

# Buchanan

Ingersoll · Rooney

**John F. Povilaitis**  
717 237 4825  
john.povilaitis@bipc.com

409 North Second Street  
Suite 500  
Harrisburg, PA 17101-1357  
T 717 237 4800  
F 717 233 0852

July 29, 2022

**VIA EFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120


Re: Application of Aqua Pennsylvania Wastewater, Inc., pursuant to Section 1102 and 1329 of the Public Utility Code for Approval of the Acquisition by Aqua of the Wastewater System Assets of Willistown Township;  
Docket No. A-2021-3027268

Dear Secretary Chiavetta:

Enclosed please find the Answer of Aqua Pennsylvania Wastewater, Inc. to Petition for Stay Pending Judicial Review, filed in the above-referenced proceeding.

Copies are being served as indicated in the attached Certificate of Service.

Very truly yours,

  
John F. Povilaitis

JFP/tlg  
Enclosure  
cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania Wastewater, Inc., pursuant to Section 1102 and 1329 of the Public Utility Code for Approval of the Acquisition by Aqua of the Wastewater System Assets of Willistown Township	:	:	:	Docket No. A-2021-3027268
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---	---	---------------------------

**ANSWER OF AQUA PENNSYLVANIA WASTEWATER, INC. TO PETITION FOR  
STAY PENDING JUDICIAL REVIEW**

Aqua Pennsylvania Wastewater, Inc. (“Aqua” or the “Company”) answers the Petition for Stay Pending Judicial Review (“Petition”) filed by Robert Swift (“Swift” or “Petitioner”) in accordance with the Pennsylvania Public Utility Commission (“Commission” or “PaPUC”) at 52 Pa. Code Section 5.572(e) and represents as follows:

**I. Summary of Aqua Relief Requested**

1. The Petition fails to support the required standard justifying a stay of the Commission’s action in approving the transaction at issue in this proceeding and, accordingly, the Commission should promptly enter an order denying the relief requested in the Petition.

**II. Background**

2. The Petition seeks a stay of the Commission’s Opinion and Order entered July 8, 2022 (“Final Order”) approving, among other things, the issuance of a Certificate of Public Convenience (“CPC”) to Aqua in connection its purchase of the wastewater system assets of Willistown Township.

3. The Commission, in the 172 page Final Order, thoroughly considered, evaluated and ultimately decided all pertinent issues regarding the granting of a Chapter 11 CPC to Aqua under 66 Pa.C.S. § 1102(a)(3) of the Public Utility Code (“Code”), and authorization under Section 1329 of the Code, 66 Pa. C. S. § 1329. Those litigated issues included, among other things,

ratemaking rate base value of the proposed acquired assets, due process claims, substantial affirmative public benefits, rate freeze, and disposition of municipal and utility contracts. After full litigation of these issues, the Commission found it was in the public interest to approve Aqua's Application to acquire Willistown Township's wastewater system assets subject to certain conditions. Final Order, Ordering Paragraph No, 7 at 165-166.

4. Not satisfied with the Final Order, Swift seeks a stay of the Final Order pending the filing of a Petition for Review with the Commonwealth Court.

5. Swift has neither filed a Petition for Review with the Commonwealth Court nor shared with Aqua a summary of the alleged arguments to be made in any such filing challenging the Final Order on appeal. Consequently, Aqua was unable and unwilling to provide any consent to Swift's request in his correspondence of July 12, 2022, that Aqua agree to a stay of the Final Order pending his alleged appeal. To do so would have required Aqua to speculate about what might be argued on appeal and, more importantly, a stay would delay Aqua from closing on the underlying wastewater system asset acquisition, thereby impairing the public interest and depriving the public the substantial affirmative public benefits of the transaction identified and found by the Commission in the Final Order.

### **III. Legal Standards**

6. While the Petitioner generally recites the legal standards applicable to the filing of stay requests in *Pa.P.U.C. v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983) ("*Process Gas*") (Petition, §§ 6-7), he does not fully and accurately explain the Commission's application of those standards.<sup>1</sup>

---

<sup>1</sup> The *Process Gas* criteria for the grant of a stay is 1) make a strong showing of likelihood to prevail on the merits, 2) show that denial of relief will cause irreparable injury, 3) show that issuance of a stay will not substantially harm other interested parties in the proceedings, and 4) show that the issuance of a stay will not adversely affect the public interest. *Process Gas*, 502 Pa. at 552-553, 467 A.2d at 808-809.

7. First, in applying the *Process Gas* standard to a stay request, the Commission has found it significant whether the issues to be raised on appeal were the subject of a fully litigated proceeding that addressed the facts and arguments raised by the parties during the proceeding. *Application of Artesian Water Pennsylvania, Inc.* Docket Nos. G-2019-3013770, G-2016-2544455, A-2017-2639994, 2020 WL 2764479 (Opinion and Order entered May 21, 2020) (“*Artesian Water*”) at 7. Aqua’s request for authorization to acquire the Willistown Township sewer system has been fully litigated before the Commission and Swift’s arguments were fully considered on their merits.

8. Second, the Commission has consistently concluded that the first of the *Process Gas* standards, likelihood to prevail on the merits on appeal, is “not applicable” to a request for a stay directed to the Commission where the PaPUC has already had an opportunity to rule on the substantive facts at issue. *Id.*, citing, *Pa.P.U.C. v. UGI Corp.*, 57 Pa.P.U.C. 83, 88-89 (1983); *Implementation of Act 40 of 2017, Petition of Cypress Creek Renewables, LLC for a Stay or Supersedeas of the Commission’s Final Implementation Order Entered May 3, 2018*, Docket No. M-2017-2631527, 2018 WL 3740734 (Opinion and Order entered August 2, 2018).

9. Where a petitioner has failed to satisfy the standard of establishing irreparable injury, the Commission has found it *unnecessary* to consider the remaining *Process Gas* criteria for granting a stay. *Myers v. PPL*, Docket No. C-2017-2620710, 2019 WL 7562347 (Order entered December 19, 2019) (“*Myers*”) at 11.

10. Finally, Swift incorrectly suggests that the Commission can find the first criteria of *Process Gas*, a strong showing of likelihood to prevail on the merits of the appeal, is met by merely “a substantial case on the merits”. Petition ¶ 8. In fact, the Commission has determined that a substantial case on the merits is a relevant criteria only when a strong showing has been made on

the second through fourth factors of the standard (i.e., denying the stay will cause irreparable harm, no substantial harm to other parties from a stay, issuance of a stay will not adversely affect the public interest). *Hoffman-Lorah v. PPL*, Docket No. C-2018-2644957, 2020 WL 128688 (Order entered December 19, 2019) at 6.

11. Nevertheless, the Petition fails to support any stay of the Final Order pending appeal under any of the *Process Gas* standards.

*a. A showing of likelihood to prevail on the merits is not applicable to a stay request where the issues have been fully litigated, and Swift has not made a strong showing he is likely to succeed on the merits.*

12. The Commission has previously concluded that the first *Process Gas* criteria, a strong showing of likelihood to prevail on the merits of an appeal, is “not applicable” to a stay request where the Commission has already had an opportunity to rule on the facts at issue. *Artesian Water* at 7. Moreover, Swift’s claim that he has significant and substantial claims and that he will succeed on the merits of his appeal appears to be based entirely on substantial evidence grounds. For example, he claims that “[t]he Commission gave undue weight to consolidation and regionalization...” and also “... gave little or no weight to substantial evidence of a likely 86% rate increase to Willistown sewer users.” Petition, ¶ 10. There is no mention of any other type of appellate claim in the Petition other than lack of substantial evidence.

13. The Petition fails to acknowledge the overwhelming substantial and probative evidence of record before the Commission on (i) the two broad issues identified by the Petition, as well as (ii) the substantial affirmative public benefits of the *entire* underlying wastewater system asset acquisition. For example, the Final Order devotes twenty pages on the substantial affirmative public benefits of the transaction including, but certainly not limited to, the issues of consolidation and regionalization and the potential rate increase to Willistown Township’s customers. Final

Order at 54-74.<sup>2</sup> The findings and conclusions of the Final Order on the issue of substantial affirmative public benefits at pages 54-74 are replete with citations to specific portions of Aqua testimony supporting those findings and conclusions, which was admitted into the evidentiary record of the case.

14. On the regionalization and consolidation issue, the Final Order noted that the Commonwealth Court itself has “acknowledged the finding that the Commission has a policy in support of consolidation and regionalization of wastewater system assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities.” Final Order at 58. *See also, McCloskey v. Pa.PUC*, 195 A.3d 1055 (Pa. Cmwlth. 2018), *appeal denied*, 207 A.3d 290 (Pa. 2019). “. . . [T]hese aspirational statements are substantial evidence to support the notion that there is a public benefit for the merger.” *McCloskey*, 195 A.3d at 1065.

15. The Commission’s longstanding support for consolidation and regionalization of water and wastewater systems goes back to at least 2006 in the Commission’s *Final Policy Statement on Acquisitions of Water and Wastewater Systems*, Docket No. M-00051926 (Order entered August 17, 2006). Final Order at 60. The same policy goals were more recently reiterated after the enactment of Code Section 1329. *See, generally, Implementation of Section 1329 of the Public Utility Code – Tentative Implementation Order*, Docket No. M-2016-2543193 (Order entered July 21, 2016). Final Order at 61.

16. In light of such overwhelming factual and policy support, both in the Final Order and in related but separate proceedings, Swift’s claims regarding undue weight on consolidation and regionalization of the water and wastewater business are unlikely to prevail on the merits.

---

<sup>2</sup> As also noted in the Final Order, pages 65-78 of the Recommended Decision contained a summary of Aqua’s further arguments regarding affirmative public benefits in response to the positions of the various Parties.

17. The Final Order also comprehensively addressed the potential rate increase to Willistown Township’s customers, making it unlikely that Swift’s efforts to focus on one aspect of the proposed transaction and not on the balancing of the benefits and claimed detriments of the transaction can support a stay pending judicial appeal.

18. As noted above, the Final Order engaged in a comprehensive evaluation of all testimony pertaining to potential benefits of the proposed transaction, including *balancing* those demonstrated benefits against all alleged detriments, and concluded that the substantial affirmative public benefits required under Pennsylvania law to be met to support relief under Code Chapter 11 were fully satisfied. And, with respect to Swift’s express concerns about potential future rate increases to the former Willistown Township customers, the Commission addressed a number of critical factors including its findings that (i) “Willistown customers will benefit from a 17% reduction in operating expenses under Aqua’s ownership...” (Final Order at 63); (ii) “Aqua will invest approximately \$3.3 million in the acquired over ten years which will include upgrades to pump stations, force mains and gravity collection systems ...” (Final Order at 63); (iii) “Required capital expenditures to Willistown’s System could further rise to \$5 million over ten years and Aqua has committed to making the necessary improvements beyond the presently estimated \$3.3 million (Final Order at 62-63); and (iv) “... [T]he rate deficiency emphasized by the ALJ is only a preliminary analysis of the potential impact on the Township’s customers” and “... is a non-binding estimate of the incremental rate effect of the proposed rate base increase ...”. Final Order at 70.

19. The key take-away from the Final Order’s analysis of rate impacts is that it is highly unlikely that the Code Section 1329 valuation would have a \$0 impact on rates and it is equally

unlikely that such valuation would result in a full allocation of such costs (acquisition and others) to a rate division comprised solely of former Willistown Township customers. Final Order at 70.

20. There is little doubt that the Commission in the Final Order considered and balanced *all* the testimony bearing on what Swift claims to support a stay pending judicial appeal:

When considering all the factors, including the impact on rates, we find the benefits of Aqua's ownership outweigh the purported harms outlined by the OCA and the Opposing Intervenors.

Final Order at 71.

21. Swift has neither made citations to the record or the Final Order to substantiate his claims on the merits nor demonstrated that substantial legal questions must be resolved to determine the rights of the parties. *Fisher v. Dep't of Public Welfare*, 439 A.2d 1172 (Pa. 1982). Accordingly, there is no reasonable likelihood that Swift's claims of error with respect to the Final Order will prevail in any appeal.

b. *No irreparable injury will occur if the Final Order is implemented.*

22. In support of his claim of irreparable injury, Swift cites four factors: (i) under Aqua ownership the billing system will change, (ii) consummation of the transaction will change who customers contact in the event of a sewer malfunction and change the cost for remedial action if the malfunction includes a lateral sewer line, (iii) the obligation of Willistown Township to pay a contingent fee to PFM Advisors in the amount of \$350,000, and (iv) the alleged time, difficulty and expense of unwinding a completed sale. Petition ¶¶ 11-13. Swift cites no record evidence in support of these allegations and none of them are meritorious.

23. Regarding factors (i) and (ii), new rules for customers routinely occur when a sewer system changes hands from a municipal system to an investor-owned system regulated by the



PaPUC. In the event the transaction was required to be unwound, the customer rules would just revert to the rules previously in effect. None of this constitutes irreparable harm.

24. Swift alleges that a fee paid to PFM Advisors by Willistown Township may not be recoverable if the sale must be unwound and that unwinding the sale will be difficult, expensive and time consuming. Petition ¶¶12-13. But Swift cites no evidence showing the un-recoverability of this fee or the difficulty, cost or time related to unwinding the transaction. Indeed, the provision of the Asset Purchase Agreement referencing fees to PFM does not address *when* those fees should be paid other than to indicate they should be paid “when due.” Aqua Application Exhibit B, APA, Section 4.15. Thus, contrary to the Petition’s implication, the payment of the PFM fees is *not tied* to the closing of the transaction and will not be an issue if the transaction had to be unwound. Further, Swift cites no precedent for the implicit proposition that either paying money that may need to be refunded or the alleged difficulty and expense in unwinding a consummated transaction constitute “irreparable” harm that supports granting a stay of the Final Order.

25. But there is law specifically regarding irreparable harm that exists and it provides no support for Swift’s claims. The Commission has held that financial harm does not constitute irreparable harm as a matter of law. *Pa.P.U.C. v. American Eagle Express, Inc.*, Docket No. A-104531C851, 61 Pa.P.U.C. 826, 0086 WL 1179836 (Order entered July 24, 1986), *citing SAMERIC Corp. v. Gross*, 448 Pa. 497, 295 A.2d 277 (1972).<sup>3</sup> Disruption to customers’ service

---

<sup>3</sup> Federal jurisdictions have similar views of what constitutes irreparable harm. Irreparable injury occurs when money damages are difficult to ascertain or would be inadequate. *In re Arthur Treacher’s Franchise Litig.*, 689 F.2d 1137, 1146 (3d Cir. 1982). The “availability of money damages for an injury typically will preclude a finding of irreparable harm.” *Reilly*, 858 F.3d at 179 n.4 (*citing Frank’s GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 & n.3 (3d Cir. 1988) (finding that “[t]he availability of adequate monetary damages belies a claim of irreparable injury”). The Third Circuit Court of Appeals has “long held that an injury measured in solely monetary terms cannot constitute irreparable harm.” *Liberty Lincoln–Mercury, Inc. v. Ford Motor Co.*, 562 F.3d 553, 557 (3d Cir. 2009), *rev’d in part on other grounds*, 676 F.3d 318 (3d Cir. 2012); see also *Arthur Treacher’s*, 689 F.2d at 1145 (“[W]e have never upheld an injunction where the claimed injury constituted a loss of money, a loss capable of recoupment in a proper action at law.”).

can be a factor in determining the presence of irreparable harm, however Swift has presented no credible evidence that unwinding the proposed transaction will instigate any service disruptions. *Nationwide Mutual Insurance Co. et al. v. Commonwealth of PA. Insurance Dept. et al.*, 522 A.2d 1167, 1171 FN 5, 104 Pa. Cmwlth. 301, 310 (1987).

26. At best, Swift's alleged "irreparable harm" claims can be addressed, if necessary, by clear prospective legal and equitable relief. And, to the extent Swift is concerned with money Willistown Township might need to expend if the proposed sale transaction proceeds, that too fails to support the type of irreparable harm justifying a stay pending appeal.

27. In a prior proceeding where the completed acquisition of three water companies was reversed, the Commission did not find the unwinding of the transaction to be too expensive, time consuming or difficult. Almost two years after the utility acquired three water companies on December 24, 1991, the Commission on November 2, 1993 directed Public Service Water Company, a certificated public utility, to relinquish all the property of the three water companies to their former owner and provide the former owner of the companies written lists of each utility's customers, accounts payable and receivable, tax and insurance information, current employees engineering reports, pending lawsuits and cash receipts and disbursements.<sup>4</sup> The Commission denied a request for supersedeas of its November 3, 1993 Order and the Commonwealth Court on appeal upheld the Commission's Order directing relinquishment. *Public Service Water Co. v. Pa.P.U.C.*, 645 A.2d 423, 424, 426, 430, 165 Pa. Cmwlth. 463, 466-467, 469-470, 478. Swift has made no credible, substantial or tangible showing that unwinding the Aqua-Willistown Township transaction would present costs or difficulties warranting the issuance of a stay.

---

<sup>4</sup> This almost two year time period during which Public Service owned the three utilities before the Commission directed relinquishment and reversed the sale transaction, exceeds the normal time period within which the Commonwealth Court could be expected to render a decision on Swift's appeal.

28. Swift has not convincingly demonstrated that irreparable harm will result if the Final Order is not stayed. When a petitioner has failed to satisfy the standard of establishing irreparable injury, the Commission has found it unnecessary to even consider the remaining *Process Gas* criteria for granting a stay. *Myers* at 11. However, should the Commission consider those additional criteria of *Process Gas*, as explained below, it will find that Swift has not met those criteria either.

c. *Numerous parties will be substantially harmed if a stay is granted.*

29. Swift's unsupported assertions of no harm to Aqua and Willistown Township if a stay of the Final Order is implemented are both wrong and unreasonably limited in scope. Petition ¶ 15. First, the Commission has found substantial affirmative public benefits of the proposed transaction. A stay pending appeal potentially denies to the public, including the customers and citizens of Willistown Township, the numerous identified benefits. Second, Swift's claim that escrowing the \$17.5 million in an interest bearing escrow account somehow maintains the status quo misses the point that delaying the closing denies to various stakeholders the various public benefits already found by the Commission in the Final Order. Substantial harm would be imposed on the public by a stay.

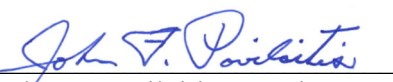
d. *Granting a stay of the Final Order will undeniably adversely affect the public interest*

30. For all the reasons specified above, granting a stay of the Final Order will profoundly and adversely affect the public interest by delaying to all of the key stakeholders the already established affirmative public benefits of the proposed purchase and sale of Willistown Township's wastewater assets to Aqua. A stay would deny Willistown Township sewer customers the near term benefits of (i) expanded availability of emergency response personnel around the clock and throughout the year to receive calls and direct licensed service personnel to handle

wastewater emergencies, (ii) online bill payment options including pay-by-text and email and phone notifications for service impact events, (iii) the customer protections of Chapter 14 of the Code and added oversight of the billing process, and (iv) access to customer assistance programs such as the Helping Hands program to benefit low income customers. Final Order at 66, citing Aqua St. 1 at 16, Aqua St. 1-R at 35-36. A stay would adversely affect the public interest in implementing Aqua's acquisition of the Willistown Township sewer system.

WHEREFORE, Aqua Pennsylvania Wastewater, Inc. respectfully requests that the Commission deny the Petition for Stay filed by Robert Swift in its entirety and grant Aqua such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

By:   
John F. Povilaitis, Esquire  
Alan M. Seltzer, Esquire  
409 North Second Street, Suite 500  
Harrisburg, PA 17101-1357  
[john.povilaitis@bipc.com](mailto:john.povilaitis@bipc.com)  
[alan.seltzer@bipc.com](mailto:alan.seltzer@bipc.com)

*Attorneys for Aqua Pennsylvania Wastewater, Inc.*

Dated: July 29, 2022

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania :  
Wastewater, Inc., pursuant to Section 1102 and :  
1329 of the Public Utility Code for Approval : Docket No. A-2021-3027268  
of the Acquisition by Aqua of the Wastewater :  
System Assets of Willistown Township :

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of the foregoing document upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

**Via Email:**

Erika L. McLain, Prosecutor  
Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
[ermclain@pa.gov](mailto:ermclain@pa.gov)

Erin K. Fure  
Assistant Small Business Advocate  
Office of Small Business Advocate  
[efure@pa.gov](mailto:efure@pa.gov)

Thomas Wyatt, Esquire  
Matthew S. Olesh, Esquire  
Sydney N. Melillo, Esquire  
Obermayer Rehmman Maxwell & Hippel, LLP  
[Thomas.Wyatt@obermayer.com](mailto:Thomas.Wyatt@obermayer.com)  
[Matthew.Olesh@obermayer.com](mailto:Matthew.Olesh@obermayer.com)  
[Sydney.Melillo@obermayer.com](mailto:Sydney.Melillo@obermayer.com)

Senator Tim Kearney  
[cameron.allen@pasenate.com](mailto:cameron.allen@pasenate.com)

Michelle and Jeffrey Atchison  
[Atchison@me.com](mailto:Atchison@me.com)


Mackenzie C. Battle  
Harrison W. Breitman  
Assistant Consumer Advocates  
Erin L. Gannon  
Christine Maloni Hoover  
Senior Assistant Consumer  
Advocates  
Office of Consumer Advocate  
[OCAAquaWillistown@paoca.org](mailto:OCAAquaWillistown@paoca.org)

Julie Frissora  
[julifriss@yahoo.com](mailto:julifriss@yahoo.com)

Henry Yordan  
[henryyordan@aol.com](mailto:henryyordan@aol.com)

Robert A Swift, Esq.  
[rswift@kohswift.com](mailto:rswift@kohswift.com)

Date: July 29, 2022

  
\_\_\_\_\_  
John F. Povilaitis, Esq.