



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

April 8, 2022

Via Electronic Filing

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

Re: Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329, 507 and 2102 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of East Whiteland Township
Docket No. A-2021-3026132
I&E Main Brief

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Main Brief of the Bureau of Investigation and Enforcement (I&E)** for the above-captioned proceeding.

Copies are being served on parties per the attached Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads 'Carrie B. Wright'.

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CBW/jfm
Enclosure

cc: Hon. Marta Guhl, Administrative Law Judge, OALJ-Philadelphia (*via e-mail only*)
Athena DelVillar, Legal Assistant, OALJ-Philadelphia (*via e-mail only*)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua PA Wastewater, Inc. :
Pursuant to Section 1329 of the Public :
Utility Code for Approval of its : Docket No.: A-2021-3026132
Acquisition of East Whiteland Township, :
Chester County Sanitary Wastewater :
Collection System :

**MAIN BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

Carrie B. Wright
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Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
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Date: April 8, 2022

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

A. Procedural History 1

B. Overview of the Proposed Transaction 3

II. BURDEN OF PROOF 4

III. STATEMENT OF QUESTIONS INVOLVED..... 4

IV. SUMMARY OF ARGUMENT..... 5

V. ARGUMENT..... 6

A. Section 1102/1103 Standards 6

1. Section 1102/1103 - Legal Principles 6

2. Fitness..... 7

3. Substantial Affirmative Public Benefit 7

4. Conclusion 7

B. Section 1329 Analysis 7

1. Introduction..... 7

2. Section 1329 - Legal Principles 8

3. Aqua’s Application 8

4. Challenges to UVE Appraisals..... 9

C. Recommended Conditions 9

1. Cost of Service 10

2. Rate Freeze 11

3. Easements 13

4. Notice to Customers 16

D. Section 507 Approvals 18

E. Section 2102 Approval..... 19

**F. Other Approvals, Certificates, Registrations and Relief, If Any,
 Under the Code. 19**

VI. CONCLUSION WITH REQUESTED RELIEF 19

Appendix A: Proposed Findings of Fact

Appendix B: Proposed Conclusions of Law

Appendix C: Proposed Ordering Paragraph

TABLE OF AUTHORITIES

CASES

Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Lower Makefield Township, Docket No. A-2021-3024267, p. 92 (Order entered January 13, 2022) 16

Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township (“Aqua/New Garden Section 1329 Case”), Docket No. A-2016-2580061, p. 69 (Order entered June 29, 2017) 8

Application of Pennsylvania American Water Co. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Upper Pottsgrove Township, Docket No. A-2020-3021460, p. 3 (Order entered September 15, 2021)..... 15

City of York v. Pa. PUC, 449 Pa. 136, 295 A.2d 825, 828 (1972) 6

Middletown Twp. v. Pa. PUC, 482 A.2d 674, 682 (Pa. Cmwlth. 1984)..... 7

Rheems Water Co. v. Pa. PUC, 620 A.2d 609, 153 Pa.Cmwlth. 49 (Cmwlth.1993)..... 9

Samuel J. Lansberry, Inc. v. Pa. PUC, 578 A.2d 600, 602 (Pa. Cmwlth. 1990) 4

Seaboard Tank Lines v. Pa. PUC, 502 A. 2d 762, 764 (Pa. Cmwlth. 1985)..... 6

Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950) 4

Warminster Twp. Mun. Auth. v. Pa. PUC, 138 A.2d 240, 243 (Pa. Super. 1958) 6

STATUTES

66 Pa. C.S. § 1102 passim

66 Pa. C.S. § 1102(a) 6

66 Pa. C.S. § 1103 4, 6

66 Pa. C.S. § 1103(a) 6, 7, 9

66 Pa. C.S. § 1329 passim

66 Pa. C.S. § 1329(d)(3)(ii) 8

66 Pa. C.S. § 2102 4, 19

66 Pa. C.S. § 332(a) 4

66 Pa. C.S. § 507 1, 4, 18

66 Pa. C.S. §§ 101 *et seq.* 1

REGULATIONS

52 Pa. Code § 5.501 3
52 Pa. Code §§ 1.1 *et seq.* 1

OTHER AUTHORITIES

Implementation of Act 129 of 2008; Organization of Bureaus and Offices,
Docket No. M-2008-2071852 (Order entered August 11, 2011) 1

I. STATEMENT OF THE CASE

A. Procedural History

On July 31, 2021, Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”) filed with the Pennsylvania Public Utility Commission (“Commission”) its Application pursuant to Sections 1102, 1329, and 507 of the Public Utility Code (“Code”), for approval of the following requests: (1) approval of the acquisition by Aqua of the wastewater system assets of the East Whiteland Township (“EWT”); (2) approval of the right of Aqua to begin to offer, render, furnish and supply wastewater service to the public in the requested service territory; and (3) an order approving the acquisition that includes the ratemaking rate base of the EWT wastewater system assets pursuant to Section 1329 of the Code.¹

The Bureau of Investigation and Enforcement (“I&E”) filed a Notice of Appearance in this proceeding on October 4, 2021. I&E serves as the Commission’s prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters and enforcing compliance with the Code.²

On August 26, 2021, the Office of Small Business Advocate (“OSBA”) filed a Notice of Appearance and Intervention. In addition, the Office of Consumer Advocate (“OCA”) filed a Protest and Notice of Appearance on September 17, 2021.

On December 20, 2021, the Commission issued a Secretarial Letter indicating that Aqua’s Application had been conditionally accepted pending the filing of requisite documents and individualized notification of the proposed acquisition to all affected

¹ Aqua Application, p. 2.

² 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* *See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

customers. The Commission issued a Secretarial Letter accepting Aqua’s Application as complete on February 4, 2022 and the matter was assigned to the Office of Administrative Law Judge (“OALJ”). Administrative Law Judge Marta Guhl (“ALJ Guhl”) was subsequently assigned to this proceeding and ALJ Guhl issued an Order on February 23, 2022, establishing March 8, 2022 as the date for a Prehearing Conference.

A telephonic Prehearing Conference took place on March 8, 2022. During the hearing, the parties discussed discovery modifications, public input hearings and identified other procedures necessary for the conduct of this case. A procedural schedule was agreed upon by all parties which set forth the following schedule for this case:

Prehearing Conference	Tuesday, March 8, 2022
Non-Company Direct Testimony	Friday, March 11, 2022
Rebuttal Testimony	Friday, March 18, 2022
Public Input Hearing	Tuesday, March 22, 2022 @ 6:00
Surrebuttal Testimony	Friday, March 25, 2022
Hearings/Oral Rejoinder	Thursday, March 31, 2022
Main Briefs	Friday, April 1, 2022
Reply Briefs	Friday, April 8, 2022
	Friday, April 15, 2022

I&E notes that it served the following direct and surrebuttal testimonies:

Christopher Keller:	I&E Statement No. 1; I&E Exhibit No. 1; I&E Statement No. 1-SR;
Ethan Cline	I&E Statement No. 2; I&E Exhibit No. 2; I&E Statement No. 2-SR.

Additionally, I&E’s counsel attended the public input hearing held telephonically at 6:00 p.m. on March 22, 2022.

On March 31, 2022, ALJ Guhl conducted evidentiary hearings telephonically. At the hearing, testimony and exhibits were entered into the record, however, cross examination was not conducted as all parties had agreed to waive cross. I&E's pre-filed testimony and exhibits were entered into the evidentiary record. Pursuant to the procedural schedule and in accordance with Commission regulations at Section 5.501, I&E submits this Main Brief.

B. Overview of the Proposed Transaction

Aqua's Application requests that the Commission grant approval for multiple acquisition-related requests. Aqua's requests under Section 1102, permission to acquire EWT's wastewater assets and to obtain the Certificates of Public Convenience necessary for it to begin to offer wastewater service to the public in the EWT territory.³ In total, through this acquisition, Aqua is seeking to provide service to EWTs approximately 3,895 wastewater customers.⁴

In its second request, pursuant to Section 1329, Aqua seeks to utilize the fair market value process to establish the ratemaking rate base of EWT's assets at \$54,930,000.⁵ In accordance with Section 1329, the \$54,930,000 million amount represents the lower of Aqua and EWT's negotiated purchase price, and the average of two fair market value appraisals completed by each of these parties' utility valuation experts ("UVEs"). The average of the UVEs appraisals was \$56,724,729.⁶ The average was calculated using the value assigned by Aqua's UVE, Harold Walker, III of Gannett Fleming Valuation and Rate Consultants, LLC who valued the EWT assets at \$55,668,000, and EWT's UVE, Jerome C. Weinert of AUS Consultants, Inc., who valued the assets at \$57,781,458.⁷

³ Aqua Application, p. 2.

⁴ Aqua Application, p. 10.

⁵ Aqua Application, p. 6.

⁶ Aqua Application, p. 18.

⁷ Aqua Application, p. 18.

In an additional request, pursuant to 66 Pa. C.S. § 507 (“Section 507”), Aqua is seeking approval to enter into an Asset Purchase Agreement (“APA”) with EWT to assume various municipal contracts that EWT has pledged to assign.⁸

II. BURDEN OF PROOF

Aqua, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application.⁹ In a case such as this one, pending before an administrative tribunal, Courts have held that a “litigant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”¹⁰ In order to meet its burden of proof, Aqua must “present evidence more convincing, by even the smallest amount, than that presented by any opposing party.”¹¹ To satisfy its burden, Aqua must demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.¹² Specifically in this case, Aqua has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, 2102 and 1329 of the Code.

III. STATEMENT OF QUESTIONS INVOLVED

1. Should Aqua’s Application be granted on a conditional basis?

Suggested Answer: Yes. Aqua’s Application be granted only if Aqua is required to provide the I&E recommended cost of service study of the EWT system in its next base rate case, Aqua and EWT’s rate freeze provision is denied, and Aqua and EWT guarantee all necessary easements and access to public rights-of-way will be transferred to Aqua prior to closing.

⁸ Aqua Application, pp. 20-22.

⁹ 66 Pa. C.S. § 332(a).

¹⁰ *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

¹¹ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

¹² *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

IV. SUMMARY OF ARGUMENT

I&E recommended that approval of Aqua's Application be subject to three conditions. One of those conditions, that Aqua provide a cost of service study in its next base rate case, has been accepted by the Company.¹³ Aqua's agreement to provide a cost of service study for the EWT system is consistent with the goals and intent of I&E's recommendation. Accordingly, I&E requests that the Commission condition Aqua's Application upon requiring this cost of service study be provided as part of the Company's next base rate case filing.

Additionally, I&E recommended that the Commission condition approval of Aqua's Application upon the rejection of Aqua's rate freeze provision. As I&E will demonstrate below, without Aqua's guarantee not to file a base rate case until the expiration of the rate freeze provision, it constitutes as nothing more than an empty promise to EWT customers in an attempt to win their favor for the proposed acquisition. Furthermore, it is not within Aqua and EWT's ability to agree to such a provision as this would infringe upon the Commission's ultimate rate setting authority.

Finally, I&E recommended that the approval of Aqua's Application be conditioned upon Aqua's and EWT's guarantee that all easements and real property rights have been transferred to Aqua by closing or for circumstances beyond EWT's control where it is unable to transfer all missing easements including public rights-of-way and other property rights prior to or at closing, that an escrow account be established from the purchase price to be used to obtain any post-closing transfers. I&E submits that its condition is within the public

¹³ Aqua St. No. 1- R, p. 11.

interest in order to ensure that the UVEs' appraisals rely on an accurate assumption and to ensure that ratepayers are safeguarded from post-transaction uncertainty.

V. ARGUMENT

A. Section 1102/1103 Standards

1. Section 1102/1103 - Legal Principles

The Code requires that the Commission issue a Certificate of Public Convenience as a prerequisite to offering service, abandoning service, and certain property transfers by public utilities or their affiliated interests.¹⁴ The standards for the issuance of a Certificate of Public Convenience are set forth in Sections 1102 and 1103 of the Code.¹⁵ A Certificate of Public Convenience shall be granted “only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.”¹⁶ These provisions have been interpreted by the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.¹⁷

Additionally, pursuant to Section 1103, Aqua must show that it is technically, legally, and financially fit to own and operate the assets it will acquire from EWT.¹⁸ In addition to assessing fitness, the Commission should consider the benefits and detriments of the

¹⁴ 66 Pa. C.S. § 1102(a).

¹⁵ 66 Pa. C.S. § 1103.

¹⁶ 66 Pa. C.S. § 1103(a).

¹⁷ *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).

¹⁸ *Seaboard Tank Lines v. Pa. PUC*, 502 A. 2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. PUC*, 138 A.2d 240, 243 (Pa. Super. 1958).

transaction “with respect to the impact on all affected parties”¹⁹ including existing customers. To ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.²⁰ I&E submits that Aqua’s Application will only be in the public interest if the Commission conditions its approval on the conditions that I&E recommends.

2. Fitness

I&E does not challenge that Aqua is technically, legally, and financially fit to own and operate any of the assets of EWT.

3. Substantial Affirmative Public Benefit

In order to ensure that the benefits will materialize as alleged, I&E submits that any approval of Aqua’s Application be subject to the conditions I&E addressed below. Absent adoption of I&E’s conditions, there is no assurance that the alleged affirmative public benefits will materialize.

4. Conclusion

For the reasons explained above, the public interest requires that Aqua’s Application be granted only if certain conditions are placed upon this acquisition. This is explained in further detail in the sections below.

B. Section 1329 Analysis

1. Introduction

While the root of the issues that I&E identified are not necessarily directly related to Section 1329, one issue raised specifically involves the statute. Aqua’s ability to obtain all

¹⁹ *Middletown Twp. v. Pa. PUC*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984).

²⁰ 66 Pa. C.S. § 1103(a).

easements, public rights-of-way, and real property rights prior to or at closing is important because if Aqua fails to obtain such, the UVEs' appraisals may be based on incorrect assumptions, thus making the valuation under Section 1329 incorrect.

2. Section 1329 - Legal Principles

Section 1329 of the Public Utility Code prescribes the process used to determine the fair market value of a municipal utility that is the subject of an acquisition. Section 1329 provides a framework for valuing, for ratemaking purposes, water and wastewater systems that are owned by a municipal corporation or authority that are to be acquired by an investor-owned water or wastewater utility under the Commission's jurisdiction. It allows the rate base of the municipal system being purchased to be incorporated into the rate base of the purchasing investor-owned utility at the lesser of either the purchase price or the fair market value as established by the two independent appraisals conducted by two utility valuation experts. Notably, a Commission Order approving a transaction under Section 1329 is permitted to include "[a]dditional conditions of approval."²¹

3. Aqua's Application

Aqua's Application contained two UVE appraisals, one completed by Gannett Fleming Valuation and Rate Consultants, LLC for Aqua and one completed by AUS Consultants, Inc. for EWT. Gannett Fleming valued the EWT assets at \$55,668,000 and AUS valued the EWT assets at \$57,781,458.²²

²¹ 66 Pa. C.S. § 1329(d)(3)(ii); Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township ("Aqua/New Garden Section 1329 Case"), Docket No. A-2016-2580061, p. 69 (Order entered June 29, 2017).

²² Aqua Application, p. 18.

4. Challenges to UVE Appraisals

I&E has not challenged the UVEs appraisals in this case; however, as I&E explains in further depth below, the UVEs' reliance on the fact that all easements and real property rights will be transferred to Aqua by EWT prior to closing may invalidate the accuracy of their appraisals. Because the UVEs' appraisals were predicated, at least in part, on the assumption that Aqua would obtain all easements, public rights-of-way, and other real property rights if EWT does not transfer such at or prior to closing, the UVEs' appraisals are flawed and unreliable.

C. Recommended Conditions

It is well-settled that in order to ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.²³ Importantly, the Commission is granted great latitude when determining conditions imposed on award of certificate of public convenience.²⁴ In order to ensure that the transaction is in the public interest, and consistent with the Code, I&E initially recommended that it only be approved subject to the following three conditions:

- (1) Aqua should provide a separate cost of service study for the EWT system.²⁵
- (2) Aqua and EWT's proposal for a three-year rate freeze should be rejected.²⁶
- (3) Aqua should provide proof that it has identified all missing easements including public rights-of-way and other property rights, taken any and all necessary actions to obtain the missing easements and other property rights

²³ 66 Pa. C.S. § 1103(a).

²⁴ *Rheems Water Co. v. Pa. PUC*, 620 A.2d 609, 153 Pa.Cmwlth. 49 (Cmwlth.1993).

²⁵ I&E St. No. 2, pp. 15-19.

²⁶ I&E St. No. 2, pp. 14-15.

so that they may be conveyed to Aqua at closing, and assumed all costs and expenses for obtaining and conveying the missing easements and other property rights. However, if the above cannot occur, in order to close the transaction without the missing easements or other property rights, Aqua and EWT must establish an escrow account of an appropriate dollar amount from the purchase price to be used to obtain any post-closing transfers of the easements and other real property rights.²⁷

Through testimony, I&E was able to reach a resolution of its first condition regarding cost of service study and is identified below.

1. Cost of Service

To protect ratepayers, I&E recommended that Aqua provide a cost of service study for the EWT Township system. As I&E witness Cline explained, the recommended cost of service study was necessary because it would be beneficial in the following ways: (1) determining the cost to operate the EWT wastewater system separately; (2) calculating the costs of the Aqua's different services; (3) separating the costs between Aqua's different customer classes and service areas; (4) attributing costs to Aqua's different customer classes and service areas (5) determining how costs will be recovered from the Aqua's different customer classes and service areas; and (6) establishing the existence and extent of subsidization (inter and intra-class) and assist in determining the appropriate amount of revenue requirement to be shifted from wastewater customers to water customers, which Aqua has utilized in past base rate cases.²⁸

²⁷ I&E St. No. 1, pp. 4-6.

²⁸ I&E St. No. 2, pp.15-16.

In response to I&E's recommendation regarding the cost of service study, Aqua witness Packer accepted I&E's recommendation to provide separate cost of service studies for the EWT system, using the same methodology it used for other systems acquired through Section 1329 proceedings in the base rate case at Docket Nos. R-2021-3027385 and R-2021-3027386.²⁹ I&E witness Cline acknowledged that Aqua agreed to file the cost of service study Mr. Packer identified and therefore satisfied his recommendation.³⁰

I&E submits that the cost of service study term is in the public interest because, as witness Cline explained, the cost of service study is a mechanism to protect ratepayers. Without it, the cost to operate the EWT wastewater system remains unknown, and therefore the appropriate ratemaking recommendations for those costs cannot be proposed or implemented when Aqua files its next base rate case.

2. Rate Freeze

I&E recommended that the two-year rate freeze as proposed by Aqua and EWT in the APA be denied.³¹ I&E witness Cline offered four reasons why the rate freeze should be rejected:

First, based on Aqua's current base rate case filing schedule the three-year rate freeze is either unnecessary or would constitute a Rate Stabilization Plan. Second, the rate freeze provision adds no value to the Transaction. Third, the parties failed to acknowledge that the Commission is the entity that makes the final determination on whether and to what extent rates will increase regardless of any rate freeze provision in the Asset Purchase Agreement. Fourth, a rate freeze will cause 100% of the projected revenue deficiency, which is likely understated, to be recovered from other Aqua customers.³²

²⁹ Aqua St. No. 1-R, p. 11.

³⁰ I&E St. No. 2-SR, pp. 6-7.

³¹ I&E St. No. 2, p. 6.

³² I&E St. No. 2, p. 7.

I&E believes that a two-year rate freeze is unreasonable and misleading as the Commission, not Aqua nor EWT, maintains the ultimate rate setting authority. Also, as discussed by I&E witness Cline, it is entirely possible that Aqua will file a base rate case before the expiration of the three-year period, and, in that event, the Commission could determine that EWT rates need to be increased before the three-year agreement expires.³³

In rebuttal testimony, Aqua witness Packer dismisses Mr. Cline's recommendation to deny the three-year rate freeze provision because "Mr. Cline's position presumes, incorrectly, that the Company will be filing a base rate case including the EWT system prior to the expiration of the rate freeze period, which as of today, is not a known fact."³⁴ He goes on to add that he believes that even if there was some overlap, it would only be a few months and could be dealt with a proposed effective date of new rates for EWT customers being synchronized to the exact day and month of the expiration. In this instance, there no amount of the authorized increase for this system would be funded entirely by existing customers, which he states the Company was able to do when they acquired the Tobyhanna system.³⁵

Despite Mr. Packer's testimony, there is no guaranteed that Aqua would not file a base rate case until after the rate freeze period had ended. There have been other recent 1329 filings made by Aqua in which a rate freeze was promised. As a result, there are more rate freeze provisions Aqua will need to take into consideration when it decides to file its next base rate case. I&E is unaware of any system acquired through the 1329 process in which the Commission has not assigned some form of rate increase regardless of any rate delay or

³³ I&E St. No. 2, pp. 7-8.

³⁴ Aqua St. No. 1-R, p. 9.

³⁵ Aqua St. No. 1-R, p. 9.

moratorium provisions in the subsequent base rate cases. While the Commission makes the ultimate determination on any rate increase, this rate freeze amounts to nothing more than political theater in order to make the pending acquisition more palatable to current EWT customers and should, therefore, be rejected.

3. Easements

I&E recommends that the closing of the transaction not be permitted to occur unless and until EWT provides proof that it has (1) identified all missing easements including public rights-of-way and other property rights; (2) taken any and all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to Aqua at closing; and (3) assumed all costs and expenses for obtaining and conveying the missing easements and other property rights so that Aqua's ratepayers are not burdened with those costs and associated expenses.³⁶

Further, I&E recommends that the Commission condition the approval of Aqua's Application that for circumstances beyond EWT's control where it is unable to transfer all missing easements including public rights-of-way and other property rights before or at the closing of the transaction, Aqua and EWT may at their discretion close the transaction without the transfer of missing easements and other property rights, provided that an escrow account be established of an appropriate dollar amount from the purchase price to be used to obtain any post-closing transfers of the easements and other real property rights.³⁷

In its filing Aqua's response to Standard Data Request No. 9 (Aqua filing, Exhibit Z), Aqua stated that it was not presently aware of any needed leases, easements, or access to

³⁶ I&E St. No. 1, p. 5.

³⁷ I&E St. No. 1, p. 5.

public rights-of-way that will not be transferred at closing.³⁸ Aqua also states that the mapping of easements and rights-of-way from EWT's abstractor's report is not yet completed. However, in response to discovery, Aqua noted that EWT had identified 22 properties with missing easements and that Aqua was working with EWT to obtain said easements.³⁹

As I&E witness Keller explains, in the absence of the abstractor/title company's final title search report that will identify the missing easements and other property rights, the UVEs' presumptive valuation of EWT's wastewater system being conveyed with all easements and other property rights necessary to operate the system, is potentially flawed or inaccurate.⁴⁰

In rebuttal testimony, Aqua witness Packer disagreed with I&E's recommendation. Mr. Packer asserted that I&E's recommendations were already contemplated in the APA entered between Aqua and EWT, and therefore, I&E's recommendation is unnecessary. Mr. Packer references Section 6.05 of the APA in which EWT is required to take any and all actions to obtain any missing easements to the same may be sold, assigned, transferred, and conveyed to Aqua at the closing at its cost and expense.⁴¹ Next, Mr. Packer references Section 6.06 of the APA that states if a parcel of unscheduled real property is discovered subsequently, then EWT shall convey, assign, or otherwise transfer any rights to each parcel of unscheduled real property, with no adjustment to the purchase price, in such a manner as

³⁸ Aqua filing, Exhibit Z, Standard Data Request No. 9.

³⁹ I&E Ex. No. 1, Sch. 1.

⁴⁰ I&E St. No. 1, p. 4-5.

⁴¹ Aqua St. No. 1-R, pp 6.

to provide Aqua with reasonable assurances that Aqua will have the right to use or occupy the unscheduled real property as it was used by EWT as of the effective date.⁴²

Although Sections 6.05 and 6.06 of the APA obligate EWT to transfer all missing easements and property rights at a later time, Aqua and EWT could mutually decide to waive the applicable sections of the APA that bind it to deliver good and marketable title to all property necessary to use and access the acquired assets. Additionally, Mr. Keller correctly explains that it is important to ensure that ratepayers are protected from post-transaction uncertainty and the costs involved in acquiring and transferring the missing easements and other property rights necessary for Aqua's operation of EWT's wastewater system. The public interest would be harmed if Aqua paid a purchase price that assumed all rights necessary to operate EWT would be transferred, and at EWT's cost, and such action did not occur.

The Commission acknowledged I&E's concern about the missing easements and other property rights in Pennsylvania American Water Company's Section 1329 Application for the acquisition of Upper Pottsgrove Township's wastewater system assets.⁴³ There the Commission directed PAWC and the Township to continue working to achieve the transfer of real property rights and permitted PAWC, at its discretion, to close the transaction without the transfer of all real property rights, provided that an escrow account was established from the purchase price to be used to obtain any post-closing transfers of the real property rights.

⁴² Aqua St. No. 1-R, p. 7.

⁴³ Application of Pennsylvania American Water Co. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Upper Pottsgrove Township, Docket No. A-2020-3021460, p. 3 (Order entered September 15, 2021).

It is also worth noting that in Aqua's most recent Section 1329 Application for the acquisition of Lower Makefield Township's wastewater system assets, the Commission agreed with the ALJ and supported terms under the partial settlement that mirrored the Commission's directions in the PAWC/Upper Pottsgrove Application.⁴⁴

4. Notice to Customers

In testimony, I&E pointed out that the rate impact for acquired EWT customers, could potentially be higher than what was noticed to EWT customers. In its notice to EWT customers, Aqua indicated, that if no costs were shared with other existing Aqua customers, the average residential and commercial customer's wastewater bill would increase by 132.93%.⁴⁵ I&E asserts that the noticed 132.93% increase is potentially less than what the increase may actually be.

The testimony of I&E witness Cline and I&E witness Keller demonstrates that the 132.93% increase may be unreliable. Mr. Cline explains, the 132.93% increase is based upon the purchase price and a single year of post acquisition plant additions. However, depending on the timing of Aqua's next base rate case, the requested revenue requirement for EWT could be based upon several additional years of system plant additions which, in turn, would drive up the revenue requirement for the EWT system beyond the 132.93%. Any additional years and plant additions will increase the revenue requirement of EWT customers and increase the subsidy that Aqua will request be provided from other Aqua customers.⁴⁶

Other factors that can impact the increase EWT customers can expect to receive include the

⁴⁴ Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Lower Makefield Township, Docket No. A-2021-3024267, p. 92 (Order entered January 13, 2022).

⁴⁵ Aqua Exhibit I2.

⁴⁶ I&E St. No. 2, p. 13.

what will be claimed in the first EWT cost of service study, the revenue requirement needed in the next base rate case, the test years used, and plant additions and retirements will be taking place during those test years. Without knowing the numbers attached to the factors explained, it is likely that EWT customers have the potential to realize a higher rate increase than what was noticed.

In addition, I&E witness Keller gives the following example:

Aqua estimates it will invest approximately \$17,000,000 in capital projects over the next ten years to improve EWT’s system (Aqua Statement No. 2, pp. 10-11). Aqua used a weighted average cost of capital of 7.37% in calculating the revenue deficiency and overall impact on customers in the proposed transaction (Aqua Statement No. 1, Appendix A, p. 1). In comparison, Aqua’s fair market valuation report prepared by Gannett Fleming used weighted average cost of capital of 3.09% for EWT (Aqua Exhibit Q, p. 28).

The example below illustrates the impact of the cost of capital for Aqua and EWT:

Company	Cost of Capital	Estimated Capital Improvements Over the Next 10 Years	Impact
Aqua	7.37%	\$17,000,000	\$1,252,900
East Whiteland	3.09%	\$17,000,000	<u>\$525,300</u>
Difference			<u>\$727,600</u>

In this example, the cost of capital for improvements to EWT’s system over the next ten years would be \$727,600 higher if it were performed by Aqua rather than by EWT. This is primarily due to the fact that debt is the only source of capital for EWT compared to Aqua which utilizes both common equity and debt resulting in a substantially higher cost of capital.

In fact, this cost disparity becomes even greater when the Aqua return is grossed up for the tax impact that is not attributable to a municipality. Using the tax gross up factor from Aqua's most recent base rate case of 1.4227⁴⁷ increases the impact of \$1,252,900 of plant additions to \$1,782,501 ($\$1,252,900 \times 1.4227$), which increases the difference by \$1,257,201 ($\$1,782,501 - \$525,300$).⁴⁸

In addition, Aqua has acquired and, likely, will continue to acquire other systems similar to the EWT wastewater system. Because of this, any potential revenue shortfall for operating costs related to other acquired systems will be spread across Aqua's existing customers, which will include EWT residents if the acquisition is approved. Unlike current ownership, the acquired EWT customers will then become part of a large investor-owned utility that must ensure return for shareholders and coverage in rates for tax liabilities. As a result, EWT Township customers will be subjected to regular rate increases.

D. Section 507 Approvals

Aqua's request to assume enumerated municipal contracts currently held by EWT is subject to review under Section 507 of the Code. Under Section 507, other than contracts to furnish service at tariffed rates, any contract between a public utility and a municipal corporation must be filed with the Commission at least 30 days prior to its effective date to be valid. Upon receipt of the filing, and prior to the effective date of the contracts, the Commission may institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. If this Commission decides to institute such proceedings, the contracts at issue will not become effective until the Commission grants its approval.

I&E has not addressed this issue.

⁴⁷ Docket Nos. R-2021-3027385 and R-2021-3027386. Aqua Exhibit 1-A, Schedule A-5, line 14.

⁴⁸ I&E St. No. 1, p. 7-8.

E. Section 2102 Approval

Aqua's request to assume enumerated municipal contracts currently held by EWT is subject to review under Section 2102 of the Code. Under Section 2102, no contract or arrangement providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease or exchange of any property, right, or thing or for the furnishing of any service, property, right or thing other than those listed, made between a public utility and any affiliated interest shall be valid or effective unless and until such contract or arrangement as received the written approval of the Commission. It is the duty of every public utility to file with the Commission a verified copy of any such contract and the Commission shall approve such contract only if it shall clearly appear and be established upon investigation that it is reasonable and consistent with the public interest.

I&E has not addressed this issue.

F. Other Approvals, Certificates, Registrations and Relief, If Any, Under the Code.

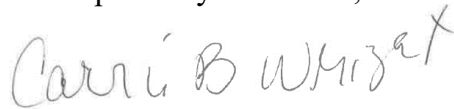
I&E has not addressed this issue.

VI. CONCLUSION WITH REQUESTED RELIEF

The proposed transaction, as filed, will not affirmatively promote the public interest in a substantial way. Conditions must be imposed prior to granting the requested certificates of public convenience to protect the interests of Aqua, Aqua's existing customers, and the regulated community. Accordingly, if the transaction is approved, I&E respectfully requests that the Administrative Law Judge recommend that the Commission condition its approval on the following terms:

- (1) In its next base rate case, Aqua must file cost of service calculations separately for the EWT system consistent with the cost of service studies filed in the 2021 Aqua base rate case;
- (2) The two-year rate freeze provision be rejected; and
- (3) Closing of the proposed transaction should not be permitted to occur until Aqua and EWT provide the Commission with a guarantee that all easements and real property rights have been transferred, or set up an escrow account from the purchase price to be used to obtain any post-closing transfers of remaining missing easements or other real property rights.

Respectfully submitted,



Carrie B. Wright
Prosecutor
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Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
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Dated: April 8, 2022

Proposed Findings of Fact

1. Parties

- a. I&E serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Pennsylvania Public Utility Code. 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* See *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).
- b. The I&E analysis in the proceeding is based on its responsibility to represent the public interest. This responsibility requires balancing the interest of ratepayers, the utility company, and the regulated community as a whole. I&E St. No. 1, p. 1.
- c. Aqua furnishes wastewater services to 45,000 customers in Pennsylvania. Aqua St. No. 1, p. 9.

2. The East Whiteland Township System

- a. The EWT system consists of twelve pump stations, about 329,072 linear feet of gravity and force mains, approximately 1,506 manholes, associated infrastructure and appurtenances, and related land and land rights. Aqua St. No. 3, p. 6.

3. The Asset Purchase Agreement

- a. Aqua's negotiated purchase price for the EWT system is \$54,930,000. Aqua St. No. 1, p. 10.
- b. In this case, Aqua is requesting to establish a ratemaking rate base level of \$54,930,000 for the EWT system. Aqua's Application, p. 18.

4. The Application and the UVE's Appraisals

- a. Aqua selected Gannett Fleming Valuation and Rate Consultants, LLC. to perform an appraisal of the EWT system. Aqua's Application, Ex. AA1.
- b. EWT selected AUS Consultants, Inc. to perform an appraisal of the EWT system. Aqua's Application, Ex. AA2.

- c. Aqua's UVE, Harold Walker, III of Gannett Fleming Valuation and Rate Consultants, LLC valued the EWT assets at \$55,668,000. Aqua's Application, Ex. Q, p. 1.
- d. EWT's UVE, Jerome C. Weinert of AUS Consultants, Inc., valued the EWT assets at \$57,781,458. Aqua's Application, Ex. R, p. 1.
- e. The average of the UVE appraisals of the EWT system was \$56,724,729 Aqua's Application, p. 18.

5. Aqua's Financial, Technical and Legal Fitness

- a. Aqua alleges that it is financially, technically, and legally fit to own and operate the EWT system and it sets forth the basis for those claims in its direct testimony. Aqua St. No. 1, pp. 10-11, and Aqua St. No. 2, pp. 17-19.
- b. I&E has not challenged Aqua's financial, technical and legal fitness to own and operate the EWT system.

6. Affirmative Public Benefits of a Substantial Nature

- a. Aqua alleges that multiple public benefits will arise under the transaction. Aqua St. No. 1, pp. 13-19, and Aqua St. No. 2, pp. 17-19.

7. Cost of Service Study

- a. Without a cost of service study, the Commission's ability to evaluate the rate impact of the acquisition upon existing Aqua customers and its options of addressing that impact to provide any appropriate relief to existing customers, could be compromised. I&E St. No. 2, pp. 15-16.
- b. Through the litigation process, I&E and Aqua reached an agreement that satisfied I&E's cost of service study recommendation. Aqua St. No. 1-R, pp. 11; I&E St. No. 2-SR, pp. 6-7.

Proposed Conclusions of Law

1. Commission Jurisdiction

- a. The Commission has jurisdiction over the subject matter of this proceeding. 66 Pa.C.S. §§ 507, 102, 1103, 1329.
- b. I&E serves as the Commission’s prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Pennsylvania Public Utility Code. 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* See *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).
- c. The Commission maintains the ultimate rate setting authority.

2. Burden of Proof

- a. Aqua, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application. 66 Pa. C.S. § 332(a).
- b. In a case such as this one, pending before an administrative tribunal, Courts have held that a “litigant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).
- c. To satisfy its burden, Aqua must demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).
- d. Aqua has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, 2102 1329 of the Code.

3. Legal Standards

- a. The Commission must issue a certificate of public convenience as prerequisite to offering service, abandoning service and certain property transfers by public utilities or their affiliated interests. 66 Pa. C.S. § 1102.

- b. The standards for the issuance of a Certificate of Public Convenience are set forth in Sections 1102 and 1103 of the Code. Under these Sections, a Certificate of Public Convenience shall be granted “only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.” 66 Pa. C.S. §§ 1102-1103.
- c. These provisions have been interpreted by the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way. *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).
- d. Under Section 1103, Aqua must show that it is technically, legally, and financially fit to own and operate the assets it will acquire from EWT. *Seaboard Tank Lines v. Pa. PUC*, 502 A. 2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. PUC*, 138 A.2d 240, 243 (Pa. Super. 1958).
- e. In assessing Aqua’s Application, the Commission should consider the benefits and detriments of the transaction “with respect to the impact on all affected parties” including existing customers. *Middletown Twp. v. Pa. P.U.C.*, 482 A.2d 674, 682 (Pa. C Cmwlth. 1984).
- f. To ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable. 66 Pa. C.S. § 1103(a).
- g. Section 1329 provides a framework for valuing, for ratemaking purposes, water and wastewater systems that are owned by a municipal corporation or authority that are to be acquired by an investor-owned water or wastewater utility under the Commission’s jurisdiction. It allows the rate base of the municipal system being purchased to be incorporated into the rate base of the purchasing investor-owned utility at the lesser of either the purchase price or the fair market value as established by the two independent appraisals conducted by two utility valuation experts. 66 Pa. C.S. § 1329.
- h. Section 1329’s fair market valuation approach dictates that once the buyer and the seller agree to its use, they must engage the services of a licensed engineer to assess the tangible assets of the seller. The licensed engineer assessment is then presented to two UVEs, one to represent the buyer and

one to represent the seller, to conduct independent analyses based on the Uniform Standards of Professional Appraisal Practice, employing the cost, market and income approaches. For ratemaking purposes, the valuation will be the lesser of the fair market value or the negotiated purchase price. 66 Pa. C.S. § 1329.

- i. Aqua's request to assume enumerated municipal contracts alleged to be currently held by EWT is subject to review under Section 507 of the Code. Under Section 507, other than contracts to furnish service at tariffed rates, any contract between a public utility and a municipal corporation must be filed with the Commission at least 30 days prior to its effective date to be valid. Upon receipt of the filing, and prior to the effective date of the contracts, the Commission may institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. If this Commission decides to institute such proceedings, the contracts at issue will not become effective until the Commission grants its approval. 66 Pa. C.S. § 507.

- j. Aqua's request to assume enumerated municipal contracts currently held by EWT is subject to review under Section 2102 of the Code. Under Section 2102, no contract or arrangement providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease or exchange of any property, right, or thing or for the furnishing of any service, property, right or thing other than those listed, made between a public utility and any affiliated interest shall be valid or effective unless and until such contract or arrangement as received the written approval of the Commission. It is the duty of every public utility to file with the Commission a verified copy of any such contract and the Commission shall approve such contract only if it shall clearly appear and be established upon investigation that it is reasonable and consistent with the public interest. 66 Pa. C.S. § 2102.

Proposed Ordering Paragraph

IT IS ORDERED THAT:

Aqua's Application is approved subject to the following terms:

- (1) In the next base rate case, Aqua must provide a separate cost of service study for the EWT system;
- (2) Aqua and EWT's proposal for a two-year rate freeze is rejected; and
- (3) Aqua must provide proof that it has identified all missing easements including public rights-of-way and other property rights, taken any and all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to Aqua at closing, and assumed all costs and expenses for obtaining and conveying the missing easements and other property rights. However, if the above cannot occur, in order to close the transaction without the missing easements or other property rights, Aqua and EWT must establish an escrow account of an appropriate dollar amount from the purchase price to be used to obtain any post-closing transfers of the easements and other real property rights.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua PA Wastewater, Inc. :
Pursuant to Section 1329 of the Public :
Utility Code for Approval of its : Docket No.: A-2021-3026132
Acquisition of East Whiteland Township, :
Chester County Sanitary Wastewater :
Collection System :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** dated April 8, 2022, in the manner and upon the persons listed below:

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A handwritten signature in cursive script that reads "Carrie B. Wright". The signature is written in dark ink and is positioned above a horizontal line.

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