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May 10, 2023

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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**Re: Pennsylvania Public Utility Commission, *et al.* v. Aqua Pennsylvania Wastewater, Inc. (Supplement No. 3 to Tariff Sewer-PA PUC No. 3)
Docket Nos. R-2022-3037141, *et al.***

Dear Secretary Chiavetta:

Attached for filing on behalf of Aqua Pennsylvania Wastewater, Inc., is the Reply Brief for the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



Nicholas A. Stobbe

NAS/dmc
Attachments

cc: Honorable Gail Chiodo (*via email; w/attachment*)
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Nicholas A. Stobbe

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, *et al.* : Docket Nos. R-2022-3037141, *et al.*
: :
v. : :
: :
Aqua Pennsylvania Wastewater, Inc. :

**REPLY BRIEF OF
AQUA PENNSYLVANIA WASTEWATER, INC.**

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I. INTRODUCTION

On December 7, 2022, Aqua Pennsylvania Wastewater, Inc. (“Aqua” or the “Company”) filed Supplement No. 3 to Tariff Sewer-PA P.U.C. No. 3 (“Supplement No. 3”) with the Pennsylvania Public Utility Commission (“Commission”). Supplement No. 3 proposed to establish a rider for contract rates for large industrial wastewater customer users with an effective date of February 5, 2023 (“Proposed Rider”).¹ As explained in the Company’s Main Brief, the Proposed Rider is just and reasonable as it incents large industrial wastewater customers with a viable competitive alternative to continue or begin receiving wastewater service from Aqua. If the Proposed Rider is not approved and otherwise eligible customers choose to forego wastewater service from Aqua, the bills of Aqua’s remaining customers would be negatively affected more so than had the same eligible customer received wastewater service under a slightly discounted negotiated rate.

On April 28, 2023, Aqua, the Office of Small Business Advocate (“OSBA”), and the Office of Consumer Advocate (“OCA”) filed their respective Main Briefs. As fully explained in Aqua’s Main Brief, the Proposed Rider should be approved as being just and reasonable.

Herein, Aqua submits its Reply Brief, which is focused on addressing any arguments or issues raised by the OCA’s and OSBA’s respective Main Briefs that were not previously addressed by the Company.

II. SUMMARY OF REPLY ARGUMENT

Aqua has established that the Proposed Rider is just and reasonable and should be approved by the Commission. Both OSBA and OCA posit that the Proposed Rider is premature and, therefore, should be denied. The OCA also argues that the Proposed Rider is an unreasonable and

¹ Aqua later voluntarily postponed the effective date of Supplement No. 3 until August 17, 2023, via letter filed with the Commission on February 23, 2023.

discriminatory rate. Further, the OCA argues that, should the Proposed Rider be approved, it should be modified to include additional eligibility hurdles. The OSBA's and OCA's arguments are without merit and should be rejected.

The Proposed Rider was modelled after similar riders approved by the Commission for other Pennsylvania utilities and is narrowly tailored to restrict eligibility for service under a negotiated rate. It seeks to mitigate or eliminate the harmful rate effects that would occur should a qualifying large industrial wastewater customer have a viable alternative to Aqua's wastewater service and opt to receive that alternative service. Additionally, the Proposed Rider does not seek specific approval of a specific negotiated rate contract. Instead, it seeks approval of the structure in which a negotiated rate contract would be permissible for certain customers under clearly delineated circumstances. Importantly, contracts entered into under rate riders – like the Proposed Rider - are subject to extensive review in base rate cases. Moreover, the Public Utility Code does not bar rate discrimination *carte blanche*. Rather, it bars unreasonable rate discrimination. Nothing in the record indicates that the Proposed Rider would result in unreasonable rate discrimination. Any rate discrimination that might occur as a result of the Proposed Rider will be inherently reasonable because its purpose is to retain the maximum amount of revenue from customers that would otherwise leave (or not connect to) the Company as a result of a competitive alternative. Lastly, the OCA's recommended modifications to the Proposed Rider should be rejected. These recommended modifications are without compare in Pennsylvania, may frustrate the purpose of the Proposed Rider, and are otherwise unsupported.

For these reasons and as more fully explained in the Company's Main Brief and below, the OCA's and OSBA's arguments regarding the Proposed Rider should be rejected and the ALJ and

the Commission should approve the Proposed Rider without modification because it is just and reasonable.

III. REPLY ARGUMENT

A. AQUA DOES NOT NEED EXISTING, INTERESTED AND ELIGIBLE CUSTOMERS FOR THE COMMISSION TO APPROVE THE PROPOSED RIDER

1. The OCA's and OSBA's arguments that the Proposed Rider is premature absent an existing qualifying customer should be rejected.

Through their respective Main Briefs, both the OCA and OSBA argue that the Proposed Rider is premature because Aqua does not currently have an interested and eligible customer under the Proposed Rider. (*See* OCA M.B., pp. 5-8; OSBA M.B., pp 4-5.) These arguments mistake the purpose of the Proposed Rider, do not dispute its structure, and fail to reconcile on-point Commission precedent on comparable riders. As such, the OCA's and OSBA's arguments related to the alleged prematurity of the Proposed Rider should be rejected.

As explained more fully in **Section III(B)(1)** of the Company's Main Brief, the Commission has evaluated a similar proposal in the past from Pennsylvania-American Water Company ("PAWC").² In the *PAWC DIS Order*, the Commission did not discuss the need for an existing and eligible industrial customer interested in taking service under a negotiated rate rider. Much like Aqua's Proposed Rider, PAWC's Rider DIS was designed to serve certain high-load customer who can prove: (1) "they have available to them a viable competitive alternative to service from PAWC, such as the development of their own supply sources, the relocation of facilities or the installation of recycling equipment; and (2) that they intend to pursue that alternative to the detriment of PAWC and its other customers." (*PAWC DIS Order*, at **92-93.)

² *See Pa. PUC, et al., v. Pennsylvania-American Water Co.*, Docket Nos. R-00943231, *et al.*, 1995 Pa. PUC LEXIS 170 (Order Entered July 24, 1995) ("*PAWC DIS Order*").

Much like the instant proceeding, the OCA asserted in the PAWC proceeding that “[Pennsylvania-American Water Co.’s] proposed tariffs are not necessary at this time, and that they lack specificity as to terms, conditions, and rates. (*PAWC DIS Order*, at *95.) In rejecting the OCA’s arguments on this point, the Commission explained:

We share some of the OCA's concerns on this issue. Negotiated rates must not become merely a means by which utilities shift the responsibility for lost revenues to core customers who have no competitive alternative. At the same time, however, we realize that the loss of a large industrial customer to an alternative source of supply is harmful to all remaining customers. For this reason we support negotiated incentive rates providing that it can be demonstrated that without such rates the customer can and will switch to a competitive source of supply, and that the rates charged are designed to recover all marginal costs of serving that customer plus some contribution to the utilities' fixed costs. We also insist that the utility have a strong incentive to drive a hard bargain with the customer.

(*PAWC DIS Order*, at **95-96.)

The Commission has evaluated the OCA’s and OSBA’s arguments before and has rejected the same. Neither OCA nor OSBA proffer a coherent reason for the Commission to depart from its precedent.

Further, and as explained by Aqua witness William C. Packer and in greater detail in the Company’s Main Brief, the OSBA’s recommendation to re-file the Proposed Rider when there is a customer interested and eligible for negotiated rate service under the Proposed Rider³ would unnecessarily delay conclusions and findings that are appropriately addressed in this proceeding. (*See Aqua St. No. 1R*, pp. 9-10; *Aqua M.B.*, p. 15.) Moreover, there is no record evidence that would suggest that a second proceeding to evaluate the efficacy of the Proposed Rider with an eligible customer seeking negotiated rate service under the same would be decided expeditiously

³ *See OSBA M.B.*, p. 3.

enough for Aqua to retain the eligible customer with viable service alternatives. Aqua filed Supplement No. 3 on December 7, 2022. As of the date of this Reply Brief, Supplement No. 3 has been pending before the Commission for more than five months, and it will likely be several more months before a Final Order is issued. An otherwise eligible and interested customer under the Proposed Rider in the future may not want to forego alternative service for the entirety of a second proceeding evaluating the Proposed Rider. Approval of the Proposed Rider in this proceeding would prevent this lag in the future.

Relatedly, OCA argues that Aqua's large industrial customers are currently permitted to advocate for lower rates in intermittent base rate proceedings, rendering the Proposed Rider unnecessary. (OCA M.B., pp. 10-11.) Aqua fully addressed this argument in **Section III(B)(1)** of its Main Brief and will not recite the same here. (Aqua M.B., pp. 16-17; *See also* Aqua St. No. 1R, pp. 6-7.) That said, arguments about class rate design presented in occasional base rate proceedings are not the appropriate vehicle for customers with lower cost competitive alternatives that are not available to the rate class as a whole and the OCA's arguments to the contrary should be rejected.

The OCA also argues that approval of the Proposed Rider carries the risk of higher rates for Aqua's existing customers. This argument is speculative, premature, and should be rejected. Indeed, and as more fully explained in Aqua's Main Brief, approval of the Proposed Rider will not immediately affect any of Aqua's customers' bills or the Company's revenues. (Aqua St. No. 1, p. 6.) Moreover, approval of the Proposed Rider could mitigate the negative rate effects caused by a qualifying customer opting out of receiving Aqua's wastewater service in the future. (Aqua St. No. 1, p. 6.) Indeed, if a large industrial wastewater customer were to opt-out of receiving Aqua's wastewater service, "that loss of revenue would be spread around the Company's service territory

to other wastewater customers to recoup the loss.” (Aqua St. No. 1, p. 6.) Losing a large industrial customer’s entire revenue is worse for Aqua’s entire customer base when compared to possibly losing out on a fractional part of that revenue.

Further, the OCA points to the Commission historically not approving a negotiated rate tariff provision in the wastewater context as alleged support for why the Proposed Rider should be denied here. (*See* OCA M.B., p. 8.) This logic is circular and meritless. OCA has not demonstrated that the Commission has previously considered and rejected a negotiated rate rider provision for a wastewater utility. Therefore, OCA’s argument comes down to a contention that the Commission should reject a rider proposal on the basis that the proposal has never previously been considered. However, if the Commission were to reject every proposed tariff change on the basis of it not approving something similar previously, every utility in each respective sector would have near-identical tariffs. Further, the OCA’s position would forever preclude any wastewater utility – not just Aqua – from instituting a negotiated rate rider for large industrial customers. Again, “[r]elative novelty is not a legitimate ground to oppose the Proposed Rider.” (Aqua St. No. 1R, p. 5.)

2. Aqua is seeking structural approval of the Proposed Rider, not a specific negotiated rate contract.

The OCA and OSBA both correctly point out that, as part of the Proposed Rider, Aqua has not presented a specific contract(s) for review. Similarly, both the OCA and OSBA are correct that, currently, Aqua does not have any customers that would be both eligible and interested in negotiated rate service under the Proposed Rider. These contentions, however, are not determinative or relevant to the Commission’s evaluation of the Proposed Rider.

The Company is requesting that the Commission approve Supplement No. 3 and permit Aqua to implement the Proposed Rider. The Company is not requesting a Commission determination that a specific negotiated rate contract is just and reasonable. Rather, Commission

approval of the Proposed Rider is approval of the structure, and not approval of specific contracts entered into thereunder. This is consistent with the Commission's evaluation of PAWC's Rider DIS. (See *PAWC DIS Order*, **95-96.) Seemingly, OCA and OSBA would have Aqua present a negotiated rate contract with an identified customer in this proceeding to provide the basis for approval for hypothetical contracts with unidentified customers seeking negotiated rate service in the future. This mistakes the trees for the forest and should be rejected. This contention ignores the fact that each contract will have unique terms and conditions, based upon the competitive circumstances available to the specific customer. Moreover, and as explained fully in the Company's Main Brief, Aqua is incented to enter into negotiated rate contracts that are just and reasonable for a number of reasons, namely: (1) Aqua will bear the revenue shortfall resulting from any negotiated rate until it can be recognized in a future and indeterminate base rate proceeding; and (2) in a future and indeterminate base rate proceeding, any negotiated rate contracts will be subject to extensive review by OCA, OSBA, the Commission, and any other party to that proceeding. (See *Aqua M.B.*, pp. 21-22; *Aqua St. No. 1*, p. 6; *Aqua St. No. 1R*, p. 8.)

B. THE PROPOSED RIDER WOULD NOT RESULT IN UNREASONABLE RATE DISCRIMINATION

1. The Public Utility Code does not bar reasonable rate discrimination.

In its Main Brief, OCA erroneously argues that the Proposed Rider is “an [u]nreasonable and [d]iscriminatory [r]ate.” (OCA M.B., p. 11.) OCA circles around the requisite standard. Indeed, under Section 1304 of the Public Utility Code, rates cannot provide an unreasonable preference or advantage. 66 Pa. C.S. § 1304. Thus, the examination that must occur of the Proposed Rider is not whether it is “discriminatory,” rather, whether it is “unreasonably discriminatory.” This concept has been discussed extensively by the Commission and appellate courts. See *Hatfield Twp. Mun. Auth. v. Pa. PUC*, 853 A.2d 1, 18 (Pa. Cmwlth. 2004) (“*Hatfield*”);

Barasch v. Pa. PUC, 533 A.2d 1108, 1111 (Pa. Cmwlth. 1987) (citing *Carpenter v. Pa. PUC*, 15 A.2d 473 (Pa. Super 1940)); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *U.S. Steel Corp. v. Pa. PUC*, 390 A.2d 849 (Pa. Cmwlth. 1978); *Consol. Commc'ns Enter. Serv., Inc. v. Omnipoint Commc'ns, Inc. d/b/a T-Mobile, et al.*, Docket No. C-2010-2210014, 2012 Pa. PUC LEXIS 479 (Order Entered Mar. 15, 2012); *Pa. PUC v. Bell Tel. Co. of Pa.*, 69 Pa. PUC 73 (Order Entered Jan. 25, 1989). Aqua does not dispute that, should an eligible customer begin receiving service under the Proposed Rider, that rate *could* be discriminatory, in the sense of being different from rates to other customers in the same rate class; however, that rate will also be reasonable, comporting with the directive of Section 1304.

Critically, in *Hatfield*, the Pennsylvania Commonwealth Court examined the application of competitive transition and intangible transition charges and explained that “Section 1304 of the Public Utility Code [...] prohibits only unreasonable discrimination or preferences in rates; a mere difference in rates does not violate this section.” *Hatfield*, at 18. The OCA acknowledges as much, quoting from *Phila. Elec. Co. v. Pa. PUC*, 470 A.2d 654 (Pa. Cmwlth. 1984) (“*PECO 1984*”) which reads, in relevant part:

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). While instructive, The Commonwealth Court’s Opinion in *PECO 1984* goes on to explain two pages later that “[d]ifferences in rates between classes of customers based on such criteria as the quantity of [the product] used, the nature of the use, the pattern of the use, or based on differences of conditions of service, or cost of service are not only permissible but often are desirable and even necessary to achieve reasonable efficiency and

economy of operation.” *PECO 1984*, at 659 (emphasis added) (citing *Philadelphia Suburban Transit Co. v. Pa. PUC*, 281 A.2d 179, 186 (Pa. Cmwlth. 1971)); *see also Peoples Natural Gas Co. v. Pa. PUC*, 409 A.2d 446 (Pa. Cmwlth. 1979). Here, the Proposed Rider is both permissible and desirable in that it seeks to mitigate the harmful rate effects of a large industrial customer with a viable alternative to Aqua’s service opting out of the same, to the detriment of Aqua’s remaining customers. As explained in more detail above in **Section III(A)(2)**, approval of the Proposed Rider will have no immediate effects on Aqua’s rates or revenues. Thus, approving the Proposed Rider would not injure any of Aqua’s customers. Even if a negotiated rate contract is entered into in the future with an eligible customer, the rate charged would mitigate – not aggravate – any supposed injury to Aqua’s other customers.

Importantly, any rate discount given under the Proposed Rider is based upon individual contracts and negotiations with individual customers. Only a small subset of Aqua’s total customer base could ever be eligible for a negotiated rate under the Proposed Rider, as evidenced by the fact that only one current Aqua customer meets a single criteria for negotiated rate service under the Proposed Rider now. (*See Aqua M.B.*, p. 12; *See also OSBA M.B.*, p. 3.) The Proposed Rider does not provide a fixed discount to all customers of a specific rate class. Therefore, the OCA’s arguments on this point are misplaced.

2. The potential rate effects of the Proposed Rider would constitute reasonable discrimination.

As noted above, a utility’s rates can be discriminatory so long as they are reasonable. Negotiated rates offered to customers in the future under the Proposed Rider will clearly differ from the rates offered to other industrial customers that do not have competitive service options. That said, they will also be reasonable. Further, they will be subject to review by the Commission and parties in future base rate proceedings. (*Aqua M.B.*, p. 22.)

Modelled after Aqua Pennsylvania, Inc’s (“Aqua PA”) Rider DIS, the Proposed Rider contains stringent eligibility criteria that strictly limit the potentially eligible customer base. Indeed, and as explained more fully in **Section III(A)(2)** of the Company’s Main Brief, the Proposed Rider is only eligible to customers that: (1) discharge wastewater into Aqua’s system resulting from industrial processes; (2) enter into a service agreement of at least 3 years; and (3) have a viable alternative that it intends to select to the detriment of the Company and the Company’s customers. (*See* Aqua M.B., pp. 8-9; Aqua Exhibit EF-1, First Revised Page 16.) Additionally, Aqua may consider whether the customer has made or agrees to make a substantial contribution of capital for facilities or facilities themselves in order to become or remain a customer, among other things. (Aqua M.B., p. 9.) Further, Aqua will require documentation from the customer to establish the existence of a competitive alternative. (Aqua M.B., p. 9.) These eligibility hurdles, in and of themselves, are *per se* evidence of the reasonableness of any rate discrimination that may occur under the Proposed Rider. The specific circumstances that are conditions precedent to even initiating the negotiation process under the Proposed Rider are spelled out in Supplement No. 3. Indeed, the Proposed Rider will be highly targeted towards few, specific customers whose declination of Aqua’s service would otherwise raise other customers’ bills.

Beyond the Proposed Rider being reasonable when viewed in a vacuum, the concept of reasonable rate discrimination is not unfamiliar. Indeed, the concept has been ratified time after time by the Commission when approving comparable rate riders in the tariffs of other Pennsylvania utilities,⁴ including that of Aqua PA’s Rider DIS. *See* Aqua Pennsylvania, Inc. Tariff Water-PA P.U.C. No. 3, Original Page 19.

⁴ *See* Aqua M.B., p. 20, n. 3.

Finally, Aqua has provided a 360-degree view of what the effects to customers' bills could be should a large industrial wastewater customer in the future opt out or decline service from Aqua in favor of an alternative. As explained by Mr. Packer and more fully in the Company's Main Brief, if the Company were to apply a 10% discount to the rates currently paid by Kimberly-Clark, should Kimberly-Clark be deemed eligible and interested to receive negotiated rate service under the Proposed Rider, if and when the Delaware County Regional Water Quality Control Authority ("DELCORA") transaction is approved by the Commission at Docket No. A-2019-3015173, the approximate discount would be \$502,057.50 given projected consumption. (Aqua M.B., p. 14; OCA Exhibit JDM-1, p. 8.) Conversely, if Kimberly-Clark were to opt to receive service from an alternative or leave Aqua's service territory altogether, the Company would lose approximately \$5,000,000 in rates annually. In turn, this loss of revenues would be shifted to Aqua's other customers in the next base rate proceeding. It is reasonable to prevent a large revenue loss by slightly discounting rates to incent new or continued service. This is evidenced by the Commission's approval of other comparable riders throughout different utility sectors in Pennsylvania. Moreover, the burden of any and all lost revenue will be borne by Aqua at least until the Company's next rate case proceeding.

C. IF THE COMMISSION APPROVES THE PROPOSED RIDER, OCA'S RECOMMENDED CHANGES SHOULD BE REJECTED.

1. The OCA's recommended changes to the Proposed Rider are inconsistent with other comparable riders in Pennsylvania.

As fully explained in **Section III(B)(2)** of the Company's Main Brief, the OCA's proposed modifications to the Proposed Rider should be rejected. Indeed, it does not appear that any comparable rider in Pennsylvania has similar eligibility language. Notably, the OCA does not point to any utility in Pennsylvania – or anywhere – with similar language. OCA justifies this departure from clear and available guidance by arguing that “there are fundamental differences

between wastewater and other types of utility service...” (OCA M.B., p. 14.) While there are differences in the provision of wastewater, water, electric and gas service, the basic ratemaking process for each of these utility services is the same, and the OCA offers no reason for why different sectors of utility services should be subjected to different analyses under Section 1304 of the Public Utility Code. *See* 66 Pa. C.S. § 1304. It appears as if the OCA is drawing a distinction without a difference under Section 1304.

Additionally, the OCA also posits that Aqua has not specified what is required to “satisfy” the Company that competitive service alternative exists. This is incorrect. The Proposed Tariff explicitly states that:

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 officers.

(Aqua M.B., p. 9; Aqua Exhibit EF-1, First Revised Page 16.) Further, Aqua is willing to perform its own feasibility study for each potentially eligible customer to determine whether a discounted rate under the Proposed Rider is in the best interests of both the Company and its customers. (Aqua M.B., p. 20.) The OCA’s position also says nothing of the fact that Aqua is strongly incented to pursue advantageous negotiated rate contracts under the Proposed Rider for both its sake and the sake of its customers because Aqua bears the burden of any lost revenues under negotiated rate contracts entered into between base rate proceedings. (*See* Aqua M.B., p. 22, n. 4.)

2. The OCA’s recommended changes may render the Proposed Rider functionally inoperative.

As noted in **Section III(B)(2)** of the Company’s Main Brief, the OCA’s recommended modifications to the Proposed Rider sidestep a pertinent consideration: there is no indication that a current or future eligible customer seeking negotiated rate service under the Proposed Rider

would even provide Aqua with a feasibility study, cost-analysis, or bid(s) for alternative service. Indeed, these offers of proof of alternatives would likely contain competitively sensitive information that customers – and potentially other wastewater service vendors – would not want to provide in the negotiation process. Like the *PAWC DIS Order* explained, “[the Commission] insist[s] that the utility have a strong incentive to drive a hard bargain with the customer.” *PAWC DIS Order*, *96. The same is true for the customer seeking to receive negotiated rate service under the Proposed Rider, which makes it unlikely that the interested customer would cede bargaining ground when they already have a viable alternative to Aqua’s service. If a customer that is otherwise intent on receiving service under the Proposed Rider is dissuaded by the prospect of sharing competitively sensitive information during the bargaining process, Aqua and its customers lose. Similarly, if all potential negotiated rate customers are deterred from seeking service under the Proposed Rider due to the OCA’s proffered eligibility hurdles, the Proposed Rider will be rendered functionally inoperative.

Lastly – and importantly – Aqua has committed to performing its own feasibility study to determine whether a customer seeking service under the Proposed Rider does, in fact, have a viable alternative to the Company’s wastewater service. This commitment, in the interests of concession on behalf of Aqua, renders the OCA’s recommended modifications to the Proposed Rider redundant, at best.

IV. CONCLUSION

WHEREFORE, as explained above and more fully in Aqua Pennsylvania Wastewater, Inc.'s Main Brief, the Company respectfully requests that Administrative Law Gail M. Chiodo recommend, and the Pennsylvania Public Utility Commission approve, Supplement No. 3 to Tariff Sewer-PA P.U.C. No. 3 filed by Aqua Pennsylvania Wastewater, Inc.

Respectfully submitted,



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