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November 23, 2021

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Application of Twin Lakes Utilities, Inc. For a Commission Order *Nunc Pro Tunc* of Service Agreement Between Middlesex Water Company and Twin Lakes Utilities, Inc. and Five Amendments to Service Agreement and Twin Lakes Utilities, Inc. Pursuant to 66 Pa. C.S. § 2102 – Docket No. G-2020-3020941

Affiliated Interest Agreement Between Twin Lakes Utilities, Inc. and Middlesex Water Company – Docket Nos. G-2020-3021018, G-2020-3021021 and G-2020-3021024

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Twin Lakes Utilities, Inc.'s Emergency Petition for Stay Pending Judicial Review with regard to the above-referenced matter. **Please note that Twin Lakes is requesting that the Commission issue an emergency stay on or before its Public Meeting of December 2, 2021.** If an emergency stay is not issued on or before December 2, 2021, Twin Lakes will withdraw this Petition and, instead, seek a stay from Commonwealth Court pursuant to Pa.R.A.P. 1781.

Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

/s/ Lauren M. Burge

Lauren M. Burge

cc: Hon. Joel Cheskis w/enc. (via email only)
Cert. of Service w/enc. (via email only)
ra-OSA@pa.gov w/enc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Twin Lakes Utilities, Inc.'s Emergency Petition for Stay Pending Judicial Review upon the persons below in the manner indicated in accordance with requirements of 52 Pa. Code Section 1.54.

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/s/ Lauren M. Burge
Lauren M. Burge, Esq.

Dated: November 23, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Twin Lakes Utilities, Inc. for a	:	
Commission Order Authorizing the Acquisition of	:	Docket No. P-2020-3020914
Twin Lakes Utilities, Inc. by a Capable Public	:	
Utility Pursuant to 66 Pa. C.S. § 529	:	
	:	
Application of Twin Lakes Utilities, Inc. For a	:	
Commission Order <i>Nunc Pro Tunc</i> of Service	:	
Agreement Between Middlesex Water Company	:	Docket No. G-2020-3020941
And Twin Lakes Utilities, Inc., and Five	:	
Amendments to Service Agreement Between	:	
Middlesex Water Company and Twin Lakes	:	
Utilities, Inc. Pursuant to 66 Pa. C.S. § 2102	:	
	:	
Affiliated Interest Agreement Between Twin	:	Docket Nos. G-2020-3021018
Lakes Utilities, Inc. and Middlesex Water	:	G-2020-3021021
Company	:	G-2020-3021024
	:	

**EMERGENCY PETITION FOR PARTIAL STAY
PENDING JUDICIAL REVIEW**

Petitioner Twin Lakes Utilities, Inc., by and through its undersigned counsel Eckert Seamans Cherin & Mellott, LLC, respectfully submits this Emergency Petition for Partial Stay Pending Judicial Review (“Emergency Petition”), pursuant to Pa.R.A.P. 1781(a), 52 Pa. Code § 3.2, or in the alternative 52 Pa. Code § 3.6, and 52 Pa. Code § 5.572. Twin Lakes requests that the Pennsylvania Public Utility Commission (“Commission” or “PUC”), on an emergency basis, grant a stay or supersedeas (“stay”) of compliance, application, or enforcement of the escrow condition imposed by the Opinion and Order issued November 18, 2021 (“November 2021

Order”) pending the ultimate disposition of the appeal by Twin Lakes.¹ Twin Lakes further requests that a decision on this Emergency Petition be issued on or before its Public Meeting of December 2, 2021.

The November 2021 Order finds that continued receivership by Aqua Pennsylvania, Inc. (“Aqua”) and the ultimate acquisition of Twin Lakes’ operations by Aqua are in the public interest. The Commission further orders that this Section 529 application should proceed to the price negotiation and sale phase. Twin Lakes agrees with these findings.

However, the Order places an unprecedented condition on the statutorily proscribed progression of the case, by requiring Twin Lakes’ New Jersey parent company, Middlesex Water Company (“Middlesex”), to first pay \$1.675 million into “escrow” within 30 days of entry of the order for the Section 529 process to continue. Middlesex has not been a party to this proceeding, and Twin Lakes has no legal ability to compel it to comply. Nor does Twin Lakes think such a requirement is legal or factually appropriate.

Middlesex has filed a Complaint For Declaratory and Injunctive Relief in the United States District Court for the Middle District of Pennsylvania, a copy of which is attached,² under which it contests this provision of the November 2021 Order and refuses to pay the escrow amount, citing its reasons for doing so.

Thus, the 30-day deadline for payment of the escrow amount will lapse unmet. Under the self-effectuating terms of the November 2021 Order, this will cause the receivership of Aqua to terminate and, once again, place Twins Lakes in possession of the water system.

¹ Twin Lakes is not seeking reconsideration of the November 2021 Order, inasmuch as Twin Lakes has filed a Petition for Review in the nature of an appeal from the November 2021 Order with the Commonwealth Court docketed at No. 1289 C.D. 2021. See **Attachment B**.

² **Attachment C**. Twin Lakes asks that the Commission take administrative notice of the filing and its contents. 52 Pa. Code §§ 5.407 and 5.408.

As found by the Commission, however, Twin Lakes itself is without the financial or operational means necessary to operate the system and ensure that customers continue to receive “adequate, efficient, safe, and reasonable service and facilities,” placing Twin Lakes in the position of potentially failing its obligations as a public utility. 66 Pa.C.S. § 1501. Twin Lakes has no employees, no billing systems, no cash to pay for water treatment or pumping, no access to financing, and no ability to sustain water operations. It was for these reasons that the Commission has found Twin Lakes met the impairment test of Section 529 in the first instance.

Plainly stated, Twin Lakes seeks to avoid the specter of being compelled to operate the water system without adequate resources. The stay of the escrow condition in the November 2021 Order pending appeal will maintain Aqua’s receivership of the system and ensure that customers continue to receive safe and adequate water service until the escrow issue is resolved.

The dire consequences of this outcome are contrary to the public interest, potentially endangering the health and safety of customers served by the water system. This constitutes an “emergency” under Commission regulations and, therefore, Twin Lakes seeks an emergency stay of the escrow condition. In the meantime, Twin Lakes asks that the Commission allow Twin Lakes and Aqua to begin the price negotiation phase as envisioned under Section 529, while the judicial actions are pending.

A decision on this Emergency Petition is requested at or prior to the Commission’s scheduled Public Meeting of December 2, 2021.³ This is necessary because, in the event that the Commission denies this Petition or fails to act, Twin Lakes should have the opportunity to seek relief from the Commonwealth Court before the 30-day escrow condition lapses, Aqua’s

³ As described *infra*, If Twin Lakes does not receive a ruling from the Commission on or before the December 2, 2021 Public Meeting, Twin Lakes will conclude that it is not practicable to obtain relief from the Commission, withdraw this Petition, and re-file it with the Commonwealth Court, pursuant to Pennsylvania Rule of Appellate Procedure 1781.

receivership terminates, and the public safety is jeopardized by returning possession of the Water System to an entity that, as found by the Commission, lacks the financial or operational means necessary to operate the system. Twin Lakes does not seek to stay the next, statutorily required step under Section 529(e) of allowing the parties to negotiate and determine the acquisition price.

For these reasons and those set forth below, Twin Lakes requests that the Commission grant this Emergency Petition, staying compliance with the escrow provisions of the November 2021 Order. In support of this Petition, Twin Lakes avers as follows:

I. BACKGROUND

1. Petitioner Twin Lakes is a public utility corporation organized and existing under the laws of the Commonwealth of Pennsylvania. (RD Finding of Fact 2; November 2021 Order at 4).

2. Twin Lakes is the owner of the property (e.g., wells and distribution facilities) that provides retail water service to 114 active residential customer accounts in Pennsylvania, all located in the Sagamore Estates community located in Shohola Township, Pike County, Pennsylvania (the “Water System”). (RD Findings of Fact 4 and 6; Twin Lakes St. No. 2-SR at 3).

3. Prior to the acquisition of the Water System by Twin Lakes, the system was beset by longstanding service deficiencies, subject to frequent boil water advisories issued by the Pennsylvania Department of Environmental Protection, and water service was frequently suspended due to numerous operational problems. (RD Finding of Fact 7).

4. Soon after Twin Lakes began operating the system in November 2009, it became apparent that the condition of the water system was significantly poorer than had been represented by the former owner, or had been visible from the inspection and assessment that

was part of the operational due diligence work performed prior to the purchase. (RD Finding of Fact 8).

5. Leaks in the Twin Lakes system are a result of a combination of factors including age and quality of the original pipe material and poor-quality workmanship associated with leak repairs prior to acquisition of the system by Twin Lakes. (RD Finding of Fact 45).

6. This creates a level of unaccounted for water as high as 87% and a significant risk of operational failure that would result in the inability to provide water service to Twin Lakes' customers. (RD Finding of Fact 44; November 2021 Order at 4).

7. Absent outside financial and operational support, Twin Lakes is at best one or two pipe leaks away from complete financial and operational failure. (RD Finding of Fact 56).

8. Over the last ten years, Twin Lakes has gone to great lengths to identify a long-term solution that would address the system's operational risks while also attempting to mitigate the need to significantly increase customers' rates. (RD Findings of Fact 21, 23, 24, 27, 31, & 32; See discussion in November 2021 Order at 5-6).

9. Because those efforts were not successful, Twin Lakes initiated this proceeding under Section 529 of the Public Utility Code, 66 Pa. C.S. § 529, requesting that the PUC order a capable public utility to acquire the system.

10. In the past, Middlesex was the primary source of financial and operational support for the Twin Lakes system. (RD Finding of Fact 11; November 2021 Order at 4).

11. Twin Lakes is a wholly-owned subsidiary of Middlesex, a New Jersey corporation. (RD Finding of Fact 3; November 2021 Order at 4). Middlesex is not now, and never was, an authorized Pennsylvania corporation.

12. Middlesex terminated its financial support of Twin Lakes effective May 28, 2020. (RD Finding of Fact 41; November 2021 Order at 6-7).

13. Middlesex also terminated the Service Agreement through which it provided operational support to Twin Lakes effective January 15, 2021. (RD Finding of Fact 42; November 2021 Order at 6-7).

14. Twin Lakes has been unable to establish an independent credit relationship with a financial institution. (RD Finding of Fact 12; November 2021 Order at 7).

15. Pursuant to the PUC's January 14, 2021 Order, Aqua assumed receivership of the Twin Lakes system on January 15, 2021. (RD Finding of Fact 40).

16. The Commission stated at that time:

... the ALJ described why the addressing Aqua's request to be appointed receiver of the Twin Lakes' system will not only expedite the 529 proceeding but more importantly will provide Twin Lakes and its customers with operational stability to ensure continued operations and service to its customers. Twin Lakes has been a troubled system and has to date been unable to successfully address and correct its troubles. As a result, the system and its customers' services have been, and are, impacted.⁴

17. No other utility is interested in this system out of their own business interests. (RD Findings of Fact 70 and 71).

18. Aqua is able to better manage operational expenses and to make the necessary capital expenditures as part of its management and operation of the Water System and to resolve the current system issues. (RD Finding of Fact 58).

19. Aqua has a large Pennsylvania customer base over which it can spread prudently incurred costs to manage and operate the Twin Lakes system with a miniscule impact on any individual customer's bill. (RD Finding of Fact 59).

⁴ January 14, 2021 Order at 18.

20. Absent Aqua’s current receivership of the Twin Lakes system, Twin Lakes has no source of financial or operational support to be able to furnish and maintain adequate, efficient, safe and reasonable service and facilities to the customers located in Sagamore Estates now or in the future. (RD Findings of Fact 41 and 89).

21. In a Recommended Decision issued April 22, 2021, the Administrative Law Judge (“ALJ”) found that Twin Lakes has met all requirements of Section 529. (RD Conclusions of Law 15, 16, 17, 18, 19 & 20).

22. In examining the question of jurisdiction, and the proper entity to establish the facts necessary to approve an acquisition under Section 529, the ALJ concluded that, “Twin Lakes is the appropriate entity to be evaluated while still recognizing Middlesex as the corporate parent.” RD at 30-33.

23. The ALJ concluded that Twin Lakes’ Petition should be granted and that Aqua be ordered to acquire the system. (RD Recommended Ordering ¶¶ 1-2), but also recommended that this acquisition be conditioned on Middlesex placing \$1.675 million in escrow. (RD at Ordering ¶1).

24. In the November 2021 Order, the Commission adopted the ALJ’s Recommended Decision, stating that the “Petition of Twin Lakes Utilities, Inc., for a Commission order, pursuant to 66 Pa. C.S. § 529, ... is hereby granted, subject to the condition that within thirty (30) days after the Commission’s final action in this proceeding Middlesex Water Company places in escrow \$1,675,000 to be used to offset the costs of replacing and remediating the existing infrastructure of the Twin Lakes system.” (November 2021 Order at Ordering ¶ 4).

25. Twin Lakes has filed a Petition for Review in the nature of an appeal from the November 2021 Order that is docketed by the Commonwealth Court at No. 1289 C.D. 2021.

Attachment B hereto.

26. Middlesex also filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Middle District of Pennsylvania, which is docketed at 3:21-cv-01981. **Attachment C** hereto.

II. LEGAL STANDARDS FOR STAY AND EMERGENCY RELIEF

27. The Commission has authority to entertain this Petition pursuant to Pennsylvania Rule of Appellate Procedure Rule 1781, which states that an “[a]pplication for stay or supersedeas of an order or other determination of any government unit pending review in an appellate court on petition for review shall ordinarily be made in the first instance to the government unit.”⁵

28. A stay is warranted when a party demonstrates that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable injury without the requested relief; (3) issuance of a stay will not substantially harm interested parties in the proceedings; and (4) issuance of the stay will not adversely affect the public interest.⁶

29. The Commission has said that the *Process Gas* criteria “require the balancing of all interests, including the public, where applicable.”⁷ Further, the Commission has observed

⁵ Pa.R.A.P. 1781(a); *see also* Pa.R.A.P. 1701(b)(1) (stating that, after an appeal is taken or review is sought, the PUC has authority to “[t]ake such action as may be necessary to preserve the *status quo*, ... grant *supersedeas*, and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.”)

⁶ *PUC v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983) (*Process Gas*).

⁷ *PUC v. HIKO Energy, LLC*, Docket Nos. P-2015-2519419 and C-2014-2431410, Opinion and Order entered Jan. 28, 2016, at 11.

that: “[I]n deciding whether to stay one of our orders pending appeal, this Commission should not indulge in a further review of the case. Rather, this Commission should concentrate solely on the effect our Order will have pending appeal.”⁸

30. Twin Lakes is further requesting that the stay be granted on an emergency basis. An emergency order is warranted when: (1) the petitioner’s right to relief is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest. 52 Pa. Code § 3.2.⁹

31. When properly applying the foregoing standards, it is apparent that Twin Lakes is entitled to the requested stay and an emergency stay is necessary to protect the public interest.

III. REQUEST FOR EMERGENCY STAY PENDING APPEAL

32. Twin Lakes satisfies all of the requirements necessary for the Commission to place a stay upon the escrow requirement contained in its November 2021 Order.

33. A stay would preserve the *status quo* by maintaining Aqua as receiver of the Water System while Twin Lakes pursues its appeal before the Courts and Middlesex pursues its federal complaint.

34. Twin Lakes is not operationally or financially capable of running the Water System. Maintaining the *status quo* will ensure that Twin Lakes’ customers continue to receive water service during the pendency of these appeals.

A. Twin Lakes Satisfies the Requirements for a Stay

⁸ *PUC v. Makovsky Brothers, Inc.*, 53 Pa. PUC 510, 511 (1979).

⁹ A verification statement is attached as **Attachment A**. Twin Lakes notes, however, that all facts contained herein have previously been established in the record of this proceeding.

For the following reasons, Twin Lakes satisfies the requirements for a stay as described in *Process Gas*:

1. Twin Lakes Is Likely To Succeed On the Merits

35. In *Process Gas*, the Pennsylvania Supreme Court noted that the tribunal which had just rendered an adverse decision could nonetheless determine that an applicant for stay had presented a substantial case on the merits even though that tribunal disagreed that its own order would likely be reversed. *See Process Gas*, 467 A.2d at 809, fn. 8 (“[T]here are ample instances where the lower tribunal could find that the applicant has presented a substantial case on the merits even though it disagrees.”).

36. Here, as in *Process Gas*, there are unquestionably significant questions of Commission jurisdiction and legal authority, so a substantial case on the merits has been made by Twin Lakes.¹⁰

37. The November 2021 Order declares that the Commission has jurisdiction over Middlesex, Twin Lakes’ out-of-state parent company and seeks to compel Middlesex to place \$1.675 million in escrow as a condition of granting Twin Lakes’ request for relief under Section 529 of the Public Utility Code.

38. The Commission now claims, despite years of acknowledging Twin Lakes as the jurisdictional public utility, that Middlesex actually holds the certificate of public convenience to provide water service, not Twin Lakes. It also claims that it has jurisdiction under federal “long arm” case law.

¹⁰ Twin Lakes incorporates, by reference, the legal and factual issues raised in its Petition for Review with the Commonwealth Court as set forth in Attachment B to this Petition.

39. The repeated assertion contained in the November 20, 2021 Order -- that Middlesex holds a CPC issued by the Commission -- is a consistent error of both law and fact and Twin Lakes will be successful in arguing this to the Commonwealth Court.

40. A CPC is an official document that is separately signed, sealed and issued by the Secretary of the Commission authorizing the commencement or abandonment of service. It is not the same as an order conditionally approving the subsequent issuance of a CPC based upon conditions yet to be met.¹¹ The CPC itself issues only once the conditions specified in the approving order are met.

41. Where there is a transfer of “property used or useful in the public service,”¹² as occurred in 2009, the Public Utility Code requires that the CPC be issued to the new owner of that property, in this case, Twin Lakes Utilities, Inc.,¹³ as well as to the entity abandoning service by sale.

42. The document presented by BI&E upon which the November 2021 Order relies is *a draft of a CPC that was never executed and remains unissued*. The Commission has never conferred a CPC upon Middlesex.

43. Consistently, during, Twin Lake’s ownership of the Water System, the Commission has been made aware and acknowledged that Twin Lakes is the owner of the utility property, not Middlesex.

¹¹ Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained it shall be lawful:” 66 Pa.C.S. §1102.

¹² “... to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.” *Id.*

¹³ Middlesex never acquired the assets of the prior owner and CPC holder (Twin Lakes Water Services, LLC) and does not does it hold the deed to the property. Twin Lakes did and does.

44. The Commission committed further reversible error, as it lacks statutory authority to exercise jurisdiction over an out-of-state, non-jurisdictional company like Middlesex. The November 2021 Order conflated personal jurisdiction with subject matter jurisdiction and improperly applied personal jurisdictional concepts that are exclusively deliberated in courts of general jurisdiction to a proceeding before an administrative agency.

45. To the extent that Commission contends that it properly exercised jurisdiction over Middlesex because Twin Lakes was its “alter ego,” this contention is also groundless. The provision of financial and operational support to an affiliate is insufficient to establish that the parent is the “alter ego” of the subsidiary and the fact still remains that the PUC lacks subject matter jurisdiction over Middlesex.

46. The November 2021 Order states that “‘doing business’ within a state [is] itself a sufficient basis for jurisdiction over a nonresident individual, including a corporation,” but this conclusion is based on outdated case law.¹⁴ The precedent upon which the Commission relies in the November 2021 Order was subsequently reversed by the United States Supreme Court in *Daimler AG v. Bauman*, 571 U.S. 117, 137 & 139 n.19 (2014) where it held that a corporation is typically “at home” in only two places: (1) its state of incorporation; and (2) the state in which it has its principal place of business. Middlesex is not incorporated in Pennsylvania, nor does it have its principal place of business here.

47. Further, the Commission violated Middlesex’s constitutional right to due process -- and by extension, harmed Twin Lakes -- because Middlesex did not have a meaningful opportunity to defend itself against the escrow condition.

¹⁴ November 2021 Order at 39-40 (citing *International Shoe v. Washington*, 326 U.S. 310 (1945)).

48. “[T]he fundamental requirement of due process is the *opportunity* to be heard at a *meaningful* time and in a *meaningful* manner[.]”¹⁵ which Middlesex was denied here.

49. The condition requiring that Middlesex forfeit \$1.675 million into an escrow account to be used for future infrastructure improvements to the Twin Lakes system is an unconstitutional taking of Middlesex’s property without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

50. Additionally, the escrow requirement is a violation of the unconstitutional conditions doctrine. As a general principle, the U.S. Supreme Court has recognized that a state cannot condition a benefit generally available to others in the state on the surrender of a constitutional right.¹⁶

51. In further error, the Order finds that: “The subsequent June 1 Notice of Termination Letter from Middlesex to Twin Lakes, was an attempt by Middlesex to modify the existing Service Agreement.” November 2021 Order at 44. Actually, the Service Agreement expressly allows for termination and was not modified.¹⁷

52. To the extent that the Commission was attempting to revive the Service Agreement and Middlesex’s obligations thereunder, it actually performed a second termination.¹⁸

¹⁵ *Cresco, Inc. v. PUC*, 622 A.2d 997, 1000 (Pa. Commw. Ct. 1993) (citation and quotation marks omitted; emphasis in original).

¹⁶ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 606 (2013); *Frost v. R.R. Comm’n of State of Cal.*, 271 U.S. 583, 593 (1926); cf. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893-94 (1988).

¹⁷ Section 1 expressly addresses the duration of the contract, stating that: “The services to be rendered hereunder shall commence on the Effective Date hereof [December 1, 2009] and this Service Agreement shall continue in full force and effect until terminated by either of the parties hereto, giving the other party hereto 90 days [sic] notice in writing.”

¹⁸ On this point, the November 2021 Order continues to conflagrate Middlesex and Twin Lakes where it rejects the termination as a *de facto* abandonment of service by Middlesex as the CPC holder: “However, given our conclusion that the Service Agreements, to the extent they reflect an attempt by a certificated public utility, Middlesex, to abandon or “transfer” its lawful duties under the Code to another entity, its wholly owned subsidiary, Twin Lakes, we conclude the Service Agreements to be contrary to the Code and void, and shall deny approval of the Service Agreements.” November 2021 Order at 44 (Note 7). This analysis suffers from the same legal and factual

The Service Agreement, now, has been expressly “voided” by the November 2021 Order, as well as terminated by the parties. Middlesex clearly has no remaining contractual obligation to continue to provide operational and financial services to Twin Lakes.¹⁹

53. Finally, there is no basis in the Public Utility Code for conditioning the grant of Section 529 relief on the surrender of money into an escrow account by an out-of-state corporate parent or any other equity owner. The statute only anticipates the Commission stepping in if the parties are unable to successfully negotiate a price for the acquisition, and in that instance, provides an alternative process through the use of eminent domain procedures. 66 Pa.C.S. §529(e).

54. Even though it is a separate and distinct entity, Twin Lakes is harmed by the Commission’s deprivation of Middlesex’s constitutional rights because: (a) Twin Lakes has no control over Middlesex and cannot compel it to comply with the escrow requirement; (b) Middlesex has clearly indicated that it will not comply with the escrow requirement; and (c) as a result, Twin Lakes may be denied relief under Section 529 despite the fact the Commission’s finding that Twin Lakes has met all of statutory criteria and that acquisition of the Twin Lakes Water System by Aqua is in the public interest.

55. Given the likelihood that the Commonwealth Court would find these challenges to be significant and substantial, Twin Lakes urges the Commission to stay compliance, application or enforcement of the escrow condition in the November 2021 Order.

deficiencies as set forth previously. Notably, the Service Agreement has been voided by the November 2021 Order, as well as terminated by the parties.

¹⁹ The Service Agreement had previously been disclosed and addressed by the parties and the Commission in the Company’s 2011, 2015 and 2019 rate cases. No party in those proceeding objected to the validity of that agreement or sought to deny recovery of the associated cost collected by Middlesex under it. Nor did the Commission.

2. Twin Lakes and the Customers of the Water System Will Suffer Irreparable Injury Without a Stay

56. The November 2021 Order inflicts immediate, substantial, and irreparable harm on Twin Lakes and its customers.

57. While the November 2021 Order finds that Twin Lakes has met all necessary criteria under Section 529 and orders Aqua to acquire the Twin Lakes system, it impermissibly conditions the acquisition on Middlesex placing \$1.675 million in escrow.

58. Twin Lakes has no control over whether Middlesex complies with this requirement. Through the federal action it has filed against the Commission in the Middle District of Pennsylvania (Attachment C), Middlesex has made it clear that it will not be making the escrow payment.

59. Therefore, under the express terms of the November 2021 Order, this Section 529 docket will close and Aqua's receivership of the Twin Lakes system will terminate.

60. Twin Lakes is not able to operate the Water System on its own. The Service Agreement between Twin Lakes and Middlesex was terminated as of January 15, 2021 (and subsequently voided by the Commission). Twin Lakes has been unable to establish an independent credit relationship with a financial institution, the Twin Lakes system will be left without the support necessary to operate the system and ensure that customers continue to receive water service.

61. Twin Lakes has no employees, no billing systems, no cash to pay for water treatment or pumping, no access to financing and no ability to sustain water operations. Absent Aqua's current receivership of the Water System, Twin Lakes has no source of financial or operational support to be able to furnish and maintain adequate, efficient, safe and reasonable service and facilities to the customers located in Sagamore Estates now or in the future.

62. As a result, customers will be at risk of losing potable water service entirely and suffer irreparable injury. The potential dire consequences of this outcome are clearly contrary to the public interest and threaten the health and safety of customers served by the Water System.

63. These circumstances also force unacceptable financial and legal risks upon Twin Lakes, including potential legal and regulatory (PUC and environmental) liability, which it is unable to avoid due to the November 2021 Order.

64. Further, as explained in the Petition for Review, Twin Lakes contends that the escrow obligation imposed by the November 2021 Order violates applicable statutory provisions, as well as constitutional rights. Such violations result in *per se* irreparable injury.²⁰

65. For these reasons, both Twin Lakes and customers served by the Water System would be irreparably harmed absent a stay.

3. Other Interested Parties Will Not Be Substantially Harmed By a Stay

66. The issuance of a stay pending appeal will not substantially harm any other party, including Aqua.

67. Aqua agreed to voluntarily act as receiver of the Water System and, pursuant to the Commission's January 14, 2021 Order, has been acting as receiver since January 15, 2021. Aqua's receivership would normally extend for the pendency of the Section 529 proceeding, absent the escrow condition.

68. A stay pending appeal will not harm Aqua, as it will maintain the *status quo* with Aqua operating the Water System.

²⁰ See, e.g., *PUC v. Israel*, 52 A.2d 317, 321 (Pa. 1947) (“The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.”); see *Philips Bros. Elec. Contractors, Inc. v. Valley Forge Sewer Auth.*, 999 A.2d 652, 657 (Pa. Commw. Ct. 2010) (reaffirming *Israel* and stating clearly that “a party need not establish irreparable harm when a statute sets forth specific conduct that is unlawful”).

69. Pursuant to the Commission's January 14, 2021 Order, Aqua will be able to recover related expenses as part of a subsequent base rate case.

4. A Stay Will Not Adversely Affect the Public Interest

70. A stay will protect the public interest as it will allow Aqua to continue acting as receiver and maintain the Water System's ability to continue providing safe and adequate water service to its customers while the appeal is pending.

71. If a stay is not granted and Middlesex does not comply with the escrow condition, as it has indicated it will not, the Section 529 docket will close and Aqua's receivership will terminate.

72. Absent Aqua's receivership and without any other financial or operational support, the Water System will be left with no meaningful ability to operate and provide the necessary service to its 114 customers. The system would have no staff, no support services, and no financing necessary to run the day-to-day operations, let alone make the substantial improvements to the system that will be necessary to maintain water service.

73. Therefore, a stay pending appeal is in the public interest as it will maintain the *status quo* with Aqua acting as receiver until these matters are resolved.

B. Twin Lakes Satisfies the Requirements for an Emergency Order

For similar reasons to those discussed above in relation to the *Process Gas* criteria, Twin Lakes satisfies the requirements for an emergency order as provided in 52 Pa. Code § 3.2,²¹

which are largely the same as the elements of a stay, as recited above:

²¹ In the alternative, Twin Lakes seeks emergency treatment under 52 Pa. Code § 3.6. The elements of §§ 3.2 and 3.6 are the same. The difference is largely procedural -- whether the matter remains at the Commission level for disposition or the case is remanded to the ALJ for hearings and an interim emergency order. The factual matters pled in this Petition are comprised of facts already found by the ALJ and the Commission. The only change in facts-of-is the filing by Middlesex of an action in Federal District Court and its refusal to pay the escrow amount

1. The Petitioner's Right to Relief Is Clear

74. Twin Lakes' Petition for Review raises significant and novel questions of Commission jurisdiction and legal authority, as well as constitutional violations.

75. As such, a substantial case on the merits has been made by Twin Lakes and a stay is clearly warranted, pending appeal, in order to prevent further harm to Twin Lakes and customers in Sagamore Estates.

76. Additionally, if the stay is not granted and Middlesex does not comply with the escrow condition, the Section 529 docket will close and Aqua's receivership will terminate.

77. This outcome would significantly harm both Twin Lakes and customers in Sagamore Estates. Absent Aqua's receivership and without any other financial or operational support, the Twin Lakes system will be left with no meaningful ability to operate and customers will be at risk of losing water service.

78. Therefore, Twin Lakes is clearly entitled to an emergency stay to maintain the *status quo* with Aqua acting as receiver pending the outcome of the appeal.

2. The Need for Relief Is Immediate

79. The need for emergency relief in the form of a stay is clearly immediate.

80. Through its filing in federal court, Middlesex has challenged the Commission's jurisdiction to impose the escrow requirement and unequivocally stated that it will not comply with this requirement.

contained therein. Twin Lakes does not believe that hearings are necessary to establish those additional facts, as they are matters of administrative notice, and does not request a hearing. This matter can be decided by the Commission on the basis of the record established

81. Without an emergency stay issued during this thirty day period, the Section 529 docket will close, Aqua's receivership will terminate, and Twin Lakes will be left without any operational or financial support to operate the system.

82. Twin Lakes is requesting that the Commission grant this Emergency Petition and stay the November 2021 Order on or before its Public Meeting of December 2, 2021.

3. The Injury Would Be Irreparable If Relief Is Not Granted

83. For the same reasons discussed above, the November 2021 Order inflicts immediate, substantial, and irreparable harm on Twin Lakes.

84. Without a stay, the Twin Lakes system risks being unable to continue providing safe and adequate water service to its customers. Absent Aqua's current receivership, the Twin Lakes Water System has no source of financial or operational support to be able to furnish and maintain adequate, efficient, safe and reasonable service and facilities to the customers located in Sagamore Estates now or in the future.

85. As a result of the escrow condition, Twin Lake's customers are at risk of losing water service entirely. As such, both Twin Lakes and customers in Sagamore Estates would suffer irreparable injury without a stay. The potential dire consequences of this outcome are against the public interest and threaten the health and safety of customers served by the Twin Lakes system.

86. As explained in Middlesex's federal complaint and Twin Lakes' appeal, the escrow obligation imposed by the November 2021 Order violates applicable statutory provisions as well as constitutional rights. Such violations result in *per se* irreparable injury.²²

²² See, e.g., *Israel*, 52 A.2d 317; *Philips Bros. Elec. Contractors*, 999 A.2d at 657.

87. For these reasons, both Twin Lakes and customers served by the Water System will be irreparably harmed absent a stay.

4. The Relief Requested Is Not Injurious To the Public Interest

88. As explained above, an emergency stay pending appeal will not adversely affect the public interest. To the contrary, a stay will help protect the public interest as it will allow Aqua to continue acting as receiver and maintain the Water System's ability to continue providing safe and adequate water service to its customers while the judicial cases are pending.

89. It will also prevent significant costs that would ultimately be borne by customers, and avoid customer confusion or concern as to the status of the Water System.

90. Absent Aqua's receivership and without any other financial or operational support, the Water System will be left with no meaningful ability to operate and provide the necessary service to its 114 customers.

91. Therefore, a stay pending appeal is in the public interest as it will maintain the *status quo* with Aqua acting as receiver until these matters are resolved.

C. Twin Lakes Requests That an Emergency Stay Be Issued By the Commission On Or Before Its December 2, 2021 Public Meeting

92. The November 2021 Order provides Middlesex with thirty days to place \$1.675 million in escrow.

93. As discussed herein, Middlesex has indicated that it will not make the escrow payment. Therefore, it is necessary to stay the November 2021 Order within thirty days of its entry (November 18, 2021).

94. Without an emergency stay issued in this timeframe, the Section 529 proceeding will end, thus terminating Aqua's receivership. This will put customers at risk of losing access to safe and adequate water service.

95. For these reasons, Twin Lakes requests that the Commission issue an emergency stay of the escrow provisions of November 2021 Order on or before its scheduled Public Meeting of December 2, 2021.

96. If the Commission does not issue the emergency stay on or before its Public Meeting of December 2, 2021, Twin Lakes will withdraw this Petition and, instead, seek a stay from Commonwealth Court pursuant to Pennsylvania Rule of Appellate Procedure 1781. The December 2, 2021 deadline is necessary to preserve time for the Commonwealth Court to hear and consider the stay petition within the thirty day period imposed by the November 2021 Order.

D. The Section 529 Case Itself Need Not Be Stayed

97. The November 2021 Order correctly finds that Twin Lakes has fulfilled all of the statutory requirements of Section 529(a) and concludes that Twin Lakes should be acquired by a capable public utility.²³

98. The Public Utility Code requires that “[s]ubsequent to the determinations required by subsection (a), the commission shall issue an order for the acquisition of the small water or sewer utility by a capable public utility.”

99. Having found that subsection (a) has been met, the next step in the Section 529 process is the determination of the acquisition price. Section 529(e) provides that “[t]he price for

²³ November 2021 Order at 37 (“Therefore, we conclude that, pursuant to our authority under Section 529 to direct that the acquisition of Twin Lakes by Aqua is warranted in the circumstances.”).

the acquisition of the small water or sewer utility shall be determined by agreement between the small water or sewer utility and the acquiring capable public utility, subject to Commission approval” or, in the event of an impasse, by the Commission itself.

100. There is no adverse impact upon either the seller or the buyer, or any other party to this case, to proceed to this next stage. Of course, the purchase price negotiations will account for the condition of the system and other factors administered under PUC regulations.²⁴

101. The ALJ, the parties and the evidentiary record are unanimously in agreement that the rate impact of the acquisition on Aqua’s existing customers will be minimal.²⁵

102. Allowing the Twin Lakes and Aqua to engage in a discussion of price under Section 529(e) creates no prejudice to any Party. Nor is the public interest adversely affected.

103. Under the statute, this process is subject to Commission oversight and approval, with the Commission deciding the terms, if a voluntary agreement cannot be reached.

104. Such an action is permitted under the appellate rules of practice. Rule 1701 provides that “[a]fter an appeal is taken,” the Commission may “[p]roceed further in any matter in which a non-appealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order.” 210 Pa. Code Rule 1701(b)(6).

105. Given the Commission’s findings about the poor condition of the Water System and Twin Lakes, the Commission should allow this necessary step in the Section 529 process to proceed while the state and federal court systems deliberate on the escrow issue.

²⁴ Twin Lakes St. No. 2-SR at 5 (“If the Commission orders Aqua to acquire the Twin Lakes system pursuant to Section 529, Aqua will have an opportunity to request recovery of the system replacement and earn a reasonable return on the prudently incurred investments.”).

²⁵ See RD at 49-51; Twin Lakes M.B. at 47-48.

IV. CONCLUSION

WHEREFORE, Twin Lakes respectfully requests that the Commission issue an Order: (1) granting this Emergency Petition for Stay on or before December 2, 2021; (2) entering an Emergency Order staying the compliance, application or enforcement of the escrow condition in the November 2021 Order pending the ultimate disposition of Twin Lakes' appeal from the November 2021 Order; (3) allowing the Section 529 case to proceed to its next step of determining the acquisition price for the Water System; and (4) granting such further relief in favor of Twin Lakes as may be just and reasonable under the circumstances.

Respectfully submitted,

/s/ Lauren M. Burge

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Admitted Pro Hac Vice

Counsel for Petitioner

Date: November 23, 2021

VERIFICATION

I, Robert K. Fullagar, President of Twin Lakes Utilities, Inc., hereby state that the facts set forth in the foregoing Emergency Petition for Stay Pending Judicial Review are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).


Robert K. Fullagar

Date: November 23, 2021

ATTACHMENT B

Twin Lakes Utilities, Inc.
Petition for Review,
1289 C.D. 2021
(less exhibits)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TWIN LAKES UTILITIES, INC.,	:
	:
Petitioner,	:
	:
v.	:
	:
PENNSYLVANIA PUBLIC UTILITY	:
COMMISSION,	:
	:
Respondent	:

No. ____ C.D. 2021

NOTICE TO PARTICIPATE

If you intend to participate in this proceeding in the Commonwealth Court of Pennsylvania, you must serve and file a notice of intervention under Rule 1531 of the Pennsylvania Rules of Appellate Procedure within 30 days.

/s/ Casey Alan Coyle

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Lauren M. Burge, Esquire (I.D. No. 311570)
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Attorney for Petitioner Twin Lakes Utilities, Inc.

Date: November 22, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TWIN LAKES UTILITIES, INC.,	:
	:
Petitioner,	:
	:
v.	: No. ____ C.D. 2021
	:
	:
PENNSYLVANIA PUBLIC UTILITY	:
COMMISSION,	:
	:
Respondent	:

**PETITION FOR REVIEW
(IN THE NATURE OF AN APPEAL)**

Pursuant to Pennsylvania Rule of Appellate Procedure 1513(a), Petitioner Twin Lakes Utilities, Inc. (“Twin Lakes”), by and through its undersigned counsel, Eckert Seamans Cherin & Mellott, LLC, files this Petition for Review, seeking review of the Opinion and Order of the Pennsylvania Public Utility Commission (“Commission” or “PUC”) issued November 18, 2021 (“November 2021 Order”). In support of this Petition, Twin Lakes avers as follows:

JURISDICTIONAL STATEMENT

1. This Court has jurisdiction over this Petition pursuant to 42 Pa.C.S. §763(a) and 2 Pa.C.S. §702.

THE PARTIES

2. Twin Lakes is a public utility corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

3. PUC is a statutorily created independent government agency that entered the November 2021 Order that is the subject of this Petition.

BACKGROUND

4. Twin Lakes is a public utility corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

5. Twin Lakes provides retail water service to 114 active residential customer accounts in Pennsylvania, all located in the Sagamore Estates community located in Shohola Township, Pike County, Pennsylvania (the “Water System”).

6. Prior to the acquisition of the Water System by Twin Lakes, the system was beset by longstanding service deficiencies, subject to frequent boil water advisories issued by the Pennsylvania Department of Environmental Protection, and water service was frequently suspended due to numerous operational problems.

7. Soon after Twin Lakes began operating the Water System in November 2009, it became apparent that the condition of the Water System was significantly poorer than had been represented by the former owner, or had been

visible from the inspection and assessment that was part of the operational due diligence work performed prior to the purchase.

8. This includes a level of unaccounted for water as high as 87% and a significant risk of operational failure that would result in the inability to provide water service to Twin Lakes' customers.

9. Over the last decade, Twin Lakes has gone to great lengths to identify a long-term solution that would address the system's operational risks while also attempting to mitigate the need to significantly increase customers' rates.

10. Because those efforts were not successful, Twin Lakes initiated this proceeding under Section 529 of the Public Utility Code, 66 Pa.C.S. §529 ("Section 529"),¹ requesting that the PUC order a capable public utility to acquire the system.

¹ Section 529 states, in relevant part:

(a) General rule.—The commission may order a capable public utility to acquire a small water or sewer utility if the commission, after notice and an opportunity to be heard, determines:

(1) that the small water or sewer utility is in violation of statutory or regulatory standards, including, but not limited to, the act of June 22, 1937 (P.L. 1987, No. 394),¹ known as The Clean Streams Law, the act of January 24, 1966 (1965 P.L. 1535, No. 537),² known as the Pennsylvania Sewage Facilities Act, and the act of May 1, 1984 (P.L. 206, No. 43),³ known as the Pennsylvania Safe Drinking Water Act, and the regulations adopted thereunder, which affect the safety, adequacy, efficiency or reasonableness of the service provided by the small water or sewer utility;

11. In the past, Middlesex Water Company (“Middlesex”) was the primary source of financial and operational support for the Twin Lakes system.

12. Twin Lakes is a wholly-owned subsidiary of Middlesex, a New Jersey corporation.

13. Middlesex terminated its financial support of Twin Lakes effective May 28, 2020.

14. Middlesex also terminated the Service Agreement through which it provided operational support to Twin Lakes effective January 15, 2021.

(2) that the small water or sewer utility has failed to comply, within a reasonable period of time, with any order of the Department of Environmental Resources or the commission concerning the safety, adequacy, efficiency or reasonableness of service, including, but not limited to, the availability of water, the potability of water, the palatability of water or the provision of water at adequate volume and pressure;

(3) 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;

(4) that alternatives to acquisition have been considered in accordance with subsection (b) and have been determined by the commission to be impractical or not economically feasible;

(5) that the acquiring capable public utility is financially, managerially and technically capable of acquiring and operating the small water or sewer utility in compliance with applicable statutory and regulatory standards; and

(6) that the rates charged by the acquiring capable public utility to its preacquisition customers will not increase unreasonably because of the acquisition.

66 Pa.C.S. §529.

15. Twin Lakes has been unable to establish an independent credit relationship with a financial institution.

16. Pursuant to the PUC's January 14, 2021 Order, Aqua Pennsylvania, Inc. ("Aqua") assumed receivership of the Twin Lakes system.

17. This receivership is ongoing and will end when the docket for the Section 529 proceeding closes.

18. Absent Aqua's current receivership of the Twin Lakes system, Twin Lakes has no source of financial or operational support to be able to furnish and maintain adequate, efficient, safe and reasonable service and facilities to the customers located in Sagamore Estates now or in the future.

19. In a Recommended Decision issued April 22, 2021, a true and correct copy of which is attached hereto as "**Exhibit A**," the Administrative Law Judge ("ALJ") found that Twin Lakes has met all requirements of Section 529.

20. As a result, the ALJ recommended that Twin Lakes' Petition under Section 529 be granted and that Aqua be ordered to acquire the system.

21. However, the ALJ also recommended that this acquisition be conditioned on Middlesex—a non-party and non-jurisdictional public utility—placing \$1.675 million in escrow, despite the fact that there is no statutory or factual basis for this escrow requirement and without regard to the significant constitutional issues that this requirement raises.

22. In the November 2021 Order, the PUC adopted the ALJ’s recommended decision, including the provision conditioning the acquisition upon Middlesex placing \$1.675 million in escrow to be used for future infrastructure improvements to the Twin Lakes system.

23. However, the PUC modified the ALJ’s reasoning, finding that:

- a. Twin Lakes was the “alter ego” of Middlesex;
- b. Middlesex holds the Certificate of Public Conveyance (“CPC”)² and it is not transferrable; and
- c. The Service Agreements between Middlesex and Twin Lakes were void “as an attempt to unilaterally abandon service in violation of the provisions of the Code.”

24. Twin Lakes now submits this Petition for Review, requesting that this Court reverse and vacate the portion of the PUC’s November 2021 Order that directs Middlesex to place \$1.675 million in escrow as a condition of Twin Lakes receiving relief under Section 529.

² A CPC is an official document, signed, sealed and issued by the Secretary of the PUC authorizing the commencement or abandonment of service. It is not the same as an order conditionally approving the issuance of a CPC based upon conditions yet to be met; it is only issued *after* those conditions are met. 66 Pa. C.S. § 1102. Moreover, CPCs are issued to the corporation (or person) offering the utility service and controlling the assets that provide that service. Where there is a transfer of “property used or useful in the public service,” as occurred in 2009, the CPC is issued to the new owner of the property—in this case, Twin Lakes Utilities, Inc. The PUC does not issue two CPCs to serve the same water territory. The direct owner of the used and useful property holds the sole CPC.

25. Middlesex also filed a federal action against the PUC in the United States District Court for the Middle District of Pennsylvania, which is docketed at No. 3:21-CV-01981, and attached hereto (less exhibits) as “**Exhibit C.**”

ORDER SOUGHT TO BE REVIEWED

26. Twin Lakes seeks review of the PUC’s November 2021, a true and correct copy of which is attached hereto as “**Exhibit B.**”

27. The Order states, in relevant part:

Based on the foregoing discussion, we shall deny the Exceptions of Aqua and Twin Lakes and adopt the ALJ’s Recommended Decision, consistent with the discussion in this Opinion and Order; **THEREORE,**

IT IS ORDERED:

1. That the Exceptions of Twin Lakes Utilities, Inc., filed on May 12, 2021, are denied, consistent with this Opinion and Order.

2. That the Exceptions of Aqua Pennsylvania, Inc., filed on May 12, 2021, are denied, consistent with this Opinion and Order.

3. That the Recommended Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis, issued on April 22, 2021, is adopted, as modified, consistent with this Opinion and Order.

4. That the Petition of Twin Lakes Utilities, Inc., for a Commission order, pursuant to 66 Pa. C.S. § 529, authorizing the acquisition of Twin Lakes by a capable utility as that term is defined by statute, filed on July 16, 2020 at Docket Number P-2020-3020914, is hereby granted, subject to the condition that within thirty (30) days after the Commission’s final action in this proceeding Middlesex Water Company places in escrow \$1,675,000 to be used to offset the costs of replacing and remediating the existing infrastructure of the Twin Lakes system.

5. That Aqua Pennsylvania, Inc. shall acquire Twin Lakes Utilities, Inc. consistent with the above discussion and requirements.
6. That, within thirty (30) days after the Commission's final action in this proceeding, Aqua Pennsylvania, Inc., and Twin Lakes Utilities, Inc., shall engage in good-faith, arms-length negotiations regarding the sale price of the Twin Lakes Utilities, Inc. water system to Aqua Pennsylvania, Inc., subject to the Commission's approval.
7. That the Applications for Approval *Nunc Pro Tunc* of The Three Unsecured Revolving Promissory Notes between Twin Lakes Utilities, Inc. and Middlesex Water Company at Docket Numbers G-2020-3021018, G-2020-3021021 and G-2020-3021024 are granted.
8. That the Application for Approval *Nunc Pro Tunc* of the Service Agreement between Twin Lakes Utilities, Inc., and Middlesex Water Company, and the five subsequent amendments thereto at Docket Number G-2020-3020941 are modified consistent with the discussion in this Opinion and Order.
9. That to the extent the [sic] any Service Agreement executed between Middlesex Water Company and Twin Lakes Utilities, Inc., including, *inter alia*, the Service Agreement dated December 1, 2009, and the June 1, 2020 Letter of Middlesex Water Company "Notice of Termination of the Service Agreement," are relied upon by Middlesex Water Company or Twin Lakes Utilities, Inc., to constitute an abandonment of service by Middlesex Water Company, or transfer of Middlesex Water Company's Certificate of Public Convenience to Twin Lakes' Utilities, Inc., as a means to relieve Middlesex Water Company of its duty as a public utility under the Public Utility Code, we conclude the agreements, and the attempt to amend them by termination or otherwise, to be void, pursuant to our authority under both Section 508 and Chapter 21 of the Public Utility Code.
10. That the Secretary shall serve a copy of this Opinion and Order on the certificated entity directly involved in this matter, Middlesex Water Company at the address provided under Docket Nos. A-2008-2050092 and A-2008-2050089, granting the Certificate of Public Convenience:

1500 Ronson Road
Iselin, NJ 08830

11. That this docket shall be marked closed.

(Ex. B at 53-56).

OBJECTIONS TO THE ORDER³

28. For the following reasons, the PUC's November 2021 Order is not based on substantial evidence and constitutes an error of law, constitutional violations, arbitrary and capricious action, and/or an abuse of discretion.

The PUC committed reversible error in asserting jurisdiction over Middlesex

29. The PUC committed reversible error in asserting jurisdiction over Middlesex.

30. First, the PUC lacks statutory authority to exercise jurisdiction over an out-of-state, non-jurisdictional public utility like Middlesex.

31. The PUC is a creature of statute that only has the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa.C.S. §§101 *et seq.* See, e.g., *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 794 (Pa. 1977); see also *Loma, Inc. v. PUC*, 682 A.2d 424, 430 (Pa. Commw. Ct. 1996).

32. The PUC is not a court of general jurisdiction.

³ Pursuant to Pa.R.A.P. 1513(d)(5), the omission of an issue from this Statement of Objections shall not be the basis for a finding of waiver if the Court is able to address the issue based on the certified record.

33. Therefore, while formidable, the enforcement and remedial powers of the PUC are not those of a court. *Feingold*, 383 A.2d at 794.

34. Notably, the Public Utility Code does not provide a basis for asserting jurisdiction over an out-of-state, non-jurisdictional entity.

35. In concluding that it can nonetheless assert jurisdiction over Middlesex, the PUC conflated personal jurisdiction with subject matter jurisdiction and improperly applied personal jurisdictional concepts that are exclusively deliberated in courts of general jurisdiction to a proceeding before an administrative agency.

36. However, personal jurisdiction and subject matter jurisdiction are “distinct concepts with material differences.” *City of Phila. v. Zig Zag, LLC*, No. 1168 CD 2019, 2021 WL 1726163, at *5 n.9 (Pa. Commw. Ct. May 3, 2021); *see, e.g., Grimm v. Grimm*, 149 A.3d 77, 82-82 (Pa. Super. Ct. 2016).

37. Personal jurisdiction is a concept grounded in the Due Process Clause of the United States Constitution and relates to “[a] court’s power to bring a person into its adjudication.” *Grimm*, 149 A.3d at 83.

38. In contrast, subject matter jurisdiction is a notion set by statute and relates to “the competency of the individual court, administrative body, or other tribunal to determine controversies of the general class to which a particular case belongs.” *Grimm*, 149 A.3d at 83.

39. Therefore, just because an out-of-state corporation may be subject to personal jurisdiction in Pennsylvania—and therefore, may be sued in a Pennsylvania court—does not mean that the PUC has subject matter jurisdiction over that corporation.

40. Rather, the inquiry is whether the Legislature authorized the PUC to exercise subject matter jurisdiction over the dispute, through the Public Utility Code or some other statute. *See, e.g., Loma*, 682 A.2d at 430.

41. Moreover, like the ALJ's Recommended Decision, the PUC's November 2021 Order does not point to any prior instances in which the Commission has employed jurisdictional concepts to subject an out-of-state corporation to its jurisdiction. (Tab B at 37-41).

42. None of the parties advancing this position cited to any such prior orders.

43. In fact, with the exception of the November 2021 Order, Twin Lakes has not been able to identify a single PUC order applying personal jurisdiction concepts to a question of subject matter jurisdiction.

44. Presumably, this is because nothing in the Public Utility Code gives the PUC authority to assert subject matter jurisdiction over an out-of-state, non-jurisdictional entity.

45. Because the Public Utility Code does not provide a basis for asserting jurisdiction, the PUC lacks jurisdiction over Middlesex.

46. To the extent that PUC contends that it properly exercised jurisdiction over Middlesex because Twin Lakes was its “alter ego,” this contention is groundless.

47. It is well established that the mere macro-management of a subsidiary by a parent does not demonstrate that the subsidiary is the parent’s alter ego. *See, e.g., Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073-75 (9th Cir. 2015); *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 849-850 (6th Cir. 2017); *see also Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001).

48. This is true even if the parent is directly involved in financing the subsidiary. *See, e.g., Ranza*, 793 F.3d at 1074.

49. Instead, a subsidiary only becomes an alter ego of its parent if the parent controls the internal workings or day-to-day operations of the subsidiary. *See, e.g., Anwar*, 876 F.3d at 849-50; *see also In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 735 F. Supp. 2d 277, 319 (W.D. Pa. 2010).

50. In making this determination, Pennsylvania courts employ a ten-factor test:

(1) the parent corporation owns all or a significant majority of the subsidiary’s stock;

- (2) commonality of officers or directors exists between the two corporations;
- (3) the group possesses a unified marketing image, including common branding;
- (4) insignias, trademarks, and logos are uniform across corporate boundaries;
- (5) group members share employees;
- (6) the parent has integrated its sales and distribution systems with those of its subsidiaries;
- (7) the corporations exchange or share managerial or supervisory personnel;
- (8) the subsidiary performs business functions that would ordinarily be handled by the parent corporation;
- (9) the parent uses the subsidiary as a marketing division or as an exclusive distributor; and
- (10) the parent exercises direct control or provides instruction to the subsidiary's officers and directors.

UHS of Del., Inc. v. United Health Servs., Inc., No. 1:12-CV-485, 2015 WL 539736, at *4 (M.D. Pa. Feb. 10, 2015); accord *In re Chocolate Confectionary Antitrust Litig.*, 674 F. Supp. 2d 580, 598 (M.D. Pa. 2009); *Sincavage v. Schott N.A.*, No. 3:18-CV-01231, 2018 WL 4852218, at *10 (M.D. Pa. Oct. 5, 2018).

51. Here, the PUC did not analyze any of the ten factors in finding that Twin Lakes is the “alter ego” of Middlesex.

52. In fact, the PUC did not cite any case law to substantiate its finding.

53. Nonetheless, to the extent that the PUC based its finding on the fact that Middlesex previously provided financing to Twin Lakes and the two shared legal counsel and certain corporate officers, the jurisprudence is clear that those facts alone do not establish alter ego. *See, e.g., Ranza*, 793 F.3d at 1073-75; *Anwar*, 876 F.3d at 849-850; *see also Pearson*, 247 F.3d at 484.

54. Therefore, the PUC’s finding that Twin Lakes is an “alter ego” of Middlesex has all the hallmarks of a result-oriented determination.

55. The following passage from the November 2021 Opinion and Order strongly suggests that the PUC was aware that, absent a finding that Twin Lakes is an “alter ego” of Middlesex, the Commission blatantly violated Middlesex’s due process rights: “If the ALJ properly construed the ‘alter ego’ analysis in exercising jurisdiction over Middlesex, by virtue of Twin Lakes’ participation, then due process has been satisfied.” (Ex. B. at 37-38).

56. Regardless, a finding that Twin Lakes is the alter ego of Middlesex only confers personal jurisdiction over Middlesex in Pennsylvania courts—not subject matter jurisdiction over Middlesex before the PUC.

57. As such, the fact still remains that the PUC lacks subject matter jurisdiction over Middlesex.

58. Second, even assuming, *arguendo*, that the PUC has a statutory basis to assert jurisdiction over Middlesex, the applicable case law does not provide a constitutional basis for the Commission to exercise such jurisdiction.

59. The November 2021 Order states that “‘doing business’ within a state [is] itself a sufficient basis for jurisdiction over a nonresident individual, including a corporation,” but this conclusion is based on outdated case law. (Tab B at 39-40 (citing *International Shoe v. Washington*, 326 U.S. 310 (1945))).

60. In 2011, the U.S. Supreme Court overturned its prior precedent that a foreign corporation’s “continuous and systematic general business contacts” in a state could allow its courts to exercise general personal jurisdiction over the corporation.

61. Instead, the Supreme Court held that a foreign corporation is subject to general personal jurisdiction only where it “is fairly regarded as at home.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

62. Three years later, the Supreme Court held that a corporation is typically “at home” in only two places: (1) its state of incorporation; and (2) the state in which it has its principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117, 137 & 139 n.19 (2014).

63. Middlesex is not incorporated in Pennsylvania, nor does it have its principal place of business here.

64. Therefore, Middlesex cannot be fairly regarded as “at home” in Pennsylvania.

65. There is also a lingering question as to the constitutionality of Pennsylvania’s long-arm statute and business registration statute based on recent case law regarding personal jurisdiction.

66. Indeed, the U.S. District Court for the Eastern District of Pennsylvania found these Pennsylvania statutes to be unconstitutional in light of the recent decisions from the U.S. Supreme Court. *Sullivan v. A.W. Chesterton, Inc. (In re Asbestos Prods. Lia. Litig. No. VI)*, 384 F.Supp.3d 532, 537, 543 (E.D. Pa. 2019) (explaining that, “[n]ow that the Supreme Court has found that a foreign corporation’s ‘substantial, continuous, and systematic’ course of business in a state cannot be the basis for general personal jurisdiction, plaintiffs are increasingly reliant on business registration statutes such as the Pa. Statutory Scheme to attempt to establish general personal jurisdiction over a foreign corporation” and holding that the “Pa. Statutory Scheme impermissibly re-opens the door to nation-wide general jurisdiction that *Daimler* firmly closed,” “violates the Due Process Clause,” and “is unconstitutional”).⁴

⁴ *But see Kraus v. Alcatel-Lucent*, 441 F.Supp.3d 68, 73-74 (E.D. Pa. 2020).

67. Thus, under the current law, the PUC's exercise of jurisdiction over Middlesex is unconstitutional, and there is no basis for the Commission to assert either general or specific personal jurisdiction over Middlesex.

68. Third, even if current jurisprudence provides the PUC with a constitutional basis to exercise jurisdiction over Middlesex, such jurisdiction is improper based on the doctrine of equitable estoppel.

69. Middlesex is a New Jersey corporation, incorporated under the laws of New Jersey, and with its principal place of business in New Jersey.

70. Middlesex purposely established a Pennsylvania subsidiary company—Twin Lakes Utilities, Inc.—to incorporate in Pennsylvania, become the owner and titleholder of the Twin Lakes system assets, and serve as the jurisdictional public utility in Pennsylvania.

71. Twin Lakes is the entity that filed Articles of Incorporation and registered to do business in Pennsylvania with the Pennsylvania Department of State Corporations Bureau.

72. Twin Lakes is the entity that entered into the Asset Purchase Agreement to acquire the Water System and became the titleholder of the system assets as set forth in the deed.

73. Twin Lakes is the entity that filed a tariff with, and was accepted by, the PUC in 2009.

74. Twin Lakes is the entity that petitioned for, and received, three rate increases in 2011, 2015 and 2019 from the PUC.

75. After nearly twelve years of treating Twin Lakes as the jurisdictional utility in Pennsylvania, the PUC cannot now assert jurisdiction over Middlesex when it has never before done so, notwithstanding the fact that asserting such jurisdiction at this time would, on its face, be both illegal and a violation of the U.S. Constitution. *See, e.g., Commonwealth ex rel. Gonzalez v. Andreas*, 369 A.2d 416, 418 (Pa. Super. Ct. 1976) (explaining that the doctrine of equitable estoppel “is a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation albeit gratuitously knew or should have known that the other would rely upon that conduct to his or her detriment”).

76. Thus, Twin Lakes—not Middlesex—is the jurisdictional utility in Pennsylvania.

77. Insofar as the PUC contends that its exercise of jurisdiction over Middlesex was proper because Middlesex holds the CPC, there is no record evidence to support that finding, as the document that the Bureau of Investigation and Enforcement (“I&E”) presented to the Commission is *a draft of a CPC that was unissued*.

78. In any event, the PUC never conferred a CPC upon Middlesex.

79. Moreover, while the PUC also never conferred a CPC upon Twin Lakes, this appears to have been an oversight, because the Commission's subsequent conduct establishes that it consistently treated Twin Lakes as the CPC-holding, jurisdictional public utility.

80. Since 2009, the PUC repeatedly has been made aware that Twin Lakes is the owner of the utility property, not Middlesex, including:

- a. The 2009 application case filed by Middlesex expressly advised the PUC that it intended to create a subsidiary corporation as owner of the Water System and the assets and operations of the Water System would not be those of Middlesex;⁵
- b. The Twin Lakes Acquisition Order⁶ conditioned the issuance of the CPC on certain conditions precedent that were to be resolved *prior to* the issuance of a CPC, including the property sale closing itself;⁷
- c. The closing and resulting possession of the utility assets was undertaken by Twin Lakes;

⁵ The February 26, 2008 Letter of Intent filed with the PUC contains the express statement that Middlesex “is anticipating the creation of a regulated Pennsylvania wholly owned subsidiary of the MWC.” (I&E Exh. 2-SR, Sch 1). The May 20, 2008 Application itself clearly states that “a new wholly-owned subsidiary [will be] created to own and operate the water system serving the Twin Lakes community.” (I&E Exhibit 2-SR, Sch. 2).

⁶ *Joint Application of Middlesex Water Company and Twin Lakes Water Services, LLC*, A-2008-2050092, Order entered March 2, 2009 (“Twin Lakes Acquisition Order”). The unissued and unsigned CPC is dated that same day and appears to be an internal PUC draft and was obtained by the I&E witness from an unknown source.

⁷ The Twin Lakes Acquisition Order expressly states that “upon receipt of a notice of closing, a Certificate of Public Convenience shall be issued pursuant to section 1101 of the Public Utility Code...” (Order at Ordering Paragraph 2). The same language was applied to the prior owner's abandonment certificate. (*Id.* at Ordering Paragraph 3).

- d. The compliance tariffs issued in response to the Twin Lakes Acquisition Order were filed by Twin Lakes and were accepted by the PUC as such; and
- e. When Twin Lakes subsequently became aware that there was some confusion at the PUC over the identity of the owner of the utility assets, a little over a year after closing, it filed a letter on April 4, 2011 requesting that the Commission “change [its] records to reflect the name of the purchaser of Twin Lakes Water Services, LLC [the prior owner] as Twin Lakes Utilities, Inc.”⁸ The Asset Purchase Agreement sections showing that Twin Lakes purchased the Water System were attached. In response, the PUC agreed, writing that it will “now recognize Middlesex Water Company as Twin Lakes Utilities, Inc.”⁹

81. Equally important, the PUC has consistently treated Twin Lakes as the jurisdictional utility and CPC holder.

82. In every single proceeding over the last twelve years since acquisition by Twin Lakes, the PUC has recognized Twin Lakes as the CPC holder and never once asserted otherwise, until the November 2021 Order.¹⁰

⁸ Letter of Kenneth Quinn dated April 4, 2011, submitted at the original application docket, Docket No. A-2008-2050092. (Twin Lakes Exh. ABO-1).

⁹ Secretarial Letter dated May 17, 2011, entered at Docket No. A-2008-2050092. (I&E Exh. 2-SR, Sched. 3).

¹⁰ Contradictorily, the November 2021 Order also states: “Twin Lakes is a public utility corporation that provides water service to 113 residential customers in the Sagamore Estates community located in Shohola Township, Pike County, Pennsylvania” and recognizes that “Twin Lakes is a wholly owned subsidiary of Middlesex, a New Jersey Corporation.” (Ex. B at 4).

83. In the three rate cases filed by Twin Lakes in 2011, 2015 and 2019, Twin Lakes was recognized as the jurisdictional utility petitioning for rate increases and tariff changes before the PUC.¹¹

84. The PUC expressly recognized Twin Lakes as the proper entity to submit a request in 2019 “to abandon water service to its customers *in its certificated service territory* known as Sagamore Estates, in Shohola Township, Pike County, Pennsylvania.”¹²

85. In fact, the PUC’s prior orders in this proceeding repeatedly recognized Twin Lakes as the CPC holder.

86. In its September 17, 2020 Opinion and Order ruling on I&E’s Petition for Interlocutory Review and Answer to Material Question, the PUC was asked, “[s]hould the Commission permit a *certificated small water or wastewater public utility* to proceed by its own petition pursuant to 66 Pa. C.S. § 529 of the Public Utility Code?,” and the PUC answered in the affirmative.¹³

¹¹ See Docket Nos. R-2011-2246415, R-2015-2506337**Error! Bookmark not defined.** and R-2019-3010958, respectively. (Twin Lakes St. No. 2-R at 3).

¹² *Application of Twin Lakes Utilities, Inc. to Abandon Service to its Customers in Sagamore Estates in Shohola Township, Pike County, Pennsylvania*, A-2018-3005590, Opinion and Order entered Feb. 28, 2019 at 2 (Emphasis added).

¹³ (Sept. 17, 2020 Opinion and Order at 2, Ordering Para. 2).

87. In its September 22, 2020 Opinion and Order ruling on the Office of Consumer Advocate’s (“OCA”) Petition for Emergency Relief, the PUC made the following statements:

- a. “There is no dispute here about the legal requirements imposed on Twin Lakes *as a Pennsylvania certificated public utility*.” (Sept. 22, 2020 Opinion and Order at 18);
- b. “Twin Lakes is a public utility in Pennsylvania which has an obligation to provide service *pursuant to its certificate of public convenience* until directed otherwise by the Commission.” (*Id.* at 24-25);
- c. “The continued provision of water service required by Twin Lakes *pursuant to its certificate of public convenience* along with the anticipated cooperation of its parent Middlesex during the Commission evaluation of the Amended Service Agreement appears to diminish the likelihood that the harms projected by the OCA would actually occur.” (*Id.* at 38);
- d. “It is ordered...[t]hat Twin Lakes Utilities, Inc. is prohibited from terminating water utility service *pursuant to its Commission approved certificate of public convenience* until otherwise directed by the Commission.” (*Id.* at Ordering Paragraph 3); and
- e. In its January 14, 2021 Opinion and Order approving Aqua’s temporary receivership of the Water System, the PUC included a requirement that, in acting as receiver, Aqua must “[p]rovide tentative schedules, updates, and recommendations in status reports to the Commission for bringing Twin Lakes into compliance with conditions of *Twin Lakes’ certificate of public convenience* as appropriate.” (Jan. 14, 2021 Opinion and Order at 16, App. A at Paragraph 3(c)).

88. The doctrine of estoppel applies where patterns of consistent past practice establish a fact, even a legal fact, as true and should apply here. *See, e.g., Morris v. S. Coventry Twp. Bd. Of Supervisors*, 898 A.2d 1213, 1218 (Pa.

Commw. Ct. 2006); *see also Brandywine Vill. Assoc., LP v. E. Brandywine Twp. Bd. Of Supervisors*, No. 499 C.D. 2020, 2021 WL 3046662, at *5-6 (Pa. Commw. Ct. 2021).

89. Finally, even if the PUC is not estopped from claiming that Middlesex is the jurisdictional utility in Pennsylvania, the Commission's assertion of jurisdiction over Middlesex is arbitrary and capricious and/or an abuse of discretion.

90. Twin Lakes is the jurisdictional entity that submitted the petition seeking relief pursuant to Section 529.

91. Twin Lakes has no control over Middlesex and cannot compel it to comply with the escrow requirement.

92. By filing a federal action against the PUC, Middlesex has clearly indicated that it will not comply with the escrow requirement.

93. As a result, Twin Lakes may be denied relief under Section 529 despite the fact the PUC's finding that Twin Lakes has met all of the Section 529 criteria and that acquisition of the Twin Lakes system by Aqua is in the public interest.

94. Accordingly, in asserting jurisdiction over Middlesex, the PUC committed an error of law, acted outside of its statutory authority, committed

constitutional violations, rendered factual findings lacking substantial evidence, acted arbitrarily and capriciously, and abused its discretion.

The PUC also committed reversible error by conditioning approval of relief under Section 529 of the Public Utility Code on Middlesex placing \$1.675 million in escrow

95. The PUC also committed reversible error by conditioning approval of relief under Section 529 of the Public Utility Code on Middlesex placing \$1.675 million in escrow.

The PUC violated Middlesex’s constitutional right to due process—and by extension, harmed Twin Lakes—because Middlesex did not have a meaningful opportunity to defend itself against the escrow condition

96. First, the PUC violated Middlesex’s constitutional right to due process—and by extension, harmed Twin Lakes—because Middlesex did not have a meaningful opportunity to defend itself against the escrow condition.

97. While not capable of an exact definition, “the basic elements of procedural due process are adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case.” *Commonwealth v. Turner*, 80 A.3d 754, 764 (Pa. 2013).

98. Moreover, “due process is fully applicable to adjudicative hearings involving substantial property rights.” *Lyness v. State Bd. of Med.*, 605 A.2d 1204, 1207 (Pa. 1992) (citation and quotation marks omitted).

99. “[T]he fundamental requirement of due process is the *opportunity* to be heard at a *meaningful* time and in a *meaningful* manner.” *Cresco, Inc. v. PUC*, 622 A.2d 997, 1000 (Pa. Commw. Ct. 1993) (citation and quotation marks omitted; emphasis in original).

100. In imposing the escrow requirement, however, the PUC violated Middlesex’s due process rights, because the Commission did not afford Middlesex, a non-party, with adequate notice, the opportunity to be heard, or the chance to defend itself before the PUC levied a \$1.675 million penalty against Middlesex.

101. The fact that the PUC’s November 2021 Order directs that a copy of the Opinion and Order be served upon Middlesex—notwithstanding its finding that Twin Lakes is an “alter ego” of Middlesex—is tantamount to an admission by the Commission that its prior conduct violated Middlesex’s due process rights. (Ex. B. at 55).

102. Even though it is a separate and distinct entity, Twin Lakes is harmed by the PUC’s deprivation of Middlesex’s constitutional rights because: (a) Twin Lakes has no control over Middlesex and cannot compel it to comply with the escrow requirement; (b) Middlesex has clearly indicated that it will not comply with the escrow requirement; and (c) as a result, Twin Lakes may be denied relief under Section 529 despite the fact the PUC’s finding that Twin Lakes has met all

of the Section 529 criteria and that acquisition of the Twin Lakes system by Aqua is in the public interest.

The escrow condition amounts to an unconstitutional taking without just compensation

103. Second, the condition requiring that Middlesex forfeit \$1.675 million into an escrow account to be used for future infrastructure improvements to the Twin Lakes system is an unconstitutional taking of Middlesex's property without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

104. The Fifth Amendment's Takings Clause applies to the states through the Fourteenth Amendment, and prohibits the government from taking private property for public use without just compensation. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

105. The U.S. Supreme Court has found that a public utility "may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it." *Smyth v. Ames*, 169 U.S. 466, 546 (1898), *overruled on other grounds by Federal Power Comm'n v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942).

106. The Pennsylvania Supreme Court has further stated that "the 'just compensation' safeguarded to a utility by the fourteenth amendment of the federal constitution is a reasonable return on the fair value of its property at the time it is

being used for public service.” *Barasch v. PUC*, 532 A.2d 325, 335 (Pa. 1987) (citations and quotation marks omitted).

107. The requirement that Middlesex place \$1.675 million in escrow to fund repairs to the Twin Lakes system is a taking without just compensation.

108. The escrow funds are intended to be used to make improvements to the Twin Lakes system, which will eventually be used and useful in public service.

109. However, Middlesex will never have the opportunity to earn a return on this property that it would be compelled to surrender under the escrow requirement.

110. As such, the escrow requirement amounts to a taking of Middlesex’s property without just compensation.

111. The escrow requirement violates Middlesex’s constitutional rights and Middlesex has indicated that it will not comply with this requirement.

112. Because the PUC’s November 2021 Order may ultimately prevent Twin Lakes from receiving relief under Section 529, to the detriment of Twin Lakes’ customers, Twin Lakes is harmed by the Commission’s deprivation of Middlesex’s constitutional rights.

Conditioning Section 529 relief on Middlesex placing funds in escrow creates an impermissible unconstitutional condition

113. Third, the escrow requirement is a violation of the unconstitutional conditions doctrine.

114. As a general principle, the U.S. Supreme Court has recognized that a state cannot condition a benefit generally available to others in the state on the surrender of a constitutional right. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 606 (2013); *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593 (1926); cf. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893-94 (1988).

115. This principle is known as the unconstitutional conditions doctrine, and its logical foundation “applies with equal force in any case in which the enjoyment of a government-sponsored benefit is conditioned upon a person’s nonassertion of any constitutional right.” *Wojtczak v. Cuyler*, 480 F.Supp. 1288, 1306 (E.D. Pa. 1979) (citing William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1446 (1968)); see also Richard A. Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 Harv. L. Rev. 4, 7 (1988).

116. Middlesex possesses a constitutional right under the Due Process Clause not to be subjected to the PUC’s jurisdiction as it did not knowingly or voluntarily waive that right.

117. Middlesex purposely established Twin Lakes as a Pennsylvania subsidiary company to own, operate, and serve as the jurisdictional utility.

118. Middlesex also is not fairly regarded as “at home” in Pennsylvania.

119. Conditioning the acquisition of the Twin Lakes system on Middlesex depositing \$1.675 million into an escrow account would require Middlesex to surrender its constitutional protections under the Due Process Clause, in order for Twin Lakes to obtain relief under Section 529.

120. This requirement conditions such relief on Middlesex waiving its due process rights, and therefore, violates the unconstitutional conditions doctrine.

121. Even assuming, *arguendo*, that Middlesex were subject to personal jurisdiction in Pennsylvania, the PUC has never imposed any such escrow condition on any other small water system or other entity, pursuant to Section 529.

122. The PUC in this instance would therefore be impermissibly discriminating against Middlesex by conditioning Twin Lakes' benefit of Section 529 relief—which is generally available to other small water systems without that condition—on Middlesex waiving its constitutional rights.

123. Additionally, the escrow requirement would constitute a taking without just compensation.

124. If Middlesex were required to put this amount in escrow, it would require Middlesex to surrender its constitutional protection against such takings in order for Twin Lakes to obtain relief under Section 529.

125. This would likewise create an unconstitutional condition.

126. Conditioning the acquisition of Twin Lakes by a capable public utility under Section 529 on a requirement that Middlesex set aside \$1.675 million into an escrow account, where Twin Lakes has met all of the statutory requirements of Section 529, is therefore unconstitutional as it would compel Middlesex to surrender its constitutional rights under the Due Process Clause and the Takings Clause.

Twin Lakes met its burden to show that all of the statutory requirements of Section 529 have been met, and the Public Utility Code does not provide for any further inquiry

127. Fourth, Twin Lakes met its burden to show that all of the statutory requirements of Section 529 have been met, and the Public Utility Code does not provide for any further inquiry.

128. The November 2021 Order correctly found that Twin Lakes fulfilled all of the statutory requirements of Section 529, regardless of whether Middlesex's role as a corporate parent is considered as part of that analysis, and concluded that Twin Lakes should be acquired by a capable public utility. (Tab B at 48-49).

129. The inquiry under Section 529 should have ended there.

130. Instead, the PUC proceeded to hold that the "unique circumstances of the this case . . . place the reasonable and necessary condition upon the acquisition of Twin Lakes by Aqua, that Middlesex escrow funds in the amount of \$1,675,000,

to offset the costs associated with replacing and remediating the existing infrastructure of Twin Lakes' water system.” (Tab B at 53).

131. However, there is no basis in the Public Utility Code for conditioning the grant of Section 529 relief on the surrender of money into an escrow account by an out-of-state corporate parent or any other equity owner.

132. Section 529 plainly states that “[t]he 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 capable public utility, subject to a determination by the commission that the price is reasonable.” 66 Pa.C.S. §529(e).

133. The escrow condition represents an inappropriate, predetermined condition on the purchase price that is not contemplated by the text of Section 529.

134. The statutory language leaves it to the small water utility and the acquiring capable public utility to negotiate the acquisition price, subject to a Commission determination that the price is “reasonable.” 66 Pa.C.S. §529(e).

135. The statute only anticipates the PUC stepping in if the parties are unable to successfully negotiate a price for the acquisition, and in that instance, provides an alternative process through the use of eminent domain procedures. 66 Pa.C.S. §529(e).

136. It is inappropriate for the PUC to presuppose how the purchase price negotiations will proceed and to impose the very significant condition in the form of an escrow requirement that is not contemplated by the Public Utility Code.

137. Nothing in Section 529—or any other provision of the Public Utility Code—permits the PUC to exercise such control over any entity in connection with negotiations pursuant to Section 529, particularly given that Middlesex was not a party to the proceeding and is not subject to the Commission’s jurisdiction.

138. Additionally, it is irrelevant under Section 529 that Twin Lakes has a parent company, as the statute does not provide for any different or special treatment in that situation.

139. To conclude otherwise requires violating a central tenet of statutory interpretation and inserting words into a statute. *See, e.g., Mission Funding Alpha v. Commonwealth*, 173 A.3d 748, 762 (Pa. 2017); *see also Burke ex rel. Burke v. Independent Blue Cross*, 103 A.3d 1267, 1274 (Pa. 2014) (“[W]e are mindful of the precept that courts cannot insert words into a statute.”).

140. Accordingly, in conditioning Twin Lakes’ acquisition by Aqua on a requirement that Middlesex set aside \$1,675,000 into an escrow account, the PUC committed an error of law, and its action is arbitrary and capricious and an abuse of discretion.

Financial considerations regarding quality of service are appropriately addressed in a base rate case, not a Section 529 proceeding

141. Fifth, financial considerations regarding quality of service are appropriately addressed in a base rate case, not a Section 529 proceeding.

142. The November 2021 Order inappropriately requires Middlesex to pay \$1.675 million into an escrow account, based on the mistaken assumption that Middlesex has not properly maintained the Water System over the last decade. (Tab B at 51-53).

143. The November 2021 Order makes this claim without recognizing the improvements in service quality that have been made by Twin Lakes since it began operating the system, which are substantiated in the record.

144. However, under the Public Utility Code, the financial implications of quality of service issues are not appropriately addressed in a Section 529 proceeding. 66 Pa.C.S. § 529.

145. Rather, the proper forum for adjudicating a utility's investment in and operational performance of a utility system is in a base rate case as provided in Chapter 13 of the Public Utility Code, 66 Pa. C.S. §§ 1301 *et seq.*

146. In fact, these issues have been addressed in Twin Lakes' past rate cases.

147. Twin Lakes' rate cases have already taken into account concerns with quality of service to customers.

148. For example, in Twin Lakes’ most recent rate case, the final Opinion and Order stated that: “the ALJ considered the evidence relating to the various quality of service issues in this proceeding and factored such evidence as part of her overall determination of recommending a just and reasonable cost of equity for rate setting purposes in this proceeding...” *PUC v. Twin Lakes Utilities, Inc.*, Docket No. R-2019-3010958, Opinion and Order (Mar. 26, 2020), at 46-47.

149. Thus, quality of service and the condition of the system are factored into Twin Lakes’ current Commission-approved customer rates.

150. In addition, that Order stated that the PUC “acknowledge[s] that Twin Lakes has taken affirmative steps toward the necessary repairs and improvements to its system.” *PUC v. Twin Lakes Utilities, Inc.*, Docket No. R-2019-3010958, Opinion and Order (Mar. 26, 2020), at 46-47.

151. It is inappropriate for the PUC to impose the escrow condition outside of a rate case, particularly after the Commission has acknowledged Twin Lakes’ attempts to address quality of service issues in its most recent base rate case.

152. Further, in Twin Lakes’ three rate cases before the PUC, neither the Commission nor any of the parties have ever attempted to join Middlesex as a party.

153. Any concerns about the appropriate level of investment should have been and were, in fact, addressed in those rate proceedings.

154. Choosing to now fault Middlesex for the perceived state of the system and to criticize the level of investment is inappropriate outside the context of a base rate case, especially when the PUC did not provide Middlesex with adequate due process to defend itself against these claims.

155. Therefore, the escrow requirement imposed by the November 2021 Order constitutes an error of law, arbitrary and capricious action, and an abuse of discretion by the Commission.

The factual record does not support the imposition of the escrow requirement

156. Lastly, the November 2021 Order is not based on substantial evidence, because the record directly contradicts the Order's false narrative that Twin Lakes or Middlesex sat idly by and allowed the system to deteriorate.

157. To the contrary, the record establishes that Twin Lakes made significant efforts to improve the system and to provide a long-term solution for sustainable quality of service for its customers.

158. First, the record shows that the poor condition of the distribution system existed when it was acquired by Twin Lakes. (Ex. A at 8, Findings of Fact ¶7).

159. Soon after Twin Lakes began operating the system in November 2009, it became apparent that the condition of the water system was significantly poorer than had been represented by the former owner, or than had been visible

from the inspection and assessment that was part of the operational due diligence work performed prior to the purchase. (Ex. A at 8, Findings of Fact ¶8).

160. As a condition of its approval of the acquisition of the system, the PUC required the installation of water meters for all customers. (Ex. A at 8, Findings of Fact ¶9).

161. Twin Lakes complied with this requirement and after the meters were installed and an annual meter reading database was established, Twin Lakes was able to calculate a non-revenue, or unaccounted-for, water usage percentage which was previously unknown by the former owner, the PUC, or the Pennsylvania Department of Environmental Protection. (Ex. A at 8-9, Findings of Fact ¶10).

162. This critical metric revealed the true amount of leakage within the water distribution system, which was extensive, and provided a true indication of the poor quality of the system.

163. Further, Middlesex provided significant support in the form of financing and operational expertise to Twin Lakes as its corporate parent in its attempts to further improve the reliability of the distribution system.

164. Middlesex was Twin Lakes' sole source of equity capital, debt financing and primary operations support. (Ex. A at 9, Findings of Fact ¶11).

165. Unfortunately, Twin Lakes has been unable to establish a credit arrangement at any reasonable cost with any financial institution as a stand-alone entity. (Ex. A at 9, Findings of Fact ¶12).

166. This is due to Twin Lakes' inability to demonstrate that it had the net income and cash flow to adequately support its financial obligations incurred in operating the Twin Lakes water system. (Ex. A at 9, Findings of Fact ¶12).

167. Beginning in 2009, Middlesex made equity investments in, and extended credit to, Twin Lakes in order to enable Twin Lakes to maintain service for its customers and pay for the necessary improvements given the poor condition of the system. (Ex. A at 9, Findings of Fact ¶¶13-15; Twin Lakes Petition at ¶9).

168. Specifically, Middlesex provided to Twin Lakes the needed working capital and funds for utility plant investment in the form of debt and equity capital under an assumption that Twin Lakes could obtain sufficient rate relief to not only sustain operations, but also to service Twin Lakes' debt and provide a fair return to the equity investor. (Ex. A at 9, Findings of Fact ¶11; Twin Lakes Petition at ¶9).

169. Since 2009, Middlesex has extended financial credit to Twin Lakes through three outstanding Unsecured Revolving Promissory Notes. (Ex. A at 9, Findings of Fact ¶13).

170. Since that time, Middlesex has invested, loaned or advanced over \$2.4 million to Twin Lakes. (Twin Lakes Petition at ¶11).

171. Middlesex also provided operational support to Twin Lakes through a Service Agreement executed between Middlesex and Twin Lakes. (Ex. A at 9, Findings of Fact ¶15).

172. Additionally, over the last decade, Twin Lakes has gone to great lengths to identify a long-term solution that would address the system's operational risks while also attempting to mitigate the need to significantly increase customers' rates. (Ex. A at 45-46).

173. These efforts represent a decade of diligent attempts to solicit support and recommendations by the PUC and others to identify a sustainable solution for the Twin Lakes customers, in order to resolve current and anticipated future problems that only came to light after Twin Lakes acquired the system. (Ex. A at 45-46).

174. Twin Lakes filed for Section 529 relief only as a last resort after the foregoing efforts did not result in a long-term solution to the operational risks and affordability issues for customers with the Twin Lakes system.

175. The November 2021 Order falsely accuses Middlesex of having done nothing to support Twin Lakes' efforts to maintain sustainable service for the current and future benefit of its customers, but this conclusion is not supported by the record.

176. For these reasons, the November 2021 Order is not based on substantial evidence, and the imposition of an escrow requirement constitutes arbitrary and capricious action and/or an abuse of discretion by the Commission.

The PUC further committed reversible error by *sua sponte* purporting to revive the Service Agreements between Twin Lakes and Middlesex

177. The PUC held that, “[b]y attempting to modify the Service Agreement by terminating it, Middlesex was effectively attempting to abandon its duty to provide water service without seeking prior Commission approval to do so, adding: “[t]o the extent that the *June 1 Notice of Termination Letter*, from Middlesex to Twin Lakes attempts to modify/terminate the existing Service Agreement between the two, we find it to be void, as an attempt to unilaterally abandon service in violation of the provisions of the Code.” (Ex. B at 45).

178. However, no party in its Exceptions argued or even suggested that the Notice of Termination Letter was void.

179. Therefore, the PUC engaged in *sua sponte* decision-making in declaring the Notice of Termination Letter void.

180. That practice is highly disfavored, because it violates the core principles underlying appellate law. *See, e.g., Danville Area Sch. Dist. v. Danville Area Educ. Ass’n, PSEA/NEA*, 754 A.2d 1255, 1259 (Pa. 2000) (when an appellate court decides issues *sua sponte*, it exceeds its proper function, unnecessarily

disturbs the process of orderly judicial decision-making, and deprives the court the benefit of counsel's advocacy).

181. While lower courts are authorized to raise a few, discrete non-jurisdictional issues *sua sponte*, this case does not implicate those exceptions. *See, e.g., In re Estate of Tscherneff*, 203 A.3d 1020, 1027 n.3 (Pa. Super. 2019).

182. Thus, the only logical explanation for the PUC taking the extraordinary step of engaging in *sua sponte* decision-making is that the Commission wanted to force non-party Middlesex to continue to provide financial and operational oversight to Twin Lakes while the Section 529 proceeding remained pending.

183. Regardless of its motives, the *sua sponte* character of the PUC's holding constitutes reversible error, especially since the Commission did not direct supplemental briefing on the issue. *See, e.g., Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 228 (Pa. 2010) (holding that, "prior to overruling decisional law *sua sponte*, the interests of all parties are best served by allowing the participants an opportunity to present argument"); *see also* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigations Of An Opportunity To Be Heard*, 39 SAN DIEGO L. REV. 1253, 1298 (2002) (observing that the U.S. Supreme Court and lower courts often direct supplemental briefing on issues raised *sua sponte* "thereby affording the litigants a chance to have their say" (quoting Ginsburg, J.)).

184. Putting aside its improper *sua sponte* character, the PUC’s finding that it could revive a terminated contract constitutes reversible error because: (1) the express terms of the Service Agreement contain a termination provision ***that was properly executed in compliance with it, and not in modification of it***; and (2) the Commission lacks jurisdiction to compel Middlesex to perform any action.

185. Regarding the former, the Service Agreement allows for termination.

186. Section 1 addresses the duration of the contract, stating: “The services to be rendered hereunder shall commence on the Effective Date hereof [December 1, 2009] and this Service Agreement shall continue in full force and effect until terminated by either of the parties hereto, giving the other party hereto 90 days [sic] notice in writing.”

187. Middlesex tendered a notice of termination to Twin Lakes on June 1, 2020, initially effective on September 1, 2020 and, later, voluntarily extended, at Commission request, until January 15, 2021, when Aqua began its role as receiver.¹⁴

¹⁴ *Application of Twin Lakes Utilities, Inc. Commission Approval, Nunc Pro Tunc, of Fifth Amendment To The Service Agreement Between Middlesex Water Company and Twin Lakes Utilities, Inc. Pursuant To 66 Pa. C.S. §2102* , Docket No. G-2020-3020941 dated December 31, 2020.

188. To the extent that the PUC was attempting to revive the Service Agreement and Middlesex's obligations thereunder, it actually performed a second termination.¹⁵

189. The Service Agreement now has been "voided" by the parties and again by the PUC in its November 2021 Order.

190. Thus, Middlesex has no remaining contractual obligation to continue to provide operational and financial services to Twin Lakes.¹⁶

191. Concerning the latter, and as noted above, PUC has no jurisdiction over Middlesex, as a New Jersey corporation, even as the parent of a Pennsylvania-registered corporation certificated as a public utility in Pennsylvania.

192. Middlesex has no CPC and does not possess the jurisdictional utility assets or provided jurisdictional services.

¹⁵ On this point, the November 2021 Order continues to conflate Middlesex and Twin Lakes when it rejects the termination as a *de facto* abandonment of service by Middlesex as the CPC holder: "However, given our conclusion that the Service Agreements, to the extent they reflect an attempt by a certificated public utility, Middlesex, to abandon or 'transfer' its lawful duties under the Code to another entity, its wholly owned subsidiary, Twin Lakes, we conclude the Service Agreements to be contrary to the Code and void, and shall deny approval of the Service Agreements." (Ex. B at 44 n.7). This analysis suffers from the same legal and factual deficiencies as set forth previously. Notably, the Service Agreement has been voided twice, first by the parties and then later by the PUC in its November 2021 Order.

¹⁶ The Service Agreement had previously been disclosed and addressed by the parties and the PUC in Twin Lakes' 2011, 2015 and 2019 rate cases. No party in those proceedings objected to the validity of that agreement or sought to deny recovery of the associated costs collected by Middlesex under it. Nor did the Commission.

193. Accordingly, in *sua sponte* purporting to revive the Service Agreements between Twin Lakes and Middlesex, the PUC committed an error of law, and its action is arbitrary and capricious and an abuse of discretion.

WHEREFORE, Petitioner Twin Lakes Utilities, Inc. requests that this Court reverse and vacate the portion of Respondent Pennsylvania Public Utility Commission's November 18, 2021 Order directing non-party and non-jurisdictional public utility Middlesex Water Company to place \$1.675 million in escrow, and grant such further relief as the Court deems just and reasonable.

Respectfully submitted,

/s/ Casey Alan Coyle

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Date: November 22, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Casey Alan Coyle

Casey Alan Coyle, Esquire

*Attorney for Petitioner Twin Lakes Utilities,
Inc.*

Date: November 22, 2021

PROOF OF SERVICE

I hereby certify that this day I served a copy Twin Lakes Utilities, Inc.'s Petition for Review, upon the persons listed below in the manner indicated, which service satisfies the requirements of Pa.R.A.P. 121 and Pa.R.A.P. 1571(d):

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ATTACHMENT C

Middlesex Water Company's
Complaint for Declaratory and Injunctive Relief,
U.S. District Court for the
Middle District of Pennsylvania
3:21-cv-01981
(less exhibits)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

Middlesex Water Company,	:	
	:	
Plaintiff,	:	Case No.
	:	
v.	:	Judge
	:	
Pennsylvania Public Utility Commission,	:	
	:	
Defendant.	:	Electronically Filed
	:	
	:	

VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Middlesex Water Company (“Middlesex”) files this lawsuit in order to obtain relief from a November 18, 2021 Order (“PUC Order”) of the Pennsylvania Public Utility Commission (“PUC” or “Commission”) requiring Middlesex to place \$1.675 million into escrow as a prerequisite to the purchase, pursuant to Section 529 of the Pennsylvania Public Utility Code, of Twin Lakes Utilities, Inc. (“Twin Lakes”) by Aqua Pennsylvania, Inc. (“Aqua”). A copy of the PUC Order is attached hereto as **Exhibit A.**

The provisions of the PUC Order that conclude that the Commission has jurisdiction over Middlesex, a New Jersey corporation that is not a Pennsylvania public utility, and purport to require Middlesex to deposit \$1.675 million into escrow violate the Due Process, Equal Protection and Commerce Clauses of the United

States Constitution as applied to Middlesex by unfairly imposing requirements on Middlesex that are not otherwise applied to Pennsylvania public utilities. Middlesex therefore seeks preliminary injunctive relief prohibiting the Commission from enforcing the PUC Order against Middlesex, specifically that portion of the Order requiring Middlesex to place funds in escrow for future infrastructure improvements within 30 days – i.e., on December 17, 2021.

INTRODUCTION

1. Middlesex owns and operates regulated water and wastewater utility systems in New Jersey and Delaware.

2. Middlesex is a registered public utility in the State of New Jersey and is subject to regulation by the New Jersey Board of Public Utilities (“BPU”).

3. Since its incorporation as a water utility in 1897, Middlesex has provided a full range of regulated and-nonregulated water utility, wastewater utility and related services, in the states where it is certificated to operate, including collecting treating, distributing and selling water for domestic, commercial, municipal, industrial and fire protection purposes.

4. Middlesex does not provide regulated or unregulated water or wastewater utility or related services in the Commonwealth of Pennsylvania nor has Middlesex ever been authorized to provide such services in the Commonwealth of Pennsylvania, despite false statements to the contrary in PUC Order.

5. Twin Lakes is a public utility corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

6. Twin Lakes is a wholly-owned subsidiary of Middlesex.

7. Twin Lakes provides water service to the community known as Sagamore Estates, located in Shohola Township, Pike County, Pennsylvania.

8. On June 10, 2020, Twin Lakes issued a letter to the PUC's Bureau of Technical Utility Services ("TUS") and Bureau of Investigation Enforcement ("I&E"), as well as Pennsylvania's Office of the Consumer Advocate ("OCA"), requesting the initiation of a proceeding under Section 529 of the Pennsylvania Public Utility Code, 66 Pa. C.S.A. § 529.

9. Under Section 529, in relevant part, the Commission "may order a capable public utility to acquire a small water or sewer utility" if certain criteria are met.

10. As set forth in further detail, below, on November 18, 2021, the Commission issued an Order and Opinion ("PUC Order") which adopted the findings set forth in a Recommended Decision ("RD") of a Pennsylvania Administrative Law Judge ("ALJ") dated April 22, 2021, which, in pertinent part, requires Middlesex, a New Jersey corporation, to place \$1.675 million into an escrow account within 30 days of the date of the issuance of the PUC Order to be

used to offset the cost of Aqua replacing Twin Lakes water system infrastructure. A copy of the RD is attached hereto as **Exhibit B**.

11. Accordingly, Middlesex files this Complaint seeking, among other remedies, a preliminary injunction against the enforcement of those provisions of the PUC Order requiring Middlesex to deposit monies into escrow as a condition of the completion of Twin Lakes' 529 Proceeding.

JURISDICTION AND VENUE

12. Middlesex brings this lawsuit pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and alleges violations of the Fourteenth Amendment to, and the Commerce Clause of, the United States Constitution.

13. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367, 1343, and 2201.

14. Venue in this District is proper under 28 U.S.C. § 1391(b)(2) and 28 U.S.C. § 1391(c)(2) because (1) a substantial part of the events giving rise to the claims set forth in this Complaint occurred in this District, and (2) the Commission is subject to the Court's personal jurisdiction in this District.

PARTIES

Middlesex

15. Middlesex is a New Jersey corporation with its principal place of business at 485C Route 1 South, Suite 400, Iselin, New Jersey 08830.

The PUC

16. The PUC is an agency or body of the Commonwealth of Pennsylvania charged by statute with the regulation of public utilities.

17. The PUC's principal office is located at 400 North Street, Harrisburg, Pennsylvania 17120.

FACTUAL ALLEGATIONS

The Twin Lakes System

18. The Twin Lakes system currently serves approximately 114 water customers in Shohola Township, Pike County, Pennsylvania and consists of a supply of water from one functional underground well, one non-functional well, a small treatment/pumping station including an atmospheric 20,000 gallon storage tank, roughly 3.7 miles of water mains, and 120 active and inactive service connections.

19. Before the Twin Lakes water system was acquired by Twin Lakes in 2009, it was plagued by chronic service and public health deficiencies resulting in numerous "boil water advisories" issued by the Pennsylvania Department of Environmental Protection ("PA DEP"). These problems, among others, resulted in frequent service suspensions.

The Creation of Twin Lakes Utilities, Inc., and Acquisition of the Twin Lakes System as a Wholly-Owned Subsidiary of Middlesex

20. On February 26, 2008, Middlesex filed a Letter Application requesting a Certificate of Public Convenience ("CPC") with the PUC with the stated goal of

acquiring the assets of and operating the system of Twin Lakes Water Services, LLC (“TLWS”), the owner of the Twin Lakes water system at that time.

21. Thereafter, on May 20, 2008, Middlesex and TLWS filed a Joint Application with the PUC seeking approval for Middlesex to acquire TWLS’ assets.

22. Both the February 26, 2008 Letter Application and May 20, 2008 Joint Application contained clear statements concerning Middlesex’s intent to create a new, wholly-owned Pennsylvania subsidiary that would own and operate the assets comprising the Twin Lakes system.

23. On February 26, 2009, the Commission issued an Order in PUC Docket Nos. A-2008-2050089 and A-2008-20500092 approving the acquisition of the Twin Lakes system.

24. However, the Commission never issued a fully executed or valid CPC to Middlesex.

25. Middlesex formed Twin Lakes on April 6, 2009 by filing Articles of Incorporation with the Pennsylvania Department of State Corporation Bureau.

26. Middlesex is not now, and never was, a duly authorized Pennsylvania corporation.

27. Thus, the creation of Twin Lakes as a wholly-owned Pennsylvania subsidiary was required to ensure that the Twin Lakes system would be operated by

an entity incorporated in the Commonwealth of Pennsylvania, as first contemplated in the February 26, 2008 Letter Application.

28. On November 3, 2009, Twin Lakes entered into an Asset Purchase Agreement for the Assets of TWLS, under which Twin Lakes became the owner and titleholder of TWLS' assets comprising the Twin Lakes system.

29. Twin Lakes then filed a new tariff adopting the rules, rates, and regulations contained in TWLS' then-current tariff with the Commission on November 16, 2009.

The True Condition of the Twin Lakes System becomes Apparent

30. Almost immediately after Twin Lakes began operating the Twin Lakes system in November, 2009, it became clear that the system was not in the condition that the former owner had represented nor apparent based on analyses performed during a period of operational due diligence.

31. As part of the acquisition of the Twin Lakes system, the Commission ordered the installation of water meters for each customer in this previously unmetered water system, with which Twin Lakes complied.

32. The data collected from these meters allowed Twin Lakes to calculate the percentage of non-revenue, or unaccounted-for, water usage – a metric that was unknown by the prior owner, the PUC, or any other regulatory body.

33. This new data indicated that the Twin Lakes system was experiencing widespread and significant leakage, the reduction of which would be a significant financial challenge that Twin Lakes and its customers would face for the next decade.

Middlesex's Investment in and Loans to Twin Lakes

34. As a small stand-alone water utility, Twin Lakes faced challenges in attempting to establish any credit relationship at a reasonable cost with prospective lenders. This difficulty was the direct result of Twin Lakes' inability to demonstrate that it possessed the requisite net income and cash flow to sustain the financial burden of operating and maintaining the Twin Lakes system in light of the required capital, operations and maintenance expenditures that would be necessary to sustain safe and reliable utility service.

35. Starting in 2009, Middlesex, in its role as Twin Lakes' parent company, made equity investments in, and extended credit to, Twin Lakes so that Twin Lakes could maintain service for Twin Lakes' customers and finance the many necessary improvements to address the deteriorated state of the Twin Lakes system.

36. Since 2009, Middlesex has extended financial credit to Twin Lakes through three outstanding Unsecured Revolving Promissory Notes, executed in January 2016, October 18, 2019, and October 29, 2019 (each a "Promissory Note" and collectively, the "Notes").

37. Each Promissory Note provided Middlesex, as the Lender, with the right to demand payment from Twin Lakes, as Borrower, of the total amount due on the Promissory Note, along with any unpaid interest.

38. Since the acquisition of the Twin Lakes system in 2009, Middlesex has invested, loaned, or advanced over \$2.4 million to Twin Lakes.

39. Middlesex has also supported Twin Lakes through a Service Agreement, dated December 1, 2009 (“Service Agreement”), under which Middlesex provided various types of operational support for Twin Lakes, including, but not limited to: customer service, accounting, administration, communications, corporate secretarial, engineering, financial, human resources, information systems, operations, rates and revenue, risk management, and water quality functions.

40. Pursuant to that agreement, either Twin Lakes or Middlesex was free to terminate the Service Agreement on 90 days written notice to the other party.

**Twin Lakes’ Continuous Efforts to
Obtain Sufficient Rates to Fund Improvements**

41. Less than a year and half after the change of ownership of the Twin Lakes system, Twin Lakes understood that existing customer utility rates would not support the Twin Lakes system, nor the significant investments necessary to repair the numerous leaks and other infrastructure challenges.

42. Twin Lakes therefore sought a series of significant rate increases through base rate cases filed with the Commission in 2011, 2015, and 2019.

43. In June 2011, Twin Lakes sought the PUC's approval to increase rates by 370% largely driven by required significant capital investments to maintain safe and reliable utility service.

44. At the same time, Twin Lakes commenced what has by now turned into a ten-year endeavor to identify and institute a workable solution to provide reliable, quality water service to its customers at affordable rates.

45. In March 2012, the PUC issued an Order approving a 124.9% rate increase for Twin Lakes, to be phased in over a three-year period. This increase was far below the relief Twin Lakes had originally requested as deemed necessary.

46. Nonetheless, Twin Lakes continued to make necessary improvements in the Twin Lakes system.

47. In support of these improvements and future improvements, Twin Lakes again filed a base rate case with the Commission on November 11, 2015, seeking to increase rates by 257%.

48. On June 9, 2016, the Commission issued an Order approving a rate increase of only 164.54%, subject to two caveats.

49. First, the rate increase was to be phased-in over a three-year period. Second, half of the rate increase (82.27%) was contingent upon the completion of future planned additional system improvements.

50. On July 19, 2019, Twin Lakes filed an application with the PUC seeking an increase in base rates of 158.63%.

51. However, on March 26, 2020, the PUC issued an Opinion and Order approving a rate increase of 87.91% – only 55% of what Twin Lakes had sought.

52. As a result of the Commission’s March 26, 2020 Opinion and Order, Middlesex (the sole source of financial and operational support to Twin Lakes) concluded that the Commission would not permit Twin Lakes’ rates to be set at a level that would enable Twin Lakes to recover its prudently incurred costs and expenses to adequately serve its customers.

53. The risk associated with the essential foreclosure of Twin Lakes’ ability to recover its prudent costs and expenses represented an unacceptable and untenable level of risk with respect to further investment in Twin Lakes by Middlesex.

**Twin Lakes Works to Achieve a Lasting Solution to System Stability
and Rate Affordability**

54. In tandem with its repeated attempts to secure rate increases from the Commission, Twin Lakes also explored other possibilities to address the necessary improvements in the Twin Lakes system while balancing the interests of customers’ in keeping rates as low as possible.

55. A short time after Twin Lakes filed its June 2011 base rate case, Twin Lakes’ management discussed with Aqua the potential for Aqua to acquire the Twin Lakes system.

56. Twin Lakes provided Aqua with financial records, and hosted a site inspection in November 2011, with further follow-up thereafter.

57. Twin Lakes' management also held discussions with a representative of American Water Works Company ("American"), the parent company of Pennsylvania American Water Company, concerning American's potential interest in acquiring Twin Lakes.

58. However, neither Aqua nor American were interested in acquiring the Twin Lakes system and did not pursue the matter further.

59. In late 2014, Twin Lakes also explored the possibility of providing individual wells for each of the then 115 customers of the Twin Lakes system (as an alternative to the costly new investments needed to operate a certificated public water system).

60. However, this solution proved infeasible as a result of several of the small lot sizes in the Sagamore Estates community and applicable regulations concerning minimum clearances between septic systems and wells.

61. Twin Lakes' senior executives also had personal meetings with the Chairman of the Commission and the OCA to explore other potential solutions, but these discussions did not yield the relief necessary to enable Twin Lakes to balance the ability to make the necessary improvements in its system without significantly increasing rates.

The Commission Summarily Rejects Twin Lakes' Petition for Abandonment and Twin Lakes continues to pursue Additional Alternatives

62. On February 26, 2018, Twin Lakes issued a letter to TUS, I&E, OCA, and the Office of Small Business Advocate (“OSBA”) advising that there was an emergent need for Twin Lakes to undertake extensive system improvements that would raise Twin Lakes customers’ annual water bills above \$4,000.

63. In the February 26, 2018 letter, Twin Lakes outlined three potential options concerning how it could realistically proceed: (1) file a petition for abandonment of the Twin Lakes system franchise under the Pennsylvania Public Utility Code; (2) file for emergent rate relief; or (3) identify a larger investor-owned water utility that was able to make the necessary improvements to the Twin Lakes system.

64. On October 23, 2018, Twin Lakes filed a Petition for Abandonment with the Commission.

65. The Commission summarily rejected Twin Lakes’ Petition for Abandonment just two (2) days later, on October 25, 2018.

66. Twin Lakes, however, continued to investigate alternative opportunities that would allow the Twin Lakes system to remain viable without significantly increasing rates.

67. Twin Lakes applied for and received a PENNVEST grant in the amount of \$4.66 million to finance the five-year capital improvement plan that had been submitted in Twin Lakes' prior rate cases.

68. However, the PENNVEST grant turned out not to be the lifeboat intended, as pursuant to tax laws in the Tax Cuts and Jobs Act of 2017 ("TCJA"), the grant (considered a Contribution In Aid of Construction ("CIAC") to Twin Lakes) was subject to federal income tax.

69. Thus, the PENNVEST grant of \$4.66 million would carry an income tax liability of \$1.358 million – all of which would need to be recoverable from Twin Lakes' customers.

70. Because of the Commission's decisions in Twin Lakes' prior rate cases, Middlesex concluded that the income tax liability on the PENNVEST grant would significantly increase customer rates and, therefore, might not be approved for rate recovery for the Commission, leaving Twin Lakes without any way to recover the tax liability.

71. The likelihood that Twin Lakes would not be able to recover the PENNVEST grant's income tax liability in rates would only add to the financial difficulties faced by Twin Lakes and, as a result, Twin Lakes did not formally accept the PENNVEST grant.

72. Twin Lakes also explored solutions with another Pennsylvania water purveyor, Utilities, Inc., as well as explored the potential to interconnect with the nearest public water system, Milford Township.

73. Unfortunately, both of these avenues did not bear fruit. Utilities, Inc. had no interest in pursuing a transaction involving the Twin Lakes system, and the interconnection with Milford Township was deemed impractical because of the serious logistical and geographical challenges associated with such an interconnection over mountainous terrain.

Middlesex Makes a Payment Demand on the Balance of the Notes

74. On May 28, 2020, Middlesex, as Lender, issued a letter to Twin Lakes, as Borrower, demanding immediate payment of the total outstanding (and overdue) amounts due on the Notes.

75. The next day, on May 29, 2020, Twin Lakes responded via letter, stating that it could not meet Middlesex's payment demand and that it did not expect to be able to satisfy any of its repayment obligations of the outstanding Notes.

76. Middlesex therefore ceased providing financial support to Twin Lakes, effective May 28, 2020, the date Middlesex tendered its demand for payment on the three outstanding Notes.

77. Since May 28, 2020, Twin Lakes has been unable to establish an independent credit relationship with a financial institution.

78. On June 1, 2020, Middlesex issued a letter notice of termination of the Service Agreement between Middlesex and Twin Lakes, effective as of September 1, 2020 (the 90 days' notice required under the terms of the Service Agreement).

Twin Lakes Initiates a Section 529 Proceeding

79. Twin Lakes issued a letter to TUS, I&E, and OCA on June 10, 2020, advising of Middlesex's cessation of financial support and the termination of the Services Agreement.

80. In the June 10, 2020 letter, Twin Lakes requested the Commission's initiation of a proceeding under Section 529 of the Pennsylvania Public Utility Code, 66 Pa. C.S.A. § 529.

81. Section 529 is titled "Power of commission to order acquisition of small water and sewer utilities" and provides, in relevant part, that "[t]he commission may order a capable public utility to acquire a small water or sewer utility" if certain conditions exist. 66 Pa. C.S.A. § 529(a).

82. While the Commission initially accepted the June 10, 2020 letter, the Commission subsequently required Twin Lakes to file a Petition requesting relief under Section 529 to initiate the proceeding.

83. Twin Lakes filed that Petition ("529 Petition") on July 16, 2020.

84. Following the filing of the 529 Petition, the OCA filed a petition for issuance of an interim emergency order on an interim basis seeking the appointment

of a receiver for the Twin Lakes system in the event that Twin Lakes was unable to secure a new system operator by the September 1, 2020 deadline of Middlesex's termination of the Service Agreement.

85. The OCA's Petition, filed on August 18, 2020, specifically noted that "**Twin Lakes** has an ongoing obligation, **pursuant to its certificate of public convenience**, to provide service to its customers until the resolution of the Section 529 proceeding and/or until the Commission otherwise approves an abandonment of service." (Emphasis added).

86. On August 28, 2020, the ALJ issued an order denying the OCA's Petition.

87. In the August 28, 2020 order, the ALJ noted, in relevant part, that "Twin lakes is a certified public utility in Pennsylvania and has an obligation to provide service pursuant to **its** certificate of public convenience until the Commission directs otherwise." (Emphasis added).

88. The ALJ therefore ordered, in relevant part, that "Twin Lakes Utilities, Inc. is prohibited from terminating water utility service pursuant to its Commission approved certificate of public convenience until otherwise directed by the Commission."

89. Ultimately, on September 17, 2020, the Commission entered an Opinion and Order that, among other things, instituted a Section 529 investigation

to determine whether it should order the acquisition of the Twin Lakes system by a capable Pennsylvania public utility. The matter was remanded to the Office of Administrative Law Judge for further proceedings.

90. Tellingly, in its September 17, 2020 Order, the Commission answered the question of whether it should “permit a certificated small water or wastewater public utility to proceed by its own petition pursuant to 66 P.A. C.S. § 529 of the Public Utility Code[.]”

91. The “certificated small water or wastewater public utility” to which the Commission referred was Twin Lakes.

92. Thereafter, on September 22, 2020, the Commission further ordered that Aqua conduct due diligence as to whether it would voluntarily act as a receiver of the Twin Lakes system.

93. In the September 22, 2020 Order, the Commission explained that “[t]here is no dispute here about the legal requirements imposed on Twin Lakes as a Pennsylvania certificated public utility.”

94. The September 22, 2020 Order commanded, in relevant part, that “Twin Lakes Utilities, Inc., is prohibited from terminating water utility service **pursuant to its Commission approved certificate of public convenience** until otherwise directed by the Commission.” (emphasis added).

95. Aqua submitted a letter on December 16, 2020 indicating that it would voluntarily act as a receiver of the Twin Lakes system effective January 4, 2021 during the pendency of the Section 529 proceeding. The January 4, 2021 date was later revised to January 15, 2021, to permit the Commission to act on Aqua's request during its next public meeting.

96. The evidentiary hearings in the Section 529 proceeding were held on January 5, 2021 before an ALJ.

97. On January 14, 2021, the Commission issued an Order approving the appointment of Aqua as a receiver of the Twin Lakes system, effective January 15, 2021. The next day, January 15, 2021, Aqua assumed receivership of the Twin Lakes system pursuant to the Commission's Order from the previous day.

The ALJ'S Decision in the Section 529 Proceeding

98. On April 22, 2021, the ALJ issued the RD in the Section 529 Proceeding.

99. In relevant part, the RD concluded "that a petition filed by a small water utility seeking an order from the Commission directing a capable water utility to acquire the small water utility because all of the necessary statutory requirements have been met should be granted." RD at p. 1.

100. The RD further noted that "the small water utility cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and

facilities in the future and that the alternatives to acquisition have been considered and determined to be impractical or not economically feasible.” *Id.*

101. Despite these conclusions, the RD “conditioned [the statutory acquisition] upon the parent company of the small water utility placing into escrow \$1,675,000 to be used to offset the costs of replacing and remediating the existing infrastructure.” *Id.*

102. Specifically, the RD concluded that the Commission possessed jurisdiction over Middlesex, despite the fact that the Twin Lakes system was owned and operated by Twin Lakes, because Middlesex “was the original filer of the letter of intent in 2008 when it sought to acquire Twin Lakes” and “without Middlesex’s financial and operational support, Twin Lakes could not provide water utility services to its customers.” RD at p. 31.

103. The RD further noted that “Middlesex has a controlling interest in Twin lakes with exclusive voting rights. Executives of Twin Lakes are executives of Middlesex.” *Id.*

104. The RD finally stated that:

All of these factors warrant finding that the Commission has jurisdiction over Middlesex for the purposes of this proceeding and that Middlesex must be considered as the corporate parent when evaluating Twin Lakes under Section 529. Middlesex cannot come into Pennsylvania to purchase Twin Lakes, provide service to Pennsylvania customers, seek rate increases from the Pennsylvania Commission, and more, and then not be considered as the

corporate parent when Twin Lakes files for an investigation under Section 529.

Id. at pp. 31-32.

105. The RD’s conclusions that the Commission has jurisdiction over Middlesex ignored the facts that:

- Twin Lakes is the owner and titleholder of the Twin Lakes system and associated assets;
- Twin Lakes is the entity that filed the Articles of Incorporation and is registered to do business in Pennsylvania with the Pennsylvania Department of State Corporations Bureau;
- Twin Lakes is the entity that filed a tariff that was accepted by the Commission in 2009 and under which service is provided by Twin Lakes to its customers;
- Twin Lakes is the entity that filed for and received rate increases from the Commission in 2011, 2015, and 2019;
- Middlesex is not, and has never been recognized as a legal entity authorized to do business in the Commonwealth of Pennsylvania; and
- The Commission never issued a valid or fully executed CPC to Middlesex.

106. The RD also recommended that it was “reasonable to condition the approval of Twin Lakes’ petition on Middlesex placing \$1.675 million into an escrow account to be used to offset the costs of replacing and remediating the existing infrastructure so that just and reasonable service can be provided[.]” RD at p. 57.

107. The RD distilled its rationale for the escrow requirement as follows:

Had Middlesex been making the necessary improvements to the Twin Lakes system as it should have been during the past decade, it would not be required to place \$1,675,000 into escrow as a condition of the approval of the Section 529 petition, as is the case now. Middlesex has not made such improvements and therefore must pay as such now.

Id. at p. 58.

108. Not only did this recommendation ignore the fact that Middlesex has invested, loaned, or advanced over \$2.4 million to Twin Lakes since 2009 for which it has not seen a penny in return, but also ignored the central and determinative fact that Middlesex was never (and could not have been) required to make improvements to the Twin Lakes system, as it has never been the owner of the assets of Twin Lakes, and the Commission has never had the legal or regulatory jurisdiction or authority to mandate that it do so.

109. Indeed, in the 10 plus years that Twin Lakes has owned the Twin Lakes system, until now, not once has the Commission entered an order or otherwise sought to mandate that Middlesex, rather than Twin Lakes, take any action related to the Twin Lakes system – because it did not, and does not now, have the authority to require a utility outside of its jurisdiction to take any action.

110. Twin Lakes, as permitted under the applicable provisions of the Pennsylvania Public Utility Code, filed exceptions to the RD.

**The Commission’s Adoption of the ALJ’s Decision
in the Section 529 Proceeding**

111. On November 18, 2021, the Commission issued the PUC Order adopting the ALJ’s RD with modification.

112. In relevant part, the Commission agreed with the ALJ’s conclusion that “for purposes of the Commission’s jurisdiction, Twin Lakes and Middlesex are one in the same, per the ALJ’s analysis of an ‘alter ego’ status.” PUC Order, p. 37.

113. The Commission sought to clarify the ALJ’s basis for the exercise of jurisdiction over Middlesex.

114. For example, the Commission noted that “the appearance in this Section 529 proceeding as witnesses by corporate officers of Middlesex, may itself constitute consent to Commission jurisdiction.” PUC Order, p. 39.

115. However, the Commission failed to acknowledge that those witnesses did *not* appear in their capacity as corporate officers of Middlesex. Instead, they appeared in their capacity as corporate officers of Twin Lakes.

116. Ultimately, the Commission concluded that “the facts establish that Middlesex sought and was granted a CPC, and assumed the rights and duties thereunder, for the privilege of doing business within the Commonwealth to provide water service within the delineated service territory.” PUC Order, p. 40.

117. However, as noted above, at all relevant times during the 529 Proceeding, the ALJ *and* the Commission referred to *Twin Lakes* as the certificated water utility.

118. Further, the evidence of record in the 529 Proceeding demonstrated that Middlesex was never issued a fully executed or valid CPC.

119. Despite this, the Commission continually referred to Middlesex as the holder of a CPC, PUC Order, p. 41, even though its prior orders expressly commanded that **“Twin Lakes Utilities, Inc., is prohibited from terminating water utility service pursuant to its Commission approved certificate of public convenience until otherwise directed by the Commission.”** (emphasis added).

120. Neither the RD nor the PUC Order contained any salient analysis concerning the proper application of the “alter ego” theory or piercing the corporate veil.

121. These omissions were even despite the fact that there is a strong presumption in the Commonwealth against piercing the corporate veil. *Lumax Indus., Inc. v. Aultman*, 543 Pa. 38-41-43 (1995) (citation omitted).

122. The Commission went so far as to conclude that “the creation of Middlesex’s wholly owned Pennsylvania subsidiary, Twin Lakes, in April 2009 created the Pennsylvania alter ego of Middlesex.” PUC Order, p. 51.

123. However, such rationale turns the idea of corporate separateness on its head. *In re Enter. Rent-A-Car Wage & Hour Emp. Prac. Litig.*, 735 F. Supp. 2d 277, 317 (W.D. Pa. 2010), *aff'd*, 683 F.3d 462 (3d Cir. 2012) (“When a subsidiary of a foreign corporation is carrying on business in a particular jurisdiction, the parent company is not automatically subject to jurisdiction in that state because of the presumption of corporate separateness.”)

COUNT ONE
U.S. Const. Amend. XIV, Substantive Due Process
42 U.S.C. § 1983

124. Middlesex re-alleges and incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint, as if fully set forth herein.

125. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution safeguards a person’s right to pursue legitimate business interests free from interference except for regulations that are rationally related to a legitimate government purpose.

126. The Due Process Clause “protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702

(1982) (“The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).

127. The PUC Order violates Middlesex’s right to due process under the Fourteenth Amendment to the U.S. Constitution.

128. First, the PUC’s Order represents an impermissible exercise of personal jurisdiction by the Commission over Middlesex. The Order violates Middlesex’s liberty interest “in not being subject to the binding judgments of a forum with which [Middlesex] has established no meaningful ‘contacts, ties, or relations.’” *Burger King*, 471 U.S. at 471-72 (quoting *Int’l Shoe*, 326 U.S. at 319).

129. In concluding that it could exercise personal jurisdiction over Middlesex, the Commission ignored the corporate form between Middlesex and Twin Lakes and, in so doing, violated the Due Process Clause of the Fourteenth Amendment. *See Daimler AG v. Bauman*, 571 U.S. 117, 137-138 (2014).

130. Second, mandating that Middlesex place \$1.675 million into escrow as a prerequisite to the completion of the Twin Lakes Section 529 proceeding is not rationally related to achieving any legitimate government purpose.

131. This is so because under the applicable statute, the Commission has no role in the negotiations between the small water company and its acquirer other than an ultimate determination of whether the price is “reasonable.”

132. Indeed, the statute provides, in relevant part, that “[t]he 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 capable public utility, subject to a determination by the commission that the price is reasonable.” 66 Pa. C.S. § 529(e).

133. In the event that the small water utility and the acquiring utility are unable to agree on an acquisition price, or the Commission disapproves the acquisition price on which the negotiating parties have agreed, “the commission shall issue an order directing the acquiring 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 ... Eminent Domain Code.” 66 Pa. C.S.A. § 529(e).

134. Instead, as applied to Middlesex, the escrow requirement is an unconstitutional and punitive penalty designed to deter out-of-state actors from investing in public utilities operating in the Commonwealth of Pennsylvania. Indeed, the PUC has never imposed such a requirement on an in-state investor of a Pennsylvania public utility.

135. Unless the Commission is enjoined from violating the Fourteenth Amendment, Middlesex will continue to suffer great and irreparable harm.

COUNT TWO
U.S. Const. Amend. XIV, Procedural Due Process
42 U.S.C. § 1983

136. Middlesex re-alleges and incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint, as if fully set forth herein.

137. Middlesex did not initiate the Section 529 Proceeding or file the 529 Petition with the Commission.

138. Middlesex was not a party to the Section 529 Proceeding before the Commission.

139. Middlesex did not file, nor was Middlesex ever joined as a party to (and did not intervene in) any of Twin Lakes' prior base rate filings before the Commission.

140. Despite these facts, the PUC Order concluded that Middlesex had "notice" of its potential involvement in the Section 529 Proceeding and an opportunity to be heard because certain of Twin Lakes' witnesses during the Section 529 Proceeding were corporate officers for both Twin Lakes and Middlesex.

141. The PUC Order further claimed that Middlesex had notice because it was a "respondent" in certain filings made by Twin Lakes concerning promissory agreements. However, Middlesex did not file any documents in those proceedings,

nor did Middlesex participate in those proceedings, nor was Middlesex a statutory or necessary party in those proceedings.

142. Nonetheless, Middlesex was never formally put on notice by the Commission that it intended to exercise jurisdiction over Middlesex in the Section 529 Proceeding, or in any other of Twin Lakes' matters previously before the PUC. Middlesex, therefore, was not provided with notice and an opportunity to be heard.

143. Unless the Commission is enjoined from violating the Fourteenth Amendment, Middlesex will continue to suffer great and irreparable harm.

COUNT THREE
U.S. Const. Amend. XIV, Equal Protection
42 U.S.C. § 1983

144. Middlesex re-alleges and incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint, as if fully set forth herein.

145. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the PUC from making arbitrary and unreasonable classifications. A state actor violates the Equal Protection Clause when it provides disparate treatment to one person over another, despite the fact that those two persons are similarly situated and there is otherwise no rational basis for the disparate treatment. *See, e.g., Williams v. Vermont*, 472 U.S. 14, 27 (1985).

146. Here, the PUC Order's requirement that Middlesex place \$1.675 million in escrow as a condition of consummation of the Section 529 Proceeding for Twin Lakes constitutes disparate treatment without a legitimate justification between small water companies with a corporate parent and small water companies without a corporate parent.

147. These irrational classifications do not further a legitimate governmental interest and were drawn only to punish Middlesex and safeguard Pennsylvania public utilities from out-of-state economic competitors. Neither of these reasons represent a legitimate governmental purpose.

148. Further, the irrational classification results in an impermissible violation of Middlesex's fundamental right to just compensation in connection with a taking of private property for a public purpose. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *McCoy v. Union Elevated R. Co.*, 247 U.S. 354, 364 (1918) (discussing property "owner's fundamental right to just compensation" for government taking)

149. Unless the Commission is enjoined from violating the Fourteenth Amendment, Middlesex will continue to suffer great and irreparable harm.

COUNT FOUR
U.S. Const. art. I, Dormant Commerce Clause
42 U.S.C. § 1983

150. Middlesex re-alleges and incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

151. Congress is authorized under the United States Constitution “[t]o regulate Commerce ... among the several States.” U.S. Const. art. I, § 8, cl. 3.

152. The Commerce Clause also acts in the opposite direction, which prohibits state and local governments from interfering with the free flow of goods and services from one state to another. This is known as the dormant Commerce Clause. *See, e.g., Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575-76 (1997).

153. The dormant Commerce Clause forbids states from engaging in economic protectionism in favor of in-state economic interests by hindering or punishing out-of-state competitors. *Id.* at 577-78.

154. As applied to Middlesex, the PUC Order, violates the dormant Commerce Clause because it punishes Middlesex – an out-of-state corporation – by requiring Middlesex to post an escrow of \$1.675 million to consummate the sale of Twin Lakes, a Pennsylvania regulated utility and small water company, to another Pennsylvania public utility.

155. The escrow requirement is not found in the applicable statutory provision, 66 Pa. C.S.A. § 529, and has never been applied in another Section 529 proceeding. In fact, the August 26th Order is tantamount to an impermissible piercing of the corporate veil.

156. In that respect, the Commission can no more require Middlesex to deposit an escrow as a condition of the Twin Lakes 529 Proceeding than it could require the individual owner of a small water company to post an individual bond in his or her own name as a condition of a 529 proceeding.

157. The escrow requirement also violates the dormant Commerce Clause because it is excessive in relation to any possible local benefit. It imposes an undue burden on interstate commerce, unfairly penalizes Middlesex, and violates Middlesex's due process rights. As noted above, the only "benefit" of the escrow requirement is economic protection for Pennsylvania public utilities and a windfall for any new owner of the Twin Lakes system who stands to earn a return on any used and useful property financed by Middlesex's \$1.675 million escrow.

158. Further, the newly created escrow requirement will impede the flow into the Commonwealth of Pennsylvania of financial and operational support for public utilities operating in Pennsylvania from out-of-state entities, whether they are public utilities or not. Indeed, such overreach by the PUC, as has occurred here,

would certainly dissuade any out-of-state investors from investing in small Pennsylvania public utilities.

159. Unless the Commission is enjoined from violating the dormant Commerce Clause, Middlesex will continue to suffer great and irreparable harm.

COUNT FIVE
U.S. Const., amend. V, amend. XIV
42 U.S.C. § 1983

160. Middlesex re-alleges and incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

161. The Fifth Amendment to the United States Constitution provides, in relevant part: “nor shall private property be taken for public use without just compensation.” U.S. Const., amend. V. This language is known as the Takings Clause.

162. The Supreme Court of the United States has incorporated the Takings Clause through the Due Process Clause of the Fourteenth Amendment to apply to the states.

163. The United States Supreme Court has held that a state may not compel a public utility to use its property for the benefit of the public without receiving just compensation. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

164. Public utilities are entitled to earn a reasonable return on the fair value of their property at the time it is being used for public service. *See, e.g., id.*

165. As applied to Middlesex, the requirement that Middlesex deposit \$1.675 million in escrow to finance repairs to the Twin Lakes system that it does not own is a taking without just compensation.

166. Indeed, because Middlesex does not own the Twin Lakes system, it will never have a chance to earn a return on the property that will eventually become used and useful in the public service as a result of the \$1.675 million Middlesex provided.

167. Accordingly, the escrow requirement is an unconstitutional taking because Middlesex will never have the opportunity to earn a reasonable return on some or all of the \$1.675 million used to repair the Twin Lakes system.

168. Unless the Commission is enjoined from violating the Takings Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, Middlesex will continue to suffer great and irreparable harm.

COUNT SIX
Unconstitutional Conditions
42 U.S.C. § 1983

169. Middlesex re-alleges and incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

170. A state may not condition a benefit or right that is generally available to others in that state on the surrender of a constitutional right. *Koontz v. St. Johns Water River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013).

171. Here, however, the PUC Order conditions the completion of Twin Lakes' 529 proceeding on Middlesex surrendering its due process rights and complying with a new escrow requirement.

172. Further, the Commission is imposing a condition on Middlesex that has never previously been imposed in connection with any other Section 529 proceeding and is not found in the plain language of the relevant statutory provision or any relevant regulatory provisions.

173. By requiring Middlesex to waive its right against protection from unconstitutional takings, the Commission is mandating that Middlesex agree to an unconstitutional condition.

174. Unless the Commission is enjoined from imposing unconstitutional conditions upon Middlesex in connection with Twin Lakes' 529 proceeding, Middlesex will continue to suffer great and irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Middlesex respectfully requests that this Court order the following relief:

A. On an expedited basis, pursuant to Federal Rule of Civil Procedure 57, the entry of a judgment declaring that the Commission lacks jurisdiction over Middlesex because Middlesex is not a Pennsylvania public utility;

B. On an expedited basis, pursuant to Federal Rule of Civil Procedure 57, the entry of a judgment declaring that Middlesex is not required post \$1.675 million in escrow as a condition of the acquisition of Twin Lakes by Aqua, and the entry of a preliminary injunction prohibiting the Commission from requiring that Middlesex post \$1.675 million in escrow by December 17, 2021 as a condition of the acquisition of Twin Lakes by Aqua;

C. For the entry of a permanent injunction prohibiting the Commission from applying 66 Pa. C.S.A. § 529 in a manner that impairs Middlesex's constitutional rights; and

D. For an award of attorney's fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and

E. For such further legal and equitable relief as the Court may deem just and proper.

/s/ Courtney L. Schultz
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November 19, 2021

VERIFICATION

I, Dennis W. Doll, declare as follows:

1. I am the President and Chief Executive Officer of Middlesex Water Company, the Plaintiff in this present case.

2. I have personal knowledge of the facts asserted in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*, and if called on to testify, I would competently testify to the matters stated herein.

3. I verify under penalty of perjury that the factual statements in the foregoing *Verified Complaint for Declaratory and Injunctive Relief* concerning Middlesex are true and correct. 28 U.S.C. § 1746.

Executed on November 19, 2021.



Dennis W. Doll