

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania Wastewater,	:	A-2021-3024267
Inc., (APW), under Sections 1102 and 1329 of	:	
the Pennsylvania Public Utility Code, 66 Pa C.S.	:	
§§ 1102(a) and 1329 (relating to enumeration of	:	
acts requiring certificate and valuation of	:	
acquired water and wastewater systems), for	:	
approval of: (1) the transfer, by sale, of	:	
substantially all of the wastewater system assets,	:	
properties and rights of Lower Makefield Township	:	
(LMT) related to its wastewater collection and	:	
conveyance system; (2) the right of APW to begin	:	
to offer or furnish wastewater service to the public	:	
in Lower Makefield Township, Bucks County,	:	
Pennsylvania; and (3) the use for ratemaking	:	
purposes of the lesser fair market value or the	:	
negotiated purchase price of the LMT assets related	:	
to its wastewater collection and conveyance system.	:	

**INITIAL DECISION**

Before  
Jeffrey A. Watson  
Administrative Law Judge

**INTRODUCTION**

The preliminary objections which seek dismissal of the protest of an individual due to lack of standing to protest an application filed under 66 Pa. C.S. §§ 1102(a) and 1329 will be sustained and the protest dismissed, as Protestant failed to demonstrate an interest that is direct, immediate and substantial and a hearing on the protest is not in the public interest.

## HISTORY OF THE PROCEEDING

Aqua Pennsylvania Wastewater, Inc., (Applicant or Aqua) filed an Application with the Pennsylvania Public Utility Commission (Commission) on May 14, 2021, for approval, *inter alia*, of its acquisition of the wastewater system assets of Lower Makefield Township pursuant to Sections 1102 and 1329 of the Public Utility Code (Code).

Notice of the application was published in the August 21, 2021 edition of the *Pennsylvania Bulletin* with a protest deadline of September 7, 2021. 51 Pa.B. 5343.

Peter A. Lachance (Protestant) filed a Protest to the Application on or about August 27, 2021.

On September 8, 2021, the Applicant filed preliminary objections which seek dismissal of the protest because the Applicant contends that Protestant has not established his standing to protest the application. At the prehearing conference on September 9, 2021, Protestant agreed to file a response to the preliminary objections on or before September 15, 2021. Protestant did not file a response to the preliminary objections on or before September 15, 2021, but filed a Rebuttal to the preliminary objections on September 17, 2021. Although the Rebuttal was untimely filed it was considered by the undersigned presiding officer. Protestant stressed, *inter alia*, that although he is not a ratepayer of the Applicant or Township, he believes he will be forced to become a customer of Aqua in the near-term and is an aggrieved party.

## FINDINGS OF FACT

1. Applicant in this case is Aqua Pennsylvania Wastewater Inc.
2. The Application was filed requesting, *inter alia*, approval of the acquisition of the Lower Makefield Township wastewater system assets pursuant to Sections 1102, 1329, and 507 of the Public Utility Code.

3. Protestant is Peter A. Lachance.

4. The Protest filed by Peter A. Lachance avers that Protestant is not presently a sewer ratepayer in Lower Makefield Township, because his property has a septic system, but is a homeowner and Taxpayer in Lower Makefield Township.

### DISCUSSION

Aqua filed its Application with the Commission on May 14, 2021, seeking approval, *inter alia*, of its acquisition of the wastewater system assets of Lower Makefield Township pursuant to Sections 1102 and 1329 of the Code. 66 Pa C.S. §§ 1102(a), 1329.

Protestant filed his Protest to the Application on or about August 27, 2021.

Regulations of the Commission at 52 Pa. Code § 5.101 allow for the filing of preliminary objections in response to any pleading except motions and prior preliminary objections. Grounds for a preliminary objection include lack of standing, as set forth in 52 Pa. Code § 5.101(a)(7).

### Legal Standard

The grounds for preliminary objection are limited:

#### § 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections.<sup>1</sup> In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible.<sup>2</sup> Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections.<sup>3</sup> All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party.<sup>4</sup> A preliminary objection which seeks dismissal of a pleading will only be granted where relief is clearly warranted and free from doubt.<sup>5</sup>

### The Protest

Protestant is identified in the Protest as Peter A. Lachance with an address of 484 Stony Hill Road, Yardley, Pennsylvania. With regard to standing, Protestant stated that the Protest goes beyond his personal objections related to his own property. The grounds stated for

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<sup>1</sup> *Equitable Small Trans. Intervenor v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

<sup>2</sup> *Dep't of Auditor General v. SERS*, 836 A.2d 1053 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

<sup>3</sup> *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002).

<sup>4</sup> *Ridge v. State Emps. Retirement Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

<sup>5</sup> *Interstate Traveller Servs., Inc. v. Pa. Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979); *Application of K&F Medical Transport, LLC*, PUC Docket No. A-2008-2020353 (Initial Decision dated April 25, 2008).

the Protest provide, “[n]ot only did the Township Manager and the Chairman of the Board of Supervisors commit legally questionable acts, but two other supervisors (making 3, including the chairman, out of a total of 5) voted ‘yay’ to sell our sewers to Aqua, without having the benefit of complete information.”<sup>6</sup> The Protest criticizes Township actions and procedures of Lower Makefield Township regarding the proposed sale of its wastewater system assets to Aqua. Protestant further stated he is not presently a sewer ratepayer in Lower Makefield Township, because his property has a septic system, but is a homeowner and Taxpayer to the Township. Protestant continued, “As a taxpayer, I will be affected by the windfall that will result from this proposed asset sale, of the amount remaining after the debt associated with our sewer assets is satisfied.”<sup>7</sup> “Such windfall which may be used in part for sewer rate stabilization, which I believe would amount to a cross-subsidy; taxpayer funds used for the benefit of ratepayers.”<sup>8</sup> Protestant concluded that it is highly likely that he will be forced to become an unwilling Aqua ratepayer in the future, resulting in Protestant being required to pay far more for annual sewer charges than he historically and presently incurs to maintain his septic system.

The Applicant seeks dismissal of the protest because it fails to set forth specific facts establishing the Protestant’s standing.<sup>9</sup> The Applicant contends that Protestant's "property has a septic system"<sup>10</sup> and Protestant acknowledges that he is not a sewer ratepayer of Lower Makefield Township. Protestant also does not aver that he is a wastewater customer or a water customer of Aqua.

Applicant argues that, lacking customer status, Protestant has no right to protest this Application proceeding. *See Joint Petition of Aqua Pa., Inc. & Country Club Gardens Water Co., Inc, Pa. P.U.C. Docket No. A-210104F0066, Pa. PUC LEXIS 30 (April 7, 2006) and*

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<sup>6</sup> Protest of Peter A. Lachance, Attachment at p. 1.

<sup>7</sup> Protest of Peter A. Lachance, Attachment at p. 3.

<sup>8</sup> *Id.*

<sup>9</sup> See 52 Pa.Code § 5.52(a)(3).

<sup>10</sup> Protest of Peter A. Lachance, Attachment at p. 3.

*Pa. Pub. Util. Comm'n v. Lackawaxen Water & Sewer Auth.*, 55 Pa. P.U.C. 461 (1981) (*Lackawaxen Water & Sewer*).

The Commission recently addressed the question of standing in *Application of Aqua Pa. Wastewater, Inc. — Cheltenham Twp.*, Docket No. A-2019-3008491, Opinion and Order entered October 24, 2019, *affirmed Swift & Choi Dev., LLC v. Pa. Pub. Util. Comm'n*, 2021 Pa. Commw. Unpub. LEXIS 74 \*, 247 A.3d 1198, 2021 WL 303045 (*Swift & Choi*).

In *Swift & Choi*, the Commission denied a petition to intervene of Swift & Choi Development, LLC, in a Section 1329 Application proceeding filed by Aqua, where petitioner was neither a customer of Cheltenham Township, the selling municipality, nor a customer of Aqua, the purchasing public utility. The Commission, in *Swift & Choi*, adopted the Initial Decision of Administrative Law Judge Jones, dated June 21, 2019, which, citing *Lackawaxen Water & Sewer*, denied Swift & Choi's petition to intervene concluding that Swift & Choi, a non-customer, had failed to demonstrate that it had a direct interest in the subject matter of the proceeding.

Similar to the eligibility requirements for intervention, the eligibility requirements for a protest, which are found in Section 5.52 of the Pennsylvania Code, require that a protestant set forth the "facts from which the alleged interest or right of the protestant can be determined" and "the facts establishing the protestant's standing to protest." 52 Pa.Code § 5.52(a).

The facts averred by Protestant, specifically, his averment that his property has a septic system and that he is not a sewer ratepayer in Lower Makefield Township, demonstrate both a lack of an interest or right and a lack of standing to protest.

Consistent with *Swift & Choi*, Protestant's Protest will be dismissed.

Generally, Commission precedent provides that a protestant must have some operating rights in actual or potential conflict with the authority sought by an applicant in order to have standing to protest an application.<sup>11</sup>

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency.<sup>12</sup> “In simple terms, ‘standing to sue’ is a legal concept assuring that the interest of the party who is suing is really and concretely at stake to a degree where he or she can properly bring an action before the court.”<sup>13</sup>

If a party is not adversely affected in any way by the determination being challenged, the party is not aggrieved and, thereby, has no standing to obtain a judicial resolution of the challenge. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 280 (1975). “[I]t is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Id.* at 192, 346 A.2d at 280-81. In order to be aggrieved, a party must have a substantial interest in the subject matter of the litigation, the interest must be direct, and the interest must be immediate. *Id.* The substantial interest requirement means that “there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *Id.* at 195, 346 A.2d at 282. A direct interest “means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which [the person] complains.” *Id.* Finally, the interest must “be ‘immediate’ and ‘not a remote consequence of the judgment.’” *Id.* at 197, 346 A.2d at 283 (quoting *Keystone Raceway Corp. v. State Harness Racing Commission*, 405 Pa. 1, 7-8, 173 A.2d 97, 100 (1961)).

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<sup>11</sup> *Application of Germantown Cab Co.*, PUC Docket No. A-2012-2295131 (Initial decision served August 23, 2012)(and the cases cited therein).

<sup>12</sup> *Pa. Nat’l Gas Ass’n v. T.W. Phillips Gas & Oil Co.*, 75 Pa.PUC 598, 603 (1991).

<sup>13</sup> *In re Milton Hershey Sch.*, 867 A.2d 674, 683 (Pa. Commw. Ct. 2005), *rev’d on other grounds*, 911 A.2d 1258 (Pa. 2006)(citing *Baker v. Carr*, 369 U.S. 186 (1962)).

Protestant asserts he is an expert in privatization of water and sewer assets. In addition, Protestant Barry Summers, who filed a Protest on August 5, 2021, has indicated his intent to provide testimony of Peter A. Lachance in this proceeding. Appropriate expert testimony may be presented as consideration of the application progresses. However, the fact that Protestant may be expert in an area related to this Application dispute, opinions concerning the adequacy and potential consequences of the Applicant's proposal is not sufficient to confer standing upon Protestant. Protestant has failed to articulate a specific and immediate injury in this proceeding. The grant of relief requested in the Application will not impose a legal obligation or consequence upon Protestant. Accordingly, the potential injuries articulated by the Protestant are at best, speculative. Therefore, the protest must be dismissed as a matter of law.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa.C.S. § 701.

2. The Protestant has failed to demonstrate that he possesses any interest in the subject matter of this proceeding, which is direct, immediate, and substantial. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 280 (1975).

3. The protest of Peter A. Lachance fails to set forth sufficient facts to support his standing to challenge the application. 52 Pa.Code §§ 5.52(b); 5.101(a)(7).

4. It is just, reasonable and in the public interest that the protest filed be dismissed without a hearing. 66 Pa.C.S. § 703(b).

5. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible. *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003).



ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection of Aqua Pennsylvania Wastewater Inc., to dismiss the protest of the Peter A. Lachance at Docket No. A-2021-3024267, is sustained.
2. That the protest of Peter A. Lachance at Docket No. A-2021-3024267 is dismissed.

Date: September 17, 2021

\_\_\_\_\_/s/  
Jeffrey A. Watson  
Administrative Law Judge