

COMMONWEALTH OF PENNSYLVANIA



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May 24, 2021

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Petition of Twin Lakes Utilities, Inc. For A  
Commission Order Authorizing The Acquisition  
Of Twin Lakes Utilities, Inc. By A Capable Public  
Utility Pursuant To 66 Pa. C.S. § 529  
Docket No. P-2020-3020914

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Reply Exceptions in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

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Enclosures:

cc: The Honorable Joel H. Cheskis (**email only**)  
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Certificate of Service

\*309330

CERTIFICATE OF SERVICE

Re: Petition of Twin Lakes Utilities, Inc. For A :  
Commission Order Authorizing The Acquisition : Docket No. P-2020-3020914  
Of Twin Lakes Utilities, Inc. By A Capable Public :  
Utility Pursuant To 66 Pa. C.S. § 529 :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Reply Exceptions, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 24<sup>th</sup> day of May 2021.

**SERVICE BY E-MAIL ONLY**

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Twin Lakes Utilities Inc. For A :  
Commission Order Authorizing The :  
Acquisition Of Twin Lakes Utilities, Inc. By : Docket No. P-2020-3020914  
A Capable Public Utility Pursuant to 66 Pa. :  
C.S. § 529 :

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REPLY EXCEPTIONS OF THE  
OFFICE OF CONSUMER ADVOCATE

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Dated: May 24, 2021

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. REPLY EXCEPTIONS ..... 3

    A. Reply to Aqua Exception No. 1: The ALJ Appropriately Ordered Aqua to Acquire Twin Lakes ..... 3

    B. Reply to Aqua Exception No. 2: The ALJ Appropriately Concluded That Twin Lakes Has Satisfied the Requirement of Section 529(a)(3), Even When Considering the Financial, Managerial and Technical Expertise of the Parent ..... 6

III. CONCLUSION ..... 9

**TABLE OF AUTHORITIES**

**Page(s)**

**Administrative Decision**

Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. Pursuant to Section 529 of the Pennsylvania Public Utility Code, Docket Nos. I-00070114, P-00072313 and A-230550F2000, 2009 Pa. PUC Lexis 691 .....5

**Statutes**

66 Pa. C.S. § 529..... *passim*

66 Pa. C.S. § 529(a)(3).....6, 7, 8

66 Pa. C.S. § 529(e) .....2, 5

## I. INTRODUCTION

The OCA files these Reply Exceptions in response to the Exceptions of Aqua Pennsylvania, Inc. (Aqua) and Twin Lakes Utilities, Inc. (Twin Lakes) filed on May 12, 2021. On April 22, 2021, Deputy Chief Administrative Law Judge Joel H. Cheskis (ALJ Cheskis) issued a Recommended Decision (R.D.) granting Twin Lakes' Petition subject to Middlesex Water Company (Middlesex), Twin Lakes' parent company, placing in escrow \$1.675 million to offset the costs of replacing and remediating the Twin Lakes system within thirty (30) days of the Commission's final action. Petition of Twin Lakes Utilities, Inc. for a Commission Order Authorizing the Acquisition of Twin Lakes Utilities, Inc. by a Capable Public Utility Pursuant to 66 Pa. C.S. § 529, Docket No. P-2020-3020914, Recommended Decision at 70 (R.D.). Also within thirty (30) days from the Commission's final action, the R.D. orders Twin Lakes and Aqua to engage in good-faith, arms-length negotiations to establish a sale price subject to the Commission's approval. Id.

The OCA submits that the R.D. appropriately found that Twin Lakes met its burden to establish that an acquisition is warranted. Aqua argues that it should not be ordered to acquire Twin Lakes as part of this proceeding because Twin Lakes did not meet its burden of proof, but if the Commission determines an acquisition is warranted, Aqua argues that it must be conditioned on Middlesex placing the money in escrow. Aqua Exceptions at 1. Twin Lakes argues that ALJ Cheskis was correct in finding that Twin Lakes has met all of the statutory requirements of Section 529<sup>1</sup> but does not support the condition of escrow because it argues that the Commission lacks jurisdiction over Middlesex and the escrow condition would be confiscatory. Twin Lakes Exceptions at 1-4.

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<sup>1</sup> 66 Pa. C.S. § 529.

Regarding whether the Commission has jurisdiction over Middlesex, the OCA maintains that Twin Lakes, a Pennsylvania utility, is the relevant entity to be considered in terms of whether the Section 529 requirements are met. OCA R.B. at 4; R.D. at 30 (“...Twin Lakes is the appropriate entity to be evaluated while still recognizing Middlesex as the corporate parent.”). However, even if Middlesex’s financial and managerial fitness is relevant, Twin Lakes’ 114 customers would not be able to bear the burden of the replacement costs that are required to provide adequate, efficient, safe and reasonable service and facilities in the future, regardless of the PUC’s jurisdiction over Middlesex. OCA R.B. at 3-4; R.D. at 39.

For the reasons explained by the OCA throughout this proceeding and emphasized herein, ALJ Cheskis correctly found that Twin Lakes has met its burden to establish all of the requirements of Section 529 and appropriately ordered Aqua to take over Twin Lakes. Aqua and Twin Lakes should engage in arms-length negotiations to establish a purchase price subject to Commission approval in accordance with Section 529(e).<sup>2</sup>

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<sup>2</sup> 66 Pa. C.S. § 529(e).

## II. REPLY EXCEPTIONS

### A. Reply to Aqua Exception No. 1: The ALJ Appropriately Ordered Aqua to Acquire Twin Lakes (R.D. at 59-60, 62-64, 70; OCA M.B. at 10-22; OCA R.B. at 2-7)

Aqua argues that it should not be forced to acquire Twin Lakes because Twin Lakes has failed to satisfy the burden of proof under Section 529 and Twin Lakes is using Section 529 improperly. Aqua Exceptions at 2. Aqua further argues that if the Commission decides to order the acquisition, Twin Lakes should be required to place \$1.675 million in escrow to cover costs to repair the system that accumulated during Twin Lakes' ownership. Aqua Exceptions at 4. The OCA submits that the burden of proof has been met and that Aqua's argument about the improper use of Section 529 is without merit.

Although I&E bears the statutory burden of proof in a Section 529 proceeding, the Commission has previously stated that the burden is not exclusive to I&E. R.D. at 25. Any other party supporting an acquisition pursuant to Section 529 may produce its own evidence that the conditions are met. Id. The OCA submits that, as the record here clearly establishes, sufficient evidence demonstrating that such relief is warranted has been produced by Twin Lakes and the OCA. OCA R.B. at 2-7; R.D. at 62.

Aqua is concerned about the use of a Section 529 proceeding in this case, arguing that the R.D. will allow capable owners to acquire small water systems, let them deteriorate and then foist them upon a different Pennsylvania public utility and its ratepayers. Aqua Exceptions at 4. The OCA submits that there is no record evidence to support Aqua's position that Middlesex is attempting to improperly use a Section 529 proceeding. The OCA notes that ALJ Cheskis is aware of the weight of his decision and understands that this is a "unique case" where a smaller water utility is owned by a larger corporate parent that is located out of state. R.D. at 57. He

acknowledges that a precedent must not be set which would result in detriment to other Pennsylvania utility customers:

Allowing Middlesex in this case as corporate parent to allow the Twin Lakes system to be run so poorly for so long without having to make the financial commitment as requested by Aqua at the time its petition for Section 529 is being approved creates an incentive for other non-Pennsylvania utilities to purchase Pennsylvania utilities, run them poorly and then have them acquired by a capable public utility through the Section 529 process.

R.D. at 58. Emphasizing that his decision is based upon the uniqueness of the facts and circumstances of this case, he explains:

The condition proposed by Aqua regarding establishing the escrow account, however, is separate from the negotiations of the purchase price. The condition proposed by Aqua regarding establishing the escrow account is based solely on the poor condition of the Twin Lakes system that Middlesex as corporate parent has allowed to develop over the past decade and the unique facts and circumstances that are present in this case as discussed above. Under such facts and circumstances, this condition falls squarely within the meaning and intent of Section 529 and will be adopted as part of this proceeding.

Id. at 60.

The OCA submits that Aqua's concern about the outcome of this case incentivizing capable companies to buy small water systems, operate them poorly and then force them onto other utilities is without merit because ALJ Cheskis' recommendation is based upon the "unique facts and circumstances" of this particular case. Id. In addition, ALJ Cheskis specifically established the escrow account to address the deteriorated condition of Twin Lakes. After considering the substantial evidence of failures by Twin Lakes and Middlesex to take proper care of the Twin Lakes system and the significance of his decision, he determined that requiring Middlesex to place \$1.675 million in escrow to offset the costs of replacing and remediating the existing infrastructure is reasonable under the circumstances. Id. at 64. Therefore, Aqua's argument should be rejected.

Aqua cautions that Twin Lakes' use of Section 529 in this case could "force a potential acquiring public utility to pay more than it otherwise would agree to pay based upon arms-length negotiations between the parties." Aqua Exceptions at 3. This concern is unfounded. The purchase price established in this and any other Section 529 proceeding is subject to Commission approval which serves as a check on the price established by the small water utility and the capable acquiring utility.<sup>3</sup> Aqua also suggests that the possibility that the purchase price could be determined by use of the Eminent Domain Code pursuant to Section 529(e) means that Section 529 should not be used in this case at all. Aqua Exceptions at 3. The OCA submits that the eminent domain provision in Section 529 clearly indicates that it is a last resort option for situations where the buyer and seller are unable to agree upon a price. Id. The OCA noted in its Main Brief that parties in prior Section 529 cases have been able to arrive at an agreed-upon price, including one that used the Commission's mediation process. OCA M.B. at 20 (See e.g., Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. Pursuant to Section 529 of the Pennsylvania Public Utility Code, Docket Nos. I-00070114, P-00072313 and A-230550F2000, 2009 Pa. PUC Lexis 691 (WP)); R.D. at 55. Simply because Section 529 allows for use of the Eminent Domain Code as a last resort does not mean it will be utilized in this case, and there is no record evidence or other reason to believe that Twin Lakes and Aqua will not be able to negotiate a reasonable price. Twin Lakes' witnesses Fullagar and O'Connor indicated that they would negotiate the purchase

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<sup>3</sup> (e) Acquisition price – The price for the acquisition of the small water or sewer utility shall be determined by agreement between the small water or sewer utility and the acquiring public utility, subject to a determination by the commission that the price is reasonable. If the small water or sewer utility and the acquiring capable public utility are unable to agree on the acquisition price or the commission disapproves the acquisition price on which the utilities have agreed, the commission shall issue an order directing the acquiring capable public utility to acquire the small water or sewer utility by following the procedure prescribed for exercising the power of eminent domain pursuant to the act of June 22, 1964 (Sp.Sess., P.L. 84, No. 6), known as the Eminent Domain Code (emphasis added).

price in good faith. R.D. at 56; Tr. at 227 and 238; OCA R.B. at 8. Therefore, Aqua's Exception should be denied.

- B. Reply to Aqua Exception No. 2: The ALJ Appropriately Concluded That Twin Lakes Has Satisfied the Requirement of Section 529(a)(3), Even When Considering the Financial, Managerial and Technical Expertise of the Parent (R.D. at 42; OCA R.B. at 1-2, 4.

Aqua argues that Twin Lakes has failed to meet the requirement of Section 529(a)(3)<sup>4</sup> when considering the financial, managerial and technical fitness of Middlesex. Aqua Exceptions at 5-6. The OCA submits that Twin Lakes, not Middlesex, is the entity to be evaluated under this requirement, but even if Middlesex's capabilities are considered, Section 529(a)(3) would still be met. As the ALJ clearly found:

Substantial record evidence demonstrates that Twin Lakes cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future. This finding is made when evaluating Section 529(a)(3) for Twin Lakes as a standalone company as well as considering Middlesex as the parent company. Regardless of whether the financial, managerial or technical expertise of Middlesex as Twin Lakes' parent company is considered when determining whether Section 529(a)(3) has been satisfied, or whether Twin Lakes is considered alone, Section 529(a)(3) is satisfied. That is, even when considering Middlesex's financial, managerial or technical expertise provided during the past decade when Middlesex was providing financial and operational support to Twin Lakes, the system was poorly run. It is unreasonable to expect that Twin Lakes, with or without the support of Middlesex, can reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future.

R.D. at 39. Noting the "multiple significant failures on the Twin Lakes system," ALJ Cheskis further stated that:

Regardless of whether Twin Lakes or Middlesex is responsible for such significant failures is moot. Both Twin Lakes and Middlesex, as corporate parent, have run this system poorly. This system requires better ownership than what either Twin Lakes or Middlesex can provide. The 114 customers on the Twin Lakes system deserve better.

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<sup>4</sup> The requirement of Section 529(a)(3) reads as follows: "that the small water or sewer utility cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future." 66 Pa. C.S. § 529(a)(3).

R.D. at 40.

Aqua argues that Middlesex is able to operate the system, but since it has voluntarily decided to withdraw operational and financial support from Twin Lakes, Section 529(a)(3) cannot be met. Aqua Exceptions at 5-6. The OCA submits that the key requirement is that the small water or sewer utility company, “cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future” (emphasis added). As ALJ Cheskis explained above, there is substantial evidence that Twin Lakes, evaluated both as a standalone entity and with the support of Middlesex, cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future.

Neither Twin Lakes nor Middlesex has met the statutory obligations to provide safe and adequate service and there is no evidence in the record, or even a suggestion, that this will change. When asked whether Twin Lakes could continue to provide water service to its customers without the financial and operational support of Middlesex, Twin Lakes witness Mr. Fullagar stated that:

I mean, at some point, you know, the system is going to leak so much that the customers don't have any water because the system just can't handle it. It's got so many leaks, and you can't pump enough into it to keep it pressurized. And, if that happens and the well collapses, there won't be any water supply. So it could be one big main break or (sic) one doesn't even need to be a big main break. It could be one leak away from this system completely collapsing. I understand right now we're meeting the requirements. We're chlorinating the water. We're pumping the water. We're trying to keep the system pressurized, but tomorrow it could all collapse tomorrow.

Tr. at 225. When asked what would happen after the September 1, 2020 termination of the service agreement, Mr. Fullagar stated that:

...if we just left it on and issued everyone served by the utility a do not drink water because there would be no one there to add chlorine to the water, eventually one of the recurring power outages up there would shut the system off and there would be no one there to turn it back on. It would probably go for a couple days, a week, basically until the next, you know, rainstorm, thunderstorm came through and knocked the power out.

Tr. at 104. It is clear that with or without the support of Middlesex, Twin Lakes cannot and will not provide adequate and reasonable service to its customers.

Further, there is no requirement under Section 529(a)(3) that the reason that the utility cannot reasonably be expected to furnish and maintain service be involuntary and/or completely out of the utility's control, as Aqua suggests. Aqua seems to be concerned that if Twin Lakes is able to force Aqua to buy its system as a result of Middlesex's voluntary withdrawal of support from Twin Lakes, it would lead to similar situations in the future. As discussed above, ALJ Cheskis adequately addressed Aqua's concern that the R.D. would lead to the improper use of Section 529. It has been made abundantly clear throughout this proceeding that Twin Lakes, with or without the financial and operational support of Middlesex, meets the requirement under Section 529(a)(3). The ALJ also recognized that even if Middlesex makes the necessary investments in the Twin Lakes' system, it would force rates to unaffordable levels for the customers. R.D. at 36. Therefore, Aqua's argument should be rejected.

### III. CONCLUSION

WHEREFORE, the OCA respectfully requests that the Exceptions filed by Aqua Pennsylvania, Inc. be denied. The Commission should adopt the Recommended Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis without modification requiring Aqua Pennsylvania, Inc. to acquire Twin Lakes Utilities, Inc. after good-faith, arms-length negotiations, at a purchase price subject to final approval by the Commission and conditioned upon Middlesex Water Company placing \$1.675 million in escrow to offset costs of system replacement.

Respectfully submitted,

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