



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

August 22, 2022

Via Electronic Filing

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

Re: Application of NextEra Water Pennsylvania, LLC for All of the Necessary Authority, Approvals, and Certificates of Public Convenience: (1) Conferring Upon NextEra Water Pennsylvania, LLC the Status of a Pennsylvania Wastewater Public Utility authorized to furnish and supply wastewater service to or for the public within the Commonwealth; (2) for the Approval of Affiliated Interest Agreements; (3) Approval of the Rules and Regulations for the Initial Tariff of NextEra Water Pennsylvania, LLC; and (4) for any Other Approvals Necessary In Advance of the Contemplated Transaction

Docket Nos.: A-2022-3033924

G-2022-3033925

Protest of the Bureau of Investigation and Enforcement

Dear Secretary Chiavetta:

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

Copies are being served on parties of record per the attached Certificate of Service. Should you have any questions, please contact the undersigned.

Respectfully Submitted,

Carrie B. Wright

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CBW/jfm
Enclosures

cc: Per Certificate of Service
Paul T. Diskin, Director, Bureau of Technical Utility Services (*via email only*)
Sean Donnelly, Supervisor, Bureau of Technical Utility Services (*via email only*)

U.S. Water Services Corporation,⁴ will “oversee and manage the O&M of the wastewater facilities to provide safe and reliable wastewater service.”⁵ However, the Pennsylvania Public Utility Code⁶ mandates that *public utilities*, not third-party contractors, furnish and maintain adequate, efficient, safe, and reasonable service and facilities.⁷ The distinction is important because while the Commission regulates public utilities, it has no mechanism of enforcing public utility laws, regulations, and orders upon unregulated third-parties. While NEWPA’s Application indicates its intention to onboard all the current Union and Non-Union legacy Towamencin employees,⁸ this representation does not assuage I&E’s concerns. On the contrary, the Application clearly indicates that U.S. Water will provide daily management oversight for the operation and maintenance of the system.⁹ Therefore, while NEWPA’s plan to hire system employees may provide some continuity of experience, NEWPA nevertheless expressly assigns operation and maintenance obligations to U.S. Water.

The Commission’s Bureau of Investigation and Enforcement¹⁰ avers that Pennsylvania law, Pennsylvania public utility status, and the privilege of serving regulated ratepayers in Pennsylvania are incompatible with NEWPA’s express intent to contractually abdicate responsibility to operate and maintain the Towamencin wastewater system, including environmental compliance and customer service obligations, to U. S. Water. Absent a commitment to serving jurisdictional Pennsylvania customers in accordance with

⁴ Hereinafter “U.S. Water.”

⁵ NEWPA Application, Statement No. 3, p.3.

⁶ Hereinafter “the Code.”

⁷ 66 Pa. C.S. § 1501, Character and Service of Facilities.

⁸ NEWPA Application, p. 9, ¶25.

⁹ NEWPA Application, p. 9, ¶26.

¹⁰ Hereinafter “I&E.”

Pennsylvania law, there is no basis for NEWPA to be granted public utility status in Pennsylvania.

Additionally, NEWPA's Application demonstrates that it is not technically fit to operate the Towamencin wastewater system. Simply put, because NEWPA apparently cannot, and currently does not, propose to actually operate the system it seeks permission to acquire, nor will it serve the customers of that system, an award of a certificate of public convenience would be unnecessary and improper. I&E submits that NEWPA's Application, including supporting testimony and the proposed tariff it includes, demonstrate that its Application is contrary to the public interest, and it should be denied.

A. Procedural History

By Secretarial Letter dated July 20, 2022, the Commission acknowledged receipt of NEWPA's Application. Pursuant to 52 Pa. Code §5.14, the Pennsylvania Public Utility Commission ("Commission") published notification of NextEra's Application in *the Pennsylvania Bulletin*. The Commission's notice appeared in *the Pennsylvania Bulletin* on August 6, 2022¹¹ and it directed that formal protests and petitions to intervene must be filed in accordance with Title 52 of the Pennsylvania Code, on or before August 22, 2022. Additionally, by way of a letter dated August 4, 2022 and an accompanying Affidavit of Publication from the Philadelphia Inquirer, NEWPA represented that it had met the Commission's publication directives. I&E now submits this timely Protest to NEWPA's Application.

¹¹ 52 Pa.B. 4492.

B. I&E's Standing to Protest

The Commission established I&E to serve as the prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Code, and Commission regulations.¹² I&E, through its prosecutors, has standing and broad authority to participate in all Commission proceedings and to initiate enforcement actions and prosecutions in the public interest.¹³ I&E's responsibility to protect the public interest requires balancing the interests of ratepayers, the regulated utility, and the regulated community as a whole.

Importantly, as NEWPA seeks to establish itself as a Pennsylvania public utility and also seeks permission to begin providing wastewater service to 7,625 customers in Montgomery County Pennsylvania, part of I&E's charge in this case is to evaluate whether NEWPA is fit to operate and maintain the Towamencin wastewater system and to serve its customers. Additionally, I&E's charge to protect the public interest requires it to evaluate how NEWPA's Application, including its proposal to operate and maintain the Towamencin wastewater system through an unregulated Florida-based corporation, will impact ratepayers, NEWPA itself, and the regulated community.

C. Applicable Standards

Section 1102 of the Code requires that the Commission issue a Certificate of Public Convenience as a legal prerequisite to an entity offering service, abandoning service and certain property transfers by public utilities or their affiliated interests. A certificate can only

¹² 66 Pa.C.S. §§ 101 *et seq.*; 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).

¹³ *Id.* at 5.

be granted upon findings that the granting of such certificate is "necessary or proper for the service, accommodation, convenience or safety of the public."¹⁴ In its public interest analysis, the Commission should consider the benefits and detriments of the transaction "with respect to the impact on all affected parties, and not just on one particular group or geographic subdivision."¹⁵ Furthermore, in accordance with to Section 1103 of the Code, NEWPA must show that it is technically, legally, and financially fit to own and operate the wastewater assets it proposes to acquire from Towamencin Township.¹⁶ Of special import here, while currently certificated public utilities are entitled to a rebuttable presumption they are technically, financially and legally fit,¹⁷ there is no such presumption for NEWPA, as it is not a certificated public utility in Pennsylvania.

At this time, and absent further investigation, there is insufficient information in NEWPA's Application to enable I&E to take any position on its claims that it is legally and financially fit to own and operate to wastewater facilities in Towamencin, Pennsylvania.¹⁸ Accordingly, I&E submits that at a minimum, the Commission should permit interested parties with an opportunity to investigate NEWPA's claims regarding legal and financial fitness in order to inform any determination of these claims by the Commission. Nevertheless, I&E avers that sufficient basis now exists for the Commission to deny NEWPA's Application without the need for any further process or investigation because

¹⁴ 66 Pa. C.S. § 1103(a). *See City of York v. Pa. P.U.C.*, 449 Pa. 136, 141; 295 A.2d 825, 828 (1973); *see also Popowsky v. Pa. P.U.C.*, 594 Pa. 583; 937 A.2d 1040 (2007).

¹⁵ *Middletown Twp. v. Pa. P.U.C.*, 482 A.2d 674, 682 (Pa. Commw. 1984).

¹⁶ *Seaboard Tank Lines v. Pa. PUC*, 502 A. 2d 762, 764 (Pa. Cmwlt. 1985); *Warminster Twp. Mun. Auth. v. Pa. PUC*, 138 A.2d 240, 243 (Pa. Super. 1958).

¹⁷ *South Hills Movers, Inc. v. Pa. P.U.C.*, 601 A.2d 1308, 1310 (Pa. Cmwlt. 1992).

¹⁸ NEWPA's Application, Paragraphs 21-23 and 30-34, respectively.

as I&E explains below, the facts alleged in NEWPA’s Application directly contradict its assertion that it is technically fit to own and operates the wastewater facilities.¹⁹ Simply put, because NEWPA apparently cannot, and currently does not, propose to actually operate the system it seeks permission to acquire, an award of a certificate of public convenience would be unnecessary and improper.

II. NEWPA is Not Technically Fit to Furnish Wastewater Service in Pennsylvania

Although NEWPA admits that as a predicate to receiving its requested certificate of public convenience, it must demonstrate that it has “sufficient staff, facilities, and operating skills to provide the proposed service,”²⁰ I&E is concerned that its Application seeks to contract out its service obligations to an unregulated Florida-based entity.

While NEWPA alleges that U.S. Water has a regional office in Norristown, Pennsylvania, and that U. S. Water provides water and wastewater services in 20 states, it is what is not alleged that draws concern. Notoriously absent from NEWPA’s Application is any claim that U.S. Water has operated in Pennsylvania or that U.S. Water has any experience or even familiarity with the regulatory obligations of a Pennsylvania public utility. Despite the operational and service obligations that *Pennsylvania public utilities* must meet,²¹ NEWPA’s Application indicates that it is “retaining” U.S. Water as a third-party operator responsible for providing “daily management oversight for the operation and maintenance of the system, customer service and billing services, and environmental compliance for the Towamencin wastewater facilities.”²² It is unclear what contractual terms

¹⁹ NEWPA Application, pp.

²⁰ NEWPA Application, p. 6, ¶17.

²¹ 66 Pa. C.S. ¶1501.

²² NEWPA Application, p. 9, ¶26.

will govern U.S. Water’s third-party operator role, since the only information available is that NEWPA and U.S. Water are not affiliated with each other and that NEWPA “intends to enter into agreement” for U.S. Water’s services.²³

Nevertheless, the Application does make it clear that NEWPA intends to purchase the Towamencin assets and then pass its operational and service obligations to U.S. Water. More specifically, NEWPA witness Christopher Saliba clearly states that U.S. Water will “oversee and manage the O&M of the wastewater facilities to provide safe and reliable wastewater service.”²⁴ Therefore, no additional investigation is necessary to determine that NEWPA’s intention, should it be granted status as a Pennsylvania public utility, is to acquire a wastewater system and then pay an out-of-state corporation to operate and maintain the system and to serve that system’s customers. On this basis alone, it is clear that granting NEWPA a certificate of public convenience is not necessary or proper for the service, accommodation, convenience, or safety of the public since U.S. Water would be responsible for system and service obligations.

I&E submits that NEWPA’s attempt to simultaneously attain public utility status in Pennsylvania and assign its responsibilities is unlawful, contrary to the public interest, and it should be rejected. To be sure, by proposing to contractually assign its obligation to provide safe and reliable wastewater service to ratepayers, NEWPA’s Application offers no nexus of enforcement for the Commission because U.S. Water is not a regulated entity. It is unclear what, if any, remedy the Commission would have to ensure that NEWPA’s ratepayers would receive service in compliance with the Code. Not only would ratepayers be potentially at

²³ NEWPA Application, p. 4, ¶¶9- 10.

²⁴ NEWPA Application, Statement No. 3, p.3.

the mercy of a Florida corporation for operational and service needs, as discussed below as related to NEWPA's Tariff, but such a result is inequitable to Pennsylvania's regulated community members who comply with the Code and are directly responsible, financially and otherwise, to provide safe, reliable, and adequate service to their customers. Accordingly, NEWPA's Application should be rejected because it is facially deficient.

III. NEWPA's Proposed Tariff Demonstrates Its Lack Of Technical Fitness

To be sure, these concerns are exemplified by a review of the proposed tariff containing the Rules and Regulations for service.²⁵ NEWPA's Application specifically requests approval of these Rules and Regulations,²⁶ but I&E avers that no such approval is warranted or should be granted. Indeed, the tariff includes, but is not limited to, the following issues that demonstrate how ratepayers would be harmed by NEWPA's failure to have any meaningful nexus of connection to Pennsylvania:

- Jurisdictional customers in Pennsylvania seeking an application form are being informed that "an Application for Service form can be obtained at the Company's local business office, presently located at 700 Universe Boulevard, Juno Beach, FL 33408."²⁷
- Jurisdictional customers in Pennsylvania seeking an application form for exoneration of Wastewater Service Charges are informed that they must complete an Application for Exoneration of Vacated Property which can be obtained at the Company's local business office, presently located at 700 Universe Boulevard, Juno Beach, FL 33408.²⁸

²⁵ NEWPA Application, Attachment D.

²⁶ NEWPA Application, p. 1, ¶41.

²⁷ NEWPA Application, Attachment D, Original Page No. 4, Provision No. 4. I&E hopes that this is an error, but even in that scenario, it raises concern that approval is being sought for this tariff provision without appropriate review and consideration.

²⁸ NEWPA Application, Attachment D, Original Page No. 7, Provision C(1)(a). I&E hopes that this is an error, but even in that scenario, it raises concern that approval is being sought for this tariff provision without appropriate review and consideration.

- NEWPA’s Proposed Tariff clearly identifies NEWPA as “the Company”²⁹ but such use misrepresents that NEWPA will provide all service-related commitments. The tariff represents that “the Company” will provide all enumerated services and operations, but such representations directly conflict with its own testimony that indicates that U.S. Water’s services “**will include all tasks associated with operations, maintenance, environmental compliance, and customer service and billing.**”³⁰

Although the above-referenced provisions demonstrate only a few of the concerns I&E has identified, I&E avers that they nevertheless demonstrate that the tariff provisions should not be approved because they would be harmful to jurisdictional customers. While I&E recognizes that NEWPA may be able to address the Florida office issues existing in its tariff, no ministerial changes would remedy the issue of the Company’s misrepresentation that it will be providing the services alleged in its tariff. To that end, I&E submits that the tariff issues are simply emblematic of the larger, unavoidable issue here: NEWPA is contracting out its service of the system it seeks to buy. Absent a commitment to serving jurisdictional Pennsylvania customers in accordance with Pennsylvania law, there is no basis for NEWPA to be granted public utility status in Pennsylvania.

²⁹ NEWPA Application, Attachment D, Original Page No. 1.

³⁰ NEWPA Application, Statement No. 4, p. 3 (emphasis added).

IV. CONCLUSION

WHEREFORE, the Bureau of Investigation and Enforcement respectfully requests that the Commission deny NEWPA's Application. In the alternative, if the Commission does not determine to deny NEWPA's Application at this time, it is requested that the Commission suspend any further consideration of it until such time as interested parties have been able to investigate the issues implicated by the Application and have fully developed a record for the Commission's review.

Respectfully submitted,



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Dated: August 22, 2022

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