

COMMONWEALTH OF PENNSYLVANIA



PATRICK M. CICERO
Consumer Advocate

OFFICE OF CONSUMER ADVOCATE
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
(800) 684-6560

 @pa_oca
 /pennoca
FAX (717) 783-7152
consumer@paoca.org
www.oca.pa.gov

April 28, 2023

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

Re: Pennsylvania Public Utility Commission
v.
Aqua Pennsylvania Wastewater, Inc.
(Supp. No. 3 to Tariff Sewer-Pa. P.U.C. No. 3)
Docket No. R-2022-3037141

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Main Brief in this matter.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Respectfully submitted,

A handwritten signature in blue ink that reads "Erin L. Gannon".

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
EGannon@paoca.org

Enclosures:

cc: The Honorable Gail M. Chiodo (**email only**)
Office of Special Assistants (**email only**: ra-OSA@pa.gov)
Certificate of Service

*344896

CERTIFICATE OF SERVICE

Pennsylvania Public Utility Commission :
v. : Docket No. R-2022-3037141
Aqua Pennsylvania Wastewater, Inc. :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Main Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below. This document was filed electronically on the Commission's electronic filing system.

Dated this 28th day of April 2023.

SERVICE BY E-MAIL ONLY

Richard A. Kanaskie, Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120
rkanaskie@pa.gov
Counsel for I&E

Steven C. Gray, Esquire
Nakea S. Hurdle, Esquire
Office of Small Business Advocate
555 Walnut Street
1st Floor, Forum Place
Harrisburg, PA 17101-1923
sgray@pa.gov
nhurdle@pa.gov
Counsel for OSBA

Erin M. Feeney, Manager, Rates
Alexander R. Stahl, Esquire
Aqua Pennsylvania, Inc.
762 W. Lancaster Ave.
Bryn Mawr, PA 19010
EFDomzalski@aquaamerica.com
astahl@aquaamerica.com
Counsel for Aqua PA, Inc.

Michael W. Hassell, Esquire
Nicholas A. Stobbe, Esquire
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
mhassell@postschell.com
nstobbe@postschell.com
Counsel for Aqua PA WW, Inc.

/s/ Christopher M. Andreoli
Christopher M. Andreoli
Assistant Consumer Advocate
PA Attorney I.D. # 85676
CAndreoli@paoca.org

Counsel for:
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
717-783-5048
Dated: April 28, 2023

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
EGannon@paoca.org

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission :
 :
 v. : Docket No. R-2022-3037141
 :
 Aqua Pennsylvania Wastewater, Inc. :

MAIN BRIEF
OF THE
OFFICE OF CONSUMER ADVOCATE

Christopher M. Andreoli
Assistant Consumer Advocate
PA Attorney I.D. # 85676
CAndreoli@paoca.org

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
EGannon@paoca.org

Counsel for:
Patrick M. Cicero
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

April 28, 2023

TABLE OF CONTENTS

I.	INTRODUCTION	i
II.	STATEMENT OF THE CASE AND PROCEDURAL HISTORY	1
III.	LEGAL STANDARDS	3
IV.	SUMMARY OF ARGUMENT	4
V.	ARGUMENT	5
A.	The Commission Should Reject Rider LWCUR because Aqua Has Not Demonstrated Need	5
1.	Aqua Has No Current Customers Interested in or Eligible for Discounted Rates.....	6
2.	Aqua Has Not Shown that a Viable Competitive Alternative for Wastewater Service Exists.....	7
3.	Approval of Aqua’s Proposed Rider Will Put Other Aqua Customers at Risk to Pay Higher Rates	8
4.	Aqua Has Other Means to Address Rates for Large Industrial Customers	10
5.	Aqua’s Proposed Rider LWCUR Is an Unreasonable and Discriminatory Rate	11
B.	If Approved, the Tariff Should Specify the Minimum Documentation Required to Establish that a Competitive Alternative Exists, Is Viable, and Is Probable.....	13
VI.	CONCLUSION.....	15

APPENDIX A: Proposed Findings of Fact

APPENDIX B: Proposed Conclusions of Law

APPENDIX C: Proposed Ordering Paragraphs

APPENDIX D: List of OCA-Sponsored Testimony and Exhibits Admitted into the Record

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allegheny Ludlum Corp. v. Pa. PUC</i> , 612 A.2d 604 (Pa. Cmwlth. 1992)	4
<i>Brockway Glass v. Pa. PUC</i> , 437 A.2d 1067 (Pa. 1981)	3
<i>Building Owners and Managers Ass’n v. Pa. PUC</i> , 470 A.2d 1092 (Pa. Cmwlth. 1984)	4
<i>Burleson v. Pa. PUC</i> , 461 A.2d 1234 (Pa. 1983)	3
<i>Carpenter v. Pa. PUC</i> , 15 A.2d 473 (Pa. Super. 1940)	4
<i>Lower Frederick Twp. v. Pa. PUC</i> , 409 A.2d 505 (Pa. 1980)	3
<i>Phila. Elec. Co. v. Pa. PUC</i> , 470 A.2d 654 (Pa. Cmwlth. 1984) (<i>PECO 1984</i>)	4, 12, 13
<i>Phila. Suburban Transp. Co. v. Pa. PUC</i> , 281 A.2d 179 (Pa. Cmwlth. 1971)	4
<i>Phila. Suburban Water Co. v. Pa. PUC</i> , 808 A.2d 1044 (Pa. Cmwlth. 2002)	4
<i>University of Pa. v. Pa. PUC</i> , 485 A.2d 1217 (Pa. Cmwlth. 1984)	3
Administrative Decisions	
<i>Pa. PUC v. Consumers Pa. Water Co. - Roaring Creek Div.</i> , 1997 Pa. PUC LEXIS 93 (Oct. 14, 1997)	8, 14
<i>Pa. PUC v. Equitable Gas Co.</i> , 57 Pa. PUC 423 (1983)	3
<i>Pa. PUC v. PPL Elec. Corp.</i> , 237 PUR4th 419 (Pa. 2004)	3

Statutes

66 Pa. C.S. § 315(a)3
66 Pa. C.S. § 1301.....3, 11
66 Pa. C.S. § 1304.....4, 12
66 Pa. C.S. § 1329(d)(4)9, 10

I. INTRODUCTION

Aqua Pennsylvania Wastewater, Inc. (Aqua or the Company) seeks approval of a proposed new rider (Rider LWCUR), which would allow large industrial wastewater customers to negotiate rates that are lower than Aqua's tariffed rates for service. The Office of Consumer Advocate (OCA) contends that Rider LWCUR should be rejected, without prejudice. No existing customer seeks discounted rates, and there is no evidence that there is a viable, competitive alternative to taking wastewater service from Aqua.

II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 7, 2022, Aqua filed Supplement No. 3 to Tariff Sewer-PA P.U.C. No. 3 (Supplement No. 3), which proposes to establish a negotiated contract rate option for large industrial wastewater customers via Rider LWCUR. Rider LWCUR defines a Large Wastewater Customer User as an industrial class customer that takes or receives wastewater collection, treatment and/or disposal services that exceeds 85,000 gallons of wastewater per month. Aqua WW St. 1 at 3. The Company contends that certain large industrial customers that currently receive wastewater utility service from Aqua can opt to discontinue receiving service from the Company and leave Aqua's service territory or find a competitive alternative for wastewater service. To provide customers with competitive alternatives an incentive to continue receiving wastewater service from Aqua, the Company is proposing Rider LWCUR which would provide service to those customers at discounted rates, i.e. lower than the Company's current Commission-approved rates. *Id* at 3.

To be eligible for service under Rider LWCUR, Aqua proposes that the customer must:

1. Discharge wastewater into Aqua's collection system resulting from industrial processes;
2. Enter into a Service Agreement for a term of not less than 3 years;

3. Have a viable competitive alternative to service from the Company and, unless a new rate is established, the customer intends to select that alternative to the detriment of the Company and its customers.

Aqua WW St. 1 at 3. Whether or not the customer has a viable competitive alternative would be determined by Aqua based on documentation – such as the customer’s affidavit – that satisfies the Company that a competitive alternative exists. *Id.* at 5.

On December 13, 2022, the Commission’s Bureau of Technical Utility Services issued data requests. On December 22, 2022, Aqua filed Supplement No. 5 to Tariff Sewer-PA P.U.C. No. 3, which voluntarily postponed Supplement No. 3 to become effective February 10, 2023. On January 5, 2023, Aqua filed responses to the TUS data requests. On January 11, 2023, the OCA filed a Formal Complaint against Aqua’s proposed tariff. On January 20, 2023, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention and Public Statement.

On February 9, 2023, the Commission entered an Order suspending Supplement No. 3 by operation of law until August 10, 2023. On February 15, 2023, Aqua filed Supplement No. 8 to Tariff Sewer-PA P.U.C. No. 3 which extended the effective date of Supplement No. 3 to August 10, 2023. On February 21, 2023, Administrative Law Judge (ALJ) Chiodo held a Prehearing Conference to establish the procedural schedule. Consistent with the schedule established, on February 23, 2023, Aqua filed Supplement No. 9 to Tariff Sewer-PA P.U.C. No. 3, which extended the effective date of Supplement No. 3 to August 17, 2023.

On March 20, 2023, the OCA filed and served the Direct Testimony of Jerome D. Mierzwa as OCA Statement 1. Also on March 20, 2023, OSBA filed and served the Direct Testimony of Brian Kalcic as OSBA Statement 1. On March 30, 2023, Aqua filed and served the Rebuttal Testimony of William C. Packer as Aqua Wastewater Statement 1R. On April 7, 2023, OCA filed and served the Surrebuttal Testimony of Jerome D. Mierzwa as OCA Statement 1SR. Also on

April 7, 2023, OSBA filed and served the Surrebuttal Testimony of Brian Kalcic as OSBA Statement 1-S. The OCA now submits this Main Brief in support of its positions in this matter.

III. LEGAL STANDARDS

Aqua bears the burden of proof to establish the justness and reasonableness of every element of its proposed contract rate option for large industrial wastewater customers via Rider LWCUR. 66 Pa. C.S. § 1301 (every rate shall be just and reasonable). Section 315(a) of the Public Utility Code, 66 Pa. C.S. § 315(a), addressing reasonableness of rates, provides that:

in any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.

66 Pa. C.S. § 315(a). The Commonwealth Court has interpreted this principle in stating that Section 315(a) “places the burden of proving the justness and reasonableness of a proposed rate squarely on the utility. It is well-established that the evidence provided by a utility to meet this burden must be substantial.” *Lower Frederick Twp. v. Pa. PUC*, 409 A.2d 505, 507 (Pa. 1980) (citations omitted); *see also Brockway Glass v. Pa. PUC*, 437 A.2d 1067 (Pa. 1981).

The Pennsylvania Supreme Court has stated that the party with the burden of proof has a formidable task to show that the Commission may lawfully adopt its position. Even where a party has established a prima facie case, the party with the burden must establish “the elements of that cause of action to prevail, precluding all reasonable inferences to the contrary.” *Burleson v. Pa. PUC*, 461 A.2d 1234, 1236 (Pa. 1983). Thus, a utility has an affirmative burden to establish the justness and reasonableness of every component of its rate request.

The Commission recognizes this standard in rate cases. *See Pa. PUC v. Equitable Gas Co.*, 57 Pa. PUC 423, 471 (1983); *see also University of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984); *Pa. PUC v. PPL Elec. Corp.*, 237 PUR4th 419 (Pa. 2004). Thus, it is unnecessary for the

OCA, or any challenger, to prove that the Company's proposed rates are unjust, unreasonable, or not in the public interest. To prevail in its challenge, Pennsylvania law requires only that the OCA show how the Company failed to meet its burden of proof.

Further, Section 1304 of the Public Utility Code, 66 Pa. C.S. § 1304, prohibits rates that grant any customer unreasonable preference or advantage or subject any customer to unreasonable prejudice or disadvantage. *See Phila. Elec. Co. v. Pa. PUC*, 470 A.2d 654, 657 (Pa. Cmwlth. 1984) (*PECO 1984*). As a general matter, the utility must show that the rate differential can be justified by the difference in costs required to deliver service to each class and the rate differentials must advance efficient and satisfactory service to the greatest number at the lowest overall charge. *See Phila. Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044 (Pa. Cmwlth. 2002); *Phila. Suburban Transp. Co. v. Pa. PUC*, 281 A.2d 179 (Pa. Cmwlth. 1971). It is noted that a mere variation in rates among classes of customers does not *per se* create an intolerable preference. *Building Owners and Managers Ass'n v. Pa. PUC*, 470 A.2d 1092 (Pa. Cmwlth. 1984). In fact, different rates may be charged to customers that receive a different type, grade or class of service. *Carpenter v. Pa. PUC*, 15 A.2d 473 (Pa. Super. 1940). However, if the total sum demanded of one customer is illegally high and illegally low for another, there is rate discrimination. *Allegheny Ludlum Corp. v. Pa. PUC*, 612 A.2d 604 (Pa. Cmwlth. 1992). Here, where Aqua seeks approval to charge discounted rates to a subset of customers within the Industrial class, the Company has the burden to establish that its proposed rate is not discriminatory or unreasonable pursuant to Section 1304.

IV. SUMMARY OF ARGUMENT

This Commission should not approve Rider LWCUR, as it would result in unjust, unreasonable, and discriminatory rates. Aqua has the burden of proof in this matter, as the proponent of a change in its rates. Aqua has failed to show that the rate is needed. Aqua has no

existing customers who want the rate. The Company has not shown that it would be feasible or probable for potential customers it may acquire in the future to bypass the Aqua system. If the Rider is approved and a customer pays discounted rates, Aqua intends for other wastewater customers to subsidize the lost revenue in their rates. Allowing discounted wastewater rates, use of which will cause known harm, in response to a speculative, future harm is not reasonable. Until then, Aqua and its large industrial customers have means to address and control rates in base rate cases. If an actual need presents itself in the future, Aqua can present those facts in support of a new request for discounted rates. Aqua has failed to satisfy its statutory burden at this time, however, and its requested Rider LWCUR should be rejected.

If the Commission decides to approve Rider LWCUR, then the standard that Aqua will apply for discounting rates for some customers should be clear. The Company's proposed tariff should be revised to affirmatively require information adequate to demonstrate that a competitive alternative is not only viable but probable in the absence of a negotiated rate. This requires, at a minimum, a feasibility study, cost-analysis or bid(s) for alternative service to document that the customer has evaluated and assessed the costs of the competitive alternative.

V. ARGUMENT

A. The Commission Should Reject Rider LWCUR because Aqua Has Not Demonstrated Need

Aqua contends that certain large industrial customers that currently receive wastewater utility service from Aqua can opt to discontinue receiving service from the Company and leave Aqua's service territory or find a competitive alternative for wastewater service. Aqua WW St. 1 at 5-6. According to Aqua, the proposed Rider will incent large industrial customers to continue to receive service from Aqua at a discounted rate rather than lose all of the revenue from that

customer. Aqua WW St. 1 at 6; Aqua WW St. 1R at 4. However, at this time, Aqua has not established a need for the Rider:

- Aqua has no existing customers who want the rate.
- The Company has not shown that it would be feasible or probable for potential customers it may acquire in the future to bypass the Aqua system.
- Aqua has other means to address rates for large industrial customers.

OCA St. 1 at 7-8. In the absence of facts supporting a current need for the rate and showing that a viable competitive alternative for wastewater service from Aqua exists, it is not reasonable to establish a preferential rate for certain large industrial customers that is intended to increase costs recovered from other customers. For these reasons and as discussed below, Rider LWCUR should be rejected without prejudice.

1. Aqua Has No Current Customers Interested in or Eligible for Discounted Rates.

No current Aqua customers have expressed an interest in service under Rider LWCUR. In fact, only one of Aqua's existing customers would be eligible for service under Rider LWCUR and that customer does not plan to apply for service under the Rider. Aqua WW St. 1 at 7-8 ("there is only one customer eligible for the rider right now, and that customer has indicated that they do not plan to participate or enter into a contracted rate with the Company").

It should be noted that Aqua is currently before this Commission pursuing the acquisition of two wastewater systems (DELCORA and City of Beaver Falls). The Company contends that at least four customers that could be acquired through those acquisitions might qualify under Rider LWCUR based on their usage. Aqua WW St. 1 at 7-8. However, it is not certain if or when Aqua will obtain customers who may be eligible, from DELCORA, City of Beaver Falls, or other acquisitions that have not been approved by the Commission. OCA St. 1 at 6. Further, Aqua has not presented any evidence to show that any prospective customer has a viable and probable

competitive alternative to taking wastewater service from the Company. OCA St. 1SR at 2; *see also* OSBA St. 1 at 5; OSBA St. 1SR at 2.

Aqua is proposing to solve a speculative problem that does not currently exist. The evidence does not establish that any current customer is thinking of leaving its wastewater system, instead the evidence shows that the one potentially eligible customer is not going to participate in the Rider LCWUR. What is known and certain is that if Aqua is permitted to offer discounted wastewater rates, customers taking service at discounted rates will increase the costs to be recovered from customers paying tariffed rates, in subsequent base rate cases. OCA St. 1SR at 2.

2. Aqua Has Not Shown that a Viable Competitive Alternative for Wastewater Service Exists.

Wastewater is different from all other types of public utilities, including water. Critically, Aqua has not shown that, for wastewater, there exists a “viable competitive alternative to service from the Company.” When asked for examples, Aqua said it would expect to see (1) an alternative treatment facility or hauled wastewater at a cost lower than the Company’s tariffed rates or (2) a customer leaving the area to receive service at a lower cost. OCA Exh. JDM-1 (Aqua response to OCA-1-8). In addition to the ongoing costs for wastewater service, those alternatives would likely require significant upfront investment to install a treatment facility or accommodate wastewater hauling (and obtain necessary regulatory approvals) or move the industry to a different site. OCA St. 1 at 7-8. Aqua has not shown that these possibilities are feasible or probable. Moreover, for some industrial customers the characteristics, constituents or volume or quantities of the waste can require pretreatment.¹ OCA St. 1SR at 4. This requirement for additional processing makes it even

¹ Supplement No. 10 to Aqua PA Tariff-Sewer-PA P.U.C. No. 3 at original page 38. https://www.aquawater.com/_assets/doc/supplement-no.-10---tariff-sewer-pa-puc-no.-3.pdf

more uncertain that a lesser cost alternative to continuing or taking wastewater service from Aqua exists. That may be why the Commission has not previously allowed negotiated rates in the wastewater context. OCA Exh. JDM-1 (Aqua response to OCA-1-9). Aqua also admits that, to its knowledge, no other state public utility commissions have approved discounted rates for wastewater customers with viable competitive alternatives. OCA Exh. JDM-1 (Aqua response to OCA-1-10).

Regarding Aqua Water, the Commission first approved its Rider DIS in a base rate proceeding, when an existing customer requested a discounted rate. OCA Exh. JDM-1 (Aqua responses to OCA-3-1, OCA-3-2, OCA-3-3). In that proceeding, evidence was provided and evaluated regarding the alternative source of water supply and the cost impact of the negotiated rate on other customers.² OCA St. 1SR at 4. Since no existing Aqua customers have expressed an interest in Rider LWCUR, that type of evidence and evaluation are not available in this proceeding.

Moreover, it is not possible to fully evaluate and examine the circumstances associated with any potential customer's alternative to assess whether the proposed terms and conditions of Rider LWCUR are reasonable, and protect the interests of Aqua's remaining customers that may be responsible for any revenue deficiency resulting from the Rider LWCUR service agreement.

3. Approval of Aqua's Proposed Rider Will Put Other Aqua Customers at Risk to Pay Higher Rates.

Aqua states that it "intends to recover the revenue deficiency resulting from its proposed Rider LWCUR from its larger customer base." OCA Exh. JDM-1 (Aqua response to OCA-1-4). According to Aqua, it "does not intend" to shift any of the revenue deficiency resulting from its proposed Rider to water customers. *Id.* (Aqua response to OCA-1-6). Notwithstanding Aqua's

² *Pa. PUC v. Consumers Pa. Water Co. - Roaring Creek Div.*, 1997 Pa. PUC LEXIS 93 (Oct. 14, 1997).

present intentions, whether the revenue deficiency will be shifted to water customers or wastewater customers, and whether it will be shifted to customers outside the industrial class, such as the residential or commercial classes, will be decided in a base rate case where a customer is receiving service (at a discounted, contract rate) under Rider LWCUR. *Id.* (Aqua response to OCA-1-5); OCA St. 1 at 6.

Aqua calculated that if the one existing customer that is eligible for service under Rider LWCUR negotiated a 10% discount from current tariffed rates, it would result in an annual revenue decrease of \$2,615 based on prior year consumption. OCA Exh. JDM-1 (Aqua response to OCA-1-3); OCA St. 1 at 7. Aqua also ran a calculation for one of the two potential customers from the DELCORA system, and calculated that if that customer negotiated a 10% discount from the rate it currently pays DELCORA for service – which is itself a contract rate,³ that discount would result in a decrease in annual revenues of \$502,058. OCA Exh. JDM-1 (Aqua response to OSBA-I-2). Full tariffed rates for this customer could be higher depending on the indicated cost of service under Aqua ownership, which would have the effect of increasing the revenue deficiency driven by a hypothetical 10% discount.

Aqua also provided information about the impact of discounted rates for its water operations. For Aqua Water, the 2022 revenue deficiency resulting from the three customers taking service under its discounted rate (Rider DIS) represented more than 25% of the total revenue from the Industrial class. OCA St. 1SR at 4-5; OCA Exh. JDM-1SR (Aqua responses to OCA-3-5, OCA-3-6, OCA-3-7).

³ Aqua would be assuming an existing agreement of DELCORA if the DELCORA transaction closes. OCA Exh. JDM-1 (Aqua response to OSBA-I-4). Under Section 1329(d)(4) of the Public Utility Code, 66 Pa. C.S. § 1329(d)(4), those rates would apply to the acquired customer until the Commission approves new rates in Aqua's first base rate case that includes the DELCORA system assets.

In sum, while Aqua has not shown that approval of a discounted rate for its wastewater operations will avoid bypass by any customers, approval of the Rider will put other customers at risk to pay for the discount in their future rates.

4. Aqua Has Other Means to Address Rates for Large Industrial Customers.

Aqua contends that it needs to have the Rider in place now, before it potentially acquires a system with an otherwise eligible customer who could opt to obtain alternative service or leave Aqua's service territory. Aqua WW St. 1R at 4-5. When the acquisition is under Section 1329, like DELCORA and Beaver Falls, however, the customers' existing rates (whether or not established by contract) would remain in effect until Aqua's next rate case at which time the reasonableness of continuing that discounted rate, establishing a new discounted rate, or eliminating the discounted rates can be evaluated. OCA St. 1SR at 5; 66 Pa. C.S. § 1329(d)(4). Whether or not the customer's system is acquired under Section 1329, large industrial customers often participate in wastewater base rate cases to advocate for lower tariffed rates and favorable rate design. Also, the issue that customers pay lower rates to the selling utility than the buying utility is not limited to industrial customers. All types of customers may face future rate increases to bring their rates to cost of service under Aqua ownership and Aqua has means to address that issue instead of negotiating rates that are less than tariffed rates. OCA St. 1 at 8-9.

Aqua argues that an alternative to Aqua's wastewater service could arise between base rate cases and before the customer's rate concerns could be addressed in a base rate case, causing Aqua to lose that customer's rate revenue altogether. Aqua WW St. 1R at 6-7. This suggests that a large industrial customer would make and act quickly on a decision about disconnecting from a public wastewater system or physically relocating its large industrial facility to a different service territory. That is not a reasonable assumption. OCA St. 1SR at 5. Moreover, there is not that much

time between base rate cases. In its 2021 base rate case, Aqua indicated it would file its next base rate case in 2024. Further, Aqua supported the use of three years for normalizing expenses on the basis that intervals of longer duration were not likely. *Id.* at 4-5. Based on Aqua's projections, the Company will file its next base rate case within a year.

5. Aqua's Proposed Rider LWCUR Is an Unreasonable and Discriminatory Rate.

Aqua has not met its burden of proof to show the just and reasonableness of its proposed rates as required by 66 Pa. C.S. § 1301. As discussed in Sections V.A. 1 through 4 above, Aqua has not established need for the Rider to support a preferential rate. No current Aqua industrial customers would participate in the rate. There is no evidence showing that an alternative to service from Aqua is viable, feasible or probable. Aqua has other means to address rates for large industrial customers. Should concerns regarding rates for large industrial customers arise, they can be addressed in future base rate cases. If, in the future, an existing Aqua large industrial customer expresses an interest and identifies competitive alternative wastewater service options, Aqua can seek Commission approval when facts are available for the Commission to evaluate whether a competitive alternative exists in the wastewater context and to assess whether the proposed terms and conditions of Rider LWCUR are reasonable, and protect the interests of Aqua's other customers. The proposed tariff should be denied, without prejudice.

The OSBA also recommends that Rider LWCUR should be rejected without prejudice at this time. OSBA St. 1 at 4-5. In support of this recommendation, OSBA witness Brian Kalcic stated:

First, Aqua has not presented any evidence that any known prospective industrial customer may bypass the Company's system, absent the ability of Aqua to negotiate a discounted rate for wastewater service. Second, industrial wastewater volumes must be treated, and absent an industrial customer's ability to convey such volumes to an alternative treatment facility, the opportunities for economic bypass of any wastewater utility's system would appear to be limited, at best. Third, in the

arguably unlikely event that a future large industrial customer should approach the Company with evidence that it has a viable economic bypass alternative, Aqua could file a proposed rider to address bypass at that time.

OSBA St. 1SR at 2.

Aqua's proposed rate is also not reasonable because it is discriminatory. To be discriminatory under Section 1304 of the Public Utility Code, rates must provide an unreasonable preference or advantage:

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage.

66 Pa. C.S. § 1304. In *PECO 1984*, the Commonwealth Court stated as follows:

It must be first noted that not all differences in rates are discriminatory and, therefore, unlawful. Only unreasonable differences are prohibited. More importantly:

Before a rate can be declared unduly preferential and therefore unlawful, it is essential that there be not only an advantage to one, but a resulting injury to another. Such an injury may arise from collecting more than a reasonable rate to him in order to make up for inadequate rates charged to another, or because of a lower rate to one of two patrons who are competitors in business. There must be an advantage to one at the expense of another.

PECO 1984 at 657 (citations omitted). Here, approval of the Rider will advantage a potential subset of large industrial customers and it will put other Aqua customers at risk to pay for the discount in their future rates. Accordingly, and for the additional reasons discussed above, the Commission should reject Rider LWCUR at this time.

B. If Approved, the Tariff Should Specify the Minimum Documentation Required to Establish that a Competitive Alternative Exists, Is Viable, and Is Probable.

If this Commission decides to approve Rider LWCUR, the OCA recommends changes to clarify the standard that Aqua will apply for discounting rates. As proposed, the tariff does not require any minimum documentation for a potential customer to establish that they are eligible for service under Rider LWCUR:

The Company shall require documentation to establish, to the Company's satisfaction, the existence of a competitive alternative along with any other applicable qualifying condition stated above. Such documentation may include, but is not limited to an affidavit of the customer or if, the customer is a corporation, an affidavit of one of more of its senior managers or its officer.

Aqua WCP-IR Exhibit A at 1.

An affidavit by a customer is not adequate to demonstrate the legitimacy of a competitive alternative. OCA St. 1 at 9-10. Aqua's tariff should be clear that the Company will request and review written documentation including service agreements, feasibility studies, cost-benefit analyses, etc., to support its evaluation and assessment of the costs of the facilities necessary for the customer to take service under the competitive alternative. *Id.* That is consistent with the type of documentation that is routinely required in other industries where contract rates are permitted. For example, when natural gas distribution companies (NGDCs) review their larger customers' competitive alternatives, they evaluate the cost of connecting those customers' facilities with an alternative service provider. The documentation of that evaluation is examined again in base rate proceedings for reasonableness and to determine whether the NGDC exercised due diligence. OCA St. 1 at 9.

It is particularly concerning, in the wastewater context, that Aqua's tariff does not specify a minimum amount of documentation that will be required. Aqua argues that utilities in other industries, including Aqua Water, have tariff provisions similar to what it has proposed for Rider

LWCUR, i.e. do not specify what is required to “satisfy” the utility that a competitive alternative exists. Aqua WW St. 1 at 9-10; Aqua WW St. 1R at 5-6, 8. As discussed above, however, there are fundamental differences between wastewater and the other types of utility service, and Aqua has not demonstrated any current need for a wastewater rider.⁴ OCA St. 1 at 7-8; OCA St. 1SR at 4, 7. Thus, if a discounted rate is approved for Aqua Wastewater, the tariff should ensure that Aqua will require documentation adequate to demonstrate that a competitive alternative is viable, feasible and probable in the absence of a negotiated rate. Specifically, the OCA recommends that the tariff should be modified as follows:

The Company shall require documentation to establish, to the Company’s satisfaction, the existence of a competitive alternative along with any other applicable qualifying condition stated above. Such documentation **will at minimum include a feasibility study, cost-analysis or bid(s) for alternative service and** may include, ~~but is not limited to~~ an affidavit of the customer or if, the customer is a corporation, an affidavit of one of more of its senior managers or its officer.

OCA St. 1 at 9-10.

⁴ Also, the evidentiary record in the proceeding where Aqua Water’s tariff was first approved included substantial documentation and review of an existing customer’s competitive alternative, which does not exist for Aqua Wastewater. *Aqua Water 1997* at *74-87.

VI. CONCLUSION

For the reasons stated above, Rider LWCUR should be rejected. However, if the Commission approves Rider LWCUR, the Office of Consumer Advocate's proposed modifications to the tariff should be adopted.

Respectfully Submitted,

/s/ Christopher M. Andreoli
Christopher M. Andreoli
Assistant Consumer Advocate
PA Attorney I.D. # 85676
CAndreoli@paoca.org

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
EGannon@paoca.org

Counsel for:
Patrick M. Cicero
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

April 28, 2023

PROPOSED FINDINGS OF FACT

1. On December 7, 2022, Aqua filed Supplement No. 3 to Tariff Sewer-PA P.U.C. No. 3 (Supplement No. 3), which proposed to establish a negotiated contract rate option for large industrial wastewater customers via Rider LWCUR. Aqua updated the tariff in response to data requests from Technical Utility Services and the revised tariff was submitted as Aqua Wastewater Exhibit EF-1.
2. Rider LWCUR defines a Large Wastewater Customer User as an industrial class customer that takes or receives wastewater collection, treatment and/or disposal services that exceeds 85,000 gallons of wastewater per month. Aqua WW St. 1 at 3; Aqua WW Exh. EF-1.
3. To be eligible for service under Rider LWCUR, Aqua's customer must discharge wastewater into Aqua's collection system resulting from industrial processes; enter into a Service Agreement for a term of not less than 3 years; and have a viable competitive alternative to service from the Company and, unless a new rate is established, the customer intends to select that alternative to the detriment of the Company and its customers. Aqua WW St. 1 at 3; Aqua WW Exh. EF-1.
4. There are no current Aqua customers that have expressed an interest in service under Rider LWCUR. In fact, only one of Aqua's existing customers would be eligible for service under Rider LWCUR; however, this customer has indicated that it does not plan to apply for service under the Rider. Aqua WW St. 1 at 7-8.
5. Aqua has not presented any evidence to show that any prospective customer has a viable and probable competitive alternative to taking wastewater service from the Company. OCA St. 1SR at 2; *see also* OSBA St. 1 at 5; OSBA St. 1SR at 2.
6. In addition to the ongoing costs for wastewater service, those alternatives would likely require significant upfront investment to install a treatment facility or accommodate wastewater hauling (and obtain necessary regulatory approvals) or move the industry to a different site. OCA St. 1 at 7-8.
7. For some industrial customers the characteristics, constituents or volume or quantities of the waste can require pretreatment. OCA St. 1SR at 4.
8. Aqua intends to recover the revenue deficiency from other customers in its base rate cases. OCA Exh. JDM-1 (Aqua response to OCA-1-4); OCA St. 1 at 5.
9. Whether the revenue deficiency will be shifted to water customers or wastewater customers, and whether it will be shifted to customers outside the industrial class, such as the residential or commercial classes, will be decided in a base rate case where a customer is receiving service (at a discounted, contract rate) under Rider LWCUR. OCA Exh. JDM-1 (Aqua response to OCA-1-5); OCA St. 1 at 6.

10. Aqua calculated that if the one existing customer that is eligible for service under Rider LWCUR negotiated a 10% discount from current tariffed rates, it would result in an annual revenue decrease of \$2,615 based on prior year consumption. OCA Exh. JDM-1 (Aqua response to OCA-1-3); OCA St. 1 at 7.

11. Aqua also ran a calculation for one of the two potential customers from the DELCORA system, and calculated that if that customer negotiated a 10% discount from the rate it currently pays DELCORA for service – which is itself a contract rate, that discount would result in a decrease in annual revenues of \$502,058. OCA Exh. JDM-1 (Aqua response to OSBA-I-2); OCA St. 1 at 7.

12. For Aqua Water, the 2022 revenue deficiency resulting from the three customers taking service under its discounted rate (Rider DIS) represented more than 25% of the total revenue from the Industrial class. OCA Exh. JDM-1SR (Aqua responses to OCA-3-5, OCA-3-6, OCA-3-7); OCA St. 1SR at 4-5.

13. Based on Aqua’s projections, the Company will file its next base rate case within a year. OCA St. 1SR at 5.

14. As proposed, the tariff does not require any minimum documentation for a potential customer to establish that they are eligible for service under Rider LWCUR:

The Company shall require documentation to establish, to the Company’s satisfaction, the existence of a competitive alternative along with any other applicable qualifying condition stated above. Such documentation may include, but is not limited to an affidavit of the customer or if, the customer is a corporation, an affidavit of one of more of its senior managers or its officer.

Aqua WW Exh. EF-1.14.

15. No regulated wastewater utilities in Pennsylvania have sought or received Commission approval to charge discounted rates for wastewater customers with competitive alternatives. OCA Exh. JDM-1 (Aqua response to OCA-1-9); OCA St. 1 at 8; Aqua St. 1R at 5.

16. No other state public utility commissions have approved discounted rates for wastewater customers with viable competitive alternatives. OCA Exh. JDM-1 (Aqua response to OCA-1-10).

PROPOSED CONCLUSIONS OF LAW

1. The Public Utility Commission has jurisdiction over the parties and the subject matter of this proceeding by virtue of the Public Utility Code, 66 Pa. C.S. § 101, *et seq.*
2. Rates charged by public utilities must be just and reasonable and cannot result in unreasonable rate discrimination. 66 Pa. C.S. §§ 1301, 1304.
3. Section 1304 of the Public Utility Code prohibits rates that grant any customer unreasonable preference or advantage or subject any customer to unreasonable prejudice or disadvantage. 66 Pa. C.S. § 1304.
4. A public utility seeking a proposed rate has the burden of proof to establish the justness and reasonableness of the rate request. 66 Pa. C.S. § 315(a); *see Lower Frederick Twp. v. Pa. PUC*, 409 A.2d 505, 507 (Pa. 1980) (citations omitted); *see also Brockway Glass v. Pa. PUC*, 437 A.2d 1067 (Pa. 1981).
5. As a general matter, the utility must show that the rate differential can be justified by the difference in costs required to deliver service to each class and the rate differentials must advance efficient and satisfactory service to the greatest number at the lowest overall charge. *See Phila. Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044 (Pa. Cmwlth. 2002); *Phila. Suburban Transp. Co. v. Pa. PUC*, 281 A.2d 179 (Pa. Cmwlth. 1971).
6. 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 (Pa. Cmwlth. 1990).
7. Any finding of fact necessary to support an adjudication of the Commission must be based on substantial evidence. *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189 (Pa. Cmwlth. 2008); 2 Pa. C.S. § 704.
8. Even where a party has established a prima facie case, the party with the burden must establish "the elements of that cause of action to prevail, precluding all reasonable inferences to the contrary." *Burleson v. Pa. PUC*, 461 A.2d 1234, 1236 (Pa. 1983).
9. Aqua has failed to meet its burden in this matter and, therefore, Rider LWCUR will be rejected, without prejudice. 66 Pa. C.S. §§ 1301, 1304.
10. An affidavit by a customer is not adequate to demonstrate the legitimacy of a competitive alternative. OCA St. 1 at 9-10.
11. If approved, Aqua's proposed tariff for Rider LWCUR should be modified as follows:

The Company shall require documentation to establish, to the Company's satisfaction, the existence of a competitive alternative along with any other applicable qualifying condition stated above. Such documentation **will at**

minimum include a feasibility study, cost-analysis or bid(s) for alternative service and may include, ~~but is not limited to~~ an affidavit of the customer or if, the customer is a corporation, an affidavit of one of more of its senior managers or its officer.

OCA St. 1 at 9-10.

PROPOSED ORDERING PARAGRAPHS

IT IS HEREBY ORDERED:

1. That Aqua's Rider LWCUR is rejected, without prejudice.
2. That the Commission's investigation at Docket No. R-2022-3037141 and the Formal Complaint at Docket No. C-2023-3037579 will be marked closed.

DATE: _____

Administrative Law Judge Gail M. Chiodo

LIST OF OCA-SPONSORED TESTIMONY AND
EXHIBITS ADMITTED INTO THE RECORD

1. OCA Statement 1, Direct Testimony of Jerome D. Mierzwa
OCA Exhibit JDM-1 (interrogatory responses referenced in Direct Testimony)
Witness verification
2. OCA Statement 1SR, Surrebuttal Testimony of Jerome D. Mierzwa
OCA Exhibit JDM-1SR (interrogatory responses referenced in Surrebuttal Testimony)
Witness verification