

April 17, 2023

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Docket Nos. C-2022-3036893 and C-2022-3037118
SCH USA, LLC v. Aqua Pennsylvania Wastewater, Inc.
Motion of Aqua for Judgement on the Pleadings**

Dear Secretary Chiavetta:


Attached for filing is the Motion of Aqua Pennsylvania Wastewater, Inc. for Judgement on the Pleadings (Motion) in the above-captioned proceeding.

A copy of the enclosed Motion has been forwarded to the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris, Esquire

MAM/co
Enclosures

cc: The Hon. John Coogan, PA Public Utility Commission [w/encls.]
Mary McFall Hopper, Esquire, Aqua Pennsylvania, Inc. [w/encls.]
Carl R. Shultz, Esquire [w/encls.]
Lauren M. Burge, Esquire [w/encls.]
Bryce R. Beard, Esquire [w/encls.]

**Re: Docket Nos. C-2022-3036893 and C-2022-3037118
SCH USA, LLC v. Aqua Pennsylvania Wastewater, Inc.
Motion of Aqua for Judgement on the Pleadings**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following person in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

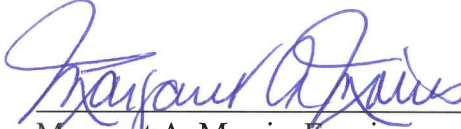
Via Electronic Mail

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Dated: April 17, 2023



Margaret A. Morris, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SCH USA, LLC	:	
	:	Docket No. C-2022-3036893
v.	:	Docket No. C-2022-3037118
	:	
AQUA PENNSYLVANIA WASTEWATER, INC.	:	

NOTICE TO PLEAD

Pursuant to the *Scheduling Order* of the Honorable John M. Coogan, dated March 10, 2023, and Commission regulations at 52 Pa. Code § 5.102, you are hereby notified that if you do not file a written response answering the enclosed Motion for Judgement on the Pleadings of Aqua Pennsylvania Wastewater, Inc. within twenty (20) days from service of this notice, the facts set forth by Aqua Pennsylvania Wastewater, Inc. in the Motion may be deemed to be true, whereby requiring no other proof. All pleadings, such as an Answer to the Motion, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with an electronic copy served to counsel for Aqua Pennsylvania Wastewater, Inc., Margaret A. Morris, Esq., and to the Honorable John M. Coogan, the Presiding Officer in the above-captioned proceeding.

File by Mail or e-filing with:

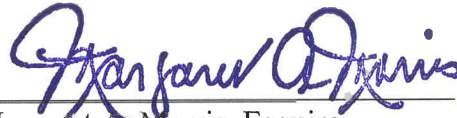
Rosemary Chiavetta, Esquire
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Margaret A. Morris, Esquire
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mmorris@regerlaw.com

Date: April 17, 2023

The Hon. John M. Coogan
jcoogan@pa.gov



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Counsel for Aqua Pennsylvania Wastewater, Inc.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SCH USA, LLC	:	
	:	Docket No. C-2022-3036893
v.	:	Docket No. C-2022-3037118
	:	
AQUA PENNSYLVANIA WASTEWATER, INC.	:	

**MOTION OF AQUA PENNSYLVANIA WASTEWATER, INC. FOR
JUDGMENT ON THE PLEADINGS**

Pursuant to the *Scheduling Order* issued by the Honorable John M. Coogan, dated March 10, 2023, (*Order*) and Commission regulations at 52 Pa. Code § 5.102, Aqua Pennsylvania Wastewater, Inc. (Company or Aqua), by and through its attorneys, Reger Rizzo & Darnall LLP, hereby submits its Motion for Judgment on the Pleadings to the Formal Complaints filed by SCH USA, LLC (Complainant).

PROCEDURAL BACKGROUND

1. On November 21, 2022, Aqua was served a Formal Complaint at Docket No. C-2022-3036893 filed by the Complainant alleging incorrect charges for unmetered wastewater service to three separate accounts at three separate service locations.
2. On December 7, 2022, Aqua was served a Formal Complaint at Docket No. C-2022-3037118 filed by Complainant alleging incorrect charges for unmetered wastewater service to a single account at a single service location.
3. On December 12, 2022, Aqua filed an Answer and New Matter to the Formal Complaint at Docket No. C-2022-3036893 denying the material allegations therein.
4. On December 27, 2022, Aqua filed an Answer and New Matter to the Formal Complaint at Docket No. C-2022-3037118 denying the material allegations therein.
5. On December 29, 2022, the Complainant filed a Reply to New Matter at both dockets (C-2022-3036893 and C-2022-3037118).
6. By Notice, dated January 4, 2023, an Initial Call-in Telephonic Hearing was scheduled in both matters for Friday, March 17, 2023, before the Honorable John M. Coogan.

7. By *Order*, dated January 6, 2023, Docket Nos. C-2022-3036893 and C-2022-3037118 were consolidated.

8. By *Order Converting Hearing to a Prehearing Conference*, dated March 10, 2023, the Initial Call-in Telephonic Hearing scheduled for March 17, 2023, was converted to a Prehearing Conference. Both parties were directed to submit a Prehearing Memorandum identifying the issues and relief requested.

9. Both parties timely filed their respective Prehearing Memorandum.

10. On March 17, 2023, the Prehearing Conference was held as scheduled. Counsel for both parties appeared.

11. The *Scheduling Order* was issued, dated March 10, 2023, directing Aqua to file a motion regarding issues it seeks to resolve prior to the scheduling of an evidentiary hearing.

LEGAL STANDARD

12. In accordance with the Commission's regulations, after the pleadings are closed but within such time as to not delay a hearing, a party may move for judgment on the pleadings. 52 Pa. Code § 5.102(a).

13. A presiding officer should grant a motion for judgment on the pleadings "if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving participant is entitled to judgment as a matter of law." 52 Pa. Code § 5.102 (d)(1). *Hammerstein v. Lindsay, M.D.*, 655 A.2d 597 (Pa. Super. 1995).

14. When deciding whether a motion for judgment on the pleadings should be granted the court must examine the record in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983).

15. The Commission's regulations related to a motion for judgment on the pleadings serves judicial economy where no factual dispute exists. If no factual dispute exists, a hearing is wholly unnecessary. 66 Pa.C.S. § 703(b). *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 563 A.2d 557 (Pa. Cmwlth. 1989).

16. Section 5.102 of the Commission regulations provides for the granting of a Motion where there is no genuine issue as to a material fact and Respondent is entitled to a judgment as a matter of law. 52 Pa. Code § 5.102.

ARGUMENT

17. At issue is Aqua's Commission-approved Tariff for Rate Zone 4 which sets forth the unmetered charge of \$133.35 per Equivalent Dwelling Unit (EDU) as authorized by the Commission's *Opinion and Order*, entered on May 16, 2022 (*2022 Rate Order*). The Complainant receives unmetered wastewater service at the four separate resort service locations (Resort).

18. At the Prehearing Conference, the Complainant identified two issues and the requested relief, to wit: (1) reduce the number of EDU under Rate Zone 4 that are allocated to the Complainant due to the reduction in the Resort's occupancy rate and (2) bill the Complainant based on a metered basis, not flat fee per EDU, going forward.¹

The Commission lacks the jurisdiction to grant the requested relief to reduce the allocation of EDU assigned to the Complainant.

19. Aqua purchased the Wastewater System Assets from Kidder Township in 2012 and maintained the same rate structure for EDU allocation directed by the Department of Environmental Protection (DEP) in the Act 537 Sewage Facilities Plan for Kidder Township, Carbon County, Pennsylvania, which was finalized in May 2000 (Act 537 Plan).

20. The Commission lacks subject matter jurisdiction to entertain and to resolve a dispute regarding the number of EDU allocation set forth in the Act 537 Plan.

21. As a creature of legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Public Utility Code, 66 Pa.C.S. §§ 101, *et seq.* (Code).

22. The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 427 Pa.

¹ The request for a Commission payment arrangement for the non-residential accounts was withdrawn at the Prehearing Conference.

562, 237 A.2d 602 (1967); *Behrend v. Bell of Pa.*, 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); *Harrisburg Taxicab & Baggage Co. v. Pa. P.U.C.*, 786 A.2d 288 (Pa. Cmwlth. 2001); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978).

23. Consistent with Section 501 of the Code², the Commission must “enforce, execute and carry out, by its regulations, orders or otherwise” all the provisions of the Code.

24. Section 701 of the Code,³ allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer. *See also*, 52 Pa. Code § 5.21(a).

25. The Commission and DEP have concurrent jurisdiction over the service and facilities of the Company. *Pickford et al v PAWC*, Docket Nos. C-20078029 *et al*, (Opinion and Order entered March 20, 2018).

26. The Commission has regulatory authority under 66 Pa.C.S. § 1301 *et seq.* over the rates charged by Aqua, whereas the DEP has primary jurisdiction over the Act 537 Plan.

27. The *2022 Rate Order* only addressed and authorized rates per EDU for Rate Zone 4. The *2022 Rate Order* based the authorized rate on the established EDU set forth in the Act 537 Plan.

28. The Commission lacks jurisdiction to entertain a complaint that requests a reduction of the allocated EDU set forth in the Act 537 Plan. Such authority to revise the 537 Plan lies exclusively with DEP. *McGrath Constr., Inc. v Upper Saucon Twp. Bd. Of Supervisors*, 952 A.2d 718 (Commw. Court 2008).

A Complaint proceeding is not the proper forum to request a change to the Commission-approved rate design for Rate Zone 4.

29. The Complainant does not allege that Aqua has violated any provision of the Code, Commission regulations or order, or its Commission-approved tariff.

30. Before Complainant can succeed in their consolidated Complaint, Aqua’s actions must violate the Code, the Commission’s regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701.”

² 66 Pa.C.S. § 501.

³ 66 Pa.C.S. § 701.

31. In order for the Commission to sustain a complaint brought under Section 701, Aqua must be in violation of its duty. Without such a violation by Aqua, the Commission does not have the authority, when acting on a customer's complaint, to require any action by Aqua. *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 478 A.2d 947 (Pa. Cmwlth. 1984).

32. The Complainant alleges that the Rate Zone 4 Tariff is "unreasonable as applied."

33. The appropriate time for the Complainant to raise issues regarding the reasonableness of Rate Zone 4 was during the rate case proceeding that concluded in the *2022 Rate Order. Hersca v. Twin Lakes Utils., Inc.* Docket No. C-2020-3020883, (Opinion and Order issued Aug. 5, 2021).

34. There is no allegation that Complainant did not have notice of Aqua's rate proceeding resulting in the *2022 Rate Order*.

35. The Complainant cannot attack, through the consolidated Complaints, filed pursuant to 66 Pa.C.S. Section 701, challenge the authorized rate structure in the *2022 Rate Order* based on the established EDU allocation. *Hersea, supra*.

36. A complaint proceeding is not the proper forum to request a revision to the rate structure authorized in the *2022 Rate Order*; since any revision will directly impact the Commission authorized rate increase, effective May 19, 2022.

37. The Complainant also seeks to be billed on a volumetric basis going forward.

38. The Complainant is requesting that the Commission direct Aqua to establish metered service which is not authorized under its Commission-approved Tariff for Rate Zone 4.

39. The request to alter Aqua's Rate Zone 4 Tariff is not permissible outside of a rate proceeding. *Jay Larry Moyer v PPL Electric Utilities Corp.*, Docket No. C-2022-3031294, *Opinion and Order* entered December 8, 2022.

40. The *2022 Rate Order* specifically rejected the request to meter residential wastewater rates in the community served under Rate Zone 4 for customers who obtain their water supplies from individual wells not owned or operated by a utility or municipality/municipal authority.

41. The Complainant is not a water customer of any utility or municipality/municipal authority.

42. The disposition of this issue in the *2022 Rate Order* is applicable to the Complainant.

43. The *2022 Rate Order*, at page 272 stated:

“There is no question that volumetric billing is preferable to flat-rate billing, as it provides better price signals and promotes conservation, as well as resulting in a more equitable distribution of the variable costs of wastewater service among ratepayers. However, in situations, such as this, where metered water information is unavailable, we acknowledge the standard industry practice of basing flat rate on a system-wide average per month plus a customer charge.”

CONCLUSION

44. There is no issue in dispute for which a hearing is required.

45. The Complainant does not allege that Aqua has violated Commission regulations or orders, the Code or the Company’s Commission-approved tariff.

46. Any revision to the DEP approved Act 537 Plan lies with DEP, not the Commission. The Commission lacks the jurisdiction to grant the relief requested.

47. A complaint proceeding is not the proper forum to request a tariff revision to the rate structure for Rate Zone 4. The proper forum is a rate proceeding.

48. The *2022 Rate Order* rejected the request to meter wastewater rates for Rate Zone 4 customers who do not obtain their water supply from a utility or municipality/municipal authority.

49. The Company is entitled to judgment as a matter of law; judgment on the pleadings is appropriate.

WHEREFORE, Respondent, Aqua Pennsylvania Wastewater, Inc., requests that the Honorable John M. Coogan and the Commission grant this Motion for Judgment on the Pleadings and dismiss, with prejudice, the Formal Complaints of SCH USA, LLC against Aqua Pennsylvania Wastewater, Inc., in its entirety.

Respectfully submitted,

Date: April 17, 2023



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