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VIA ELECTRONIC FILING

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

February 28, 2022

Re: Pa. PUC v. Aqua Pa., Inc., and Aqua Pa. Wastewater, Inc.,
R-2021-3027385, R-2021-3027386

Dear Secretary Chiavetta:

I have enclosed for electronic filing the Exceptions of Masthope Mountain Community Association in the above-referenced matters. I have served copies on counsel via email per the certificate of service.

Should you have any questions, please feel free to contact me.

Very truly yours,

GA BIBIKOS LLC


George A. Bibikos
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Counsel for Masthope Mountain
Community Association

Enclosures

c: Honorable Mary Long (via email)
OSA (via e-mail at ra-osa@pa.gov)
Certificate of Service (via email)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket Nos. R-2021-3027385
	:	R-2021-3027386
Aqua Pennsylvania, Inc.	:	
and Aqua Pennsylvania Wastewater	:	C-2021-3028992
	:	C-2021-3028996

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing upon the parties and in the manner listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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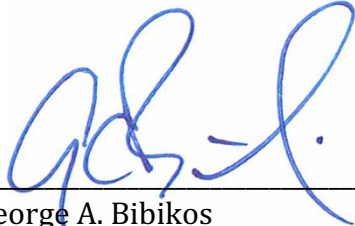
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Dated this 28 day of February, 2022.



George A. Bibikos

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket Nos. R-2021-3027385
	:	R-2021-3027386
Aqua Pennsylvania, Inc.	:	
and Aqua Pennsylvania Wastewater, Inc.	:	C-2021-3028992
	:	C-2021-3028996

EXCEPTIONS OF MASTHOPE MOUNTAIN COMMUNITY ASSOCIATION

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February 28, 2022

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I. INTRODUCTION AND SUMMARY

Masthope Mountain Community Association (“Masthope”) submits two exceptions to the recommended decision (“RD”) of the Presiding Officer, Mary J. Long, regarding the water and wastewater rate increases proposed by Aqua Pennsylvania, Inc. and Aqua Pennsylvania Wastewater, Inc. (together “Aqua”). Contrary to the RD, the Commission should consider hydraulic overload conditions at the Masthope wastewater treatment plant (“WWTP”) as part of these proceedings, impose conditions on any rate increase to assure that Aqua coordinate with Masthope and timely resolve hydraulic overload conditions, and reject the RD’s determinations on revenue allocation and rate design that results in a 147% increase in wastewater usage charges and a 35% increase in monthly service charges for Masthope wastewater customers.

II. BACKGROUND

On August 20, 2021, Aqua filed Original Tariff Water – PA P.U.C. No. 3 (“Tariff Water No. 3”) and Original Tariff Sewer – PA P.U.C. No. 3 (“Tariff Sewer No. 3”) to become effective on October 19, 2021. As it relates to Masthope, these tariff filings, *inter alia*, propose a 17% increase in water rates for Zone 3 and a 27% increase in wastewater rates for Zone 5 (to be renumbered from previous Zone 6).

Masthope filed a formal complaint in both cases docketed at C-2021-3028992 (Water) and C-2021-3028996 (Wastewater). The OCA and OSBA filed formal complaints at both rate cases and I&E also formally entered an appearance in both cases. In addition, CAUSE-PA, Aqua LUG, and various water and wastewater customers, associations, and individuals filed objections, protests, and/or formal complaints in both cases.

Masthope raised the following issues in its complaint: (1) whether the proposed rates in Tariff Water No. 3 and Tariff Sewer No. 3 filed by Aqua are unjust, unreasonable and inconsistent with the Public Utility Code, sound ratemaking principles, and public policy; (2) whether Aqua's proposed rate design is discriminatory, unjust and unreasonable and violates ratemaking principles; (3) whether Aqua properly forecasted the impact of COVID-19 on customer growth patterns, consumption levels, and annualized sales; (4) the lawfulness and reasonableness of Aqua's planning process for anticipating and resolving system overloads and connection restrictions within the company's capital improvement program in light of "Corrective Action Plans" for wastewater operations under review by the Pennsylvania Department of Environmental Protection ("PADEP").

By order entered October 7, 2021, the Commission instituted investigations to determine the lawfulness, justness and reasonableness of the rates, rules and regulations contained in Aqua's proposed water and wastewater tariffs. The tariffs were suspended by operation of law until May 22, 2022, and both matters were assigned to the Office of Administrative Law Judge. The rate cases and complaints were consolidated.

The Presiding Officer convened an evidentiary hearing on Monday, December 20, 2021. Counsel for Aqua, I&E, OCA, OSBA, CAUSE-PA, Aqua LUG and Masthope appeared. The parties agreed to waive cross-examination of witnesses and entered pre-served written testimony into the record. Masthope submitted the following into the record: Masthope Statement No. 1, Direct Testimony of Robert A. Rosenthal, including Exhibit Masthope-1 (Schedules 1-6) ("Masthope St. 1"); Masthope Statement No. 2-R, Rebuttal Testimony of Robert A. Rosenthal ("Masthope St. 2-R"); and Masthope Statement No. 3-SR, Surrebuttal Testimony of Robert A. Rosenthal ("Masthope St. 3-SR"). In addition, Masthope's "List of

Evidence offered by Masthope Mountain Community Association” was marked and entered into the record as Masthope Hearing Exhibit 1. Following the evidentiary hearing, Masthope submitted its Main Brief and Reply Brief.

The Presiding Officer issued the RD on February 18, 2022. The RD approved a maximum water revenue increase of approximately \$15.2 million and a maximum wastewater revenue increase of approximately \$16.7 million, resulting in an approximate 2.97% increase in water operating revenues and 45% increase in wastewater operating revenues. As it relates to Masthope wastewater customers, the RD rejected Masthope’s arguments regarding inadequate wastewater service in connection with Aqua’s proposed rate increases and effectively adopted a 147% increase in wastewater usage charges and a 35% increase in monthly service charges. *See* RD at 84-91.

III. EXCEPTIONS

As described in more detail below, Masthope submits two exceptions to the RD for the Commission’s consideration. First, the RD erred by approving a substantial increase in wastewater rates despite undisputed evidence of inadequate wastewater service to Masthope ratepayers since at least 2018. Second, the RD erred by adopting a revenue allocation pursuant to Act 11 of 2012, 66 Pa.C.S. § 1311(c), and rate design proposals that results in unjust and unreasonable wastewater rate increases for Masthope ratepayers, particularly for Masthope commercial customers.

A. Exception No. 1: The RD erred by approving a substantial increase in Masthope residential and commercial wastewater rates despite undisputed evidence of inadequate wastewater service to Masthope ratepayers since at least 2018. (RD pp. 131-133 and Findings of Fact Nos. 112-114).

Masthope challenged Aqua's request for rate relief in part because the Commission approved a substantial rate increase in 2019, Aqua sought significant additional rate relief in this case, yet hydraulic overload conditions have persisted at the Masthope WWTP since at least 2018 with no resolution to date, resulting in a moratorium on new connections imposed by the Pennsylvania Department of Environmental Protection ("PADEP") in 2020 (which PADEP recently modified in a limited fashion) to the detriment of the Masthope community and property owners. *See* Masthope Main Brief at 9-19. Masthope argued that it would be unjust and unreasonable to increase rates for Masthope ratepayers for a second time in the past three years despite ongoing and unresolved service issues, particularly when Aqua has represented that it may take the company five years to upgrade and expand the Masthope WWTP to fully resolve the hydraulic overload conditions. *See* Masthope Main Brief at 9-19. Masthope also argued that if the Commission approves any increase in rates, the Commission should impose conditions and deadlines on Aqua to assure that the company timely resolves the hydraulic overload conditions and permanently eliminates building restrictions that detrimentally affect the community. *See* Masthope Main Brief at 9-19.

Although the RD acknowledges "[t]he Masthope community is clearly experiencing challenges due to hydraulic overload at the WWTP," *see* RD at 133, the RD (a) approved what amounts to a 147% increase in wastewater usage charges and a 35% increase in monthly service charges for Masthope wastewater customers; (b) stated that despite the hydraulic overload conditions, "Aqua has not ignored this problem" because "Aqua has begun the

execution of a project to address these concerns and appears to be working with PADEP to address the sewage planning and regulatory issues within that agency's purview," *see* RD at 133; and (c) declined to recommend additional service changes or impose conditions on Aqua's rate increases. *See* RD at 133.

The RD erred in several ways. First, the Commission has a statutory duty to consider service in the context of rate proceedings. To illustrate:

- Section 523 of the Public Utility Code, 66 Pa.C.S. § 523, requires the Commission to "consider ... the efficiency, effectiveness and adequacy of service of each utility when determining just and reasonable rates[.]" *Pa. P.U.C. v. Pa. Gas & Water Co.*, 61 Pa. P.U.C. 409, 415-16 (1986).
- Section 1501 of the Code provides that: "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission." *See* 66 Pa.C.S. § 1501.
- A public utility must demonstrate actual improvements to rectify inadequate service. *See, e.g., Pa. P.U.C. v. Pa. Gas & Water Co.*, 61 Pa. P.U.C. 496, 501 (1986) ("PG&W must show actual results of service improvements as opposed to optimistic plans for the future. On this point, we again state that every customer is entitled to water that is fit for the basic, domestic purpose.").
- The Commission has the discretion to deny a proposed rate increase, in whole or in part, if the Commission finds "that the service rendered by the public utility is inadequate." 66 Pa.C.S. § 526(a); *Pa. Gas & Water Co.*, 61 Pa. P.U.C. at 416 ("[I]n exchange for the utility's provision of safe, adequate, and reasonable service, the ratepayers are obligated to pay rates which cover the cost of service which includes reasonable operation and maintenance expenses, depreciation, taxes and a fair rate of return to the utility's investors."); *National Utilities, Inc. v. Pa. P.U.C.*, 709 A.2d 972 (Pa. Cmwlth. 1998) (holding that a public utility's rate increase request could properly be denied solely on the basis of service issues, even where the public utility asserts that the increase is justified by evidence with respect to rate base, revenues, expenses and rate of return).

- The Commission has jurisdiction to determine whether “repeated and ongoing overflows of sewage from [the public utility’s] facilities demonstrate that [the public utility] has failed to provide its usage customers with adequate, efficient, safe and reasonable service and facilities.” *See, e.g., Sutter v. Clean Treatment Sewage Company*, No. C-20078197 *et al.*, 104 Pa. P.U.C. 146, 2009 WL 1514994, slip op. at 14 (Pa. P.U.C. May 15, 2009).
- The failure to properly treat sewage constitutes a failure to provide safe, adequate, and reasonable service, for which customers are paying rates. *Id.*; 66 Pa.C.S. § 1501.

Here, there is no dispute over the existence of hydraulic overload conditions at the Masthope WWTP since 2018. *See Masthope Main Brief at 9-12 & Notes 15-24.* Despite undisputed evidence of inadequate service since 2018, the RD makes no finding of fact that the Masthope WWTP has experienced hydraulic overloads since 2018 and makes no conclusion of law that Aqua has rendered inadequate and unreasonable wastewater service as a matter of law for upwards of four years that justifies an adjustment to reduce the impact on Masthope wastewater customers. *See RD, Findings of Fact Nos. 111-113.*

Second, the RD presumes, incorrectly, that because PADEP has granted limited approval of Aqua’s proposed Corrective Action Plan, the Commission has no room to act as part of these rate proceedings. *See RD at 133.* However, the Commission has explained the difference between PADEP jurisdiction over hydraulic overloads and the Commission’s jurisdiction over adequate service in the context of rate proceedings:

We are sensitive to the possibility that a public utility can be caught between the competing demands of two regulatory agencies. Nevertheless, after review and consideration of the record in the instant proceeding, we find we have jurisdiction over the instant Complaints. This case does not involve a claim, for example, that CTSC improperly polluted a waterway when its sludge tanks overflowed on October 14, 2005. *I.D. at 14.* Rather, we are faced with such issues as whether CTSC failed to provide reasonably continuous service to customers being charged an availability fee, despite the fact that CTSC could not connect those customers to its wastewater system due to a moratorium on additional hookups. We are also presented with the question of whether the repeated and on-going overflows of sewage from CTSC’s facilities demonstrate

that CTSC has failed to provide its usage customers with adequate, efficient, safe and reasonable service and facilities. This is not a matter for DEP. Rather, it is a matter for this Commission, and we will resolve that question here.

Sutter v. Clean Treatment Sewage Company, No. C-20078197 *et al.*, 104 Pa. P.U.C. 146, 2009 WL 1514994, slip op. at 14 (Pa. P.U.C. May 15, 2009).

As in *Sutter*, the question here is not whether Aqua caused pollution or engaged in other environmental harm that the Commission should address from an environmental standpoint. That is a PADEP question. The question here is whether Aqua's wastewater service to Masthope is adequate and reasonable given the persisting hydraulic overload conditions that will not be resolved for many more years while Aqua pursues rate relief for a second time in the past three years. That is a question for the Commission, not PADEP.

The PADEP's recent approval of Aqua's Corrective Action Plan (dated January 11, 2022, but moved for admission into the record as AP Post-Hearing Ex. 1 on January 20, 2022) does not change Masthope's position. The PADEP's determination regarding the Corrective Action Plan imposes various reporting requirements on Aqua and only authorizes 60 new connections to the Masthope WWTP, as opposed to Aqua's request for 120 connections. *See* AP Post-Hearing Ex. 1. PADEP's determination does not lift the building restrictions entirely; imposes no hard deadlines on Aqua either to fully complete final Act 537 planning or to upgrade and enhance the Masthope WWTP; maintains Aqua's sole discretion to approve additional connections; and does not require that Aqua report, communicate, and coordinate with Masthope, local officials, or the Commission regarding Aqua's progress and activities.

Despite the RD's conclusion to the contrary, these are matters within the Commission's discretion to assure adequate and reasonable service in connection with requests to increase rates. The PADEP's determination only generally approves to some

extent how Aqua proposed to address the hydraulic overloading within that agency's jurisdiction but it does not address service issues under Section 1501 of the Code. Pursuant to Section 1501 of the Code, the Commission has the authority to assure that Aqua provide adequate and reasonable service to Masthope ratepayers who face potential increases in rates without any assurance that Aqua will timely and finally resolve all issues associated with the Masthope WWTP that render the system inadequate to serve Masthope's current and future needs.

Third, the RD's conclusions that COVID-19, elevated precipitation levels, and shifts from part-time to full-time residencies during COVID-19 lack support in the record. The RD merely adopts Aqua's conclusory representations and stated as follows:

During the course of the Treatment Train Project, two intervening events beyond the Company's control occurred that ultimately led to hydraulic overloads on the system. A combination of elevated precipitation levels and shifts to more full-time use of the residences at Masthope, as a result of the COVID-19 pandemic, caused hydraulic overloads on the system. AP St. 9-R at 33-36. PADEP issued a moratorium on new connections to mitigate the hydraulic overloads caused by these events. In response, Aqua submitted a Corrective Action Plan to PADEP, which is targeted at restoring or otherwise making available capacity to current and future connections at Masthope. This Corrective Action Plan was recently approved by PADEP. As part of the approved Corrective Action Plan, PADEP also granted a sewer connection allocation of 60 Equivalent Dwelling Units (EDUs) to Aqua, modifying the sewer connection moratorium.

See RD at 132.

However, Masthope presented substantial evidence that hydraulic overload conditions pre-date any alleged increase in flows resulting from COVID-19; elevated precipitation levels had nothing to do with hydraulic overloads; and there was no shift from part-time to full-time residencies during COVID-19 in any meaningful way. *See* Masthope Main Brief at 12-16 & Notes 25-34; Masthope Reply Brief at 2-5 & Notes 1-4. In any event,

the RD's conclusion that Aqua should be excused due to matters beyond Aqua's control are irrelevant as a matter of law. As the Commission has explained: "Section 1501 makes the public utility responsible for providing reasonably continuous service to its customers. The actions/inactions of the Township do not excuse the Company's protracted inability to provide service to availability customers who wish to hook up to [the public utility's] system." *See Sutter, supra*, at 17.

Finally, the RD erred by focusing solely on whether to deny rate relief entirely vs. whether to impose any conditions on Aqua's request for rate relief to assure the Commission carries out its duties to assure adequate and reasonable wastewater service. The Commission's duty under Section 523 of the Code, Aqua's service obligations under Section 1501 of the Code, and various case law cited above and throughout Masthope's Main and Reply Briefs confirm the Commission's ability to deny in whole or in part requests for rate increases when a public utility's service obligations fall short based on the record. *See Masthope Main Brief at 9-19 & Notes 15-24; Masthope Reply Brief at 2-5 & Notes 1-4.* To that end, the Commission should order that Aqua:

- coordinate with Masthope and local officials regarding the Corrective Action Plan;
- report to Masthope and the Commission on the status of corrective actions;
- seek additional requests or an amendment to the Corrective Action Plan to increase the number of connections to the Masthope WWTP pending completion of the Corrective Action Plan;
- assure that Aqua's "Project 15088006258 – Masthope WWTP Add Treatment Train" results in eliminating the building restrictions currently affecting the Masthope WWTP;
- timely complete Act 537 planning and related improvements to eliminate building restrictions in Masthope; and

- at a minimum, in light of PADEP's recent modifications to Aqua's Corrective Action Plan, require that Aqua meet and confer with Masthope and Lackawaxen Township officials to discuss the 60 permitted connections to determine areas of priority and maximize the benefit to the Masthope community.

See Masthope Main Brief at 17-18 & Notes 36-39; Masthope Reply Brief at 2-5 & Notes 1-4.

Accordingly, the Commission should reject the RD's determinations regarding the Masthope WWTP, grant Masthope's exception, and impose reasonable conditions on any increase in Masthope rates that the Commission approves consistent with Masthope's recommendations.

B. Exception No. 2: The RD erred by adopting a revenue allocation pursuant to Act 11 of 2012, 66 Pa.C.S. § 1311(c), and rate design proposals that result in unjust and unreasonable wastewater rate increases for Masthope ratepayers, particularly for Masthope commercial customers. (RD pp. 84-91).

Throughout these proceedings, Masthope cautioned against adopting revenue allocations pursuant to Act 11 of 2021, 66 Pa.C.S. 1311, for allocating water revenues to Aqua's wastewater revenue requirement that result in significant increases in wastewater rates for Masthope ratepayers. See Masthope Main Brief at 19-24 & Notes 40-46; Masthope Reply Brief at 6-7. In addition, Masthope urged the Presiding Officer to support Aqua's original distribution of the proposed rate increases both between and within water and wastewater rate schedules. See Masthope Main Brief at 19-24 & Notes 40-46. The RD, however, adopted in large part the Act 11 revenue allocation of the Commission's Bureau of Investigation & Enforcement ("I&E") and approved what amounts to a 147% increase in wastewater usage charges and a 35% increase in monthly service charges for Masthope wastewater customers. See RD at 84-91.

The Commission should reject the RD to the extent it results in a dramatic increase in rates for Masthope wastewater customers. Act 11 amends Chapter 13 of the Code by exempting water and wastewater utilities from the prohibition on combining, for ratemaking purposes, different utility types and by allowing the Commission to allocate a portion of the wastewater utility's revenue requirement to the combined water and wastewater utility. *See* 66 Pa.C.S. § 1311(c); *Implementation of Act 11 of 2012*, 299 P.U.R.4th 367, 2012 WL 3249678 (Pa. P.U.C. Aug. 2, 2012). The Commission has broad discretion to allocate wastewater revenue requirements across a utility's combined customer base under Act 11, but not at the expense of assuring just and reasonable rates for all classes of customers as required by Section 1301 of the Code, 66 Pa.C.S § 1301. In addition, the Commission should avoid rate shock and embrace principles of gradualism.

Here, the Act 11 subsidy adjustments adopted by the RD result in unjust and unreasonable rates that disproportionately and negatively affect Masthope wastewater customers. As Masthope explained at length in its Main Brief and Reply Brief, the impact on Masthope would be particularly detrimental given Masthope's unique blend of part-time/seasonal residents and mixture of residential and commercial customers. *See* Masthope Main Brief at 19-22 & Notes 40-45.

If the Commission approves revenues in amounts less than Aqua originally proposed, the Commission should distribute any increased revenue requirement for water and wastewater customers and the amount of revenue support to be provided by water customers in a manner consistent with Aqua's proposal. *See* Masthope Main Brief at 22.

Similarly, the Commission should distribute any increase in rates both between and within rate schedules in a manner consistent with Aqua's original proposal. Aqua selectively

proposed increases between and within rate schedules to foster its long-term plan of rate schedule consolidation into a uniform statewide tariff. By contrast, the adjustments adopted by the RD are excessive for certain customers in certain schedules, such as the commercial customers in wastewater Zone 6 (who would experience a rate increase by as much as 147%). See Masthope Main Brief at 22-23 & Note 46. To the extent the Commission faces a choice between the company's or the public advocates' respective positions, Masthope supports Aqua's original distribution of the proposed rate increases both between and within water and wastewater rate schedules.

Accordingly, the Commission should reject the RD's determinations regarding revenue allocation and rate design that result in unjust and unreasonable rate increases for Masthope wastewater customers.

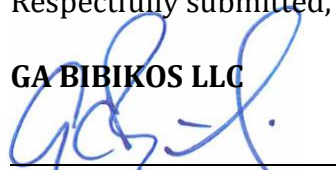
IV. CONCLUSION

WHEREFORE, Masthope submits that the Commission should grant Masthope's exceptions and order such other and further relief as the Commission deems just or reasonable.

February 28, 2022

Respectfully submitted,

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