

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania Inc,	:	A-2022-3034143
pursuant to Sections 1102 and 1329 of	:	
the Pennsylvania Public Utility Code for:	:	
	:	
(1) approval of the acquisition by Aqua of the	:	
water system assets of the Borough of Shenandoah	:	
("Shenandoah" or "Borough") and the Municipal	:	
Authority of the Borough of Shenandoah	:	
("MABS" or the "Authority") situated in the Borough	:	
Of Shenandoah, West Mahanoy Township, Mahanoy	:	
Township, Butler Township, Girardville Borough,	:	
and Union Township, Schuylkill County, Pennsylvania;	:	
	:	
(2) approval of the right of Aqua to begin to offer,	:	
render, furnish and supply water service in the	:	
Borough of Shenandoah, West Mahanoy Township,	:	
Mahanoy Township, Butler Township, and Girardville	:	
Borough, Schuylkill County, Pennsylvania; and	:	
	:	
(3) an order approving the acquisition that includes	:	
the ratemaking rate base of the Borough and MABS	:	
water system assets pursuant to Section 1329(c)(2)	:	
of the Public Utility Code.	:	
	:	
Request for Approval of the Contract, between Aqua,	:	
the Borough and MABS, Pursuant to Section 507	:	
of the Public Utility Code	:	

RECOMMENDED DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

Table of Contents

I. INTRODUCTION 1

II. HISTORY OF THE PROCEEDING..... 2

III. FINDINGS OF FACT 9

IV. DISCUSSION..... 20

 A. Legal Standard 20

V. SETTLEMENT TERMS AND CONDITIONS 23

 A. Approval of Application and Acquisition..... 23

 B. Tariff..... 24

 C. Ratemaking Rate Base 25

 D. Cost of Service Study (“COSS”) 25

 E. Cell Tower Revenue 26

 F. Distribution System Improvement Charge (“DSIC”) and Long Term Infrastructure Improvement Plan (“LTIIP”)..... 26

 G. Allowance for Funds Used During Construction (“AFUDC”) and Deferral of Depreciation and Transaction Costs 27

 H. Unaccounted For Water (“UAW”) 27

 I. Metering..... 27

 J. Lead Service Line Replacements..... 27

 K. Welcome Letter and Low Income Program Outreach 28

 L. Hardship Contribution 28

 M. Easements 29

 N. Transaction and Closing Costs..... 29

VI. SETTLEMENT CONDITIONS 30

VII. PUBLIC INTEREST ANALYSIS – POSITIONS OF THE SETTLING PARTIES. 31

VIII. OPPOSITION TO THE PROPOSED SETTLEMENT..... 79

IX. CONCLUSIONS OF LAW 93

X. ORDER..... 96

I. INTRODUCTION

This Decision recommends that the Joint Petition of Aqua Pennsylvania, Inc., the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Borough of Shenandoah, and the Municipal Authority of the Borough of Shenandoah for Approval of Settlement regarding the Application filed by Aqua October 26, 2022, pursuant to Sections 507, 1102 and 1329 of the Public Utility Code, for approval of its acquisition of the water system assets of the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah be approved as modified herein and subject to the Ordering Paragraphs herein. Specifically, the Settlement Tariff attached to the Settlement as Exhibit A, to the extent that it permits or requires Aqua to provide free water service to the eight enumerated fire companies is rejected. In addition, the Settlement provision set forth in Section 17. B. 3. iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing, is also rejected. Subject to the specific Ordering Paragraphs set forth below, the Settlement is Approved without further modification.

In addition, the Objections raised by Protestant, Donna Gawrylik, that approval of the sale is not justified as the system is financially sound based on an analysis of the revenues and operating expenses and is not in the public interest, and that due process was not afforded in this matter, are denied.

By Secretarial Letter of February 3, 2023, Aqua was informed that its Application was accepted for filing.

The statutory deadline for the Commission to act in this proceeding is August 3, 2023.

II. HISTORY OF THE PROCEEDING

On October 26, 2022, Aqua Pennsylvania, Inc. (Aqua or Company) filed with the Pennsylvania Public Utility Commission (Commission) its Application pursuant to Sections 1102, 1329, and 507 of the Pennsylvania Public Utility Code (Code), 66 Pa.C.S. §§ 507, 1102, 1329, for (1) approval of the acquisition by Aqua of the water system assets of the Borough of Shenandoah (Shenandoah or Borough) and the Municipal Authority of the Borough of Shenandoah (MABS or the Authority) situated in the Borough of Shenandoah, West Mahanoy Township, Mahanoy Township, Butler Township, Girardville Borough, and Union Township, Schuylkill County, Pennsylvania; (2) approval of the right of Aqua to begin to offer, render, furnish and supply water service in the Borough of Shenandoah, West Mahanoy Township, Mahanoy Township, Butler Township, and Girardville Borough, Schuylkill County, Pennsylvania; and; (3) an order approving the acquisition that includes the ratemaking rate base of the Borough and MABS water system assets pursuant to Section 1329(c)(2) of the Public Utility Code and request for Approval of the Contract, 66 Pa.C.S. § 1329, between Aqua, the Borough and MABS, pursuant to Section 507 of the Public Utility Code, 66 Pa.C.S. § 507.

On February 3, 2023, the Commission accepted, for filing, an Application of Aqua Pennsylvania Inc., under Sections 1102 and 1329 of the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 1102(a) and 1329 (relating to enumeration of acts requiring certificate and valuation of acquired water and wastewater systems), for approval of the acquisition of the water system assets of the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah pursuant to Sections 1102, 1329, and 507 of the Public Utility Code. The Application was filed on October 26, 2022.

On January 17, 2023, a Protest was filed by Donna M. Gawrylik.¹

On February 3, 2023, a Secretarial Letter was issued setting a deadline to file Protests by March 6, 2023.

On February 7, 2023, the Commission issued a Telephonic Prehearing Conference Notice scheduling a prehearing conference for 10:00 a.m. on March 7, 2023.

On February 7, 2023, a Prehearing Conference Order was issued scheduling a Prehearing Conference for March 7, 2023.

On March 2, 2023, Petitions to Intervene were filed by the Borough and by the Authority. No objections were filed to the Petitions to Intervene.

No other Protests or Petitions to Intervene were filed or asserted in this proceeding.

On March 2, 2023, Aqua filed a Petition for a Protective Order, which was discussed at the prehearing conference. Upon the consent of the Parties and over the objection of Protestant, Donna M. Gawrylik, an Interim Order Granting the Petition filed by Aqua for a Protective Order was entered on March 8, 2023.

The prehearing conference was held on March 7, 2023, as scheduled. Aqua, the Borough, the Authority, the Commission's Bureau of Investigation and Enforcement (I&E), the Office of Consumer Advocate (OCA), and the Office of Small Business Advocate (OSBA),

¹ The two-page letter signed by and filed by Ms. Gawrylik did not include a title, a caption, notice to plead, verification, certificate of service or have any other characteristics of a Petition to Intervene in an Application proceeding. A Reference line was included in the letter that stated "RE: PROTEST & PETITION TO INTERVENE." At the Prehearing Conference, the Public Input Hearing, and the evidentiary hearing, the document filed by Ms. Gawrylik was identified as a Protest and Ms. Gawrylik confirmed that she was a Protestant in this proceeding. The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party. 52 Pa. Code § 1.2(c). Accordingly, Ms. Gawrylik was referred to as a Protestant and her letter was recognized as a Protest throughout the proceeding. In addition, throughout every stage of the proceeding, Ms. Gawrylik participated as a full party in the proceeding.

appeared and were represented by counsel. In addition, Protestant Donna M. Gawrylik attended the conference. The parties discussed a variety of matters, agreed to present this case at the evidentiary hearing on the submission of preserved written testimony and agreed upon a litigation schedule and an expedited discovery schedule. A telephonic evidentiary hearing was scheduled for March 28-29, 2023.

On March 7, 2023, a Telephonic Public Input Hearing Notice was issued by the Commission providing notice that the telephonic public input hearing was scheduled for March 21, 2023 at 6:00 p.m., and providing instructions regarding how to participate at the public input hearing. In addition, instructions were provided to offer evidence or exhibits at the hearing, to preregister to participate in or testify at the public input hearing, to request an interpreter, and to request assistance to participate in the public input hearing. The deadline to pre-register to testify at the public input hearing was set at 10:00 a.m. on March 20, 2023.

On March 8, 2023, a Prehearing Order was entered. The Parties were reminded of the Commission's requirements for the preparation and filing of written testimony. 52 Pa. Code §§ 5.412 and 5.412(a).

The Parties were also advised that written testimony must be accompanied by all exhibits to which it relates; that technical terms and concepts are to be clearly defined and explained in the testimonies and briefs; that no written testimony will be admitted into evidence unless accompanied by a verification or affidavit of the witness; and that active parties serving written testimony in proceedings pending before the Commission pursuant to 52 Pa. Code § 5.412(f) shall be required, within thirty days after the final hearing in an adjudicatory proceeding, to e-file with the Secretary's Bureau a copy of all testimony furnished to the court reporter during the proceeding consistent with 52 Pa. Code § 5.412(a).

The sole Protest was filed by Donna M. Gawrylik, who attended and participated in the conference. No objections were raised to the Protest. The only Petitions to Intervene filed and advanced at the prehearing conference were filed by the Borough and by the Authority and were discussed at the prehearing conference. The Borough and Authority participated at the

Prehearing Conference through counsel. The Petitions to Intervene filed by the Borough and by the Authority were granted by the Prehearing Order entered on March 8, 2023, without objection.

The Prehearing Order entered on March 8, 2023, also advised the Parties that, if anyone planned to call as a witness, anyone having a limited ability to speak or understand English or are deaf or hearing-impaired, a qualified interpreter may be provided upon request. The Prehearing Order provided that if anyone wanted to request an interpreter, they must contact the presiding officer's legal assistant, in writing and the Commission Scheduling Office at least ten days before any scheduled proceeding or Hearing. The telephone number for the office of the presiding officer, Scheduling Office and the AT&T Relay Service number for persons who are deaf or hearing-impaired was provided in the Prehearing Order.

Pursuant to the litigation schedule agreed upon by the Parties at the prehearing conference on March 7, 2023, and the terms of the Prehearing Order entered on March 8, 2023, the deadline to submit preserved written direct testimony was March 20, 2023. Written direct testimony was served upon the Parties on March 20, 2023, by OCA and I&E.

The public input hearing convened on March 21, 2023, as scheduled. Aqua, the Borough, the Authority, I & E, OCA, and OSBA, appeared and were represented by counsel. In addition, Protestant Donna M. Gawrylik attended the public input hearing. Ten individuals preregistered to testify at the public input hearings, including Protestant, Donna M. Gawrylik. No individuals submitted proposed exhibits to present at the public input hearing.

Prior to receiving testimony the parties and participants were advised that the parties and witnesses at the public input hearing would have the choice to testify under oath or affirmation, which testimony will be taken down and transcribed by the official reporter, subject to cross-examination and would become part of the official record and considered by myself and the Commission. The Parties and witnesses were further advised that they could choose to make an unsworn statement, which statement will be "off the record," would not be transcribed and would not be able to be used, relied upon, or considered by me, the parties, or the Commission.

The Parties and witnesses were also informed that if anyone testified at the public input hearing, that person will not be permitted to testify again at another public input hearing or at an evidentiary hearing, if one was held.

On March 22, 2023, an interim order was entered which provided, in part, that the deadline to file a Settlement Petition and Statements in Support shall be not later than April 11, 2023, at 4:00 p.m., with a deadline to file objections to the proposed settlement of April 20, 2023, at 4:00 p.m. The Order further provided that any Joint Settlement Petition and Briefs shall include proposed findings of fact, proposed conclusions of law, proposed ordering paragraphs and a procedural history, with specific citations to the record, where applicable. In the event of a settlement or the filing of Briefs, the Parties shall confer and establish a list of common issues which the Parties shall utilize in the organization of the briefs, settlement petition and all statements in support of settlement in these proceedings. All issues addressed in the settlement petition and statements in support of settlement and briefs shall be structured so that all parties' statements in support of settlement and the settlement petition discuss identical issues as identified by the parties.

The evidentiary hearing was held on March 28, 2023. Aqua, OCA, I&E, the Borough, and MABS appeared and participated through counsel. In addition, Protestant, Donna Gawrylik appeared and participated. The hearing was concluded on March 28, 2023, and the March 29, 2023, hearing was cancelled.

During the hearing, the following testimony and exhibits were admitted into the record:

Exhibit No.	Party	Exhibit Description
1	Aqua	Application with Exhibits A – CC2 filed on October 6, 2022 ²
2	Aqua	Letter to Sec. Chiavetta encl. Aqua’s Responses to TUS Information Request Nos. 1, 2, 3, 4 & 7 filed on November 9, 2022 ³
3	Aqua	Letter to Sec. Chiavetta encl. Aqua’s Responses to TUS Information Request Nos. 4-6, 8-12 filed on November 18, 2022 ⁴
4	Aqua	Letter to Sec. Chiavetta encl. Supplemental Information re Ringtown Dam No. 5 filed on December 16, 2022
5	Aqua	Application Ex. U – Verified Direct Testimony of William C. Packer, including Appendix A (Aqua Statement No. 1)
6	Aqua	Application Ex. V – Verified Direct Testimony of Brennan Kelly. Including Appendix A (Aqua Statement No. 2)
7	Aqua	Application Ex. W – Verified Direct Testimony of Stephen Clark (Aqua Statement No. 3)
8	Aqua	Application Ex. X – Verified Direct Testimony of Matt Marchisello (Aqua Statement No. 4) (Public)
9	Aqua	Application Ex. X – Verified Direct Testimony of Matt Marchisello (Aqua Statement No. 4) (Confidential)
10	Aqua	Application Ex. Y – Verified Direct Testimony of Leo Pietkiewicz, including Appendix A (Aqua Statement No. 5)
11	Aqua	Application Ex. Z – Verified Direct Testimony of Harold Walker, III, including Appendix A (Aqua Statement No. 6)
12	Aqua	Application Ex. AA – Verified Direct Testimony of Dylan D’Ascendis, including Attachment A (Aqua Statement No. 7)
13	Aqua	Verifications of Discovery Request Responses included in Exhibits to OCA and I&E Direct Testimony
14	OCA	Verified Direct Testimony of Morgan N. DeAngelo, including Appendices A – F and OCA Schedule MND-1 (OCA Statement No. 1)
15	I&E	Verified Direct Testimony of D.C. Patel, including Appendix A and I&E Exhibit No. 1 (I&E Statement No. 1)
16	I&E	Verified Direct Testimony of Esyan A. Sakaya, including Appendix A (I&E Statement No 2)

² Includes public and confidential versions of Exhibits and Supporting Workpapers filed confidentially with the Commission on October 6, 2022.

³ Includes public and confidential versions of Exhibits and Supporting Workpapers filed confidentially with the Commission on November 9, 2022.

⁴ Includes public and confidential versions of information filed confidentially with the Commission on November 18, 2022.

On April 11, 2023, the Settling Parties, Aqua, OCA, I&E, the Borough, and MABS, filed a Joint Petition for Approval of Settlement (Joint Petition or Settlement), for the purpose of settling the proceeding under the terms and conditions set forth therein. OSBA is not a Party to the Settlement. The Settlement, at page 1 includes Footnote 1, which provides: Aqua, OCA, I&E, the Borough, and MABS are collectively referred to herein as “Joint Petitioners.” The Office of Small Business Advocate (“OSBA”) has authorized the Joint Petitioners to represent that while it is not a signatory to this Joint Petition it does not oppose the Settlement. In addition, Protestant, Donna Gawrylik is not a party to the Settlement.

A Certificate of service was attached to the Settlement indicating that the Settlement was served upon Maria Casey, Esq., counsel for Donna Gawrylik, on April 11, 2023. Attorney Casey filed an Entry of Appearance on April 11, 2023, and a Brief on behalf of Donna Gawrylik.

On April 11, 2023, an interim order was entered providing that any non-settling party, including Protestant, Donna Gawrylik, who wishes to object to the proposed Settlement as set forth or referenced in the Joint Petition, must file his or her written objections with the Secretary for the Commission, Rosemary Chiavetta, at P.O. Box 3265, Harrisburg, PA 17105-3265, and serve copies upon the undersigned presiding Administrative Law Judge electronically and by first class mail, and serve a copy on the parties named on the enclosed Service List, so that the objections are filed and received by electronic mail not later than 4:00 p.m. on April 20, 2023.

On April 19, 2023, Protestant, Donna Gawrylik filed her objections to the Settlement.⁵

At the prehearing conference and through the Prehearing Order, the Parties were advised that they were permitted to submit briefs and reply briefs in this proceeding. No briefs

⁵ The Objections were titled “Objections of Intervenor, Donna Gawrylik, regarding Aqua’s application in the Shenandoah Borough Pennsylvania for the acquisition of water rights.”

or responsive pleadings were filed in response to the Objections filed by Donna Gawrylik and no request to permit such filings were submitted.

The record in this case closed on May 1, 2023. For the reasons set forth below, the Settlement proposed by Aqua, OCA, I&E, the Borough and the Authority will be recommended for approval, as modified herein. In addition, the Objections filed by Donna Gawrylik, Protestant, will be denied.

III. FINDINGS OF FACT

The Settling Parties have agreed to the following findings of fact that were numbered 18 through 74 in the Settlement. These stipulated findings of fact by the Settling Parties are set forth below and are adopted without modification, with regard to the settlement of this matter, based upon the record evidence presented in this proceeding.⁶

As a consequence of the Settlement terms and conditions set forth in Section II above and supported by the Application, exhibits and testimony submitted for admission in the record, the Joint Petitioners request that Judge Watson and the Commission make the following findings of fact and such other findings and conclusions as may be required or appropriate.

Aqua and Shenandoah

1. Aqua is a regulated public utility company, duly organized and existing under the laws of the Commonwealth of Pennsylvania. Aqua is engaged in the water service business and furnishes water service to approximately 448,000 customers. Aqua's existing service territories cover various counties throughout Pennsylvania, including parts of Schuylkill County. Exhibit No. 1, Application, at ¶ 8.

⁶ See, Settlement pp. 11-21. Note also that the numbering of the paragraphs has been changed but the substance of each paragraph has not been modified.

2. The Borough is a duly organized and validly existing borough of the Commonwealth of Pennsylvania. In 1941, the Borough created MABS, which is duly organized and existing under the Municipal Authorities Act, and thereafter transferred ownership of the water system to MABS, which provides water service to approximately 2,899 customers (as of December 31, 2021) in the Requested Territory. *Id.* at ¶ 9.

APA

3. Aqua, the Borough, and MABS are parties to an APA,^[7] dated as of July 20, 2021. *Id.* at ¶ 7; Application Ex. B.

4. The negotiated purchase price for the Shenandoah water system assets (the “Assets”) is Twelve Million Dollars (\$12,000,000.00), and is based on arm’s length negotiations. Aqua is not affiliated with the Borough or MABS. Exhibit No. 1, Application, at ¶¶ 21-22.

5. Aqua will use short term debt initially for the purchase of the Assets with the expectation that the short term debt will be converted to long term debt and equity capital at a later date. *Id.* at ¶ 23.

Assets Subject to Transfer

6. The water system assets to be transferred are the “Acquired Assets” and have the meaning specified in Section 2.01 of the Agreement. The Acquired Assets include the assets, properties and rights of Shenandoah used in the system and all pipes, services, valves, hydrants, pumping stations, reservoirs, dams, storage tanks, improvements, fixtures, manholes, and pipelines and any billing and collections related assets necessary to run the system. *Id.* at ¶ 24.

7. Aqua will be taking assignment of one contract identified on Schedule 4.15 of the APA (“Assigned Contracts”). *Id.* at ¶ 25; Application Ex. F.

⁷ Asset Purchase Agreement (APA).

8. The Acquired Assets also include all Authorizations and Permits of or held by Shenandoah (to the extent transferrable to Aqua under applicable law), including all Authorizations and Permits which are environmental permits, other operating permits and those items listed or described on Schedule 4.14 of the APA. Exhibit No. 1, Application, at ¶ 26.

9. “Excluded Assets,” which are those assets not being transferred to Aqua, has the meaning specified in Section 2.02 of the APA. Excluded Assets include contracts that are not Assigned Contracts; breached dams including, Kehly Run Dam No. 5, Kehly Run Dam No. 6, and Kehly Run Reservoir No. 3; cash and cash equivalents; and the assets, properties and rights set forth in Schedule 2.02(g) of the Agreement. *Id.* at ¶ 27.

10. “Assumed Liabilities” has the meaning specified in Section 2.04(a) of the APA and includes all liabilities and obligations arising out of or relating to Aqua’s ownership or operation of the water system and the Acquired Assets on or after closing. *Id.* at ¶ 28.

Rates

11. MABS bills customers with a 5/8”, 5/8 x 3/4”, 3/4”, or 1” meter a minimum charge of \$61.46 quarterly for the first 3,000 gallons of water usage; \$20.49 on the next 3,000 gallons (4,000-6,000); \$10.96 for the next 3,000 gallons (7,000-9,000 gallons); \$4.83 for the next 12,000 gallons (10,000-21,000 gallons); and \$10.96 for all in excess of 21,000 gallons. Customers having a 2-inch meter or greater are billed monthly at a fixed charge up to a stated allowance, then \$3.92 on the next 500,000 gallons (per 1,000 gallons) and \$1.89 per 1,000 gallons on the balance. Exhibit No. 1, Application, at ¶ 36; Application Ex. B, at Schedule 7.04(a).

12. Aqua will implement MABS’ water rates in effect at closing as reflected in the Settlement Tariff (**Exhibit A**), which rates shall remain unchanged until Aqua’s next base rate proceeding following closing. A schedule of rates for MABS was included with the Application as Exhibit G. MABS, presently bills on a monthly and quarterly basis. Aqua will convert MABS customers to monthly billing at closing. Exhibit No. 1, Application, at ¶ 35.

13. Aqua projects annual revenue of \$1,927,789 from MABS' customers based on MABS current rate schedule,^[8] and annual operating and maintenance expenses of \$1,203,215 based on MABS operating expenses presented in the 2020 financial statements, as adjusted by Aqua. *Id.* at ¶¶ 43-44.

14. Aqua projects an annual revenue requirement for the MABS system of approximately \$2.8 million and an annual revenue deficiency of \$865,000. Exhibit No. 5, Packer Direct, Appendix A, at 1; OCA Statement No. 1, at 6:4-8.

15. The current average monthly bill of a MABS residential customer is approximately \$43.46 per month. Applying 100% of the revenue deficiency to the existing rates, the average bill would increase to approximately \$62.96 per month or a 44.87% increase. Exhibit No. 5, Packer Direct, at 15:4-7 and Appendix A. Aqua projects that if 20% of the revenue deficiency of \$865,000 is applied to the existing Aqua water customers, the estimated incremental rate effect is a \$0.08 or 0.10% monthly increase for those customers. Exhibit No. 5, Packer Direct, Appendix A, at 1.

16. Aqua will implement its *Rules and Regulations* to govern the provision of water service in the Requested Territory, as those *Rules and Regulations* are in effect from time to time for Aqua. *Id.* at ¶ 37.

Proof of Compliance

17. Aqua will operate and manage the Shenandoah water system as a standalone system within Aqua's footprint from its Southeastern Division Office in Bryn Mawr, Pennsylvania, with operations support from Aqua's Roaring Creek Division Office in Shamokin, Pennsylvania. The system is approximately 14 miles from the Roaring Creek Division Office and a portion of the system overlaps with Aqua's closest water system. Aqua provides water

⁸ This estimate included the Miscellaneous Charges DEP that are excluded as a result of the Settlement. *See* Paragraph 17.B.2, *supra*.

service in Schuylkill County, as well as in the neighboring counties of Berks, Carbon, Columbia, Lehigh and Northumberland. Exhibit No. 1, Application, at ¶¶ 45, 51.

18. Aqua is planning to interconnect the Shenandoah water system with its Roaring Creek system to provide redundancy, improve water quality, and provide additional emergency supply as a result of the acquisition; however, this interconnection will occur only after Aqua has had an opportunity to conduct, review and analyze the results of hydraulic and water compatibility studies to determine any appropriate steps required prior to interconnection are followed.^[9] *Id.* at ¶ 52; Exhibit No. 7, Clark Direct.

19. Aqua is a Class A utility in good standing with the DEP and in general compliance with the DEP with regard to the provision of water service. Exhibit No. 1, Application, at 49.

20. A list of violations for the MABS System within the last five years along with actions taken to address those violations is attached to the Application as Exhibit O, and the DEP correspondence related to deficiencies in the MABS dams was attached to the Application as Exhibit P. *Id.* at ¶¶ 47-48. Dam inspection reports for MABS dams were also provided. Exhibit No. 3.^[10]

21. Aqua is not aware of any DEP violations for MABS other than those listed in the Application. Exhibit No. 6, Kelly Direct, at 8:15-17.

Planned Capital Projects, COLSLs and UAW

22. Aqua has identified capital improvement needs for distribution mains, pump stations, emergency power, storage tanks, and dams based on facility conditions observed, facility age, and safety. Aqua estimates that it will invest approximately \$23 million over the

⁹ The Joint Petitioners have not waived their rights to take any position on future claims for rate recovery of investment in the Shenandoah system, including the ability to challenge reasonableness and prudence.

¹⁰ These reports were filed confidentially with the Commission.

next 10 years, with approximately \$13 million of that investment for distribution main replacement. *Id.* at 6:15-20.

23. The MABS water system also has high UAW, which MABS has taken steps to address, but which Aqua will look to measure through performing a system audit, and endeavor to reduce through main replacements and other improvements, including meter replacements. Exhibit No. 6, Kelly Direct, at 9:6-17.

24. Lead Service Lines (“LSLs”) have been observed in the MABS system, however, the number of LSLs in the system is unknown. MABS does not have a COLSLR^[11] program, but Aqua does. Exhibit No. 7, Clark Direct, at 6-7. Aqua will integrate the MABS system into its service line inventory efforts to be completed by 2024 and will make its COLSLR program available to MABS customers, which will eliminate partial replacements of LSLs and provide opportunity for no-cost replacements to MABS customers with a COLSL. *Id.* at 8.

Fitness

25. *Legal Fitness.* Aqua is a certificated provider of water service in the Commonwealth, with no pending legal proceedings that would suggest that Aqua is not able to provide safe and adequate service to customers. Exhibit No. 1, Application, at ¶55.a., n.3; Exhibit No. 5, Packer Direct, at 8:6-8.

26. *Financial Fitness.* Aqua is a Class A water utility in the Commonwealth and the largest water subsidiary of Essential, with total net water utility plant assets of \$4.1 billion and annual revenues of \$495 million in 2021. Aqua had operating income of approximately \$260 million and net income of \$194 million. Aqua’s cash flows from operations equaled approximately \$275 million. Exhibit No. 5, Packer Direct, at 8:11-15.

27. Aqua has an A rating from Standard and Poor’s Rating Service and has approximately \$1.815 billion in outstanding long-term debt at a weighted average interest rate of

¹¹ Customer-owned lead service line replacement (COLSLR).

approximately 4.00%. Aqua also utilizes low-cost long-term debt financing instruments through the Pennsylvania Infrastructure Investment Authority (“PENNVEST”), representing about 2% of Aqua’s total debt portfolio. In addition to Aqua’s access to long-term debt, Aqua has a short-term credit facility of \$100 million and has access to equity capital as a subsidiary of Essential. *Id.* at 8:15-21.

28. The Proposed Transaction will be funded using existing short-term credit lines. The short-term credit funding will be converted to a mix of long-term debt and equity capital shortly after closing. Aqua does not anticipate that the Proposed Transaction will affect its corporate credit rating. *Id.* at 9:3-10.

29. *Technical and Managerial Fitness.* Management, customer service, regulatory compliance, engineering, financial and ancillary services will be provided from the Southeastern Division Office in Bryn Mawr, as well as operational support to be provided by Roaring Creek Division Office in Shamokin, Pennsylvania. Mr. William M. Grutza will be the assigned Certified Water Operator for the system. Exhibit No. 1, Application, at ¶ 45.

30. Aqua is already providing water service in Girardville (through its Girardville System). Aqua’s Girardville system is interconnected with Aqua’s nearby Mt. Carmel and Roaring Creek systems. Aqua is planning to interconnect its existing water system with the MABS water system to provide redundancy and emergency supply. Aqua’s Roaring Creek Division office is located in close proximity to the MABS water system. Exhibit No. 5, at 13:6-13.

Benefits of the Transaction and Settlement

31. Aqua has the managerial, technical, and financial resources to improve the operations of MABS. Exhibit No. 1, Application, at 55.d.

32. Aqua has technical experience and fitness in deploying resources towards capital improvements. Exhibit No. 5, Packer Direct, at 13:22-14:2; Exhibit No. 1, Application, at ¶ 55.b.

33. As noted above, Aqua is planning to interconnect its existing water system with the Shenandoah water system to provide redundancy and emergency supply. Exhibit No. 5, Packer Direct, at 13:6-13.

34. Aqua is projecting less O&M costs under its ownership through reductions in costs for water maintenance. Specifically, referencing MABS 2020 Financial Statements, Operating Expenses were approximately \$1.7 million, whereas Aqua is projecting annual expenses of approximately \$1.2 million. *Id.* at 13:14-21.

35. As noted above, Aqua plans to invest \$23 million in the MABS system for main replacements and other system needs, will endeavor to minimize future water losses through main replacements and other improvements, will integrate the MABS system into its LSL inventory efforts, and MABS customers will be able to participate in Aqua's COLSLR program. Exhibit No. 6, Kelly Direct, at 6:15-20, at 9:6-17; Exhibit No. 7, Clark Direct, at 6-8.

36. Aqua provides customer service through a toll-free number that customers can call from 8:00AM-5:00PM EST for regular business, which expands on MABS' current business hours. The same customer service number houses Aqua's 24/7/365 emergency response line. Exhibit No. 7, Clark Direct, at 3:22-4:2.

37. MABS customers will benefit from expanded bill payment options including payment by text message. MABS customers can also sign up for notifications and alerts to be via email or text message regarding their service. These services allow customers to stay informed of events impacting their service. MABS customers will also have access to Aqua's customer assistance programs. *Id.* at 4:2-6.

38. Aqua's turn on fee, during normal business hours, is \$50, which is significantly less than MABS turn on fee of \$123. *Id.* at 4:7-9.

39. Aqua has procedures in place under Chapter 14 of the Code that provide for billing, payment, collection, termination and reconnection of service, payment arrangements, medical certifications, and formal and informal complaint procedures. Aqua has customer care teams available to help resolve service and billing issues and has an established process and procedure for addressing formal and informal complaints. *Id.* at 4:12-16.

40. The acquisition of the Shenandoah water system will be an approximate 0.6% increase in Aqua's customer base. Exhibit No. 5, Packer Direct, at ¶ 14:5-8.

41. The connections per MABS' records are approximately 2,900, which equates to an approximately \$4,100 purchase price per connection and is approximately 50% less than Aqua's existing rate base per connection, projected at approximately \$8,500. *Id.* at 14:9-15.

42. Shenandoah will receive the benefit of sale proceeds of \$12,000,000, and retain[] cell tower revenues for a period of time following closing.

Section 1329 Considerations

43. *Ratemaking Rate Base.* Aqua and Shenandoah have agreed to use the process presented in Section 1329 of the Code to determine the fair market value of the Acquired Assets and the ratemaking rate base.

44. Aqua and Shenandoah agreed on a Licensed Engineer to complete the Engineering Assessment with Original Cost Estimate of the Shenandoah Water System and engaged UVEs^[12] to perform Fair Market Value analyses of the system in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), utilizing the cost, market, and income approaches. Exhibit No. 1, Application, at ¶ 12 and Exhibit D.

¹² Utility valuation expert (UVE). 66. Pa.C.S § 1329(b).

45. Aqua engaged the services of Gannett. Shenandoah engaged the services of ScottMadden. Both firms were pre-certified as authorized UVEs and are on the list of qualified appraisers maintained by the Commission. *Id.* at ¶ 57; *see also* Exhibit No. 11, Walker Direct, and Exhibit No. 12, D'Ascendis Direct.

46. As required by Section 1329(d)(1)(i), copies of the Fair Market Value Appraisal Reports of Gannett and ScottMadden were attached as Exhibit Q and Exhibit R, respectively, to the Application. Exhibit No. 1, Application, at ¶ 57, Exhibit Q, and Exhibit R.

47. As required by Section 1329(d)(1)(ii), the purchase price agreed to by Aqua and Shenandoah was identified as \$12,000,000. Exhibit No. 1, Application, at ¶ 58.

48. As required by Section 1329(d)(1)(iii), ratemaking rate base for the Shenandoah Water System was identified as \$12,000,000. This amount is based on the agreed-to purchase price of \$12,000,000, which is less than the average of the two UVE appraisals. Exhibit No. 1, Application, at ¶ 59; *see also* Exhibit No. 5, Packer Direct, at 17:19-22. Gannett's fair market value appraisal is \$25,221,000. ScottMadden's fair market value appraisal is \$18,100,307. The average of the two appraisals is \$21,660,654. Exhibit No. 5, Packer Direct, at 17:11-15.

49. As required by Section 1329(d)(1)(iv), transaction and closing costs were identified as approximately \$457,000. Exhibit No. 1, Application, at ¶ 60. Exact closing costs will be determined at closing. Exhibit No. 5, Packer Direct, at 18:17-18.

50. As required by Section 1329(d)(1)(v), a tariff containing a rate equal to the existing MABS rates at the time of acquisition was attached as Exhibit G to the Application. Exhibit No. 1, Application, at ¶ 61 and Exhibit G.

51. The UVEs were paid \$45,977.50 for the completed Fair Market Value Appraisal Reports. Documentation of the fees paid to each UVE was included with the Application as Exhibit S1 and Exhibit S2, respectively. Exhibit No. 1, Application, at ¶ 63,

Exhibit S1 and Exhibit S2; Exhibit No. 5, Packer Direct, at 3-13; Exhibit No. 12, D'Ascendis Direct, at 6:13-21.

52. The UVEs' fees were less than 5% of the fair market value benchmark noted in the Final Implementation Order. Exhibit No. 1, Application, at ¶ 63.

53. Gannett and ScottMadden filed verifications stating that they have no affiliation with Aqua or Shenandoah as specified in Section 1329 and that their Appraisals determined fair market value in compliance with the most recent edition of USPAP, employing the cost, market and income approaches and that they complied with applicable jurisdictional exceptions were attached to the Application. Exhibit No. 1, Application, at ¶ 41, Exhibit T1 and Exhibit T2.

54. Aqua's contract with Gannett to undertake its Fair Market Value Appraisal was included as Exhibit S1 to the Application. Shenandoah's contract with ScottMadden to undertake its Fair Market Value Appraisal was included as Exhibit S2 to Application. Exhibit No. 5, Packer Direct, at 18:8-13.

55. Aqua is proposing to implement MABS' existing rates after closing and to maintain those rates until the next Aqua rate proceeding. Exhibit No. 1, Application, at ¶ 65.

Section 507 Considerations

56. Aqua's Application asks that the Commission, if necessary, issue certificates of filing pursuant to Section 507 of the Code, for its APA with the Borough and MABS. Exhibit No. 1, Application, at ¶ 75 and Exhibit B.

IV. DISCUSSION

The Settlement presented here is not a unanimous or full settlement given that the Office of Small Business Advocate is not a Party to the Settlement but does not oppose the Settlement and Protestant, Donna Gawrylik has objected to the Settlement.

A. Legal Standard

Section 1102(a) of the Public Utility Code, 66 Pa.C.S. § 1102(a), permits a public utility to undertake certain actions only upon Commission approval evidenced by a certificate of public convenience. Among the activities that require Commission approval is the following:

[f]or any public utility or an affiliated interest of a public utility . . . to acquire from, or to transfer to, any person or corporation . . . by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service[.]

66 Pa.C.S. § 1102(a)(3). The acquisition proposed by the Joint Petition falls under Section 1102(a)(3).

When a certificate of public convenience is required under Section 1102, pursuant to Section 1103(a) of the Public Utility Code, 66 Pa.C.S. § 1103(a), the Commission may issue the certificate only upon a finding or determination that the granting of such certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.” Since Aqua is the party that filed the Application at issue in this proceeding, Aqua has the burden of proof to satisfy this particular legal standard.

According to the Pennsylvania Supreme Court, satisfying this standard requires the Commission to find that a proposed transaction would “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *City of York v.*

Pa. Pub. Util. Comm'n, 295 A.2d 825, 828 (Pa. 1972) (*City of York*); see also, *Popowsky v. Pa. Pub. Util. Comm'n*, 937 A.2d 1040, 1057 (Pa. 2007) (when addressing the issue of affirmative public benefits “the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission's finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way”). In addition, Section 1103(a) allows the Commission to impose upon its issuance of a certificate of public convenience “such conditions as it may deem to be just and reasonable.” 66 Pa.C.S. § 1103(a).

Additionally, pursuant to Section 1103 of the Code, Aqua must show that it is technically, legally, and financially fit to own and operate the assets it will acquire from the Township. *Seaboard Tank Lines v. Pa. Pub. Util. Comm'n*, 502 A. 2d 762 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d 240 (Pa. Super. 1958). As a certificated public utility, there is a rebuttable presumption that Aqua possesses the requisite fitness. *South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308 (Pa. Cmwlth. 1992); *See also*, 66 Pa.C.S. § 1329.

Section 1329 of the Public Utility Code sets forth a procedure which permits a public utility to utilize fair market valuation for ratemaking purposes instead of the original cost of construction of the acquired facilities minus the accumulated depreciation. 66 Pa.C.S. § 1329. Section 1329 of the Code addresses the valuation of the assets of municipally-owned or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities. The acquiring utility is authorized to collect a distribution system improvement charge. Section 1329 also enables a public utility or other acquiring entity's post-acquisition improvement costs not recovered through a distribution system improvement charge to be deferred for book and ratemaking purposes. In sum, Section 1329 helps mitigate the risk that a utility will not be able to fully recover its investment when water or wastewater assets are acquired from a municipality or authority.

If the parties agree to the Section 1329 process, an “acquiring public utility” and the seller of the municipal system each select a UVE from a list of such experts established and

maintained by the Commission. The selected UVEs perform independent appraisals of the system to establish its fair market value. Also, the acquiring public utility and the seller select one licensed engineer to conduct an assessment of the tangible assets of the seller which is incorporated into the valuations of the UVEs.

After receiving the valuations, the acquiring public utility must apply for a certificate of public convenience under Section 1102 of the Code and include the following as an attachment to the Section 1102 application: copies of the UVE appraisals; the agreed purchase price; the ratemaking rate base; the transaction and closing costs incurred by the acquiring public utility that will be included in its rate base; and a tariff containing a rate equal to the existing rates of the selling utility at the time of the acquisition and a rate stabilization plan, if applicable. 66 Pa.C.S. § 1329(d)(1). For applications involving an acquiring public entity under Section 1329(d)(1), the Commission has a six-month deadline for issuing a determination.

Aqua seeks approval of other connected agreements pursuant to Section 507 of the Public Utility Code, 66 Pa.C.S. § 507. Section 507 requires that contracts between a public utility and a municipal corporation (except for contracts to furnish service at regular tariff rates) be filed with the Commission at least 30 days before the effective date of the contract. The Commission approves the contract by issuing a certificate of filing, unless it decides to institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. Should the Commission initiate proceedings, the contract or agreement is not effective until the Commission grants its approval. Section 507 is a filing requirement and does not require service of the filing on any potentially interested parties.

In this case, the Settling Parties submitted a non-unanimous settlement of all issues. The Office of Small Business Advocate did not join in the Settlement but did not oppose the Settlement and Protestant, Donna Gawrylik did not reach an agreement with the Settling Parties on the issues in this proceeding.

Commission policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. *Pa. Pub. Util. Comm’n v. City of Lancaster – Bureau of Water*, Docket No. R-2010-2179103 (Opinion and Order entered July 14, 2011) (*Lancaster*). Instead, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. *Id.* (citing, *Warner v. GTE N., Inc.*, Docket No. C-00902815 (Opinion and Order entered Apr. 1, 1996) (*Warner*)); *Pa. Pub. Util. Comm’n. v. CS Water & Sewer Assocs.*, 74 Pa.P.U.C. 767 (1991). In addition, the Commission has held that parties to settled cases are afforded flexibility in reaching amicable resolutions, so long as the settlement is in the public interest. *Pa. Pub. Util. Comm’n v. MXenergy Elec. Inc.*, Docket No. M-2012-2201861 (Opinion and Order entered Dec. 5, 2013).

V. SETTLEMENT TERMS AND CONDITIONS

The terms of the Settlement are set forth below, verbatim, as submitted by the Settling Parties in the Joint Petition for Settlement filed on April 11, 2023. For ease of reference, the Settlement terms were provided at Paragraph number 17 in the Joint Petition.¹³ The Joint Petition provides as follows:

Joint Petitioners agree that this Application proceeding can be settled without the need for further litigation and agree to the following terms and conditions in Settlement thereof:

A. Approval of Application and Acquisition

1. The Commission should approve Aqua’s acquisition of the Shenandoah water distribution and treatment system assets and Aqua’s right to begin to offer,

¹³ Settlement pp. 6-10.

render, furnish, or supply water service in the areas served by MABS.^[14]

2. The Commission shall issue any necessary approvals or certificates for the transaction pursuant to 66 Pa.C.S. § 507.^[15]

B. Tariff

3. A revised pro forma tariff (“Settlement Tariff”) is attached hereto as **Exhibit A**. The Settlement Tariff, including all rates, rules and regulations regarding conditions of Aqua’s water service, shall be permitted to become effective immediately upon closing of the transaction.
4. MABS currently charges fees described as “Miscellaneous Charges: D.E.P Commercial \$ 1.00 per Month, D.E.P Residential \$ 3.00 per Quarter.” The parties agree that Aqua will not adopt those fees and they are not included in the Settlement Tariff.
5. The OCA does not join in supporting the Settlement Tariff to the extent that it requires Aqua to provide free water service to the Fire Companies listed on First Revised page 12.9. The Joint Petitioners agree that no precedent is established by adoption of the Settlement Tariff and all parties reserve their rights to challenge the provision of free service in future proceedings. The parties further agree that:
 - i. For those fire companies receiving free water service, at closing for the metered fire companies, and as each meter is installed for the unmetered fire companies, Aqua will begin tracking their monthly consumption. Aqua will report that usage, by customer, as part of its rate filing in its first base rate proceeding that includes the Shenandoah water system assets.
 - ii. In the first base rate proceeding that includes the Shenandoah water system assets, Aqua will propose to charge rates for water service

¹⁴ Settlement p. 6.

¹⁵ The OCA does not join in this Paragraph but does not oppose Aqua’s request; *See also*, Settlement p. 6.

to all entities it serves in the Requested Territory.^[16]

- iii. Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa. C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing.^[17]

C. Ratemaking Rate Base

1. Pursuant to 66 Pa. C.S. § 1329(c), Aqua shall be permitted to use \$12,000,000 for ratemaking rate base for the acquired assets.
2. Any improvements made by Shenandoah prior to closing related to the \$286,200 grant awarded by the Susquehanna River Basin Commission to MABS will not increase the \$12,000,000 addition to ratemaking rate base and such improvements will be included in the assets transferred to Aqua at closing.^[18]

D. Cost of Service Study ("COSS")

1. In the first base rate case that includes the Shenandoah water system assets, Aqua will submit a water COSS that removes all costs and revenues associated with the operation of the Shenandoah system.
2. In the first base rate case that includes the Shenandoah water system assets, Aqua will file COSS calculations separately for the Shenandoah system consistent with typically filed ratemaking exhibits including, but not limited to, the following: Rate Base (Measures of Value), Statement of

¹⁶ The Requested Territory includes the Borough and portions of West Mahanoy Township, Mahanoy Township, Butler Township, and Girardville Borough, located in Schuylkill County, Pennsylvania.

¹⁷ Settlement pp. 6-7.

¹⁸ Settlement p. 7.

Operating Income, Proof of Revenue, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.^[19]

E. Cell Tower Revenue

In future base rate cases, Aqua will impute 50% of revenue received from Cell Towers, as defined in Schedule 2.02(g)(4) of the APA, to the benefit of ratepayers, as if Aqua received and retained all revenues beginning on the closing date.^[20]

F. Distribution System Improvement Charge (“DSIC”) and Long Term Infrastructure Improvement Plan (“LTIIIP”)

1. Within 90 days after closing, Aqua will file an amendment to its water LTIIIP to include the Shenandoah water system and any other Section 1329 systems that have been acquired but not included in the LTIIIP, which does not re-prioritize other existing commitments in other service areas. This Paragraph does not limit Aqua’s current practice and ability to allocate projects as needed by Aqua necessary for its capital program, but recognizes that any Shenandoah system infrastructure will be in addition to capital improvements already planned.
2. No later than the next quarterly DSIC filing following the Commission’s approval of the amended water LTIIIP, Aqua will file a compliance tariff supplement that applies the DSIC, including all customer safeguards applicable thereto, to all systems included in the amended water LTIIIP. Additionally, Aqua will not include investments related to the Shenandoah system in its DSIC until Aqua applies the DSIC to those customers.^[21]

¹⁹ Settlement p. 7.

²⁰ Settlement p. 8.

²¹ Settlement p. 8.

G. Allowance for Funds Used During Construction (“AFUDC”) and Deferral of Depreciation and Transaction Costs

1. Any claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes, will be addressed in Aqua’s first base rate case which includes the Shenandoah water system assets.
2. Regarding future claims for AFUDC, deferral of depreciation, and transaction costs related to this acquisition, Joint Petitioners reserve the right to litigate their positions fully in future base rate cases when these issues are ripe for review. The parties assent to this agreement should not be construed to operate as its preapproval of Aqua’s requests.^[22]

H. Unaccounted For Water (“UAW”)

Aqua agrees to review the high UAW in the Shenandoah system and will submit an AWWA^[23] Water Audit Report for the Shenandoah system and provide a copy to the statutory advocates.^[24]

I. Metering

Aqua agrees to ensure the four unmetered Fire Companies are metered within 60 days after closing.^[25]

J. Lead Service Line Replacements

1. Aqua agrees that upon closing, it will incorporate the Shenandoah system into its customer-owned lead service line replacement (“COLSLR”) program.
2. Aqua also agrees it will explore low cost or no cost financing for lead service line replacement in the Requested Territory, and provide an update to the parties on the progress of obtaining a low interest

²² Settlement p. 8.

²³ American Water Works Association (AWWA).

²⁴ Settlement p. 8.

²⁵ Settlement p. 9.

loan or grant money to replace COLSLs in the Shenandoah system in its next base rate case following closing of the transaction.^[26]

K. Welcome Letter and Low Income Program Outreach

1. Aqua will send out a welcome letter within 30 days following closing and will include information about its customer assistance programs in the welcome letter, and the COLSLR program. The welcome letter will include, at minimum, a description of the low-income programs and eligibility requirements for participation in the programs, and Aqua's contact information.
2. Aqua agrees it will include the same information regarding low-income programs in bills to MABS' customers within the first 90 days after closing.
3. The welcome letter and information about the customer-assistance programs will be sent in both English and Spanish. If 5% or more of the residents of the Requested Territory are using another language, information in that language directing customers to the numbers to call for information and translation assistance will be included in the materials.
4. Aqua will include information in the welcome letter about in-person bill payment options reasonably proximate to the Requested Territory.
5. Aqua will work with community-based organizations with offices local to the Requested Territory for purposes of providing information and enrolling customers in Aqua's customer-assistance programs.^[27]

L. Hardship Contribution

In addition to existing commitments, Aqua will contribute \$45,000 to the Company's Hardship Grant program. All unspent funds at the end of the program year will be rolled over and added to the budget for the Hardship Grant program in the following year(s).^[28]

²⁶ Settlement p. 9.

²⁷ Settlement p. 9.

²⁸ Settlement p. 10.

M. Easements

1. Aqua and Shenandoah will (i) identify all missing easements including public rights-of-way and other property rights; (ii) take any and all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to Aqua at closing; and (iii) Shenandoah shall bear all costs and expenses for obtaining and conveying the missing easements and other property rights.
2. Additionally, if for any circumstances beyond Shenandoah's control where it is unable to transfer all missing easements including public rights-of-way and other property rights before or at the closing of the transaction, Aqua and Shenandoah may at their discretion close the transaction without the transfer of missing easements and other property rights, provided that an escrow account be established of an appropriate dollar amount from the purchase price to be used to obtain any post-closing transfers of the easements and other real property rights.^[29]

N. Transaction and Closing Costs

1. The Joint Petitioners acknowledge that the Application includes a request that Aqua be permitted to claim transaction and closing costs associated with the transaction. The Joint Petitioners agree that they will not contest this request in this proceeding, but they reserve their rights to litigate their positions fully in future rate cases. The Joint Petitioners' assent to this term should not be construed to operate as their preapproval of Aqua's request.
2. The inclusion of outside legal fees, if any, in Aqua's transaction and closing costs under the APA shall be separately identified in Aqua's next base rate case, and OCA, I&E and OSBA reserve the right to challenge the reasonableness, prudence, and basis for such fees.
3. Any claim by Aqua to recover transaction and closing costs associated with the transaction will not include costs incurred by Shenandoah.^[30]

²⁹ Settlement p. 10.

³⁰ Settlement p.10.

VI. SETTLEMENT CONDITIONS

The conditions of the Settlement are set forth below, verbatim, as submitted by the Settling Parties in the Joint Petition for Settlement filed on April 11, 2023. For ease of reference, the conditions of Settlement were provided at Paragraph number 96 in the Joint Petition.³¹ The Joint Petition provides as follows:

96. This Joint Petition is proposed to resolve all issues in the instant matter and, except as set forth above, is made without any admission against or prejudice to any positions which any Joint Petitioner might adopt during subsequent litigation in any case, including further litigation in this case if this Joint Petition is rejected by the Commission or withdrawn by any one of the Joint Petitioners as provided below. Except as set forth above, Joint Petitioners agree that this Joint Petition shall not constitute or be cited as controlling precedent in this or any other jurisdiction.^[32]

97. This Joint Petition is conditioned upon the Commission's approval of all terms and conditions contained herein without modification. If the Commission should fail to grant such approval or should modify the terms and conditions herein, this Joint Petition may be withdrawn upon written notice to the Commission and all parties within three (3) business days by any one of the Joint Petitioners and, in such event, shall be of no force and effect. In the event that the Commission does not approve the Joint Petition or any Joint Petitioner elects to withdraw as provided above, the Joint Petitioners reserve their respective right to fully litigate the case, including producing

witnesses, conducting full cross-examination and presenting briefs and legal argument.^[33]

98. Joint Petitioners will make reasonable, good faith efforts to obtain approval of the Joint Petition by the Administrative Law Judge and the Commission without modification. If the Administrative Law Judge in his

³¹ Settlement pp. 25-26.

³² Settlement p. 25.

³³ Settlement pp. 97-98.

Recommended Decision recommends that the Commission adopt the Joint Petition without modification as herein proposed, the Joint Petitioners agree to waive the filing of Exceptions. However, the Joint Petitioners do not waive their right to file Exceptions with respect to any modifications to the terms and conditions of this Joint Petition, or any additional matters, proposed by Administrative Law Judge Watson in his Recommended Decision. The Joint Petitioners reserve their right to file Reply Exceptions to any Exceptions which may be filed whether by a Joint Petitioner or other party to the proceeding.^[34]

99. The Joint Petitioners recognize that this Joint Petition does not bind the *pro se* Protestant. A copy of the Joint Petition will be served on Ms. Gawrylik who may comment or object to the Joint Petition by Thursday, April 20, 2023, at 4:00 p.m., pursuant to the March 22, 2023 Interim Order issued in this proceeding. Nothing herein is intended to limit in any way any position which any Joint Petitioner may have or take concerning any comment or objection to the Settlement that may be filed by the Protestant.^[35]

VII. PUBLIC INTEREST ANALYSIS – POSITIONS OF THE SETTLING PARTIES

Structure of the Settlement

On March 22, 2023, an interim order was entered, which provided, in part, that any Joint Settlement Petition and Briefs shall include proposed findings of fact, proposed conclusions of law, proposed ordering paragraphs and a procedural history, with specific citations to the record, where applicable. In the event of a settlement or the filing of Briefs, the Parties were directed to confer and establish a list of common issues which the Parties were required to utilize in the organization of the briefs, settlement petition and all statements in support of settlement in these proceedings. The Parties were directed that all issues addressed in the settlement petition and statements in support of settlement and briefs were to be structured so that all parties' statements in support of settlement and the settlement petition discuss identical

³⁴ Settlement p. 26.

³⁵ Settlement p. 26.

issues as identified by the parties. The list of common issues was required to be exchanged by the parties and provided to the undersigned presiding officer on or before 12:00 noon on April 10, 2023. The use of a common outline or issues for use by the Parties was addressed as early as the prehearing conference on March 7, 2023.

On April 10, 2023, the Company provided the undersigned presiding officer with a List of Common Issues for Joint Petition for Settlement and Statements in Support, on behalf of the Settling Parties, that provided, in pertinent part, as follows:

- I. Introduction and Procedural History
- II. Settlement Terms
 - A. Approval of Application and Acquisition
 - B. Tariff
 - C. Ratemaking Rate Base
 - D. Cost of Service Study
 - E. Cell Tower Revenue
 - F. DSIC and LTIP
 - G. AFUDC and Deferral of Depreciation and Transaction Costs
 - H. Unaccounted for Water
 - I. Metering
 - J. Lead Service Line Replacement
 - K. Welcome Letter and Low Income Program Outreach
 - L. Hardship Contribution
 - M. Easements
 - N. Transaction and Closing Costs

To the extent that the Parties provided Statements in Support of the Settlement terms consistent with the requirements addressed at the prehearing conference and the order entered on March 22, 2023, and the response submitted on behalf of the Parties on April 10, 2023, they will be addressed below.

Approval of Application and Acquisition³⁶

Aqua Statement in Support of Settlement

No section identified as Approval of Application and Acquisition was included in the Statement in Support of Settlement submitted by Aqua.

OCA Statement In Support of Settlement

OCA submits that the terms and conditions of the proposed Settlement provide a reasonable resolution of the issues raised by the OCA in its testimony, including the ratemaking rate base to be incorporated into Aqua's revenue requirement, the rate impact for existing Aqua customers and the acquired customers, cell tower lease revenue, Aqua's application of the Distribution System Improvement Charge (DSIC) to acquired customers, the treatment of post-acquisition improvement, transaction and closing costs, and Aqua's outreach and assistance to low income customers, as discussed below.³⁷

OSBA

OSBA is not a Party to the Settlement.

I&E Statement In Support of Settlement

I&E did not specifically address this issue.

³⁶ See Settlement ¶ 17.A.

³⁷ OCA St. in Support, p. 3.

Shenandoah Borough Statement in Support of Settlement

A common issue outline was addressed at the prehearing conference on March 7, 2023, the instructions for the organization and preparation of Statements in Support of Settlement was set forth in the Interim Order entered on March 22, 2023, and the submission of the common issue outline was agreed upon by the Parties and submitted by Aqua on behalf of the Settling Parties. Despite this, the Borough of Shenandoah failed to file a Statement in Support of Settlement consistent with the Interim Order entered on March 22, 2023 or the agreed upon issues submitted by Aqua on April 10, 2023 specifically addressing Approval of Application and Acquisition, Tariff, Ratemaking Rate Base, Cost of Service Study, Cell Tower Revenue, Distribution System Improvement Charge and Long Term Infrastructure Improvement Plan, Allowance of Funds Used During Construction and Deferral of Depreciation and Transaction Costs, Unaccounted For Water, Metering, Lead Service Line Replacements, Welcome Letter and Low Income Program Outreach, Hardship Contribution, Easements or Transaction Closing Costs. Accordingly, no consideration will be given to the Statement in Support of Settlement as it relates to the settlement terms, submitted on behalf of the Borough in this proceeding.³⁸

MABS Statement in Support of Settlement

The Statement in Support of Settlement submitted by the Municipal Authority of the Borough of Shenandoah or MABS appears to be similar if not identical to that submitted on behalf of the Borough of Shenandoah. Like the Statement submitted by the Borough, despite addressing a common issue outline at the prehearing conference on March 7, 2023, the instructions for the organization and preparation of Statements in Support of Settlement set forth in the Interim Order entered on March 22, 2023, and the common issue outline agreed upon by the Parties and submitted by Aqua on behalf of the Settling Parties, the Municipal Authority of the Borough of Shenandoah failed to file a Statement in Support of Settlement consistent with the Interim Order entered on March 22, 2023 or the agreed upon issues submitted by Aqua on

³⁸ The Commission's regulations specify certain sanctions that are available when a party fails to comply with an order of the Commission "as is just." 52 Pa.Code § 5.372(a).

April 10, 2023, as identified above. Accordingly, no consideration will be given to the Statement in Support of Settlement submitted on behalf of the Municipal Authority of the Borough of Shenandoah in this proceeding, as it relates to the settlement terms.³⁹

Protestant, Donna Gawrylik

Donna Gawrylik is not a party to the Settlement and accordingly, did not file a Statement in Support of Settlement.

Discussion

OCA submits that the terms and conditions of the proposed Settlement provide a reasonable resolution of the issues raised by the OCA in its testimony, including the ratemaking rate base to be incorporated into Aqua’s revenue requirement, the rate impact for existing Aqua customers and the acquired customers, cell tower lease revenue, Aqua’s application of the Distribution System Improvement Charge to acquired customers, the treatment of post-acquisition improvement, transaction and closing costs, and Aqua’s outreach and assistance to low income customers.

Based upon the record in this proceeding, I agree that the approval of the Application of Aqua, as modified herein, and subject to the ordering paragraphs set forth below are appropriate and should be approved by the Commission.

Tariff

Aqua Statement in Support of Settlement

The Settling Parties agreed that the Settlement Tariff should be permitted to become effective immediately upon closing of the transaction, as modified to remove the fees charged by MABS for “Miscellaneous Charges: D.E.P Commercial \$ 1.00 [sic] per Month,

³⁹ See 52 Pa.Code § 5.372(a).

D.E.P Residential \$ 3.00 [sic] per Quarter.” Aqua explains the Settling Parties also agreed that Aqua is permitted to continue MABS practice (as evidenced in its currently effective rates ordinance) of providing free water service to the Fire Companies listed on First Revised page 12.9 of the Settlement Tariff and that Aqua would propose to charge rates to these Fire Companies in its first base rate proceeding following closing. Aqua and OCA agreed to cooperate in efforts to seek a determination from the Commission to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329(d) of the Code that address the buyer’s adoption of seller’s rates at closing. Aqua submits that it is appropriate that these matters not be addressed here but rather await a future proceeding where they can be fully vetted.⁴⁰

OCA Statement In Support of Settlement

OCA explains that Aqua submitted a *pro forma* tariff with the application, which includes all rates, rules, and regulations regarding conditions of Aqua’s Water service and requested that the tariffs become immediately effective upon closing of the transaction.⁴¹ A revised *pro forma* tariff that reflects the terms of settlement is attached to the Settlement as Exhibit A (Settlement Tariff).⁴²

OCA explains that Aqua initially proposed to charge the MABS customers a “Miscellaneous Charge” labeled “D.E.P. Commercial” and “D.E.P. Residential.”⁴³ Those charges appeared to be costs related to compliance with DEP requirements, which for PUC-regulated utilities are the type of costs recovered in base rates, rather than a separate line item.⁴⁴

⁴⁰ Aqua St. in Support, pp. 8-9.

⁴¹ See Aqua Exh. G and Exhibit A attached to Joint Petition.

⁴² Settlement ¶ 17.B.1; OCA St. in Support, p. 3.

⁴³ Aqua Exhibit G; OCA St. 1 at 16; OCA St. in Support, p. 3.

⁴⁴ *Id.*

OCA submits, as it recommended, the settlement eliminates the miscellaneous charges for the purpose of the rates that Aqua will apply to customers in the MABS at closing.⁴⁵

OCA explains it does not join in supporting the Settlement Tariff to the extent that it requires Aqua to provide free water service to eight fire companies.⁴⁶ OCA submits that free service is not permitted under Section 1304 of the Public Utility Code and long-standing Commission and appellate precedent.⁴⁷ In addition, OCA witness DeAngelo explained that, although other Aqua ratepayers are not at risk to subsidize the cost of serving the Fire Companies until new rates are established in a base rate case that includes the MABS system, existing customers and the other acquired customers will not benefit from the Fire Companies contributing revenues through the DSIC during that period.⁴⁸ OCA asserts, if free service is permitted for entities acquired in Section 1329 acquisitions, it would have a cumulative impact on existing customers.⁴⁹

The Settlement provides that no precedent is established by adoption of the Settlement Tariff and all parties to the Joint Petition reserve their rights to challenge the provision of free service in future proceedings. In addition, the settlement provides that Aqua will, in the first base rate proceeding that includes the Shenandoah water system assets, propose to charge rates for water service to all entities it serves in the Requested Territory.⁵⁰ OCA

⁴⁵ Settlement ¶ 17.B.2; OCA St. 1 at 16; OCA St. in Support, p. 3.

⁴⁶ MABS does not bill 12 entities for service: eight Fire Companies and four Borough-owned properties. Also, MABS does not bill for public hydrants in the Borough. Aqua proposes that it will stop free service for the Borough-owned properties and public hydrants in the Borough and begin billing them at closing. OCA St. 1 at 14-15; See Settlement ¶ 17.B.3; OCA St. in Support, p. 4.

⁴⁷ OCA St. in Support, p. 4; See, e.g. *Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n*, 808 A.2d 1044, (Pa. Cmwlth 2002) (*Phila. Suburban*) (“Pennsylvania-American cannot justify providing hydrant service to Coatesville at no charge; there must be a difference in the type and condition of the respective service in order for a rate differential to satisfy the terms [of Section 1304]. Free service is necessarily an illegally low charge.”).

⁴⁸ OCA St. 1 at 15; OCA St. in Support, p. 4.

⁴⁹ Currently, Aqua has four pending Section 1329 acquisitions (DELCORA, Willistown, Shenandoah and Beaver Falls). Two more Section 1329 acquisitions have closed but not had new base rates set (Lower Makefield and East Whiteland); OCA St. in Support, p. 4.

⁵⁰ Settlement ¶ 17.B.3.ii; OCA St. in Support, p.4.

submits that this provision helps to ensure that free service will not continue beyond the next base rate case, to mitigate harm to Aqua’s other ratepayers. Aqua has also agreed to begin tracking monthly consumption for those fire companies receiving free water service and report that usage, by customer, in its first base rate proceeding that includes the MABS water system assets.⁵¹ OCA submits this information will assist the parties to evaluate whether the rates Aqua proposes for the fire companies in that rate proceeding are reasonable and recover the cost of service, to minimize subsidies paid by other Aqua customers.⁵²

Aqua also commits to join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and Section 1329(d) of the Code, which addresses the buyer’s adoption of seller’s rates at closing.⁵³ OCA submits this provision recognizes that the issue of free service is likely to reoccur in future 1329 acquisitions and its resolution will provide certainty for Aqua, other potential buyers, and potential sellers.⁵⁴

I&E Statement In Support of Settlement

I&E submits that the Joint Petitioners have agreed that the *pro forma* tariff supplement, to become effective immediately upon closing of the transaction, will accurately include all rates, rules, and regulations regarding the conditions of Aqua’s water service, and that this full and accurate disclosure of rates is in the public interest.⁵⁵

⁵¹ Settlement ¶ 17.B.3.i; OCA St. in Support, p.p. 4-5.

⁵² OCA St. in Support, p. 5.

⁵³ Settlement ¶ 17.B.3.iii; OCA St. in Support, p. 5.

⁵⁴ OCA St. in Support, p. 5.

⁵⁵ I&E St. in Support, pp. 6-7.

Discussion

As required by Section 1329, Aqua included a *pro forma tariff* supplement in its Application.⁵⁶ The Settlement provides that, upon closing the Transaction, Aqua will adopt the revised *pro forma* tariff that reflects the terms of settlement. The Settlement Tariff is attached to the Settlement as Exhibit A.

Aqua initially proposed to charge the MABS customers a “Miscellaneous Charge” labeled “D.E.P. Commercial” and “D.E.P. Residential,” which appeared to be costs related to compliance with DEP requirements, and which are the type of costs recovered in base rates, rather than a separate line item, for PUC-regulated utilities. The settlement appropriately provides that the miscellaneous charges are eliminated for the purpose of the rates that Aqua will apply to customers in the MABS at closing.⁵⁷

OCA did not join in supporting the Settlement Tariff to the extent that it requires Aqua to provide free water service to eight fire companies.⁵⁸ According to OCA, free service is not permitted under Section 1304 of the Code and long-standing Commission and appellate precedent.⁵⁹ OCA also presented evidence that, although other Aqua ratepayers are not at risk to subsidize the cost of serving the Fire Companies until new rates are established in a base rate case that includes the MABS system, existing customers and the other acquired customers will not benefit from the Fire Companies contributing revenues through the DSIC during that period.⁶⁰ OCA argues, if free service is permitted for entities acquired in Section 1329 acquisitions, it would have a cumulative impact on existing customers.⁶¹

⁵⁶ See Aqua Exh. G.

⁵⁷ Settlement ¶ 17.B.2; OCA St. 1 at 16; OCA St. in Support, p. 3.

⁵⁸ OCA St. 1 at 14-15; See Settlement ¶ 17.B.3; OCA St. in Support, p. 4.

⁵⁹ OCA St. in Support, p. 4; See, e.g. *Phila. Suburban*, 808 A.2d at 1050-51 (Pa. Cmwlth. 2002).

⁶⁰ OCA St. 1 at 15; OCA St. in Support, p. 4.

⁶¹ OCA St. in Support, p. 4.

Aqua acknowledges that the Settlement Tariff provides that Aqua will provide free water service to the Fire Companies listed on First Revised page 12.9.⁶² The Settlement further provides that no precedent is established by adoption of the Settlement Tariff and all parties reserve their right to challenge the provision of free service in future proceedings. Neither the Borough nor MABS acknowledged or addressed this provision, nor did it identify any legal authority to support this term or address how this term would impact the legal requirements that the Parties and Commission must adhere to in considering the request to approve the Application.

Although, Aqua, the Borough nor the Authority specifically addressed the applicable law regarding this issue and whether the Tariff may require Aqua to provide free water service to the subject fire companies, OCA correctly submits that this, and the related provisions in the Settlement must be addressed by the Commission.

66 Pa.C.S. §1304, provides, in relevant part, as follows:

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. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.

Obviously, based upon the language of the statute, an examination of the relevant case law is required.

In *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Cmwlth. 2002) (Coatesville Case), Philadelphia Suburban Water filed a petition for review of an adjudication of the Commission approving several agreements by which Coatesville Authority sold its water system to the Pennsylvania-American Water Company. Suburban Water challenged the Commission's approval of an Asset Purchase

⁶² Settlement, p. 6.

Agreement that obligated Pennsylvania-American to make an annual contribution, in perpetuity, to the Coatesville Economic Development Fund in an amount exactly equal to the annual rates paid by the City of Coatesville to Pennsylvania-American for fire hydrant service. Suburban Water argued this arrangement effected free water service to Coatesville and, further, that free service deviated unlawfully from Pennsylvania-American's approved tariff and discriminated against municipalities that pay the utility's approved tariff for their fire hydrant service. The Commonwealth Court of Pennsylvania agreed and reversed the Commission's approval of this provision of the Agreement.

Philadelphia Suburban Water also challenged the Commission's approval of the Amendment on the additional theory that the Amendment violates the statutory prohibition against a utility giving an "unreasonable preference" to one customer while subjecting another to an "unreasonable disadvantage." Pennsylvania-American noted that it was Philadelphia Suburban Water's burden to show the arrangement was "unreasonably preferential." It further argued that before a preference can be found unreasonable, the advantage to one service class must be balanced against the injury to another and the injury found to outweigh the benefit. Under any analytical approach, the Court explained, the Agreement gives an unreasonable preference to Coatesville and it cannot be justified by or even related to Pennsylvania-American's costs to deliver fire hydrant service to Coatesville.

Philadelphia Suburban Water also argued that the Free Service Covenant and the Amendment established an unreasonable preference for Coatesville, which, alone among Pennsylvania-American's municipal customers, would receive hydrant service for effectively no charge. In response, Pennsylvania-American argued that consideration of what is "reasonable" depends on the facts and circumstances of each case, and that the Court should defer to the exercise of the PUC's discretion in evaluating whether a rate differential is unreasonable.

Although different rates may be charged to customers that receive a different type, grade or class of service⁶³ if the total sum demanded of one customer is illegally high

⁶³ *Carpenter v. Pa. Pub. Util. Comm'n*, 15_A.2d_473_(Pa. Super.1940).

and illegally low for another, there is rate discrimination.⁶⁴ Rate classification systems must be designed to furnish the most efficient and satisfactory service at the lowest reasonable price for the greatest number of customers.⁶⁵

In order for a rate differential to survive a challenge brought under Section 1304 of the Public Utility Code, 66 Pa.C.S. § 1304, the utility must show that the differential can be justified by the difference in costs required to deliver service to each class. The rate cannot be illegally high for one class and illegally low for another.⁶⁶ Overall, the rate differentials must advance efficient and satisfactory service to the greatest number at the lowest overall charge.

The Commonwealth Court explained, Pennsylvania-American's tariff did not express a rate preference for Coatesville and that Section 1304 had no application to this situation.

66 Pa.C.S. § 1304, establishes standards that must be followed when a utility is making a rate. Section 1304 must be read in conjunction with other provisions of the Public Utility Code. Necessarily, the rate-making activity referred to in Section 1304 is the making of rates that end up in a scheduled tariff, *i.e.*, the only lawful way to make rates. A charge that deviates from the scheduled tariff is unlawful even if it satisfies the standards set forth in Section 1304. If a charge deviates from the scheduled tariff, that is the basis of its unlawfulness. There is no need to go further and determine whether the unlawful rate meets the standards for a lawful rate; it is a futile exercise.

The Commonwealth Court explained that the Coatesville case is a deviation case, not a case where the tariff itself provides an undue preference for class at the expense of another. The Amendment, not Pennsylvania-American's tariff, established a rate differential

⁶⁴ *Allegheny Ludlum Corp. v. Pa. Pub. Util. Comm'n*, 612 A.2d 604 (Pa. Cmwlth. 1992).

⁶⁵ *Phila. Suburban Transp. Co. v. Pa. Pub. Util. Comm'n*, 281 A.2d 179 (Pa. Cmwlth. 1971).

⁶⁶ *Allegheny Ludlum Corp.*, 612 A.2d at 611.

based upon the personal identity of the customer, which is indefensible discrimination.⁶⁷ Although Pennsylvania-American's tariff does not violate Section 1304 of the Public Utility Code, the Commonwealth Court explained, it is also clear that Pennsylvania-American cannot solve its tariff deviation problem simply by revising its tariff to provide Coatesville free service. Pennsylvania-American cannot justify providing hydrant service to Coatesville at no charge; there must be a difference in the type and condition of the respective service in order for a rate differential to satisfy the terms of Section 1304.⁶⁸ Free service is necessarily an illegally low charge.⁶⁹

The Commonwealth Court concluded that, in its request for proposal, Coatesville stated that the successful bidder had to make "whatever arrangements necessary *to waive or pay* these charges on behalf of the City." Pennsylvania-American honored this demand by structuring the payment of Coatesville's fire hydrant service charge as a contribution to a special fund of the City. However, the law does not permit such an arrangement for relieving Coatesville of the obligation to pay Pennsylvania-American's scheduled tariff amount for fire hydrant service. Section 3.4(b) of the Agreement establishes a device that violates Section 1303 of the Public Utility Code, 66 Pa.C.S. § 1303.

Accordingly, the decision of the Commission was reversed.

A similar situation is presented by the terms of the APA in this proceeding. The APA essentially provides for Aqua to continue the MABS practice of providing free water to the enumerated fire companies. Regardless of the desire of the Parties to continue this practice, and despite the failure of Aqua, the Borough or Authority to advance any legal authority to permit this proposal, existing customers would bear the expense of the proposal, if permitted upon approval of the proposed sale. Aqua has provided no legal justification for providing the proposed service, at no charge. There must be a difference in the type and

⁶⁷ See, e.g., *Wight v. U.S.*, 167 U.S.512, (1987); *Leiper v. Baltimore & P. R. Co.*, 105 A. 551 (1918).

⁶⁸ *Carpenter*, 15 A.2d at 476.

⁶⁹ *Allegheny Ludlum Corp.*, 612 A.2d at 604.

condition of the respective service in order for a rate differential to satisfy the terms of Section 1304. Here, no legal authority has been established to permit the free service.

OCA did not join in supporting the Settlement Tariff to the extent that it requires Aqua to provide free water service to eight enumerated fire companies. OCA correctly argued that free service is not permitted under Section 1304 of the Code and long-standing Commission and appellate precedent, under the circumstances.⁷⁰ In addition, as established by evidence presented by OCA, although other Aqua ratepayers are not at risk to subsidize the cost of serving the Fire Companies until new rates are established in a base rate case that includes the MABS system, existing customers and the other acquired customers will not benefit from the Fire Companies contributing revenues through the DSIC during that period.⁷¹ As OCA asserts, if free service is permitted for entities acquired in Section 1329 acquisitions, it would have a cumulative impact on existing customers.⁷² Despite the desire by any party to support fire companies and other entities who provide invaluable service to our communities, the means and method to implement the policy must be permitted by applicable law, and not specifically prohibited by established legal authority, as is the case here. Here, it appears there was not an adequate understanding or appreciation of applicable law in drafting an assets purchase agreement designed, in part, to advance the policy to support the enumerated fire companies under the circumstances.

The Settlement Tariff, in part, requires Aqua to provide free water service to eight fire companies.⁷³ The Settlement at 17. B. 3. iii provides;

3. The OCA does not join in supporting the Settlement Tariff to the extent that it requires Aqua to provide free water service to the Fire Companies listed on First Revised page 12.9. The Joint Petitioners agree that no precedent is established by adoption of the Settlement Tariff and all

⁷⁰ OCA St. in Support, p. 4; *See, e.g. Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n*, 808 A.2d 1044 (Pa. Cmwlth. 2002).

⁷¹ OCA St. 1 at 15; OCA St. in Support, p. 4.

⁷² OCA St. in Support, p. 4.

⁷³ OCA St. 1 at 14-15; *See Settlement ¶ 17.B.3*; OCA St. in Support, p. 4.

parties reserve their rights to challenge the provision of free service in future proceedings. The parties further agree that:

....

iii. Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing.^[74]

66 Pa.C.S. § 1329 provides, in pertinent part:

(d) Acquisitions by public utility.--The following apply:

(1) If the acquiring public utility and selling utility agree to use the process outlined in subsection (a), the acquiring public utility shall include the following as an attachment to its application for commission approval of the acquisition filed pursuant to section 1102 (relating to enumeration of acts requiring certificate):

....

(v) A tariff containing a rate equal to the existing rates of the selling utility at the time of the acquisition and a rate stabilization plan, if applicable to the acquisition.

....

(4) The tariff submitted pursuant to subsection (d)(1)(v) shall remain in effect until such time as new rates are approved for the acquiring public utility as the result of a base rate case proceeding before the commission. The acquiring public utility may collect a distribution system improvement charge during this time, as approved by the commission under this chapter.^[75]

Settlement Paragraph 17.B.3.iii., provides that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing. Upon review of the evidentiary record, the Settling Parties have not provided any evidence or legal authority to

⁷⁴ Settlement pp. 6-7.

⁷⁵ 66 Pa.C.S. § 1329.

substantiate the inclusion of this settlement term in this proceeding or to support the Tariff provision regarding free service identified above. Furthermore, the Settlement provision appears to be inconsistent with clearly established precedent regarding the Commission's ultimate authority to set rates resulting from a base rate case proceeding before the commission.

The requirements of 66 Pa.C.S. § 1329(d)(1)(v), 1329(d)(4) are clear and unambiguous. Specifically, 66 Pa.C.S. § 1329(d)(4) requires the tariff submitted pursuant to subsection (d)(1)(v) shall remain in effect until such time as new rates are approved for the acquiring public utility as the result of a base rate case proceeding before the Commission. The Commission clarified in its Final Implementation Order, entered October 27, 2016, at Docket No. M-2016-2543193, pg. 28, “[t]hat the entity’s initial tariff filing should contain rates ‘equal to the existing rates of the selling utility at the time of acquisition’ consistent with Section 1329(d)(1)(v) and Section 1329(e).”

It appears that, as a compromise, the Settling Parties agreed to the language set forth in Section 17.B.3.iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer’s adoption of seller’s rates at closing. This provision is also not supported by the evidentiary record or and legal authority cited by the Settling Parties. Accordingly, I have no option, other than to reject the Settlement Tariff attached to the Settlement as Exhibit A, to the extent that it permits or requires Aqua to provide free water service to the eight enumerated fire companies. I must also reject the Settlement provision set forth in Section 17.B.3.iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer’s adoption of seller’s rates at closing.

The Settlement also provides that no precedent is established by adoption of the Settlement Tariff and all parties to the Joint Petition reserve their rights to challenge the provision of free service in future proceedings. In addition, the settlement provides that Aqua will, in the first base rate proceeding that includes the Shenandoah water system assets, propose to charge rates for water service to all entities it serves in the Requested Territory.⁷⁶ OCA also submits that this provision helps to ensure that free service will not continue beyond the next base rate case, to mitigate harm to Aqua's other ratepayers. Aqua has also agreed to begin tracking monthly consumption for those fire companies receiving free water service and report that usage, by customer, in its first base rate proceeding that includes the MABS water system assets.⁷⁷ OCA submits this information will assist the parties to evaluate whether the rates Aqua proposes for the fire companies in that rate proceeding are reasonable and recover the cost of service, to minimize subsidies paid by other Aqua customers.⁷⁸ This provision is rendered moot by the modification of the Settlement, as set forth above.

Ratemaking Rate Base

Aqua Statement in Support of Settlement

No section identified as Ratemaking Rate Base was included in the Statement in Support of Settlement submitted by Aqua.

OCA Statement In Support of Settlement

Aqua presented an appraisal of \$25,221,000 and Shenandoah submitted an appraisal of \$18,100,307. Aqua sought a ratemaking rate base of \$12,000,000 for the

⁷⁶ Settlement ¶ 17.B.3.ii; OCA St. in Support, p.4.

⁷⁷ Settlement ¶ 17.B.3.i; OCA St. in Support, p.p. 4-5.

⁷⁸ OCA St. in Support, p. 5.

Shenandoah System, which was the price Aqua agreed to pay for the System.⁷⁹ The engineer's report provides that the original cost less depreciation for the system is \$10,790,078.⁸⁰

OCA submits it reviewed the Utility Valuation Engineer valuations and would have recommended reasonable adjustments to both appraisals under all three valuation approaches but determined that its recommended adjustments to the appraisals would not be likely to reduce the average of the appraisals below \$12,000,000 and, therefore, did not address the valuations.⁸¹

OCA notes the settlement also specifies that any improvements made by Shenandoah prior to closing related to the \$286,200 grant awarded by the Susquehanna River Basin Commission to MABS (1) will not increase the \$12,000,000 addition to ratemaking rate base and (2) such improvements will be included in the assets transferred to Aqua at closing.⁸² OCA submits, Aqua customers will receive the benefit of improvements funded by the grant without having to pay return and depreciation on those assets.⁸³

I&E Statement In Support of Settlement

I&E explains that pursuant to the Settlement Aqua will be permitted to use \$12,000,000 for the ratemaking rate base of the acquired assets. I&E avers that approval of \$12 million for the ratemaking rate base is both warranted and in the public interest.⁸⁴

⁷⁹ Application ¶ 59; Aqua Exh. B, Article III.

⁸⁰ OCA St. 1 at 3; OCA St. in Support, p. 5.

⁸¹ OCA St. 1 at 2; OCA St. in Support, p. 5.

⁸² Settlement ¶ 17.C.2; OCA St. in Support, p.6.

⁸³ OCA St. in Support, p. 6.

⁸⁴ I&E St. in Support, p. 7.

Discussion

Aqua and Shenandoah agreed to use the procedure set forth in Section 1329 for the Transaction. Based on appraisals presented by Aqua and Shenandoah (\$25,221,000 and \$18,100,307, respectively), Aqua sought a ratemaking rate base of \$12,000,000 for the Shenandoah System, the price Aqua agreed to pay for the System. The engineer's report provides that the original cost less depreciation for the system is \$10,790,078.

In the Settlement, the Joint Petitioners agreed that \$12,000,000 (the purchase price) will go into Aqua's rate base in its next rate case due to the acquisition of the System. The agreed-upon ratemaking rate base of \$12,000,000 is supported by substantial record evidence and is consistent with Section 1329.

Cost of Service Study

Aqua Statement in Support of Settlement

In response to concerns raised by I&E and OCA, Aqua explains it has agreed to submit, in its first base rate case that includes the Shenandoah water system assets, a water COSS that removes all costs and revenues associated with the operation of the Shenandoah water system. Aqua will file COSS calculations separately for the Shenandoah water system consistent with typically filed ratemaking exhibits as set forth in the Settlement.⁸⁵

OCA Statement In Support of Settlement

OCA explained that it identified the need for Aqua to provide a cost of service study that removes all costs and revenues associated with the operations of the Shenandoah water system, and a separate cost of service study for the Shenandoah system, in the first base rate case in which it includes Shenandoah's assets in rate base. OCA submits these studies will provide

⁸⁵ Aqua St. in Support, p. 7.

information to establish rates that reflect the costs for the Shenandoah system.⁸⁶ OCA notes the settlement adopts the OCA's recommendation.⁸⁷

OCA explains that the Company will also provide a separate cost of service study for the system, which will include calculations including, but not limited to, the following: Rate Base (Measures of Value), Statement of Operating Income, Proof of Revenue, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.⁸⁸

Taken together, OCA submits these settlement terms will provide a means for the parties to use the cost of service data to set rates for Shenandoah customers that reflect the cost of service under Aqua ownership, or movement towards the cost of service, and that may differ, as appropriate, from rates established for other water customers. OCA explains, this will help to mitigate the potential level of subsidy by Aqua's other water customers and applies the ratemaking principle of gradualism to rates set for customers in Shenandoah's service area for existing Aqua customers and the acquired Shenandoah customers by reducing overall costs.⁸⁹

I&E Statement In Support of Settlement

I&E explains this Settlement term is consistent with protecting the public interest and will protect Aqua, its customers, and the parties to this proceeding. Specifically, I&E submits the results of the cost of service study will provide Aqua with information necessary to determine an appropriate level of rates in the future and will benefit Aqua's ratepayers as well, because if Aqua's Application is approved, Aqua's existing customers will bear the rate impact.⁹⁰

⁸⁶ OCA St. in Support, p. 6.

⁸⁷ Settlement ¶ 17.D; OCA St. in Support, p. 6.

⁸⁸ Settlement ¶ 17.D; OCA St. in Support, pp. 6-7.

⁸⁹ OCA St. in Support, pp. 6-7.

⁹⁰ I&E St. in Support, pp. 7-8.

Discussion

The Settlement, at Paragraph 17.D, provides that, in its first base rate case in which Aqua includes Shenandoah's assets in rate base, Aqua will submit a water cost of service study that removes all costs and revenues associated with Shenandoah's system. Paragraph 17.D also provides that the Company will also provide a separate cost of service study for the system. As OCA explains, these settlement terms will provide a means for the parties to use the cost of service data to set rates for Shenandoah customers that reflect the cost of service under Aqua ownership, or movement towards the cost of service, and that may differ, as appropriate, from rates established for other water customers. This will help to mitigate the potential level of subsidy by Aqua's other water customers and applies the ratemaking principle of gradualism to rates set for customers in Shenandoah's service area for existing Aqua customers and the acquired Shenandoah customers by reducing overall costs.

Under the Settlement, Aqua's obligation to prepare cost of service studies begins at the time of the first base rate case in which Shenandoah's assets are included.

This settlement provision is in the public interest because the results of the cost of service study will provide Aqua with information necessary to determine an appropriate level of rates in the future and will benefit Aqua's ratepayers. As OCA explained, without a cost of service study, the Commission's ability to evaluate the rate impact of the acquisition upon existing Aqua customers and its options of addressing that impact to provide any appropriate relief to existing customers, could be compromised.

Cell Tower Revenue

Aqua Statement in Support

According to Aqua, pursuant to the APA, while Aqua will be assigned a lease for cellular communications facilities (Cell Towers) revenues between Shenandoah and Verizon, Shenandoah has a right to retain revenues thereunder for a stated period following closing. After

objections raised by OCA and I&E, Aqua agreed that in future base rate cases, Aqua will impute 50% of revenue received from Cell Towers, as defined in Schedule 2.02(g)(4) of the APA, to the benefit of ratepayers, as if Aqua received and retained all revenues beginning on the closing date.⁹¹

OCA Statement In Support of Settlement

OCA explains that Aqua proposes to take assignment from MABS of an agreement to lease space for Cell Towers.⁹² Under the terms of the Asset Purchase Agreement, Aqua will acquire the MABS water assets on which the cell towers are located. Aqua also proposed, however, for the Borough to keep the revenues from the lease agreements. In total, Aqua proposed to forego a total of \$133,140 in revenue from the cell tower lease agreements over 10 years.⁹³

OCA submits that it objected to Aqua's proposal because Aqua customers would pay the costs for acquiring, operating, maintaining and replacing the assets that generate the lease revenue.⁹⁴ OCA recommended that in future base rate cases, Aqua would impute the revenue received from the Cell Towers, to the benefit of ratepayers, as if Aqua received and retained all revenues beginning on the closing date.⁹⁵ OCA explains that, according to the Settlement, Aqua will impute 50% of the revenue that it foregoes under its agreement with Shenandoah, or \$66,570.⁹⁶ OCA submits this compromise serves to ensure that Aqua customers who will pay for the MABS assets will benefit from more of the revenues generated by those assets.⁹⁷

⁹¹ Settlement ¶ 17.E; Aqua St. in Support, pp. 9-10.

⁹² OCA St. in Support, p. 7.

⁹³ OCA St. 1 at 14.

⁹⁴ *Id.*

⁹⁵ OCA St. 1 at 14; OCA St. in Support, p. 7.

⁹⁶ Settlement ¶ 17.E; OCA St. in Support, p. 7.

⁹⁷ OCA St. in Support, p. 7.

I&E Statement In Support of Settlement

I&E explains that witness Sakaya recommended that Aqua retain or impute 100% of the Cell Tower revenue because, “the cell tower revenue will be generated from cell towers located on plant that will be owned by Aqua. Therefore, since revenue will be generated from plant 100% owned by Aqua, it is reasonable that Aqua retain 100% of the cell tower revenue from the date of the Acquisition” and “this additional revenue should accrue to the benefit of MABS customers as it is generated through plant that those customers pay for in their rates. I&E submits the offsetting cell tower revenue helps to mitigate future rate increase requirements.”⁹⁸

I&E concludes that the Settlement represents a reasonable compromise which will serve to protect the interests both of Aqua and the Shenandoah customers.⁹⁹

Discussion

The Parties agreed that the resolution contained in the Settlement represents a reasonable compromise which will serve to protect the interests both of Aqua and the Shenandoah customers. As the Settlement is the result of compromise by the Parties and is reasonable under the circumstances, the settlement provision is in the public interest and should be approved.

DSIC and LTIIP

Aqua Statement in Support of Settlement

Aqua will amend its LTIIP to include the Shenandoah water system and any other Section 1329 systems that have been acquired but not included in the LTIIP, which does not re-prioritize other existing commitments in other service areas, provided however, that such

⁹⁸ I&E Statement No. 2, p. 12.

⁹⁹ I&E St. in Support, p. 8.

inclusion shall not limit Aqua’s current practice and ability to allocate projects as needed by Aqua necessary for its capital program. Aqua submits that any Shenandoah system infrastructure will be in addition to capital improvements already planned.¹⁰⁰ Aqua also agreed not to include investments related to the Shenandoah system in its DSIC until Aqua applies the DSIC to those customers, and that no later than the next quarterly DSIC filing following the Commission’s approval of the amended water LTIP, Aqua will file a compliance tariff supplement that applies the DSIC. The filing will include all customer safeguards applicable thereto, to all systems included in the amended water LTIP.¹⁰¹

OCA Statement In Support of Settlement

OCA explains that, within 90 days after closing, Aqua will file an amendment to its water Long-Term Infrastructure Improvement Plan (Amended LTIP) to include the Shenandoah water system and any other Section 1329 systems that have been acquired but not included in the LTIP, which does not re-prioritize other existing commitments in other service areas.¹⁰² OCA notes the settlement places deadlines on when Aqua will file the amendment and when Aqua will file to apply the Distribution System Improvement Charge to customers of the acquired system.¹⁰³ OCA witness DeAngelo opined that having the acquired customers pay a DSIC is one small way in which Aqua’s existing customers can receive a short-term benefit from the acquisition, by spreading the costs recovered through the DSIC over a larger customer base.¹⁰⁴

OCA further notes that the Settlement addresses its concern that proposed projects reflected in the amended LTIP should be in addition to, and not re-prioritize, any capital

¹⁰⁰ Aqua St. in Support, p. 10.

¹⁰¹ *Id.*

¹⁰² Settlement ¶ 17.F.1.

¹⁰³ Settlement ¶ 17.F.1; OCA St. in Support, pp. 7-8.

¹⁰⁴ OCA St. 1 at 13.

improvements that Aqua has already committed to undertake for existing customers.¹⁰⁵ Additionally, as recommended by the OCA, Aqua will not include investments related to the Shenandoah system in its DSIC until Aqua applies the DSIC to those customers.¹⁰⁶ OCA submits these last two requirements protect Aqua's existing customers by helping to ensure that (1) the acquisition does not mean that planned projects and investment in their service areas will not be carried out as planned and (2) they will not pay for projects in the Shenandoah service area through their DSIC rates until Shenandoah customers are also paying DSIC rates.¹⁰⁷

I&E Statement In Support of Settlement

I&E explained it did not oppose Aqua's request for approval to collect a DSIC, as this request appeared to simply memorialize Aqua's intention to employ certain provisions of Section 1329. I&E submits that it reserves the right to address these issues in future proceedings, including base rate, LTIP, and distribution system improvement charge proceedings, when additional information and facts are available and when these issues are ripe for review. Nonetheless, I&E agrees that this term serves the public interest because Aqua has agreed that existing commitments will not be re-prioritized as a result of this term. I&E submits that acquired Shenandoah customers will benefit from improved water infrastructure, promoting safer and more reliable service, and therefore this term is in the public interest.¹⁰⁸

Discussion

Section 1329(d)(4) of the Code, 66 Pa.C.S. § 1329(d)(4), permits an acquiring public utility to collect a DSIC from the date of Closing on the Transaction until new rates are approved in the utility's next base rate case. In order to qualify for DSIC recovery, a utility must submit a LTIP to, and receive approval from, the Commission.

¹⁰⁵ Settlement ¶ 17.F.2; OCA St. 1 at 13.

¹⁰⁶ *Id.*

¹⁰⁷ *See* OCA St. 1 at 13-14; OCA St. in Support, p. 8.

¹⁰⁸ I&E St. in Support, p.p. 8-9.

Pursuant to the Settlement, within 90 days after closing, Aqua will file an amendment to its LTIP to include the Shenandoah water system and any other Section 1329 systems that have been acquired but not included in the LTIP, which does not re-prioritize other existing commitments in other service areas. The settlement places deadlines on when Aqua will file the amendment and when Aqua will file to apply the Distribution System Improvement Charge to customers of the acquired system. As OCA explained, the Settlement addresses the concern that proposed projects reflected in the amended LTIP should be in addition to, and not re-prioritize, any capital improvements that Aqua has already committed to undertake for existing customers. In addition, Aqua will not include investments related to the Shenandoah system in its DSIC until Aqua applies the DSIC to those customers.

The Settlement recognizes that acquired Shenandoah customers will benefit from improved water infrastructure, promoting safer and more reliable service, and therefore is in the public interest. This provision also recognizes the Commission's authority to modify Aqua's LTIP submission.

AFUDC and Deferral of Depreciation and Transaction Costs

Aqua Statement in Support of Settlement

Aqua explains that any claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes will be addressed in Aqua's first base rate case which includes the Shenandoah water system assets. The Settling Parties also reserve the right to litigate claims for AFUDC, deferral of depreciation and transaction costs in future rate cases. Aqua submits it is appropriate that these matters be addressed in a future rate case where they can be fully vetted.¹⁰⁹

¹⁰⁹ Aqua St. in Support, p. 10.

OCA Statement In Support of Settlement

OCA explains that any claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes will be addressed in Aqua's first base rate case which includes Shenandoah's water system assets.¹¹⁰ In addition, the Joint Petitioners reserve their rights to litigate future claims for AFUDC and deferral of depreciation on post-acquisition projects pursuant to Section 1329(f) and transaction costs in future rate cases. Furthermore, OCA submits the settlement explicitly provides that OCA's assent to Paragraph 17.G should not be construed to operate as preapproval of Aqua's future requests and that the settlement term preserves all parties' positions in future rate cases, including the ability to challenge the reasonableness and prudence of the Company's claims.¹¹¹

I&E Statement In Support of Settlement

I&E explains that the Joint Petitioners agree that they reserve their rights to litigate their positions fully in future rate cases. I&E submits that it endorses this term because while it recognizes the potential for Aqua to invoke portions of Section 1329 related to post-acquisition projects,¹¹² it also empowers parties to review Aqua's proposed treatment of those projects in a future base rate case.¹¹³ I&E concludes that preserving the ability to litigate any of Aqua's proposed AFUDC and deferred depreciation treatment protects the public interest by ensuring that interested parties are not hindered in developing a full and complete record for the Commission on this issue when additional information is available and ratemaking issues are ripe for determination.¹¹⁴

¹¹⁰ OCA St. in Support, pp. 8-9.

¹¹¹ *Id.*

¹¹² 66 Pa.C.S. §1329(f).

¹¹³ I&E St. in Support, p. 9.

¹¹⁴ *Id.*

Discussion

Under the terms of the settlement, any claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes will be addressed in Aqua's first base rate case which includes Shenandoah's water system assets. In addition, the Joint Petitioners reserve their rights to litigate future claims for AFUDC and deferral of depreciation on post-acquisition projects pursuant to Section 1329(f) and transaction costs in future rate cases. As OCA and I&E explained, this settlement term preserves all parties' positions in future rate cases, including the ability to challenge the reasonableness and prudence of the Company's claims. The term is therefore reasonable under the circumstances and is in the public interest.

Unaccounted For Water

Aqua Statement In Support of Settlement

Aqua explains it agreed to review the high UAW in the Shenandoah water system and to submit an AWWA Water Audit Report and provide a copy to the statutory advocates in response to concerns over the high levels of water loss reported by MABS.¹¹⁵

OCA Statement in Support of Settlement

OCA explains that the Shenandoah water system experiences a significant volume of non-revenue (unaccounted for) water, approximately 50% in 2021.¹¹⁶ Aqua witness Pietkiewicz explained the Pennsylvania Department of Environmental Protection issued MABS a Water Allocation Permit, which includes a condition requiring MABS to reduce its unaccounted-for water loss to a level of 20% or less within five years. However, MABS does not anticipate that it will achieve the 20% condition by November 21, 2022. OCA explains the Settlement, at

¹¹⁵ Aqua St. in Support, p. 11.

¹¹⁶ Aqua St. 5 at 5; OCA St. in Support, p. 9.

Paragraph 17.H provides that Aqua will review the Shenandoah system, submit an American Water Works Association Water Audit Report for the system and provide a copy to the statutory advocates. Reducing the quantity of unaccounted for water will help the system to comply with its Water Allocation Permit and lower treatment and other operating costs for customers.¹¹⁷

I&E Statement In Support of Settlement

I&E explains that Aqua's review of and report on the UAW levels for the Shenandoah system is an important step in getting UAW levels down, as higher UAW levels result in more costs for customers because leaking water leads to chemical treatment of water that ultimately does not reach the end user. I&E concludes that determining the specific reasons UAW is high on this system will help Aqua combat the levels and determine what needs to be done to fix the cause of the high UAW levels.¹¹⁸

Discussion

The Shenandoah water system experiences a significant volume of non-revenue or unaccounted for water, amounting to approximately 50% in 2021. In order to address and ultimately reduce this high volume of unaccounted for water, the Settlement, at Paragraph 17.H provides that Aqua will review the Shenandoah system, submit an American Water Works Association Water Audit Report for the system and provide a copy to the statutory advocates. As OCA and I&E explain, reducing the quantity of unaccounted for water will help the system to comply with its Water Allocation Permit and lower treatment and other operating costs for customers.

¹¹⁷ *Id.*

¹¹⁸ I&E St. in Support, p. 10.

Metering

Aqua Statement in Support of Settlement

Aqua explains there are four fire companies that are not metered, which Aqua agreed to meter within 60 days after closing, and which usage will then be tracked and reported in Aqua's next base rate proceeding, consistent with the OCA's condition that the fire companies be charged for service as a result of Aqua's next base rate proceeding.¹¹⁹

OCA Statement In Support of Settlement

OCA explains that the Settlement provides that Aqua agrees to install meters at the four fire companies in the Shenandoah service area that do not have meters on 2-inch water lines that serve their location within 60 days of closing, as opposed to the 90-day period proposed by the Company. OCA notes this will serve to increase the period of consumption data tracked and reported for the purpose of setting cost-based rates for these customers in the next base rate case.¹²⁰ OCA further submits this will also ensure that the customers have meters installed so they can be charged metered instead of flat rates for service, which is consistent with the Commission's policy requiring the installation of meters and allows customers to control their usage through conservation.¹²¹ In addition, OCA submits that metering all customers will improve the Company's understanding of water consumption and non-revenue water within the Shenandoah system and help Aqua to more effectively plan ways to make improvements to reduce water loss.¹²²

¹¹⁹ Aqua St. in Support, p. 11.

¹²⁰ See Settlement Paragraph 17.B.3.i.

¹²¹ 52 Pa. Code § 65.7.

¹²² Aqua St. 3 at 9; OCA St. in Support, pp. 9-10.

I&E Statement In Support of Settlement

In testimony I&E took no position on the issue of unmetered Fire Companies, but supports this term as being in the public interest as part of a total settlement.¹²³

Discussion

The Joint Petitioners have agreed that Aqua will install meters at the four fire companies in the Shenandoah service area that do not have meters on 2-inch water lines that serve their location within 60 days of closing. As noted by the Parties, this provision will serve to increase the period of consumption data tracked and reported for the purpose of setting cost-based rates for these customers in the next base rate case and will ensure that the customers have meters installed so they can be charged metered instead of flat rates for service. This is consistent with the Commission's policy requiring the installation of meters and allows customers to control their usage through conservation.¹²⁴ In addition, as OCA explains, metering all customers will improve the Company's understanding of water consumption and non-revenue water within the Shenandoah system and help Aqua to more effectively plan ways to make improvements to reduce water loss.

The issue of providing water service to the fire companies is further addressed above.

Lead Service Line Replacement

Aqua Statement in Support of Settlement

The Settling Parties agreed that upon closing, Aqua will incorporate the Shenandoah water system into its COLSLR program and that Aqua would explore low cost or no

¹²³ I&E St. in Support, p. 10.

¹²⁴ 52 Pa. Code § 65.7.

cost financing for lead service line replacement in the Requested Territory, and provide an update to the parties on the progress of obtaining a low interest loan or grant money to replace COLSLs in the Shenandoah water system in its next base rate case following closing of the transaction.¹²⁵

OCA Statement In Support of Settlement

Aqua witness Clark explained that Shenandoah's water system contains lead service lines, although the number of such lines is not known.¹²⁶ The MABS system does not have program for replacing LSLs, however Aqua does have such a program, approved by the Commission pursuant to Section 1311(b)(2) of the Public Utility Code. Aqua's initiative is referred to as the Customer-Owned Lead Service Line Replacement (COLSLR) program.¹²⁷ Aqua has agreed that upon the closing of the transaction, it will incorporate the Shenandoah system into its COLSLR program, which will provide an opportunity for Shenandoah customers with LSLs to replace them without incurring a direct cost.¹²⁸

Aqua has agreed to explore low cost or no cost financing for lead service line replacement in the Shenandoah system and provide an update on its progress in obtaining low interest loan or grant money in its next base rate case.¹²⁹ The costs of Aqua's COLSLR program are borne by Aqua customers in the aggregate.¹³⁰ In addition, if Aqua secured low interest loan or grant funding for its program, it would benefit customers by enabling more LSL replacements to be performed within the existing program budget or lowering the overall costs of the program recovered from customers through base rates and the DSIC.¹³¹

¹²⁵ Aqua St. in Support, p. 11.

¹²⁶ Aqua St. 3 at 6; OCA St. in Support, p. 10.

¹²⁷ *Id.* at 6-7. In Settlement Paragraph 17.J.1; OCA St. in Support, p. 10.

¹²⁸ OCA St. in Support, p. 10.

¹²⁹ Settlement Paragraph 17.J.2; OCA St. in Support, p. 10.

¹³⁰ *Petition of Aqua Pennsylvania, Inc.*, P-2020-3021766, R.D. at 15, 32; OCA St. in Support, p. 10.

¹³¹ OCA St. in Support, p. 10.

I&E Statement In Support of Settlement

I&E notes that lead represents a serious threat to the health and safety of water customers and replacing lead service lines is in the public interest. Therefore, I&E supports this term as being in the public interest.¹³²

Discussion

The evidence established that Shenandoah's water system contains lead service lines, the number of which is not known. In addition, Aqua has a program for replacing LSLs, and has agreed that upon the closing of the transaction, it will incorporate the Shenandoah system into its COLSLR program, which will provide an opportunity for Shenandoah customers with LSLs to replace them without incurring a direct cost.

The costs of Aqua's COLSLR program are borne by Aqua customers in the aggregate.

Under the circumstances, this settlement term is in the public interest.

Welcome Letter and Low Income Program Outreach

Aqua Statement in Support of Settlement

Aqua explains, in order to ensure MABS customers are informed as to the low-income and COLSLR programs available to them as Aqua customers and that they are aware of all payment options, it agreed to OCA's condition that it send a welcome letter with information that includes, at minimum, a description of the low-income programs and eligibility requirements for participation in the programs, and Aqua's contact information, along with information about in-person bill payment options reasonably proximate to the Requested Territory. Aqua agreed to send this letter within 30 days following closing and to also include the same information

¹³² I&E St. in Support, p. 10.

regarding low-income programs in bills to MABS' customers within the first 90 days after closing.¹³³

OCA Statement In Support of Settlement

Aqua and OCA explained the settlement term and the provision requiring that letter to be sent in both English and Spanish. In addition, if 5% or more of the residents of the Shenandoah territory speak another language, information in that language directing customers to the numbers to call for information and translation assistance will be included in the materials.¹³⁴ The welcome letter will also include information about in-person bill payment options in or near the Shenandoah territory.¹³⁵

OCA also explains that Aqua has agreed to work with community-based organizations with offices in or near the Shenandoah territory for purposes of providing information and enrolling customers in Aqua's customer assistance programs.¹³⁶

OCA submits each of the provisions of the Settlement will ease Shenandoah customers' transition to becoming customers of Aqua and will provide timely, important information to any payment-troubled Shenandoah customers on how to access Aqua's available customer assistance programs. According to information provided by Aqua witness Pietkiewicz, as of 2015, the household affordability limit in Shenandoah was \$561.¹³⁷ OCA submits Aqua has calculated that water bills for an average MABS residential customer could increase by 45% under its ownership, from \$521.52 to \$755.52 per year, well above the household affordability

¹³³ Aqua St. in Support, pp. 11-12.

¹³⁴ Settlement ¶ 17.K.3; OCA St. in Support, p. 11.

¹³⁵ Settlement ¶ 17.K.4; OCA St. in Support, p. 11.

¹³⁶ Settlement ¶ 17.K.5; OCA St. in Support, p. 11.

¹³⁷ Aqua St. 5, App. A at 7; OCA St. in Support, p.11.

limit.¹³⁸ As OCA witness DeAngelo explained, "Unless MABS customers know about and enroll, the existence of Aqua's low-income programs will not provide a benefit."¹³⁹

I&E Statement In Support of Settlement

I&E explains it fully supports this term because ensuring that acquired customers are fully informed about the programs offered by their new provider is prudent and in the public interest, to ensure that acquired customers will have a clear understanding of COLSLR program and low-income programs.¹⁴⁰

Discussion

As explained by the Joint Petitioners, the Settlement provides for a welcome letter that will be sent by Aqua to Shenandoah customers upon completion of the sale as well as to Aqua's efforts to acquaint these customers with Aqua's customer assistance programs, including the COLSLR program. Aqua will include the same information regarding low-income assistance programs in the bills of Shenandoah customers.

The settlement provisions further require the welcome letter to be sent in both English and Spanish, and if 5% or more of the residents of the Shenandoah territory speak another language, information in that language directing customers to the numbers to call for information and translation assistance will be included in the materials. The welcome letter will include information about in-person bill payment options in or near the Shenandoah territory. Aqua also agreed to work with community-based organizations with offices in or near the Shenandoah territory for purposes of providing information and enrolling customers in Aqua's customer assistance programs.

¹³⁸ OCA St. 1 at 12; OCA St. in Support, pp. 11-12.

¹³⁹ *Id.*

¹⁴⁰ I&E St. in Support, pp. 10-11.

As OCA and I&E explained, the settlement terms will provide Shenandoah customers with information on how to access Aqua's available customer assistance programs, given the projected increase in MABS residential customer rates.

Hardship Contribution

Aqua Statement in Support of Settlement

Aqua explains it agreed to OCA's recommendation to further assist Aqua customers with bill payment assistance, and accordingly, Aqua agreed to contribute \$45,000 to the Company's Hardship Grant program.¹⁴¹

OCA Statement In Support of Settlement

OCA explains that any unspent funds at the end of the program year from the \$45,000 contribution to the Company's Hardship Grant program will be rolled over and added to the following year's program budget. Additional funding for the program will assist customers in need throughout Aqua's service territory, including the acquired Shenandoah customers. Given the impact on the projected rate increase on Shenandoah customers and the evidence from Aqua witness Pietkiewicz, based on US Census data, that 30.7% of households in Shenandoah are below the poverty level and 43% of households in Shenandoah have incomes below \$20,000 per year, OCA supports this settlement term.¹⁴²

I&E Statement In Support of Settlement

I&E took no position on this issue in testimony, but explains it supports the settlement as a whole as being in the public interest.¹⁴³

¹⁴¹ Aqua St. in Support, p. 12.

¹⁴² Aqua St. 5, App. A at 7; OCA St. in Support, p. 12.

¹⁴³ I&E St. in Support, p. 11.

Discussion

The Settlement, at Paragraph 17.L provides that Aqua will make a \$45,000 contribution to its Hardship Grant program, with any unspent funds at the end of the program year will be rolled over and added to the following year's program budget. Additional funding for the program will assist customers in need throughout Aqua's service territory, including the acquired Shenandoah customers. Given the percentage of households in Shenandoah below the poverty level and number of households in Shenandoah with incomes below \$20,000 per year, the settlement term is in the public interest, as agreed by the Joint Petitioners.

Easements

Aqua Statement in Support of Settlement

Aqua explains it has a contractual provision with Shenandoah in the APA that Aqua believes reasonably and adequately addresses the transfer of real property rights, easements and rights of way for the Acquired Assets. Aqua further explains it has agreed, in settlement and in response to concerns expressed by I&E, to work with Shenandoah to (i) identify all missing easements including public rights-of-way and other property rights; (ii) take any and all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to Aqua at closing; and that (iii) Shenandoah shall bear all costs and expenses for obtaining and conveying the missing easements and other property rights.¹⁴⁴

Aqua further submits that this term does not preclude Aqua and Shenandoah from closing the transaction if any easements remain missing at closing, provided that an escrow account be established of an appropriate dollar amount from the purchase price to be used to obtain any post-closing transfers of the easements and other real property rights.¹⁴⁵

¹⁴⁴ Aqua St. in Support, p. 12.

¹⁴⁵ *Id.*

OCA Statement In Support of Settlement

OCA explains that Aqua and Shenandoah will work to identify and obtain all missing easements, including public rights-of-way and other property rights, so that they can be conveyed to Aqua at the closing of the sale, and that Shenandoah will bear the cost for obtaining and conveying the missing easements and other property rights.¹⁴⁶

OCA further explains that if for reasons beyond Shenandoah's control it is unable to transfer all missing easements to Aqua at closing, Aqua and Shenandoah may proceed with closing without the transfer of the missing easements provided an escrow account consisting of an appropriate amount of settlement funds is established to obtain any post-closing transfers of the missing easements or other property rights. OCA submits this condition was recommended by OCA witness DeAngelo to help to ensure that the UVEs' assumption that all necessary easements would be conveyed to Aqua at closing is accurate, and that ratepayers receive the full assets for which the purchase price was negotiated and are protected from paying in rates any costs for acquiring the missing easements or other property rights.¹⁴⁷

I&E Statement In Support of Settlement

I&E explains it supports this term as necessary as the public interest would be harmed if Aqua paid a purchase price that assumed that all rights necessary to operate Shenandoah would be transferred, and at Shenandoah's cost, and such action did not occur. I&E submits the escrow account provision of the Settlement would prevent this possibility. In addition, I&E submits the public interest is protected because this term provides an additional layer of accountability that would not exist if Aqua and Shenandoah would ever mutually decide to waive the applicable sections of the Asset Purchase Agreement that bind it to deliver good and marketable title to all real property necessary for the operation of the acquired system.¹⁴⁸

¹⁴⁶ OCA St. in Support, pp. 12-13.

¹⁴⁷ Settlement Paragraph 17.M.2; OCA St. 1 at 17; I&E St. 1 at 5-7; OCA St in Support, p. 13.

¹⁴⁸ I&E St. in Support, p. 11.

Discussion

The Settlement, at Paragraphs 17.M.1 and M.2, as explained by OCA above, permits the transfer of the real property rights, including easement rights, by closing and further provides a process whereby a closing could occur without the transfer of all of the Real Property Rights, provided that an escrow is established as agreed upon by the specific terms of the Settlement.

The terms are a compromise of the positions of the parties and are reasonable under the circumstances.

Transaction and Closing Costs

Aqua Statement in Support of Settlement

Aqua submits that OCA, I&E and OSBA agreed that for purposes of settlement of this proceeding they will not oppose Aqua's request to claim transaction and closing costs associated with the transaction, but reserve their right to litigate their positions fully in future rate cases. Aqua explains it agreed, that (i) any claim by Aqua to recover transaction and closing costs associated with the transaction will not include costs incurred by Shenandoah; and (ii) the inclusion of outside legal fees, if any, in Aqua's transaction and closing costs under the APA shall be separately identified in Aqua's next base rate case, and that the reasonableness, prudence, and basis for such fees will be subject to challenge by OCA, I&E and OSBA.¹⁴⁹

OCA Statement In Support of Settlement

OCA explains that Settlement Paragraph 17.N relates to Aqua's transaction and closing costs and adopts the recommendation by OCA witness DeAngelo.¹⁵⁰ OCA notes the

¹⁴⁹ Aqua St. in Support, p. 12.

¹⁵⁰ OCA St. 1 at 3; OCA St. in Support, p. 13.

terms of settlement provide that while Aqua has estimated its transaction and closing costs, as required by Section 1329(d)(1)(iv), the Joint Petitioners reserve the right to litigate their positions fully in future rate cases when this issue is ripe for review, and the settlement should not be construed to operate as their preapproval of Aqua's request.¹⁵¹ In addition, Settlement Paragraph 17.N.2 provides that any outside legal fees included as part of Aqua's transaction and closing costs must be separately identified in Aqua's next base rate case and that OCA and I&E reserve the right to challenge the reasonableness, prudence and basis for such fees.¹⁵² OCA explains that Settlement Paragraph 17.N.3 further provides that Aqua will not include in its transaction and closing costs any costs incurred by Shenandoah in connection with the sale.¹⁵³

I&E Statement In Support of Settlement

I&E submits that Aqua's commitment to separately identify any legal fees included in its transaction and closing costs pursuant to the Asset Purchase Agreement between Aqua and Shenandoah is consistent with ensuring that Aqua will only be permitted to recover prudently incurred costs from ratepayers and are in the public interest because they protect ratepayers from paying unwarranted costs and promote rate affordability.¹⁵⁴ Consistent with I&E's obligation to enforce the Code, I&E submits it has not forfeited its position that Section 1329 does not permit the acquiring utility to recover the seller's transaction and closing costs. Further, by preserving the ability to challenge the permissibility of any claims that Aqua may make for its legal fees in its next base rate case, I&E is protecting the public interest.¹⁵⁵

I&E further submits Aqua has agreed that if it ever does make a claim for any Shenandoah legal fees in a future base rate case, it will separately identify those fees. I&E stresses the importance to be able to readily identify any portion of claimed legal fees and the

¹⁵¹ Settlement ¶17.N.1; OCA St. in Support, p. 13.

¹⁵² See OCA St. 1 at 3; OCA St. in Support, pp. 13-14.

¹⁵³ OCA St. 1 at 3; OCA St. in Support, pp. 13-14.

¹⁵⁴ I&E St. in Support, pp. 11-12.

¹⁵⁵ I&E St. in Support, p. 12.

need to minimize the administrative burden of uncovering this information when Aqua files its next rate case. I&E submits these combined commitments will protect Aqua's ratepayers from bearing the burden of Shenandoah's legal fees.¹⁵⁶

Discussion

The Settlement terms agreed upon by the Joint Petitioners preserve the rights of the Joint Petitioners to challenge or litigate their positions fully in future rate cases and, by their terms, will not be construed to operate as their preapproval of Aqua's request. Furthermore, any outside legal fees included as part of Aqua's transaction and closing costs must be separately identified in Aqua's next base rate case and that OCA and I&E reserve the right to challenge the reasonableness, prudence and basis for such fees. Accordingly, under the circumstances, these provisions are in the public interest as they provide for a full review of the transaction and closing costs in future rate cases. In addition, Aqua has agreed that it will not include in its transaction and closing costs any costs incurred by Shenandoah in connection with the sale. As OCA and I&E explained, this protects Aqua's ratepayers and is consistent with Section 1329, which does not allow transaction and closing costs incurred by the *selling* utility to be included in the acquiring utility's ratemaking rate base.

Approvals Pursuant To Sections 1102, 1329, and 507 of the Code

This proceeding concerns the Application of Aqua, at Docket No. A-2022-3034143, filed with the Commission on October 6, 2022 for approvals related to its acquisition of the Shenandoah water system assets pursuant to Sections 1102, 1329 and 507 of the Public Utility Code.

Section 1102 Approval

The Application requests that the Commission issue an order and certificates of public convenience pursuant to Section 1102 of the Code approving Aqua's acquisition of the

¹⁵⁶ I&E St. in Support, p. 12.

water system assets of Shenandoah situated within the Borough, and portions of West Mahanoy Township, Mahanoy Township, Butler Township, Girardville Borough, and Union Township, within Schuylkill County, Pennsylvania, and allowing Aqua to begin to provide water service in the Borough, and portions of West Mahanoy Township, Mahanoy Township, Butler Township, and Girardville Borough, within Schuylkill County, Pennsylvania.

There appears to be no opposition raised by the Joint Petitioners to the request that the Commission issue an order and certificates of public convenience pursuant to Section 1102 of the Code, as requested by Aqua.

Section 1329 Approval

The Application also asks that the Commission include in its order approving the acquisition, a determination that the ratemaking rate base of the assets being acquired by Aqua is \$12,000,000 pursuant to Section 1329(c)(2) of the Code.

There appears to be no opposition raised by the Joint Petitioners to the request that the Commission issue an order to include a determination that the ratemaking rate base of the assets being acquired by Aqua is \$12,000,000 pursuant to Section 1329(c)(2), as requested by Aqua.

Section 507 Approval

Section 507 of the Code states that, except for contracts between a public utility and a municipal corporation to furnish service at tariff rates, no contract or agreement between a public utility and a municipal corporation shall be valid unless filed with the Commission at least 30 days prior to its effective date. As I&E notes, upon receipt of the filing, and prior to the effective date of the contracts, the Commission may institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of

the contract. If this Commission decides to institute such proceedings, the contracts at issue will not become effective until the Commission grants its approval.¹⁵⁷

Aqua submits the Asset Purchase Agreement, dated July 20, 2021, between Aqua, the Borough and MABS was filed with the Application as Exhibit B. Aqua asserts that, upon approval of the acquisition, on the terms set forth in the settlement in the Joint Petition, the Commission should also approve, to the extent necessary, the APA pursuant to Section 507 of the Code and provide such other approvals, certificates, registrations and relief, if any, under the Code that may be required.

Aqua's Application asks that the Commission, if necessary, issue certificates of filing pursuant to Section 507 of the Code, for its APA with the Borough and MABS.¹⁵⁸

In its Statement in Support of Settlement, Shenandoah Borough requested that Section 507 approval be given, and stated that, on the terms set forth in the settlement in the Joint Petition, the Commission should also approve, to the extent necessary, the APA pursuant to Section 507 of the Code and provide such other approvals, certificates, registrations and relief, if any, under the Code that may be required. Shenandoah Borough also requests that the Commission issue such other approvals, certificates, registrations and relief, if any, that may be required with respect to Aqua's acquisition of the System assets.¹⁵⁹ The Borough did not address the issue raised by OCA regarding free services provided to certain entities or identify any basis for such provisions. In addition, the Borough did not identify any approvals that it seeks from the Commission, other than identifying the APA.

Similarly, the Authority's Statement in Support of Settlement seems to mirror that filed by the Borough and fails to address the issue raised by OCA regarding free services provided to certain entities or identify any legal authority for such provisions. In addition, the

¹⁵⁷ I&E St. in Support, p. 5.

¹⁵⁸ Exhibit No. 1, Application, at ¶ 75 and Exhibit B.

¹⁵⁹ *See*, Shenandoah Borough St. in Support, p. 7.

Authority did not identify any approvals that it seeks from the Commission, other than identifying the APA.¹⁶⁰

The Settling Parties agreed that the Settlement Tariff should be permitted to become effective immediately upon closing of the transaction, as modified to remove the fees charged by MABS for “Miscellaneous Charges: D.E.P Commercial \$ 1.00 [sic] per Month, D.E.P Residential \$ 3.00 [sic] per Quarter.” Aqua explains the Settling Parties also agreed that Aqua is permitted to continue MABS practice (as evidenced in its currently effective rates ordinance) of providing free water service to the Fire Companies listed on First Revised page 12.9 of the Settlement Tariff and that Aqua would propose to charge rates to these Fire Companies in its first base rate proceeding following closing. Aqua and OCA agreed to cooperate in efforts to seek a determination from the Commission to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329(d) of the Code that address the buyer’s adoption of seller’s rates at closing. Aqua submits that it is appropriate that these matters not be addressed here but rather await a future proceeding where they can be fully vetted.¹⁶¹

As explained above, OCA does not join in supporting the Settlement Tariff to the extent that it requires Aqua to provide free water service to eight fire companies.¹⁶² OCA submits that free service is not permitted under Section 1304 of the Public Utility Code and long-standing Commission and appellate precedent.¹⁶³

Aqua agreed to join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and Section

¹⁶⁰ See, MABS Authority Statement in Support, p. 7.

¹⁶¹ Aqua St. in Support, pp. 8-9.

¹⁶² OCA St. 1 at 14-15; See Settlement ¶ 17.B.3; OCA St. in Support, p. 4.

¹⁶³ OCA St. in Support, p. 4; See, e.g. *Phila. Suburban Water Co. v. Pa. Pub. Util. Comm’n*, 808 A.2d 1044, 1050-51 (Pa. Cmwlth. 2002).

1329(d) of the Code, which addresses the buyer's adoption of seller's rates at closing.¹⁶⁴ OCA submits this provision recognizes that the issue of free service is likely to reoccur in future 1329 acquisitions and its resolution will provide certainty for Aqua, other potential buyers, and potential sellers.¹⁶⁵

Aqua acknowledges that the Settlement Tariff provides that Aqua will provide free water service to the Fire Companies listed on First Revised page 12.9.¹⁶⁶ The Settlement further provides that no precedent is established by adoption of the Settlement Tariff and all parties reserve their right to challenge the provision of free service in future proceedings. Neither the Borough nor MABS acknowledged or addressed this provision and did not identify any legal authority to support this term or address how this term would impact the legal requirements set forth in Section 1329.

It appears that, as a compromise, the Settling Parties agreed to the language set forth in Section 17.B.3.iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing. This provision is also not supported by the evidentiary record or and legal authority cited by the Settling Parties. Accordingly, I have no option, other than to reject the request for approval of the APA and any other contracts or documents requiring Commission approval to the extent that the APA and other such contracts or documents permit or requires Aqua to provide free water service to the eight enumerated fire companies or any other individual or entity. The request for Section 507 approval will be granted subject to and consistent with this provision, and the Settlement is modified consistent with this provision.

¹⁶⁴ Settlement ¶ 17.B.3.iii; OCA St. in Support, p. 5.

¹⁶⁵ OCA St. in Support, p. 5

¹⁶⁶ Settlement, p. 6.

Aqua has not specifically identified any other contracts or documents requiring Commission approval for the issuance of the Certificates of Filing for the contracts which are necessary for the ownership and operation of the system.

Obviously, the assignment and/or approval of contracts can be critical to ensuring that customers and ratepayers are protected and that acquired customers will receive safe, adequate, and reliable service and thus within the public interest.

Testimony From Public Input Hearing

Eight individuals testified at the public input hearing to raise issues to be considered by the Commission, including the potential benefits to Aqua and Borough, potential costs for system improvements and rate increases, concerns if the sale would be approved, and alternatives to the sale of the system.

The Parties cooperated in good faith with Commission staff to promptly schedule one telephonic public input hearing in this matter. The Parties agreed that, for purposes of this proceeding, Aqua and OCA would coordinate the manner and method of notice for the public input hearing and adequate and sufficient notice was provided for the public input hearing that was scheduled for March 21, 2023.

The public input hearing was convened as scheduled. All of the Parties participated at the hearing, represented by counsel, except the Protestant, Donna Gawrylik participated, without counsel.

Michael Uholik objected to the proposed sale, explaining the Number Nine Dam, a source of significant fresh water, is a valuable asset and could provide substantial water to the area. He also expressed concerns that customers' bills would increase if the sale was approved.¹⁶⁷

¹⁶⁷ Tr. 74-81.

Donna Gawrylik, a Protestant, testified that she previously served as chairperson of the water authority and as a member from 2015 through 2020. She testified that, during this time, infrastructure was addressed, all bills were paid, and the system was maintained. She explained that during her time with the Authority, the Authority considered the sale of its assets to Aqua and decided against the sale.¹⁶⁸

Ms. Gawrylik further testified that the Borough subsequently stacked the deck with regard to Authority membership, replacing Authority members who opposed the sale, and that the sale was ultimately approved by the Authority, without public input.¹⁶⁹ She also testified there are twelve entities that receive free water from the Authority, including various fire departments and several Borough properties.¹⁷⁰

Joe Boris, a retired corporate engineer and facility manager testified his sewerage rates have increased 85% since 2014 and his water bill increased 43.6% with Aqua projecting a rate increase for Shenandoah residents of 44.87%. He also discussed the benefits of possibly selling both the water and sewer systems in a single transaction. Mr. Boris also discussed the possibility of Aqua water bills being paid while sewage bills were unpaid and how such a circumstance would affect termination of service. He stated the water system is supplying customers with good clean water, without issue, since he has been a customer since 1996. He also expressed concerns of losing local control of water rates if Aqua would take over, and questioned if volunteer fire companies would be responsible for paying for the water they use.¹⁷¹

Charles Vascavage, a volunteer fireman and member of the Borough Zoning and Planning Commission, testified he was involved in circulating a petition to have residents vote

¹⁶⁸ Tr. 83-91, 101.

¹⁶⁹ Tr. 91-97.

¹⁷⁰ Tr. 102-104.

¹⁷¹ Tr. 105-122.

on whether or not to sell the water assets. He testified that everyone he spoke with opposed the sale.¹⁷²

Mary Catherine Berresford, a homemaker and water customer testified that the sale would result in a substantial increase in water bills. Ms. Berresford also questioned the validity of the Borough and Authority votes as well as the makeup of the board and council and potential conflicts of interest. Ms. Berresford also addressed the value of the water assets and the cell towers as well as Borough Council's action not to accept a petition requesting that the proposed sale be placed on a ballot for voters to decide.¹⁷³

Dave Horn, a business agent for a union and who works in the area of utility infrastructure testified regarding the erosion of the workforce standards that the transaction may bring to the contracted construction workforce and its impact on the community and the ratepayers. He expressed concerns about exempting contracted construction workers from the Pennsylvania Prevailing Wage Act and its effect on the local economy. He also expressed concerns about the effect of the sale on wages and benefits for the local contracted construction workforce and the economic impact on the local area.¹⁷⁴

Reverend Frank Dellinger raised concerns regarding the sale, considering the valuation of the assets and the purchase price, as well as concerns regarding the make-up of the Authority board and Council and their legal ability, under the circumstances, to approve the sale.¹⁷⁵

Robert Cook also testified that he opposes the sale of the water assets and expressed concerns regarding the ability of the water authority, given the make-up of the

¹⁷² Tr. 123-126.

¹⁷³ Tr. 127-130.

¹⁷⁴ Tr. 131-138.

¹⁷⁵ Tr. 144-150.

Authority board and the Borough Council, and the alleged conflicts, to be able to legally effectuate the sale.¹⁷⁶

The witnesses articulated relevant and legitimate concerns that were addressed by the Parties, in their filings in this Application proceeding. Additionally, although the Settling Parties appear to acknowledge that Aqua may apply for a rate increase in the near future, any such rate increase application will be subject to the Commission’s jurisdiction. Aqua would be required to apply for any increase, following which interested parties, including existing customers, may intervene in any such proceeding. Any requested increase would ultimately be subject to approval by the Commission, and the Commission would have the authority to approve, deny or modify any such requested increase.

VIII. OPPOSITION TO THE PROPOSED SETTLEMENT

Objections of Donna Gawrylik

On April 19, 2023, Donna Gawrylik, through her legal counsel, filed objections to Aqua’s Application (Objection). The Objection avers that Ms. Gawrylik has intervened in this proceeding citing that the Borough failed to abide by the Pennsylvania Code and the Third Class City Code by refusing to stay the sale and, instead, put a referendum on the ballot.¹⁷⁷ Ms. Gawrylik further avers that any acquisition by Aqua will have a very deleterious effect on the residents in the Borough due to the impending rate increases as the majority of these residents are elderly and on fixed incomes.¹⁷⁸ Ms. Gawrylik further averred the system currently in place in the Borough is fully functional and financially sound “as admitted in the proposed Settlement Agreement.”¹⁷⁹

¹⁷⁶ Tr. 139-143.

¹⁷⁷ See, Objection of Donna Gawrylik, p. 1. No citations were provided for the Pennsylvania Election Code or Third Class City Code, nor was any legal or factual basis provided for how the Borough is subject to the Third Class City Code. Finally, no factual or legal authority was provided regarding the jurisdiction of the Commission to adjudicate claims pursuant to the Pennsylvania Election Code or the Third Class City Code.

¹⁷⁸ Objection of Donna Gawrylik, p. 1.

¹⁷⁹ *Id.*

Specifically, Ms. Gawrylik objected that it is not in the public interest to sell the water rights, that due process was not afforded in this matter, and that the Borough water system is financially sound based on its revenues versus operating expenses.¹⁸⁰

Public Interest

Ms. Gawrylik argues the issuance of a public convenience certificate requires the Commission to find affirmatively that the public will benefit from the merger/sale. Here, Ms. Gawrylik argues the Borough residents will not benefit as the Water Authority is fully functioning and providing water at reasonable rates to the Borough residents.¹⁸¹ Ms. Gawrylik argues that paragraph 33 of the Settlement provides the Borough would see an average increase in rates of 44.87% after the settlement, which would be very deleterious to the elderly residents and residents on a fixed income.¹⁸²

Pursuant to Section 1103 of the Code, 66 Pa.C.S. § 1103, Aqua must demonstrate that it is technically, financially, and legally fit to own and operate the System. Furthermore, no record evidence was presented challenging Aqua's technical, financial or legal fitness or expertise with regard to water and wastewater utility operations.

In addition to demonstrating fitness, Aqua must demonstrate that the Transaction and Aqua's ownership/operation of the System will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.

The Transaction benefits members of the public-at-large in that the Transaction promotes the Commission's policy favoring regionalization and consolidation of water and wastewater systems. 52 Pa. Code § 69.721(a). In addition, the Transaction benefits members of the public-at-large by promoting the Legislature's policy goals when it enacted Section 1329.

¹⁸⁰ Objection of Donna Gawrylik, pp. 2-3.G

¹⁸¹ Objection of Donna Gawrylik, p. 2.

¹⁸² *Id.*

As noted above, the Settling Parties have stipulated that Aqua has the requisite technical, financial and legal fitness to own and operate the system and the technical experience and fitness in deploying resources towards capital improvements. Aqua is projecting less O&M costs under its ownership through reductions in costs for water maintenance. Specifically, referencing MABS 2020 Financial Statements, Operating Expenses were approximately \$1.7 million, whereas Aqua is projecting annual expenses of approximately \$1.2 million. Further, Aqua plans to invest \$23 million in the MABS system for main replacements and other system needs, will endeavor to minimize future water losses through main replacements and other improvements, will integrate the MABS system into its LSL inventory efforts, and MABS customers will be able to participate in Aqua's COLSLR program.

In addition, the acquisition of the Shenandoah water system will be an approximate 0.6% increase in Aqua's customer base. The connections per MABS' records are approximately 2,900, which equates to an approximately \$4,100 purchase price per connection and is approximately 50% less than Aqua's existing rate base per connection, projected at approximately \$8,500.¹⁸³

Where the active parties in a proceeding have reached a settlement, the principal issue for Commission consideration is whether the agreement reached is in the public interest.¹⁸⁴ Aqua, I&E, OCA, the Borough and the Authority have stipulated to the findings of fact set forth above, which, supported by the record evidence in this proceeding, demonstrate that the Settlement will affirmatively promote the service, accommodation, convenience, or safety of the public in a substantial way and will further the public interest.

¹⁸³ Exhibit No. 5, Packer Direct, at ¶ 14:5-8; 14:9-15.

¹⁸⁴ *Pa. Pub. Util. Comm'n v. City of Lancaster – Bureau of Water*, Docket No. R-2010-2179103 (Opinion and Order entered July 14, 2011) (citing *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Opinion and Order entered Apr. 1, 1996) and *Pa. Pub. Util. Comm'n v. C S Water and Sewer Assoc.*, 74 Pa.P.U.C. 767 (1991)); *See also Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 60 Pa.P.U.C. 1 (1985).

Due Process

Next, Ms. Gawrylik appears to argue that the Borough council enacted an ordinance without allowing ten percent of the registered voters of the Borough to file a Petition to stay the Aqua sale. No citation to the record evidence to support this objection was provided by Ms. Gawrylik. Ms. Gawrylik did aver that Leo Pietkiewicz, Borough Council President, testified that Borough residents were not informed of their rights to sign a Petition or even informed of their rights to do this within ten days of the enactment of the ordinance.¹⁸⁵

Ms. Gawrylik also averred that Joseph Boris of Shenandoah addressed the devastating effect that a sale to aqua would have on Borough of Shenandoah residents. Ms. Gawrylik averred, “Mr. Boris testified to rate increases of at least 15.9 percent per customer as well as the current upgrades to the existing infrastructure, thereby making a sale unnecessary.”¹⁸⁶

Constitutional due process requires notice and an opportunity to be heard. *Conestoga Nat'l Bank of Lancaster v. Patterson*, 275 A.2d 6 (Pa. 1971); 2 Pa.C.S. § 504. Adequate notice was provided to the public to file protests and petitions to intervene as well as to participate in this proceeding. Ms. Gawrylik fully participated at all stages of the proceeding, including the prehearing conference, the public input hearing, the evidentiary hearing and the filing objections to the proposed settlement.

The Parties, including Protestant and Intervenors further participated as active parties in the litigation by providing testimony and appearing at the evidentiary hearing with the opportunity to present evidence and cross examine witnesses.

The Commission provided the Parties, Protestant and the Intervenors with notice of this proceeding and an opportunity to be heard in respect to it, Aqua asserts that constitutional due process requirements were satisfied. No legal or statutory authority was presented to

¹⁸⁵ See, Objection of Donna Gawrylik, pp. 2-3, citing “March 28, 2023 testimony of Leo Pietkiewicz at pp. 205-215.”

¹⁸⁶ Objection of Donna Gawrylik, p. 3.

establish that the interests of the Parties, customers of either Aqua, the Borough or Authority were denied the opportunity to be heard in this proceeding before the Commission.

To the extent Ms. Gawrylik argues that the Parties were denied due process by the Borough council or Authority for enacting an ordinance without allowing ten percent of the registered voters of the Borough to file a Petition to stay the Aqua sale; by failing to inform residents of their rights to sign a Petition or challenge Borough or Authority action within ten days of the enactment of the ordinance; for failure to allow ten percent of the registered voters of the Borough to file a Petition to stay the Aqua sale; or by failing to comply with the Pennsylvania Election Code or the Third Class City Code, Ms. Gawrylik failed to cite and authority to support these objections or even aver that the Commission has jurisdiction to adjudicate these claims.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Shedlosky v. Pa. Elec. Co.*, Docket No. C-20066937 (Opinion and Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm' n.*, 43 A.2d 348 (Pa Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992).

To the extent Ms. Gawrylik believes that due process was not afforded to the Borough residents or taxpayers, or the customers of the Authority regarding the alleged improprieties in the make-up and votes of the Authority Board or Borough Council, those matters must be addressed upon proper filings with the Court of Common Pleas or another entity or forum with jurisdiction or authority to adjudicate such claims. However, the Commission simply does not have jurisdiction to consider or determine the merits of such issues.

Financially Sound

This objection by Ms. Gawrylik is set forth in a single sentence providing, “based on the fact that the Borough’s financials show that the current water system is sound, there is no reason for a sale to occur.”¹⁸⁷

Ms. Gawrylik simply provided no legal authority, record evidence or citation to the record to support her conclusion. As stated above, where the active parties in a proceeding have reached a settlement, the principal issue for Commission consideration is whether the agreement reached is in the public interest. Aqua, I&E, OCA, the Borough and the Authority have stipulated to the findings of fact set forth above, which, supported by the record evidence in this proceeding, demonstrate that the Settlement will affirmatively promote the service, accommodation, convenience, or safety of the public in a substantial way and will further the public interest.

For all of the reasons set forth above, the objections of Ms. Gawrylik are not supported by any legal authority or record evidence in this proceeding and must be denied.

Conclusion

Given all of the foregoing, I conclude that the Settlement should be approved by the Commission as modified herein and as specifically set forth in the ordering paragraphs below, as the Settlement, as modified, is in the public interest. The Settlement will ensure that the system customers will receive quality service from Aqua, a certificated public utility with the necessary financial, technical and legal resources to provide that service into the foreseeable future. Bringing the System’s existing customers into Aqua’s customer base will also ensure they will have access to the Commission’s procedures for investigating and enforcing any complaints that the residents may have regarding their service. Additionally, future rate increases are subject to the Commission’s jurisdiction.

¹⁸⁷ Objection of Donna Gawrylik, p. 3.

Pursuant to Section 1103 of the Code, 66 Pa.C.S. § 1103, Aqua must demonstrate that it is technically, financially, and legally fit to own and operate the System. Furthermore, no record evidence was presented challenging Aqua's technical, financial or legal fitness or expertise with regard to water utility operations.

In addition to demonstrating fitness, Aqua must demonstrate that the Transaction and Aqua's ownership/operation of the System will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.

In addition to the specific benefits referenced above, the Transaction benefits members of the public-at-large in that the Transaction promotes the Commission's policy favoring regionalization and consolidation of water and wastewater systems. 52 Pa. Code § 69.721(a). In addition, the Transaction benefits members of the public-at-large by promoting the Legislature's policy goals when it enacted Section 1329.

It is the stated policy of the Commission to encourage parties to resolve contested proceedings through settlement.¹⁸⁸ Settlements lessen the time and expense of litigating a case and, thus, directly benefit all parties concerned. Where the active parties in a proceeding have reached a settlement, the principal issue for Commission consideration is whether the agreement reached is in the public interest.¹⁸⁹ The Joint Petitioners submit that the resolution of issues as presented in this settlement will further the public interest. The Joint Petitioners agree that Aqua has the requisite technical, financial and legal fitness to own and operate the system, and their respective Statements in Support of the Settlement are attached to the Joint Petition as Exhibits B, C, D, E and F.

¹⁸⁸ 52 Pa. Code § 5.231(a). The Commission, moreover, has stated that the results achieved from a negotiated settlement or stipulation in which the interested parties have had an opportunity to participate are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401.

¹⁸⁹ *Pa. Pub. Util. Comm'n v. City of Lancaster - Bureau of Water*, Docket No. R-2010-2179103 (Opinion and Order entered July 14, 2011) (citing *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Opinion and Order entered Apr. 1, 1996); *Pa. Pub. Util. Comm'n v. CS Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991)); *See also Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 60 Pa. P.U.C. 1 (1985).

With regard to approval of Section 507 Agreements, Section 507 of the Code, 66 Pa.C.S. § 507, requires that contracts between a public utility and a municipal corporation (except for contracts to furnish service at regular tariffed rates) be filed with the Commission at least thirty days before the effective date of the contract in order to be valid. The Commission may allow the contract to become valid and issue a certificate of filing, unless prior to the effective date of the contract, it decides to institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract.

Aqua seeks certificates of filing of the agreements enumerated in the Joint Petition. For the reasons discussed above, I recommend that the Commission approve the Settlement, as modified herein and specifically in the ordering paragraphs below.

Modifications to the Settlement

As required by Section 1329, Aqua included a *pro forma tariff* supplement in its Application.¹⁹⁰ The Settlement provides that, upon closing the Transaction, Aqua will adopt the revised *pro forma* tariff that reflects the terms of settlement. The Settlement Tariff is attached to the Settlement as Exhibit A.

OCA did not join in supporting the Settlement Tariff to the extent that it requires Aqua to provide free water service to eight fire companies.¹⁹¹ According to OCA, free service is not permitted under Section 1304 of the Code and long-standing Commission and appellate precedent.¹⁹²

The APA essentially provides for Aqua to continue the MABS practice of providing free water to the 8 enumerated fire companies. There must be a difference in the

¹⁹⁰ See, Aqua Exh. G.

¹⁹¹ OCA St. 1 at 14-15; See Settlement ¶ 17.B.3; OCA St. in Support, p. 4.

¹⁹² OCA St. in Support, p. 4; See, e.g. *Suburban Water Co. v. Pa. Pub. Util. Comm'n*, 808 A.2d 1044, 1050-51 (Pa. Cmwlth. 2002).

type and condition of the respective service in order for a rate differential to satisfy the terms of Section 1304. Here, no legal authority has been established to permit the free service.

- iv. The Settlement Tariff, in part, requires Aqua to provide free water service to eight fire companies.¹⁹³ The Settlement at 17. B. 3. iii provides that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code.^[194]

Upon review of the evidentiary record, the Settling Parties have not provided any evidence or legal authority to substantiate the inclusion of this settlement term in this proceeding or to support the Tariff provision regarding free service identified above. Furthermore, the Settlement provision appears to be inconsistent with clearly established precedent regarding the Commission's ultimate authority to set rates resulting from a base rate case proceeding before the commission.

66 Pa.C.S. § 1329(d)(4) requires the tariff submitted pursuant to subsection (d)(1)(v) shall remain in effect until such time as new rates are approved for the acquiring public utility as the result of a base rate case proceeding before the Commission. The Commission clarified in its Final Implementation Order, entered October 27, 2016, at Docket No. M-2016-2543193, p. 28, “[t]hat the entity’s initial tariff filing should contain rates ‘equal to the existing rates of the selling utility at the time of acquisition’ consistent with Section 1329(d)(1)(v) and Section 1329(e).”

The Settling Parties agreed to the language set forth in Section 17.B.3.iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy

¹⁹³ OCA St. 1 at 14-15; *See*, Settlement ¶ 17.B.3; OCA St. in Support, p. 4.

¹⁹⁴ Settlement pp. 6-7.

precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing. This provision is also not supported by the evidentiary record or and legal authority cited by the Settling Parties. Accordingly, I have no option, other than to reject the Settlement Tariff attached to the Settlement as Exhibit A, to the extent that it permits or requires Aqua to provide free water service to the eight enumerated fire companies. I must also reject the Settlement provision set forth in Section 17.B.3.iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing.

Despite the parties' creative settlement attempts to adopt seller's rates at closing, the Settlement Tariff included in the Settlement is contrary to law and must therefore be rejected. Since the Settlement Tariff provision is being rejected, I recommend in the ordering paragraphs below, that the parties amend the Settlement Tariff to comply with Sections 1304 and 1329 of the Code, 66 Pa.C.S. §§ 1304, 1329, as set forth above, prior to filing it with the Commission.

Settlement Paragraph 17. I

This settlement term provides that Aqua agrees to ensure the four unmetered Fire Companies are metered within 60 days after closing.¹⁹⁵

52 Pa. Code § 5.591 provides as follows:

Reports of compliance.

- (a) A person subject to the jurisdiction of the Commission who is required to do or perform an act by a Commission order, permit or license provision shall file with the Secretary a notice stating that the requirement has or has not been met or complied with.

¹⁹⁵

Settlement p. 9.

(b) The notice shall be filed within 30 days following the date when the requirement becomes effective, unless the Commission, by regulation, by order or by making specific provision thereof in a license or permit, provides otherwise for compliance or proof of compliance. The notice shall be accompanied by a verification in accordance with § 1.36 (relating to verification and affidavit).

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.251 (relating to reports of compliance).

Under the circumstances, in order to comply with applicable law¹⁹⁶ and to further the public interest, Aqua, pursuant to the Settlement will be required to meter certain unmetered properties, as set forth in the Settlement, within 60 days of closing. The Settlement will be modified to require Aqua to file a verified notice at the docket of this proceeding within 70 days of closing, indicating that it has metered the unmetered properties, as required by the Settlement.

In addition, consistent with the above, an ordering paragraph will be entered requiring that, within ten days after closing of the acquisition, Aqua Pennsylvania, Inc., shall file notice of closing of the transaction with the Commission at this docket.

In addition, an ordering paragraph shall be entered requiring that, within ten days after closing of the acquisition, Aqua Pennsylvania, Inc. shall file notice of closing of the transaction with the Commission at this docket.

The modifications to the Settlement are also set forth in the ordering paragraphs below.

Section 507 Approval

Aqua submits the Asset Purchase Agreement, dated July 20, 2021, between Aqua, the Borough and MABS was filed with the Application as Exhibit B. Aqua asserts that, upon approval of the acquisition, on the terms set forth in the settlement in the Joint Petition, the Commission should also approve, to the extent necessary, the APA pursuant to Section 507 of

¹⁹⁶ See also, 52 Pa. Code § 65.7 (relating to metered service).

the Code and provide such other approvals, certificates, registrations and relief, if any, under the Code that may be required.

Aqua acknowledges that the Settlement Tariff provides that Aqua will provide free water service to the Fire Companies listed on First Revised page 12.9.¹⁹⁷ The Settlement further provides that no precedent is established by adoption of the Settlement Tariff and all parties reserve their right to challenge the provision of free service in future proceedings.

The language set forth in Section 17.B.3.iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing, is not supported by the evidentiary record or and legal authority cited by the Settling Parties. Accordingly, the request for approval of the APA and any other contracts or documents requiring Commission approval to the extent that the APA and other such contracts or documents permit or requires Aqua to provide free water service to the eight enumerated fire companies or any other individual or entity will be rejected and excluded from the Settlement. The request for Section 507 approval will be granted subject to and consistent with this provision, and the Settlement is modified consistent with this provision.

Conclusion

Aqua, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application.¹⁹⁸ Aqua must establish this burden, by a preponderance of evidence which is substantial and legally credible.¹⁹⁹ In order to meet its burden of proof, Aqua must “present evidence more convincing, by even the smallest

¹⁹⁷ Settlement, p. 6.

¹⁹⁸ 66 Pa.C.S. § 332(a).

¹⁹⁹ *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

amount, than that presented by any opposing party.”²⁰⁰ To satisfy its burden, Aqua must demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.²⁰¹ Specific to this case, Aqua has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, and 1329 of the Code.²⁰²

It is well-settled that in order to ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.²⁰³

As stated in detail above, Aqua has established that it has the financial, legal and technical fitness to own and operate the system under the circumstances. Aqua and the other Settling Parties have also introduced substantial record evidence to demonstrate that the transaction proposed in the Settlement, as modified, will provide affirmative public benefits. The main benefit noted is that Aqua will ensure that Systems customers will receive high quality water service meeting all applicable regulatory requirements and customer service standards pursuant to the Code. Given the foregoing, I conclude that the Settlement should be approved by the Commission, as modified herein, because the Settlement is in the public interest.

The Settlement will ensure that, upon closing, the Borough, Authority and Aqua customers will receive high quality water service from Aqua, a certificated public utility with the necessary financial, technical, and legal resources to provide that service into the foreseeable future. Bringing the System’s existing customers into Aqua’s customer base will also ensure that Systems customers will have access to the Commission’s procedures for investigating and enforcing any complaints that the residents may have regarding the water service. Additionally, although the Settling Parties in this proceeding acknowledge that Aqua may apply for a rate

²⁰⁰ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

²⁰¹ *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

²⁰² I&E notes that each of these applicable standards are fully articulated in the Joint Stipulation of Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Ordering Paragraphs.

²⁰³ 66 Pa.C.S. § 1103(a).

increase in the future, any such rate increase application will be subject to the Commission's jurisdiction. Aqua would be required to apply for any increase, following which other parties in interest, including existing customers, may intervene in any such proceeding. Any requested increase would ultimately be subject to approval by the Commission, and the Commission would have the authority to approve, deny or modify any such requested increase.

In reaching the conclusion that the Settlement should be approved by the Commission, as modified, the testimony from the public input hearing was also considered, as noted above. As noted by the Parties in this proceeding, Section 1329 of the Public Utility Code explicitly provides for the acquisition of municipal water systems by existing public utilities. Also, as noted herein, the legislative intent behind Section 1329 of the Code is to encourage the sale of municipal water systems so that those systems will be operated by public utilities with the resources and expertise to ensure those systems' viability into the future. Additionally, the Settling Parties noted that the proceeds of the sale of the system may provide immediate and substantial benefits to the Borough residents. For the reasons discussed above, it is my recommendation that the Commission approve the Settlement, as modified herein.

With regard to the Objections of the Protestant, Donna Gawrylik, the issues raised were not supported by any record evidence cited in the Objections or by any applicable law cited by counsel for Ms. Gawrylik, to support the Objections. Furthermore, several of the Objections, as discussed above, are outside of the jurisdiction of the Commission, and would be the subject of a proceeding before the Court of Common Pleas or another appropriate forum. The Commission is without the jurisdiction or authority to act on the Objections raised by Ms. Gawrylik, through her legal counsel.

For the reasons discussed above, it is recommended that the Commission approve the Settlement, as modified herein, as the Settlement, as modified, is in the public interest. It is further recommended that the Commission dismiss the Objections asserted by Protestant Gawrylik, as more fully set forth above.

IX. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. §§ 1102 and 1329.

2. The Commission must issue a certificate of public convenience for a public utility to expand its service territory and to acquire property used or useful in the public service. 66 Pa.C.S. § 1102(a)(1), (3).

3. The burden of proving entitlement to a certificate is upon the applicant as it is the applicant that is seeking a proposed rule or order. 66 Pa.C.S. § 332; *see also Se-Ling Hosiery v. Margulies*, 70 A.3d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery*. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the slightest degree, than the evidence presented by the opposing party. *Se-Ling Hosiery*.

4. Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Com. Bd. Of Rev.*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Comm., Dept. of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

5. Commission policy promotes settlements. 52 Pa. Code § 5.231.

6. A settlement lessens the time and expense that the parties must expend litigating a case and, at the same time, conserves administrative resources. The Commission has

indicated that settlement results are often preferable to those achieved at the conclusion of a fully-litigated proceeding. 52 Pa. Code § 69.401.

7. In order to accept a settlement, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm'n v. York Water Co.*, Docket No. R-00049165 (Order entered Oct. 4, 2004); *Pa. Pub. Util. Comm'n v. C.S. Water & Sewer Assocs.*, 74 Pa.P.U.C. 767 (1991). The instant settlement, as modified, is in the public interest.

8. A certificate of public convenience will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa.C.S. § 1103(a).

9. In the context of a utility merger, the issuance of a certificate of public convenience requires the Commission to find affirmatively that public benefit will result from the merger. *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825 (Pa. 1972).

10. In granting a certificate of public convenience, the Commission may impose such conditions as it may deem to be just and reasonable. 66 Pa.C.S. § 1103(a).

11. The party receiving the assets and service obligation must be technically, legally, and financially fit. *Joint Application of Peoples Natural Gas Co. LLC, Peoples TWP LLC, and Equitable Gas Co., LLC*, Docket No. A- 2013-2353647 (Order entered Nov. 14, 2013).

12. An existing provider of public utility service is presumed fit. *See Applications of Pennsylvania-American Water Co.*, 85 Pa.P.U.C. 548 (1995). The burden of proof to rebut the presumption is on Protestants. *In Re Byerly*, 270 A.2d 186 (Pa. 1970); *Morgan Drive-Away, Inc., v. Pa. Pub. Util. Comm'n.*, 293 A.2d 895 (Pa. Commw. Ct. 1972). Aqua has demonstrated that it is technically, legally, and financially fit.

13. 66 Pa.C.S. § 1329, addresses the valuation of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities.

14. If the buyer and seller agree to the Section 1329 process, the acquiring public utility and the selling municipality each select a UVE from a list of experts established and maintained by the Commission. The selected UVEs are required to perform independent fair market value appraisals of the system in compliance with USPAP, employing the cost, market and income approaches. 66 Pa.C.S. § 1329(a).

15. Aqua has demonstrated that Aqua and Shenandoah engaged the services of Gannett and ScottMadden, respectively, to provide a fair market value appraisal in accordance with USPAP, utilizing the cost, market and income approaches. Both firms were pre-certified as authorized UVEs by the Commission and are on the list of qualified appraisers maintained by the Commission. 66 Pa.C.S. § 1329(a), (b).

16. The ratemaking rate base of the selling utility shall be the lesser of the purchase price negotiated by the acquiring public utility or entity and selling utility or the fair market value of the selling utility. 66 Pa.C.S. § 1329(c)(2).

17. Fair market value is the average of the two utility valuation expert appraisals conducted under subsection (a)(2). 66 Pa.C.S. §1329(g).

18. During the period that the *pro forma* tariff supplement is in effect, an acquiring public utility may collect a DSIC, as approved by the Commission. 66 Pa.C.S. § 1329(d)(4).

19. An acquiring public utility may include transaction and closing costs in its rate base, during its next base rate proceeding. 66 Pa.C.S. § 1329(d)(2). The Commission will not approve these costs during the 1329 proceeding. *Implementation of Section 1329 of the*

Public Utility Code, Docket No. M-2016-2543193 (Final Implementation Order entered Oct. 27, 2016).

20. Except for contracts between a public utility and a municipal corporation to furnish service at tariff rates, no contract or agreement between a public utility and a municipal corporation shall be valid unless filed with the Commission at least 30 days prior to its effective date. 66 Pa.C.S. §507.

21. The APA, dated July 20, 2021, between Aqua, the Borough and MABS is accepted as valid pursuant to Section 507, subject to the conditions of the Settlement and the modifications to the Settlement. 66 Pa.C.S. §507.

X. ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Joint Petition for Settlement, filed on April 11, 2023, by Aqua Pennsylvania, Inc., the Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Borough of Shenandoah, and the Municipal Authority of the Borough of Shenandoah at Docket No. A-2022-3034143, including all terms and conditions thereof, be approved as modified herein.

2. That the Application filed by Aqua Pennsylvania, Inc., on October 3, 2022 and accepted by the Commission on February 3, 2023, be granted, subject to the conditions set forth in Paragraph 17 of the Joint Petition for Settlement, and as modified herein.

3. That a Certificate of Public Convenience be issued pursuant to Section 1102(a)(3) of the Public Utility Code, 66 Pa.C.S. § 1102(a)(3), evidencing Commission approval

of the right of Aqua Pennsylvania, Inc. to acquire the water system assets of the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah situated within the Borough of Shenandoah, and portions of West Mahanoy Township, Mahanoy Township, Butler Township, Girardville Borough, and Union Township, within Schuylkill County, Pennsylvania.

4. That within ten (10) days after closing of the acquisition, Aqua Pennsylvania, Inc. shall file notice of closing of the transaction with the Commission at this docket.

5. That, upon receipt of a notice of closing of the acquisition, a Certificate of Public Convenience be issued pursuant to Section 1102(a)(1) of the Public Utility Code, 66 Pa.C.S. § 1102(a)(1), evidencing Commission approval of the right of Aqua Pennsylvania, Inc. to begin to offer, render, furnish and supply water service to the public in the Borough of Shenandoah, and portions of West Mahanoy Township, Mahanoy Township, Butler Township, and Girardville Borough within Schuylkill County, Pennsylvania, consistent with the map and written description of the requested service territory provided as the Application's Exhibit A, and this Recommended Decision.

6. That, pursuant to 66 Pa.C.S. § 1329(c)(2), the ratemaking rate base of the water system assets acquired from the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah is \$12,000,000.

7. That within 10 days after closing of the acquisition, Aqua Pennsylvania, Inc. shall file with the Commission at this docket a tariff supplement, which may become effective on at least one day's notice on or after the date of closing of the transaction, consistent with the modifications set forth in this Recommended Decision, in the form filed with the Joint Petition for Settlement as Exhibit A implementing rates for customers served by the water system assets acquired from the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah post-closing. The Settlement Tariff attached to the Settlement as Exhibit A, to the extent that it permits or requires Aqua to provide free water service to the eight enumerated fire companies, be rejected. In addition, the Settlement provision set forth in Section

17.B.3.iii, providing that Aqua will join the OCA in any efforts, including but not limited to filing a petition for declaratory order with the Commission, to reconcile the regulatory, legal and policy precedent against provision of free service by Commission-regulated utilities and the provisions of Section 1329 of the Code, 66 Pa.C.S. § 1329(d), that address the buyer's adoption of seller's rates at closing, also be rejected.

8. That Aqua Pennsylvania, Inc. shall file a verified notice at Docket No. A-2022-3034143 within 70 days of closing of the acquisition indicating that it has metered the four unmetered fire companies in accordance with the Joint Petition for Settlement, Paragraph 17.I.

9. That the Secretary's Bureau shall issue certificates of filing pursuant to, 66 Pa.C.S. § 507 for the Asset Purchase Agreement between Aqua Pennsylvania, Inc., the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah, consistent with this Recommended Decision and providing that the request for approval of the APA and any other contracts or documents requiring Commission approval to the extent that the APA and other such contracts or documents permit or requires Aqua to provide free water service to the eight enumerated fire companies or any other individual or entity be rejected. The request for Section 507 approval should be granted subject to and consistent with this provision, and the Settlement be modified consistent with this provision.

10. That the Settlement Tariff should be amended, consistent with this Recommended Decision and providing for Aqua to provide water service to the eight enumerated fire companies at a rate subject to and consistent with these ordering paragraphs and Sections 1304 and 1329 of the Code.

11. That, no later than six months from filing a notice of closing of the acquisition, Aqua Pennsylvania, Inc. shall complete and file an American Water Works Association Water Audit Report for the acquired water system in an Excel format with the Secretary's Bureau, with copies served upon the Bureau of Technical Utility Services, the

Bureau of Investigation and Enforcement, the Office of Consumer Advocate, and the Office of Small Business Advocate.

12. That nothing in the Commission's Order shall be construed as an approval or determination of costs or expenses for the purposes of just or reasonable rates or to exempt Aqua Pennsylvania, Inc. from obtaining all necessary permits, licenses, and approvals from other federal, state, and local government agencies having jurisdiction.

13. That the Commission issue all other approvals, certificates, registrations and relief with respect to Aqua Pennsylvania, Inc.'s acquisition of the water system assets of the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah pursuant to Sections 1102, 1329, and 507 of the Public Utility Code, consistent with this Recommended Decision.

14. That, if Aqua Pennsylvania, Inc. determines that closing of the acquisition will not occur, Aqua Pennsylvania, Inc. shall file written notice of this determination with the Commission at this docket.

15. That a copy of the Commission's Order be served upon Aqua Pennsylvania, Inc., the Borough of Shenandoah, the Municipal Authority of the Borough of Shenandoah, the Borough of Shenandoah Planning Commission, West Mahanoy Township, the West Mahanoy Township Planning Commission, Mahanoy Township, Butler Township, the Butler Township Planning Commission, Girardville Borough, Schuylkill County, the Schuylkill County Planning Commission, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, the Pennsylvania Department of Revenue's Bureau of Corporate Taxes, and the Department of Environmental Protection – Northeast Regional Office and its Central Office Bureau of Regulatory Counsel.

16. That the Commission's Bureau of Technical Utility Services be directed to monitor Aqua Pennsylvania, Inc.'s compliance with Ordering Paragraphs 4, 7, 8, and 10.

17. That, upon receipt of notice of closing of the acquisition, the proceeding at Docket No. A-2022-3034143 be terminated and marked closed.

18. That the Objections to the Settlement filed by Donna Gawrylik, on April 19, 2023, be denied.

Date: May 18, 2023

_____/s/
Jeffrey A. Watson
Administrative Law Judge