

COMMONWEALTH OF PENNSYLVANIA



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May 10, 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 Reply 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".

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Enclosures:

cc: The Honorable Gail M. Chiodo (**email only**)
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Certificate of Service

*345856

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 Reply 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 10th day of May 2023.

SERVICE BY E-MAIL ONLY

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF
OF THE
OFFICE OF CONSUMER ADVOCATE

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I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits this Reply Brief in response to the Main Brief filed by Aqua Pennsylvania Wastewater, Inc. (Aqua, Aqua Wastewater or Company). The OCA will respond only to those matters raised by Aqua that were not previously addressed in the OCA’s Main Brief or that require clarification. The OCA does not waive its opposition on any contested issues simply because it does not repeat arguments here and incorporates by reference the arguments and analysis provided in its Main Brief.

II. BURDEN OF PROOF

Aqua acknowledges that it carries the burden of proof in this proceeding, as the party seeking to implement the proposed tariff rider. Aqua M.B. at 4-5; 66 Pa. C.S. § 332(a). In its recitation of applicable caselaw, Aqua states that if the proponent makes a prima facie case, the “burden shifts to the opponent.” Aqua M.B. at 5. More accurately, and as clarified in the *MacDonald* and *Replogle* cases directly cited by the Company, the “burden” that shifts to the opponent is the burden of going forward. *MacDonald v. Pa. R.R. Co.*, 36 A.2d 492, 493 (Pa. 1944); *Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528, 530-31 (1980). Thus, the burden is not on the OCA to prove that Aqua’s proposed rate is unjust, unreasonable, or not in the public interest. Instead, Pennsylvania law requires only that the OCA show how Aqua failed to meet its burden of proof. While subtle, this critical distinction shows that parties opposing a utility in a rate proceeding need only to shift the burden of going forward to prevail. The burden of proof remains with Aqua. *See, e.g., Pa. PUC v. City of Bethlehem*, 2011 Pa. PUC LEXIS 190, *11 (2011); *Pa. PUC v. UGI Utilities, Inc.- Elec. Div.*, R-2017-2640058, Order at 7 (Oct. 18, 2018); *Pa. PUC v. Equitable Gas Co.*, 57 Pa. PUC 423, 444, n.37 (1983) (*Equitable*). Here, Aqua has failed to satisfy its statutory burden.

To the extent that the findings of fact and conclusions of law proposed by Aqua in Appendices A and B of its Main Brief are inconsistent with the OCA's recommendations as presented in the OCA's Main Brief and herein, the OCA respectfully requests that the findings and conclusions be modified or denied by the Commission.

III. SUMMARY OF REPLY ARGUMENT

Aqua has not shown that Rider LWCUR is just and reasonable and not unreasonably discriminatory under Sections 1301 and 1304 of the Public Utility Code. 66 Pa. C.S. §§ 1301, 1304. Aqua calling the proposed rider "proactive" is merely another way to say that it is not manifest but rather speculative; it does not make it just and reasonable because there is no evidentiary basis for the Commission to allow discounted wastewater rates.

- No current Aqua industrial customer has requested or would participate in the rate.
- There is no evidence showing that a competitive alternative to wastewater service from a utility is viable, feasible or probable.

Aqua's request to get approval now for something that *may* happen in the future is unprecedented and unnecessary. If a competitive alternative comes into existence in the future, Aqua can address it for large industrial customers in future base rate cases. The Commission should have an opportunity to consider whether to approve a discounted rate rider at the time that Aqua Wastewater actually has an existing customer(s) interested in the rate, rather than now – when the magnitude by which the rider could impact wastewater rates is entirely unknown. 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. This will allow the Commission to evaluate whether a competitive alternative exists in the wastewater context, to assess whether the proposed terms and conditions of Rider LWCUR are reasonable, and to protect the interests of Aqua's other customers. As such, the

proposed tariff should be denied, without prejudice.

If the Commission decides to approve Rider LWCUR, then the standard that Aqua will apply for discounting rates for some customers should be clear. Aqua has agreed that that it will perform its own feasibility study for each future potentially-eligible customer. The tariff should reflect that commitment and ensure there will be a demonstration that a viable competitive alternative to wastewater service from a utility exists before any customer is afforded discounted rates.

IV. REPLY ARGUMENT

A. It Is Not in the Public Interest to Approve a Rate that Will Harm Other Customers Without any Demonstrated Need.

Aqua acknowledges that no current customers are eligible and interested in Rider LWCUR but argues that approval of the rider now would be “proactive.” Aqua M.B. at 15. Aqua argues that not having a discounted rate in place now puts other customers at risk to pay higher rates. Aqua M.B. at 13, 16. The problem with Aqua’s position is that, without any actual, existing customer interest, its claims regarding potential, future risk amounts to mere speculation. As discussed in the OCA’s Main Brief and herein, 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.

Aqua argues that the revenue impact of discounting rates is smaller than the revenue impact of a large industrial customer leaving the system, and it is better to increase rates for other customers by a smaller amount than a larger one. Aqua M.B. at 13. This claim by Aqua is a belief not a fact as there is no evidence to support it. Moreover, the Company has not demonstrated that rates for other customers should be increased at all. The actual loss of a

customer is neither known nor certain. Furthermore, there is no evidence that it is actually feasible and probable for a wastewater customer to leave the system in the absence of a negotiated rate. Installing treatment facilities, hauling wastewater or relocating a large industry would likely require significant upfront investment, in addition to the ongoing costs for wastewater service. OCA M.B. at 7-8, *citing* OCA St. 1 at 7-8; OCA Exh. JDM-1 (Aqua response to OCA-1-8). For some industrial customers the characteristics, constituents or volume or quantities of the waste can require pretreatment. OCA St. 1SR at 4. This requirement for additional processing makes it even more uncertain that a lesser cost alternative to continuing or taking wastewater service from Aqua exists.

Also, contrary to Aqua's contention, it is not known or certain that, in response to such hypothetical loss, other customers will have to pay 100% of that customer's lost rates. *See* Aqua M.B. at 13. As recognized by Aqua, the provision of wastewater service has variable costs, which indicates there would be decreased costs if a customer left the system. Aqua St. 1 at 4-5. Also, some of the facilities serving that customer may no longer be useful in the provision of utility service. The revenue requirement associated with those facilities which are not used and useful should not be recovered from other wastewater customers. OCA St. 1SR at 2, n. 1.

What is known and certain, however, is that if Aqua is permitted to offer discounted wastewater rates now, 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. Allowing discounted wastewater rates, use of which will cause known harm, in response to a speculative, uncertain harm that *may* occur is not reasonable. Aqua should not be permitted to have a rider in its tariff that is not currently needed but becomes a self-fulfilling prophecy

because customers who had no intention of exploring alternative service are enticed to request a discounted rate.¹ *Id.*

Aqua does not rebut that there is no evidence to show that a competitive alternative for wastewater exists but argues that the Commission should approve Rider LWCUR anyway. Aqua argues that a competitive alternative could come to exist in the future for an existing or potential customer and that customer could act on that option before Aqua could get a discounted rate in place. Aqua M.B. at 15-16. As discussed in the OCA's Main Brief on pages 10 to 11, however, the claimed risk is not supported by the facts. It is not reasonable to assume 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, and without discussing that decision with Aqua. If the large industrial customer is acquired under Section 1329, that customer's existing rates (whether or not established by contract) will 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. 66 Pa. C.S. § 1329(d)(4). Whether or not the customer is acquired under Section 1329, Aqua has indicated it will be filing rate cases at intervals of three years or less. OCA St. 1SR at 4-5. In those rate cases, a large industrial customer can (and they regularly do) participate in the base rate case to advocate for lower tariffed rates and favorable rate design. OCA St. 1 at 8-9.

Aqua contends, however, that a base rate process is not well suited to address a customer that has alternatives not available to every member of the class that are lower than the average

¹ Moreover, Aqua has other means to incent large customers to take or continue service from Aqua that do not put other customers at risk for rate increases. OCA St. 1SR at 3. It could, for example, incent large customers by not increasing overall rates, or by increasing rates a lesser amount in future rate cases by electing to use a capital structure with less equity or by choosing to acquire systems that generate a lower additional revenue requirement per customer. *Id.*

cost to serve the class as a whole. Aqua M.B. at 17. OCA witness Mierzwa rebutted this contention, explaining that if there are differences in the availability of competitive alternatives then there may also be differences in the characteristics of that customer that could justify differences in tariffed rates. OCA St. 1SR at 6. We do not have those facts which, again, is the underlying problem with trying to address the need for the rider when no existing Aqua wastewater customer has requested it. The Commission must act on facts and a record, not statements of belief asserted by a utility.

The Company also argues that discounted rates should be approved for Aqua Wastewater because it is consistent with a prior decision where the Commission supported discount rates where it could be demonstrated that without such rates the customer could switch to a competitive source of supply. Aqua M.B. at 16-17 *citing Pa. PUC v. Pennsylvania-American Water Co.*, 1995 Pa. PUC LEXIS 170 (July 24, 1995). Specifically, Aqua notes that the Commission approved a discount rate rider for Pennsylvania-American Water Company without discussion of a specific customer interested and eligible to take service under that rider. *Id.* This ignores that, when the Commission decided the PAWC case in July 1995, it had already reviewed and decided an earlier base rate case involving the Roaring Creek system, where it approved a “flexible” rate for a large industrial water customer.² In that case, evidence was provided and evaluated to determine whether there was a competitive alternative to taking water service from the public utility.³ In the wastewater context, that showing has not been made – for Aqua or any

² The next Roaring Creek base rate case was the case in which Aqua Water’s Rider DIS was first approved.

³ The customer provided testimony that it could use mine pool water available at its plant site or another source of raw water because the customer’s manufacturing process did not require filtered water. *Pa. PUC v. Roaring Creek Water Co.*, 1995 Pa. PUC LEXIS 69, *67-172 (R.D. May 5, 1995); *Pa. PUC v. Roaring Creek Water Co.*, 1995 Pa. PUC LEXIS 67, *79-91 (Order May 31, 1995).

other wastewater utility.⁴ Until and unless it has been shown that competitive alternatives to wastewater service from a utility are feasible and probable, the Commission has no basis on which to approve discounted rates for wastewater service. At this time, in this proceeding, Aqua's proposed Rider should be denied.

B. Aqua Cannot Have It Both Ways: If the Rider Will Not Be Used, It Is Not Needed and If It Is Used, It Will Impact Customers Between and After Base Rate Cases.

Aqua argues that Rider LWCUR will have no immediate rate impact, as reason for the Commission to approve it. Aqua M.B. at 21. Noting that the only customer who is currently eligible does not plan to participate in the rider, Aqua claims that if no one uses the rate, there will be no harm to other customers. Further, Aqua contends that approval of the rider, without any customer using it, will not affect the Company's revenues. *Id.* If the rider will not be used, however, that is further showing that it is not needed and should not be approved.

If customers do take service under Rider LWCUR, Aqua acknowledges there will be an impact on other customers' rates in a base rate case that includes contract rates under the rider. Aqua M.B. at 21, *quoting* Aqua St. 1 at 6; OCA St. 1SR at 4; OCA Exh. JDM-1 (Aqua response to OCA-1-4). In addition, if the rider is used to discount rates, there will be an impact on Company revenue between base rate cases. It would reduce revenue available for system operations and investment, which would be a detriment to all Aqua wastewater customers.

While it has no existing customers who are interested and eligible, Aqua proposes that the Commission should give its authorization now for the Company to enter into contracts for discounted rates in the indefinite future, and those contracts would not be reviewed by the Commission until after the fact. Aqua St. 1 at 10. That is an unreasonable request. For Aqua Water,

⁴ To Aqua's knowledge, for wastewater, no state public utility commission has approved discounted rates for service on the basis that a competitive alternative exists. OCA Exh. JDM-1 (Aqua response to OCA-1-9, 1-10). This

the 2022 revenue deficiency resulting from the three customers taking service under Rider DIS (\$5.7 million per year) represented more than 25% of the total revenue from the Industrial class. OCA St. 1SR at 4-5. The Commission should have an opportunity to consider whether to approve a discounted rate rider that could impact wastewater rates by unknown magnitude, at the time that Aqua Wastewater actually has an existing customer(s) interested in the rate.

C. If Approved in This Proceeding, Before Showing that a Competitive Alternative Exists for Wastewater, the Tariff Should Be Clear About the Documentation Aqua Will Obtain.

If the Commission decides to approve Rider LWCUR, the OCA recommends changes to clarify the standard that Aqua will apply for discounting rates. The OCA's particular concern is that an affidavit by a customer is not adequate to demonstrate the legitimacy of a competitive alternative. OCA St. 1 at 9-10. 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 M.B. at 20. The Company also contends that a customer may be unwilling to disclose feasibility studies, cost-analysis or bid(s) if it is negotiating with both Aqua and the competitive service. Aqua states, however, that it is willing to perform its own feasibility study for each future potentially-eligible customer. *Id.* While it offers this concession, Aqua continues to recommend that the OCA's alternative language should be rejected.

As discussed herein and in the OCA's Main Brief, however, wastewater is different from all other types of public utilities, including water. Unlike for those other utilities, there has been no demonstration that a viable competitive alternative to wastewater service from a utility exists. OCA M.B. at 7-8, 13-14. Those differences warrant a requirement in Aqua's tariff for the Company to obtain 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.* 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.

For all of the reasons discuss in the OCA's briefs, Rider LWCUR should be rejected, at this time. If, however, the Commission determines to approve Rider LWCUR, that approval should be conditioned on the adoption of tariff language that expressly requires documentation that, at a minimum, includes a feasibility study, cost-analysis or bid(s) for alternative service. That documentation could be provided by the customer or by Aqua, which is consistent with the concession that Aqua offered.

D. Rider LWCUR Should Be Denied, Without Prejudice.

There is no presumption of reasonableness attached to a utility's claim that it is entitled to pursue a policy and it is not the burden of another party to disprove the reasonableness of a utility's claim. *Equitable* at 444, n.37. No current Aqua industrial customers would participate in the rate and there is no evidence showing that an alternative to service from Aqua is viable, feasible or probable. Approval of the Rider would advantage a potential subset of large industrial customers and put other Aqua customers at risk to pay for the discount in their future rates. Accordingly, and for the additional reasons set forth in the OCA's Main Brief and herein, Aqua has not met its burden of proof to show the just and reasonableness of its proposed rider as

required by 66 Pa. C.S. § 1301 and 66 Pa. C.S. § 1304. OCA M.B. at 5-12. In addition to the burden of proof, Aqua has failed to provide substantial evidence to support its claim that the rider is necessary, proper or even desired by its customers. *See* 2 Pa. C.S. § 704. As such, Rider LWCUR should be denied at this time, without prejudice. If an existing Aqua large industrial customer expresses an interest and identifies a competitive alternative wastewater service option in the future, Aqua can seek Commission approval at that time, when it is possible to evaluate and examine the alternative and assess whether the proposed terms and conditions of Rider LWCUR are reasonable and protect the interests of Aqua's other customers.

V. CONCLUSION

Consistent with the foregoing, 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,

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