

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held August 3, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Pennsylvania Public Utility Commission
Office of Consumer Advocate

R-2022-3037141
C-2023-3037579

v.

Aqua Pennsylvania Wastewater, Inc.
(Tariff Supplement No. 3)

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Aqua Pennsylvania Wastewater, Inc. (Aqua or the Company) filed on June 16, 2023, in the above-captioned proceeding. The Exceptions were filed in response to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Gail M. Chiodo issued on June 6, 2023, which denied the Company's request for a tariff rider authorizing Aqua to negotiate discounted rates for eligible large industrial customers. For the reasons discussed more fully, *infra*, we

shall deny the Exceptions and adopt the ALJ's Recommended Decision denying the Company's proposed tariff rider.

I. History of the Proceeding

This matter concerns Tariff Supplement No. 3 to Tariff Sewer-PA P.U.C. No. 3 (Tariff Supplement No. 3, Tariff Rider, or Rider) filed with the Commission by Aqua on December 7, 2022, for approval to establish a Tariff Rider, authorizing the Company to negotiate discounted contract rates with large industrial wastewater customer users, with an effective date of February 5, 2023.

By Secretarial Letter dated December 13, 2022, the Commission's Bureau of Technical Utility Services (TUS) issued data requests to Aqua. On December 22, 2022, Aqua filed Supplement No. 5 to Tariff Sewer-PA P.U.C. No. 3 to voluntarily postpone the effective date of Tariff Supplement No. 3 to February 10, 2023. Subsequently, on January 5, 2023, Aqua filed responses to TUS's data requests attaching a revised Tariff Supplement No. 3 to clarify eligibility for proposed rates.

On January 11, 2023, the Office of Consumer Advocate (OCA) filed a Formal Complaint (Complaint) and Public Statement against Tariff Supplement No. 3. The OCA Complaint was docketed at Docket No. C-2023-3037579. The Office of Small Business Advocate (OSBA) filed a Notice of Intervention and Public Statement on January 20, 2023.

On February 9, 2023, the Commission entered an Order suspending Tariff Supplement No. 3 by operation of law (*Suspension Order*), pursuant to 66 Pa. C.S. § 1308(b), 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 Aqua's proposed rates, rules, and regulations contained in

Tariff Supplement No. 3, as well as Aqua's existing rates, rules, and regulations. Pursuant to the *Suspension Order*, the matter was assigned to the Commission's Office of Administrative Law Judge (OALJ) for Alternative Dispute Resolution, if possible, and for the prompt scheduling of hearings, as necessary, culminating in the issuance of a Recommended Decision.

A Notice of a Prehearing Conference was issued on February 9, 2023, scheduling a telephonic Prehearing Conference in this matter for February 21, 2023, and assigning ALJ Chiodo as the presiding officer. On February 10, 2023, the ALJ issued a Prehearing Conference Order directing the Parties to file and serve a prehearing conference memorandum by February 20, 2023. Prehearing memoranda were filed by the Parties consistent with the Prehearing Conference Order.

On February 15, 2023, Aqua filed Supplement No. 8 to Tariff Sewer-PA P.U.C. No. 3, to suspend the effective date of Tariff Supplement No. 3 until August 10, 2023, in accordance with the *Suspension Order*.

The Prehearing Conference was held on February 21, 2023, as scheduled. Counsel for Aqua, the OCA, and the OSBA participated and agreed to, *inter alia*, a litigation schedule. Aqua also agreed to voluntarily extend Tariff Supplement No. 3 to August 17, 2023. During the conference, all the Parties did not agree to Alternative Dispute Resolution. Further, no request was made to schedule a public input hearing.

In accordance with the established schedule, on February 23, 2023, Aqua filed Supplement No. 9 to Tariff Sewer- PA P.U.C. No. 3 to voluntarily suspend the effective date of Tariff Supplement No. 3 until August 17, 2023.

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

On March 2, 2023, ALJ Chiodo issued a Scheduling Order to memorialize the results of the procedural matters discussed during the Prehearing Conference. The Scheduling Order set the telephonic evidentiary hearing date in this matter for April 14, 2023. The following day, the ALJ issued an Initial Telephonic Hearing Notice.

On March 20, 2023, the OCA filed and served the Direct Testimony of Jerome D. Mierzwa as OCA Statement 1, along with OCA Exhibit JDM-1. Also on this date, the OSBA filed and served the Direct Testimony of Brian Kalcic as OSBA Statement No. 1 and OSBA Exhibit BK-1.

On March 23, 2023, Aqua filed an unopposed Motion for Protective Order, which was granted by the ALJ on March 27, 2023.

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

On April 7, 2023, the OCA filed and served the Surrebuttal Testimony of Jerome D. Mierzwa as OCA Statement 1SR and OCA Exhibit JDM-1SR. Also on this date, the OSBA filed and served the Surrebuttal Testimony of Brian Kalcic as OSBA Statement No. 1-S.¹

¹ On April 12, 2023, Aqua filed and served a letter advising that it would not be submitting a Rejoinder Outline or Rejoinder Testimony in the proceeding.

On April 13, 2023, Aqua advised ALJ Chiodo that the Parties were unable to reach a settlement on any issue raised in this matter, but that they agreed to waive cross-examination of all witnesses. Accordingly, all witnesses were excused from appearing at the hearing.

The telephonic evidentiary hearing convened as scheduled on April 14, 2023. Aqua, the OCA, and the OSBA appeared and participated through counsel. Testimony and exhibits were entered, by stipulation, into the record at the hearing. On April 20, 2023, a hearing transcript was filed.

Pursuant to the Scheduling Order, Main Briefs were filed by Aqua, the OCA, and the OSBA on April 28, 2023. On May 10, 2023, Aqua and the OCA filed Reply Briefs.²

The record in this case closed on May 10, 2023.

In the Recommended Decision issued on June 6, 2023, ALJ Chiodo recommended that the Commission reject Tariff Supplement No. 3, without prejudice, because Aqua failed to meet its burden of proof to establish that the proposed rates are just and reasonable. Should the Commission decide to approve the proposed Rider, the ALJ alternatively recommended that approval be conditioned upon the adoption of tariff language requiring documentation that Aqua or the potentially eligible customer perform a feasibility study.

As noted, *supra*, Aqua filed Exceptions to the Recommended Decision on June 16, 2023. The OCA and the OSBA each filed Reply Exceptions on June 23, 2023.

² That same day, the OSBA submitted a letter indicating that it would not be filing a Reply Brief.

II. Legal Standards

We advise the Parties that any issue or argument that we do not specifically address herein has been duly considered and will be denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Chapter 13, Subchapter A (Regarding Rates) and General Ratemaking Principles

1. Chapter 13, Subchapter A (Regarding Rates)

Section 1301 of the Pennsylvania Public Utility Code (Code) establishes the requirement that every rate be “reasonable” in the circumstances. Section 1301 provides, in pertinent part:

§ 1301. Rates to be “just and reasonable.”

- (a) Regulation. -- Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be “just and reasonable”, and in conformity with regulations or orders of the commission...

66 Pa. C.S. § 1301(a).

In a rate proceeding, the public utility seeking a rate increase traditionally submits other supporting evidence relating to the development of specific rate schedules under each customer class. *See, Pa. PUC, et al. v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2020-3018835, et al. (Order entered February 19, 2021) (Columbia Order)

at 185 (citing *Lloyd*, 904 A.2d at 1015 (Pa. Cmwlth. 2006) (*Lloyd*); 66 Pa. C.S. §§ 1301, 1304). Section 1304 provides, in pertinent part:

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation, to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service....

66 Pa. C.S. § 1304.

A utility seeking a change to a rate in effect is required to file for Commission approval in advance of the proposed effective date of the change in rate, [pursuant to Section 1308 (pertaining to voluntary changes in rates).] Under Section 1308, a utility may seek a voluntary change in a tariff rate, either by filing a new rate under Section 1308(b) or by filing a general rate increase under Section 1308(d). When a utility voluntarily submits a tariff stating a new rate which is not a general rate increase, Section 1308(b) directs a hearing to determine the lawfulness of the proposed rate. *See*, 1308(b) (hearing and suspension of rate change). 66 Pa. C.S. § 1308(b).

For general rate increases, Section 1308(d) provides the procedures for changing rates, the time limitations for the suspension of the new rates, and the time limitations on the Commission's actions. 66 Pa. C.S. § 1308(d) (relating to general rate increases).

Section 1308(a) establishes the general rule that existing Commission-approved tariff rates remain in effect until a new Commission-approved tariff rate takes effect. Section 1308(a) provides in pertinent part:

§ 1308. Voluntary changes in rates.

- (a) **General rule.**--Unless the commission otherwise orders, no public utility shall make any change in any existing and duly established rate, except after 60 days notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. Such notices regarding the **proposed changes which are provided to the utility's customers shall be in plain understandable language as the commission shall prescribe. All proposed changes shall be shown by filing new tariffs, or supplements to existing tariffs filed and in force at the time.** The commission, for good cause shown, may allow changes in rates, without requiring the 60 days notice, under such conditions as it may prescribe.

66 Pa. C.S. § 1308(a) (emphasis added) (requiring any changes to the effective tariff rate to be pursuant to filing with 60 days' notice in advance of any proposed change, which filing plainly states the change proposed to the rates then in force, and the time when the changes to rates will go into effect).

Section 1308(d) further sets forth the mandatory procedure for an investigation of any proposed rate increase. Section 1308(d) provides in pertinent part:

- (d) **General rate increases.**--Whenever there is filed with the commission by any public utility described in paragraph (1)(i), (ii), (vi) or (vii) of the definition of "public utility" in section 102 (relating to definitions), and such other public utility as the commission may by rule or regulation direct, **any tariff stating a new rate which constitutes a general rate increase, the commission shall promptly enter into an investigation and analysis of said tariff filing and may by order setting forth its reasons therefor,**

upon complaint or upon its own motion, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, and the commission may, at any time by vote of a majority of the members of the commission serving in accordance with law, permit such tariff to become effective, except that absent such order such tariff shall be suspended for a period not to exceed seven months from the time such rate would otherwise become effective.

66 Pa. C.S. § 1308(d)(emphasis added).

2. General Ratemaking Principles

The Code gives the Commission broad authority and responsibility to ensure that the rates charged by public utilities are “just and reasonable” and not unduly discriminatory. *See*, 66 Pa. C.S. §§ 1301, 1304. Pursuant to this “just and reasonable” standard, a public utility may obtain “a rate that allows it to recover those expenses that are reasonably necessary to provide service to its customers[,] as well as a reasonable rate of return on its investment.” *City of Lancaster (Sewer Fund) v. Pa. PUC*, 793 A.2d 978, 982 (Pa. Cmwlth. 2002) (*City of Lancaster*). There is no single way to arrive at “just and reasonable” rates. “The [Commission] has broad discretion in determining whether rates are reasonable” and “is vested with discretion to decide what factors it will consider in setting or evaluating a utility’s rates.” *Popowsky v. Pa. PUC*, 683 A.2d 958, 961 (Pa. Cmwlth. 1996) (*Popowsky*). The Commission is required to investigate all general rate increase filings. *Popowsky*, 683 A.2d at 961.

3. Cost of Service and Customer Class

It is well settled that the “polestar” of ratemaking concerns is the public utility’s “cost of providing service (COS).” (*Columbia Order*) at 46, n.17 (citing *Lloyd*, 904 A.2d at 1010, 1019-21). Inherent in the “cost of providing service” principle of

ratemaking is the recognition that public utilities are natural monopolies and that the Commission’s oversight through cost-of-service ratemaking regulation serves as a proxy for a competitive market in appropriately restraining, or exerting downward pressure on, the profit-maximizing prices a monopoly could otherwise charge in the absence of price regulation. *Columbia Order* at 46, n.17. Other important ratemaking concerns include quality of service,³ rate gradualism,⁴ and rate affordability.⁵ *Columbia Order* at 46-47.

Once the revenue requirement or COS is determined, the next steps traditionally are to allocate these costs to customer classes and then design the specific rates. The utility will typically propose the appropriate “class cost of service,” determined by the utility’s provision of service to different customer classes. In general rate increases of more than \$1 million, a public utility traditionally submits an allocated class cost of service study (COSS) for the test year, showing the allocation of the overall COS to each customer class based on certain allocation method(s). As previously noted, the public utility traditionally submits other supporting evidence relating to the development of specific rate schedules under each customer class. *See, Columbia Order* at 185 (citing *Lloyd*, 904 A.2d at 1015; 66 Pa. C.S. §§ 1301, 1304).

³ *See*, 66 Pa. C.S. § 523(a)-(b) (Commission shall consider the efficiency, effectiveness and adequacy of service when determining “just and reasonable” rates and shall give effect to this section by making such adjustments to specific components of the utility’s claim cost of service as it may determine to be proper and appropriate); *see also* 66 Pa. C.S. § 526(a) (Commission given authority to reject, in whole or in part, a public utility’s rate increase request upon finding that service rendered is inadequate in that it fails to meet quantity or quality for the type of service provided).

⁴ *See, Lloyd*, 904 A.2d at 1020 (explaining that gradualism is the principle under which utility rates are gradually increased to avoid rate shock, as part of what is overall considered a reasonable rate under the circumstances and is permitted in implementing large rate increases).

⁵ *See, Pa. PUC et. al. v. Twin Lakes Utilities, Inc.*, Docket No. R-2019-3010958 (Order entered March 26, 2020) at 48, 80 (the ALJ did not err in considering evidence relating to the various quality of service and rate affordability issues in the proceeding and factoring in such evidence as part of her overall determination on which expert witnesses’ cost of equity to adopt for setting “just and reasonable” rates).

4. Burden of Proof for Rate Increase is Borne by the Utility

The burden of proving the justness and reasonableness of a rate is placed on the public utility. 66 Pa. C.S. § 315(a) (relating to reasonableness of rates). The evidence necessary to meet this burden of proof must be substantial. *Lower Frederick Twp. Water Co. v. Pa. PUC*, 409 A.2d 505, 507 (Pa. Cmwlth. 1980).

5. Commission Review of the Recommended Decision is *De Novo*

The Parties are reminded that the Commission's scope of review of the ALJ's Recommended Decision regarding approval of rates extends to any matter deemed relevant to the Commission. 66 Pa. C.S. § 335(a); *See, Romeo v. Pa. PUC*, 154 A.3d 422 (Pa. Cmwlth. 2017).

III. Discussion

The ALJ made thirty-one Findings of Fact and reached seven Conclusions of Law. R.D. at 5-11, 34-35. We hereby adopt the said findings and conclusions, unless they are expressly rejected, or rejected by necessary implication from our disposition of this Opinion and Order.

A. Exceptions of Aqua and Replies

1. Aqua Exception No. 1: The ALJ Erred in Finding that Aqua Failed to Demonstrate a Need for Tariff Supplement No. 3.

a. Positions of the Parties

Aqua's asserted basis for proposing Tariff Supplement No. 3, was to provide Aqua with a prospective and preemptive means of negotiating discounted rates to

both prevent the loss of current large industrial customers from Aqua's wastewater system and to attract future large industrial customers to join the system. Aqua asserted that *potentially available wastewater alternatives* to Aqua's current and future large industrial customers make it necessary for Aqua to be permitted to negotiate discounted rates to retain/attract such customers. Aqua further asserted that large industrial customers' interests cannot be adequately addressed on a timely basis in the context of the Section 1308 base rate proceedings. Aqua M.B. at 12-23; Aqua St. No. 1, at 7.

In support of the need for the Tariff Rider, Aqua emphasized that it is seeking to provide incentive for eligible large industrial customers to continue receiving, or to begin receiving, wastewater service in the future. Aqua submitted that through the proposed Rider Aqua may retain the maximum amount of revenue from large industrial customers that would otherwise leave, or not connect to, Aqua's system because of an available competitive alternative. Aqua argued that in the absence of the proposed Rider, Aqua would lose all revenues derived from service to the large industrial customers which would elect other alternatives to Aqua's wastewater system. Aqua maintained that without the authority to negotiate discounted rates for large industrial customers, Aqua would be forced to shift the entire revenue burden to the remaining customers on the system, resulting in significant increases to the remaining customers' bills. Aqua M.B. at 12-13, 21-22; Aqua R.B. at 2.

Aqua reasoned that if its proposed Rider is approved, and alternative wastewater service becomes an option for eligible large industrial wastewater customers in its service territory, then the Company will be able to offer a negotiated discounted rate to retain these customers. According to Aqua, although it would still need to shift the costs of the revenue deficit associated with this negotiated discount to its remaining other customers, the resulting higher bills for these customers would be much lower than had the large industrial wastewater customer elected to stop receiving service from Aqua altogether. In summary, Aqua asserted the increased costs to remaining customers to

support the discounted rates for large industrial customers under the Rider would be more beneficial to the remaining customers than the drastic increase in costs/rates due to the loss of a large industrial customer.

To illustrate the reasonableness and necessity of the proposed Rider, Aqua pointed to OCA Exhibit JDM-1, which outlines a series of responses by the Company to interrogatories by the OCA and the OSBA. Included in these responses was Aqua's explanation that should the single existing potentially eligible customer in Aqua's current service territory opt to take service under 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 that customer's prior year's consumption. Aqua continued that absent the ability to offer discounts under its proposed Rider, Aqua's remaining customers would be forced to bear the entirety of that customer's lost rates, or approximately nine times the annual revenue decrease of \$2,615.00. Aqua M.B. at 12-13, 16, 21-22.

The OCA opposed the Commission's approval of Aqua's proposed Tariff Supplement No. 3 on the grounds that the Company failed to establish any *present need* for the Rider, as required by Chapter 13 of the Code. The OCA emphasized that the Company's characterization of the proposed Rider as "proactive" demonstrated that the proposal was based upon "speculative" circumstances rather than "manifest" need, as required by Section 1301 of the Code. The OCA averred that the Company's proposed Rider could not meet the "in the public interest" standard for rates under Section 1308, where the Company's proposal to negotiate discounted rates in favor of large industrial customers would invariably come at the expense of the Company's remaining customer base, without any established need to do so. The OCA averred that where the proposed Rider was premised upon the alleged benefit to the customer base by retention of large industrial customers, the proposal failed to meet the public interest standard where the Company was required to offer, but failed to establish, the *necessity* of costs to be borne by the remaining customer base by countervailing evidence of a *present need* to negotiate

discounted rates to retain existing large industrial customers. OCA M.B. at 5-8, citing OCA St. No. 1 at 7-8; OCA R.B. at 3-5.

The OSBA argued that Aqua’s proposed Rider is a “solution in search of a problem,” where Aqua proposes the Rider without any present large industrial customer which is interested in seeking a discounted rate under the terms of the Rider. The OSBA argued that Aqua has not presented any evidence that any known prospective industrial customer may bypass the Company’s system, absent the ability of Aqua to negotiate a discounted rate for wastewater service. OSBA St. 1 at 5; OSBA St. 1-S at 2. The OSBA further asserted that potential for any future eligible large industrial customer is not demonstrated by Aqua’s possible acquisition of the Delaware County Regional Water Quality Control Authority (DELCORA), which is itself speculative. However, the OSBA posited that if an eligible customer were to appear, Aqua could refile the request for the proposed Rider. *See*, OSBA St. 1, at 2; OSBA M.B. at 4.

b. Recommended Decision

The ALJ concluded that, as argued by the OCA, Aqua failed to demonstrate a need for the Rider where the Company established no record evidence of a viable competitive alternative wastewater service for any large industrial customer to choose over the Company’s wastewater service. For example, the ALJ noted that of the at least four eligible large industrial customers which may be acquired by the Company through the various potential acquisitions, none of the potential customers would have *viable competitive alternatives* to receiving wastewater service from Aqua. The ALJ concluded that it is the lack of any viable competitive alternatives which distinguishes the circumstances under which the Commission has previously approved tariff riders which authorize the negotiation of discounted rates. R.D. at 31.

The ALJ also noted that wastewater service is distinguishable from other utility types of service, where the alternatives to the Company’s wastewater service would require a customer’s substantial capital investment and regulatory approvals, *e.g.*, to install a treatment facility or accommodate wastewater hauling. The ALJ concluded that the unique circumstances of wastewater service weigh against the likelihood that a lesser cost alternative to taking wastewater service from Aqua would be readily available to Aqua’s large industrial customers. R.D. at 31, citing OCA St. 1, at 7-8; OCA M.B. at 8, citing OCA Exh. JDM-1, Aqua Response to OCA-1-9.

c. Aqua Exception No. 1 and Replies

In its Exception No. 1, Aqua challenges the ALJ’s conclusion that Aqua failed to demonstrate a need for Tariff Supplement No. 3, based upon the flawed conclusions that: (1) the proposed Rider was “premature”; (2) potential wastewater alternatives were insufficient to establish need; and, (3) that a future base rate proceeding would adequately address the interests of large industrial customers. Aqua Exc. at 3-6.

Aqua asserts that the ALJ’s conclusion that the proposed Rider is “premature” mistakes the purpose of the proposed Rider which is intended to operate as a preemptive tool to *prevent* the loss of a large industrial customer. Aqua avers that the Commission’s Opinion and Order in a Pennsylvania-American Water Company (PAWC) proceeding refutes the “prematurity” arguments of the OCA and the OSBA. Aqua Exc. at 3, citing *Pa. PUC, et al, v. Pennsylvania-American Water Co.*, Docket Nos. R-00943231, *et al*, 1995 Pa. PUC LEXIS 170 (order Entered July 24, 1995) (*PAWC DIS*⁶ *Order*). Aqua asserts that the Commission’s approval of a negotiated rate rider in the *PAWC DIS Order* is directly on point in the present case and weighs in favor of approving Aqua’s proposed Rider. Aqua Exc. at 3-5.

⁶ Demand Based Industrial Service (DIS).

Aqua further disputes the ALJ's conclusion that, in the wastewater context, there is no record evidence of a viable competitive alternative to Aqua's service. Aqua avers that the ALJ disregarded the fact that large industrial customers may have the resources to construct their own wastewater facilities. In addition, Aqua avers that large industrial customers may well relocate out of Aqua's service territory to that of a wastewater treatment facility not owned by Aqua. Aqua Exc. at 5, citing Aqua M.B. at 8. Based on these existing alternatives to Aqua's service, Aqua asserts that the ALJ should have concluded that sufficient viable service alternatives exist to warrant approval of the proposed Rider. *Id.*

Finally, Aqua asserts that the ALJ erred by concluding that a future base rate proceeding may adequately address the future need for a discounted rate to retain a large industrial customer. Aqua asserts that the ALJ's conclusion fails to account for the need to offer discounted wastewater service rates to retain large industrial customers between rate cases. Aqua Exc. at 6, citing Aqua M.B. at 17.

Aqua asserts, *inter alia*, that, as averred by its witness, Mr. William C. Packer:

[B]ase rate proceedings are intermittent, often occurring only once every several years. The Proposed Rider circumvents the rigidity of occasional base rate proceedings, thus providing Aqua increased flexibility to attempt to meet the needs of potentially eligible large industrial customer, now or in the future, without those customers opting out of receiving Aqua's wastewater service altogether.

Id., citing Aqua M.B. at 17-18; Aqua St. No. 1R, at 6-7.

Further, Aqua asserts that the ALJ's reasoning misconstrues the review and approval of negotiated rates, which would occur only at base rate proceedings, with

approval of the proposed Rider, which would only authorize the negotiation of the discounted rates, and not serve as Commission approval of the negotiated rate. As such, Aqua avers ALJ Chiodo misapprehends that the whole point of the proposed Rider is to allow negotiation of rates to retain customers on a timely basis *between base rate cases*, which could not be achieved if the Company were forced to wait to do so until its next base rate case. Aqua Exc. at 6-7.

In its Replies to Aqua's Exception No. 1, the OCA avers that the ALJ properly found that Aqua has not demonstrated a need for the proposed Rider, and that if a need should arise in the future, Aqua has the means to address the need for discounted rates for large industrial customers by either a base rate proceeding or refiling the proposed Rider. OCA R. Exc. at 1-5, citing I.D at 30-33; OCA M.B. at 5-8, 10-11; OCA R.B at 3-7.

First, the OCA avers that there is no precedent for approving a discounted rate for utility service in the absence of record evidence of competitive alternatives from existing customers. The OCA asserts that Aqua's reliance upon the Commission's *PAWC DIS Order* for the proposition that discounted rate riders may be found to be "necessary" even where no evidence of a competitive alternatives is provided, is misplaced. The OCA notes that when the Commission decided the *PAWC DIS* 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. In that case, the customer's request for a discounted rate was evaluated based upon that existing customer's provision of evidence of a competitive alternative to taking water service from the public utility. OCA R. Exc. at 2, citing *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 entered May 31, 1995).

The OCA avers that in the present case Aqua has made no showing that any of its current customers have requested a discounted special rate and offered no evidence that any viable competitive alternative to Aqua's wastewater service exists for any of its existing or future customers. The OCA further notes that Aqua cannot cite to any Commission precedent in which the Commission approved a tariff rider granting a wastewater utility authority to negotiate a discounted rate. OCA R. Exc. at 2.

Second, the OCA asserts that the ALJ properly considered Aqua's assertions that the proposed Rider may be needed in the future or between base rate proceedings. The OCA submits that Aqua's claimed risks, *i.e.*, the loss of a large industrial customer due to the inability to immediately negotiate a discounted rate, are not supported by the record evidence. The OCA asserts that Aqua's position is predicated upon the unreasonable assumption that large industrial wastewater customers are likely to act precipitously to disconnect from Aqua's system or relocate to another service territory without Aqua's ability to adequately respond to the large customer's concerns. OCA R. Exc. at 4, citing, OCA M.B. at 10-11; OCA R.B. at 5.

Finally, the OCA rejects Aqua's arguments that a base rate proceeding is insufficient to respond to the needs of the large industrial customer which may have viable alternatives to Aqua's wastewater service, and reiterates its position that, in the present case, Aqua has provided no evidence of an existing customer seeking a discounted rate that has a viable competitive alternative to Aqua's service. The OCA asserts that if in the future a large industrial customer with competitive alternatives to Aqua's service seeks a discounted special rate, Aqua may address the issue at a base rate proceeding or re-file the proposed Tariff Rider. *Id.*

In its Replies to Aqua's Exception No. 1, the OSBA avers that the ALJ properly found that Aqua's proposed Rider was premature, and that the ALJ properly considered the potential current or future viable alternatives to Aqua's wastewater

service. OSBA R. Exc. at 1-3. Specifically, the OSBA reiterates its position that Aqua seeks to support its proposed Rider based upon a speculative “worst-case scenario” in which, absent immediate Commission approval of the proposed Rider, an eligible customer may leave Aqua’s system, on the prediction that future Commission action (approving a hypothetically refiled tariff rider) “may not be decided expeditiously enough.” The OSBA asserts that where Aqua’s position is premised upon speculative claims regarding future circumstances rather than current facts, Aqua fails to demonstrate any immediate need for the proposed Rider. *Id.*, citing Aqua Exc. at 3-5.

d. Disposition

We concur with the ALJ, the OCA, and the OSBA that, at present, Aqua’s claims regarding the potential for a large industrial wastewater customer leaving its system are speculative. Aqua’s own witness, Mr. Packer, conceded that Aqua has no current customers interested in seeking service under the proposed Rider, and that existence of a competitive alternative to Aqua’s wastewater service for large industrial customers was based upon speculation that current and future alternatives may become an option for such customers. *See*, Aqua St. 1-R at 5. Therefore, we are persuaded that Aqua has failed to present any evidence of a present need/necessity for the proposed Rider. *See* OCA St. 1 at 8.

Further, we agree with the ALJ’s conclusion that a significant factor weighing against the finding of necessity of the proposed Rider is that a viable alternative to Aqua’s wastewater service would require a large industrial customer to bear significant upfront investment to: (1) install a treatment facility or to accommodate wastewater hauling, (2) obtain the associated regulatory approvals, or (3) move the wastewater customer to a location outside of the Company’s service territory. As argued by the OCA, we conclude that Aqua has failed to sufficiently demonstrate either the feasibility or likelihood of a large industrial customer making the significant upfront investment

necessary to establish a viable alternative to Aqua's wastewater system or relocating to disconnect from Aqua's system. *See*, R.D. at 21; *See also*, OCA St. 1 at 7-8.

Based on the forgoing, we shall deny Aqua's Exception No. 1 and adopt the ALJ's recommendation on this issue.

2. Aqua Exception No. 2: Whether Aqua's Proposed Rider Would Put its Other Customers At Risk

a. Positions of the Parties

Aqua submitted that the negotiated discounted rate contracts entered into under its proposed Tariff Supplement No. 3 would be entirely voluntary. Therefore, Aqua argued that absent participation by an eligible customer in the proposed Rider, Aqua's existing customers' bills would not be affected. In addition, Aqua claimed that because it only has one current customer eligible for the proposed Rider, and that this customer is not interested in participating, approval of the proposed Rider will have no immediate effect on its customers' rates or the Company's revenues. Aqua M.B. at 21.

Although it currently has no eligible customers interested in participating, Aqua argued that approval of its proposed Rider would not be premature. In this regard, Aqua emphasized that through its proposed Rider, it is seeking to provide incentive for eligible large industrial customers to continue receiving, or to begin receiving, wastewater service in the future. Aqua M.B. at 21-22. Namely, Aqua restated that the purpose of its proposed Rider is to retain the maximum amount of revenue from customers that would otherwise leave, or not connect to, the Company as a result of a competitive alternative. Aqua R.B. at 2. Aqua insisted that in the absence of its proposed Rider, if a large industrial wastewater customer elected to stop receiving service from Aqua altogether, either by finding an alternative wastewater service provider or by

leaving the Company's service territory, Aqua would lose all revenues derived from service to this customer. As a result, Aqua argued that to recover this loss in revenues, it would be forced to shift the entire revenue burden to the Company's remaining other customers, resulting in significant increases to the remaining customers' bills. Aqua M.B. at 12-13, 21-22.

Conversely, Aqua submitted that if its proposed Rider is approved, and alternative wastewater service becomes an option for eligible large industrial wastewater customers in its service territory, then the Company will be able to offer a negotiated discounted rate to retain these customers. As previously noted, Aqua argued that although it would still need to shift the costs of the revenue deficit associated with this negotiated discount to its remaining other customers, the resulting higher bills for these customers would be much lower than had the large industrial wastewater customer elected to stop receiving service from Aqua altogether. Aqua M.B. at 12-13, 16, 21-22.

Aqua also stressed that contracts entered into under rate riders, including the Company's proposed Rider, are subject to extensive review in base rate cases. Thus, Aqua submitted that the effects of the Rider on the Company's other wastewater customers, and any corresponding rate changes, would, in turn, be determined in future base rate proceedings. Aqua insisted that to the extent that its negotiated rate revenues are less than the revenue at full tariff rates, its other customers may be *marginally* affected. Moreover, Aqua argued that if a negotiated rate contract is entered into by the Company between base rate proceedings, the burden of the lost revenue would fall to the Company, and not to its customers, at least until that next base rate case is concluded. Aqua M.B. at 22-23.

The OCA maintained that the Commission should deny the proposed Rider. In response to the Company's argument that its proposed Rider will have no immediate rate impact, the OCA submitted that Aqua "cannot have it both ways." More specifically,

the OCA explained that, if no eligible customer opts to participate in the proposed Rider, there will be no harm to other customers; and if eligible customers do participate, Aqua has acknowledged there will be an impact on other customers' rates in a base rate case that includes contract rates under the Rider. Thus, the OCA took the position that the Company's proposed Rider would put Aqua's other customers at risk to pay higher rates. The OCA noted that despite the Company's intention not to shift any of the revenue deficiency associated with its proposed Rider to its 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 to the residential or commercial classes, will ultimately be decided in a base rate case. In the OCA's view, absent any facts supporting a current need for the proposed Rider, including a demonstration that a viable competitive alternative to wastewater service from Aqua exists, it is not reasonable to establish a preferential rate for certain large industrial customers that is intended to increase the costs recovered from other customers. OCA M.B. at 8-9 (citing OCA Exh. JDM-1); OCA R.B. at 3-8.

The OCA disagreed with Aqua's argument that the revenue impact of discounting rates is smaller than the revenue impact of a large industrial customer leaving the system, such that it is better to increase rates for other customers by a smaller amount than a larger one. According to the OCA, Aqua's claim is merely a belief that is not supported by any evidence. Rather, the OCA argued, the actual impact of a loss of a customer is neither known nor certain. In addition, the OCA submitted that 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. Instead, the OCA posited that what *is* known and certain is that if Aqua is permitted to offer discounted wastewater rates at present, customers taking service at discounted rates will increase the costs to be recovered from customers paying tariffed rates in subsequent base rate cases. Moreover, the OCA pointed out that any discounted rate contracts entered into between base rate cases would also impact the Company's revenues between base rate cases, to the detriment of all

customers. For example, the OCA argued, the Company would have less revenue available for system operations and investment. OCA R.B. at 3-4, 7.

Based on the above, the OCA posited that the Commission should have an opportunity to consider whether to approve a discounted rate rider that could impact wastewater rates by an unknown magnitude, at the time that Aqua actually has one or more existing customers interested in the rate. OCA R.B. at 8.

As previously noted, the OSBA opposed the Company's proposed Rider, arguing that Aqua has not presented any evidence that any known prospective industrial customer may bypass the Company's system, absent the ability of Aqua to negotiate a discounted rate for wastewater service. OSBA St. 1 at 5.

b. ALJ's Recommendation

The ALJ found that approval of Aqua's Proposed Tariff Supplement No. 3 may put Aqua's other customers at risk to pay for the discount in their future rates. The ALJ disagreed with Aqua's argument that in the event a customer takes service under the Rider, any impact on other customers' rates would be minimal. Rather, the ALJ concluded that such impact is not known, at present. R.D. at 32. The ALJ noted that in its Main Brief, Aqua noted that there are two customers that could be eligible for its proposed Rider that are currently served on DELCORA's system at contract rates, including Kimberly-Clark Corporation and Kimberly-Clark Pennsylvania LLC (collectively Kimberly-Clark). 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 its projected consumption. According to the ALJ, Aqua has merely submitted that providing the discount would result in a lower revenue decrease than if the DELCORA transaction is

approved and Kimberly-Clark elects to leave Aqua's service territory altogether, or to begin receiving alternative wastewater service. However, the ALJ found that Aqua has provided no analysis to demonstrate that losing a large industrial customer would be worse for all customers than providing the proposed discount. R.D. at 32-33 (citing Aqua M.B. at 13-14). The ALJ reasoned that while Aqua's claim *may* be true, the Company has provided no evidence to support such a conclusion. R.D. at 33.

The ALJ also pointed to the OCA's argument that 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. The ALJ was persuaded by 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 one or more eligible customers interested in participating in the Rider. In light of the present uncertainty, however, the ALJ recommended that the proposed Rider be rejected, without prejudice. R.D. at 33.

c. Aqua Exception No. 2 and Replies

In its Exception No. 2, Aqua finds fault with the ALJ's conclusion that approval of the proposed Rider may place the Company's other customers at risk. The Company claims that in making this conclusion, the ALJ has disregarded that Aqua's stated purpose of its proposed Rider is to prevent eligible large industrial customers from opting to receive alternative wastewater service or to leave the Company's service territory altogether. Aqua insists that in such a situation, losing all revenue derived from service to that customer would have severe negative rate effects for all of Aqua's ratepayers. Conversely, Aqua restates that the rate effects to Aqua's customer base if an eligible customer opts for service under the proposed Rider would be less than if a large

industrial customer were to stop receiving service from the Company entirely. Aqua Exc. at 8, 9.

Aqua also reiterates that negotiated rate contracts entered into under the proposed Rider, should it be approved, are entirely voluntary. Aqua reasons that, absent an interested and eligible customer taking service under the proposed Rider, Aqua's existing customers' rates would not be affected at all. On the other hand, Aqua maintains that when participation in wastewater service at a negotiated discounted rate under the proposed Rider occurs, customers paying full tariffed rates for wastewater service would not be affected until the Company's then next base rate proceeding. Aqua submits that in either scenario, simple approval of the proposed Rider will not present a risk to Aqua's customers. Aqua Exc. at 9-10.

In its Replies to Exceptions, the OCA rebuts that ALJ Chiodo correctly found that approval of Aqua's proposed Rider may put the Company's other customers at risk to pay for the discount in their future rates. The OCA submits that the ALJ properly rejected Aqua's argument that: (1) the revenue impact of discounting rates is smaller than the revenue impact of a large industrial customer leaving the system, and (2) it is better to increase rates for other customers by a smaller amount than a larger one. The OCA agrees with the ALJ that such an argument is mere speculation, because there is no evidence or quantitative analysis to support Aqua's claims about the relative rate impacts. OCA R. Exc. at 5.

The OCA restates its argument that what *is* known and certain is that if Aqua is permitted to offer discounted wastewater rates at present, customers taking service at discounted rates will increase the revenue requirement to be recovered from customers paying full tariffed rates in subsequent base rate cases. According to the OCA, permitting discounted wastewater rates, which will cause known harm, in response to a

speculative, uncertain harm that may occur, is not reasonable. Therefore, the OCA submits that the Commission should deny Aqua's Exception No. 2. OCA R. Exc. at 5-6.

d. Disposition

As previously noted, we concur with the ALJ, the OCA and the OSBA that, at present, Aqua's claims as to the effects of a large industrial wastewater customer leaving its system are speculative. As Aqua's witness, Mr. Packer, conceded, Aqua's asserted need for the proposed Rider is premised upon the *potentially available wastewater alternatives* to Aqua's wastewater service which may become an option in the future for current and future customers in the Company's service territory. Thus, it is not based upon current large industrial customers, with actual available wastewater alternatives, having interest in taking a negotiated discounted rate under Aqua's proposed Rider. *See*, Aqua St. 1-R at 5.

Thus, we find the direct testimony of the OCA's witness, Mr. Jerome D. Mierzwa, to be on point. Namely, Mr. Mierzwa stated that given that Aqua has no current eligible customers interested in its proposed Rider, it is not possible to evaluate and examine the circumstances associated with any potential customer's access to an alternative wastewater supplier to assess whether the proposed terms and conditions of the Rider are reasonable; nor is it possible to determine the impact on remaining customers that may be responsible for any revenue deficiency resulting from a discounted rate contract agreed upon under the proposed Rider. *See*, OCA St. 1 at 8. Further, the record indicates that in addition to the ongoing costs for wastewater service, such alternatives would likely require significant upfront investment to: (1) install a treatment facility or to accommodate wastewater hauling, (2) obtain the associated regulatory approvals, or (3) move the wastewater customer to a location outside of the Company's service territory. *See, Id.* at 7-8.

Therefore, based upon the record before us, we cannot reach a conclusion that it would be either feasible or probable for an Aqua wastewater customer to disconnect from the Company's system, or to leave Aqua's service territory entirely, based simply on it receiving an offer for discounted wastewater service from an alternative wastewater service provider. Moreover, the record indicates that this Commission has not previously approved a wastewater tariff filing that provides for discounted rates for customers with a viable competitive alternative, nor has any Party to this proceeding indicated any knowledge of such tariff provisions being approved for wastewater utilities in other jurisdictions. *See*, OCA Exh. JDM-1 at 9-10; *See also*, R.D. at 11, FOF No. 31.

Next, we find that the record is also devoid of any evidence that if Aqua were to lose a large industrial wastewater customer to a competitive service provider, then its remaining customers would have to pay higher rates than if the Company were able to offer discounts under its proposed Rider. Aqua's witness, Ms. Erin M. Feeney, testified that the minimum rate set forth in the proposed Rider is designed to recover variable wastewater treatment costs, plus the fixed costs on the facilities necessary to serve the customer, and some portion of the fixed costs of the Company's wastewater treatment and collection facilities. Aqua St. 1 at 4-5. Thus, in the event a customer were to leave Aqua's system, it follows that Aqua would experience a decrease in the costs associated with serving that customer. Additionally, we note that in this scenario, it is possible that some of the facilities used to serve that customer would no longer be used and useful in the provision of service and would, therefore, not be eligible to be included in the Company's rate base. *See*, OCA R.B. at 4.

Further, we are not persuaded by the analysis offered by Aqua as to the revenue decreases it would experience if the current eligible customer in its service territory were to elect to participate in the proposed Rider versus the revenue decrease the Company were to experience if the customer were to elect to obtain alternative

wastewater service. *See*, Aqua M.B. at 12-13 (citing OCA Exh. JDW-1 at 5). On review, we find that Aqua has provided only a surface analysis, with no detail to support its claim that its remaining customers would be worse off if it is unable to offer discounted service under its proposed Rider. Thus, as the ALJ observed, while a more detailed analysis might prove Aqua's claims to be true, the present record renders such claims to be ambiguous.⁷

Conversely, we *are* persuaded by the ALJ's findings, and the arguments of the OCA, that, at present, approval of the proposed Rider would place the balance of Aqua's customers at risk. As discussed above, while the potential effects of a customer leaving the Company's system entirely are speculative, all Parties, including Aqua, have noted that in future rate cases, there *will* be a definite increase to the bills of Aqua's customers paying full tariffed rates as a result of customers taking service at negotiated discounted rates. *See*, Aqua M.B. at 21-23; OCA R.B. at 4. In addition, as the OCA observed, Aqua's entire customer base may be negatively impacted between base rate cases, as there would be less revenue available for system operations and investment. OCA R.B. at 7. Accordingly, we echo the ALJ and the OCA that this 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 one or more customers interested in the negotiated discounted rate. At this present time, however, we decline to approve the Company's proposed Rider.

Based on the forgoing, we shall deny Aqua's Exception No. 2 and adopt the ALJ's recommendation on this issue.

⁷ As noted above, the ALJ made this finding in discussing Aqua's analysis regarding the revenue impact if its DELCORA transaction is approved and Kimberly-Clark were to receive the discounted service under the proposed Rider. R.D. at 32-33. We find that in both instances, Aqua has offered only a surface analysis, which does not clearly delineate whether the Company has also accounted for any reduced costs that would be associated with no longer serving the customer.

3. Aqua Exception No. 3: the ALJ's Recommendation To Deny or Modify Proposed Tariff Supplement No. 3 Is Inconsistent With Prior Commission Approval of Similar Tariff Riders

a. Position of the Parties

The OCA submitted that if the Commission approves the proposed Tariff Supplement No. 3, then the OCA recommends changes to clarify the minimum requisite documentation for a potential customer to establish eligibility for service under Tariff Supplement No. 3. Specifically, the OCA proposed that, like documentation required in other industries where contract rates are permitted, Tariff Supplement No. 3 should state 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 necessary for the customer to take service under the competitive alternative. OCA M.B. at 13 (citing OCA St. 1 at 9-10).

The OCA also submitted that, if a discounted rate is approved and given that Aqua has not demonstrated a current need for a wastewater rider, then the tariff should ensure that the Company will provide documentation adequate to demonstrate that a competitive alternative is viable, feasible, and probable in the absence of a negotiated rate. OCA M.B. at 14. Specifically, the OCA proposed that Tariff Supplement No. 3 be modified to reflect the following:

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 or more of its senior managers or its officer.

Id. (citing OCA St. 1 at 9-10).

Aqua submitted that, if the Commission approves Tariff Supplement No. 3, then the OCA's proposed modifications to the language in Tariff Supplement No. 3 should be rejected because the modifications: (1) are not comparable to any utility with similar language for a negotiated rate rider provision; and (2) do not utilize the Company's Rider DIS, which Aqua used to develop Tariff Supplement No. 3. Aqua M.B. at 18-19 (citing Aqua St. 1 at 9; Aqua Exh. WCP-IR Exhibit A). Further, Aqua submitted that it is unaware of any other utility in Pennsylvania with a negotiated rate rider that requires potential customers to conduct and/or provide a feasibility study, cost analysis, or a bid(s) for alternative service. Aqua M.B. at 19-20. Moreover, Aqua submitted that, given that a customer with a viable alternative and seeking to negotiate may be unwilling to disclose such confidential information, the Company, "in the interests of concession," is willing to perform its own feasibility study for each future, potentially-eligible customer, to determine whether participation in Tariff Supplement No. 3 is reasonable and in the best interests of the Company and its customers. *Id.*

b. ALJ's Recommended Decision

The ALJ recommended that, if the Commission approves Tariff Supplement No. 3, then the approval should be conditioned on the adoption of tariff language that requires documentation that a feasibility study be performed by the Company or the potentially eligible customer. The ALJ found that the OCA's recommended modification to Tariff Supplement No. 3 is reasonable to verify discounted rates at less than fully tariffed rates which loss of revenue may be eventually borne by all customers. The ALJ also noted that this documentation is consistent with the concession offered by Aqua.

R.D. at 34, citing Aqua R.B. at 12; Aqua M.B. at 20; *Pa. PUC v. Metropolitan Edison Company*, Docket No. R-00061366 (Order entered January 11, 2007) at 111-12.

c. Aqua Exception No. 3 and Replies

In its Exception No. 3, Aqua argues that, essentially, the ALJ's rejection of Tariff Supplement No. 3 is inconsistent with Commission precedent because the ALJ did not: (1) offer a clear reason why, in the context of wastewater, the Commission should treat negotiated rates differently than it does in other utility sectors; and (2) address the Company's Rider DIS, which was used by the Company to develop Tariff Supplement No. 3. Aqua contends that, contrary to the ALJ's conclusion, record evidence of alternative options for the Company's customers exists, including the option to leave Aqua's service territory. Aqua Exc. at 10-11, citing R.D. at 31; Aqua R.B. at 10-11; Aqua M.B. at 18-21; Aqua St. 1 at 9-10; Aqua Exh. WCP-IR Exhibit A.

Aqua also questions whether the ALJ's alternative recommendation that if the Commission approves Tariff Supplement No. 3, then the Commission adopt certain changes to the language is an adoption of the OCA's proposed changes to Tariff Supplement No. 3. Aqua Exc. at 11-12 (citing R.D. at 34; OCA St. 1 at 10). Aqua notes that, although it is willing to prepare its own feasibility study for future potential customers, the OCA's proposed language does not allow the Company to prepare a feasibility study. Further, Aqua argues that customers should not be required to perform a feasibility study because: (1) the OCA's proposed language is inconsistent and does not compare with other Pennsylvania utilities' negotiated rate riders; (2) there is no guarantee that a prospective customer seeking service under a negotiated rate would conduct and/or provide a feasibility study, cost-analysis, or bid(s) for alternative service; and (3) a customer and other wastewater service vendors may be unwilling to provide proof of alternatives in the negotiation process as it would likely contain competitively sensitive information. Aqua Exc. at 12-13, citing Aqua M.B. at 19-20. Moreover, Aqua contends

that, given that the utility should have a strong incentive to bargain with the customer, the same is true for a customer seeking to negotiate rate service under Tariff Supplement No. 3, which makes it unlikely that a customer with a viable alternative to the Company's service would give up its bargaining power. Aqua Exc. at 13, citing Aqua R.B. at 13; *Pa. PUC, et al., v. Pennsylvania-American Water Company*, Docket Nos. R-00943231, *et al.* (Order Entered July 24, 1995) at 96.

In its Replies, the OCA notes that the ALJ found that Aqua did not provide evidence that a probable option for current or potential wastewater customers to leave the Company's service territory exists. OCA R. Exc. at 6, citing Aqua Exc. at 10-11; R.D. at 30-33; OCA R.B. at 3-4; OCA M.B. at 6-8, 13-14. The OCA counters that, in addition to ongoing wastewater service costs, a significant initial investment would be required to: (1) install a wastewater treatment facility; (2) accommodate wastewater hauling and obtain the necessary regulatory approvals; or (3) move the industry to a different location. OCA R. Exc. at 6-7 (citing R.D. at 31; OCA St. 1 at 7-8). Further, the OCA argues that given the industrial wastewater customers that require pretreatment, the existence of a lesser cost alternative to the Company's wastewater service is uncertain. Moreover, the OCA notes that the ALJ found that the Commission's approval of the Company's Rider DIS was based on facts that are not pertinent here, including: (1) an existing customer requested a discounted rate; (2) evidence was provided and evaluated regarding the specific alternative source of water supply; and (3) the negotiated rate on other customers was analyzed for cost impact. OCA R. Exc. at 7, citing R.D. at 31-32; OCA St. 1SR at 4; *Pa. PUC v. Consumers Pennsylvania Water Company – Roaring Creek Division*, 1997 Pa. PUC LEXIS 93 (Order entered October 14, 1997) at 74-87; *Pa. PUC v. Roaring Creek Water Company*, 1995 Pa. PUC LEXIS 69 (Recommended Decision entered May 5, 1995) at 67-172, 1995 Pa. PUC LEXIS 67 (Order entered May 31, 1995) at 79-91.

The OCA also addresses Aqua’s claim that the ALJ’s conditional adoption of the OCA’s proposed modifications to Tariff Supplement No. 3 lacks clarity, noting that in the Recommended Decision, Ordering Paragraph No. 2 replicates the OCA’s proposed modifications verbatim. OCA R. Exc. at 7-8, citing Aqua Exc. at 11; R.D. at 34-35; OCA St. 1 at 9-10. Further, the OCA notes that contrary to Aqua’s argument otherwise, the OCA’s proposed modification does not require that minimum documentation be provided by the customer, nor does it prohibit the Company from providing such documentation. OCA R. Exc. at 8, citing R.D. at 30; OCA R.B. at 9. Moreover, the OCA notes that as the Company commits to performing its own feasibility study, documentation provided by the customer is not a cause for concern. *Id.*

The OCA also disagrees with Aqua’s argument that utilities in other industries have tariff provisions similar to the Tariff Supplement No. 3 because: (1) no current Aqua customer has requested a discounted rate; and (2) a viable competitive wastewater alternative does not exist. OCA R. Exc. at 8-9 (citing Aqua Exc. at 12-13). Further, the OCA contends that Tariff Supplement No. 3 does not specify adequate documentation to demonstrate the existence of a legitimate, competitive alternative. Moreover, the OCA contends that Tariff Supplement No. 3 must state the minimum documentation to support the Company’s evaluation and assessment of the necessary costs for a wastewater customer to take alternative service. OCA R. Exc. at 9, citing OCA St. 1 at 9-10.

d. Disposition

As a preliminary matter, we shall address Aqua’s argument that the ALJ’s rejection of Tariff Supplement No. 3 is inconsistent with Commission precedent. We note

that the ALJ found the contrast between the proceeding for the Company's Rider DIS⁸ and the instant proceeding to be significant. Specifically, the ALJ found that, in the proceeding for the Rider DIS, evidence was provided and evaluated regarding the alternative source of water supply and the cost impact of the negotiated rate on other customers. Here, however, analysis and evaluation of evidence is not possible because no existing Aqua customers have expressed an interest in Tariff Supplement No. 3. Moreover, Aqua provided no evidence that an option for the Company's current or potential wastewater customers to leave the Company's service territory exists. Thus, as noted by the OCA, the Commission's decision to approve Aqua's Rider DIS was decided on facts and circumstances that are not present or pertinent in the instant proceeding.⁹ We are persuaded by both the ALJ's analysis and the position of the OCA, and therefore, we find that Aqua's argument on this issue has no merit.

As previously indicated, while recommending that the Commission reject Tariff Supplement No. 3, the ALJ only addressed the OCA's proposed modifications to

⁸ *Pa. PUC v. Aqua Pennsylvania, Inc.*, Docket No. R-2021-3027385, et al. (Order entered May 16, 2022).

⁹ As noted, *supra*, Aqua argues that the ALJ ignored the Commission's reasoning in approving the riders for gas and electric utilities associated with the following Commission proceedings: *Pa. PUC v. Peoples Natural Gas Company LLC*, Docket No. R-2018-3006818, et al. (Order entered October 3, 2019); *Pa. PUC v. UGI Utilities, Inc. Gas Division*, Docket No. R-2018-3006814, et al. (Order entered October 4, 2019); *Pa. PUC v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2012-2321748, et al. (Order entered May 23, 2013); and *Pa. PUC v. Duquesne Light Company*, Docket No. R-2021-3024750, et al. (Order entered December 16, 2021). We note that the approval of tariff riders in the context of these proceedings is materially distinguishable from the present case. In each of the referenced proceedings, the Commission approved a joint petition for approval of settlement, which included approval of the respective tariff riders. Moreover, record evidence in each of these proceedings was found sufficient for the Commission to determine that approval of the joint petition for settlement was warranted. Here, however, there is no proposed settlement and Aqua has not provided any evidence of the existence of a viable competitive option for the Company's current or potential wastewater customers to leave the Company's service territory.

Tariff Supplement No. 3 if the Commission wants to approve Tariff Supplement No. 3 and consider the tariff language modifications proposed by the OCA. Thus, in other words, if the Commission adopts the Recommended Decision and rejects Tariff Supplement No. 3, further discussion of the modifications to the language in the Tariff Supplement No. 3, as proposed by the OCA, is not necessary. *See*, R.D. at 1, 4, 34. As we have previously denied Aqua's Exception Nos. 1 and 2, and have rejected Tariff Supplement No. 3, we find Aqua's Exception No. 3 to be rendered immaterial with regard to the ALJ's conditionally recommended modifications to language in Aqua's proposed Tariff Supplement No. 3.

However, for purposes of clarification, as the ALJ found: (1) the OCA's recommended modification is a reasonable request to verify discounted rates at less than full tariff rates; and (2) documentation that a feasibility study be performed by Aqua or the potentially eligible customer is consistent with the concession previously offered by Aqua. *See* R.D. at 34. In this instance, we agree with the ALJ that this is the case, which is strengthened by the fact that, as noted by the OCA, documentation is essential to support the evaluation and assessment of the costs necessary for a customer to take competitive, alternative service. *See*, OCA St. 1 at 9. Nevertheless, Aqua's Exception No. 3 has been rendered immaterial, as it challenges language in Tariff Supplement No. 3 which is not determinative to our disposition above pertaining to the rejection of Aqua's proposed Tariff Supplement No. 3. Therefore, as we shall deny approval of Tariff Supplement No. 3, and expressly decline to adopt the alternative language proposed by the ALJ's Ordering Paragraph No. 2, we shall also deny Aqua's Exception No. 3, as moot.

IV. Conclusion

Upon analysis, we find that Aqua's proposed Tariff Supplement No. 3 is neither reasonable and necessary, nor in the public interest. We shall therefore: (1) adopt the ALJ's Recommended Decision; (2) deny the Exceptions of Aqua; and (3) direct that

Aqua file a supplement removing Tariff Supplement No. 3 from its tariff;

THEREFORE,

IT IS ORDERED:

1. That the Exceptions of Aqua Pennsylvania Wastewater, Inc., to the Recommended Decision of Administrative Law Judge Gail M. Chiodo, issued on June 6, 2023, at Docket Nos. R-2022-3037141; C-2022-3037579, are denied, consistent with this Opinion and Order.

2. That by this Opinion and Order, we shall adopt the Findings of Fact and Conclusions of Law contained in the Recommended Decision of Administrative Law Judge Gail M. Chiodo, issued on June 6, 2023, at Docket Nos. R-2022-3037141; C-2022-3037579.

3. That within thirty (30) days of the date of entry of this Opinion and Order, Aqua Pennsylvania Wastewater, Inc., is directed to file a Tariff Supplement removing Tariff Supplement No. 3 to Tariff Sewer- Pa. P.U.C. No. 3 (Tariff Supplement No. 3) at Docket No. R-2022-3037141, with an effective date of August 17, 2023, in accordance with Tariff Supplement No. 9 to Tariff Sewer- Pa. P.U.C. No. 3 (Tariff Supplement No. 9), which modified the suspension date of August 10, 2023, established by Order of Suspension, filed on February 9, 2023, and by Tariff Supplement No. 8 to Tariff Sewer- Pa. P.U.C. No. 3 (Tariff Supplement No. 8) at Docket No. R-2022-3037141.

4. That upon the filing of the Tariff Supplement effectuating the removal of Tariff Supplement No. 3 to Tariff Sewer- Pa. P.U.C. No. 3 (Tariff Supplement No. 3) at Docket No. R-2022-3037141, 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 shall be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 3, 2023

ORDER ENTERED: August 3, 2023