*Via electronic service only due to Emergency Order at M-2020-3019262*

**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.:

**INTERIM ORDER**

**GRANTING THE MOTION OF AQUA**

**PENNSYLVANIA WASTEWATER INC., TO STRIKE THE**

**TESTIMONY OF PETER A. LACHANCE**

In accordance with the litigation schedule adopted at the prehearing conference on September 9, 2021, written testimony of Peter A. Lachance, was served on September 10, 2021.

On September 16, 2021, the Applicant filed a Motion of Aqua Pennsylvania Wastewater, Inc., to Strike the Testimony of Peter A. Lachance (Motion to Strike). Regulations of the Commission at 52 Pa. Code Section 5.103 allow for the presentation of requests, by written motion, for relief desired.

Applicant asserts that the testimony of Peter A. Lachance (Lachance testimony) served by Protestant, Barry Summers, is, in its entirety, a criticism of the Township sale process. Applicant asserts the testimony starts on page 2 with a claim that Township ratepayers were not well-served by the Township’s RFP process and that the RFP process could have been improved. Applicant asserts that the testimony continues, on page 3, with a question premised on the assumption that the Township bid process was nowhere near ideal in the opinion of Mr. Lachance and was followed by a claim of conflict of interest by PFM, the Township’s consultant. Applicant summarizes the Lachance testimony as presenting three alternative scenarios, which, are a challenge to the Township’s decision to sell the wastewater system and, in Mr. Lachance’s opinion, are preferable to the proposed transaction in this proceeding. The testimony also concludes that Mr. Ferguson, the Township Manager, was biased in favor of a sale.

Applicant argues that 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 to consider alternative scenarios that may or may not have been considered by the local governmental authority. Applicant asserts, 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. Applicant further asserts that an action was initiated in the Court of Common Pleas of Bucks County, and that the attempt to stop the sale of the wastewater system apparently was unsuccessful.[[1]](#footnote-1)

Applicant argues that the jurisdictional issue is not solved for Protestant Summers and the testimony of witness Lachance by couching the testimony in public interest terms or fairness to ratepayers. Applicant concludes that the testimony is simply a criticism of the Township’s sale process, which is not something that the Commission has jurisdiction to consider, and requests that the testimony of Peter A. Lachance be stricken.

On September 17, 2021, an interim order was entered providing a deadline for the filing of responsive pleadings to theMotion of Aqua Pennsylvania Wastewater Inc To Strike The Testimony Of Peter A. Lachance, no later than 4:30 p.m. on Wednesday, September 22, 2021.

On September 22, 2021, the undersigned presiding officer was provided with an email that included an attachment from Peter A. Lachance entitled Responsive Pleading by Peter A. Lachance to the Motion of Aqua Pennsylvania Wastewater Inc to Strike the Testimony of Peter A. Lachance (Responsive Pleading). No responsive pleading was filed and no response to the Motion to Strike was provided by Protestant, Barry Summers.

In the Responsive Pleading, Mr. Lachance explained that his testimony criticized the Township’s entire bid proceed relative to the proposed sale of the wastewater assets, not just the sale process and that the Public was not well served because the bid process was faulty from its beginning.[[2]](#footnote-2) Mr. Lachance further explained that the issues with this case go to the cumulative analysis of the public interest, and that it’s not only about the value of the sale, but also its effect on neighboring Yardley Borough.[[3]](#footnote-3) Mr. Lachance also argued that the effect of the merger on future rates to customers will be impacted by the methods used during the bid process by the Township.[[4]](#footnote-4) Mr. Lachance also expressed concerns regarding an alleged conflict of interest with the Township’s consultant.[[5]](#footnote-5)

A Public Input Hearing is scheduled for 6 p.m. on September 23, 2021, and the evidentiary hearing in this proceeding has been scheduled for September 29-30, 2021.

When a certificate of public convenience is required under Section 1102, pursuant to Section 1103(a) of the Public Utility Code, 66 Pa.C.S. § 1103(a), the Commission may issue the certificate only upon a finding or determination that the granting of such certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.”

According to the Pennsylvania Supreme Court, satisfying this standard requires the Commission to find that a proposed transaction would “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972) (*City of York*); see also, *Popowsky v. Pa. Pub. Util. Comm’n*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007) (when addressing the issue of affirmative public benefits “the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission's finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of

the public in some substantial way”). In addition, Section 1103(a) allows the Commission to impose upon its issuance of a certificate of public convenience “such conditions as it may deem to be just and reasonable.” 66 Pa.C.S.§ 1103(a).

Section 1329 of the Public Utility Code sets forth a procedure which permits a public utility to utilize fair market valuation for ratemaking purposes instead of the original cost of construction of the acquired facilities minus the accumulated depreciation. 66 Pa.C.S. § 1329. Section 1329 of the Code addresses the valuation of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities. If the parties agree to the Section 1329 process, an “acquiring public utility” and the seller of the municipal system each select a utility valuation expert (UVE) from a list of such experts established and maintained by the Commission. The selected UVEs perform independent appraisals of the system to establish its fair market value. Also, the acquiring public utility and the seller select one licensed engineer to conduct an assessment of the tangible assets of the seller which is incorporated into the valuations of the UVEs.

After receiving the valuations, the acquiring public utility must apply for a certificate of public convenience under Section 1102 of the Code and include the following as an attachment to the Section 1102 application: copies of the UVE appraisals; the agreed purchase price; the ratemaking rate base; the transaction and closing costs incurred by the acquiring public utility that will be included in its rate base; and a tariff containing a rate equal to the existing rates of the selling utility at the time of the acquisition and a rate stabilization plan, if applicable. 66 Pa.C.S. § 1329(d)(1). For applications involving an acquiring public entity under Section 1329(d)(1), the Commission has a six-month deadline for issuing a determination.

Here, Protestant Summers offered testimony of Mr. Lachance that is not relevant to the issues, as outlined above, before the Commission in this Application proceeding. Under the circumstances, the following order will be entered.

THEREFORE,

IT IS ORDERED:

1. That the Motion of Aqua Pennsylvania Wastewater, Inc., to Strike the Testimony of Peter A. Lachance, is Granted.

Date: September 23, 2021 /s/

Jeffrey A. Watson

Administrative Law Judge

**A-2021-3024267 - Aqua Pennsylvania Wastewater, Inc. Section 1329 Application for the Acquisition of Lower Makefield Township Wastewater System Assets**

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1. Aqua Motion to Strike, at p. 3. [↑](#footnote-ref-1)
2. Lachance Responsive Pleading at p. 1. [↑](#footnote-ref-2)
3. *Id* at p. 2. [↑](#footnote-ref-3)
4. *Id* at p. 4. [↑](#footnote-ref-4)
5. *Id* at p. 5. [↑](#footnote-ref-5)