

COMMONWEALTH OF PENNSYLVANIA



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August 27, 2024

Via Electronic Filing

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

Re: Application of Aqua Pennsylvania Wastewater, Inc. for Approval of
its Acquisition of the Wastewater System Assets of Greenville
Sanitary Authority, Docket No. A-2023-3041695

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Main Brief in this matter. Please note that the **CONFIDENTIAL** version of OCA's Main Brief will only be sent to the parties that have executed the non-disclosure agreement as indicated on the Certificate of Service. The **CONFIDENTIAL** version of the OCA's Main Brief will be e-filed using the Public Utility Commission's Share Point file process.

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 Mark A. Hoyer (email only)
The Honorable Alphonso Arnold III (email only)
Certificate of Service

CERTIFICATE OF SERVICE

Application of Aqua Pennsylvania Wastewater, :
Inc. pursuant to Sections 1102, 1329, and 507 :
of the Public Utility Code for Approval of its : Docket No. A-2023-3041695
Acquisition of the Wastewater System Assets :
of Greenville Sanitary Authority :

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

Dated this 27th day of August 2024.

*** Received Confidential Version**

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Dated: August 27, 2024

**BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 Greenville Sanitary Authority	:	:	:	Docket No. A-2023-3041695
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PUBLIC VERSION

MAIN BRIEF
OF THE
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I. STATEMENT OF THE CASE

The Office of Consumer Advocate (OCA) is a statutory advocate with authority and duty to represent the interest of utility consumers as a party before the Pennsylvania Public Utility Commission (Commission). 71 P.S. § 309-4. The OCA's interest in this case is to protect utility consumers by ensuring that the Commission appropriately exercises its authority to ensure that only where there is a net, affirmative public benefit from approving an acquisition, with or without Commission imposed conditions, can a certificate of public convenience (CPC) be issued.

A. Procedural History

On November 17, 2023, Aqua Pennsylvania Wastewater, Inc. (Aqua, Applicant, or Company) filed an Application under Sections 507, 1102, and 1329 of the Public Utility Code. Through its Application, Aqua requested that the Commission: (1) approve consistent with the provisions of 66 Pa. C.S §§ 1102 and 1103, the acquisition of the wastewater system assets owned by Greenville Sanitary Authority (GSA or Greenville); (2) approve the right of Aqua to provide wastewater service in the Borough of Greenville, Hempfield Township, and West Salem Township in Mercer County, Pennsylvania; and (3) include, in its Order approving the acquisition, the ratemaking rate base of the acquired Assets as determined under Section 1329(c)(2) of the Public Utility Code (Application or the Transaction). Application ¶5. As part of its Application, Aqua requests approval of the Asset Purchase Agreement (APA) dated April 27, 2023. Additionally, Aqua requests approval of other municipal agreements pursuant to Section 507 of the Public Utility Code, to the extent necessary. Finally, Aqua requests that the Commission issue an Order granting the Certificate of Public Convenience authority requested in the Application. *Id.* at ¶¶ 73-74.

Aqua provides wastewater service to approximately 60,000 customers throughout Pennsylvania. Application at ¶ 9. GSA is a municipal corporation organized and validly existing

under the Municipal Authorities Act of 1945, and it owns a sanitary wastewater collection and treatment system which provides sanitary wastewater service to approximately 2,283 customers and which also provides transmission and treatment service for Hempfield Township and West Salem Township (collectively, the Contributing Municipalities). Additionally, Greenville accepts flows from approximately 1,168 Hempfield Township customers and 571 West Salem Township customers. Finally, Greenville provides bulk treatment service for the Contributing Municipalities as these municipalities own their respective collection systems and bill their own residents. Application ¶ 9. GSA also oversees the Borough of Greenville's stormwater system assets under a lease agreement with the borough, OCA St. 1 at 11; OCA Exh. CMH-5. Notably, all GSA customers within the Borough of Greenville are also stormwater customers. *Id.* at 12.

On December 1, 2023, the Office of Small Business Advocate filed a Protest and Notice of Appearance. On December 8, 2023, the OCA filed a Protest and Public Statement, as well as a letter concerning the OCA's inability to review Exhibit Z of the initial filing, which Aqua had designated as Confidential Security Information. On December 20, 2023, Aqua revised the security designation of Exhibit Z to "highly confidential," which permitted parties with the ability to access Exhibit Z within the confines of agreed terms, and Aqua also filed a redacted version of Exhibit Z with the Commission. Between January 11, 2024, and April 12, 2024, Aqua petitioned the Commission five times for extensions of time for the Commission's initial review period of its Application.

By Secretarial Letter dated May 2, 2024, the Commission conditionally accepted the instant application. On June 3, 2024, Keith Gabage filed a Protest against Aqua's Application. On June 11, 2024, Greenville and the Borough of Greenville filed a Petition to Intervene in this matter. Aqua filed a proof of publication on June 18, 2024. The Commission accepted Aqua's application

on June 21, 2024, by Secretarial Letter. The Commission's Bureau of Investigation and Enforcement filed a notice of appearance on June 24, 2024.

On June 26, 2024, a Prehearing Conference Order was issued scheduling a telephonic prehearing conference for July 17, 2024. The Commission's Office of Administrative Law Judge assigned Deputy Chief Administrative Law Judge Mark A. Hoyer (DCALJ Hoyer) and Administrative Law Judge Alphonso Arnold III (ALJ Arnold) (collectively, the ALJs) to preside. On July 17, 2024, the ALJs conducted a Prehearing Conference and counsel for OCA, Aqua, GSA, I&E, and OSBA participated. During the Prehearing Conference, the parties and the ALJs adopted a litigation schedule and established other procedures necessary for the conduct of this case, including the scheduling of a telephonic public input hearing. Thereafter, on July 22, 2024, the ALJs issued a Prehearing Order memorializing the protocols in place for this case. A telephonic public input hearing was held in this case on July 30, 2024 at 6 p.m., and four witnesses provided testimony, including Protestant Keith Gabage.

On July 26, 2024, the OCA served the direct testimony of Christine Maloni Hoover; I&E and OSBA also served direct testimony that same date. Both Aqua and OSBA served rebuttal testimony on August 2, 2024. The OCA, I&E, OSBA, and Aqua served surrebuttal testimony on August 9, 20234. On August 13, 2024, Aqua submitted written rejoinder testimony.

On August 15, 2024, the ALJs conducted telephonic evidentiary hearings. At the hearings, testimony and exhibits were entered into the record and cross examination was conducted. The OCA entered OCA's testimony and exhibits into the evidentiary record. Tr. at 123-126. Pursuant to the procedural schedule adopted in this case, and in accordance with the Commission's regulations at 52 Pa. Code § 5.501, the OCA submits this Main Brief.

B. Overview of the Proposed Transaction

In accordance with Section 1102 of the Public Utility Code, Aqua is requesting a Certificate of Public Convenience to acquire GSA’s wastewater system assets and provide wastewater service to those areas previously served by GSA in the Borough of Greenville, Hempfield Township, and West Salem Township in Mercer County, Pennsylvania. Application at ¶ 5. Aqua proposes to pay \$18 million for GSA’s assets that have a depreciated original cost value of approximately \$6.9 million. More specifically, GSA’s assets have an original cost of \$13,638,921 with a depreciation reserve of \$6,784,482.¹ Application at ¶¶ 5, 20. With the calculated accrued depreciation reserve of \$6,784,482, the net book value of the GSA wastewater assets is \$6,854,439.² OCA St. 1 at 5. Application at ¶¶ 5, 20. Aqua chose to file its application under Section 1329 of the Public Utility Code; accordingly, Aqua requests that the GSA purchase price of \$18,000,000 be approved as the rate base for ratemaking purposes. Application at ¶¶56-57.³ In addition, Aqua seeks approval from the Commission for several other municipal agreements pursuant to Section 507 of the Public Utility Code, including the APA and enumerated municipal agreements. Application at ¶ 73.

¹ The depreciated original cost was established using a plant in service date as of May 31, 2023. See Aqua Application, Appendix D, Facility Engineering Assessment of GSA’s assets performed by KLH Engineers, Inc. at 7. See also Application Exhibit , calculated Annual and Aqua’s Exhibit HJW 8, Accrued Depreciation Related to Original Cost at May 31, 2023.

² Depreciated original cost, as used in Section 1329(d)(5), does not reflect an offset for contributed plant or capital, as is done in ratemaking.

³ Under Section 1329, the purchasing utility may include in ratemaking rate base “the lesser of the purchase price negotiated by the acquiring public utility or entity and selling utility or the fair market value of the selling utility.” 66 Pa.C.S. § 1329(c). In this case, Aqua’s UVE appraisal was \$24,060,000. Application Exhibit Q (later updated to \$23.3 million on April 15, 2024). The Borough’s UVE appraisal was \$18,757,633. Application Exhibit R (later updated to \$18,695,839 on April 15, 2024). The average of the two UVE appraisals is \$21,408,816.50, which is greater than the purchase price of \$18 million; as a result, if this transaction is approved.

II. BURDEN OF PROOF

A. Burden of Proof, 66 Pa. C.S. § 332(a)

As the proponent of an order in this proceeding, Aqua has the burden of proof to establish that it is entitled to the relief it is seeking. 66 Pa.C.S. § 332(a). Aqua must demonstrate its case by a preponderance of evidence. *Lansberry v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. Ct. 1990) (*Lansberry*), *alloc. denied*, 602 A.2d 863 (Pa. 1992). More precisely, Aqua’s evidence supporting its case must be more convincing than the evidence presented by any opposing party against it. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). Additionally, a Commission decision must be supported by substantial evidence in the record. Indeed, “the elements of that cause of action [must be] proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.” *Burleson v. Pa. PUC*, 461 A.2d 1234, 36 (Pa. 1983). Additionally, the evidence must be substantial and legally credible, and cannot be mere “suspicion” or a “scintilla” of evidence. *Lansberry* at 602; *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

B. Substantial Public Benefits, 66 Pa.C.S. § 1103(a)

The Applicant has the burden of proving that the acquisition will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *City of York v. Pa. P.U.C.*, 295 A.2d 825, 828 (Pa. Cmwlth. Ct. 1972) (*City of York*); 66 Pa. C.S. § 315(c). Under *City of York*, the Commission must conduct a “net benefits assessment,” whereby the proposed substantial benefits of a transaction must outweigh the harms caused by the transaction, should the Commission approve the Application. *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040, 1056 (Pa. 2007) (*Popowsky*). To satisfy Section 1103, the utility must demonstrate that the transaction has more than the mere absence of any adverse effect upon the public. *City of York* at

828. As the Commonwealth Court explained, “when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties, and not merely on one particular group or geographic subdivision...” *Middletown Township v. Pa. PUC*, 482 A.2d 674, 682 (Pa. Cmwlth. Ct. 1984). The Court added that “the primary objective of the law in this area is to serve the interests of the public.” *Id.*; *see also Popowsky*, 937 A.2d at 1057.

As the Supreme Court explained in *City of York*, relevant to the Commission’s determination of affirmative public benefit is the transaction’s likely effect on service and rates:

[A]t least in a general fashion, the effect that a proposed merger is likely to have on future rates to consumers. Along with the likely effect of a proposed merger upon the service that will be rendered to consumers, ***the probable general effect of the merger upon rates is certainly a relevant criteria of whether the merger will benefit the public.***

City of York, 295 A.2d at 829 (emphasis added). In applying the above language from *City of York*, the Commonwealth Court held that the Commission must perform “the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, *including the impact on rates*, to determine if there is a substantial public benefit.” *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1066-67 (Pa. Cmwlth. Ct. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*) (emphasis added).

Additionally, the Commission may consider: “(1) the legal and technical fitness of the purchasing entity to provide service; (2) the public need for service; (3) the inadequacy of the existing service; and (4) any other relevant evidence.” *Application of North Heidelberg Water Co.*, 2010 PaPUC LEXIS 919 (June 7, 2010), R.D. at *20. However, to qualify as benefits of a transaction, the services, expertise, or fitness provided by the acquiring utility must differ substantially from the benefits already provided by the system operator, and must be specific to

the transaction in question, not merely arising out of the fitness of the acquiring utility. *Cicero v. Pa. P.U.C.*, 300 A.3d 1106, 1119 (Pa. Cmwlth. Ct. 2023) (*Cicero*), appeal docketed at 568 MAL 2023, No. 569 MAL 2023, No. 570 MAL 2023 (June 14, 2024)). Furthermore, the Court clarified that:

Where...there are **no benefits that differ substantially** from the benefits already being provided by the existing system operator, those alleged benefits arise as a result of the acquiring utility's fitness, rather than from the actual transaction, and where there are acknowledged or known harms that will result from the transaction, there are insufficient net benefits to support approving the transaction and granting the [Certificate] under Section 1103(a).

Id. at 1120 (emphasis added). The Court explained that providing the same services as are already being provided, or providing for upgrades that the existing system operator is capable of providing, are not substantial affirmative benefits consistent with *City of York*, especially if the existing system is already operating safely and reliably. *Id.* at 1119. Moreover, the public benefits arising from aspirational statements or benefits that cannot be quantified at the time of the transaction may not always constitute affirmative public benefits that will be substantial enough to outweigh known harms. *Id.* at 1121.

In sum, for an acquiring utility to warrant an approved Certificate of Public Convenience for the proposed acquisition of another utility, the acquiring utility must demonstrate by a preponderance of the evidence that benefits will arise out of the transaction which: (1) are substantial and unique to the transaction; and (2) outweigh the acknowledged or known harms that will result from the transaction. That is, the law requires that the Commission conduct a fact-based evaluation and fact-based balancing such that any approval must demonstrate that the public is better off – on net – because of the transaction than it would be in the absence of the transaction, and this decision must be rooted in the facts that are specific to both the acquiring utility and the acquired system. *Application of Pennsylvania-American Water Co. under Section 1329 for*

Acquisition of the Butler Area Sewer Authority, Docket No. A-2022-3037047 at p. 14 (Order Nov. 9, 2023) (BASA Order) (citing *Cicero*, 300 A.3d at 1117).⁴

Finally, the Commission can impose just and reasonable conditions in granting CPC authority. 66 Pa.C.S. § 1103(a). Section 1103(a) states: “The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.” *Id.*

C. Contracts Between Utilities and Municipal Corporations, 66 Pa.C.S. § 507

The Commission has the authority in this proceeding to determine the reasonableness, legality or any other matter affecting the validity of the proposed APA that Aqua wishes to enter with GSA. Section 507 states, in relevant part:

[N]o contract or agreement between any public utility and any municipal corporation shall be valid unless filed with the commission at least 30 days prior to its effective date. Upon notice to the municipal authorities, and the public utility concerned, the commission may, prior to the effective date of such contract or agreement, institute proceedings to determine the reasonableness, legality or any other matter affecting the validity thereof. Upon the institution of such proceedings, such contract or agreement shall not be effective until the commission grants its approval thereof.

66 Pa. C.S. § 507. Aqua bears the burden of proof to demonstrate with substantial evidence that the proposed APA should be approved under Section 507.

III. STATEMENT OF QUESTIONS INVOLVED

1. Has Aqua failed to present substantial evidence that the Transaction will provide an affirmative public benefit?

Suggested answer: Yes. In most cases, the public benefits that Aqua, and to some degree, GSA, allege will result from the Transaction are predicated upon Aqua’s fitness to operate the GSA system. Aqua’s fitness, while not challenged, is not, on its own, a substantial public benefit, and particularly not here where evidence reveals that GSA is already complying with applicable standards. In other cases, the alleged public benefits are actually contradicted by record evidence, as is the case with GSA’s claimed community benefits from the sale proceeds that will not be realized. On the

⁴ Available at: <https://www.puc.pa.gov/pcdocs/1805882.pdf>.

other hand, Aqua's decision to pay \$18 million for the GSA system will have measurable, detrimental rate consequences for existing and acquired customers that far outweigh any benefits that may materialize. Finally, Aqua and GSA raised contradictory claims about the GSA system that conflict with the terms of the Asset Purchase Agreement underlying the Transaction, creating an irreconcilable conflict that does not comport with a public benefit determination. The record supports a determination that Transaction detriments will far outweigh any benefits.

IV. SUMMARY OF ARGUMENT

Aqua's request for approval of its proposed purchase of the GSA wastewater system under Sections 1102 and 1103 of the Public Utility Code should be denied because Aqua failed to establish that the transaction would result in substantial affirmative public benefits. 66 Pa. C.S. §§ 1102, 1103; *City of York*, 295 A.2d at 828; *Popowsky*, 937 A.2d at 1057; *McCloskey*, 195 A.3d at 1067. Aqua's averred benefits are either not benefits at all – because they do not differ in any substantial way from the technical, legal, or financial capability of GSA – or they do not outweigh the substantial adverse impact on its existing wastewater customers and the GSA customers who would be served by Aqua following the close of the proposed transaction.

From a rate perspective, the detriments are significant, even while they are likely understated. The only clear Transaction consequences for Aqua's existing customers are the higher rates they will pay if Aqua's Application is accepted. Significantly, Aqua projects an annual revenue deficiency of \$2.23 million for operating the GSA system, which, while already substantial, will likely increase. To be sure, OCA has demonstrated that Aqua's projections of revenue deficiencies for recently acquired systems have been understated by as much as almost \$2 million, suggesting that the \$2.23 million revenue deficiency Aqua projects may be far more conservative than the actual deficiency realized. For GSA customers, the rate impact of moving from compliance – which is where GSA is currently -- to “top of the class” service, as Aqua suggests, is an 185% increase in rates at the time of closing. This rate impact does not include

the normal Aqua rate increases that will likely materialize. Additionally, GSA customers' projected rate impacts also do not include the rate increases that may be shifted to them from the acquisitions of other systems through fair market value as has happened to other former municipal system customers acquired by fair market value. Thus, Aqua's decision to pay \$18,000,000 for the GSA system, which is 2.63 times higher than the net book value of \$6,854,439, will have measurable, detrimental rate consequences for existing and acquired customers that far outweigh any benefits. On these facts alone, Aqua's Application should be denied.

Additionally, the Commission should deny Aqua's Application because Aqua failed to demonstrate that the APA is reasonable or valid under Section 507. Aqua has made representations in this record regarding **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** that directly conflict with the representations that GSA made about its system in the APA (see Article IV, *Representations and Warranties of the Seller*, Section 4.13 Environmental Compliance). Importantly, GSA's representations in the APA about environmental matters form part of the basis of Aqua's agreement to pay GSA \$18 million for the system assets, and the contradiction has not been reconciled by Aqua in this record, which warrants rejection of the APA and thus rejection of the Application. Finally, in the event that the Commission determines to approve the proposed transaction under Sections 1102 and 1103, the OCA identified several conditions that are essential to mitigating ratepayer harm and to protecting the public interest and they should be adopted as part of such determination.

V. ARGUMENT

A. Section 1102 and 1103 - This Transaction Does Not Result in Net Affirmative Public Benefits

1. Introduction

In addition to the requirements of Section 1329, the proposed transaction must satisfy Section 1102. 66 Pa. C.S. § 1102. As proposed, Aqua has not supported that the acquisition will produce affirmative public benefits for its existing wastewater and water customers and the acquired GSA customers. Aqua has failed to show that the transaction would provide the required affirmative benefits and therefore should not be approved or at a minimum, only be approved with the acceptance of the appropriate and necessary conditions, including those recommended by the OCA.

As outlined more fully throughout this brief, the general benefits claimed by Aqua in this Application would apply to any system acquisition by Aqua and this, standing alone, is not sufficient to meet the substantial public benefit standard. *Cicero*, 300 A.3d at 1119. On the other hand, all existing Aqua and GSA customers will pay higher rates because of this transaction, and such future rate harm outweighs the few, if any, benefits of the transaction. OCA St. 1 at 24; OCA St. 1 SR at 3.

In this proceeding, the Commission must fully consider the impacts of this acquisition on three specific groups of customers with respect to the traditional *City of York* affirmative public benefits test: (1) the existing Aqua wastewater customers, (2) the existing Aqua water customers—who may potentially bear costs of the GSA system, if the Commission permits costs to be shifted under 66 Pa. C.S. § 1311(c), and (3) the existing GSA customers who will be transferred to Aqua. As the OCA demonstrated in the record of this case, and as set forth in this Main Brief, approval of Aqua's Application would be detrimental to all identified groups of customers. Accordingly,

Aqua has failed to meet its burden of demonstrating that substantial public benefits will result from the Application's approval, that those benefits arise out of the instant transaction, and that those benefits outweigh the known or foreseeable harms which will result from approval. 66 Pa.C.S. §§ 1102, 1103; *City of York*, 295 A.2d at 828; *Popowsky*, 937 A.2d at 1057; *McCloskey*, 195 A. 3d at 1067; *Cicero*, 300 A.3d at 1119-21. Because Aqua has not demonstrated that the proposed transaction will meet the substantial public benefit standard under Sections 1102 and 1103, the instant Application must be denied. 66 Pa.C.S. §§ 1102, 1103; *City of York*, 295 A.2d at 828; *Popowsky*, 937 A.2d at 1057; *McCloskey*, 195 A. 3d at 1067.

2. Fitness: Aqua's Fitness and Benefits that Flow From it are Not Substantial Affirmative Public Benefits.

The OCA did not contest Aqua's fitness as a certificated public utility. However, under *Cicero*, Aqua is required to present evidence that any benefits which derive from its technical, managerial, or financial fitness provide a substantial benefit over the fitness of the acquired utility. *Cicero*, 300 A.3d at 1119. As discussed below, Aqua has not provided evidence sufficient to prove that the approval of the instant Application would create a substantial improvement for GSA customers over the *status quo*.

3. Substantial Affirmative Public Benefits: There are no Substantial Affirmative Public Benefits Resulting from this Transaction

a. The Transaction will result in substantial rate harm to customers.

While the Commission is vested with the ultimate authority to set the rates charged by regulated public utilities, it is axiomatic that someone will have to pay for the annual revenue requirement deficiency that would result if the Commission approves this transaction and, thus, it is both likely and foreseeable that the rates paid by existing Aqua customers will increase as a result of this transaction. To be sure, Aqua projects an annual revenue deficiency of \$2,223,000 for

its operation of the GSA system. Aqua St. 3 at Appendix A; OCA St. 1 SR at 19. While the \$2,223,000 deficiency that Aqua projects is already substantial, it will likely increase, as OCA has demonstrated that Aqua's projections of revenue deficiencies for recently acquired systems have been understated by as much as almost \$2 million. OCA St. SR at 6. Taking into account Aqua's historic under projection of revenue deficiencies for acquired systems, it is likely that Aqua's existing customer base will be subject to absorbing costs that are not yet quantifiable and which may be substantial. In return, Aqua has provided no concrete benefits to existing Aqua customers which will result from this transaction, outside of vague, illusory, aspirational and unsupported statements regarding cost-sharing, regionalization, and consolidation that are at odds with GSA's small customer base and standalone sewer system.

The lack of benefits and clear detriments for existing customers only serve to compound the rate burdens that Aqua's customers have already borne to date. To gauge the impact that existing customers have already faced, and continue to face, OCA witness Hoover provided an analysis to demonstrate the rate increases that Aqua's existing customers have historically borne to cover the revenue deficiencies from Aqua's fair market value acquisitions. More specifically, in Aqua's 2021 rate case, it included 5 acquisitions made pursuant to fair market value. Aqua proposed an overall increase in annual revenues of \$96.99 million, or an 18% increase in revenues. Aqua proposed to shift \$20.8 million from wastewater to water customers under Section 1311(c). Although the Commission did not adopt Aqua's original proposal, it approved shifting \$11.2 million to water customers of the overall increase of \$70.393 million. *Pa. PUC v. Aqua Pa., Inc.*, Docket Nos. R- 2021-3027385 (water) and R-2021-3027386 (wastewater) (Order entered May 12, 2022) at Table Act 11. OCA St. 10. Significantly, in its pending base rate cases, , Aqua proposes to include three more acquisitions valued using fair market value. *PA. PUC v. Aqua Pennsylvania*,

Inc. and Aqua Pennsylvania Wastewater, Inc, R-2024-3047822 et al. All three acquisitions (Lower Makefield, East Whiteland, and Shenandoah Water) have even greater annual revenue shortfalls in this first rate case compared to the revenue deficiencies at closing. The shortfalls for Lower Makefield, East Whiteland, and Shenandoah Water are \$1.4 million, \$698,708, and \$1.98 million, respectively, and they are likely to continue to grow. *Id.* at 10-11; *See also* OCA Exhibit CMH-1SR.

Aqua water customer Keith Gabage explained the burden Aqua's existing customers face from the impact of acquisitions from his perspective, and he testified about that perspective at the public input hearing held in this case on July 30, 2024. Mr. Gabage testified that the higher purchase price Aqua agrees to pay, the more customers have to pay. Tr. at 71. Mr. Gabage used a cupcake analogy to explain the layering of rate impacts imposed by Aqua's continue Section 1329 acquisitions:

At the end of the day, I mean, literally, my view of these notice of proposed acquisition and rate base additions are like, you know, ordering a cupcake. And every time an acquisition is proposed, you know, you're literally putting an extra layer of icing on the cake. And at the end of the day, after maybe nine or ten acquisitions, I'm buying more icing than I am getting a cupcake.

Tr. at 75-76.

Mr. Gabage concluded his cupcake analogy by indicating his concerns about deceptiveness about the true impact to water customers who are supporting the acquisitions. *Id.* at 76.

To be sure, the continued rate burden Aqua's customers would face under the Transaction are exacerbated in that Aqua has agreed to pay GSA a steep, premium price that is multiple times more than the GSA's system's depreciated original cost. More specifically, Aqua provided the Engineering Assessment submitted by KLH Engineers, Inc. as Exhibit D to the Application. According to Section III, ¶ 20 of the Application, and that report established the depreciated

original cost. As indicated on page 5 of the Engineering Report, the original cost of the system is \$13,638,921. With the calculated accrued depreciation reserve of \$6,784,482, the net book value of the GSA wastewater assets is \$6,854,439.1 (OCA St 1 at 5) Aqua agreed to pay \$18,000,000 for the GSA system, or \$11,145,561 over the average net book value. The purchase price is 2.63⁵ times higher than the net book value. OCA St. 6.

In order to put Aqua’s purchase price for GSA in better context, the Commission recently released its first annual Reasonableness Review Ratio (RRR), which serves as a reference for assisting the Commission’s review of Section 1329 purchases. *Bureau of Technical Utility Service Report on the Reasonableness Review Ratio for the Year Ended 12.31.2023 to Approximate Market Value in Section 1329 Proceedings*, Docket No. M-2024-3050303. Specifically, from the vantage point of an approximation of a ratio of a proxy fair market value to the depreciated original cost of similarly-situated investor owned water utilities, the Commission calculated a RRR. *Id.* at 1. The RRR is not binding and it does not establish any legal standard; however, it serves as a reference point. *Id.* The Commission’s recently-determined RRR result identified 1.68 as the reference point formed by its analysis. *Id.* at 6. While OCA acknowledges that, from a timing perspective, no RRR was calculated at the time Aqua’s submitted its Application on November 17, 2023, and while it is not determinative,⁶ the OCA submits that Aqua’s 2.63 ratio of fair market value to depreciated cost is significantly higher than the Commission’s 1.68 RRR.

While GSA will receive a premium price for its system, which Aqua and GSA claim is “troubled” and “non-viable” in certain contexts as described more thoroughly below, there are no substantiated, quantifiable benefits for Aqua’s customer base. The only clear Transaction

⁵ $(\$18,000,000 / \$6,854,439) = 2.63$

⁶ *Valuation of Acquired Municipal Water and Wastewater Systems- Act 12 of 2016 Implementation*, Final Supplementation Order, M-2016-2543193, at 114 (Entered July 2, 2024).

consequences for Aqua's customers are the higher rates they will pay if Aqua's Application is accepted.

b. The Transaction Benefits Alleged by Aqua are Mainly Insubstantial and Unlikely to Materialize and Do Not Outweigh the Substantial Rate Harm

The known and foreseeable harms which will result from approval of this Application outweigh the rather insubstantial benefits which Aqua avers will result from approval. First, even accounting for projected annual operating savings associated with GSA being a part of a larger system, the *overall increase* in annual costs under Aqua ownership will generate an annual revenue deficiency of \$2,223,000 and increase rates for the acquired GSA customers, as well as for Aquas' current customer. OCA St. No. 1 at 19. Thus, regardless of any cost savings or economies of scale, Aqua is still projecting a revenue deficiency of 180.85% of current revenues. (Aqua St. 3, App'x A at 1). This means that any savings resulting from Aqua's acquisition of the system are not sufficient to outweigh the substantial cost to GSA customers to provide Aqua with its return on rate base, among other costs. Furthermore, as outlined more fully in various sections below, the record is devoid of any evidence that there are any net benefits to the transaction. Aqua has failed to meet its burden of demonstrating that substantial benefits will result from the Application's approval, that those benefits arise out of the instant transaction, and that those benefits outweigh the known or foreseeable harms which will result from approval.

The gist of Aqua's argument in this case is that making GSA operate exactly like Aqua operates its existing wastewater systems will provide affirmative benefits despite the rate impact of the \$18 million purchase price and the \$20 million of capital expenditures. The OCA's position is that the harms related to the transaction, including, but not limited to, the rate harm, imposed ratemaking rate base and subsequent capital expenditures, do not outweigh the purported benefits

in this proceeding. The evidence in this proceeding shows that GSA is operating in accordance with regulatory requirements. If acquired by Aqua, Aqua is essentially saying that GSA's operations will be brought up to Aqua's standards, but at the \$18 million purchase price, the rate impact of moving from compliance – which is where GSA is currently -- to top of the class is an 185% increase in rates at the time of closing. The additional \$20 million of capital expenditures will nearly double the rates over the first ten years. Those rate impacts do not include the normal Aqua rate increases that would be approved over the course of the same 10 year period. Those rate impacts also do not include the rate increases that may be shifted to former GSA customers from the acquisitions of other systems through fair market value as has happened to other former municipal system customers acquired by fair market value. OCA St. 1 SR at 3. All of these harms are real and tangible and cannot be ignored under applicable law. Under Section 1102 of the Public Utility Code, the Commission may grant a certificate of public convenience to a regulated public utility, permitting that utility to begin to offer service in an additional territory, and to acquire property used and useful in the public service, as is requested in this application. 66 Pa. C.S. § 1102(a)(1), (3). Section 1103 provides that the Commission may only grant a certificate of public convenience “if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103.

In *City of York*, the Pennsylvania Supreme Court established the standard applied by the Commission under Section 1103. The Court addressed the Commission's approval of the proposed merger of three telephone companies, where the Commission's approval was based on the absence of adverse effects. *City of York* at 828. Specifically, the Court held that:

Section [1103] of the Public Utility Law requires that those seeking approval of a utility merger demonstrate more than the mere absence of any adverse effect upon

the public. Section [1103] requires that the proponents of a merger demonstrate that the merger will affirmatively promote the “service, accommodation, convenience, or safety of the public” in some substantial way.

Id. (referring to Section 203, the predecessor statute to Section 1103) (quoted in *Application of Pennsylvania-American Water Co.*, Docket No. A-2016-2537209, Order at 11 (Oct. 19, 2016)).

This is the standard by which all acquisitions proposed by Commission-regulated utility companies must be judged.

The Commonwealth Court, in *Middletown Township v. Pa. P.U.C.*, 482 A.2d 674 (Pa. Cmwlth. Ct. 1984) (*Middletown*), clarified that *City of York* required weighing the impact of the proposed merger on all affected parties, not just certain groups. In that case, Middletown Township filed an application for a Certificate of Public Convenience to acquire part of the facilities of the Newtown Artesian Water Company. *Id.* at 678. After finding that the Commission’s rejection of Middletown’s application was supported by substantial evidence, the Commonwealth Court affirmed the Commission’s decision, deciding that “when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on *all affected parties*, and not merely on one particular group or geographic subdivision as might have occurred in this case.” *Id.* at 682 (emphasis in original). The Court added that “the primary objective of the law in this area is to serve the interests of the public.” *Id.*; *see also Popowsky*, 937 A.2d at 1057.

Sections 1102 and 1103, as a result, require an Applicant to demonstrate that a proposed acquisition provides an affirmative public benefit, meaning that the benefits of the transaction outweigh the adverse impacts of that transaction, when all affected parties are considered. *Application of CMV Sewage Co., Inc.*, 2008 PaPUC LEXIS 950, *30 (Dec. 18, 2008) (*CMV*). This is commonly referred to as the “affirmative public benefits test.” *See Popowsky* at 937 A.2d at

1052-53. To determine whether benefits meet this standard, the Commission may consider: “(1) the legal and technical fitness of the purchasing entity to provide service; (2) the public need for service; (3) the inadequacy of the existing service; and (4) any other relevant evidence.” *Application of North Heidelberg Water Co.*, 2010 PaPUC LEXIS 919, *20 (June 7, 2010).

The Commonwealth Court recently provided additional clarity to the evaluation of utility acquisitions under Section 1102 and 1103 and the relationship between these sections and Section 1329. The Court held that the benefits which derive from the acquiring utility’s technical, managerial, and financial fitness are not sufficient to satisfy the utility’s burden under *City of York* to find substantial affirmative benefits, where the system being acquired provides similar benefits. *Cicero*, 300 A.3d at 1119. Instead, only those benefits which are specific to the transaction before the Commission are considered substantial; and only those benefits may be weighed against the harm which would result from the proposed transaction. *Cicero*, 300 A.3d at 1120.

This application fails to meet the appropriate legal standard. The benefits Aqua asserts will result from the transaction are almost exclusively based on its fitness -- especially as derived from its size and its desire to make GSA like Aqua -- and not specific to the transaction proposed in this Application and are not marked improvements over the safe and reliable service already being provided by GSA.⁷ The general benefits claimed by Aqua would apply to *any* utility acquisition Aqua could engage in and this, standing alone, is not sufficient to meet the *City of York* standard. *Cicero*, 300 A.3d at 1119.

⁷ The OCA recognizes that Aqua argues that it will make improvements to the safety by enhancing physical and cybersecurity measures; however, there is no evidence that GSA cannot do these things, there is only evidence that it elects not to do so. See Aqua St. 1 at 1-28; GSA St. 1 at 8-10. The OCA avers that rewarding GSA with a windfall for its willful failure to make improvements that an investor-owned utility will make at a higher cost to GSA, when GSA is capable of making these investments is antithetical to the public interest and cannot be viewed as a substantial public benefit.

Under *Cicero*, a regulated public utility applying for a Certificate of Public Convenience approving a proposed merger must demonstrate that benefits will result from the transaction which are specific to the proposed transaction and do not merely flow from the acquiring utility's fitness. *Cicero*, 300 A.3d at 1120. In that case, Aqua Pennsylvania Wastewater, Inc. (Aqua), sought Commission approval of its acquisition of the East Whiteland Township wastewater system, averring that the acquired customers would benefit from Aqua's managerial and technical expertise, access to capital, and other, aspirational, proposed benefits. *Id.* at 1117. The Commission approved the application; however, the Commonwealth Court reversed, finding that Aqua's reliance on general, aspirational benefits flowing from its fitness were not substantial enough to outweigh the known harms of the proposed transaction. *Id.* at 1120. Instead, the Commonwealth Court applied the *City of York* standard, that affirmative public benefits must arise from and be specific to a transaction, and outweigh the harms of the transaction, such that substantial affirmative public benefit would result therefrom *Id.*

In its Application, Aqua avers several benefits, each of which flow from the technical, managerial, and financial fitness of the Company. The OCA does not contest that Aqua is fit. *See McCloskey*, 195 A.3d at 1058 (certificated public utilities are presumed to be fit). However, Aqua's proposition that GSA customers would benefit from, among other things, additional capital investment by Aqua and better customer service relate more to Aqua's fitness than to the proposed transaction, specifically. Therefore, the OCA submits that these purported benefits are not substantial and, instead, simply perpetuate the *status quo*.

c. Aqua's Claimed Capital Improvement Benefits for the GSA Rely on Assumptions that Do Not Comport with the Record and Will Increase Costs.

In addition to agreeing to pay \$18 million for a system that has a depreciated original cost of \$6.9 million – which is 2.6 times the depreciated original cost – Aqua proposed to spend more than \$20.4 million in investments in the system over the next 10 years ostensibly to upgrade the GSA's system, Aqua does not tie its spending level and projected timeline to any demonstrated environmental compliance directive or other regulatory requirement. *See* Aqua St. No. 2 at 10. That is, there is no known or documented requirement for this spending and, instead, the record indicates that before entering the Transaction, GSA had already begun working to improve its system, as it devoted \$2.8 million on engineering design for upgrading its treatment plant before stopping its work because of its decision to sell to Aqua. *Id*; OCA St. 1 at 15. In fact, when Aqua submitted its Application on November 17, 2023, GSA had no then-current environmental compliance issues that necessitated the capital spending that Aqua now projects. Aqua St. No. 2 at 16. Tellingly, the only identified compliance issue that arose since then occurred as a direct result of GSA's decision to sell to Aqua, as, during the pendency of this case, GSA received a notice of breach from the PA Department of Environmental Protection (DEP) that resulted directly from GSA's failure to move forward under its Consent Order and Agreement (COA) with DEP. OCA St. 1 SR at 9; OCA Exh. CMH-2SR. Based on the evidence in this case, GSA's reasons for not moving forward with the COA obligation is because it entered into the APA with Aqua. Aqua St. No. 2-R at 10-11. However, nothing in the record indicates that GSA is either incapable or unwilling to meet its COA obligation with DEP in the absence of this transaction, and the OCA submits that a party who stands to benefit from the transaction – GSA – should not be permitted to manufacture compliance issues through its neglect of this obligation *after* signing an APA and

then point to this fact as a need for relief. Thus, the record is devoid of evidence that the more than \$20 million in capital improvements that Aqua proposes to make are anything more than Aqua wanting to make GSA more like Aqua and this additional spending is not a benefit per se.

From a practical perspective, OCA witness Hoover explained that the treatment plant and collection system projects that Aqua identified are the types of projects that a wastewater system undertakes in its normal course of business. OCA St. 1SR at 8. Capital projects needs not all be done immediately nor in the short-term. OCA St. 1 SR at 8.. No regulatory urgency for Aqua's planned upgrades and projected timeline was identified, and GSA indicated that it has been able to replace all infrastructure within the system and make all necessary upgrades within the past 10 years. OCA St. 1 at 14; OCA Exh. CMH-6. Moreover, under Aqua's ownership, the capital projects will include costs that GSA would not have to pay, such as taxes and costs related to Aqua's return on equity for shareholders. On these facts, while Aqua may be able to provide faster upgrades than GSA contemplated, the is no demonstrated need for Aqua to do so, and the increased costs that Aqua's improvements will generate for ratepayers does not support a determination that Aqua's capital improvement plan for GSA is a substantial affirmative public benefit.

d. Aqua's claims that Operating and Maintenance Costs for the GSA System Will Decrease under its Ownership Are Immaterial in Light of the More Than \$2 Million in Net Rate Harm.

Aqua argues that an affirmative public benefit of the Transaction will materialize in the form of reduced operating and maintenance costs of the GSA system under its ownership, but those claims do not withstand scrutiny. More specifically, Aqua witness Packer indicated that Aqua projects that there will "likely be less operating and maintenance costs under its ownership through reductions in costs for wastewater maintenance, as well as efficiencies in administrative and general costs, such as insurance, auditing and legal, among others" Aqua St. 3 at 14. According to

Mr. Packer, while GSA's 2022 financial Statements identified \$1.160 million in operating and maintenance expenses for the GSA system, Aqua projects annual expenses of \$0.996 million, representing a reduction of \$164,000, or 14%. *Id.* Aqua also incorporated the projected savings of \$164,000 into its projected revenue requirement calculated for GSA, which still nets an annual \$2.223 million shortfall. OCA St. 1 at 19. Thus, on net, even assuming Aqua's projected savings materialize, the reality is that GSA rates are insufficient to cover its cost of service under Aqua's ownership and the other Aqua ratepayers will have to have their rates increased by at least \$2.223 million each and every year. In reality this shortfall is likely under projected, as the OCA provided unrefuted evidence to demonstrate that in three of Aqua's recent acquisitions, Lower Makefield⁸ (wastewater), Shenandoah Water⁹, and East Whiteland Township¹⁰ (wastewater). Aqua's projected revenue deficiencies for those systems were underprojected by \$706,082, \$1,402,877, and \$1,981,719, respectively. OCA St. 1 SR at 6

Additionally, with the benefit of additional context, as OCA witness Hoover also demonstrated, Aqua's projected cost savings are selectively determined in a manner that ignores the reality of other costs that GSA, as a municipal system, would not have incurred, but which Aqua, an investor-owned utility must pay. *Id.* Although Aqua ignores such costs, they exist and will include payment of sales tax, state income tax, federal income tax, and providing shareholders with a return on equity.

⁸ *Application of Aqua Pennsylvania Wastewater, Inc. to acquire the wastewater system assets of Lower Makefield Township*, Docket No. A-2021-3024267 (Order entered Jan. 13, 2022).

⁹ *Application of Aqua Pennsylvania, Inc. to acquire the water system assets of the Borough of Shenandoah and the Municipal Authority of the Borough of Shenandoah*, Docket No. A-2022-3034143 (Order entered July 13, 2023).

¹⁰ *Pa. PUC v. Aqua Pa., Inc.*, Docket Nos. R-2024-3047822 (water) and R-2024-3047824 (wastewater), Exhs. 1-B at Sch. A-3 (Shenandoah), 1-D at Sch. A-3 (Lower Makefield), 1-E at Sch. A-3 (East Whiteland).

e. Aqua's Claimed Economies of Scale Lack Support

In this case, Aqua makes unsubstantiated claims that existing customers will benefit from an increased customers base from which to spread future infrastructure costs and to provide more flexibility and opportunity to deal with rate impacts over a much larger customer base. *See* Aqua St 3 at 15, 19. At the outset, it is important to recognize that Aqua's Application indicates that it has 60,000 wastewater customers, and that it will only be acquiring approximately 2,283 wastewater customers under the Transaction. Application at ¶ 9. The practical reality of the acquisition is that Aqua would only increase its customer base by about 3.8%,¹¹ which is squarely at odds with Aqua's representation of establishing a much larger customer base from this Transaction.

Outside of the de minimis increase in its wastewater customer base, Aqua fails to support claimed economies of scale beyond skewed projections that rely upon assumptions that are refuted in the record. As recognized by I&E, operational economies of scale are largely insubstantial here and that those that may materialize lack a definitive timeline. *See* I&E St. No. 1 at 13. Moreover, Aqua admits that GSA is a standalone system that will not be interconnected with Aqua's system. Aqua St. 1 at 5. As I&E witness Kubas explained, the reality of GSA's standalone system is that since it will not be physically interconnected to any other Aqua system, normal economies of scale achieved by combining treatment plans and/or closing a treatment plant will not be achieved through this acquisition. I&E St. No. 1 at 13.

While Aqua provides an analysis that claims that its "consolidated revenue requirement per customer has decreased" but to arrive at its conclusion, Aqua makes assumptions that do not comport with reality. Aqua St. 3-R at 6-7. As OCA witness Hoover explained, a closer look at the

¹¹ $2,283 \div 60 = .03805$

chart that Aqua witness Packer includes as a representation of customers served versus revenue requirement is built in a manner containing the following faulty assumptions and defects identified in OCA St 1 SR at 9-11:

1. Projected economies of scale that fail to identify an underlying timeframe for when these economies will materialize;
2. Complete disregard of any cost shifting between wastewater and waster customers may materialize, especially under Aqua’s pending acquisition of the Greenville Water Authority;
3. Failure to identify data points at the time of acquisition or following the conclusion of capital expenditures, resulting in the potential inclusion of anticipated capital expenditures, which could affect the weighted cost per connection;
4. Complete disregard for dramatic rate increases that acquired systems must receive in order to have consolidated rates. As an example, the average GSA customer currently pays around \$23 per month (Greenville St. 1 at 13). Aqua wastewater customers in Rate Zone 1 currently pay, on average, \$94.62 (Aqua Notice of Proposed Rate Increase, R-2024-3047824, 1-WW). Aqua Rate Zone 1 wastewater customers currently pay a monthly fixed customer charge of \$47.35, or over twice a GSA customer’s average bill, *before the inclusion of any usage charges* (Tariff Sewer-Pa. P.U.C. No. 3, p. 10.1.1).
5. Complete disregard for the level of rate increases borne by existing customer to cover the revenue deficiencies. As an example, In Aqua’s 2021 rate case, it included 5 acquisitions made pursuant to fair market value. Aqua proposed an overall increase in annual revenues of \$96.99 million, or 18% increase in revenues. Aqua proposed to shift \$20.8 million from wastewater to water customers under Section 1311(c). Although the Commission did not adopt Aqua’s original proposal, it approved shifting \$11.2 million to water customers of the overall increase of \$70.393 million. *Pa. PUC v. Aqua Pa., Inc.*, Docket Nos. R- 2021-3027385 (water) and R-2021-3027386 (wastewater) (Order entered May 12, 2022) at Table Act 11.
6. Complete disregard for the fact that Aqua’s pending 2024 rate case includes of three acquisitions (Lower Makefield, East Whiteland, and Shenandoah Water) with greater than projected revenue shortfalls, which are likely to grow.

As demonstrated above, Aqua’s claimed economies of scale derived from the notion that its consolidated revenue requirement per customer has decreased rely upon levels of faulty

assumptions that unravel upon closer examination. To that end, Aqua's attempt to rely upon such claims to support economies of scale from the Transaction must be rejected.

The OCA submits that when combined with the other reasons identified above, the lack of such benefits weighs heavily against any determination that the Transaction will produce economies of scale because the evidence supports the opposite conclusion.

f. Alleged cybersecurity benefits are speculative and ignore the realities of GSA's existing operations

In the face of more than \$2.223 million of annual rate harm, Aqua points to other factors to bolster its arguments that the Transaction will provide substantial affirmative public benefits, specifically, Aqua makes much of the cybersecurity improvements it alleges it will make in order to improve the cybersecurity of GSA's operations. Aqua St. No. 4 at 8-12. While the OCA certainly supports sufficient, adequate and compliant cybersecurity, as well as improvements to cybersecurity of utility operations, a closer look at both the benefits that Aqua alleges and the realities of GSA existing operations does not support a determination that Aqua's claimed cybersecurity benefits are substantial improvements beyond what GSA has in place and could readily pursue on its own. This is another example of Aqua wanting GSA to look like Aqua rather than accepting that GSA is currently compliant.

To be sure, there is no evidence that GSA has violated any cybersecurity regulations. OCA St. 1 at 26; Exh. CMH-16. Beyond this, even assuming that all of Aqua's cybersecurity improvement planning may be logical for the GSA if it is a part of Aqua's system, it does not appear to be *necessary* from a regulatory standpoint particularly in the absence of this transaction. As further demonstrated in the analysis below, and in totality when viewed in the weighing of Transaction benefits and detriments, Aqua's planned cybersecurity improvements for the GSA system are not sufficient to establish substantial affirmative public benefits.

At the outset, the record indicates that GSA has not been informed by any authority that is must improve its cyber security in order to maintain compliance with the law. OCA St. 1 at 26; OCA Exh. CMH-16. Despite this, in this case, Aqua has **(BEGIN CONFIDENTIAL)** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **(END CONFIDENTIAL)**

The OCA does not dispute that Aqua may be willing to provide GSA with the enumerated cybersecurity protocols, but the record does not support a determination that GSA is required to undertake these protocols. Instead, Aqua’s proposed improvements appear to be designed to make GSA’s system consistent with its own processes, which does not necessarily confer a benefit. OCA St. 1 at 28. In fact, to some degree, Aqua’s plans, **(BEGIN CONFIDENTIAL)** [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Even assuming, that evidence did exist in this case (it does not), to support a determination that GSA has a clear need to adopt all of the cybersecurity protocols Aqua identifies, the OCA has offered evidence to support GSA's ability to seek funding and resources to make these improvements on its own. Specifically, OCA identified opportunities for GSA to pursue federal or state grant or loan funding, such as PENNVEST funding, for projects that improve safety and bring systems into statutory and regulatory compliance. OCA St. 1 at 29. Eligible projects could include building out cybersecurity infrastructure. *Id.* citing 25 Pa. Code §§ 963.5, 963.8. In addition to PENNVEST funding availability, the OCA identified the existence of a significant number of free programs which are specifically designed to assist small- and medium-sized wastewater systems with upgrading their cybersecurity infrastructure without requiring substantial funding or technical expertise. As an example, tools are available through the US Department of Homeland Security's Cybersecurity and Infrastructure Security Agency Performance Goals Checklist, USEPA and National Institute of Standards and Technology. OCA St. 1 SR at 16.

Despite identified opportunities, GSA indicated that it has not pursued them. OCA Exh. CMH-21. However, there is no evidence in the record demonstrating that they *could not* pursue these remedies and, as such, as the Commonwealth Court found in *Cicero* it is not a benefit "to provide for upgrades that [the Authority] is equally capable of providing." *Cicero*, 300 A.3d at 1119. Moreover, the OCA submits that GSA's decision not to avail itself of available tools is not a viable basis to determine that requiring Aqua's ratepayers to pay a premium for the GSA system is somehow a public benefit. OCA St. 1 SR at 16. Instead, it is a detriment, and one that is further compounded by the nearly identical issues related to claimed physical security benefits that are also detrimental.

g. There is no established need for Aqua to rescue the GSA from security or safety issues

At the outset, the record indicates that GSA has never been informed by any local, state, or federal authority that it must improve its physical security in order to maintain regulatory compliance with the law. OCA St. 1 at 26; OCA Exh. CMH-16. No evidence exists to support any determination that GSA has been cited by any local, state or federal entity for any alleged deficiencies that Aqua claims exist. Despite this, in this case, Aqua **(BEGIN CONFIDENTIAL)**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(END CONFIDENTIAL) Again, each of these things would make GSA more like Aqua, but they are not per se required, essential, or benefits that outweigh the costs.

The OCA does not dispute that Aqua may be willing to provide GSA with the enumerated security and safety protocols, but the record does not support a determination that GSA is required to undertake these protocols, or even that if it were required, that it could not do so. Instead, Aqua’s proposed improvements appear to be designed to make GSA’s system consistent with its own processes, which does not necessarily confer a benefit. OCA St. 1 at 28. Aqua’s position that it can “do it better” does not somehow make GSA’s operations deficient. OCA witness Hoover explained why Aqua “do it better” arguments do not equate for substantial affirmative public benefits:

Essentially Mr. Martin and other Aqua witnesses attempt to find “deficiencies” if a smaller system like GSA does not do everything at the same level or to the same extent as a large company like Aqua. Under this approach, elevating Aqua’s fitness in this way subsumes the substantial public benefits analysis and fails to meet the legal standard required of this transaction. Moreover, taking GSA’s planning processes to Aqua’s level would require GSA customers to pay more than 2x more for that at closing and even higher rates going forward.

OCA St. 1 SR at 7.

Beyond Aqua's "do it better" arguments, Aqua witness Martin claims that **(BEGIN CONFIDENTIAL)** [REDACTED]

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[REDACTED] (END CONFIDENTIAL)

Outside of the irreconcilable conflict between Aqua’s claims about the GSA system and the APA, the record in this case contains the unrefuted fact that GSA has not been informed by any local, state, or federal regulatory authority that it must improve its physical security in order to maintain compliance. OCA St. 1 at 26; OCA Exh. CMH-16. Additionally, it has not been refuted that GSA has submitted (BEGIN CONFIDENTIAL) [REDACTED]

[REDACTED] (END CONFIDENTIAL).

While virtually any investor-owned utility in Pennsylvania will have more security funding and state-of-the-art resources, this reality is only relevant in the context of Aqua’s technical fitness alone, which the

OCA has not challenged. OCA St. 1 at 28. Technical fitness alone cannot not be the defining metric for whether this transaction will produce affirmative public benefits. *Cicero* at 1119; OCA St. 28.

h. Beyond general claims, there is no evidence that the GSA system is distressed, underfunded, or non-viable

Although Aqua argues simultaneously that GSA is a non-viable system, but that its non-viability is not determinative in this case, GSA consistently attempts to paint its operations as non-viable. See Aqua St. No. 3-R at 9; Aqua St. No. 1-R at 3; GSA St. No. 1-R. To be sure, GSA's arguments include, but are not limited to, claims that GSA performs only reactive maintenance when necessary, that it has no long-term capital plan, and that most assets are past their life expectancy. GSA St. No. 1 at 5-7. Yet, these claims are directly at odds with the representations underlying Aqua's Application. Tellingly, the Engineering Report submitted by KLH Engineers, Inc, which provides an inventory assessment that underlies that fair market value appraisals, indicates that the GSA treatment plant is "well maintained" and that while it is reaching the end of its design life, its general condition is fair. Aqua Application Exhibit D at 3. Additionally, neither of the two fair market value appraisals underlying Aqua's Application recommended a downward adjustment to the valuation of the GSA's assets due to non-viability or poor condition. OCA St. 1 at 13. To the contrary, both Aqua and GSA's utility valuation experts expressly acknowledged their reliance upon the KLH Engineering Assessment's inventory and indicated that they have no reason to doubt the accuracy of the inventory of the assets. Aqua St. No. 6 at 12, 16; GSA St. No. 2 at 11-12. Thus, from the perspectives of the UVEs, the GSA system was in fair condition, and this is squarely at odds with a determination that the system is non-viable. The OCA submits that any determination that GSA is a non-viable system would necessitate rejection of the UVE appraisals.

- i. GSA's desires to exit the wastewater business and its desire to sell is not evidence that substantial public benefits would result.

GSA touts its desire the exit the wastewater business as a public benefit of the Transaction. See GSA St. 1 at 10. Although the OCA has not questioned the basis of GSA's decision making in determining to sell its wastewater system to Aqua, the OCA also cannot agree that the decision or desire constitutes an affirmative public benefit. As OCA witness Hoover explained, although GSA witness explained why GSA determined to sell its assets to Aqua, a key question to be determined is "whether the rate impact harms from the ratemaking rate base (the sale price in this case) and the capital expenditure commitments, are so great that it results in a lack of substantial affirmative benefits." OCA St. 1 SR at 18-19. The OCA avers that the harms outweigh the benefit.

Additionally, the OCA maintains that GSA's desire to exit the wastewater business need not be limited to selling its system to Aqua under the terms of this Transaction, which will not produce net benefits when all benefits and detriments are weighed. Section 1329 transactions are not the only type of transactions under which a municipal system may be acquired. OCA St 1SR at 4. Accordingly, the OCA has no objection to GSA's decision to exist the wastewater business; however, in order for the Commission to approve this transaction and allow GSA to sell to a regulated public utility, it must find that there is an affirmative public benefit. Since that showing has not been made, GSA's desire to exit the benefit is immaterial and insufficient, standing alone, to warrant approval of the Transaction.

- j. Based on the Record, there are little, if any, perceptible changes in service, quality, or system staff for GSA customers if this transaction is approved.

Instead of identifying perceptible changes in service, quality, or system staff for GSA customers, the crux of almost all claimed benefits are that making GSA operate exactly like Aqua

will provide affirmative benefits despite the rate impact of the \$18 million purchase price and the \$20 million of capital expenditures. OCA St. 1 SR at 3. While Aqua essentially claims that GSA's operations will be brought to top of the class performance, such general claims would come at a cost that is not commensurate with quantifiable service benefits. More specifically, at the \$18 million purchase price, the rate impact of moving from compliance to top of the class is an 185% increase in rates at the time of closing. The additional \$20 million of capital expenditures will nearly double the rates over the first ten years. Those rate impacts do not include the normal Aqua rate increases that would be approved over the course of the same 10 year period, any cost increases that may be shifted to GSA customers from future acquisitions, including the pending acquisition of GSA's waste provider, Greenville Water Authority . OCA St 1SR at 3.

While Aqua has alleged that it will make improvements to GSA's security and cybersecurity operations, and perform capital improvements and system upgrade for GSA, the OCA has addressed these claims throughout this Main Brief and demonstrated that GSA is not out of compliance, and that GSA would be positioned to make sure improvements at a lower cost than Aqua. Additionally, from an operational perspective, Aqua plans to rely on the same six GSA employees to operate the GSA system that GSA witness Urey claimed had bare minimum training. GSA St. 1 at 8. According to Mr. Urey, four of the six employees that Aqua will hire to continue operating the GSA system do not have certification or formal training in wastewater operations. *Id.* While Aqua may have future plans to provide additional training to acquired GSA employees, depending upon them to operate the GSA system at higher rates does not produce a public benefit.

Moreover, while OCA agrees that Aqua's low income programming could be beneficial to acquired GSA customers, this does not support a determination that Aqua's acquisition of the GSA system will produce substantial affirmative public benefits. By way of further explanation, Aqua

witness Black testified that Aqua’s customer assistance program (CAP) would provide a benefit to low income customers, and OCA witness Hoover agreed. Aqua St. No. 5 at 3-4; OCA St. 1 at 29. Witness Hoover acknowledged that the median income in the Greenville Borough is 54,237 and that there are here are 1,766 individuals in Greenville that are below 200% of the federal poverty limit (FPL) and 335 families in Greenville that are below 200% of the FPL, meaning that many families may benefit from assistance. OCA St. 1 at 29; OCA Exh. CMH-22. However, even if GSA customers were educated about Aqua’s CAP program and they became enrolled,¹² GSA will face higher bills under Aqua’s ownership. OCA St. 1 at 30. Because higher rates will likely increase ratepayers’ need for CAP assistance, benefits that flow from GSA’s customers’ access to CAP are more akin to band aids than benefits, as they address a need that will either be created by, or exacerbated by, the rate consequences of the Transaction.

k. The record evidence contradicts any determination that sale proceeds will benefit GSA customers or the community

As part of the claimed affirmative public benefits that will materialize under Aqua’s acquisition of GSA, witness Urey claims that the sale of Aqua will allow the Borough of Greenville to reinvest sale proceeds from the transaction into redevelopment in the community. GSA St. No. 1 at 10. Aqua witness Packer also advances claims that the public will benefit from net sale proceeds in the form of “tangible financial benefits”, which he calculates will be \$16,174,944 if placed into an interest bearing account at 5.25% Aqua St. No. 3-R at 7-8. Mr. Packer identifies the financial benefits that GSA’s customer base can expect to derive from the sale, including the

¹² As explained below in the context of recommended conditions for approval, Aqua accepted several of OCA witness Hoover’s recommendations to notify and educate GSA customers about CAP funding and to track and report upon enrollment if the Application is approved. See Aqua St. 5-R at 5-6.

following: “paying off all their debt, being able to utilize their cash surplus (otherwise encumbered by sewer utility operations), have proceeds to place into interest earning securities. . . .” *Id* at 8.

Despite the touted public benefits of the sale proceeds for GSA, the evidentiary hearing held in this case revealed that the claimed benefits are unlikely to materialize. Specifically, during the August 15, 2024 evidentiary hearing in this case, GSA’s counsel indicated that “the Authority will receive the sale proceeds, not the borough. The authority is still in existence after the sale of the wastewater assets. The presumption that the money will go to the borough is still speculative at this point because we still have a stormwater component to the authority functioning.” Tr. at 157-158. GSA’s counsel also explained that “the characterization that the borough would be in a better financial position is not accurate as stated. These monies will remain in the Sanitary Authority, which also still runs the stormwater. So the borough is not actually receiving these funds at this time.” Tr. at 156. Taking into account the record representation made by GSA’s counsel, the testimony offered in this case regarding the community benefits from the sale proceeds of GSA are already spoken for in ways that do not contemplate a surplus of cash for the borough, redevelopment, or investment in interest-bearing accounts. On this record, the claimed public benefits even to Greenville Borough are not only unsupported, but they are actually refuted.

1. There Are No Net Benefits to the Proposed Transaction.

After weighing Aqua’s claims of substantial benefits against the known or foreseeable harms which would result from the proposed transaction, it is clear that there is no substantial affirmative public benefit. Specifically, to the extent that Aqua’s claims regarding economic, environmental, and regionalization benefits appear more in line with Aqua’s fitness as a large, investor-owned utility and application of standards that apply to Aqua but not to GSA. Where an Application under Sections 1102 and 1103 of the Public Utility Code relies on benefits which flow

from the acquiring utility's fitness – as opposed to benefits which arise specifically from the transaction – those benefits cannot be considered substantial. *Cicero*, 300 A.3d at 1119. Instead, purported benefits must be specific to the transaction, even if aspirational, to be able to outweigh any known or foreseeable harms which would result from the transaction. *Id.* This Transaction produces the opposite outcome, as known and foreseeable harms outweigh the few benefits that may materialize and which are contingent upon significant rate increases that are likely to exceed Aqua's representation of "worst-case scenario" rates.

In *CMV*, the Commission concluded that the adverse impacts of the proposed transaction for the existing customers outweighed the benefits. *CMV v. Pa. P.U.C.*, 2008 PaPUC LEXIS 950, *30. While the CMV system might have required upgrades to comply with stricter environmental requirements at an unknown future date, the Commission emphasized the acquired system's compliance with applicable environmental regulations at the time of the application. *Id.* The Commission could not rely on the presented evidence to determine the cost of any required, future upgrades to the target system. *Id.*

Here, the GSA system is in a similar position to that of the target system in *CMV*, except that GSA's environmental compliance was actually compromised as a direct result of the Transaction. By way of further context, GSA is currently in environmental compliance, with one lone exception that directly resulted from this Transaction. Aqua St. No. 2 at 16; OCA St. 1 at 15; OCA St. 1 SR at 9. More specifically, during the pendency of this case, GSA received a notice of breach from the PA Department of Environmental Protection (DEP) that resulted directly from GSA's failure to move forward under its Consent Order and Agreement (COA) with DEP. OCA St. 1 SR at 9; OCA Exh. CMH-2SR. Aqua provided testimony to indicate that GSA did not move forward with the COA obligation because it entered into the APA with Aqua. Aqua St. No. 2-R at

10-11. Put another way, GSA was in compliance with its obligations to PA DEP before it transacted with Aqua, but it is now out of compliance because it entered the APA with Aqua. In this vein, Aqua’s “fitness” directly led to GSA’s sole environmental compliance issue, and such a result exemplifies that fallacy of assuming that the Aqua way of operating is always superior to the GSA way of operating.

4. Conclusion

When considering the long-term rate impact of the proposed transaction, to both Aqua and GSA customers, Aqua has not provided evidentiary support to establish that net benefits will result. To the extent that Aqua has alleged any benefits exist – with the exception of Aqua’s ability to provide a low-income discount program – those benefits result entirely from Aqua’s fitness, are not specific to this transaction, and do not differ substantially from the service currently provided by the GSA. As a result, Aqua has failed to meet its burden of its proof under Section 1103 of the Public Utility Code, as interpreted by the Commonwealth and Supreme Courts, to establish that net benefits would result from the proposed transaction. Where a utility is unable to establish a net benefit would result from an Application under Section 1102, the Commission should reject that Application. *City of York*, 295 A.2d at 141. Therefore, the OCA respectfully requests that Aqua’s Application be denied.

B. Section 1329

1. Introduction

Section 1329 was enacted in April 2016 and became effective on June 29, 2016. Act 2016-12 (HB 1326). Section 1329 provides, *inter alia*, that when a regulated water or wastewater utility acquires a municipal water or wastewater provider, the regulated utility can ask for ratemaking treatment of the acquired utility’s assets using fair market value. 66 Pa. C.S. § 1329. As set forth

in Section 1329(a) and (b), the process for determining the fair market value is based on two separate appraisals each using the Cost, Market and Income approaches. 66 Pa. C.S. §§ 1329(a)(3), (b). The appraisals are then averaged to determine the fair market value, 66 Pa. C.S. § 1329(g) and the lesser of the purchase price or the fair market value is what the acquiring utility will present as the proposed rate base. 66 Pa. C.S. § 1329(c)(2). This is not a simple mathematical exercise. The appraisals reflect the judgments and choices made by each utility valuation expert. Here, the Commission does not need to reach any conclusion of the appropriate ratemaking ratebase to put into rates because even assuming that there are no adjustments to the UVE appraisals that would reduce the average of the two below the purchase price, there are no affirmative public benefits that result from this transaction.

2. Legal Principles

Pursuant to Section 1329, upon agreement by the acquiring public utility and the selling entity, “two utility valuation experts shall perform two separate appraisals of the selling utility for the purpose of establishing its fair market value” and each “shall determine fair market value” in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP) based on the cost, market, and income approaches. 66 Pa. C.S. § 1329(a). “The ratemaking rate base shall be the lesser of the purchase price negotiated by the acquiring public utility . . . and selling utility or the fair market value of the selling utility.” 66 Pa. C.S. § 1329(c)(2).

The Applicant must provide to the Commission copies of the appraisals, the purchase price, the ratemaking rate base, the closing costs, and, if applicable, a tariff and rate stabilization plan. 66 Pa. C.S. § 1329(d)(1). Regardless of whether the Applicant meets the requirements of Section 1329, the Applicant still has the burden of proving that it satisfies the requirements of Sections 1102 and Section 1103 of the Public Utility Code. See *McCloskey v. Pa. PUC*, 195 A.3d 1055,

1064 (Pa. Commw. 2018) (*New Garden*); 66 Pa. C.S. §§ 1102, 1103. As evidenced by the analysis and argument above, the Applicants have not made this showing.

3. Aqua's Application

In this proceeding, Aqua's Application presented two appraisal values for the GSA assets: a fair market valuation of \$24,060,000 (Gannett Fleming Appraisal on behalf of Aqua) and \$18,757,633 (ScottMadden on behalf of GSA). Aqua St. No. 3 at 20-21. The average of these two appraisals is \$21,408,817. *Id.* at 21. Aqua and GSA negotiated a purchase price of \$18 million. *Id.* As discussed below, although the OCA did not recommend any adjustments to the UVEs' appraisals in this case, it contests Aqua's Application because it does not meet the threshold requirements of demonstrating an affirmative public benefit pursuant to the requirements of Section 1102 and 1103 which warrant rejection of the Application. Accordingly, the Commission should not approve Aqua's Application nor the addition of the \$18 million purchase price as GSA's ratemaking rate base under Section 1329.

a. Fair Market Value for Ratemaking Purposes

The OCA did not offer adjustments to the fair market value appraisals of the GSA's system in this case; however, this should not be construed as OCA's endorsement for including a ratemaking rate base value of \$18 million for the GSA system in Aqua's next rate case. On the contrary, the OCA's position is that the Transaction is not in the public interest for failure to provide any affirmative public benefit; therefore, OCA expressly opposes inclusion of an \$18 million ratemaking rate base for the GSA system into future Aqua rates.

b. Transaction and Closing Costs

In its Application, Aqua projected that it would incur transaction and closing costs of approximately \$487,250, which it intends to include in rate base. Application ¶58. In this case, the

OCA recommended that Aqua should be required to separately identify all of its closing costs by cost category, including outside legal fees, when it makes a claim for recovery in its next base rate case. OCA St. 1 at 5. The OCA submits that segregating and tracking these costs are essential in ensuring that the OCA, other interested parties, and the Commission, will have ready access to critical information necessary to evaluate the reasonableness and prudence of any claimed costs. The OCA also recommended that Aqua should be barred from claiming any transaction and closing costs incurred by the seller. OCA St. 1 at 5. To be sure, Section 1329 permits only the transaction and closing costs incurred by the acquiring public utility to be included in the established ratemaking rate base. 66 Pa. C.S. § 1329(d)(1)(iv). Although Aqua did not respond to the OCA's recommendations, leaving it unclear whether Aqua opposes them, the OCA submits that they are necessary to ensure that ratepayers do not pay imprudent and unreasonable transaction and closing costs if the Commission determines to approve Aqua's Application.

4. Conclusion

C. **Recommended Conditions**

As set forth above, the OCA recommends that the Commission deny the relief requested in the Application. The OCA submits that the weighing of the Transaction detriments significantly outweigh any benefits, and no finding of substantial affirmative public benefits would be appropriate under the facts of this case. The lack of affirmative public benefits is further compounded by the record that Aqua created regarding the condition of the GSA assets, which is wholly incompatible with the Seller's representations about the system in the APA, providing an additional, independent basis for denying Aqua's Application. If, however, the Commission determines to approve Aqua's Application, the OCA recommends that the following conditions be imposed. Aqua has agreed to certain of these conditions, but it has opposed others. As explained

below, it is the OCA's position that all conditions must be granted to mitigate harm to existing and acquired Aqua customers.

1. Conditions that Aqua Agrees to Adopt

a. Cost of Service Studies

The OCA argued that Aqua should be required to perform a separate cost of service study for the GSA System when it files its next base rate case. OCA St. 1 at 31. OCA's recommendation was made because if adopted, it provides the necessary information needed to establish rates that reflect the costs of the GSA system in Aqua's next rate case. *Id.* Aqua witness Packer indicated that Aqua would agree to adopt this condition. Aqua St. 3-R at 15. Accordingly, the cost of service condition should attach to any approval of Aqua's Application.

b. Employee Segregation from Borough of Greenville Stormwater Services

In order to protect Aqua customers from paying for stormwater-related costs that ought to remain with the Borough of Greenville, OCA recommended that GSA employees hired by Aqua must not be permitted to perform any work or services related to the Borough of Greenville's stormwater assets unless interest agreements and any other necessary steps are completed. OCA St. 1 at 12. Both Aqua and GSA represented that none of the GSA employees hired by Aqua will work on the stormwater system because the Borough of Greenville will cover stormwater work with its employees. Aqua St. 1-R at 2; GSA St. 1-R at 4. Although an agreement appears to exist on this issue, the OCA avers that it ought to be memorialized as a condition of the Transaction to ensure that Aqua customers do not pay inappropriate costs.

c. Low-Income Program Information and Tracking

To ensure that GSA customers can avail themselves of CAP programming benefits, the OCA recommended that Aqua provide a letter to the acquired customers that provides information regarding its low-income programs, including a description of the available programs, eligibility and requirements, and Aqua's contact information. The letter should be sent within 30 days after closing so that eligible customers can benefit from the program as soon as possible and before rates are increased. Also, Aqua should include the same information regarding low-income programs in bills sent to GSA customers within 90 days after closing. OCA. St. 1 at 30. Aqua should report the number of eligible customers from the former GSA service area who are enrolled in Aqua's CAP. The report should be provided to the Commission and to the parties every six months until the conclusion of Aqua's next base rate case. *Id.* Aqua agreed to these conditions; accordingly, they should be adopted in any approval of Aqua's Application. *See* Aqua 5-R at 5-6.

2. Conditions that Aqua Opposes, But Are Necessary to Protect Ratepayers

a. Missing Easements and Other Property Rights

As a condition for approval of the application, the Commission should require that the closing of the transaction shall not be permitted to occur until Aqua has (1) identified all missing easements including public rights-of-way and other property rights and (2) taken any and all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to Aqua at closing. Also, Aqua should not be permitted to recover in rates any costs for obtaining and conveying the missing easements and other property rights. Finally, Aqua should not be permitted to include the GSA assets into its ratebase until it acquires all outstanding easements OCA St. 1 at 25-26; OCA St. 1SR at 15.

At the time that OCA submitted its direct testimony in this case, Aqua reported that GSA still had 119 missing easement that needed to be obtained for the system. OCA St. 1 at 25; OCA Exh. CMH-13. Despite Aqua's representation that its easement map and file would be continuously updated as easements are located or obtained, no further updated has been provided. *Id.*; OCA Exh. CMH-14. It is critical for GSA to obtain all outstanding easements before the close of the transaction. Having the land rights to all parts of the system is important and critical in the event maintenance is required, or an emergency occurs. OCA St. 1 at 25.

In this case, GSA indicated that when maintenance is required on private property where it does not have an easement, GSA reaches out to the property owner in advance to notify them that maintenance on GSA assets located on their property is necessary. OCA Exh. CMH-15. In the event of an emergency, GSA would notify the property, owner to the extent practical, and would perform the maintenance acting under GSA's obligations to protect the health, safety and welfare of the residents. *Id.* Under Aqua ownership, we do not know what the circumstances will be for areas where the land rights are not found. It is critical for GSA to obtain all outstanding easements before the close of the transaction. For Aqua's part, it dismisses the OCA's concerns by alleging that if it needs to access property where no easement has been obtained in order to perform maintenance, it will simply notify the owner and enter into a temporary easement, or, that in the event of an emergency, it will simply notify the property owner and then enter to perform the emergency service. Aqua St. 3-R at 13. Yet none of Aqua's claims, which rely on assumptions that Aqua will simply be able to enter upon unacquired property when necessary, adequately address OCA's concerns, which are amplified by the cavalier response from Aqua while 119 easements remain missing despite the fact that Aqua has been in discussions with GSA to acquire its system since 2022. OCA St. 1 SR at 15; OCA CMH-4.

Beyond access issues, Aqua ignores the fact that by seeking to close the Transaction while 119 easements remain missing, there is a distinct possibility that Aqua may attempt to include the GSA ratemaking ratebase into future rates before the easements are obtained. OCA St. 1 SR at 15. In that event, Aqua would essentially be seeking to require its ratepayers to pay for, and pay for a shareholder return upon, property that it will not own and which is not providing service. To that end, the OCA reaffirms that the Commission should not permit Aqua to include property in its rate base, and then earn a return on such property, when it has not yet legally acquired such property. Aqua should be required to acquire all easements as a condition of closing the Transaction to prevent this outcome, as well as to prevent emergency access issues that Aqua has not sincerely addressed.

b. Transaction and Closing Costs

Aqua should be required to separately identify all of its closing costs by cost category, including outside legal fees, when it makes a claim for recovery in its next base rate case. Aqua should be barred from claiming any transaction and closing costs incurred by the seller. OCA St. 1 at 5. Section 1329 permits only the transaction and closing costs incurred by the acquiring public utility to be included in the established ratemaking rate base. 66 Pa. C.S. § 1329(d)(1)(iv). Although Aqua did not respond to the OCA's recommendations, leaving it unclear whether Aqua opposes them, the OCA submits that they are necessary to ensure that ratepayers do not pay imprudent and unreasonable transaction and closing costs if the Commission determines to approve Aqua's Application.

c. Increased Hardship Funding from Aqua

Aqua should provide an additional annual contribution of \$50,000 to the hardship fund for five years following the closing of the Transaction. These contributions should not be recovered in rates and all unspent funds at the end of the program year should be rolled over and added to the budget for the hardship grant program in the following year(s). OCA St. 1 at 30-31. Although Aqua did not entirely oppose OCA's recommendation for additional funding, Aqua suggested that a more appropriate level of funding would be \$25,000 for each of the next three years. Aqua 5-R at 7-8. OCA appreciated Aqua's recognition that additional hardship finding would be appropriate here, but because Aqua would reduce the amount and the term of funding recommended in order to provide a concrete and actual benefit to existing and acquired customers, and the reduction Aqua offered would diminish those benefits, the OCA maintains its recommendation. OCA St. 1SR at 17. Accordingly, if the Transaction is approved, Aqua should be required to provide an additional annual contribution of \$50,000 to the hardship fund for five years following the closing.

d. Amended LTIP and DSIC for GSA Customers

Aqua's amended LTIP including the GSA customers should be filed within 90 days of closing. Additionally, the proposed projects reflected in the amended LTIP should be in addition to, and not re-prioritize, any capital improvements that Aqua has already committed to undertake for existing customers. Also, Aqua should not include GSA system-related investments in its DSIC until Aqua collects a DSIC from GSA customers. OCA St. 1 at 32. These recommendations are necessary to ensue that Aqua is accountable for timely planning the infrastructure improvements it claims will occur for GSA, that existing customers' projects will not be compromised, and that GSA customers contribute to projects in their service area. *Id.* at 32-33.

Aqua's response to OCA's recommendations is simply that it is not required to honor them. Aqua St. 3-R at 15. As OCA witness Hoover explained, the fact that Aqua may not be expressly required to adopt the OCA's recommendations does not somehow render them unreasonable. OCA St. 1 SR at 15. To be sure, Section 1329 does permit Aqua to charge a DSIC to acquired customers as proposed, and the other recommendations OCA made were intended to provide at least some level of rate relief for existing DSIC customers by protecting their planned infrastructure improvements and by including GSA customers in at least some of the DSIC costs that will be incurred. *Id.* Given the significant rate impacts customers have faced under Aqua's acquisition scheme, the OCA avers that providing at least a floor level protection for existing ratepayers by requiring Aqua to adopt these terms as conditions of any Application approval is appropriate.

D. Section 507

To receive approval of a contract between a public utility and a municipal corporation, the public utility must seek Commission approval of that contract. 66 Pa. C.S. § 507. When considering the filing, the Commission is tasked with ensuring that the contract is reasonable, legal, and otherwise valid. *Id.* Where a contract is not reasonable, legal, or is otherwise invalid, the Commission may revise or reform the contract to ensure that its provisions are just, reasonable, and equitable. 66 Pa. C.S. § 508.

As described above, the representations that Aqua makes in its Application regarding the GSA system directly conflict with the warranties that GSA made as the Seller in the Asset Purchase Agreement (*see, Representation and Warranties* section contained in Article IV of the APA (Section 4:13, *Environmental Compliance*). As OCA explained above, there are irreconcilable conflicts between the claims that Aqua and GSA make about the GSA assets and the commitments

regarding those assets as set forth in the APA. Substantial evidence demonstrates that the APA contains representations and warranties that are unreasonable and invalid when reviewed in conjunction with the testimony that Aqua and GSA offered in this record. Accordingly, as Aqua bears the burden of proof to demonstrate, with substantial evidence, that the proposed APA should be approved under Section 507 of the Code, and it instead has provided substantial evidence to the contrary, the Commission should not approve the APA.

E. Other Approvals, Certificates, Registrations and Relief, If Any, Under the Code

At this time, the OCA has not requested any additional relief related to other approvals, certificates, registrations, and relief under the Code beyond that which is addressed in this Main Brief. To the extent that the OCA does identify a need to raise such matters, or to respond to those matters raised by other parties, the OCA expressly reserves the right to address them in its Reply Brief and further pleadings as deemed necessary to protect consumers.

VI. CONCLUSION WITH REQUESTED RELIEF

For the reasons stated above, the Application should be denied. Aqua Wastewater, Inc. has failed to meet its burden of proof under Section 507, 1102 and 1103.

Respectfully Submitted,

/s/ Gina L. Miller

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August 27, 2024

OCA Proposed Findings of Fact**PUBLIC VERSION**Section 1102/1103

1. Aqua Pennsylvania Waster, Inc (Aqua) provides wastewater service to approximately 60,000 customers throughout Pennsylvania. Application at ¶ 9.
2. Greenville Sanitary Authority (GSA) owns a wastewater system which provides wastewater service to approximately 2,283 customers in the Borough of Greenville, Hempfield Township, and West Salem Township in Mercer County, Pennsylvania who will become Aqua wastewater customers if the Transaction is approved. Application at ¶ 9.
3. GSA also oversees the Borough of Greenville’s stormwater system assets under a lease agreement with the borough, OCA St. 1 at 11; OCA Exh. CMH-5.
4. All GSA customers within the Borough of Greenville are also stormwater customers. OCA St. 1 at 12; OCA Exh. CMH-5.
5. The GSA is a standalone wastewater system that will not be interconnected with Aqua’s system. Aqua St. 1 at 5.
6. Aqua seeks to establish an \$18 million ratemaking rate base for GSA’s assets as part of its Application. Application at ¶57.
7. The depreciated original cost of the GSA’s system is \$6,854,439. OCA St. 1 at 5. Application at ¶¶ 5, 20.
8. Aqua agreed to pay \$18,000,000 for the GSA system, or \$11,145,561 over the net book value. The purchase price is 2.63 times higher than the net book value. OCA St. 6.
9. The Commission recently released its first annual Reasonableness Review Ratio (RRR), which serves as a reference for assisting the Commission’s review of Section 1329 purchases. *Bureau of Technical Utility Service Report on the Reasonableness Review Ratio for the Year Ended 12.31.2023 to Approximate Market Value in Section 1329 Proceedings*, Docket No. M-2024-3050303.
10. The Commission’s recently-determined RRR result identified 1.68 as the reference point formed by its analysis of an approximation of a ratio of a proxy fair market value to the depreciated original cost of a similarly-situated investor owned water utilities. *Bureau of Technical Utility Service Report on the Reasonableness Review Ratio for the Year Ended 12.31.2023 to Approximate Market Value in Section 1329 Proceedings*, Docket No. M-2024-3050303 at 6.

11. Aqua calculates the GSA system will generate an annual revenue deficiency of \$2,223,000 that may be recovered from GSA customers, Aqua water customers, Aqua wastewater customers, or all three. Aqua St. 3 at Appendix A; OCA St. 1 SR at 19.
12. In Aqua's 2021 rate case, it included 5 acquisitions made pursuant to fair market value. Aqua proposed an overall increase in annual revenues of \$96.99 million, or an 18% increase in revenues. Aqua proposed to shift \$20.8 million from wastewater to water customers under Section 1311(c). Although the Commission did not adopt Aqua's original proposal, it approved shifting \$11.2 million to water customers of the overall increase of \$70.393 million. *Pa. PUC v. Aqua Pa., Inc.*, Docket Nos. R- 2021-3027385 (water) and R-2021-3027386 (wastewater) (Order entered May 12, 2022) at Table Act 11. OCA St. 10.
13. In its pending 2024 rate case, Aqua include three more acquisitions valued using fair market value. All three acquisitions (Lower Makefield, East Whiteland, and Shenandoah Water) have even greater annual revenue shortfalls in this first rate case compared to the revenue deficiencies at closing. The shortfalls for Lower Makefield, East Whiteland, and Shenandoah Water are \$1.4 million, \$698,708, and \$1.98 million, respectively, and they are likely to continue to grow. OCA St. 1SR at 10-11.
14. In three of Aqua's recent acquisitions, Lower Makefield (wastewater), Shenandoah Water, and East Whiteland Township (wastewater). Aqua's projected revenue deficiencies for those systems were unprojected by \$706,082, \$1,402,877, and \$1,981,719, respectively. OCA St. 1 SR at 6.
15. Aqua indicates that it will makes \$20.4 million over the next 10 years to upgrade the GSA's system. Aqua St. No. 2 at 10.
16. Before contracting with Aqua for the sale of its system, GSA had already invested \$2.8 million on engineering design for upgrading its treatment plant before stopping its work because of its decision to sell to Aqua. Aqua St. No. 2 at 10.
17. GSA rates will need to increase by 185% to cover the projected annual revenue deficiency of the GSA system under Aqua's ownership. OCA St. 1SR at 3.
18. If GSA's estimated rate increase includes the \$20 million cost of Aqua's planned capital improvement expenditures, GSA's increase will likely double over the first ten years . OCA St. 1SR at 3.
19. Under Aqua's ownership, the capital projects will include costs that GSA would not have to pay, such as taxes and costs related to Aqua's return on equity for shareholders. OCA St. 1 at 14.
20. The median income in the Greenville Borough is \$54,237 and there are 1,766 individuals in Greenville that are below 200% of the federal poverty limit (FPL) and 335 families in Greenville that are below 200% of the FPL. OCA St. 1 at 29; OCA Exh. CMH-22.

21. During the August 15, 2024, evidentiary hearing in this case, GSA’s counsel indicated that “the Authority will receive the sale proceeds, not the borough. The authority is still in existence after the sale of the wastewater assets. The presumption that the money will go to the borough is still speculative at this point because we still have a stormwater component to the authority functioning.” Tr. at 157-158.
22. During the August 15, 2024 evidentiary hearing in this case, GSA’s counsel indicated that “the characterization that the borough would be in a better financial position is not accurate as stated. These monies will remain in the Sanitary Authority, which also still runs the stormwater. So the borough is not actually receiving these funds at this time.” Tr. at 156.
23. GSA is currently in environmental compliance, with one lone exception that directly resulted from this Transaction. Aqua St. No. 2 at 16; OCA St. 1 at 15; OCA St. 1 SR at 9.
24. During the pendency of this case, GSA received a notice of breach from the PA Department of Environmental Protection (DEP) that resulted directly from GSA’s failure to move forward under its Consent Order and Agreement (COA) with DEP because of its decision to sell to Aqua. OCA St. 1 SR at 9; OCA Exh. CMH-2SR;. Aqua St. No. 2-R at 10-11.
25. There is no evidence that GSA has violated any cybersecurity regulations. OCA St. 1 at 26; Exh. CMH-16
26. **(BEGIN CONFIDENTIAL)** [REDACTED]
[REDACTED]
[REDACTED] **(END CONFIDENTIAL)**
OCA St. 1 at 28.
27. **(BEGIN CONFIDENTIAL)** [REDACTED]
[REDACTED]
[REDACTED] **(END CONFIDENTIAL)** OCA St. 1 at 28.
28. **(BEGIN CONFIDENTIAL)** [REDACTED]
[REDACTED] **(END CONFIDENTIAL)** Confidential OCA Exh. CMH-18.
29. **(BEGIN CONFIDENTIAL)** [REDACTED]
[REDACTED]
[REDACTED] **(END CONFIDENTIAL)**
30. OCA identified opportunities for GSA to pursue federal or state grant or loan funding, such as PENNVEST funding, for projects that improve safety and bring systems into statutory and regulatory compliance. OCA St. 1 at 29.

31. GSA indicated that it has not pursued federal or state grant or local funding for upgrades to its physical or cybersecurity. OCA Exh. CMH-21.
32. (BEGIN CONFIDENTIAL) [REDACTED] (END CONFIDENTIAL) Aqua St. No. 1 at 21
33. (BEGIN CONFIDENTIAL) [REDACTED] (END CONFIDENTIAL) Aqua St. 1 at 22.
34. GSA has not been informed by any local, state, or federal regulatory authority that it must improve its physical security in order to maintain compliance with the law. OCA St. 1 at 26; OCA Exh. CMH-16
35. GSA witness Urey claimed that GSA's six employees had bare minimum training. GSA St. 1 at 8.
36. Four of the six GSA employees that Aqua will hire to continue operating the GSA system do not have certification or formal training in wastewater operations. GSA St. 1 at 8.
37. At the time that OCA submitted its direct testimony in this case, Aqua reported that GSA still had 119 missing easement that needed to be obtained for the system. OCA St. 1 at 25; OCA Exh. CMH-13.
38. Despite Aqua's representation that its easement map and file would be continuously updated as easements are located or obtained, no further updated has been provided. OCA Exh. CMH-14.
39. Having the land rights to all parts of the system is important and critical in the event maintenance is required, or an emergency occurs. OCA St. 1 at 25.
40. 119 easements remain missing despite the fact that Aqua has been in discussions with GSA to acquire its system since 2022. OCA St. 1 SR at 15; OCA CMH-4.

Section 1329

41. Aqua's Utility Valuation Expert (UVE) appraised the GSA's system's assets at \$24,060,000. Aqua St. No. 3 at 20-21
42. GSA's UVE appraised the GSA system's assets at \$18,757,633. Aqua St. No. 3 at 20-21
43. The average of these two appraisals is \$21,408,817. Aqua St. No. 3 at 21.
44. Aqua and the GSA negotiated a purchase price of \$18 million. Aqua St. No. 3 at 21.
45. The GSA treatment plant is "well maintained" and that while it is reaching the end of its design life, its general condition is fair. Aqua Application Exhibit D at 3.

46. A key assumption underlying Aqua witness Harold Walker's fair market valuation of the GSA system is that "no hazardous conditions or materials exist which could affect the assets." Aqua St. No. 6 at 12-13.
47. Neither of the two fair market value appraisals underlying Aqua's Application recommended a downward adjustment to the valuation of the GSA's assets due to non-viability or poor condition. OCA St. 1 at 13.
48. Both Aqua and GSA's utility valuation experts expressly acknowledged their reliance upon the KLH Engineering Assessment's inventory and indicated that they have no reason to doubt the accuracy of the inventory of the assets. Aqua St. No. 6 at 12, 16; GSA St. No. 2 at 11-12
49. Aqua projected that it would incur transaction and closing costs of approximately \$487,250, which it intends to include in rate base. Application ¶58

Conditions of Approval

50. Aqua has agreed to perform a separate cost of service study for the GSA system and present it when it files its next base rate case.. Aqua St. 3-R at 15.
51. OCA recommended that GSA employees hired by Aqua must not be permitted to perform any work or services related to the Borough of Greensville's stormwater assets unless interest agreements and any other necessary steps are completed. OCA St. 1 at 12.
52. Aqua agreed to provide a letter to the acquired customers that provides information regarding its low-income programs, including a description of the available programs, eligibility and requirements, and Aqua's contact information. Aqua 5-R at 5-6.
53. Aqua agreed that its welcome letter should be sent within 30 days after closing so that eligible customers can benefit from the program as soon as possible and before rates are increased. Aqua 5-R at 5-6.
54. Aqua agreed to include the same information regarding low-income programs in bills sent to GSA customers within 90 days after closing. Aqua agreed to report the number of eligible customers from the former GSA service area who are enrolled in Aqua's CAP and will provide this information to the Commission and to the parties every six months until the conclusion of Aqua's next base rate case. Aqua 5-R at 5-6.
55. The OCA recommended that Aqua should provide an additional annual contribution of \$50,000 to the hardship fund for five years following the closing of the Transaction. These contributions should not be recovered in rates and all unspent funds at the end of the program year should be rolled over and added to the budget for the hardship grant program in the following year(s). OCA St. 1 at 30-31.
56. Aqua rejected the OCA's recommendation that Aqua modify its Long-Term Infrastructure Improvement Plan (LTIIP) within 90 days of closing to include GSA. Aqua St. 3-R at 15.

57. Aqua rejected the OCA's recommendation that Aqua should not include GSA system-related investments in its DSIC until Aqua collects a DSIC from GSA customers. Aqua St. 3-R at 15.

Section 507

58. Under Article IV, Section 4:13, *Environmental Compliance*, GSA warranted that

The System as currently operated by the Seller and all operations and activities conducted by the Seller with respect to the System are in compliance in all material respects with all applicable Environmental Requirements. Section 4.13(a)

59. Under Article IV, Section 4:13, *Environmental Compliance*, GSA warranted that

Hazardous Materials are not present at or on the System or Acquired Assets, there has been no Release of Hazardous Materials at, on or from any part of the System or the Acquired Assets, in each case in a manner that violates any Environmental Requirements or has resulted in, or could reasonably be anticipated to give rise to, Environmental Liabilities. Section 4.13(d)

OCA Proposed Conclusions of Law

1. Aqua Pennsylvania Wastewater, Inc is a public utility as defined in Section 102 of the Public Utility Code. 66 Pa. C.S. § 102.
2. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa. C.S. § 101, *et seq.*
3. Aqua Pennsylvania Wastewater, Inc has the burden of proof to show that its proposed acquisition of the Greenville Sanitary Authority wastewater system is adequate, efficient, safe, and reasonable under Section 315(c). 66 Pa. C.S. § 315(c).
4. Aqua Pennsylvania Wastewater, Inc has the burden of proof to show that its proposed purchase of the Greenville Sanitary Authority wastewater system would provide substantial affirmative benefits under Section 1102 of the Public Utility Code. 66 Pa. C.S. § 1102.
5. Aqua Pennsylvania Wastewater, Inc has not established that the proposed transaction would provide the required substantial affirmative benefits to existing Aqua Pennsylvania Wastewater, Inc. customers or to the acquired Greenville Sanitary Authority wastewater customers under Section 1102. 66 Pa. C.S. § 1102.
6. The Commission has the authority to grant a certificate of public convenience to a utility only when doing so is necessary or proper for the service, accommodation, convenience, or safety of the public. 66 Pa. C.S. § 1103(a).
7. Aqua Pennsylvania Wastewater, Inc has not established that the proposed transaction is necessary or proper for the service, accommodation, convenience, or safety of the public. 66 Pa. C.S. § 1103(a).
8. Section 1329 permits only the transaction and closing costs incurred by the acquiring public utility to be included in the established ratemaking rate base. 66 Pa. C.S. § 1329(d)(1)(iv).
9. The warranties and representations that Greenville Sewer Authority made regarding its assets in Section IV of its Asset Purchase Agreement with Aqua Pennsylvania Wastewater, Inc. irreconcilably conflict with the record representation of Greenville Sewer Authority's assets rendering the Asset Purchase Agreement unreasonable and invalid. 66 Pa. C.S. § 507.

OCA Proposed Ordering Paragraphs

It is hereby ORDERED THAT:

1. The Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 507, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the Greenville Sanitary Authority, is denied.