



THOMAS, NIESEN & THOMAS, LLC

*Attorneys and Counsellors at Law*

THOMAS T. NIESEN  
Direct Dial: 717.255.7641  
tniesen@tntlawfirm.com

September 17, 2021

*Via Electronic Filing*

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

In re: Docket No. A-2021-3024267  
Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329 and  
507 of the Public Utility Code for Approval of its Acquisition of the Wastewater System  
Assets of Lower Makefield Township

Dear Secretary Chiavetta:

We are counsel to Aqua Pennsylvania Wastewater, Inc. in the above matter and are submitting, via electronic filing with this letter, the Company's Motion to Strike Portions of the Testimony of Barry Summers. Copies of the Motion are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Thomas T. Niesen

cc: Certificate of Service (w/encl.)  
The Honorable Jeffrey A. Watson, Administrative Law Judge (via email, w/encl.)  
Alexander R. Stahl, Esq. (via email, w/encl.)





## **BACKGROUND**

1. This proceeding concerns the Application of Aqua, filed with the 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”).

2. In accordance with the litigation schedule adopted at the prehearing conference on September 9, 2021, written testimony of Barry Summers was served on September 10, 2021.

3. Regulations of the Commission at 52 Pa. Code Section 5.103 allow for the presentation of requests, by motion, for relief desired. A motion may be made, in writing, at any time.

## **MR. SUMMERS’ QUESTIONING OF THE TOWNSHIP’S SALE PROCESS IS BEYOND THE BOUNDS OF COMMISSION JURISDICTION**

4. Beginning in the middle of page 2 of his testimony, Mr. Summers questions the “assumptions” behind the Township’s decision to sell the wastewater system. Specifically, at pages 2 through 5, numbered subparagraphs 1 through 6, 9, 10 and 13, Mr. Summers would testify that:

1. Alternatives may not have been sufficiently considered, and if so, have not been well communicated;
2. Complete Details of all causes for this financial need have not been well communicated;
3. We do not understand the vetting process;
4. The sale is based on a need to improve the system that Aqua will provide, and which LMT is unable to do. It is not a short-term financial concept;
5. That LMT has the best financial interests of its citizens in mind and is careful with its expenses;
6. That the sewer system sale is urgent;

\* \* \*

9. That the assessment by the pricing consultants PFM Financial Advisors, LLC, of Harrisburg was fair;
10. Are sewer rate increases fair and reasonable based on the service provided to the end customer?

\* \* \*

13. Do you have any information regarding how private ownership of public assets is driven by return on investment, not on citizen approval when there is no alternative for the citizen?

5. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pennsylvania Pub. Util. Comm'n.*, 43 A.2d 348 (Pa. Super. 1945).

6. The Public Utility Commission has no subject matter or other jurisdiction to review, or “second guess,” a decision of local Township supervisors to enter into a transaction to sell a wastewater system or question the “assumptions” of the local governmental authority in deciding to sell a system.

7. In *Application of Aqua Pennsylvania Wastewater, Inc. – Cheltenham Township*, Docket No. A-2019-3008491, Opinion and Order entered October 24, 2019, *affirmed Swift & Choi Development, LLC v. Pa. P.U.C.*, 2021 Pa. Commw. Unpub. LEXIS 74 \*; 247 A.3d 1198; 2021 WL 303045 (“*Swift & Choi*”), the Commission held that its jurisdiction in implementing Section 1329 starts and stops at determining the acquiring utility’s ratemaking rate base value for the acquired system in accordance with the applicable statutory provisions.<sup>1</sup>

---

<sup>1</sup> *Swift & Choi*, mimeo at 48.

8. If any forum has jurisdiction to review a local Township decision to sell its wastewater system, it would be the local court of common pleas. An unsuccessful attempt to stop the Township's sale of the wastewater system was, apparently, pursued in the Bucks County Court of Common Pleas. It is not the jurisdictional function of the Commission to review or second guess a decision of the Bucks County Court.

9. Mr. Summers' testimony as listed above is irrelevant and immaterial to the matters before the Commission and beyond the jurisdiction of the Commission to consider. The testimony of Mr. Summers at pages 2 through 5, numbered subparagraphs 1 through 6, 9, 10 and 13, should be struck and not accepted into the evidentiary record.<sup>2</sup>

**MR. SUMMERS' TESTIMONY IS BASED ON INADMISSIBLE HEARSAY**

10. Subparagraphs 4, 5, 9 and 13 at pages 2 through 5 of Mr. Summers' testimony is also inadmissible hearsay. Subparagraph 4 is based on statements of Township supervisors and a newspaper article in the Bucks County Herald News. Subparagraphs 5 and 9 are based on the same newspaper article. Subparagraph 13 is based on a lengthy list of articles found on the internet.

11. None of the declarants quoted from or cited in the newspaper articles or internet sites is before the Commission. The information upon which Mr. Summers would rely in the referenced Subparagraphs is, consequently, hearsay. Aqua objects to Mr. Summers' attempt to introduce hearsay testimony into the evidentiary record. Hearsay evidence, properly objected to, is not competent evidence to support a Commission finding. *Walker v. Unemployment Compensation Board of Review*, 27 Pa. Commw. 522, 367 A.2d 366, 1976 Pa. Commw. LEXIS

---

<sup>2</sup> Mr. Summers' recommendations at page 5 that LMT consider retaining a management/repair firm, improve the value of the sewer system and consider selling later along with his alternatives that LMT use entities to manage/repair without sale or a lease/take back also must be struck and for the same reasons as they, likewise, are irrelevant and immaterial to the matters before the Commission and beyond the jurisdiction of the Commission to consider.

1253.<sup>3</sup> The testimony of Mr. Summers at pages 2 through 5 of his testimony, numbered subparagraphs 4, 5, 9 and 13 should be struck and not accepted into the evidentiary record.<sup>4</sup>

**SUMMARY**

12. Mr. Summers' disagreement with the decision of the duly elected Township representatives to sell the wastewater system is wholly outside the Commission's jurisdiction and his reliance on hearsay testimony is impermissible.

13. Striking the portions of Mr. Summers' testimony cited above will avoid undue litigation in this Section 1329 proceeding, which is being considered and reviewed on an expedited six-month schedule as required by statute.

WHEREFORE Aqua Pennsylvania Wastewater, Inc. requests that Administrative Law Judge Watson and the Pennsylvania Public Utility Commission grant this Motion to Strike portions of the Testimony of Barry Summers.

Respectfully submitted,

**AQUA PENNSYLVANIA WASTEWATER, INC.**

By 

Thomas T. Niesen  
PA Attorney ID No. 31379  
Thomas, Niesen & Thomas, LLC  
212 Locust Street, Suite 302  
Harrisburg, PA 17101  
tniesen@tntlawfirm.com  
Tel. No. (717) 255-7600

*Counsel for Aqua Pennsylvania Wastewater, Inc.*

Date: September 17, 2021

---

<sup>3</sup> Facts pled based solely on a newspaper article and not upon any affiant's personal knowledge, are perhaps the most blatant form of hearsay imaginable. *See Conners v. West Greene School Dist.*, 131 Pa. Commw. 95, 569 A.2d 978, 1989 Pa Commw. LEXIS 812.

<sup>4</sup> Mr. Summers' statement at page 6, as part of his conclusion, that "[i]n fact, the many articles cited above demonstrate that the overwhelming evidence is that prices will likely increase greatly, service will decline substantially, and the amount and quality of repairs will be unknown" also must be struck and for the same reasons as it is based on inadmissible hearsay.



Erin L. Gannon  
Senior Assistant Consumer Advocate  
Harrison W. Breitman  
Assistant Consumer Advocate  
Office of Consumer Advocate  
egannon@paoca.org  
hbreitman@paoca.org

Thomas Wyatt, Esq.  
Matthew S. Olesh, Esq.  
Sydney N. Melillo, Esq.  
Obermayer Rebmann Maxwell & Hippel, LLP  
Thomas.Wyatt@obermayer.com  
Matthew.Olesh@obermayer.com  
Sydney.Melillo@obermayer.com

Peter A. Lachance  
peter@LMTconstable.com

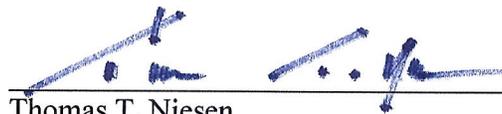
Barry Summers  
blsummers5@verizon.net

Kevin and Beth Cauley  
artage2000@aol.com  
jcauley679@aol.com

**VIA FIRST CLASS MAIL, POSTABLE PREPAID**

Jaan Pesti  
1367 Brentwood Road  
Yardley, PA 19067

John C. Char  
7218 Hilltop Road  
Upper Darby, PA 19082



---

Thomas T. Niesen  
PA Attorney ID No. 31379