BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

William Ferguson	:	
	:	C-2023-3043108
v.	:	C-2023-3043109
	:	
Aqua PA Wastewater Inc.	:	

ORDER GRANTING MOTION TO CONSOLIDATE

First Complaint – Docket No. C-20023-3043108

On September 19, 2023, William Ferguson (Mr. Ferguson or Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against Aqua Pennsylvania Wastewater Inc. (Aqua, the Company, or Respondent) alleging that there are irregularities in how Aqua set New Garden wastewater tariffs in its last rate case at Docket No. R-2021-3027386 (2021 Rate Case). In support of his claim, Complainant attached extensive documentation to the Complaint. As relief, the Complainant sought as follows: 1) revision of the accuracy of Aqua's compliance data; 2) a Commission investigation into whether Aqua is exceeding its allowed revenue; 3) a revision of Aqua's tariff schedule for New Garden that conforms to an allowed revenue of $4,428,399 per year based on actual use volumes; and 4) a recalculation of all ratepayer bills based on the revised tariffs, from the start of the May-2022 rate increase on, as well as a refund of all overcharges to its customers. This Complaint was docketed at C-2023-3043108 (First Complaint, or Revenue Complaint).

October 10, 2023, Aqua filed an Answer and New Matter to the First Complaint. In its Answer Aqua denied the material allegations of the First Complaint, whereas in the New Matter Aqua averred that the Complainant participated in the public input hearings held in the 2021 Rate Case. Specifically, Aqua averred that, at the public input hearing held on November 12, 2021, at 1:00 p.m., Mr. Ferguson provided testimony under oath regarding the proposed rate

increase and its applicability to New Garden customers. Mr. Ferguson presented no testimony challenging the pro forma usage data for New Garden customers. See New Matter¶¶ 8.

In addition, Aqua averred that the Company addressed Mr. Ferguson's testimony from the November 12, 2021, public input hearing in its testimony and its briefs, and that no party challenged the pro forma usage data specific to New Garden wastewater customers. On February 18, 2022, the Administrative Law Judge issued the Recommended Decision in the 2021 Rate Case. According to Aqua, the Recommended Decision addressed the issues raised by the Complainant at the public input hearings. On May 16, 2022, the Commission entered the Rate Case Order. The Rate Case Order authorized Aqua to file tariffs reflecting, among other things, a revenue requirement for New Garden wastewater operations of $4,428,399, as part of the overall allowed revenue requirement of Aqua of $18,740,978 for wastewater service. Aqua argued that the authorized revenue requirement of $4,428,399 reflected the impacts of the Commission-approved Act 11 allocation of certain wastewater revenues to water customers. On May 23, 2022, Aqua submitted its Compliance Tariff in accordance with the Rate Case Order and the Commission's regulations. Aqua maintains that the usage data used in the Compliance Tariff filing for New Garden operations was the same as the usage data presented in Exhibit 5-B, Part I, Schedules A-NG through E-NG as submitted by as a part of its initial filing in the 2021 Rate Case proceeding. 15. The Commission issued a Secretarial Letter dated June 3, 2023, which stated that "Commission Staff reviewed the [Compliance Tariff] revisions and proof of revenues and found that suspension or further investigation does not appear warranted at this time," and permitted the Compliance Tariff to become effective by operation of law. See New Matter ¶¶ 12-15.

In its New Matter, Aqua requested that Mr. Ferguson's First Complaint be denied in its entirety because the issues raised in the Complaint are barred by the application of 66 Pa.C.S. § 316,[1] as well as by the legal doctrine of *collateral estoppel* or issue preclusion.

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[1] Pursuant to 66 Pa. C.S. § 316,
Whenever the [C]ommission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon

On October 25, 2023, Mr. Ferguson filed a Response to New Matter.

Second Complaint - Docket No. C-20023-3043109

On September 19, 2023, Mr. Ferguson filed a second Formal Complaint with the Commission against Aqua Pennsylvania Wastewater, Inc. alleging that Aqua is collecting revenue from New Garden ratepayers for a cost it is not incurring. As relief, the Complainant requested that the Commission investigate Aqua's "Purchased Wastewater" expenses. If the excess charge is verified, the Complainant requested that it be removed from the revenue Aqua is allowed to collect from New Garden ratepayers. This Complaint was docketed at C-2023-3043109 (Second Complaint or Expense Complaint).

October 10, 2023, Aqua filed an Answer and New Matter to the Second Complaint. In its Answer, Aqua denied the material allegations of the First Complaint, whereas in the New Matter, Aqua averred that the Complainant participated in the 2021 Rate Case and that Aqua's Main Brief submitted in the 2021 Rate Case addressed Mr. Ferguson claims. By way of further response, Aqua stated that Mr. Ferguson testified under oath at the public input hearing held on November 12, 2021, at 1:00 p.m. regarding the rates proposed in the 2021 Rate Case for New Garden wastewater operations. In that testimony, Mr. Ferguson did not challenge the Company's claimed expenses for Purchased Wastewater. Moreover, no other parties to the 2021 Rate Case challenged this expense. The Recommended Decision dated February 18, 2022, specifically considered Mr. Ferguson testimony, and the Rate Case Order issued in the 2021 Rate Case disposed of all issues related to Aqua's proposed rates for New Garden wastewater operations. New Matter ¶¶ 1-23. Aqua further argued that the Second Complaint is barred by Section 316 of the Code, 66 Pa.C.S. § 316, and the doctrine of collateral estoppel.

> all parties affected thereby, unless set aside, annulled or modified on judicial review.

66 Pa.C.S. § 316. 17. Under Section 316 of the Public Utility Code, a complainant is prohibited from raising issues that were previously decided. See Moore, Jr. v. PECO Energy Co., Docket No. C-2012-2309932, 2012 Pa. PUC LEXIS 1251, at *12 (Initial Decision dated July 18, 2019), adopted without modification, Docket No. C-2012-2309932 (Order entered Oct. 24, 2012).

On October 25, 2023, Mr. Ferguson filed a Response to New Matter.

By Hearing Notice dated October 27, 2023, a telephonic hearing was scheduled for December 12, 2023, for both the First and Second Complaints, and the matters were assigned to me.

On November 3, 2023, I issued a Prehearing Order reminding the parties of the time and date of the hearing, informing them of the procedures applicable to this proceeding, and directing the submission of documents prior to the hearing.

On November 15, 2023, Aqua filed a Motion seeking the continuance of the scheduled hearing and referral of the two matters to the Mediation Unit. In its Motion, Aqua indicates that Complainant is aware of its requests and does not object to them.

By order dated November 21, 2023, I granted Aqua's Motion for a continuance of the scheduled hearing. I also consolidated the two Complaints and referred the matters to the Mediation Unit.

The parties were unable to resolve the consolidated matters through mediation. By Hearing Notice dated June 12, 2024, a telephonic hearing was scheduled for July 23, 2024, for both the First and Second Complaints.

A second Prehearing Order was issued on June 27, 2023.

On July 10, 2024, Aqua filed a Motion seeking to consolidate Mr. Ferguson's First and Second Complaints with the pending base rate proceeding of Pennsylvania Public Utilities Commission, et al. v. Aqua Pennsylvania, Inc. and Aqua Pennsylvania Wastewater, Inc., at Docket Nos. R-2024-3047822 and R-2024-3047824 (2024 Base Rate Case), pursuant to 52 Pa.

Code § 5.81, for purposes of adjudication because they raise common issues of fact and law (Motion to Consolidate).[2]

A Hearing Cancellation Notice was issued on July 12, 2024, informed the parties that the telephonic hearing scheduled for July 23, 2024, on the two consolidated matters were cancelled.

On July 24, 2024, Mr. Ferguson filed his Answer in opposition to Aqua's Motion to Consolidate.

On August 8, 2024, Mr. Ferguson testified at a Public Input Hearing for Aqua's 2024 Rate Cases. His testimony did not touch directly on the claims raised in his present Complaints.[3]

As of the date of this Order, Aqua's Motion to Consolidate has not been ruled upon. The Motion is now ready for ruling.

The Commission regulation pertaining to consolidation appears at 52 Pa. Code §5.81, and states, in relevant part:

> **§5.81. Consolidation.**
> (a) The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs or delay.

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[2] Aqua's Motion to Consolidate was filed at each of the four dockets involved, and it was separately served upon the Administrative Law Judges assigned to each docket and the parties in each docket.

[3] See Pennsylvania Public Utilities Commission, et al. v. Aqua Pennsylvania, Inc. and Aqua Pennsylvania Wastewater, Inc., at Docket Nos. R-2024-3047822 and R-2024-3047824, Tr. 542-52.

The question of consolidation is clearly left to the sound discretion of the Commission or presiding officer.

Cases have been consolidated for adjudication; Re Middletown Taxi Company, 50 Pa. PUC 263 (1976), for hearing; City of York v. York Telephone and Telegraph Co., 43 Pa. PUC 240 (1967), for briefing; Clepper Farms, Inc. v. Grantham Water Co., 41 Pa. PUC 749 (1965), and have been refused consolidation for any purpose; Dopp v. Williamsburg Borough Dept. of Water and Sewer, 59 Pa. PUC 25 (1984).

In considering the consolidation of cases, the first criteria (set forth in the Commission's regulations) is that the proceedings must involve "a common question of law or fact." An examination of Commission precedent in such cases as Applications of Philadelphia Electric Co., 43 Pa. PUC 781 (1968), Pa. Public Utility Comm'n v. Bell Telephone Co. of Pennsylvania, 46 Pa. PUC 568 (1973), and Pa. Public Utility Comm'n v. Butler Twp. Water Co., 52 Pa. PUC 442 (1978), as well as those cited above, establishes that considerations in addition to the presence of common questions of law or fact must also be evaluated in ruling on a consolidation. These other considerations are:

1. Will the presence of additional issues cloud a determination of the common issues?
2. Will consolidation result in reduced costs of litigation and decision-making for the parties and the Commission?
3. Do issues in one proceeding go to the heart of an issue in the other proceeding?
4. Will consolidation unduly protract the hearing, or produce a disorderly and unwieldy record?
5. Will different statutory and legal issues be involved?
6. Does the party with the burden of proof differ in the proceedings?
7. Will consolidation unduly delay the resolution of one of the proceedings?
8. Will supporting data in both proceedings be repetitive?

No single consideration, nor group of these considerations, is dispositive of a consolidation, any more so than the presence of a common question of law or fact. Rather, the evaluation of all of them and a balancing of those favoring and disfavoring consolidation is required.

In its Motion to Consolidate, Aqua argued that: "…the June 13, 2024, Suspension Order, the 2024 Base Rate Case shall include consideration of the lawfulness justness, and reasonableness of the existing rates, rules and regulations of Aqua PA Wastewater Inc, which the Complainant is challenging." Motion to Consolidate ¶ 24.

In his response to the Motion, Mr. Ferguson challenged the timing of Aqua's Motion to Consolidate, noting that his Complaints were filed over eight months before Aqua filed its rate case but that the Motion to Consolidate was filed seven weeks after the after the filing of Aua's rate case. Answer to Motion to Consolidate ¶ 4.

Next, Mr. Ferguson argued that Aqua has failed to establish a connection between his Complaints and Aqua's most recent base rate cases currently pending before the Commission. He averred that cases regarding proposed rate increases "do not appear to carefully examine previous cases. They focus on "Fully Projected Future Test Year." Answer to Motion to Consolidate ¶ 5. In addition, the Complainant explained that the Revenue Complaint alleges that the customer usage data Aqua applied to calculate tariffs was substantially different than actual customer use. Therefore, the resulting tariffs cannot be fair and just to the customers. The Expense Complaint, on the other hand, alleges that a major cost Aqua forecast actually was eliminated shortly after the rate case was filed and many months before the rate increases went into effect. According to Mr. Ferguson, his two Complaints concern a small and well-defined set of customers who have been impacted by Aqua's rates currently in effect. Furthermore, the Complaints suggest remedies that do not require formal rate making action by the Commission. Answer to Motion to Consolidate ¶ 5.

It is true that the Commission's June 13, 2024, Suspension Order in Aqua's 2024 Base Rate Case ordered an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase in that filing, in addition to the Company's existing rates, rules, and regulations. However, the timing of the filing of Mr. Ferguson's Complaints, the late stage of the proceedings in Aqua's 2024 Base Rate Case, as well as the nature of some of Mr. Ferguson's

claims make it appropriate to adjudicate his Complaints separately from the 2024 Base Rate Case.

Tariff provisions previously approved by the Commission are *prima facie* reasonable. Sattar v. Aqua Pa., Inc., Docket No. C-2010-2169756 (Order entered July 28, 2012); Zucker v. Pa. Pub. Util. Comm'n, 437 A.2d 1067 (Pa. Cmwlth. 1981). A complainant seeking to evade the effect of an existing tariff provision carries a very heavy burden of proving that the facts and circumstances leading to the creation of the tariff provision have changed so drastically as to render the application of the tariff provision unreasonable. *Citing* Shenano Twp. bd. of Supervisors v. Pa. Pub. Util. Comm'n, 686 A.2d 910 (Pa. Cmwlth. 1996).

Mr. Ferguson's Consolidated Complaints will be set for evidentiary hearings.

THEREFORE,

IT IS ORDERED:

1. That the Aqua Pennsylvania Wastewater Inc's Motion to Consolidate is denied.

2. That the Consolidated Complaints of William Ferguson against Aqua Pennsylvania Wastewater Inc., at Docket Nos. C-2023-3043108 and C-2023-3043109 shall be set for a hearing to address the issues raised in the Complaints.

Date: October 21, 2024

/s/
Eranda Vero
Administrative Law Judge

C-2023-3043108 - WILLIAM FERGUSON v. AQUA PENNSYLVANIA WASTEWATER INC.

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