



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

April 15, 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 Reply Brief

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Reply 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 :

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

Carrie B. Wright
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Date: April 15, 2022

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I. STATEMENT OF THE CASE

A. Procedural History

The procedural history of this proceeding was set for in the I&E Main Brief.¹ On April 8, 2022, Main Briefs were filed by I&E, Aqua Pennsylvania Wastewater, Inc. (Aqua or Company), the Office of Consumer Advocate (OCA), and the Office of Small Business Advocate (OSBA).

In addition, Aqua, I&E, East Whiteland Township (EWT), OCA and OSBA have entered into a Stipulation resolving most issues in this proceeding.

I&E now files this Reply Brief in support of the Stipulation.

B. Overview of the Proposed Transaction

The overview of the proposed transaction, as set forth in the I&E Main Brief, is incorporated herein by reference.²

II. BURDEN OF PROOF

In its Main Brief, I&E explained that 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.³ Aqua's burden includes the obligation to establish a preponderance of evidence which is substantial and legally credible.⁴ 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.⁵ To satisfy its burden, Aqua must

¹ I&E MB, pp. 1-3.

² I&E MB, pp. 3-4.

³ I&E Main Brief, pp. 4; 66 Pa. C.S. § 332(a).

⁴ Aqua Main Brief, p. 4; *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

⁵ Aqua Main Brief, p. 4; *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.⁶ Specifically to 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. Absent imposition of the conditions I&E recommends, Aqua cannot meet its burden because its Application will not comply with any of the applicable sections of the Code.

III. STATEMENT OF QUESTIONS INVOLVED

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

Suggested Answer: Yes. I&E recommends Aqua's Application be approved as modified by the Stipulation entered into by Aqua, OCA, OSBA, I&E and EWT. If the Stipulation is not approved, however, I&E recommends 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.

IV. SUMMARY OF ARGUMENT

In Main Brief, I&E recommended that approval of Aqua's Application be subject to three conditions.⁷ One of those conditions, that Aqua provide a cost of service study in its next base rate case, has been accepted by the Company. Next, I&E recommended that the Commission condition approval of Aqua's Application upon the rejection of Aqua's rate freeze provision. Lastly, I&E recommended that the approval of Aqua's Application

⁶ *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

⁷ I&E Main Brief, pp. 5-6.

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.

As of the filing of this Reply Brief, Aqua, OCA, OSBA, EWT, and I&E have reached a Stipulation in Settlement which accommodates I&E's concerns. While I&E continues to recommend approval of the accommodations listed above if the Commission does not approve the Stipulation, I&E ultimately recommends the Commission approve Aqua's Application as modified by the Stipulation.

V. ARGUMENT

A. Section 1102/1103 Standards

1. Section 1102/1103 - Legal Principles

I&E incorporates, by reference, this section of its Main Brief.⁸

2. Fitness

As noted in its Main Brief, 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

I&E submits that Aqua's Application, as modified by the Stipulation, should be approved as the substantial affirmative benefits test will be met.

⁸ I&E MB, pp. 6-7.

In the alternative, if the Commission does not approve the Stipulation, I&E submits that any approval of Aqua's Application be subject to the conditions I&E addressed in its Main Brief. Absent adoption of either the Stipulation or I&E's conditions addressed in Main Brief, there is no assurance that the alleged affirmative public benefits will materialize.

4. Conclusion

For the reasons explained above, I&E recommends Aqua's Application be approved as modified by the Stipulation. In the alternative, if the Stipulation is not approved, the public interest requires that Aqua's Application be granted only if the conditions identified in the I&E Main Brief are placed upon the acquisition.

B. Section 1329 Analysis

1. Introduction

I&E incorporates, by reference, this section of its Main Brief.⁹

2. Section 1329 - Legal Principles

I&E incorporates, by reference, this section of its Main Brief.¹⁰

3. Aqua's Application

I&E incorporates, by reference, this section of its Main Brief.¹¹

4. Challenges to UVE Appraisals

I&E incorporates, by reference, this section of its Main Brief.¹²

⁹ I&E MB, pp. 7-8

¹⁰ I&E MB, p. 8.

¹¹ I&E MB, p. 8.

¹² I&E MB, p. 9.

C. Stipulation

1. Cost of Service Study

Pursuant to the Stipulation, at the time of its next base rate case that includes EWT's wastewater system assets, Aqua has agreed to provide a cost of service study that removes all costs and revenues associated with the operations of the EWT system. At the same time, Aqua also agrees to provide a separate cost of service study for the EWT system.¹³ I&E fully supports this term which is consistent with protecting the public interest.

I&E submits that the cost of service study will protect Aqua, its customers, the parties to this proceeding and the Commission. Specifically, the results of the cost of service study that Aqua has committed to perform will provide it with information necessary to determine an appropriate level of rates in the future. The cost of service study will benefit Aqua's ratepayers as well, because if Aqua's Application is approved, Aqua's existing customers will bear the rate impact. However, 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. Finally, Aqua's cost of service study commitment will serve the public interest because a cost of service study can establish the existence and extent of subsidization (inter and intra-class) and assist in determining the appropriate amount of revenue requirement that is reasonable to be

¹³ Stipulation, pp. 3-4.

shifted from the wastewater customers to the water customers.

This resolves I&E's concern related to the cost of service study.

2. Rate Freeze

As explained in Main Brief, I&E opposed the rate freeze provision contained in this filing.¹⁴

Per the Stipulation, however, in the first base rate case that includes EWT's wastewater assets, Aqua has agreed that it will propose to move the EWT system to its cost of service so long as that cost of service does not exceed Rate Zone 1 rates. However, in the context of a settlement, in the next base rate case, Aqua may agree to rates other than those proposed for EWT customers. The stipulating parties reserve their rights to fully address this proposal, and to make other rate proposals in the base rate case. In addition, the Stipulation acknowledges that the Commission retains its full ratemaking authority. This term is within the public interest because it complies with Section 1329, but it also preserves I&E's ability to address rates in the future while correctly recognizing the Commission's ultimate authority to set rates.

Therefore, I&E's concern about the proposed rate freeze has been resolved by this provision.

3. Easements

As explained in Main Brief, I&E was concerned about the possibility of missing easements, and the costs associated with such.¹⁵

¹⁴ I&E MB, pp. 11-12.

¹⁵ I&E MB, pp. 13-16.

However, per the Stipulation, the following has been agreed to:

Aqua and the Township will work to ensure the transfer of all real property rights including easements and missing easements as defined in the Asset Purchase Agreement (“APA”) by Closing. However, Aqua shall be permitted in its discretion to close without the transfer of all of the Real Property Rights, provided that an escrow is established from the Purchase Price to be used to obtain any post-Closing transfers of the Real Property Rights. Aqua will provide an update to I&E, OCA, and OSBA approximately 30 days in advance of the anticipated Closing Date and a final update before Closing regarding the status of the transfer of real property rights including easements related to the system.¹⁶

I&E supports this term of the Stipulation as necessary to protect the public interest in two ways. First, it is important to note that the public interest would be harmed if Aqua paid a purchase price that assumed that all rights necessary to operate EWT would be transferred, and at EWT’s cost, and such action did not occur. To protect against this possibility, I&E fully supports the protection measure of the escrow account that would be imposed upon EWT to ensure that any right not transferred at closing must be financially accounted for via payment to the escrow account. Additionally, the public interest is protected because this term provides an additional layer of accountability that would not exist if Aqua EWT would ever mutually decide to waive the applicable sections of the Asset Purchase Agreement that bind it to deliver good and marketable title to all real property necessary for the operation of the acquired system.¹⁷

Additionally, because Aqua has committed to providing I&E, OCA, and OSBA with an update on the status of the transfer of real property rights related to the system

¹⁶ Stipulation, p. 3.

¹⁷ Aqua’s Application, Exhibit B, Section 2.01, p. 11.

within 30 days of advance of the anticipated Closing Date, I&E will have a mechanism in place to gauge EWT's progress in meeting its property transfer obligations. Through this reporting mechanism, the public interest is further protected because by being informed of the status of any missing property rights, I&E will be empowered to take any action that may be warranted and available to ensure that Aqua's ratepayers are not paying for property rights that are not obtained or paying any costs associated with obtaining those rights. At the same time, Aqua will be able to monitor any missing easements to either ensure that it does not encounter access issues, or, if such issues are identified, that it can develop a plan to address access. Accordingly, this term of the Stipulation is in the public interest and it should be approved without modification.

As a result, I&E's concern about potential missing easements has been resolved.

4. Conclusion Regarding the Stipulation

Based upon I&E's analysis of the filing, acceptance of Aqua's Application as modified by the Stipulation is in the public interest.

D. Recommended Conditions

I&E recommends that Aqua's Application as modified by the Stipulation be approved.

However, as noted in the I&E Main Brief 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.¹⁸

¹⁸ 66 Pa. C.S. § 1103(a).

In order to ensure that the transaction is in the public interest, and consistent with the Code, if the Stipulation is not approved, I&E recommends Aqua's Application only be approved subject to the following three conditions:

- (1) Aqua should provide a separate cost of service study for the EWT system.¹⁹
- (2) Aqua and EWT's proposal for a three-year rate freeze should be rejected.²⁰
- (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 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.²¹

Through the Stipulation, I&E was able to reach resolution of each of these condition.

Therefore, I&E recommends the Application be approved as modified by the Stipulation.

However, as explained above if the Stipulation is not approved, I&E continues to recommend approval of the Application, only if the conditions noted above are also implemented as part of the approval of the Application.

¹⁹ I&E St. No. 2, pp. 15-19.

²⁰ I&E St. No. 2, pp. 14-15.

²¹ I&E St. No. 1, pp. 4-6.

In addition, in I&E's Main Brief, I&E addressed its concern over the possibility that EWT customers could potentially see higher rates than what was noticed to them.²² As I&E's main goal was to identify and introduce the issue of EWT customers' potential future rate impact into the record in this proceeding this particular issue has been satisfied.

E. Section 507 Approvals

As explained in its Main Brief, I&E has not addressed this issue.

F. Section 2102 Approval

As explained in its Main Brief, I&E has not addressed this issue.

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

As explained in its Main Brief, I&E has not addressed this issue.

VI. CONCLUSION WITH REQUESTED RELIEF

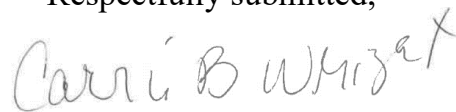
The proposed transaction, as filed, will not affirmatively promote the public interest in a substantial way. Conditions must be imposed prior to granting the requested certificates of public convenience to protect the interests of Aqua, Aqua's existing customers, and the regulated community. Accordingly, if the transaction is approved, I&E respectfully requests that the Administrative Law Judges approve the instant Stipulation as this resolves the issues identified by I&E in this proceeding. However, if the Stipulation is not approved, I&E recommends Aqua's Application only be approved

²² I&E Main Brief, pp. 16-18.

subject to the following conditions:

- (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,



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Dated: April 15, 2022

**BEFORE THE
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Application of Aqua PA Wastewater, Inc. :
Pursuant to Section 1329 of the Public :
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Acquisition of East Whiteland Township, :
Chester County Sanitary Wastewater :
Collection System :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Reply Brief** dated April 15, 2022,
in the manner and upon the persons listed below:

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