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May 20, 2022

**Via electronic filing**

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

**RE: Docket No. A-2021-3026132– Application of Aqua Pennsylvania  
Wastewater, Inc. to Acquire the Wastewater System Assets of East  
Whiteland Township**

Dear Secretary Chiavetta:

We are counsel to East Whiteland Township (the “Township”) in the above-referenced proceeding and are submitting, with this letter, the Exceptions of the Township to the Recommended Decision of Administrative Law Judge Marta Guhl.

This document is being served via electronic on the Honorable Marta Guhl and all parties of record.

Very truly yours,

Matthew S. Olesh

cc: The Honorable Marta Guhl, Administrative Law Judge (via e-mail)  
All parties of record

**CERTIFICATE OF SERVICE**

I, Matthew S. Olesh, Esq., hereby certified that I have served a true and correct copy of the Exceptions upon the following parties by electronic mail:

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/s/ Matthew S. Olesh

Dated: May 20, 2022

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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The Honorable Marta Guhl, Presiding

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Application of Aqua Pennsylvania Wastewater, Inc. under Section 1102(a) of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1102(a), for approval of (1) the transfer, by sale, of East Whiteland Township's wastewater system assets situated within the Township of East Whiteland, Chester County, Pennsylvania, to Aqua Pennsylvania Wastewater, Inc., (2) the rights of Aqua Pennsylvania Wastewater, Inc. to begin to offer or furnish wastewater service to the public in East Whiteland Township, Chester County, Pennsylvania; and (3) an order approving the acquisition that includes the ratemaking rate base of the East Whiteland Township wastewater system assets pursuant to Section 1329(c)(2) of the Public Utility Code; (4) approval of contracts, including assignment of contracts, between Aqua and East Whiteland Township, pursuant to Section 507 of the Public Utility Code; and (5) approval of a contract between affiliated interests, pursuant to Section 2102 of the Public Utility Code.

A-2021-3026132

**EXCEPTIONS OF EAST WHITELAND TOWNSHIP TO  
THE RECOMMENDED DECISION OF ADMINISTRATIVE  
LAW JUDGE MARTA GUHL**

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Dated: May 20, 2022

## I. INTRODUCTION

Pursuant to the procedural schedule established and in accordance with the regulations of the Public Utility Commission (the “Commission”) at 52 Pa. Code Section 5.533, East Whiteland Township (hereinafter “East Whiteland” or the “Township”) hereby submits these Exceptions to the Recommended Decision of Administrative Law Judge Marta Guhl, (“Judge Guhl”) in connection with Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua”), filed with the Public Utility Commission (the “Commission”) pursuant to section 507, 1102, 1329, and 2102 of the Public Utility Code (the “Application”) that is the subject of this proceeding.

Aqua’s Application, filed with the Commission on July 23, 2021, seeks approval to acquire the wastewater system assets of the Township (the “System”) and right of Aqua to provide wastewater service to the public in East Whiteland pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (hereinafter the “Proposed Transaction”). The Application was assigned Docket No. A-2021-3026132 by the Commission with Judge Guhl presiding.

Judge Guhl scheduled evidentiary hearings for March 31, 2022 and April 1, 2022. However, prior to the scheduled evidentiary hearing, Aqua, East Whiteland, the Office of the Consumer Advocate, the Office of Small Business Advocate, and the Bureau of Investigation and Enforcement agreed to a mutual waiver of cross examination and, therefore, requested that Judge Guhl excuse all witnesses from attending the evidentiary hearing. At the hearing on March 31, all pre-served written testimony and exhibits were entered into the record. The evidentiary hearing was adjourned on March 31, 2022 and Judge Guhl cancelled the second day of the hearing previously scheduled for April 1, 2022.

By Recommended Decision dated May 10, 2022 (the “Recommended Decision”), Judge Guhl recommended that Aqua’s Application be denied due to her belief that Aqua failed to meet

its burden of proof that it is entitled to the relief it is seeking under 66 Pa.C.S. § 332(a). More specifically, despite recognizing that Aqua established its legal, financial, and technical fitness to own or operate the System, Judge Guhl recommends the denial of Aqua's Application based on the following two points: (1) Aqua failed to establish that Aqua's ownership of the System would affirmatively promote the service, accommodation, convenience, or safety of the public; and (2) the record evidence did not establish that the benefits to be realized from the Proposed Transaction would outweigh the harms to current Aqua customers or existing East Whiteland customers. *See, e.g., Recommended Decision, p. 59.*

## **II. SUMMARY OF ARGUMENT**

The Township respectfully submits the following exceptions to the Recommended Decision because – from the Township's perspective – the record includes several substantial affirmative benefits for Township customers and the Township itself that were seemingly overlooked due to the potential rate impact of the Proposed Transaction. For example, the Township presented various substantial benefits – albeit qualitative in nature as opposed to the quantitative prospective rate increase – that would be realized by the Township and its customers. When all benefits of the Proposed Transaction – both qualitative and quantitative – are considered, the Commission is presented with a record that fully demonstrates that the Application should be approved based on numerous substantial affirmative public benefits. Aqua and the Township demonstrated that the Proposed Transaction was negotiated at arms-length and is in the public interest, presenting substantial benefits to both Township ratepayers and the public.

Furthermore, as discussed in more detail below, the Township respectfully submits that this Recommended Decision subverts the standard established by section 1103 of the Public Utility Code as its been interpreted by the Pennsylvania Supreme Court. *See* 66 Pa.C.S. § 1103; *see also Popowsky v. PaPUC*, 937 A.2d 1040 (Pa. 2007); *City of York v. PaPUC*, 295 A.2d 825 (Pa. 1972).

The Recommended Decision essentially creates precedent that requires a municipality wishing to sell its wastewater assets to first prove imminent financial distress, inadequacy of service, or some element of operational distress prior to exploring a sale. In other words, under the express conclusion of this Recommended Decision, a municipality – like East Whiteland – that currently provides safe and reliable service to its customers is penalized and must apparently satisfy a higher burden of proof to sell its wastewater assets.

Accordingly, for the reasons set forth herein, East Whiteland respectfully submits the following Exceptions to the Recommended Decision and urges the Commission to reverse that decision and approve the relief requested in the Application.<sup>1</sup>

### III. EXCEPTIONS

#### **A. Exception No. 1 – The Recommended Decision Incorrectly Concludes that the Substantial Public Benefits in the Record do not Outweigh the “Harm” of Potential Rate Impacts to Aqua and Township Customers**

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The Township excepts to the Recommended Decision’s conclusion that the Application should be denied because “Aqua failed to establish that the [Proposed Transaction] will affirmatively promote the service, accommodation, convenience, or safety of the public . . . and the evidence did not establish any benefit to be realized from the Proposed Transaction would outweigh the harms to current Aqua water and wastewater customers or existing East Whiteland sewer customers.” *See, e.g.*, Recommended Decision, p. 59. More specifically, the particular conclusions of law to which the Township takes exception are included in paragraphs 6, 8, and 14 of the Recommended Decision. *See id.*, Conclusions of Law, ¶¶ 6, 8, 14.

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<sup>1</sup> Judge Guhl also failed to make any recommendation with respect to the ratemaking rate base for this Application. As such, her review of the Proposed Transaction is essentially incomplete.

East Whiteland does not dispute that Township and/or Aqua customers' rates may potentially increase as a result of the Proposed Transaction; however, the Township wholly disagrees that the record evidence does not illustrate that those potential rate impacts – *i.e.*, the only identified “harm” of the Proposed Transaction – are outweighed by the various benefits of the Proposed Transaction, especially those benefits to the Township in the long-term.<sup>2</sup>

For example, the Township identified the following affirmative benefits of the Proposed Transaction for the Township customers and its residents generally throughout this proceeding: (1) the Township can exit the sanitary sewer business and instead focus its resources on other core government functions while ensuring safe, reliable, and professional service at affordable rates for its residents; (2) East Whiteland customers will benefit from the expertise and experience of a regulated public utility like Aqua; and (3) the up-front proceeds from the Proposed Transaction will allow for various redevelopment opportunities in the Township. *See* Aqua Statement No. 3, p. 8. Notably, these “general” benefits were not the only stated benefits; yet, the Recommended Decision seemingly ignores – or makes short-shrift of – the other stated benefits.

As the Recommended Decision accurately notes, the Township does not dispute that it currently provides adequate service to its customer; however, this adequacy of current service does not undermine the areas that the Township identified for operational improvement. For example, the safe and reliable service East Whiteland provides to its customers monopolizes a significant amount of time and attention of the Township's already lean staff. The team dedicated to sewer service in East Whiteland is only comprised of the Director of Public Works and three full-time employees. *See* Aqua Statement No. 3-R, p. 3-4. More significantly, the Director of Public Works

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<sup>2</sup> For purposes of these exceptions, East Whiteland will focus on the benefits that the Township and its customers would enjoy as a result of the Proposed Transaction. That said, the Proposed Transaction will promote the public interest—and the Commission's stated policy—to regionalize and consolidate wastewater operations within the Commonwealth.

currently dedicates approximately fifty percent (50%) of his time operating and managing the System – leaving only half of his time to tend to the various other core governmental responsibilities as Director of Public Works such as maintenance of East Whiteland’s roads, parks, and traffic. *Id.*, p. 4. Thus, if Aqua’s Application is approved, the Director of Public Works and the full-time employees could focus their time and efforts on the other core functions in the Public Works Department while simultaneously ensuring East Whiteland customers continue to enjoy safe and reliable service under Aqua’s ownership.

Nonetheless, the Recommended Decision ignores these benefits and instead concludes that “[m]any of the benefits claimed by Aqua are general benefits anticipated by an acquisition like the one proposed of the East Whiteland system and were not supported by any specific evidence relative to this particular acquisition.” *See Recommended Decision*, p. 58. As illustrated above, there are several public benefits of the Proposed Transaction for the Township and its customers in the record that outweigh the potential rate increase for customers. When considering all stated benefits – both qualitative and quantitative – of the Proposed Transaction, Aqua has satisfied its burden under sections 1102 and 1103 of the Public Utility Code as interpreted by the Pennsylvania Supreme Court.

Accordingly, the Township respectfully excepts to the conclusion that Aqua failed to establish that the Proposed Transaction will affirmatively promote the service, accommodation, convenience or safety of the public and, further, requests that the Commission approve Aqua’s Application.

**B. Exception No. 2 – The Recommended Decision Subverts the Public Utility Code and Established Supreme Court Precedent to Create a Precedent that Municipalities Cannot Sell its Wastewater Assets Unless or Until Dire Circumstances Warrant the Sale**

As illustrated above and throughout this proceeding, Aqua has satisfied its burden to prove that the Proposed Transaction on the whole will affirmatively promote the service, accommodation, convenience or safety of the public – consistent with section 1103 of the Public Utility Code. However, the Recommended Decision seemingly requires Aqua to satisfy a higher burden of proof under section 1103 of the Public Utility Code due to East Whiteland’s admitted healthy financial position and reliable customer service.

The Public Utility Code does not require proof that a system is distressed or that residents are suffering from poor operational management before a municipality is permitted to sell its system. Instead, as the plain language of the Public Utility Code dictates, the Commission shall grant a *Certificate of Public Convenience* where doing so is “necessary *or proper* for the service, accommodation, convenience, or safety of the public.” *See* 66 Pa.C.S. § 1103(a) (emphasis added). As such, *Certificates of Public Convenience* are not exclusively reserved for those transactions that are “necessary” for safe and reliable service to the public; the Commission is also authorized to approve transactions – like the Proposed Transaction at issue in this proceeding – that permit a financially sound municipality to exit the business of providing sanitary sewer service and focus on its core governmental functions while simultaneously customers will *continue* to enjoy safe and reliable service.

Absent from section 1103 and its jurisprudence is *any* requirement that a municipality must affirmatively prove overt necessity or some element of “improvement” to the service that will arise as a result of the proposed transaction. Instead, the Pennsylvania Supreme Court has specifically held that the Commission is not required to secure legally binding commitments or

to quantify benefits where this may be impractical, burdensome or impossible; rather, the Commission properly applies the preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters under section 1103 of the Public Utility Code. *See Popowsky*, 937 A.2d at 1055–1056 (citing *City of York v. PaPUC*, 295 A.2d 825 (Pa. 1972)).

Nonetheless, in her recommendation for denial of Aqua’s Application, Judge Guhl concludes the following:

The record evidence does not establish that the sale would provide an affirmative public benefit by ensuring that East Whiteland customers have safe and reliable service **any more than they have under the current East Whiteland Township ownership. East Whiteland is not a troubled system and based on the information provided by Aqua and the Township, the current service provided by the Township is safe and reliable.**

*See Recommended Decision*, pp. 56-57 (emphasis added). Thus, it is evident that this Recommend Decision either establishes: (1) that approval under section 1103 first requires proof of a municipality’s imminent financial distress, inadequacy of service, or operational mismanagement, or (2) applications for those “necessary” despite a municipality’s current healthy financial position and adequate service will be subject to heightened scrutiny by the Commission. As made clear above, this is simply not the standard established by the plain language **and/or** the Pennsylvania Supreme Court’s interpretation of section 1103 of the Public Utility Code. Thus, the Township respectfully submits that Judge Guhl misapplies the section 1103 standard for issuance of *Certificates of Public Convenience* in her Recommended Decision.

From the Township’s perspective, if the Commission adopts this Recommended Decision, elected officials around the Commonwealth will be discouraged from selling their wastewater systems unless or until they can affirmatively prove imminent financial distress, substandard service, or failures in their operation of their respective system. In other words, the

Recommended Decision potentially creates a perverse incentive for a municipality that provides adequate service to its customers – like East Whiteland – to somehow provide unsafe, unreliable, or inadequate service to its customers to ensure that the Commission will approve a proposed sale – a perverse, and wholly unnecessary, disincentive, and surely not what was intended by the legislature.

Accordingly, the Township respectfully submits that Judge Guhl misapplied the section 1103 standard. Aqua satisfied its burden to prove that the Proposed Transaction will promote the service, accommodation, convenience or safety of the public. This Application should not be subject to heightened scrutiny simply because East Whiteland has a healthy financial position and reputation for safe, reliable service to its customers. To hold otherwise is in direct contravention of the Commission’s overall goal to improve the environment and public health by providing safe, reliable service throughout the Commonwealth.

#### **IV. INCORPORATION OF AQUA’S EXCEPTIONS**

East Whiteland adopts and incorporates by reference the Exceptions filed by Aqua to the Recommended Decision.

#### **V. CONCLUSION**

Accordingly, the Township respectfully submits that Judge Guhl erred in concluding that the Application should be denied. The Commission is presented with a record that fully demonstrates that the Application should be approved based on numerous substantial affirmative public benefits and satisfies As such, the Township respectfully requests that the Commission grant the Exceptions submitted by East Whiteland and Aqua regarding the Recommended Decision, and approve the Application.

Respectfully submitted,

*/s/ Matthew S. Olesh*

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Dated: May 20, 2022