

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	R-2022-3037141
Office of Consumer Advocate	:	C-2023-3037579
	:	
v.	:	
	:	
Aqua Pennsylvania Wastewater, Inc.	:	

**RECOMMENDED DECISION**

Before  
Gail M. Chiodo  
Administrative Law Judge

**INTRODUCTION**

In this proceeding, Aqua Pennsylvania Wastewater, Inc. seeks approval of a proposed rider which would authorize the Company to negotiate discounted rates for certain qualifying large industrial wastewater customers below current tariff rates. Both statutory advocates, the Office of Consumer Advocate and the Office of Small Business Advocate, oppose the proposed rider. This Decision recommends that the Commission reject, without prejudice, the proposed rider because the Company has not met its burden of proof to establish that the proposed rates are just and reasonable. Alternatively, however, if the Commission decides to approve the proposed rider, this Decision recommends that approval be conditioned on the adoption of tariff language that requires documentation that a feasibility study be performed by Aqua or the potentially eligible customer.

Pursuant to Section 1308(b) of the Public Utility Code, 66 Pa.C.S. § 1308(b), the suspension deadline is August 17, 2023, and the last reasonable public meeting that the Commission must act is August 3, 2023.

## HISTORY OF THE PROCEEDINGS

On December 7, 2022, Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “the Company”) filed with the Pennsylvania Public Utility Commission (“Commission”) Supplement No. 3 to Tariff Sewer-PA P.U.C. No. 3 (Supplement No. 3) to become effective on February 5, 2023. On December 22, 2022, Aqua filed Supplement No. 5 to Tariff Sewer-PA P.U.C. No. 3 to voluntarily extend the effective date of Supplement No. 3 to February 10, 2023. On January 5, 2023, Aqua filed a revised Supplement No. 3 (Revised Supplement No. 3), to clarify eligibility for proposed rates. Aqua filed Revised Supplement No. 3 to establish a rider (“Proposed Rider” or “Rider LWCUR”) to allow Aqua to establish contract rates for certain large industrial wastewater customers.

On January 11, 2023, the Office of Consumer Advocate (“OCA”) filed a Formal Complaint at Docket No. C-2023-3037579. On January 20, 2023, the Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention and a Public Statement.

On February 9, 2023, pursuant to Section 1308(b) of the Public Utility Code (“Code”), 66 Pa.C.S. § 1308(b), the Commission suspended the filing by operation of law until August 10, 2023, unless permitted by Commission Order to become effective at an earlier date, and instituted an investigation to determine the lawfulness, justness and reasonableness of the proposed and existing rates, rules, and regulations. The Commission assigned the case to the Office of Administrative Law Judge for Alternative Dispute Resolution, if possible, and for the prompt scheduling of such hearings as may be necessary culminating in the issuance of a recommended decision.

On February 9, 2023, a Notice of a Prehearing Conference was issued scheduling a telephonic prehearing conference for February 21, 2023, and assigning me as the presiding officer. On February 10, 2023, a Prehearing Order was issued. In accordance with this Prehearing Order, prehearing memoranda were filed by the parties.

On February 21, 2023, the Prehearing Conference convened as scheduled. Counsel for Aqua, the OCA and the OSBA participated. The parties agreed to various procedural matters, including a litigation schedule that reflected Aqua's agreement to a further seven-day extension of the suspension date. There was no request for scheduling a public input hearing.<sup>1</sup>

On February 23, 2023, Aqua filed Supplement No. 9 to Tariff Sewer-PA P.U.C. No. 3 (Supplement No. 9) which voluntarily suspends Supplement No. 3 to Tariff Sewer-PA. P.U.C. No. 3 until August 17, 2023.

On March 1, 2023, Aqua served Aqua Wastewater Statement No. 1, the Direct Testimony of Erin M. Feeney, along with Aqua Wastewater Exhibit No. EF-1.

On March 2, 2023, a Scheduling Order was issued, which included setting an evidentiary hearing for April 14, 2023.

On March 20, 2023, the OCA served OCA Statement 1, the Direct Testimony of Jerome D. Mierzwa, and OCA Exhibit JDM-1; and the OSBA served OSBA Statement 1, the Direct Testimony of Brian Kalcic, and OSBA Exhibit BK-1.

On March 23, 2023, Counsel for Aqua advised the undersigned and the parties that William C. Packer would be providing the Company's Rebuttal Testimony and would be adopting the previously-served Direct Testimony and Exhibit of Ms. Feeney. Also on this date, Aqua filed an unopposed Motion for Protective Order. On March 27, 2023, this Motion was granted, and a Protective Order was issued.

---

<sup>1</sup> During the conference, the OCA requested, as raised in its prehearing memorandum, that Aqua be directed to provide direct notice to its customers within a reasonable period, given the number of possible customers impacted. Aqua opposed this request. I stated that I would hold the OCA's request in abeyance and if the OCA wanted to pursue this request, it should file a written motion detailing the basis of its request, the proposed method and contents of the notice. *See* Scheduling Order, dated March 2, 2023. No subsequent request was filed.

On March 30, 2023, Aqua served Aqua Wastewater Statement No. 1R, the Rebuttal Testimony of William C. Packer, along with WCP-IR Exhibit A.

On April 7, 2023, the OSBA served OSBA Statement No. 1-S, the Surrebuttal Testimony of Brian Kalcic; and the OCA served OCA Statement No. 1SR, the Surrebuttal Testimony of Jerome D. Mierzwa, and OCA Exhibit JDM-1SR.<sup>2</sup>

On April 13, 2023, Aqua advised the undersigned that the parties had not reached a settlement of any issue raised in this proceeding, but that they agreed to waive cross-examination of all respective witnesses. In response, I excused all witnesses from the hearing.

On April 14, 2023, the evidentiary hearing was held, as scheduled. During the hearing, all respective testimony and exhibits were entered by stipulation into the evidentiary record. A hearing transcript was filed on April 20, 2023.

On April 28, 2023, in accordance with the Scheduling Order, Main Briefs were filed by Aqua, the OCA, and the OSBA. On May 10, 2023, Reply Briefs were filed by Aqua and the OCA,<sup>3</sup> and the record closed on that date. The record consists of the transcript of the prehearing conference and evidentiary hearing, the written testimony of the witnesses and attached exhibits admitted into the record, and the briefs and reply briefs of the parties.

For the reasons set forth below, I recommend that the Commission deny without prejudice, the Proposed Rider. Alternatively, if the Commission decides to approve the Proposed Rider, this Decision recommends that approval be conditioned on the adoption of tariff language that requires documentation that a feasibility study be performed by Aqua or the potentially eligible customer, which is consistent with the concession offered by Aqua.

---

<sup>2</sup> On April 12, 2023, Aqua filed and served a letter indicating that it would not be submitting a Rejoinder Outline or Rejoinder Testimony in this proceeding.

<sup>3</sup> On May 10, 2023, the OSBA submitted a letter advising that it would not be filing a reply brief.

## FINDINGS OF FACT

1. Aqua Pennsylvania Wastewater, Inc. is a public utility company that serves 61,323 wastewater customers. Aqua Pennsylvania Wastewater, Inc. Supplement No. 3 to Tariff Sewer-PA P.U.C. No. 3.

2. The Office of Consumer Advocate is authorized to represent the interests of consumers before the Commission. Act 161 of 1976, 71 P.S. § 309-2.

3. The Office of Small Business Advocate is authorized to represent the interests of small business consumers of utility service under the provisions of the Small Business Advocate Act. Act 181 of 1988, 73 P.S. §§ 399.41 - 399.50.

4. On December 7, 2022, Aqua filed Supplement No. 3 to Tariff Sewer – PA P.U.C. No. 3, which would institute a rider (“Proposed Rider” or “LWCUR Rider”) that would be available to certain qualifying large industrial wastewater customers.

5. On January 5, 2023, Aqua filed a revised Supplement No. 3 to clarify the eligibility for proposed rates.

6. The Proposed Rider defines a Large Wastewater Customer User (“LWCUR”) as an industrial class customer that takes or receives wastewater collection, treatment and/or disposal services that exceeds 85,000 gallons of wastewater per month. Aqua St. No. 1, at 3.

7. The Proposed Rider was designed by Aqua to incentivize existing or future eligible large industrial customers to continue or begin receiving wastewater service from Aqua. Aqua St. No. 1R, at 4.

8. The Proposed Rider addresses the possibility that a large industrial customer might choose to leave or “opt-out” of the Company’s system should a competitive wastewater alternative exist. Aqua St. No. 1, at 5.

9. To deter an industrial customer from bypassing or opting out of the Company’s system, Rider LWCUR would permit Aqua to offer that customer a discounted rate compared to the Company’s otherwise applicable tariff rate. Aqua St. No. 1, at 5.

10. There is one existing customer on Aqua’s wastewater system that would be eligible—i.e., meets the annual wastewater volume criterion required, to participate in Rider LWCUR. Aqua St. No. 1, at 6.

11. Aqua has stated that its existing eligible customer does not plan to apply for service under Rider LWCUR, if approved. Aqua St. 1, at 7-8.

12. Aqua is pursuing Certificates of Public Convenience to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”), situated within all or part of 49 municipalities within portions of Chester and Delaware Counties, Pennsylvania. *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority*, Docket No. A-2019-3015173 (currently stayed per Order dated Feb. 6, 2023, pending resolution in related matters in Bankruptcy Court and the Court of Common Pleas of Delaware County).

13. There are two customers that could be eligible for Rider LWCUR that are currently served on DELCORA’s system at contract rates, including Kimberly-Clark Corporation and Kimberly-Clark Pennsylvania LLC (collectively “Kimberly-Clark”). Aqua St. No. 1, at 7; Aqua St. No. 1R, at 8.

14. If Aqua’s acquisition of DELCORA is approved, Aqua would assume a previously negotiated service agreement between DELCORA and Kimberly-Clark upon closing of the transaction. Aqua St. No. 1R, at 8-9; OSBA St. No. 1, at 3.

15. As part of the ongoing DELCORA proceeding, Aqua filed Rider LWCUR as required by a Joint Stipulation Aqua entered with Kimberly-Clark. Aqua St. No. 1R, at 8; OSBA St. No. 1, at, 3.

16. If Rider LWCUR is approved, and once Kimberly-Clark’s current wastewater service agreement expires, Kimberly-Clark would be eligible to apply for service from Aqua under Rider LWCUR. OSBA St. No. 1, at 3.

17. Aqua has not yet entered into negotiations with Kimberly-Clark for discounted wastewater service. OSBA St. No. 1, at 4.

18. Aqua has not proffered any evidence that Kimberly-Clark has a viable alternative to the Company’s wastewater service. OSBA St. No. 1, at 4.

19. Aqua is pursuing Certificates of Public Convenience to acquire the wastewater system assets of the City of Beaver Falls, which has at least two potential customers that could qualify under the proposed Rider based on usage. *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 507, 508, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the City of Beaver Falls*, Docket No. A-2022-3033138; Aqua St. No. 1, at 7-8.

20. Aqua modeled Rider LWCUR off of its rider for water service, Aqua Rider DIS—Demand Based Industrial Service, that was approved by the Commission. Aqua St. No. 1, at 8; Aqua St. No. 1R, at 6. *See*, Aqua Pennsylvania, Inc. Tariff Water—PA P.U.C. No. 3, Original Page 19 (“Water Rider”), which is attached as WCP-1R Exhibit A.

21. Approval of Rider LWCUR does not change any rate to other customers currently being charged by Aqua. Aqua St. No. 1R, at 10.

22. If a large wastewater customer were to opt-out of receiving service from Aqua, the Company would lose out on revenue from that customer. Aqua St. No. 1, at 5.

23. The loss of revenue due to a customer opting-out of service from Aqua would be spread around the Company's service territory to other wastewater customers to recoup the loss. Aqua St. No. 1, at 5.

24. If a customer opts-in to the Rider, to the extent the negotiated rate revenue is less than revenue at full tariffed rates between a base rate case, that reduction in revenue falls on Aqua and not on existing customers. Aqua St. No. 1, at 6; Aqua St. No. 1R, at 8.

25. If a customer opts-in to the Rider, to the extent the negotiated rate revenue is less than revenue at full tariffed rates, Aqua intends to recover the revenue deficiency from other customers in base rate cases. OCA Exh. JKM-1 (Aqua response to OCA-1-4); OCA St. 1, at 5.

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

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

28. For Aqua Water, the 2022 revenue deficiency resulting from the three customers taking service under its discounted rate under the Water Rider represented more than

25% of the total revenue from the Industrial class. OCA Exh. JDM-1SR (Aqua responses to OCA-3-5, OCA-3-6, OCA-3-7); OCA St. 1SR, at 4-5.

29. The eligibility requirements and rate(s) to be charged for customers seeking a negotiated rate under the Proposed Rider are memorialized in Aqua Exhibit No. EF-1, and provides, verbatim,<sup>4</sup> as follows:

## **II. Availability**

The rider is available to a current or prospective Large Wastewater customer that:

1. Discharges wastewater into Aqua Wastewater's collection system resulting from industrial processes;
2. Enters into a Service Agreement for a term of not less than 3 years; and,
3. Has a viable competitive alternative to service from the Company and, unless a new rate is established, the customer intends to select that alternative to the detriment of the Company and its customers.
4. In addition to 1-3, the Company may consider whether the current or prospective Large Wastewater Customer has made or agrees to make a substantial contribution of capital for facilities or facilities themselves to the Company in order to become or remain a customer and whether a customer plans to locate or retain a substantial facility in the Company's existing or applied-for franchise territory that provides substantial economic development and employment in the immediate local or Commonwealth.

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

---

<sup>4</sup> For ease of reference, the subheadings and numbering are retained as in Aqua Exhibit EF-1, including the duplicate numbering of "II."

## II. Rate

The rate(s) to be charged qualifying customers under this rider shall be negotiated and set forth in the Service Agreement, provided, however, that such rate(s): (1) shall not be less than the Minimum Rate; and (2) shall be subject to an Escalation Clause, as hereafter defined.

Minimum Rate: The Minimum Rate shall be sufficient to recover (1) variable Wastewater Treatment Cost (e.g., electric power and fuel costs for power production, sludge removal and disposal costs, wastewater conveyance costs, any chemical costs not otherwise covered by any applicable surcharges for BOD, TSS, etc.); plus (2) the fixed costs (depreciation and pre-tax return) on the facilities necessary to serve the customer; and (3) some portion of the fixed costs of the Company's wastewater treatment and collection facilities.

Escalation Clause: The rate set forth in the Service Agreement shall be subject to an Escalation Clause, during the original and any renewal terms of the Service Agreement, which may be a fixed annual percentage or may be based upon changes in published price indices and/or changes in the Company's cost of service, as the Company and the qualifying customer shall agree.

Filing with the Pennsylvania Public Utility Commission/Confidentiality: Service Agreements entered into between the Company and qualifying customers under this rider shall be filed with the Commission on a confidential basis within thirty (30) days of their execution and shall not be subject to disclosure except by Petition made to and granted by the Commission pursuant to 52 Pa Code §1.74.

Aqua Exhibit EF-1, First Revised Pages 16 and 17.

30. None of the parties are aware that any regulated wastewater utility in Pennsylvania has sought, received, or been rejected, Commission approval to charge discounted rates for wastewater customers with competitive alternatives. OCA Exh. JDM-1 (Aqua response to OCA-1-9); OCA St. 1, at 8; Aqua St. 1R, at 5.

31. None of the parties are aware that any other state public utility commission has approved or rejected discounted rates for wastewater customers with viable competitive alternatives. OCA Exh. JDM-1 (Aqua response to OCA-1-10); Aqua St. 1R, at 5.

## DISCUSSION

### Legal Standards

As the proponent of a rule or order, Aqua bears the burden of proof to establish that it is entitled to the relief it is seeking in this proceeding pursuant to Section 332(a) of the Code. 66 Pa.C.S. § 332(a). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). That is, Aqua's evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. 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. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

The public utility bears the burden of proof to establish the justness and reasonableness of its proposed rate increase. As set forth in Section 315(a) of the Code:

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

66 Pa.C.S. § 315(a).

As explained by the Commonwealth Court:

Section 315(a) of the Public Utility Code, 66 Pa.C.S. § 315(a), places the burden of proving the justness and reasonableness of

a proposed rate hike squarely on the utility. It is well-established that the evidence adduced by a utility to meet this burden must be substantial.

*Lower Frederick Twp. v. Pa. Pub. Util. Comm'n*, 409 A.2d 505, 507 (Pa. Cmwlth. 1980) (citations omitted). Once approved, the tariff provisions are legally binding on both the utility and its customers. *Brockway Glass v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

The Pennsylvania Supreme Court has stated that the party with the burden of proof has a formidable task to show that the Commission may lawfully adopt its position. However, as the Commonwealth Court has explained: “While it is axiomatic that a utility has the burden of proving the justness and reasonableness of its proposed rates, it cannot be called upon to account for every action absent prior notice that such action is to be challenged.” *Allegheny Center Assocs. v. Pa. Pub. Util. Comm'n*, 570 A.2d 149, 153 (Pa. Cmwlth. 1990). Therefore, while the ultimate burden of proof does not shift from the utility, a party proposing an adjustment to a ratemaking claim bears the burden of presenting some evidence or analysis tending to demonstrate the reasonableness of the adjustment. *See, e.g., Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, Docket No. R-00891364, 1990 Pa. PUC LEXIS 155 (Opinion and Order entered May 16, 1990); *Pa. Pub. Util. Comm'n v. Breezewood Tel. Co.*, Docket No. R-00901666, 1991 Pa. PUC LEXIS 45 (Opinion and Order entered Jan. 31, 1991).

In this proceeding, the burden of proof with regard to its Proposed Rider filing lies squarely with Aqua, as Aqua is the public utility seeking permission from the Commission to implement the Proposed Rider. The burden of proof does not shift to a statutory party which challenged the requested Rider. Instead, the utility’s burden, to establish the justness and reasonableness of every component of its request, is an affirmative one and remains with the public utility throughout the course of the proceeding. Nevertheless, a party that offers a proposal not included in Aqua’s filing bears the burden of proof with regard to that proposal. *Pa. Pub. Util. Comm'n v. Metro. Edison Co.*, Docket No. R-00061366 (Opinion and Order entered Jan. 11, 2007); Pa. PUC Lexis 5, at \*111-112.

## The Parties' Positions

### Aqua's Position

Aqua's position is that it has carried its burden of proof that the Proposed Rider is just and reasonable and, therefore, should be approved by the Commission. Aqua essentially argues that there are three reasons why its Rider should be approved, which can be summarized as: (1) it is designed to incentivize eligible LWCUR, now or in the future, to continue receiving or begin receiving, wastewater service from Aqua, thereby preventing loss of revenue or providing new revenue, which it turn will benefit all its customers; (2) it is similar to other riders proposed and approved by the Commission for other utilities and is narrowly tailored to restrict eligibility for service under a negotiated rate; and (3) it will not immediately affect any Aqua customers' rates. (M.B. Aqua, at 12-23). Each reason is discussed further below.

First, Aqua argues that its Proposed Rider is a preemptive or proactive solution to retain and/or acquire a LWCUR who can opt out of receiving service from the Company should a competitive alternative exist for that LWCUR. Aqua asserts that if a LWCUR were to opt-out of receiving service from Aqua, the Company would lose the revenue from that customer. In turn, other remaining customers' bills would be adversely affected because that loss of revenue would be spread to its other customers. In support of this argument, Aqua pointed to the testimony of the OCA wherein the Company explained that, should the single exiting potentially eligible customer in Aqua's current service territory opt-in the Proposed Rider, a 10% discount from Aqua's current tariffed rates would result in an annual revenue decrease of \$2,615.00 based on the prior year's consumption. (OCA Exhibit No. JDM-1, p. 5; M.B. Aqua, at 12). Aqua argues that that this projected revenue decrease would then be spread to Aqua's other wastewater customers and recouped, creating higher bills for those remaining customers. (M.B. Aqua, at 13).

While Aqua states that it does not currently have any customer(s) that is eligible and interested in the Proposed Rider, Aqua argues that this does not mean that its Proposed Rider is premature or unnecessary, as asserted by the statutory advocates. In support of this position,

Aqua asserts that it is notable that the Commission approved a similar Rider DIS in *Pennsylvania Public Utility Commission v. Pennsylvania-American Water Co.*, Docket No. R-00943231, 1995 Pa. PUC LEXIS 170 (Opinion and Order entered July 24, 1995) (“*PAWC DIS Order*”). Aqua notes that in the *PAWC DIS Order*, the Commission approved PAWC’s rider without discussion of a specific customer interested and eligible in service under that rider. (M.B. Aqua, at 16, n.2). Further, Aqua cites to the following language in the *PAWC DIS Order*, in which the Commission stated:

[W]e realize that the loss of a large industrial customer to an alternative source of supply is harmful to all remaining customers. For this reason we support negotiated incentive rates providing that it can be demonstrated that without such rates the customer can and will switch to a competitive source of supply . . . .

(M.B. Aqua, at 16, citing *PAWC DIS Order*, \*96).

In further support of this reason, Aqua argues that its customer base is not stagnant because Aqua is expanding its footprint through current and future acquisitions which will or may include prospective customers that may be eligible to receive service under the Proposed Rider, if approved. For example, Aqua points to the current case pending before the Commission at Docket No. A-2019-3015173 wherein Aqua is pursuing certificates of public convenience to acquire the wastewater systems assets of the Delaware County Regional Water Quality Control Authority (“DELFCORA”) situated within all or part of 49 municipalities within portions of Chester and Delaware Counties, Pennsylvania.<sup>5</sup> Should that transaction be approved, Aqua explains that there are two customers that could be eligible for the Proposed Rider that are currently served on DELFCORA’s system at contract rates. (Aqua St. No. 1, at 7.)

---

<sup>5</sup> See, *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority*, Docket No. A-2019-3015173 (currently stayed per Order dated Feb. 6, 2023, pending resolution in related matters in Bankruptcy Court and the Court of Common Pleas of Delaware County).

Aqua further points out that as part of the ongoing DELCORA proceeding, Aqua entered a Joint Stipulation with Kimberly-Clark Corporation and Kimberly-Clark Pennsylvania, LLC (collectively, “Kimberly-Clark”). (Aqua St. No. 1R, at 8). Kimberly-Clark currently receives wastewater service on the DELCORA system under a negotiated rate agreement that Aqua would assume should the DELCORA transaction close. (M.B. Aqua, at 13-14). According to Aqua, this existing negotiated rate agreement between Kimberly-Clark and DELCORA was, in part, the impetus for Aqua filing the Proposed Rider. (Aqua St. No. 1R, p. 8). Should the DELCORA transaction be approved, it is possible that Kimberly-Clark would meet the discount criteria included in the Proposed Rider. If the Company were to apply a 10% discount to the rates currently paid by Kimberly-Clark, should Kimberly-Clark be deemed eligible and interested to receive negotiated rate service under the Proposed Rider, that discount would result in a revenue decrease of \$502,057.50 given projected consumption. (M.B. Aqua, at 14, citing OCA Exhibit JDM-1, at 8). Aqua argues that “[c]ritically, this projected revenue decrease pales in comparison to the revenue decrease that would occur if the DELCORA transaction is approved and Kimberly-Clark elects to leave Aqua’s service territory altogether or begin receiving alternative wastewater service.” (M.B. Aqua, at 14).

As to potential other acquisitions, Aqua pointed to its filing to acquire the wastewater system assets of the City of Beaver Falls at Docket No. A-2022-3033138,<sup>6</sup> which has at least two potential customers that could qualify under the Proposed Rider based on usage. (M.B. Aqua, at 14).

Second, Aqua argues that the Proposed Rider is similar to other riders proposed and approved by the Commission for other utilities. (M.B. Aqua, at 18-21). Aqua explains that the Proposed Rider was modeled after Aqua Rider DIS – Demand based Industrial Service (“*Water Rider*”), which was approved by the Commission and implemented successfully. (See, Aqua Pennsylvania, Inc. Tariff Water-PA P.U.C. No. 3, Original Page 19; Aqua St. No. 1, p. 9). Aqua explains that Aqua’s *Water Rider* is available to a water customer or future water customer that: (1) purchases or intends to purchase water from the Company for industrial purposes;

---

<sup>6</sup> See, *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 507, 508, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the City of Beaver Falls*, Docket No. A-2022-3033138.

(2) enters into a Service Agreement for a term of not less than 2 years; (3) during the original and any renewal terms of the Service Agreement, agrees to purchase a minimum of 10 million gallons of water per month at a daily load factor of not less than 0.60; and (4) has a viable competitive alternative to service from the Company and intends to select that alternative to the detriment of the Company and its other customers. (M.B. Aqua, at 19).

In support of this reason, Aqua points to the testimony of its witness, Mr. Packer, who explains that the rationale behind the Proposed Rider is the same rationale employed by Aqua when developing and implementing the *Water Rider* – i.e., to incentivize large industrial customers to continue to receive service from Aqua, rather than seek out an alternative service, or to relocate out of Aqua’s service territory, thereby requiring Aqua to recoup lost revenues from other customers. (M.B. Aqua, at 19; Aqua St. No. 1, at 9).

Third, Aqua argues that the Proposed Rider will not immediately affect any Aqua customers’ rates. (M.B. Aqua, at 21-23). Initially, Aqua points out that the negotiated rates entered under the Proposed Rider are voluntary. Next, Aqua points out that currently there is only one customer eligible for the Proposed Rider, and that customer has indicated that it does not plan to participate or enter into a contract with the Company. Therefore, explains Aqua, “the rates of any customers would not be affected until any contract that is entered into is included in a base rate proceeding in the future.” (Aqua St. No. 1, at 8).

In further support of its position that Aqua customers’ rates will not be immediately affected, Aqua further argues that, since the Company would reflect negotiated rate revenue in future base rate proceedings, and other customers may be “marginally affected,” the rate effects would be less than if a LWCUR were to stop receiving service from the Company entirely. (M.B. Aqua, at 21). Aqua’s witness testified:

The Company would reflect negotiated rate revenue in future base rate proceedings. To the extent that negotiated rate revenue is less than revenue at full tariffed rates, other customers may be marginally affected. However, the rate effects would be less than if a large industrial customer were to stop receiving service from the Company entirely. . . . However,

I emphasize that there would be no immediate revenue or rate impacts if the proposed rider is approved as no contract would take effect upon the approval of this proposed rider, and a determination of cost allocation would not be made until a base rate case proceeding was decided that included negotiated contract rates under this rider.

(Aqua St. No. 1, at 6).

Next, Aqua asserts that, should the Commission decide to approve the Proposed Rider, that it should reject the OCA's recommended modifications. The OCA recommends that, if the Proposed Rider is approved by the Commission, that it should be revised to require, at a minimum, a feasibility study, cost-analysis or bid(s) to document that a customer has evaluated and assessed the costs of the competitive alternative.<sup>7</sup> Aqua argues that OCA's proposed changes are inconsistent with other comparable riders in Pennsylvania, including Aqua's *Water Rider*, as discussed above.<sup>8</sup> Aqua explains that it is not aware of any other utility in Pennsylvania with a target negotiated rate rider that requires prospective customers to submit a feasibility study, cost-analysis, or bid(s) for alternative service. (M.B. Aqua, at 20).

Further, Aqua argues that the OCA's modification would be functionally inoperative. Aqua counters that there is no indication that a current or future eligible customer seeking negotiated rate service under the Proposed Rider would even provide Aqua with a feasibility study, cost-analysis, or bid(s) for alternative service. Further, since these offers of proof of alternatives would likely contain competitively sensitive information that customers – and potentially other wastewater service vendors – would not want to provide in the negotiation process, this would deter potential negotiated rate customers from seeking service under the Proposed Rider. (M.B. Aqua, at 19-20).

However, Aqua stated that despite its opposition to the OCA's proposed modification, "in the interests of concession, Aqua is willing to perform its own feasibility study

---

<sup>7</sup> The OCA's specific language to its recommended modifications is delineated in this Decision under the OCA's discussion of its position on this issue.

<sup>8</sup> See, Aqua Pennsylvania, Inc. Tariff Water-PA P.U.C. No. 3, Original Page 19.

for each potentially-eligible customer to determine whether the discounted rate is reasonable and in the Company's – and its ratepayers' – best interests.” (M.B. Aqua, at 20).

Finally, Aqua explains that, should the Proposed Rider be approved, Aqua has committed to confidentially filing any negotiated rate contract(s) entered into under the Proposed Rider with the Commission within 30-days of the contract's execution. (Aqua St. No. 1, at 10). Any determination of cost allocation would not be made until a base rate case proceeding was decided that included negotiated contract rates under the Proposed Rider. (M.B. Aqua, at 22-23).

### The Statutory Advocates' Positions

Both statutory advocates, the OSBA and the OCA, oppose the Proposed Rider, and argue it should be rejected without prejudice because Aqua has not met its burden that the Proposed Rider would result in just and reasonable rates. In support of their positions, both advocates argue that the Proposed Rider is a solution in search of a problem because Aqua has not demonstrated any need for the Rider. Both advocates explain that Aqua's one qualifying customer has expressed no interest in the Rider and future customers are far from certain.

The OCA provides additional reasons why Aqua has not demonstrated any need for the Rider and why it should be rejected. They include: that Aqua has not shown that a viable competitive alternative for wastewater service exists; that approval of the Proposed Rider will put other Aqua customers at risk to pay higher rates; that Aqua has other means to address rates for large industrial customers; and that Aqua's Proposed Rider is an unreasonable and discriminatory rate. In the alternative, the OCA argues that if the Commission approves the Proposed Rider, that the Commission should adopt its proposed modification to the tariff to specify the minimum documentation required to establish that a competitive alternative exists, is viable, and is probable.

### OSBA's Position

The OSBA argues that the Proposed Rider should be rejected without prejudice because at this time there is no current, otherwise qualifying LWCUR interested in the Proposed Rider. (M.B. OSBA, at 2). The OSBA points out that the one LWCUR that would meet the first eligibility criterion of discharging at least 85,000 gallons of wastewater resulting from industrial processes into Aqua's wastewater collection system, has stated that it will not be participating in the Proposed Rider, if approved. (OSBA St. No. 1, at 2). The OSBA argues that while Aqua may serve a possible eligible customer in Kimberly-Clark sometime in the future, the Company's acquisition of DELCORA is far from certain. Finally, even if Aqua ultimately does acquire DELCORA, there is no record evidence that Kimberly-Clark would qualify for the Rider. (M.B. OSBA, at 4).

Nonetheless, OSBA recognizes that while the Company has no current interested qualifying customer, the Company does have a reason for its Proposed Rider – namely, that Aqua filed the proposed Rider LWCUR as required by a Joint Stipulation with Kimberly-Clark in the DELCORA proceeding. The OSBA explains that if Aqua's acquisition of DELCORA is approved, the Company would initially assume the existing wastewater service agreement between DELCORA and Kimberly-Clark when the transaction closes. Then, if the Proposed Rider is approved, and once Kimberly-Clark's current wastewater service agreement expires, Kimberly-Clark would be eligible to apply for service from Aqua under the Proposed Rider. (M.B. OSBA, at 4).

However, the OSBA observes that Aqua has not yet entered into negotiations with Kimberly-Clark for discounted wastewater service. (OSBA St. No. 1, at 4). Also, the OSBA argues, Aqua has not proffered any evidence that Kimberly-Clark has a viable alternative to the Company's wastewater service. Further, according to the OSBA, the Company's acquisition of DELCORA is far from certain. The OSBA points out that the DELCORA proceeding is currently stayed and that there are two separate cases, one before the Court of Common Pleas in Delaware County and one before the Bankruptcy Court for the Eastern District of Pennsylvania, which must be resolved before the Commission Docket can resume. (M.B. OSBA, at 4).

Consequently, at this time, in OSBA’s view, Aqua’s proposed Rider “is a solution in search of a problem.” (M.B. OSBA, at 5). The OSBA further notes that in the future, if Aqua should serve a large industrial wastewater customer that has a viable alternative to taking service from the Company, Aqua can re-file for a similar rider at that time. Therefore, OSBA argues that the Proposed Rider should be rejected without prejudice. (M.B. OSBA, at 3).

### OCA’s Position

The OCA argues that the Proposed Rider should be rejected at this time because: (1) Aqua has no current customers interested in or eligible for discounted rates; (2) Aqua has not shown that a viable competitive alternative for wastewater service exists; (3) approval of the Proposed Rider will put other Aqua customers at risk to pay higher rates; (4) Aqua has other means to address rates for large industrial customers; and (5) that Aqua’s Proposed Rider is an unreasonable and discriminatory rate. (M.B. OCA, at 5-12). Alternatively, the OCA argues that if the Commission approves the Proposed Rider, that the Commission should adopt its proposed modification to the tariff. (*Id.*, at 15). Each reason and alternative proposed modification are discussed further below.

First, the OCA argues, as did the OSBA, that the Proposed Rider should be rejected without prejudice because no existing customer seeks discounted rates, thus not demonstrating any need for the Rider. The OCA acknowledges that Aqua contends that at least four customers could be acquired by Aqua through Aqua’s pursuit of the acquisitions of two wastewater systems—DELCORA and the City of Beaver Falls. However, similar to the OSBA’s argument, the OCA argues that it is not certain if or when Aqua will obtain customers who may be eligible, whether from DELCORA, the City of Beaver Falls, or other acquisitions that have not been approved by the Commission. (M.B. OCA, at 6; OCA St. 1, at 6). Similar to the OSBA’s position, the OCA’s view is that Aqua is proposing to solve a speculative problem that does not currently exist. (M.B. OCA, at 7).

Second, the OCA argues that Aqua has not demonstrated need for the Rider because, “[c]ritically, Aqua has not shown that, for wastewater, there exists a ‘viable

competitive alternative to service from the Company.’’ (M.B. OCA, at 7). In support of this position, the OCA points to the response of Aqua when asked for examples of such alternatives, and Aqua replied that it would expect to see, (1) an alternative treatment facility or hauled wastewater at a cost lower than the Company’s tariffed rates, or (2) a customer leaving the area to receive service at a lower cost. (OCA Exh. JDM-1, Aqua response to OCA-1-8); (M.B. OCA, at 7).

Wastewater, the OCA explains, is different from all other types of public utilities, including water. The OCA explains that Aqua’s expected customer alternatives would likely require significant upfront investment to install a treatment facility or accommodate wastewater hauling (and obtain necessary regulatory approvals) or move the industry to a different site. (OCA St. 1, at 7-8). The OCA argues that Aqua has not shown that these possibilities are feasible or probable. Moreover, the OCA points out that for some industrial customers the characteristics, constituents or volume or quantities of the waste can require pretreatment. (OCA St. 1SR, at 4).<sup>9</sup> The OCA argues that this requirement for additional processing makes it even more uncertain that a lesser cost alternative to continuing or taking wastewater service from Aqua exists, which may be why the Commission has not previously allowed negotiated rates in the wastewater context. (M.B. OCA at 8, citing OCA Exh. JDM-1, Aqua response to OCA-1-9).

Further, the OCA addresses Aqua’s *Water Rider*, which Aqua stated it used as a model for the Proposed Rider. The OCA points out that the Commission first approved Aqua’s *Water Rider* in a base rate proceeding, when an existing customer requested a discounted rate, citing to *Pennsylvania Public Utility Commission v. Consumers Pennsylvania Water Co.-Roaring Creek Division*, Docket No. R-00973869, 1997 Pa. PUC LEXIS 93 (Opinion and Order entered Oct. 14, 1997) (“*Roaring Creek*”) (M.B. OCA, at 8). Thus, the OCA argues that, in the *Roaring Creek* proceeding, evidence was provided and evaluated regarding the alternative source of water supply and the cost impact of the negotiated rate on other customers. In contrast, the OCA argues, since no existing Aqua customers have expressed an interest in Rider LWCUR, that

---

<sup>9</sup> OCA cites to Supplement No. 10 to Aqua PA Tariff-Sewer-PA P.U.C. No. 3 at original page 38, available at: <https://www.aquawater.com/assets/doc/supplement-no.-10---tariff-sewer-pa-puc-no.-3.pdf>. (See M.B. OCA, at 7).

type of evidence and evaluation are not available in this proceeding. Moreover, argues the OCA, “it is not possible to fully evaluate and examine the circumstances associated with any potential customer’s alternative to assess whether the proposed terms and conditions of Rider LWCUR are reasonable, and protect the interests of Aqua’s remaining customers that may be responsible for any revenue deficiency resulting from the Rider LWCUR service agreement.” (M.B. OCA, at 8).

Third, the OCA argues that approval of Aqua’s Proposed Rider will put other Aqua customers at risk to pay for the discount in their future rates. The OCA initially acknowledges that Aqua states that it “intends to recover the revenue deficiency resulting from its proposed Rider LWCUR from its larger customer base.” (M.B. OCA, at 8, citing OCA Exh. JDM-1, Aqua response to OCA-1-4). In the OCA’s view, notwithstanding Aqua’s present intentions that it does not intend to shift any of the revenue deficiency resulting from its Proposed Rider to water customers, “whether the revenue deficiency will be shifted to water customers or wastewater customers, and whether it will be shifted to customers outside the industrial class, such as the residential or commercial classes, will be decided in a base rate case where a customer is receiving service (at a discounted, contract rate) under Rider LWCUR.” (M.B. OCA, at 9).

In support of this position, the OCA pointed to the several Aqua calculations in response to OCA’s discovery concerning potential negotiated rates. For example, the OCA notes that Aqua calculated that if the one existing customer that is eligible for service under Rider LWCUR negotiated a 10% discount from current tariffed rates, it would result in an annual revenue decrease of \$2,615 based on prior year consumption. Aqua also ran a calculation for one of the two potential customers from the DELCORA system, and calculated that if that customer negotiated a 10% discount from the rate it currently pays DELCORA—which itself is a contract rate, that discount would result in a decrease in annual revenues of \$502,058. The OCA explains that full tariffed rates for this customer could be higher depending on the indicated cost of service under Aqua ownership, which would have the effect of increasing the revenue deficiency driven by a hypothetical 10% discount. The OCA also points out that if the DELCORA transaction closes, Aqua would be assuming an existing agreement and under 66 Pa.C.S.

§ 1329(d)(4), those rates would apply to the acquired customer until the Commission approves new rates in Aqua's first base rate case that includes the DELCORA system assets. (M.B. OCA, at 9).

Further, the OCA points out that Aqua also provided information about the impact of discounted rates for its water operations. For Aqua Water, the 2022 revenue deficiency resulting from the three customers taking service under its discounted rate (*Water Rider*) represented more than 25% of the total revenue from the Industrial class. (M.B. OCA, at 9).

Fourth, the OCA argues that Aqua has other means to address rates for large industrial customers, and has not demonstrated need for the Proposed Rider now. The OCA argues that when the acquisition is under Section 1329, like DELCORA and the City of Beaver Falls, the customers' existing rates (whether or not established by contract) would remain in effect until Aqua's next rate case at which time the reasonableness of continuing that discounted rate, establishing a new discounted rate, or eliminating the discounted rates can be evaluated. (M.B. OCA, at 10); 66 Pa.C.S. § 1329(d)(4). The OCA explains that whether the customer's system is acquired under Section 1329, large industrial customers often participate in wastewater base rate cases to advocate for lower tariffed rates and favorable rate design. Also, the issue that customers pay lower rates to the selling utility than the buying utility is not limited to industrial customers. All types of customers may face future rate increases to bring their rates to cost of service under Aqua ownership and Aqua has means to address that issue instead of negotiating rates that are less than tariffed rates. *Id.*

The OCA also takes issue with Aqua's position that the Proposed Rider is needed now because an alternative to Aqua's wastewater service could arise between base rate cases and before the customer's rate concerns could be addressed in a base rate case, causing Aqua to lose that customer's rate revenue altogether. (M.B. OCA, at 10, citing to Aqua St. 1R, at 6-7). The OCA argues that Aqua's assumption that a large industrial customer would make and act quickly on a decision about disconnecting from a public wastewater system or physically relocating its large industrial facility to a different service territory, is not a reasonable assumption. The OCA points out that there is not that much time between base rate cases. In its 2021 base rate case, Aqua

indicated it would file its next base rate case in 2024. Further, Aqua supported the use of three years for normalizing expenses on the basis that intervals of longer duration were not likely. According to the OCA, based on Aqua's projections, the Company will file its next base rate case within a year. (M.B. OCA, at 10-11).

Fifth, the OCA argues that Aqua's Proposed Rider is an unreasonable and discriminatory rate, and thus has not met its burden of proof to show the just and reasonableness of its proposed rates as required by 66 Pa.C.S. § 1301. In accordance with the OCA's above arguments, the OCA argues that Aqua's Proposed Rider is unreasonable, as Aqua has not established a need for the Proposed Rider to support a preferential rate. Should concerns regarding rates for large industrial customers arise, they can be addressed in future base rate cases. If, in the future, an existing Aqua large industrial customer expresses an interest and identifies competitive alternative wastewater service options, Aqua can seek Commission approval when facts are available for the Commission to evaluate whether a competitive alternative exists in the wastewater context and to assess whether the proposed terms and conditions of Rider LWCUR are reasonable, and protect the interests of Aqua's other customers.

The OCA also argues that Aqua's proposed rate is not reasonable because it is unreasonably discriminatory under Section 1304 Code, which provides:

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

66 Pa.C.S. § 1304. The OCA acknowledged that the Commonwealth Court has held that not all differences in rates are discriminatory, that only unreasonable differences are unlawful. (M.B. OCA, at 12). The OCA argues that approval of the Proposed Rider will advantage a potential subset of large industrial customers and it will put other Aqua customers at risk to pay for the discount in their future rates, and therefore must be rejected. (*Id.*).

In the alternative, the OCA takes the position that if the Commission decides to approve the Proposed Rider, that the Commission adopt the OCA's recommended changes to certain language of the proposed tariff regarding the documentation of a competitive alternative to the Company's wastewater service. The OCA argues that the Proposed Rider does not require any minimum documentation for a potential customer to establish that they are eligible for service under the Rider due to a viable competitive alternative, and the tariff should. Aqua's Proposed Rider provides:

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

Aqua WCP-IR Exhibit A at 1 (emphasis added).

The OCA takes issues with simply requiring an affidavit, which it states it not adequate or consistent with the type of documentation that is routinely required in other industries where contract rates are permitted. According to the OCA, an affidavit is not adequate to demonstrate the legitimacy of a competitive alternative in the wastewater context. Rather, Aqua's tariff should be clear that the Company will request and review written documentation including service agreements, feasibility studies, cost-benefit analyses, etc., to support its evaluation and assessment of the costs of the facilities necessary for the customer to take service under the competitive alternative. Further, the OCA points out that as an example of other industries, that when natural gas distribution companies (NGDCs) review their larger customers' competitive alternatives, they evaluate the cost of connecting those customers' facilities with an alternative service provider. The documentation of that evaluation is examined again in base rate proceedings for reasonableness and to determine whether the NGDC exercised due diligence. (M.B. OCA, at 13).

Specifically, the OCA recommends that the tariff should be modified as follows:

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

(M.B. OCA, at 14).

The OCA acknowledged that Aqua argues that utilities in other industries, including Aqua Water, have tariff provisions similar to what it has proposed for Rider LWCUR— i.e., do not specify what is required to “satisfy” the utility that a competitive alternative exists. (M.B. OCA, at 13, citing to Aqua St. 1 at 9-10; Aqua St. 1R at 5-6, 8). However, the OCA counters that, as it discussed above, there are fundamental differences between wastewater and the other types of utility service, and Aqua has not demonstrated any current need for a wastewater rider. Thus, if a discounted rate is approved for Aqua Wastewater, the tariff should ensure that Aqua will require documentation adequate to demonstrate that a competitive alternative is viable, feasible and probable in the absence of a negotiated rate. (M.B. OCA, at 14).

### Reply Briefs

As noted above, Reply Briefs were filed by Aqua and OCA. While each reply brief referred to its respective main brief, without repeating their arguments, highlights of the parties' replies are summarized below.

#### *Aqua's Reply*

In its Reply Brief, Aqua took issue with both statutory advocates' positions that the Proposed Rider is not necessary, as it is premature absent existing qualifying customers. Aqua again asserts that it does not need existing, interested and eligible customers for the Commission to approve the Proposed Rider. According to Aqua, the statutory advocates'

arguments mistake the purpose of the Proposed Rider – i.e., to be proactive or preemptive. Further, Aqua argues that the statutory advocates do not dispute the Rider’s structure, and they fail to reconcile on-point Commission precedent on comparable riders. (R.B. Aqua, at 3).

As to precedent, Aqua again cites to the *PAWC DIS Order* and notes that the Commission rejected the concerns raised by the OCA in that proceeding – namely, that negotiated rates should not become a means by which utilities shift the responsibility for lost revenues to core customers. (R.B. Aqua, at 16). Aqua asserts that neither the OCA nor the OSBA proffer a coherent reason for the Commission to depart from this precedent. (R.B. Aqua, at 4).

Aqua also counters both statutory advocates’ positions that it should refile the Proposed Rider when there is a customer interested and eligible for negotiated rate service, instead arguing that this would unnecessarily delay conclusions and findings that are appropriately addressed in this proceeding. Relatedly, Aqua counters the OCA’s argument that Aqua’s large industrial customers are currently permitted to advocate for lower rates in intermittent base rate proceedings, rendering the Proposed Rider unnecessary. In Aqua’s view, arguments about class rate design presented in occasional base rate proceedings are not the appropriate vehicle for customers with lower cost competitive alternatives that are not available to the rate class as a whole and the OCA’s arguments to the contrary should be rejected. (R.B. Aqua, at 4-5).

Next, Aqua asserts that its Proposed Rider would not result in unreasonable rate discrimination in violation of Section 1304 of the Code, 66 Pa.C.S. § 1304. Initially, Aqua takes issue with the OCA’s explanation of the applicable standard, citing the Commission and the appellate courts. Aqua explains that it does not dispute that should an eligible customer begin receiving service under the Proposed Rider, that rate *could* be discriminatory, in the sense of being different from rates to other customers in the same rate class; however, that rate will also be reasonable, comporting with the directive of Section 1304. (R.B. Aqua, at 9). Aqua argues that the potential rate effects of the Proposed Rider would constitute reasonable discrimination, and be subject to review by the Commission and parties in future base rate proceedings. (*Id.*).

Finally, Aqua argues that if the Commission approves the Proposed Rider, that the OCA's recommended changes to its tariff should be rejected. Aqua again argues, as it did in its Main Brief, that the OCA's proposed changes are inconsistent with other comparable riders in Pennsylvania and are functionally inoperative. However, Aqua again stated that in the interests of concession, Aqua is willing to perform its own feasibility study for each potentially eligible customer to determine whether a discounted rate under the Proposed Rider is in the best interests of the Company and its customers. (R.B. Aqua, at 12).

### OCA's Reply

In its Reply Brief, the OCA emphasizes that it is not in the public interest to approve a rate that will harm other customers without any demonstrated need. Aqua calling the proposed rider "proactive" is merely another way to say that it is not manifest but rather speculative. The OCA argues that Aqua's assertion that it is better to increase rates for other customers by a smaller amount than a larger one due to the potential loss of a large industrial customer, is a belief, not a fact, as there is no evidence to support it. (R.B. OCA, at 3).

Moreover, the OCA argues that the Company has not demonstrated that rates for other customers should be increased at all. The actual loss of a customer is neither known nor certain, and there is no evidence that it is actually feasible and probable for a wastewater customer to leave the system in the absence of a negotiated rate. Moreover, Aqua has other means to incentivize large customers to take or continue service from Aqua that do not put other customers at risk for rate increases. It could, for example, incentivize large customers by not increasing overall rates, or by increasing rates a lesser amount in future rate cases by electing to use a capital structure with less equity or by choosing to acquire systems that generate a lower additional revenue requirement per customer. (R.B. OCA, at 5).

The OCA also counters Aqua's contention that a base rate process is not well suited to address a customer that has alternatives not available to every member of the class that are lower than the average cost to serve the class as a whole. The OCA explains that if there are differences in the availability of competitive alternatives, then there may also be differences in

the characteristics of that customer that could justify differences in tariffed rates. But, “we do not have those facts which, again, is the underlying problem with trying to address the need for the rider when no existing Aqua wastewater customer has requested it. The Commission must act on facts and a record, not statements of belief asserted by a utility.” (*Id.* at 6).

Next, the OCA counters the Company’s argument that Commission approval of its Proposed Rider is warranted herein since it is consistent with the prior Commission approval in the *PAWC DIS Order*. Specifically, the OCA notes that Aqua asserts that the Commission approved a discount rate rider for PAWC without discussion of a specific customer interested and eligible to take service under that rider. However, according to the OCA, Aqua ignores that, when the Commission decided the PAWC case in July 1995, it had already reviewed and decided an earlier base rate case involving the Roaring Creek system, where it approved a “flexible” rate for a large industrial water customer.<sup>10</sup> The OCA points out that in that case, evidence was provided and evaluated to determine whether there was a competitive alternative to taking water service from the public utility. The customer provided testimony that it could use mine pool water available at its plant site or another source of raw water because the customer’s manufacturing process did not require filtered water.<sup>11</sup> In the wastewater context, the OCA argues that showing has not been made – for Aqua or any other wastewater utility. (R.B. OCA, at 6-7).

Next, the OCA takes issue with Aqua’s position that Rider LWCUR will have no immediate rate impact. The OCA argues that Aqua cannot have it both ways – explaining that, if no customer uses the rate, there will be no harm to other customers; and if customers do take service under the Rider LWCUR, Aqua acknowledges there will be an impact on other customers’ rates in a base rate case that includes contract rates under the Rider. In addition, if the rider is used to discount rates, there will be an impact on Company revenue between base rate

---

<sup>10</sup> The OCA also noted in a footnote that the next *Roaring Creek* base rate case was the case in which Aqua’s Water Rider DIS was first approved. (R.B. at 6, n.2).

<sup>11</sup> R.B. OCA at 6, citing note 3, *Pa. Pub. Util. Comm’n v. Roaring Creek Water Co.*, 1995 Pa. PUC LEXIS 69, \*67-172 (R.D. May 5, 1995); *Pa. Pub. Util. Comm’n v. Roaring Creek Water Co.*, 1995 Pa. PUC LEXIS 67, \*79-91 (Order May 31, 1995).

cases. It would reduce revenue available for system operations and investment, which would be a detriment to all Aqua wastewater customers. (R.B. OCA, at 7).

Next, as to its recommended changes if the Commission does approve the Proposed Rider, the OCA again states that it is particularly concerning that an affidavit by a customer be deemed adequate to demonstrate the legitimacy of a competitive alternative. The OCA acknowledges, as it did in its Main Brief, that Aqua states that it is willing to perform its own feasibility study for each future potentially-eligible customer, but notes that Aqua continues to recommend that the OCA's alternative language should be rejected. If, however, the Commission determines to approve Rider LWCUR, the OCA continues to recommend that approval should be conditioned on the adoption of tariff language that expressly requires documentation that, at a minimum, includes a feasibility study, cost-analysis or bid(s) for alternative service. That documentation, explains the OCA, could be provided by the customer or by Aqua, which is consistent with the concession that Aqua offered. (R.B. OCA, at 8-9).

### Disposition

After an exhaustive review of this matter, I find that Aqua has not carried its burden of proof in this proceeding that Aqua's Proposed Rider is just and reasonable. While I agree with the statutory advocates that Aqua has not demonstrated a current need for the Rider, I find that the lack of any current eligible and interested LWCUR gives rise to other significant issues with the Proposed Rider. I find that approval of the Proposed Rider will put other Aqua customers at risk to pay higher rates, and that Aqua has other means to address rates for large industrial customers including a rate base proceeding, or it can re-file if Aqua should serve a large industrial wastewater customer that has a viable alternative to taking service from the Company.

First, Aqua admits that it does not currently have any customer that is eligible and interested in the Proposed Rider. Although Aqua currently serves one LWCUR that would meet the annual wastewater volume criterion required to participate in Ride LWCUR, Aqua has stated that this one customer will not be participating in Rider LWCUR, if approved. All the parties

agree, however, that at least four eligible customers could be acquired by Aqua through Aqua's pursuit of the acquisitions of two wastewater systems, the DELCORA and the City of Beaver Falls systems. However, I agree with the statutory advocates that it is not certain if or when Aqua will obtain customers who may be eligible and interested, whether from DELCORA, which Commission proceeding is currently stayed pending resolutions in two separate civil proceedings in Bankruptcy and county proceedings, the City of Beaver Falls, or other acquisitions that have not been approved by the Commission.

Second, I find persuasive the OCA's position that Aqua has also not demonstrated a need for the Rider because there is no record evidence that, in the wastewater context, there exists a viable competitive alternative to service from the Company. For example, although the parties agree that at least four eligible customers could be acquired by Aqua through Aqua's pursuit of the acquisitions of the DELCORA and the City of Beaver Falls systems, there is no record evidence of potential viable competitive alternatives for any of these potential customers. I find persuasive the argument of the OCA that wastewater is different from other types of public utilities, including water, in the context of probable and feasible alternatives. While I acknowledge Aqua's argument that the basic ratemaking process for each utility, whether wastewater, water, electric or gas service, is the same, the different considerations in the wastewater context goes to the current need for the Proposed Rider outside the basic ratemaking process.

Rather, I find persuasive the testimony presented by the OCA that Aqua's expected customer alternatives would likely require significant upfront investment to install a treatment facility or accommodate wastewater hauling (and obtain necessary regulatory approvals) or move the industry to a different site, all of which is capital intensive. (OCA St. 1, at 7-8). Further, there is no record evidence whether even the four potential eligible customers from Aqua's anticipated acquisition of the DELCORA and City of Beaver Falls systems, are industrial customers in an industry that requires pretreatment. (OCA St. 1SR, at 4). As the OCA pointed out, this requirement for additional processing makes it even more uncertain that a lesser cost alternative to continuing or taking wastewater service from Aqua exists. (M.B. OCA, at 8, citing OCA Exh. JDM-1, Aqua response to OCA-1-9).

Next, I also find it significant that regarding Aqua's water service, that the Commission first approved its *Water Rider*, which Aqua stated it used as a model for the Proposed Rider, in a base rate proceeding. Thus, in that proceeding, as the OCA pointed out, evidence was provided and evaluated regarding the alternative source of water supply and the cost impact of the negotiated rate on other customers. (M.B. OCA, at 8). In contrast, the OCA argues, since no existing Aqua customers have expressed an interest in Rider LWCUR, that type of evidence and evaluation are not available in this proceeding. Moreover, as the OCA argues, "it is not possible to fully evaluate and examine the circumstances associated with any potential customer's alternative to assess whether the proposed terms and conditions of Rider LWCUR are reasonable, and protect the interests of Aqua's remaining customers that may be responsible for any revenue deficiency resulting from the Rider LWCUR service agreement." (M.B. OCA, at 8).

Next, significantly, I also find that approval of Aqua's Proposed Rider may put other Aqua customers at risk to pay for the discount in their future rates. To a certain extent, I agree with the OCA that the Company is trying to have it both ways. In other words, if no customer takes service under Rider LWCUR, then of course, there is no impact on other customers' rates now or in a future base rate case, as Aqua points out. On the other hand, if a customer(s) takes service under Rider LWCUR, Aqua acknowledges there will be an impact on other customers' rates in a base rate case that includes contract rates under the Rider. Although Aqua argues that this impact will be "marginal," the fact is that the impact is not known. (Aqua M.B., at 21).

For example, Aqua calculated that if the Company were to apply a 10% discount to the rates currently paid by Kimberly-Clark, should Kimberly-Clark be deemed eligible and interested to receive negotiated rate service under the Proposed Rider, that discount would result in a revenue decrease of \$502,057.50 given projected consumption. (M.B. Aqua, at 14). However, I find that Aqua's argument that, "[c]ritically, this projected revenue decrease pales in comparison to the revenue decrease that would occur if the DELCORA transaction is approved and Kimberly-Clark elects to leave Aqua's service territory altogether or begin receiving alternative wastewater service," is not adequately supported by any quantitative analysis. There is no analysis that losing a large industrial customer would be worse for all customers than

providing the proposed discount. For example, there is no evidence that this conclusion takes into account reduced costs from not serving Kimberly-Clark. Of course, a more detailed analysis might show Aqua's claim to be true, but without such evidence, I find this claim is not supported by the record evidence.

As noted by the OCA, whether the revenue deficiency will be shifted to water customers or wastewater customers, and whether it will be shifted to customers outside the industrial class, will be decided in a base rate case where a customer is receiving service at a discounted, negotiated rate. (M.B. OCA, at 9). I also find it illustrative that for Aqua Water, the 2022 revenue deficiency resulting from three customers taking service under Rider DIS (\$5.7 million per year) represented more than 25% of the total revenue from the Industrial class. (OCA St. 1SR, at 4-5). I find persuasive the OCA's position that the Commission should have an opportunity to consider whether to approve a discounted rate rider that could impact wastewater rates by an unknown amount, at the time that the Company actually has an existing customer(s) interested in the rate.

Next, I also find that Aqua has other means to address rates for large industrial customers, and has not demonstrated a need for the Proposed Rider now. Aqua's pending acquisitions, DELCORA and Beaver Falls, involve acquisitions under Section 1329, 66 Pa.C.S. § 1329. Therefore, the customers' existing rates would remain in effect until Aqua's next rate case at which time the reasonableness of continuing that discounted rate, establishing a new discounted rate, or eliminating the discounted rates can be evaluated. 66 Pa.C.S. § 1329(d)(4). Further, as pointed out by the OCA, large industrial customers often participate in wastewater base rate cases to advocate for lower tariffed rates and favorable rate design. I also find it notable that, as the OCA points out, there is not that much time between base rate cases. In its 2021 base rate case, Aqua indicated it would file its next base rate case in 2024. Further, Aqua supported the use of three years for normalizing expenses on the basis that intervals of longer duration were not likely. (M.B. OCA, at 10-11).

Accordingly, for all the reasons discussed above, this Decision recommends that the Commission reject without prejudice, the Proposed Rider of Aqua.

However, alternatively, if the Commission decides to approve Aqua's Proposed Rider, this Decision recommends that approval be conditioned on the adoption of tariff language that requires documentation that a feasibility study be performed by Aqua or the potentially eligible customer. *Pa. Pub. Util. Comm'n v. Metro. Edison Co.*, Docket No. R-00061366 (Opinion and Order entered Jan. 11, 2007); 2007 Pa. PUC Lexis 5, at \*111-112. I find that the OCA has met its burden of proof in its recommended change. The OCA's recommended modification is a reasonable request to verify discounted rates at less than fully tariffed rates which loss of revenue may be eventually borne by all customers. Further, this documentation is consistent with the concession that Aqua offered in its main and reply briefs. (M.B. Aqua, at 20; R.B. Aqua, at 12).

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. §§ 501, 1308(b).

2. As the proponent of a rule or order, Aqua bears the burden of proof by a preponderance of the evidence to establish that it is entitled to the relief it is seeking in this proceeding. 66 Pa.C.S. § 332(a). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

3. A public utility seeking a proposed rate has the burden of proof to establish that justness and reasonableness of the rate request. 66 Pa.C.S. § 315(a). *Lower Frederick Twp. v. Pa. Pub. Util. Comm'n*, 409 A.2d 507 (Pa. 1980); *Brockway Glass v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. 1981).

4. This Commission's decision must be supported by substantial evidence in the record. 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. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

5. Rates charged by public utilities must be just and reasonable and cannot result in unreasonable rate discrimination. 66 Pa.C.S. §§ 1301, 1304.

6. A party that offers a proposal not included in Aqua's filing bears the burden of proof with regard to that proposal. *Pa. Pub. Util. Comm'n v. Metro. Edison Co.*, Docket No. R-00061366, 2007 Pa. PUC Lexis 5 (Opinion and Order entered Jan. 11, 2007).

7. Aqua Pennsylvania Wastewater, Inc. has not met its burden of proof to show that Proposed Rider is just and reasonable. 66 Pa.C.S. §§ 322, 315(a).

### ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Commission reject, without prejudice, Aqua Pennsylvania Wastewater, Inc. Proposed Rider, Supplement No. 3 to Tariff Sewer – PA P.U.C. No 3.

2. That, alternatively, if the Commission decides to approve Supplement 3 to Tariff Sewer – Pa P.U.C. No. 3, that it be conditioned on the adoption of the following tariff language:

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

3. That the Commission's investigation at Docket No. R-2022-3037141 and the Formal Complaint filed by the Office of Consumer Advocate at Docket No. C-2023-3037579 be marked closed.

Date: June 6, 2023

\_\_\_\_\_/s/  
Gail M. Chiodo  
Administrative Law Judge