

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held August 25, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Application of Aqua Pennsylvania Wastewater, Inc., pursuant to 66 Pa. C.S. §§ 1102 and 1329 for: (1) approval of the acquisition by Aqua Pennsylvania Wastewater, Inc. of the wastewater assets of Willistown Township situated within the Township of Willistown, Chester County, Pennsylvania; (2) approval of the right of Aqua Pennsylvania Wastewater, Inc. to begin to offer, render, furnish and supply wastewater service to the public in portions of Willistown Township, Chester County, Pennsylvania; and (3) an order approving the acquisition that includes the ratemaking rate base of the Willistown Township wastewater system assets pursuant to Section 1329(c)(2) of the Public Utility Code

A-2021-3027268

Request for Approval of Contracts, including Assignments of Contracts, between Aqua Pennsylvania Wastewater, Inc. and Willistown Township, Pursuant to Section 507 of the Public Utility Code

Request for Approval of a Contract between Affiliated Interests, Pursuant to Section 2102 of the Public Utility Code.

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Stay Pending Judicial Review (Petition) filed by *Pro Se* Intervenor Robert Swift (Mr. Swift or Petitioner) on July 22, 2022, which seeks a stay of our Opinion and Order entered on July 8, 2022, in the above-captioned proceeding (*July 2022 Order*). Aqua Pennsylvania Wastewater, Inc. (Aqua or the Company) filed an Answer opposing the Petition on July 29, 2022. For the reasons stated more fully, *infra*, we shall deny the Petition.

History of the Proceeding¹

On August 3, 2021, Aqua filed an Application under Sections 1102, 1329, and 507 of the Public Utility Code (Code), 66 Pa. C.S. §§ 1102, 1329, 507, seeking approval of: (1) the acquisition, by Aqua, of the wastewater system assets of Willistown Township (Willistown or the Township); (2) the right of Aqua to begin to offer, render, furnish and supply wastewater service to the public in the requested territory; and (3) an order approving the acquisition that includes the ratemaking rate base of the Township's wastewater system assets pursuant to Section 1329(c)(2) of the Code, 66 Pa. C.S. § 1329(c)(2).² Application at ¶ 3. Aqua also requested approval of the Asset Purchase Agreement (APA) dated January 20, 2021, as well as other municipal agreements and contracts, pursuant to Sections 507 and 2102 of the Code, 66 Pa. C.S. §§ 507, 2102, and

¹ Below is a short summary of the procedural history. For the full History of the Proceeding see pages 1-8 of the *July 2022 Order*.

² Under 66 Pa. C.S. § 1329, *inter alia*, Aqua sought to establish a ratemaking rate base of \$17,500,000 for Willistown's wastewater system assets based on the negotiated purchase price, as the negotiated purchase price of \$17,500,000 is less than the average of the fair market value appraisals, which is \$22,363,070 (determined by \$25,613,000 presented in the appraisal of Gannett Fleming Valuation and Rate Consultants, LLC (Gannett Fleming) and \$19,113,140 presented in the appraisal of AUS Consultants, Inc. (AUS)). Application at 18.

requested that the Commission issue an order and Certificate of Public Convenience (Certificate) approving and addressing the items requested in its Application. Application at ¶¶ 5, 69-72.

On January 25, 2022, an Interim Order was entered granting the Petitions to Intervene filed by Mr. Swift and other intervenors. Mr. Swift also filed a Protest on January 26, 2022.

In the Recommended Decision issued on April 21, 2022, Administrative Law Judge (ALJ) Jeffrey A. Watson found that Aqua had not established that the proposed purchase of the Willistown system would provide substantial affirmative benefits under Section 1102 of the Code. The ALJ also found that the proposed transaction was not necessary or proper for the service, accommodation, convenience, or safety of the public under 66 Pa. C.S. § 1103. Thus, ALJ Watson recommended that the proposed transaction be denied. R.D. at 1, 124, 212-213. The ALJ went on to provide conditional recommendations on the remaining issues in this proceeding if the Commission does not agree with his primary recommendation. In this regard, ALJ Watson recommended adoption of the OCA's proposed adjustments to the fair market value appraisals of Gannett Fleming and AUS.³ R.D. at 171-182. The ALJ also addressed four recommended conditions in the event the Commission approves the Application. R.D. at 195-201.

On May 2, 2022, Aqua, Willistown, the OCA, Mr. Swift and other intervenors filed Exceptions. Replies to Exceptions were filed on May 9, 2022.

³ The Recommended Decision adopted the OCA's proposed adjustments to the Gannett Fleming Cost Approach reducing the Gannett Fleming appraisal result to \$19,567,522. It also adopts the OCA's proposed adjustment to the AUS Cost and Market Approaches that reduce the AUS appraisal result to \$18,038,548.

In the *July 2022 Order*, we (1) granted, in part, and denied, in part, the Exceptions of Aqua, the Township, the OCA, Mr. Swift, and other intervenors; (2) adopted the Recommended Decision, as modified; and (3) approved the Application, as modified.

As noted above, Mr. Swift filed his Petition on July 22, 2022, and Aqua filed an Answer in opposition on July 29, 2022.

Discussion

The Petitioner seeks a stay pending the disposition of his Petition for Review in the Commonwealth Court, or the Pennsylvania Supreme Court, from the *July 2022 Order*. Mr. Swift seeks to preserve the *status quo* pending action by the Commonwealth or Pennsylvania Supreme Court. Petition at 1.

Legal Standards

As a preliminary matter, any issue that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. As to his request for a stay, the burden of proof is therefore on the Petitioner. It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings 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).

In reviewing petitions which seek to stay the effect of Commission Orders, the Commission has adopted the standards set forth in *Pa. PUC v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983) (*Process Gas*). Under *Process Gas*, a grant of a stay is warranted if:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
4. The issuance of a stay will not adversely affect the public interest.

467 A.2d at 808-809. For a stay pending appellate review, the Court found that the petitioner must make a “strong showing” under these criteria to justify the issuance of a stay. *Id.* at 809.

The stay standard has been elucidated further in subsequent decisions of this Commission. *See also, Pa. PUC, et al. v. Pennsylvania Electric Company, et al.*, Docket No. M-2008-2036188, 2010 Pa. PUC LEXIS 248 (Order entered March 25, 2010) (*Pennsylvania Electric*); *Pa. PUC v. UGI Corp.*, 57 Pa. P.U.C. 83, 88-89 (1983) (*UGI*); *Accord Pa. PUC v. Nat’l Fuel Gas Dist. Co.*, 65 Pa. P.U.C. 210, 213 (1987); *Re: General Elec.*, 59 Pa. P.U.C. 61, 63 (1984).

In *Pennsylvania Electric*, the electric utilities filed tariff revisions seeking to adjust their transmission service charges on April 10, 2006. After subsequent tariff

filings and challenges to those filings, the issues were litigated before an administrative law judge resulting in the issuance of a Recommended Decision on August 11, 2009. After consideration of Exceptions filed to the Recommended Decision, the Commission adopted an order on March 3, 2010. It was this order that the utilities sought a stay that was ruled on in an order entered on March 25, 2010. *Pennsylvania Electric* at 1-7. Based on these facts and the procedural history, the Commission, relying on a prior decision in *Pa. PUC v. Makovsky Brothers, Inc.*, 53 Pa. P.U.C. 510 (1979) (*Makovsky*),⁴ “declined to engage in a review of the case as well as any further review of substantive determinations underlying the March 3 Order.” *Id.* at 10.

It was found significant in *Pennsylvania Electric*, that a stay was requested from a Commission order where the Commission ruled on fully litigated proceedings addressing substantive determinations, facts and arguments addressed by the parties during the proceeding. Such is the case in the instant matter, and we have considered Mr. Swift’s Petition with this scenario in mind.

Petition and Answer

Regarding the first *Process Gas* standard, the Petitioner argues that it is likely he will succeed on the merits. Mr. Swift contends that significant questions exist regarding the Commission’s rejection of the Recommended Decision denying the sale of the sewer system. According to the Petitioner, the Commission ignored or rejected the major findings of fact and conclusions of law in the Recommended Decision, frequently without explanation. *Petition* at 3.

⁴ In *Makovsky*, the Commission stated that “[i]n deciding whether to stay one of our orders pending appeal, this Commission should not indulge in a further review of the case.” *Makovsky* at 511.

Mr. Swift also asserts that the Commission gave undue weight to consolidation and regionalization, which have little application to Willistown's standalone sewer system, and gave little or no weight to substantial evidence of a likely 86% rate increase to Willistown sewer users. Believing that there is the likelihood that the Commonwealth Court will find these challenges to the *July 2022 Order* as significant, substantial and meritorious, the Petitioner requests that the Commission stay any issuance of a Certificate to Aqua. *Id.* at 3-4.

Addressing the second *Process Gas* factor, Mr. Swift proffers that irreparable injury will occur without a stay. The Petitioner argues that the sale of the Willistown System will transfer all pumping stations, piping and operation of the system to Aqua as well as changing the billing system to customers so that users will be charged for external water usage, which he describes as water usage that does not enter the sewer. According to Mr. Swift, consummation of the sale will force customers to change who they contact in the event of a sewer malfunction and change the cost for remedial action if the malfunction includes a lateral sewer line. *Petition* at 4.

Additionally, Mr. Swift submits that permitting the sale will require Willistown to pay \$350,000 to PFM Advisors, whose 2% contingent fee is due upon closing of the transaction. *Id.* (citing *Yordan St.* 1 at 12). The Petitioner argues that if the Commonwealth or Pennsylvania Supreme Court reverse the Commission, it will be difficult, expensive and time consuming to unwind the sale operationally, and Willistown may not be able to recover the \$350,000 paid to PFM Advisors. Unless a stay pending appeal is granted, Mr. Swift asserts that the *July 2022 Order* will deprive the Petitioner of meaningful access to judicial process. The Petitioner adds that refunds to sewer customers from excess billing will be difficult and time consuming to recoup. *Petition* at 4.

Regarding the third *Process Gas* standard, the Petitioner submits that Aqua and Willistown will not be substantially harmed by a stay. In support, Mr. Swift contends that the purchase price of \$17.5 million can be deposited in an interest-bearing account. The Petitioner adds that for forty-five years Willistown has ably and successfully operated its sewer system, currently has employees knowledgeable in its operation, and is fiscally able to continue operating the sewer system. According to Mr. Swift, there are no pending Pennsylvania Department of Environmental Protection violations and customers will continue to pay their sewer bills using the Township's billing system. Thus, Mr. Swift concludes there will be no disruption to the sewer system or Willistown customers pending the ultimate disposition of Petitioner's appeal from the *July 2022 Order*. Petition at 4-5.

As to the fourth *Process Gas* factor, Mr. Swift simply states that the issuance of a stay pending appeal will not adversely affect the public interest. *Id.* at 5.

In its Answer, Aqua objects to the Petition arguing that it fails to satisfy the *Process Gas* standards and that the Commission should promptly deny the request for a stay. As a preliminary assertion, the Company states that Mr. 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 *July 2022 Order* on appeal. Thus, Aqua submits that it was unable and unwilling to provide any consent to the Petitioner's request that Aqua agree to a stay of the *July 2022 Order* pending his alleged appeal. According to Aqua, such consent would have required the Company 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 of the substantial affirmative public benefits of the transaction identified and found by the Commission in the *July 2022 Order*. Answer at 2.

Next, Aqua contends that Mr. Swift misstates the *Process Gas* standard involving appeals of a fully litigated proceeding that addressed the facts and arguments raised by the parties during the proceeding. Answer at 3 (citing *Application of Artesian Water Pennsylvania, Inc.*, Docket Nos. G-2019-3013770, *et al.* (Order entered May 21, 2020) (*Artesian Water*)). Aqua also contends that Mr. Swift misapplies the *Process Gas* standard pertaining to irreparable injury and argues that if a petitioner fails to satisfy this standard it is unnecessary to consider the remaining criteria for granting a stay. Answer at 3 (citing *Myers v. PPL*, Docket No. C-2017-2620710 (Order entered December 19, 2019) (*Myers*)).

Additionally, Aqua submits that Mr. Swift incorrectly suggests that the Commission can find the first criterion of *Process Gas* – a strong showing of likelihood to prevail on the merits of the appeal – is met by merely asserting a substantial case on the merits. Rather, the Company argues that a substantial case on the merits is only a relevant standard when a strong showing has been made on the second through fourth factors. Answer at 3-4 (citing *Hoffman-Lorah v. PPL*, Docket No. C-2018-2644957 (Order entered December 19, 2019) (*Hoffman-Lorah*)).

Addressing the individual factors, Aqua contends that pursuant to *Artesian Water* a showing of likelihood to prevail on the merits is not applicable to this stay request where the issues have been fully litigated. Nonetheless, the Company argues that Mr. Swift has not made a strong showing of likely succeeding on the merits. In support, the Company asserts that Mr. Swift has neither made citations to the record or the *July 2022 Order* to substantiate his claims on the merits nor demonstrated that substantial legal questions must be resolved to determine the rights of the Parties. Moreover, the Company submits that 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 pertaining to consolidation and regionalization and the likely rate increase for Willistown customers, as well as (ii) the substantial affirmative public

benefits of the entire underlying wastewater system asset acquisition. According to Aqua, there is no reasonable likelihood that Mr. Swift's claims of error with respect to the *July 2022 Order* will prevail in any appeal. Answer at 4-7.

Regarding the second *Process Gas* factor, Aqua contends that Mr. Swift cites to no record evidence to support claims of irreparable injury if a stay were not granted. Aqua argues that Mr. Swift's assertions of harm pertaining to billing system changes and contact information and costs of remedial actions for malfunctioning later sewer lines lack merit. The Company submits that new rules for customers routinely occur when a municipal system changes hands to an investor-owned system regulated by the Commission. Aqua proffers that if the transaction were to be unwound, the customer rules would simply revert to those previously in effect which does not constitute irreparable harm. Answer at 7-8.

As to Mr. Swift's claim of irreparable harm based on the fee paid to PFM Advisors by Willistown, Aqua argues that there is no evidence showing that the fee would be unrecoverable or that it would be difficult, costly, or time-consuming to unwind the transaction. The Company contends that, in contrast, the APA's reference to fees to PFM does not address when those fees should be paid other than "when due." Answer at 8 (citing Aqua Application, Exh. B, APA at § 4.15). Thus, Aqua contends that 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. Additionally, the Company criticizes Mr. Swift's failure to cite to any 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 *July 2022 Order*. Answer at 8.

Further, Aqua argues that financial harm does not constitute harm as a matter of law and that any alleged irreparable harm can be addressed, if necessary, by

clear prospective legal and equitable relief. Answer at 8-9 (citing *Pa. PUC v. American Eagle Express, Inc.*, Docket No. A-104531C851, 61 Pa. P.U.C. 826 (Order entered July 24, 1986)).

Although contending that it is unnecessary to address the remaining factors due to the failure to establish irreparable harm, Aqua argues that the Petitioner also fails to satisfy the third *Process Gas* factor. Here, the Company asserts that numerous Parties would be substantially harmed if a stay is granted. According to Aqua, a stay pending appeal potentially denies to the public, including the customers and citizens of the Township, the numerous substantial affirmative benefits identified in the *July 2022 Order*. Answer at 10.

Regarding the fourth *Process Gas* factor, Aqua proffers that granting a stay would adversely affect the public interest by delaying to all of the key stakeholders the already established affirmative public benefits of the transaction. Specifically, Aqua submits that Willistown customers in the near term would not have the benefit of (1) 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, (2) online bill payment options including pay-by-text and email and phone notifications for service impact events, (3) the customer protections of Chapter 14 of the Code and added oversight of the billing process, and (4) access to customer assistance programs such as the Helping Hands program to benefit low income customers. Answer at 10-11 (citing, in part, *July 2022 Order* at 66).

Disposition

In his Petition, Mr. Swift essentially claims the *July 2022 Order* lacks substantial evidence in support of the decision to grant the Application. Referencing the first prong of *Process Gas*, the Petitioner contends that “[t]he Commission gave undue

weight to consolidation and regionalization” and “gave little or no weight to substantial evidence of a likely 86% rate increase to Willistown sewer users.” Petition at 3-4. Next, Mr. Swift offers a single, conclusory sentence that the Commonwealth Court will likely find these challenges to be “significant, substantial and meritorious.” *Id.* at 4.

Pursuant to the Court’s guidance in *Process Gas*, the Commission has previously concluded that the first factor – to make a strong showing to prevail on the merits – is “not applicable” to a request for a stay directed to the Commission where the Commission has already had an opportunity to rule on the substantive facts at issue and such ruling is pending appeal (or reconsideration). *See, UGI*, 57 Pa. P.U.C. at 88-89; *see also, 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 (Order entered August 2, 2018) (finding that “the first prong of the four-part test of whether a stay, requiring the petitioner to make a strong showing that he is likely to prevail on the merits, is applicable in a matter where the Commission has not had an opportunity to rule on the substantive facts at issue”). Thus, “[i]n deciding whether to stay one of our orders pending appeal, this Commission should not indulge in a further review of the case. Rather, this Commission should concentrate solely on the effect our order will have pending appeal.” *UGI*, 57 Pa. P.U.C. at 89 (citation omitted).

Lacking in Mr. Swift’s Petition is any well-developed analysis of his claim of error or the alleged resultant likelihood of success on the merits on petition for review. Although we shall not end our inquiry here, we proceed cognizant of the fact that, like the circumstances presented in *Pennsylvania Electric*, Commission review of substantive facts or argument after a fully litigated proceeding would be a rehashing in contravention of the teachings of *Process Gas*. In the instant proceeding, substantive facts relating to Mr. Swift’s general claims have been fully litigated before the presiding officer and addressed by the Commission in the *July 2022 Order*. As such, we shall consider

Petitioner's success on the merits argument only as it relates to whether he has proven the balance of the *Process Gas* test where relevant.

The second criterion of *Process Gas*, the irreparable injury standard, requires a far more substantial affirmative demonstration than that presented by Mr. Swift in his Petition. Here, the Petitioner asserts general contentions that under Aqua ownership the billing system for Township customers will change, the customer contact information for any wastewater malfunctions will change, and the cost for remedial action for any malfunctions will change if the malfunction includes a lateral sewer line. Additionally, Mr. Swift references a 2% contingent fee due to PFM Advisors upon closing of the transaction. According to the Petitioner, if the *July 2022 Order* gets reversed on appeal, Willistown may not be able to recover the \$350,000 payable to PFM Advisors and that refunds to wastewater customers from any excess billing will be difficult and time consuming to recoup. Petition at 4. These contentions fail to demonstrate any tangible irreparable harm.

To the extent that Mr. Swift is arguing that failure to grant a stay may result in economic harm, it is well settled in the law that financial harm is not irreparable.⁵ Moreover, even if economic harm were considered irreparable, the Petitioner cites to no evidence showing that the PFM Advisors fee owed by Willistown may not be recoverable or that it would be difficult, time consuming or costly to do so. Likewise, Mr. Swift's general assertions that it may be difficult, time consuming or expensive to unwind the completed sale are speculative and lack any factual or legal support.

⁵ See, e.g., *Duquesne Interruptible Complainants v. Duquesne Light Co.*, Docket No. C-913424, 1993 WL 854406 (Order entered May 14, 1993) at *5 (citing *Sameric Corporation v. Gross*, 448 Pa. 497, 295 A.2d 277 (1972), *Goadby v. Philadelphia Electric Co.*, 639 F.2d 117 (3d Cir. 1981), and *Virginia Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958)).

Finding that the Petitioner has failed to make a strong showing that without the requested relief he will suffer irreparable injury and consistent with prior Commission decisions, we need not address the remaining *Process Gas* criteria. *See, e.g., Myers* at 17 and *Hoffman-Lorah* at 16.

Conclusion

Based on the foregoing discussion, we shall deny Mr. Swift's Petition;
THEREFORE,

IT IS ORDERED:

That the Petition for Stay Pending Judicial Review filed by *Pro Se* Intervenor Robert Swift on July 22, 2022, is, hereby, denied.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 25, 2022

ORDER ENTERED: August 25, 2022