

COMMONWEALTH OF PENNSYLVANIA



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June 23, 2023

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

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

Dear Secretary Chiavetta:

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

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

Respectfully submitted,

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Enclosures:

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

*347996

CERTIFICATE OF SERVICE

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

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

Dated this 23rd day of June 2023.

SERVICE BY E-MAIL ONLY

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I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits these Replies to the Exceptions of Aqua Pennsylvania Wastewater, Inc. (Aqua). The Commission should deny Aqua's Exceptions and adopt the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Gail M. Chiodo.

II. REPLY TO AQUA EXCEPTIONS

Reply to Exception 1: The ALJ Properly Found That Aqua Has Not Demonstrated a Need for the Proposed Rider. I.D. at 30-33; OCA M.B. at 5-8, 10-11; OCA R.B. at 3-7.

1. *There Is No Precedent for Approving a Discounted Rate for Utility Service Before and Without Actual Evidence from Existing Customers about Competitive Alternatives.*

In its Exception 1, Aqua argues that the ALJ's decision does not follow the guidance set forth in a prior Commission proceeding where the Commission approved a discounted rate proposal for a water utility. Specifically, Aqua notes that the Commission approved a discount rate rider for Pennsylvania-American Water Company without discussion of a specific customer interested and eligible to take service under that rider. Aqua Exc. at 3-4, *citing Pa. PUC v. Pennsylvania-American Water Co.*, 1995 Pa. PUC LEXIS 170 (Order July 24, 1995) (*PAWC DIS Order 1995*).

The OCA asserts that ALJ Chiodo correctly found that Aqua failed to meet its burden to demonstrate a need for the Proposed Rider. A utility cannot unreasonably discriminate for or against one of its customers by establishing a special rate for them. 66 Pa. C.S. §§ 1301, 1304; *Popowsky v. Pa. PUC*, 683 A.2d 958 (Pa. Cmwlth. Ct. 1996). As discussed in the I.D., as well as in OCA's briefs, in the absence of facts supporting a current need for the rate and showing that a viable competitive alternative for wastewater service from Aqua exists, it is not reasonable to establish a preferential rate for certain large industrial customers that is intended to increase costs

recovered from other customers. I.D. at 30-31; OCA M.B. at 5-8; OCA R.B. at 3-5.

Aqua's argument regarding the *PAWC DIS Order* 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. There, an existing customer requested the discounted rate. *Pa. PUC v. Consumers Pennsylvania Water Co.- Roaring Creek Div.*, 1997 Pa. PUC LEXIS 93 (Order Oct. 14, 1997) (*Roaring Creek 1997*). Evidence had been provided and evaluated to determine whether that customer had a competitive alternative to taking water service from the public utility.¹ None of these facts are present in the record of this case. Aqua made no showing that any of its current customers are requesting a special rate and made no showing that any viable alternative to wastewater exists for any of its existing or future customers. Also, the ALJ correctly observed that 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. I.D. at 10; Aqua St. 1R at 5; OCA Exh. JDM-1; OCA St. 1 at 8. Moreover, 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. I.D. at 11; Aqua St. 1R at 5; OCA Exh. JDM-1.

Further, the ALJ found it, at best, uncertain that showing *could* be made, given the difference between wastewater and other types of utility service. She stated:

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

¹ *Pa. PUC v. Roaring Creek Water Co.*, 1995 Pa. PUC LEXIS 69, *67-172 (R.D. May 5, 1995); *Pa. PUC v. Roaring Creek Water Co.*, 1995 Pa. PUC LEXIS 67, *79-91 (Order May 31, 1995).

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).

I.D. at 31.

For these reasons and as further discussed in the OCA's briefs, ALJ Chiodo properly determined that Aqua did not meet its burden of proof. I.D. at 30. Aqua did not show that the Proposed Rider is just and reasonable and not unreasonably discriminatory under Sections 1301 and 1304 of the Public Utility Code. 66 Pa. C.S. §§ 1301, 1304. There is no evidentiary basis for the Commission to allow discounted wastewater rates.

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

I.D. at 30-31. Moreover, in the absence of such evidence, it is not possible 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. *Id.* at 32; OCA M.B. at 8.

2. *If a Need Exists in the Future, Aqua Has Means to Address Rates for Large Industrial Customers in Base Rate Cases or by Re-filing.*

In subparts 2 and 3 of Exception 1, Aqua contends that the ALJ did not adequately consider its assertions that the proposed Rider may be needed in the future or between base rate

cases. Aqua Exc. at 4-8. Aqua argues that a competitive alternative could come to exist in the future for an existing or potential customer and that customer could act on that option before Aqua could get a discounted rate in place. *Id.* at 6-7. As discussed in the I.D., however, the claimed risk is not supported by the facts. *See* I.D. at 33. It is not reasonable to assume that a large industrial customer would make and act quickly on a decision about disconnecting from a public wastewater system or physically relocating its large industrial facility to a different service territory, and without discussing that decision with Aqua. OCA M.B. at 10-11; OCA R.B. at 5. Moreover, the ALJ observed that Aqua's pending acquisitions are under Section 1329, 66 Pa. C.S. § 1329, and 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. I.D. at 33 *citing* 66 Pa. C.S. § 1329(d)(4).

Repeating arguments from its briefs, Aqua also asserts that large industrial customers' interests cannot be adequately represented in base rate proceedings. I.D. at 32; Aqua Exc. at 6-8. Specifically, Aqua contends that a base rate process is not well suited to address a customer that has alternatives that are not available to every member of the class and that are lower than the average cost to serve the class as a whole. *Id.* at 7. The ALJ disagreed and this premise was thoroughly rebutted by OCA witness Mierzwa who explained 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. I.D. at 33; OCA St. 1SR at 6. None of those underlying facts are available here because no customer has requested this rate which, again, is the underlying problem with trying to address the need for the rider when no existing Aqua wastewater customer believes that it is necessary. The Commission must act on facts and a

record, not statements of belief asserted by a utility. The ALJ correctly found that if a competitive alternative comes into existence in the future, Aqua can address it for large industrial customers in future base rate cases or by re-filing a Petition.

Aqua's request to get approval now for something that may happen in the future is unprecedented and unnecessary. For all of the reasons discussed above and in the OCA's testimony and briefs, Aqua's Exception 1 should be denied.

Reply to Exception 2: The ALJ Properly Determined That Approval of the Proposed Rider Would Put Other Aqua Customers at Risk. I.D. at 32-33; OCA M.B. at 8-9; OCA R.B. at 3-5, 7-8.

Contrary to Aqua's assertion in its Exceptions, ALJ Chiodo found that approval of Aqua's Proposed Rider may put other Aqua customers at risk to pay for the discount in their future rates. I.D. at 32-33. Aqua argues that the revenue impact of discounting rates is smaller than the revenue impact of a large industrial customer leaving the system, and it is better to increase rates for other customers by a smaller amount than a larger one. Aqua Exc. at 8-10. The problem with this argument is that it is mere speculation.

The ALJ addressed and properly rejected this argument because there is no evidence or quantitative analysis supporting Aqua's claims about the relative rate impacts. I.D. at 32-33; OCA M.B. at 8-9; OCA R.B. at 7-8. ALJ Chiodo stated:

Although Aqua argues that the impact of Rider LWCUR on other customers' rates will be "marginal," the fact is that the impact is not known.

...

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.

I.D. at 32-33. What is known and certain, however, is that if Aqua is permitted to offer discounted wastewater rates now, customers taking service at discounted rates will increase the

revenue requirement to be recovered from customers paying tariffed rates in subsequent base rate cases. OCA St. 1SR at 2. Allowing discounted wastewater rates, use of which will cause known harm, in response to a speculative, uncertain harm that may occur is not reasonable. OCA M.B. at 6; OCA R.B. at 7-8. ALJ Chiodo correctly determined that the Commission should have an opportunity to consider whether to approve a discounted rate rider that could impact wastewater rates, at the time that the Company actually has an existing customer(s) interested in the rate.

In sum, ALJ Chiodo properly rejected the Rider because Aqua failed to support its claim that losing a large industrial customer would be worse for all customers than providing the proposed discount. As such, Aqua's Exception 2 should be denied.

Reply to Exception 3: In Rejecting the Proposed Rider Without Prejudice, the ALJ Properly Found That Aqua Failed to Meet Its Burden of Proof and the ALJ Properly Proposed Alternative Tariff Language in the Event the Commission Approved the Proposed Rider. I.D. at 30-34; OCA M.B. at 6-8, 13-14; OCA R.B. at 3-4, 8-9.

1. *Aqua Failed to Provide Evidence – Specific to Wastewater – to Support a Finding That a Lesser Cost Alternative to Continuing or Taking Service from Aqua Exists.*

In its Exception 3, Aqua repeats arguments that discounted rates should be approved for wastewater service because they have been approved for utilities in other industries, particularly water service. Aqua's argument hinges on there being no difference between wastewater and any other type of utility service where a customer might have the wherewithal to construct its own facilities or move out of the service territory altogether. *Id.* at 5, 10-11. ALJ Chiodo specifically considered and rejected this claim because Aqua provided no evidence specific to any existing or potential wastewater customer, on which it could be determined that there exists – *for wastewater* – a viable, feasible and probable option to leave Aqua's service territory. I.D. at 30-33; OCA M.B. at 6-8, 13-14; OCA R.B. at 3-4. To the contrary, and as discussed above, there

was persuasive testimony that installing a wastewater treatment facility or accommodating wastewater hauling (and obtaining necessary regulatory approvals) or relocating the industry in addition to the ongoing costs for wastewater service required for the latter two options, would likely require significant upfront investment. R.D. at 31; OCA St. 1 at 7-8. If the industrial wastewater customer requires pretreatment due to the characteristics (constituents, volume or quantities) of the wastewater, the additional processing makes it even more uncertain that a lesser cost alternative to continuing or taking wastewater service from Aqua exists. R.D. at 31; OCA St. 1SR at 4.

The ALJ additionally and specifically rejected Aqua's reliance on the Commission's approval of a discounted rate rider for water service. I.D. at 32. The ALJ agreed with the OCA that the Commission's decision to approve Aqua PA's Rider DIS was decided based on facts that do not exist here. That rider was approved in a base rate proceeding, where (1) an existing customer requested the discounted rate, (2) evidence had been provided and evaluated regarding the specific alternative source of water supply and (4) the cost impact of the negotiated rate on other customers was analyzed. I.D. at 32; *see Roaring Creek 1997* at *74-87; *Roaring Creek 1995*, R.D. at *67-172; *Roaring Creek 1995*, Order at *79-91.

2. *The ALJ's Adoption of the OCA's Alternative Tariff Language Was Proper as the OCA Met Its Burden of Proof.*

For all of the reasons stated in the I.D., Rider LWCUR should be rejected, at this time. I.D. at 30-33. If, however, the Commission determines to approve Rider LWCUR, ALJ Chiodo recommended that approval should be conditioned on the adoption of tariff language that requires that a feasibility study be performed by Aqua or the potentially eligible customer. I.D. at 34. Specifically, the ALJ recommended that if the Commission decides to approve Rider LWCUR, it be conditioned on the adoption of the following tariff language, in lieu of

that proposed in Aqua's filing:

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

I.D. at 34, 35. In its Exception 3, Aqua attempts to raise confusion where none exists. Aqua claims the I.D. is not clear as to whether the ALJ "outright adopted the OCA's proposed changes to Supplement No. 3." Aqua Exc. at 11. This is disproven by a review of Ordering Paragraph 2, which replicates the OCA's tariff language without modification. I.D. at 35; *see* OCA St. 1 at 9-10.

Aqua next argues that the OCA's tariff language "does not allow Aqua to prepare a feasibility study to support a rate discount." Aqua Exc. at 12. This is incorrect. On its face, the language requires minimum documentation, it neither requires the customer to provide the documentation nor prohibits Aqua from providing the documentation. *See* I.D. at 30 ("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"); *see* OCA R.B. at 9 ("That documentation could be provided by the customer or by Aqua, which is consistent with the concession that Aqua offered"). As Aqua commits to performing its own feasibility study, there is no concern if the customer chooses not to provide the documentation.

Aqua makes a final argument that utilities in other industries, including Aqua Water, have tariff provisions similar to what it has proposed for Rider LWCUR. Aqua Exc. at 12-13. As already discussed, the controlling distinction here is two-fold: (1) no current customer has

requested a discounted rate; and (2) there has been no demonstration that a viable competitive alternative actually exists for wastewater. If a discounted wastewater rate rider is approved in this proceeding, without and before that showing, the tariff originally proposed is not adequate because it does not specify what is required to “satisfy” the utility that a competitive alternative exists.² The tariff must be clear about the minimum documentation that will be required to support Aqua’s evaluation and assessment of the costs of the facilities necessary for the wastewater customer to take service under the competitive alternative. Again, that documentation could be provided by the customer or by Aqua.

There is just cause to treat a wastewater rider differently than for other utilities. Moreover, there is no confusion or dispute about the requirement for documentation reflected in the tariff language recommended by the ALJ. As such, Aqua’s third Exception should be denied.

The OCA maintains that the ALJ properly rejected Aqua’s tariff as there was no evidence to support that it was just and reasonable. No current Aqua industrial customers would participate in the rate and there is no evidence showing that an alternative to wastewater service from Aqua is viable, feasible or probable. Approval of the Rider would advantage a potential subset of large industrial customers and put other Aqua customers at risk to pay for the discount in their future rates. *See* I.D. at 30-33. If an existing Aqua large industrial customer expresses an interest and identifies a competitive alternative wastewater service option in the future, Aqua can seek Commission approval at that time, when it is possible to evaluate and examine the alternative and assess whether the proposed terms and conditions of Rider LWCUR are reasonable and protect the interests of Aqua’s other customers.

² The OCA’s particular concern is that the tariff originally proposed by Aqua does not require any minimum documentation to establish the existence of a competitive alternative. As proposed, Aqua could accept an affidavit by a customer without more. An affidavit is not adequate to demonstrate the legitimacy of a competitive alternative. OCA St. 1 at 9-10.

III. CONCLUSION

The Office of Consumer Advocate respectfully requests that the Commission deny the Exceptions filed by Aqua. ALJ Chiodo's Initial Decision on these contested issues is soundly based on the record and the law and should be adopted by the Public Utility Commission.

Respectfully Submitted,

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