

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Administrative Law Judges Mark A. Hoyer and Alphonso Arnold III, Presiding**

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**Application of Aqua Pennsylvania : Docket No. A-2023-3041695  
Wastewater, Inc. Pursuant to Sections :  
1102 and 1329 of the Public Utility Code :  
for Approval of the Acquisition by Aqua of :  
the Wastewater System Assets of :  
Greenville Sanitary Authority Situated :  
within the Borough of Greenville,  
Hempfield Township and West Salem  
Township, Mercer County, Pennsylvania**

**EXCEPTIONS OF AQUA PENNSYLVANIA WASTEWATER, INC.  
TO THE RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGES ALPHONSO ARNOLD III AND MARK A. HOYER**

Courtney L. Schultz, Esq.  
Pa. Attorney ID #306479  
1500 Market Street  
Centre Square West, 38th Floor  
Philadelphia, PA 19102

*Counsel for  
Aqua Pennsylvania Wastewater, Inc.*

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## I. INTRODUCTION

This proceeding concerns the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua” or the “Company”), filed with the Pennsylvania Public Utility Commission (“Commission”) on November 17, 2023, pursuant to Sections 1102, 1329 and 507 of the Public Utility Code (“Code”) 66 Pa. C.S. §§ 1102, 1329, and 507.

The Application asks the Commission to issue an order and certificates of public convenience pursuant to Section 1102 of the Code approving Aqua’s acquisition of the wastewater system assets of the Greenville Sanitary Authority (“GSA”) and to allow Aqua to begin to provide wastewater service in the Requested Territory, as outlined in the map attached to the Application as Exhibit A and which includes the Borough of Greenville (“Borough”), Hempfield Township (“Hempfield”) and West Salem Township (“West Salem”), in Mercer County, Pennsylvania.

The Application also asks that the Commission include in its order approving the acquisition, a determination that the ratemaking rate base of the assets being acquired by Aqua is \$18,000,000 pursuant to Section 1329(c)(2) of the Code.

The Application, additionally, asks that the Commission approve, to the extent necessary, its Asset Purchase Agreement (“APA”) with the GSA and the assignment of six contracts with municipalities under Section 507 of the Code and to provide such other approvals, certificates, registrations and relief, if any, under the Code that may be required.

Administrative Law Judges Alphonso Arnold III and Mark Hoyer were assigned to preside over the proceeding. By Recommended Decision dated October 3, 2024 (“Recommended Decision”), Judges Arnold and Hoyer conclude that Aqua did not meet its burden of establishing that there is an affirmative public benefit to its acquisition of GSA’s wastewater assets and recommend that the Commission deny the Application.

Aqua submits the following Exceptions to the Recommended Decision.<sup>1</sup>

## **II. EXCEPTIONS**

### **A. Sections 1102/1103 – Affirmative Public Benefit**

#### **1. Summary of Exception**

Aqua excepts to the Recommended Decision determination that it did not meet its burden of establishing that there is an affirmative public benefit to its acquisition of the GSA wastewater assets that outweighs the hypothetical rate impact. Aqua submits, rather, that its proposed acquisition of the GSA wastewater system pursuant to Sections 1102 and 1329 will further the public interest and is supported by affirmative public benefits, and should therefore be approved.

The Recommended Decision ignores the legislative determination that Section 1329 fair market value acquisitions of municipal wastewater systems further the public interest, discounts entirely public benefits arising from the proposed transaction, and focuses almost exclusively, in contravention of *McCloskey*, on the potential rate impact to customers. Aqua certainly appreciates and acknowledges that rate impacts are an important factor to consider. However, that cannot and should not be the only factor considered. The GSA wastewater system is struggling – struggling to find qualified or even unqualified members to sit on its board, struggling to comply with current regulations and is serving a community that is trying to find a path forward, having recently emerged out of Act 47 status.

In this case, Aqua and the GSA are dealing with an Asset Purchase Agreement that was signed before the Commission issued its guidance on the RRR and after the Commonwealth Court’s decision in *Cicero*. The Company has submitted more evidence of benefits to GSA customers and current customers to support this acquisition than required in the past – focusing on

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<sup>1</sup> Pursuant to 52 Pa. Code Section 5.533, Aqua incorporates into its Exceptions, by reference and citation, relevant sections and pages of its previously filed Main and Reply Briefs.

cyber security, training and safety for employees, and capital planning – all things which are required to operate a wastewater system. They are not things that make Aqua’s service far more superior than “typical” service, as suggested by the OCA. They are the standard and need to be taken seriously for long-term compliance and safety.

The Recommended Decision specifically ignores evidence presented by Aqua Witness Packer that would offset the financial impact of any **future** rate increase to the GSA customers, while simultaneously misconstruing the rate impacts to customers (existing and acquired) based upon erroneous statements proffered by the OCA directly contradicted and unsupported in the record.

Aqua submits that, considering the totality of the evidence **on the record in this case**, including, among others, that the GSA is not able to find experienced individuals to provide good governance, as evidenced by the need for significant upgrades to the GSA system to comply with the Pennsylvania Department of Environmental Protection (“DEP”) Consent Order Agreement (“COA”) and the failure to increase rates to its wastewater customers for the past 10 years from the currently charged average bill of approximately \$23.09 per month, the benefits of the transaction outweigh potential harms consistent with *McCloskey* and *Cicero*. Aqua acknowledges that the estimated percentage increase at a full cost of service rate is 180.85% and that such an increase would potentially result in GSA wastewater customers that now pay, on average, \$23.09 paying a \$64.84 monthly charge for wastewater service. Rate impacts are an important factor to consider in evaluating the whole picture of whether a transaction is in the public interest. However, they are but one factor and this cannot and should not be the only factor that the Commission considers.

The potential detriment of the hypothetical rate impact of the acquisition is not dispositive in the determination of affirmative public benefits, especially not where, as here, the GSA average bills today are approximately \$23.09 per month. If the Commission does not approve the transaction, the GSA has stated that there will be a nearly 200% increase in wastewater customers' rates. The evidence on this record, which includes a **new analysis** not done before in any Section 1329 proceeding **quantifying net benefits of \$168,131 for GSA from the proposed transaction**, shows that even if 100% of the \$2,233,000 estimated year 1 revenue deficiency were recovered from GSA customers (which is neither proposed nor established as the Recommended Decision suggests), this offsetting real financial benefit to customers cannot be (and should not have been) ignored.

## **2. Summary of Legal Framework for 1102/1103 Approval**

Section 1102 of the Code requires Commission approval through the issuance of a Certificate of Public Convenience ("CPC") for a public utility to expand its service territory and to acquire property used or useful in the public service. 66 Pa. C.S. §§ 1102(a)(1) and (3).

Section 1103 of the Code provides that a CPC will be issued "only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. § 1103(a). In *City of York*,<sup>2</sup> the Supreme Court explained in the context of a utility merger that the issuance of a CPC requires the Commission to find that the merger will "affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way."<sup>3</sup> This is referred to as the affirmative public benefits test..

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<sup>2</sup> *City of York v. Pa. P.U.C.*, 295 A.2d 825 (Pa. 1972) ("City of York").

<sup>3</sup> *Id.* at 828.

The Supreme Court explained *City of York* in *Popowsky*<sup>4</sup> holding that the Commission is *not* required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome or impossible; rather, the Commission properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.<sup>5</sup>

The Commonwealth Court, in *McCloskey*,<sup>6</sup> considered and applied *City of York* and *Popowsky* concluding, in the context of an Aqua Section 1329 proceeding, that Commission findings: (i) that Aqua, as the owner of numerous water and wastewater systems has sufficient operational expertise and ability to raise capital to support system operations; and (ii) the Commission has a policy of consolidation/regionalization of wastewater system assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities, are substantial evidence, consistent with *Popowsky*, to support a conclusion that there is a public benefit to a transaction.<sup>7</sup>

*McCloskey* also explains that the Commission must address rate impact in a “general fashion” when deciding whether there is substantial public benefit for a Section 1329 acquisition. Significantly, rate impact is not dispositive in the Commission’s determination of affirmative benefits and “the Commission is charged with deciding whether the impact of rates...is outweighed by ... other positive factors that...served [as] a substantial public benefit.”<sup>8</sup>

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<sup>4</sup> *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040 (Pa. 2007) (“*Popowsky*”).

<sup>5</sup> *Id.* at 1057.

<sup>6</sup> *McCloskey v. Pa. P.U.C.*, 195 A.3d 1055 (Pa. Cmwlth. 2018), *petition for allowance of appeal denied* No. 703 MAL 2018 (April 23, 2019) (“*McCloskey*”).

<sup>7</sup> As noted in *McCloskey*, “[a]s per [*Popowsky*] these aspirational statements are substantial evidence to support the notion that there is a public benefit for the merger.” 195 A. 3d at 1065.

<sup>8</sup> *Id.* at 1067.

In *Cicero*,<sup>9</sup> the Commonwealth Court acknowledged that “[w]hile Pennsylvania courts have recognized that the Commission is not required to obtain legally binding commitments from acquiring utilities and that ‘**aspirational statements**’ are **substantial evidence of an affirmative public benefit**, under the preponderance of the evidence standard, that recognition must be considered in the context of those cases.”

**EXCEPTION NO. 1: WEIGHING OF ALL FACTORS, INCLUDING THE IMPACT ON RATES, WARRANTS A FINDING OF AFFIRMATIVE PUBLIC BENEFIT**

*Aqua excepts to the conclusion that it has not met its burden of showing that there are significant public benefits of the proposed transaction that outweigh the purported harm of rate impact, i.e., that affirmative public benefit will result. Recommended Decision, Section VII.A.2, pages 94-112. A weighing of all factors, including the impact on rates, supports approval of the acquisition. Aqua Main Brief, Section V.A.3-4, and Reply Brief, Section II.A.*

In evaluating the proposed transaction, it must be recognized that “the primary objective of the law in this area is to serve the interests of the public.”<sup>10</sup> Section 1329 reflects a determination by the General Assembly that fair market value acquisitions of municipal water and wastewater systems further the public interest. The Recommended Decision ignores this determination and, by focusing exclusively on the potential rate impact to customers as the basis for recommending the acquisition be denied, effectively eviscerates the utility of Section 1329 preventing all future acquisitions thereunder – stifling regional consolidation in the water and wastewater section. Aqua acknowledges that rate impacts should be considered, but that cannot and should not be the only focus. GSA customers are being charged on average **\$23.09 per month for wastewater service**. Because a municipal authority has failed to appropriately charge for wastewater service cannot be the sole test for whether a sale is in the public interest. As discussed further below, Aqua’s

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<sup>9</sup> *Cicero v. Pennsylvania Pub. Util. Comm’n*, 300 A.3d 1106, 1119 (Pa. Commw. Ct. 2023), *reargument denied* (Sept. 26, 2023), *appeal granted*, 568 MAL 2023, 2024 WL 2988362 (Pa. June 14, 2024) (“*Cicero*”) (citing *Popowsky*, 937 A.2d at 1055-57 & n.18; *City of York*, 295 A.2d at 829-30; *McCloskey*, 195 A.3d at 1065-66).

<sup>10</sup> *Middletown Township v. Pa. P.U.C.*, 482 A. 2d 674 (Pa. Cmwlth. 1984).

acquisition of the GSA wastewater system should be approved.

In its Cheltenham Section 1329 decision, the Commission, citing *McCloskey* and *Popowsky*, stated the following:

Our obligation in performing “the balancing test required by Section 1102 of the Code [is] 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*, 195 A.3d at 1066 (applying *City of York*). We are also “charged with deciding whether the impact of rates...is outweighed by ... other positive factors that...served [as] a substantial public benefit.” *Id.* at 1067. As the Pennsylvania Supreme Court articulated in *Popowsky*, “in some circumstances conditions may be necessary to satisfy the Commission that public benefits sufficient to meet the requirement of Section 1103(a) will ensue.” *Popowsky*, 937 A.2d at 1061, n.21.<sup>11</sup>

The Recommended Decision departs from the recognized balancing test espoused in *Popowsky*. Rather than a weighing of all factors for and against a transaction, including the impact on rates as one among them, the Recommended Decision improperly affords significant weight to a potential rate impact to GSA and Aqua customers. In addition, the rate impact analysis in the Recommended Decision is fundamentally flawed, as it both misconstrues evidence and ignores entirely other evidence presented by Aqua that would minimize the financial impacts of any rate increase to customers resulting from the proposed transaction. As such, the Recommended Decision fails to address how the **single** articulated “harm” of the revenue requirement deficiency and subsequent hypothetical rate impact outweighs the numerous stated public benefits.

As referenced above, Aqua acknowledges that rate impacts should be considered, but that those impacts cannot be the sole focus. GSA customers are being charged on average \$23.09 per month for wastewater service, because the GSA has failed to appropriately charge for wastewater service. Solely considering the potential percentage increase in those rates cannot be the sole test

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<sup>11</sup> *Application of Aqua Pennsylvania Wastewater, Inc. – Cheltenham Township*, Docket No. A-2019-3008491, Opinion and Order entered October 24, 2019, at 80.

for whether a sale is in the public interest and doing so would likely prohibit the sale of countless other struggling wastewater providers. Aqua, therefore, excepts to the conclusion that it did not establish, by a preponderance of the evidence, that substantial affirmative benefits will be realized from the proposed transaction and that those benefits would outweigh the rate impact “harm”.

### **3. The Recommended Decision’s Failure to Consider Aqua’s Record Evidence Regarding Rate Impact and Net Financial Benefits**

#### **a. Recovery of Revenue Requirement Deficiency**

Each Section 1329 transaction includes a revenue deficiency calculation, which is based on estimates and forecasts for expenditures in Year 1 of the acquiring company’s ownership.<sup>12</sup> The Recommended Decision boldly asserts that “Aqua plans to recover 100% of the \$2.223 million revenue requirement deficiency from GSA customers” and cites to the testimony of Aqua’s Witness William Packer.<sup>13</sup> Aqua has never held this position and the Commission has not used such an extreme measure to carve out stand-alone rates for water and wastewater systems that are part of a consolidated system. Nonetheless, Aqua believes it is important to include this information on a stand-alone basis and it is but one data point to show what could happen if there is no cost sharing, whether between its wastewater customer base or potentially using an Act 11 shift.

A proper review of Aqua’s record evidence shows that the Recommended Decision improperly draws this conclusion by convoluting Mr. Packer’s testimony. In addressing rate impact “in a general fashion” per *McCloskey*, Mr. Packer provided that:

the average bill would increase to approximately \$64.84 per month or a 180.85% increase, **which assumes that one hundred percent of the revenue requirement deficiency is borne by the acquired customers of the GSA. While this quantification is one possible outcome**, as the Commission noted in its FSIO “**the Section 1329**

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<sup>12</sup> Aqua St. No. 3, at 17 and Appendix A.

<sup>13</sup> RD, at 94.

**valuation could have a highly unlikely rate effect of \$0. Equally unlikely is the full allocation of all costs – acquisition and perhaps others – to a rate division consisting of only the customers of the acquired municipal system. The more likely outcome is indeterminate; it will be found somewhere between possible extremes.<sup>14</sup>**

That is, Aqua has never stated that it plans to categorically recover 100% of the revenue requirement deficiency from GSA customers and that a 180.85% rate increase to GSA customer bills is certain. As laid out by Mr. Packer’s testimony, it would be one possible outcome of many and an extreme at the other end of \$0 rate impact. Aqua, in the interest of transparency to GSA, customers, and the parties provides this calculation on a stand-alone basis so that they may understand what could be one end of the spectrum of rate impacts for GSA wastewater customers. The Recommended Decision takes that transparency and builds a brick wall for any wastewater municipal transaction where that seller has artificially low rates. The Recommended Decision’s reliance on a hypothetical rate impact here and throughout the net benefits analysis is improper, especially in light of the fact that it completely ignores Aqua’s record evidence of tangible financial benefits that would serve to offset the revenue deficiency, as discussed *infra*.

**b. Calculation of Revenue Requirement Deficiency**

The Recommended Decision is persuaded by the OCA’s position that Aqua has likely understated the potential rate impacts of the acquisition, while ignoring Aqua’s evidence to the contrary. The Recommended Decision finds support for its position “based on the fact that Aqua has historically under projected the revenue deficiencies for acquired systems” and points to three recent acquisitions for comparison.<sup>15</sup> In doing so, the Recommended Decision completely **ignores** Mr. Packer’s testimony as to why this comparison is neither fair nor accurate. Critically, Mr.

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<sup>14</sup> Aqua St. No. 3, at 17. (emphasis added).

<sup>15</sup> RD, at 95.

Packer explained that the way in which Aqua calculated the first year revenue deficiency for the GSA is consistent with the way in “which all of the deficiency impacts have been calculated in the Section 1329 process,” is “compliant with the PUC’s Section 1329 implementation orders”, and how

[t]aking a point in time Section 1329 revenue deficiency calculation and comparing it to the current base rate proceeding with zero context as to significant differences between those acquisitions does not provide a fair comparison and should not be given weight in this proceeding.<sup>16</sup>

Mr. Packer provides that some of these differences – that the Recommended Decision ignores – include “historically high inflationary impacts on expenses and interest rates nationwide, and a higher cost of equity in the current filed rate case as compared to the cost of equity used in the Section 1329 proceedings” while further noting that “[i]nflationary pressures and interest rates would have an impact on a selling municipality as well, thus could impact the deficiency difference now being used as evidence against this Proposed Transaction.”<sup>17</sup> To be clear, none of Mr. Packer’s testimony was acknowledged in the Recommended Decision, not in the section citing Aqua’s position or in discussion of the Recommendation. It is devoid of any mention of this evidence.

Put simply, the Recommended Decision’s reliance on comparison numbers beyond the first year of operation is ill-fitting and cannot be used as viable evidence to prove that Aqua likely understated its revenue requirement deficiency. Instead, proper weight should be afforded to Aqua’s calculations of the revenue deficiency as it aligns with the Commission’s Section 1329 implementation orders.

**c. Tangible Financial Benefits and Net Public Benefits Analysis**

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<sup>16</sup> Aqua St. No. 3-RJ, at 7.

<sup>17</sup> *Id.*

The Recommended Decision further fails to acknowledge **entirely** the considerable testimony put forth by Aqua regarding the net public benefits and offsets to rate impacts that would result from this transaction. In putting forth a **new** calculation of tangible financial benefits,<sup>18</sup> Aqua Witness Packer explained that there would be substantial financial benefits resulting in a **net positive benefit of \$168,131** offsetting the initial revenue requirement deficiency of \$2.223 million in its entirety, as evidenced by the following chart, which was included in Aqua’s Reply Brief:<sup>19</sup>

| <b>Greenville Sanitary Sewer<br/>Public Benefits Analysis - Acquired Customers</b> |  |   |
|--|--|---|
|  | <u>Amount</u>  | <u>Source:</u>  |
| <b>GV Public Benefits Calc</b>   | Gross Proceeds   | \$18,000,000 - Appendix A   |
|  | Debt Repayment   | (2,943,160) - F/S 2023  |
|  | Cash on hand Available for use @ Closing                   | 1,118,104 - F/S 2023  |
|  | <b>Net Proceeds - for Deposit (Public) =====&gt;</b>       | <b>\$16,174,944</b> - 5.25% Interest bearing account  |
|  | Interest Income  | \$849,185 - Annual @ 5% PLIGA   |
|  | Interest Savings (General Fund)                            | 315,239 - F/S 2023  |
|  | O&M Expense Savings (Muni-Post Sale)                       | 60,112 - Pension, Healthcare, W/C Insurance, Legal, Engineering<br>10% of administration (Gen. Gov) |
|  | Property Tax - Received from Aqua                          | 10,940 - Appendix A - TOTI Tab  |
|  | Avoided Rate Increases (NPV 10 yr)                         | 1,155,655 - NPV Increase per year for 10 years assumed  |
|  | <b>A.) Income/Cost Reductions for Public Benefit =&gt;</b> | <b>\$2,391,130</b>  |
| <b>Rate Impact</b>   | Present Revenue  | \$1,229,219 - Appendix A  |
|  | Revenue Requirement  | 3,452,219 - Appendix A  |
|  | <b>B.) Revenue Deficiency \$ =====&gt;</b>                 | <b>\$2,223,000</b> - Appendix A - 100% Cost of Service  |
| <b>Revenue Deficiency %</b>  | <b>180.85%</b>   |   |
| <b>C.) Net Public Benefit / (Impact) =====&gt;</b>                                 | <b>\$168,131</b> - A.) minus B.) = C.)                     |   |

The Recommended Decision’s failure to consider this substantial record evidence regarding the financial benefits and offsets was a critical oversight – indeed this analysis is not even mentioned

<sup>18</sup> Aqua St. No. 3-R, at 7-8.

<sup>19</sup> *Id.* at 8; Aqua Reply Br., at 15.

in the summary of Aqua's position. When properly considered, it mitigates the alleged harm of the potential rate increase for GSA customers.

**d. Other Reasons for a Potentially Higher Rate Impact in this Acquisition**

Furthermore, while the Recommended Decision recognizes Aqua's acknowledgment of the potential rate impacts, it fails to consider or give fair weighting to the underlying causes of the potential 180.85% rate impact. Although Aqua has emphasized this fact throughout this matter, it bears repeating: the current average monthly bill of a residential GSA customer is **approximately \$23.09 per month**. The average monthly bill of a residential GSA customer **has remained at approximately \$23.09 for the last 10 years**. Although, Aqua put forth substantial evidence regarding the net public benefits when weighed against the hypothetical impact on rates, the Recommended Decision failed to consider the reason why the GSA's rates have remained at \$23.09 for the last 10 years – there is a serious deficiency in the GSA's ability to appoint and retain individuals to govern it.

The Borough's witness provided ample testimony highlighting governance concerns. The Recommended Decision glosses over these concerns and instead focuses on employees and operators. The Recommended Decision dismisses GSA's governance concerns by asserting that no record evidence indicates that GSA would be incapable of hiring additional employees or managers to continue operations.<sup>20</sup> This is concerning and highlights the practical realities the GSA is dealing with versus those that are not living in the Greenville community and ignores and discredits the actual statements of the Borough's Witness.

At the outset, it is important to note that the Borough is a small, working-class community approximately 80 miles north of Pittsburgh that has recently worked its way out of Act 47 status

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<sup>20</sup> RD, at 102-103.

after 21 years.<sup>21</sup> This designation as a distressed community and resulting restrictions have caused the Borough to limit its staff and place increased responsibilities on the limited staff they have.<sup>22</sup> The Borough's Witness Jasson Urey further noted that the GSA Board has struggled to find candidates to participate on the Board, with one seat being open for six months and that none of the current GSA Board members currently seated have any utility experience.<sup>23</sup> Mr. Urey noted further that the Board only meets on a quarterly basis which can pose difficulties and delays when issues arise with the System, such as when customers have issues with their bills and adjustments need to be made.<sup>24</sup> Mr. Urey stated that "while we have been able to keep our rates low for our consumers, that has come at a cost of neglecting prudent investment in our system."<sup>25</sup> As such, the GSA has continued to implement rates at approximately \$23.09 per month to the **detriment** (not benefit) of GSA customers – who will see a nearly 200% increase in their rates if the transaction is not approved and who will not realize any of the governance, ability to spread costs, or other benefits attendant to ownership by Aqua if the transaction were approved. Although Aqua acknowledges the potential for a 180.85% increase in rates in the future, against the backdrop of a 10-year-old rate structure and an impending nearly 200% rate increase, it is not as significant especially when considering that it is offset by the many significant public benefits, including the tangible financial benefits that the Recommended Decision ignored as stated above, of the proposed transaction.

**e. Weighing of All Factors, Including the Appropriate Weight Given to Impact on Rates**

While the Recommended Decision states that the impact of rates on customers is not reason

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<sup>21</sup> Greenville St. No. 1, at 4.

<sup>22</sup> Greenville St. No. 1-R, at 2.

<sup>23</sup> Greenville St. No. 1, at 6.

<sup>24</sup> *Id.*

<sup>25</sup> Greenville St. No. 1-R, at 3.

alone to deny the Application, the dispositive weight given to the hypothetical rate impact is apparent. The Recommended Decision follows suit with OCA's strategy in comparing each individual benefit to one specific harm – hypothetical impact on rates. However, when weighting of the potential rate impact against other benefits is done properly, by taking into consideration all of the benefits put forward by Aqua and weighing them against the single harm (hypothetical rate impact) articulated by the Recommended Decision, it is clear that there are numerous substantial affirmative public benefits<sup>26</sup> that outweigh the potential impact on rates. Additionally, while performing the net benefit analysis, the Recommended Decision repeatedly relies on the fallacy that because GSA is managing to operate its system now, that means that it can continue to do so without Aqua's intervention. This ignores the realities set out above that the GSA lacks in qualified governance and management and is not likely to be able to accomplish what the Recommended Decision contends GSA can do on its own.

**f. Planned Improvements**

The Recommended Decision first states Aqua has not demonstrated that its planned improvements to the system outweigh the increase in rates by approximately 180.85%.<sup>27</sup> In so concluding, the Recommended Decision seems to suggest that while Aqua's planned improvements would provide a public benefit, it is not outweighed by the harm of the rate increase of approximately 180.85%. It goes on to state that Aqua has not demonstrated a need for its planned improvements to the system; this conclusion is belied however by the record evidence.<sup>28</sup> However, this completely ignores the reality that the GSA will implement these planned

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<sup>26</sup> Aqua will avoid rehashing the extensive list of substantial public benefits, but will instead refer back to its Main Brief, at 12-22.

<sup>27</sup> The Recommended Decision at various times improperly rounds up the potential increase of 180.85% to 185%. RD, at 103-104.

<sup>28</sup> Aqua Main Br., at 25, 30, 33, 36-37.

improvements whether the acquisition is approved or not and that it will result in **an even larger (and more immediate) percentage increase in rates, of approximately 200%**. Surely, if an increase of 180.85% is to be viewed as a harm, then a 200% increase would be significantly so.

The Recommended Decision contends that Aqua attempts to paint the GSA as a troubled system without any evidentiary support.<sup>29</sup> First, the Recommended Decision does not take into consideration that the Borough was declared a distressed community, placed in the Act 47 program, and was just recently able to exit Act 47 status after 21 years.<sup>30</sup> Importantly, as Mr. Urey provided, “[e]ven though the Borough was able to exit the Act 47 program, the economic issues that contributed to its distressed status still exist.”<sup>31</sup> Second, Section 1329, is not limited to “troubled” systems as the Recommended Decision seems to contend.<sup>32</sup> Section 1329 encourages the acquisition of municipal systems, whether troubled or not. It certainly is not meant to apply only to municipal systems that have fallen into disrepair. Likewise, the present viability of the GSA system is not a basis for denying the acquisition, especially in light of the substantial affirmative benefits the acquisition can provide and the evidence that GSA’s governance is not set up to ensure proper management of GSA going forward.

**g. GSA’s Desire to Exit the Utility Business**

In line with the GSA’s stated difficulties with governance and mismanagement, the GSA has indicated a strong desire to exit the wastewater utility business. The Recommended Decision, while claiming Aqua has failed to show how this is an affirmative public benefit, discounts the record evidence that the GSA customers will benefit from the GSA system being managed by numerous qualified wastewater professionals where the GSA has none, and instead points to other

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<sup>29</sup> RD at 103.

<sup>30</sup> Greenville St. No. 1, at 4 and No. 1-R, at 2.

<sup>31</sup> Greenville St. No. 1-R, at 2.

<sup>32</sup> RD, at 103.

options available to GSA to exit the utility industry.<sup>33</sup> In doing so, the Recommended Decision completely ignores the testimony of Aqua’s witness Mr. Packer who provided that “while true at face value, the reality is that is not the case.”<sup>34</sup> This is true because the acquisition reflects a negotiated purchase price for the GSA System that is less than its appraised FMV; both Aqua and the GSA believe they have acted in the best interest of their constituents; and “to suggest Aqua instead pursue a regulatory avenue with even more uncertainty through a non-FMV application via Section 1327 where Aqua would face similar arguments of the differences between investor-owned utilities and municipalities/municipal authorities is even less probable.”<sup>35</sup>

#### **h. Customer Benefits**

##### **i. GSA Customers**

The Recommended Decision agreed that GSA customers will “certainly” derive several benefits from this transaction, such as access to Aqua’s CAP and Aqua Aid, and from ability to enter into deferred payment arrangements, which notably the GSA does not currently have.<sup>36</sup> Additionally, the transaction would benefit GSA customers with other useful tools, such as being able to check their consumption online and pay online, which will make it easier for them to manage their water consumption and to pay their bills.<sup>37</sup> Ultimately, the Recommended Decision minimizes these stated benefits, once again, by weighing them against the hypothetical impact on rates and again circles back to the aforementioned increase of 180.85%.<sup>38</sup> However, the Recommended Decision, once again, fails to consider this increase in light of the fact that if this acquisition were to be denied, customers would face an even larger increase, to the tune of 200%.

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<sup>33</sup> RD, at 104-105.

<sup>34</sup> Aqua St. No. 3-RJ, at 7.

<sup>35</sup> Aqua St. No. 3-RJ, at 8.

<sup>36</sup> RD, at 105.

<sup>37</sup> *Id.*

<sup>38</sup> RD, at 106.

And, that increase would be **without** the numerous added benefits – that the Recommended Decision does confirm are indeed benefits derived from the proposed transaction – that the GSA does not currently have in place. Framing this in the same perspective that the Recommended Decision articulates to deny this benefit that “the access that GSA customers [would] have to low-income programs and assistance will be counteracted by the fact that they will be paying significantly higher rates,” the reality is that without the acquisition, GSA customers will have to pay even higher rates than the Recommended Decision finds “significant” (200% increase as opposed to 180.85%) and they will not have any low-income programs or deferred payment options available to assist them.

## ii. Aqua Customers

The Recommended Decision asserts that “there is no information in the record to show that the transaction would make rates more affordable in the long-term due to economies of scale.”<sup>39</sup> In doing so, it glosses over the record evidence put forth by Aqua that it expects to realize an approximately 14% reduction in O&M expenses and other system-wide economies of scale from this transaction.<sup>40</sup> Aqua provided ample evidence, that the Recommended Decision should have considered, that the economies of scale are both real and will accrue to customers of the GSA and Aqua’s existing customers. In both its Main and Reply Briefs, Aqua specifically stated the anticipated benefits in this regard and they are restated here for ease of reference:

- Aqua estimates the non-FMV systems cumulative revenue requirement per customer to be approximately \$2,600 based on the Company’s current rate case. Compared to the all systems average of \$1,811 per customer, the reality is that in the post Section 1329 era, the cost of service or revenue requirement as measured on a per customer served basis has decreased by approximately 30%. The economies of scale are present today and existing customers are benefiting from acquisitions.<sup>41</sup>

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<sup>39</sup> RD, at 107.

<sup>40</sup> Aqua Main Br., at 19-21.

<sup>41</sup> Aqua Main Br., at 21 (citing Aqua St. No. 3-RJ, at 9-10); Aqua Reply Br., at 13.

- The GSA System, at a revenue requirement deficiency of \$1,512 per customer is both lower than the Company’s existing systems and lower than the consolidated group. This demonstrates a reasonable cost of operations, such that **the entirety of systems operated by Aqua benefit by adding the GSA to its service territories.**<sup>42</sup>

And while the Recommended Decision confirms that there is a benefit to Aqua’s customers as a result of its larger customer base, that benefit is deemed to be a nominal benefit that does not stand to outweigh the “harm” of rate impact – a conclusion not based on a review of the evidence Aqua supplied, but rather on the fact that the percentage increase to the customer base is only 4%.<sup>43</sup> The Recommended Decision compounds this failure by stating that it factored into this weighting the “fact that customer rates will rise and continue to rise as a result of this transaction”<sup>44</sup> – a premise for which Aqua can find no support in the record. Indeed, the updated analysis presented by Mr. Packer in his Rejoinder Testimony in response to the OCA’s claimed flaws in his analysis, provides unrefuted and incontrovertible evidence (as noted above) that “the entirety of systems operated by Aqua benefit by adding the GSA to its service territories.”<sup>45</sup>

Aqua will refrain from rehashing its aforementioned arguments of the Recommended Decision’s improper weighing of the public benefits analysis but would highlight that the Recommended Decision recognizes Aqua’s increased customer base as a benefit of the proposed transaction.<sup>46</sup> Certainly, then, were due consideration given to the anticipated benefits stemming from the economies of scale resulting from prior 1329 acquisitions, this would be a substantial affirmative benefit of this transaction. The Recommended Decision notes further that the “normal economies of scale that would be achieved by combining treatment plants and/or closing a treatment plant will not be achieved through this acquisition because the GSA system will not be

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<sup>42</sup> Aqua Main Br., at 21 (citing Aqua St. No. 3-RJ, at 15); Aqua Reply Br., at 13.

<sup>43</sup> RD, at 107.

<sup>44</sup> *Id.*

<sup>45</sup> Aqua St. No. 3-RJ, at 15.

<sup>46</sup> RD, at 107.

physically interconnected to any other Aqua system.” RD, at 107-08. While true, that does not make the identified economies of scale resultant from a larger customer base highlighted by Aqua Witness Packer any less real, e.g., a lower revenue requirement per customer. In addition, other Section 1329 and non-Section 1329 acquisitions have been approved without interconnecting the acquired system to that of the acquiring utility or the closing of plants.

### iii. Greenville Community Benefits

Lastly, the Recommended Decision ignores record evidence in concluding it is unclear (or even relevant) where the proceeds from the sale of GSA will go following the close of the transaction – to the Borough or the GSA.<sup>47</sup> As Aqua has noted, whether the benefit of the proceeds of the sale inure to taxpayers or ratepayers, in this instance these two groups are largely the same as a significant majority of the GSA customers are residents of the Borough. As such, the GSA customers will benefit from the transaction as the proceeds from the sale, whether they be used for reduction in stormwater rates or to ensure that the Borough would not have to incur new debt to complete projects, will reduce costs passed through to them and represent real benefits from this transaction. Aqua’s witness Mr. Packer, who has 17 years of municipal experience as a councilman and mayor, stated that the benefits that come from the proceeds are real and substantial.<sup>48</sup> The Recommended Decision’s conclusion that “given the speculative nature of Aqua’s argument here, we do not find that the Greenville community will receive a benefit from this transaction”<sup>49</sup> should be rejected.

## 4. Public Benefits

The Commission has provided that it “**strongly believe[s] that these types of acquisitions**

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<sup>47</sup> RD, at 109.

<sup>48</sup> Evidentiary Hearing Tr., at 164-70.

<sup>49</sup> RD, at 109.

**generally serve public policy goals”** through benefits such as likely improvement in overall long-term viability of the water and wastewater industry, enhancement of the quality of ratepayers’ daily lives, promotion of community economic development and providing environmental enhancements.<sup>50</sup> However, the Recommended Decision minimizes the Commission’s long-standing support for the consolidation and regionalization of water and wastewater systems and the numerous substantial benefits that stem from such an acquisition, by again claiming that they are outweighed by the one purported harm – a hypothetical rate increase of 180.85% borne entirely by the GSA’s customers.<sup>51</sup> Again, this is an improper application of the net benefit analysis. The Recommended Decision goes a step further and insinuates that Aqua seeks only to collect wastewater systems through acquisition with no benefits to customers.<sup>52</sup> This is contrary to the voluminous record evidence that Aqua has put forth throughout this proceeding, including additional evidence above and beyond that of which Aqua has provided in prior approved applications.

## **5. Conclusion – Section 1102/1103 Approval**

As presented above and in Aqua’s Main and Reply Briefs, the hypothetical impact on rates is outweighed by the recognized benefits of Aqua’s ownership including its expertise and ability to raise and deploy capital for needed system improvements and upgrades; the furtherance of consolidation/regionalization of wastewater services; and the spreading of costs over a larger customer base. Perhaps more significantly, the acquisition furthers the objective of the General Assembly with the enactment of Section 1329. While *McCloskey* and *Cicero* conclude that rate impact should be addressed, both recognize that it is not dispositive in the Commission’s

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<sup>50</sup> RD, at 110.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

determination of substantial affirmative benefits. The Recommended Decision's improper weighting of the rate impact to without viewing the aggregate of the public benefits shown by Aqua, warrants a finding that the Commission reject the Recommended Decision and instead approve the acquisition – as it will result in affirmative public benefits.

Aqua's Exception No. 1 should be granted.

**B. Section 1329 – Fair Market Value Ratemaking Rate Base**

**EXCEPTION NO. 2 - FAIR MARKET VALUE RATEMAKING RATE BASE IS \$18,000,000**

*Aqua excepts to the failure of the Recommended Decision to address fair market value and ratemaking rate base. Pursuant to Section 1329(c)(2), the fair market value ratemaking rate base is 18,000,000. Aqua Main Brief, Section V.B and Reply Brief, Section II.B.*

Section 1329 of the Code addresses the valuation of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities.<sup>53</sup> Section 1329(c)(2) provides that the ratemaking rate base of the selling utility shall be the lesser of the negotiated purchase price or the fair market value of the selling utility.

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<sup>53</sup> Section 1329 reflects a determination by the General Assembly that fair market value acquisitions of municipal water and wastewater systems further the public interest. In its Tentative Supplemental Implementation Order entered September 20, 2018, at Docket No. M-2016-2543193, page 6, the Commission explained that:

The development of water and wastewater service throughout the Commonwealth over the years has led to the creation of large numbers of geographically dispersed water and wastewater systems owned by municipal corporations or authorities. For these systems, sale to a larger, well-capitalized and well-run regulated public utility or entity can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and, ultimately, it can ensure the long-term provision of safe, reliable service to customers at reasonable rates.

The Commission further explained at page 7 of that Order how, prior to Section 1329, Section 1311(b) hampered long-term consolidation:

Prior to the enactment of Section 1329, however, the Public Utility Code worked to discourage the acquisition of these systems because Section 1311(b) requires, for rate setting purposes, that the Commission value acquired property at the original cost of construction less accumulated depreciation, in short, at depreciated original cost.

With the enactment of Section 1329, the acquisition of municipal systems is no longer discouraged but is, rather, encouraged in furtherance of the public interest.

Section 1329(g) defines “fair market value” as “[t]he average of the two utility valuation expert appraisals conducted under subsection (a)(2).”

Aqua and GSA negotiated a purchase price of \$18,000,000 for the wastewater system and agreed to use the process presented in Section 1329 to determine the fair market value of the system and ratemaking rate base. Aqua engaged the services of Gannett Fleming Valuation and Rate Consultants, LLC (“Gannett”) to provide a fair market value appraisal in accordance with the Uniform Standard of Professional Appraisal Practices (“USPAP”), utilizing the cost, market and income approaches. GSA engaged the services of ScottMadden, Inc. (“ScottMadden”) for the same purpose.

Gannett’s fair market value appraisal is \$23,260,000.<sup>54</sup> ScottMadden’s fair market value appraisal is \$18,695,839.<sup>55</sup> The average of the two is \$20,977,920. The ratemaking rate base determined pursuant to Section 1329(c)(2) is \$18,000,000, being the lesser of the negotiated purchase price of \$18,000,000 and the average of \$20,977,920.

Section 1329 provides that if the Commission issues an order approving an application thereunder, the order “shall include the ratemaking rate base of the selling utility, as determined under subsection (c)(2).” In its Order approving the acquisition, the Commission should determine that the ratemaking rate base of the GSA system is \$18,000,000.

#### **1. Statements by OSBA**

The only party to assert a challenge to the UVE appraisals was the OSBA. However, no party recommended any specific adjustment to the recommended rate base of \$18,000,000. Specifically, OSBA Witnesses Hails and Cathcart took issue with variables used in the UVE’s

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<sup>54</sup> The Gannett Appraisal results using the Cost, Market and Income Approaches are presented at page 41 of the Aqua Main Brief.

<sup>55</sup> The ScottMadden Appraisal results using the Cost, Market and Income Approaches are presented at page 41 of the Aqua Main Brief.

appraisals, including: (i) use of the cost approach in relation to net book value; (ii) ScottMadden's weighting of Market Approach methods of market value, and (iii) ScottMadden's capital expenditure and revenue inputs, and ultimately recommend that the UVEs should "update their valuation models to reflect current circumstances and evidence, given the delays in progression of the case." OSBA's statements should not be considered as they did not perform an appraisal of the GSA's assets, nor did they recommend specific adjustments to consider.

Nevertheless, Aqua addressed each of these points in its Reply Brief, and they are summarized as follows per Mr. Walker's testimony:

- The valuation date (May 31, 2023) is the specific date at which the value of the Wastewater System is based.
- Generally, only the circumstances existing at the valuation date and events occurring up to the valuation date are considered.
- Events which could affect the value may occur after the valuation date, but the appraised value remains the same since the valuation date remains unchanged.
- The appraisal reflects the asset inventory from the June 2023 Engineering Assessment and is close to the date (April 27, 2023) of the Asset Purchase Agreement. Updating the appraisal at this late stage given the Commission's condensed timeline for review of such transactions would require an updated Engineering Assessment asset inventory and not be possible as it would only add further delays.
- Given the known 7% to 10% increase in wastewater plant construction costs over those reflected in the current appraisal, any updated valuation would more than likely increase the fair market value determination, leading to a higher purchase price than is stated.<sup>56</sup>

Thus, while a lower purchase price could moderate potential rate impacts to the GSA customers, it is not warranted on the basis of the APA or the UVE appraisals prepared in

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<sup>56</sup> Aqua St. No. 6-R, at 5-6.

connection with this proposed transaction.

## **2. Conclusion – Section 1329 Fair Market Valuation**

The ratemaking rate base of the GSA wastewater system, determined pursuant to Section 1329(c)(2), is \$18,000,000, being the lesser of the negotiated purchase price of \$18,000,000 and the average of the UVE appraisals of \$20,977,920.

Aqua’s Exception No. 2 should be granted.

## **C. Section 507 – Contract Approvals**

### **EXCEPTION NO. 3 - SECTION 507 APPROVALS**

*Aqua excepts to the failure of the Recommended Decision to recommend Section 507 approvals, if necessary, for the APA between Aqua and GSA and the assignment of contracts by the GSA to Aqua. The Commission should issue the requested certificates. Aqua Main Brief, Section V.D and Aqua Reply Brief, Section II.C.*

The Application asks that the Commission approve, if necessary, Aqua’s APA with the GSA and the assignment of six contracts with municipalities under Section 507 of the Code.<sup>57</sup> The contracts are necessary for the operation of the system. I&E and OSBA did not oppose the issuance of certificates. The OCA’s argument that the APA is not reasonable, legal or otherwise valid is without merit.

### **1. OCA’s Opposition to the APA**

Specifically the OCA contends that the APA is not reasonable because Aqua’s representations about the GSA system in its Application “directly conflict with warranties that GSA made as Seller” under Section 4.13 of the APA (related to Environmental Compliance).<sup>58</sup> The OCA also argues that a “key assumption” underlying Aqua’s witness Harold Walker’s FMV that “no hazardous conditions or materials exist which could affect the assets” is inaccurate in light

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<sup>57</sup> Aqua St. No. 3, at 22-23; *see also* Application, at ¶ 73.

<sup>58</sup> OCA Main Br., at 49.

of the above argument and renders his appraisal invalid.<sup>59</sup> The OCA's arguments are misplaced for the reasons stated in Aqua's Reply Brief.<sup>60</sup>

## **2. Conclusion – Section 507 Approvals**

Aqua has established that the APA and the contracts the GSA seeks to assign to Aqua as part of the proposed transaction are all reasonable, legal and valid pursuant to 66 Pa. C.S. § 507 and the Commission should therefore approve Aqua entering into those contracts.

Aqua's Exception No. 3 should be granted.

### **III. CONCLUSION**

The Commission should grant Aqua's Exceptions to the Recommended Decision and approve Aqua's Application and:

- a. Issue *Certificates of Public Convenience* under Section 1102 of the Code:
  - (1) Authorizing Aqua to acquire, by purchase, the wastewater system assets of the GSA; and
  - (2) Authorizing Aqua to begin to offer, render, furnish and supply wastewater service to the public in the Requested Territory;
- b. Authorize Aqua to file tariff revisions, effective upon one day's notice, to:
  - (1) Include within its territory all the Requested Territory;
  - (2) Adopt and apply the GSA's rates as Aqua's Base Rates within the Requested Territory; and
  - (3) Apply Aqua's *Rules and Regulations* within the Requested Territory;
- c. Enter an *Order* approving this Application and Aqua's acquisition of the Acquired Assets and, as part of that *Order* include the ratemaking rate base of the GSA as \$18,000,000 pursuant to Section 1329(c)(2) of the Code;

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<sup>59</sup> OCA Main Br., at 33.

<sup>60</sup> Aqua Reply Br., at 19-21.

- d. Approve the APA between Aqua and the GSA and the Assigned Contracts pursuant to Section 507 of the Code; and
- e. Issue such other approvals, certificates, registrations and relief, if any, under the Code that may be required with respect to Aqua's acquisition of the Acquired Assets

Respectfully submitted,

**AQUA PENNSYLVANIA WASTEWATER, INC.**

By:  \_\_\_\_\_

Courtney L. Schultz, Esq.  
Saul Ewing LLP  
1500 Market Street  
Centre Square West, 38th Floor  
Philadelphia, PA 19102  
Courtney.schultz@saul.com  
Tel. No. (215) 972-7717  
Fax No. (215) 972-1839  
*Counsel for Aqua Pennsylvania Wastewater, Inc.*

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