

COMMONWEALTH OF PENNSYLVANIA



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October 22, 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 Reply
Exceptions in the above-referenced proceeding.

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

Respectfully submitted,

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Enclosures

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Certificate of Service

CERTIFICATE OF SERVICE

Application of Aqua Pennsylvania :
Wastewater, Inc. 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 Reply Exceptions, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below.

Dated this 22nd day of October 2024.

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**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 : Docket No. A-2023-3041695
Approval of its Acquisition of the :
Wastewater System Assets of the Greenville :
Sanitary Authority :

REPLY EXCEPTIONS
OF THE
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I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits this Reply to the Exceptions of Aqua Pennsylvania Wastewater, Inc. (Aqua or the Company) and the Borough of Greenville (Borough) and the Greenville Sanitary Authority (GSA) (collectively, Greenville). The Public Utility Commission (Commission) should adopt Administrative Law Judges (ALJs) Mark A. Hoyer's and Alphonso Arnold III's recommendation that Aqua's acquisition of the GSA wastewater system assets does not affirmatively benefit the public in a substantial way and Aqua's Application under Sections 1102, 1329, and 507 of the Public Utility Code should be denied.

II. REPLY EXCEPTIONS

Reply to Aqua Exception 1 and Greenville Exceptions 1-12: ALJs Hoyer and Arnold correctly weighed the evidence presented in this proceeding in support of their finding that Aqua's Application was not likely to affirmatively benefit the public in some substantial way. R.D. at 92-112; OCA M.B. at 10-29; OCA R.B. at 5-28.

ALJs Hoyer and Arnold correctly found that no substantial affirmative public benefit would result from approval of Aqua's Application. As stated in the Recommended Decision:

GSA is currently providing safe, adequate, and reliable service to its customers and is capable, and there is nothing in the record to suggest that GSA would be incapable, of continuing to provide safe, adequate, and reliable service to its customers without Aqua's intervention ... Many of the benefits that Aqua asserted will be present through this transaction (for example, improvements to physical and cyber security, improvements to customer service) are services that GSA are already providing its customers in an adequate and efficient manner. Aqua's ability to improve upon the services that GSA is currently providing its customers is due to Aqua's fitness ... We find the evidence of record does not support a finding that substantial affirmative public benefits will result from this transaction. As the Commonwealth [Court] stated in *Cicero*, it is not a benefit to provide for upgrades that [the selling utility] is equally capable of providing. Ultimately, the upgrades that Aqua proposed in this matter would have the impact of turning the GSA system into a system run by Aqua.

R.D. at 111 (citations omitted). Aqua and Greenville disagree with ALJs Hoyer and Arnold's well-reasoned conclusion. Aqua Exc. at 2-22; Greenville Exc. at 5-14. Aqua and Greenville complain that ALJs Hoyer and Arnold overemphasized the potential rate impact and failed to find that the

GSA is poorly run, among other issues. In their respective exceptions, Aqua and Greenville assert nothing more than their disagreement with the Recommended Decision and attempt to relitigate factual issues in which their positions are less weighty than those presented by the OCA, the Commission's Bureau of Investigation and Enforcement (I&E), and the Office of Small Business Advocate (OSBA), and they diminish the inconsistencies in the evidence that they presented.

The OCA respectfully requests that Aqua's Exception 1 and Greenville's Exceptions 1 through 12 be denied as unsupported by the evidentiary record, and that the Commission adopt the conclusion of the Recommended Decision because Aqua and Greenville have failed to meet their burden of proof that the public would affirmatively benefit in some substantial way from approval of the instant Application. Further, the OCA incorporates by reference the arguments raised in its Main and Reply Briefs as if fully restated herein. OCA M.B. at 11-40; OCA R.B. at 5-28.

A. ALJs Hoyer and Arnold Correctly Determined that the Majority of the Averred Benefits Would Not Result, on Net, in the Public Benefitting in Some Substantial Way From the Proposed Transaction.

Aqua and Greenville argue for the existence of numerous benefits in their Exceptions which clearly arise from Aqua's fitness as a large, investor-owned utility and are not benefits which arise from the instant transaction, specifically, or that the GSA is not able to provide its customers. For example, Aqua disparages the GSA's Board composition, its cybersecurity, training for employees, and overall ability to manage the system. Aqua Exc. at 3, 12, 14, 15. Greenville agrees with Aqua. Greenville Exc. at 6, 9, 12. However, Aqua and Greenville fail to recognize that Aqua's fitness, as compared to that of the GSA, is not determinative of whether the instant Application should be approved. OCA St. 1 at 18. The OCA has not challenged and does not challenge Aqua's fitness to run a wastewater utility. The Commonwealth Court has specifically stated that, where a benefit arises out a utility's fitness and is not specific to the transaction being considered by the Commission, the benefit is not considered substantial in and of itself when determining if the

public would affirmatively benefit in a substantial way from the proposed transaction. *Cicero v. Pa. PUC*, 300 A.3d 1109, 1120 (Pa. Cmwlth. 2023) *appeal pending Cicero v. Pa. PUC*, Nos. 568 MAL 2023, 569 MAL 2023, 570 MAL 2023 (Pa. June 14, 2024) (*Cicero*); OCA M.B. at 20; OCA R.B. at 14-20.

As reasoned by ALJs Hoyer and Arnold in their Recommended Decision, many of the benefits Aqua and Greenville purport would arise out of the proposed transaction, the GSA is “already providing its customers in an adequate and efficient manner.” R.D. at 111. For example, GSA customers can already pay their bills online and it is not clear how the additional benefits alleged by Aqua – such as checking consumption online – are *substantial* improvements over the services provided by GSA. OCA St. 1 at 23; Aqua Exc. at 16. Further, there is no evidence to support the conclusion that GSA cannot or will not be able to handle any of its current challenges, including meeting its Consent Order and Agreement obligations, correcting its inflow and infiltration issues, providing any needed upgrades to its physical or cybersecurity, or hiring adequately trained employees. R.D. at 97-103; OCA M.B. at 21-22, 29-33, 36; OCA R.B. at 11-12, 15-20. The GSA has clearly demonstrated that it can meet the needs of its system, even though its board may be composed of volunteers without utility experience. R.D. at 104; OCA M.B. at 21-22; OCA R.B. at 9-11; OCA St. 1 at 16-17 (“the GSA has been able to make all necessary infrastructure improvements and has no significant environmental compliance concerns”).

While Aqua and Greenville presented testimony that the GSA is incapable of operating its system, that testimony is undermined by the factual record. *Compare* OCA St. 1 at 13 (“There is no evidence to establish that the GSA system is distressed, underfunded, or non-viable”) *with* Aqua Exc. at 14-15 *and* Greenville Exc. at 5, 7-8, 14; *see also* R.D. at 104. Instead, Aqua and Greenville’s argument boils down to their position that substantial benefits arise from Aqua owning the system,

as opposed to some other entity that is not as large and well-funded, like the GSA. ALJs Hoyer and Arnold correctly dispelled this argument. R.D. at 111 (“the upgrades that Aqua proposed in this matter would have the impact of turning the GSA system into a system run by Aqua.”). Aqua acquiring a system is not, in and of itself, evidence that the public would benefit in some substantial way from the system being acquired. *Cicero*, 300 A.3d at 1119; OCA M.B. at 19-21; OCA R.B. at 6, 9-20. Therefore, the arguments raised by Aqua that the benefits arising from its fitness were not given sufficient weight in the Recommended Decision should be dismissed as contrary to the applicable law.

B. ALJs Hoyer and Arnold Correctly Found that the Benefits to Greenville Would Not Benefit the Public in Some Substantial Way.

Aqua and Greenville failed to meet their burdens of production and persuasion to show how the instant Application will result in financial benefits to the Greenville community. Aqua Exc. at 15, 19; Greenville Exc. at 6-7. Instead, the Recommended Decision correctly determined that substantial evidence was lacking to demonstrate that the proceeds of the sale would be invested into the Greenville community. R.D. at 109. Specifically, ALJs Hoyer and Arnold found that

the evidence in this proceeding does not detail where the proceeds from the sale of GSA will go following the close of the transaction. The assumption that the sale proceeds will go to the Borough so the proceeds can be invested into the Greenville community is speculative, at best, given that Aqua has not received any confirmation from GSA that the proceeds will go to the Borough, instead of to GSA. Specifically to this point, Aqua witness Packer testified at the hearing in this matter that Aqua has not received any assurances from GSA or the Borough concerning how the proceeds from the sale would be spent or otherwise allocated in Greenville

Id.

Greenville claims that the ALJs erred in their Recommended Decision by not determining that Greenville’s aspirational statements are sufficient evidence to support how community benefits would result if the Application were to be approved. Greenville Exc. at 19. Aqua, similarly, avers that its witness’s statement that the benefits that come from the proceeds of such a sale “are

real and substantial.” Aqua Exc. at 19. Both parties decline to recognize that ALJs Hoyer and Arnold’s determination was based on the evidence of record and that, during the evidentiary hearing in this proceeding, Greenville’s attorney stated on the record that the Borough will not benefit from the proceeds of the sale, only GSA. Tr. 157-58 (“The authority will receive the sales proceeds, not the borough...The presumption that the money will go to the borough is still speculative at this point...”); OCA M.B. at 38; OCA R.B. at 22-23. Given such statements, it is difficult to conclude that substantial evidence was presented to support benefits flowing to the Greenville community from the proposed transaction.

Further, Aqua’s “new” “public benefits analysis” was properly found to be excessively speculative by ALJs Hoyer and Arnold in their well-reasoned Recommended Decision. Aqua Exc. at 11. At first glance, the “public benefits analysis” presented by Aqua appears to be new, but on closer inspection, it is merely an attempt to deflect attention from the clear rate harm in this proceeding as Aqua has done in prior acquisition proceedings, is highly flawed and misleading, and should be assigned little weight. OCA St. 1SR at 11-13; OCA M.B. at 37-38. OCA witness Hoover stated that the assumptions underlying the analysis include that:

- the sale proceeds will flow to the Borough,
- those proceeds will be put into an interest-bearing account and not be spent by the Borough except on repaying debt,
- the expenditures from the interest on the account will result in a dollar-for-dollar benefit to consumers,
- the avoided rate increase is as estimated by the GSA prior to the involvement of Aqua’s engineers, and
- the rates charged to GSA customers will not increase beyond recovery of the revenue deficiency following Aqua’s acquisition.

OCA St. 1SR at 11-13. Except for disputing the avoided rate increase, neither Aqua nor Greenville responded to or countered Ms. Hoover’s criticisms. Aqua St. 3-RJ at 11. While Aqua complains that ALJs Hoyer and Arnold failed to consider this “new analysis,” ALJs Hoyer and Arnold did

examine and it found that there was little evidence of record – beyond pure speculation – which indicated that the Borough would receive the proceeds of the sale to be able to invest them in the Greenville community, undermining the first and most critical assumption of Aqua’s analysis. *Compare* Aqua Exc. at 11 *with* R.D. at 108-09. Here, the ALJs were faced with real, tangible, concrete rate harm of approximately \$2.2 million per year compared with highly speculative “public benefits” that cannot realistically amount to substantial evidence in support of benefits that in any way outweighs the known harm. Faced with this dichotomy, the ALJs correctly concluded that Aqua’s analysis was insufficient.

Similarly, ALJs Hoyer and Arnold determined that Greenville’s desire to exit the wastewater business does not, itself, affirmatively benefit the public in a substantial way. R.D. at 105. As stated by ALJs Hoyer and Arnold, “Section 1329 transactions are not the only type of transactions under which a municipal system may be acquired. As such, there are other options available to GSA to exit the wastewater business if it so desires.” *Id.* (citations omitted). Greenville overlooks the existence of other types of acquisitions in excepting to this finding. *Compare* Greenville Exc. at 12 *with* OCA St. 1SR at 4 *and* OCA M.B. at 35 *and* OCA R.B. at 8 *and* R.D. at 105. Aqua’s contention that Aqua would not seek to acquire a system with less certainty than a Section 1329 application is not evidence of a public benefit, but oversight over how the certainty afforded Aqua under Section 1329 inures to the benefit of Aqua and not the public. Aqua Exc. at 16; OCA M.B. at 35; OCA R.B. at 8.

Further, Aqua raised concerns in its Exception 1 regarding the Borough’s recent exit from Act 47 status; Greenville raised no such issue in its Exceptions. Aqua Exc. at 15. While ALJs Hoyer and Arnold did not directly address Aqua’s concerns regarding the Borough’s recent exit from Act 47 status, the Recommended Decision’s conclusion that claims regarding how the

proceeds of the sale may flow to consumers were too speculative to be given much weight renders Aqua's point moot. R.D. at 108-09. The record does not support the conclusion that the GSA's receipt of the proceeds of the sale – as an entity distinct from the Borough and which no evidence indicates has ever been considered “distressed” – would result in any benefit to the Borough's revitalization following its exit from Act 47 status. OCA M.B. at 37-38; OCA R.B. at 21-23. This is particularly true in light of Greenville's attorney admitting on the record that the Borough will not benefit from the proceeds of the sale, only the GSA. Tr. 157-58.

Therefore, the Recommended Decision correctly concluded that the weight of the evidence presented by Aqua and Greenville regarding the benefits to Greenville and to the Greenville community which would result from this transaction is, on net, insubstantial. R.D. at 104-05, 108-09. Aqua and Greenville's exception to ALJs Hoyer and Arnold's decision on this issue should be rejected.

C. ALJs Hoyer and Arnold Correctly Found No Substantial Benefit Would Arise When Considering Aqua's Alleged Public Policy Benefits.

Aqua alleges that denying the instant Application would defy the legislative intent of the General Assembly in enacting Section 1329 of the Public Utility Code and the Commission's policy support regionalization and consolidation. Aqua Exc. at 2, 5, 6, 20. However, Aqua's arguments fall flat considering the Recommended Decision adequately assessed the Application in accordance with the *City of York* standard, as required by Section 1103 of the Public Utility Code, and considered the Commission's policy supporting regionalization and consolidation in the water and wastewater industry. R.D. 109-12.

Regarding the General Assembly's intent in enacting Section 1329, Aqua fails to consider the difference between ALJs Hoyer and Arnold's finding, which was conducted pursuant to Section 1103(a) of the Public Utility Code and its implementing caselaw, and the intent of the General

Assembly in enacting Section 1329 of the Public Utility Code. Importantly, Section 1329 is a valuation tool and was not enacted with a statutory provision which impacted the analysis the Commission must perform under Section 1103 and its implementing caselaw to determine whether a proposed acquisition should be approved. *See* 66 Pa. C.S. § 1329. If the General Assembly’s intent were to alter how the Commission determined whether the requirements of Section of 1103 and its implementing caselaw were met, then the General Assembly would have enacted such a change. *Commonwealth v. Johnson*, 26 A.3d 1078, 1090 (Pa. 2011) (“although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.”); *SEDA-COG Joint Rail Auth. v. Carload Express, Inc.*, 238 A.3d 1225, 1238 (Pa. 2020) (“when enacting legislation the General Assembly is presumed to know the state of the law at that time”) (citing *Commonwealth v. McClintic*, 909 A.2d 1241, 1251-52 (Pa. 2006)).

Aqua’s argument that the Recommended Decision somehow deviates from the General Assembly’s intent in enacting Section 1329 of the Public Utility Code is inconsistent with the fact that Act 12 contained no provision which instructed the Commission to alter how it analyzes proposed acquisitions under Section 1103 and its implementing caselaw. Further, Aqua’s hyperbole that the Recommended Decision “effectively eviscerates the utility of Section 1329 preventing all future acquisitions thereunder” is contrary to ALJs Hoyer and Arnold’s meticulous analysis. Aqua Exc. at 6. Greenville’s similar claim that “the standards proposed by the ... Judges[?] Recommended Decision creates a burden so high that it is unlikely any municipality can sell its wastewater system” are not borne out by the evidence in this proceeding or Section 1103 and its implementing caselaw. Greenville Exc. at 15. ALJs Hoyer and Arnold merely weighed the evidence presented and, finding that Aqua and Greenville failed to carry their burden of persuasion that affirmative public benefit would result, on net, in some substantial way from the proposed

transaction, recommended denial of the instant Application. R.D. at 111-12. The Recommended Decision contains no conclusion establishing that the GSA could never be acquired by Aqua, only that, on the evidence of record, the parties had not established that the Application met the requirements of Section 1103. Aqua and Greenville's arguments to the contrary lack foundation.

Aqua also misapplied the Commission's policy promoting consolidation and regionalization in its Exception 1. Aqua Exc. at 5, 6, 20. The Commission's policy promoting regionalization and consolidation of the water and wastewater industry is targeted at providing greater environmental and economic benefits to customers, not at the reduction of overall water and wastewater servicers in Pennsylvania. 52 Pa. Code § 69.721(a). As pointed out by the Recommended Decision, "the goal of regionalization and consolidation is not simply to acquire as many water and wastewater systems as possible and combine them into one system, but to consolidate systems in a way that benefits customers. Aqua has not demonstrated in this proceeding that the acquisition of the GSA system will benefit customers in a way that outweighs the harms presented by this transaction." R.D. at 110 (citing *Application of Pennsylvania-American Water Company, pursuant to Section 1329 for the acquisition of the wastewater collection and conveyance system owned by the Borough of Brentwood*, Docket No. A-2021-3024058 at 76 (Opinion and Order entered Feb. 22, 2024) (*Brentwood Order*)). In sum, Aqua has failed to establish that the proposed acquisition would meet the aims of the Commission's policy statements regarding regionalization and consolidation. OCA R.B. at 7.

ALJs Hoyer and Arnold correctly determined that the policies behind the General Assembly's enactment of Section 1329 of the Public Utility Code and the Commission's policy supporting regionalization and consolidation, including creating incremental economies of scale, would not be undermined through the denial of Aqua's Application because Aqua did not meet its

burden of proof that the instant transaction would, on net, affirmatively benefit the public in some substantial way. R.D. at 107, 109-10. Aqua and Greenville's arguments on these issues should be rejected.

D. ALJs Hoyer and Arnold Accurately Assessed the Rate Harm Posed by the Application.

Aqua provided evidence to establish that, if the transaction were approved, then the revenue deficiency from its operation of the GSA system would amount to approximately \$2.2 million. Aqua St. 3, App'x A; OCA St. 1SR, at 19. Notably, this is 2.63 times the depreciated original cost of the system and exceeds the Commission's reasonableness review ratio of 1.68. OCA M.B. at 15; OCA R.B. at 4; OCA St. 1 at 5-6. If allocated entirely to GSA customers, this would result in a **180.85%** rate increase, or an additional \$41.68 *per month*. Aqua St. No. 3, p. 17. While Aqua is correct that it did not adopt the position that GSA customers would necessarily bear the entirety of the revenue deficiency, the fact remains that, solely as a result of this transaction, there is an annual revenue deficiency of \$2.2 million per year, and the Company failed to carry its burdens of production and persuasion as to any other rate impact scenario which would result from approval of this Application. Aqua Exc. at 8; *see In re Navarra*, 185 A.3d 342, n. 5 (Pa. Super. 2018) (holding that the burden of proof is composed of both the burden of production, or coming forward with evidence, and persuasion, or coming forward with enough evidence to convince a finder of fact that a fact is established).

Indeed, Aqua states that there are a significant number of possible outcomes which could result from allocating the cost of the revenue deficiency. Aqua Exc. at 9. Other rate impacts are not sufficiently supported by the evidence presented by Aqua to warrant consideration. ALJs Hoyer and Arnold correctly determined that the appropriate rate impact to use for the purpose of determining whether public benefits would result from the transaction in some substantial way is

that which was supported by the evidence presented by Aqua, a rate impact of **180.85%**. R.D. at 95; OCA St. 1 at 8; OCA St. 1SR at 19; OCA M.B. at 16; OCA R.B. at 36.

Aqua incorrectly states that ALJs Hoyer and Arnold failed to adequately compare the rate impact of **180.85%** with the “avoided rate increase” which results from this transaction. Aqua Exc. at 4, 13, 15-17. Greenville also inaccurately provides that ALJs Hoyer and Arnold ignored its statements regarding the likely increase to rates if the transaction is denied. Greenville Exc. at 12-13. While the OCA agrees that the Recommended Decision could have more thoroughly analyzed the “avoided rate impact,” the fact remains that there was simply a dearth of evidence to support any concrete analysis of the rate increase that would be avoided as a result of this transaction as compared to, or with respect to, the costs the GSA would need to incur in near-term investment in plant. R.D. at 95-96.

As identified by OCA witness Hoover, the estimated capital improvements which would result in the “avoided rate increase” of \$46 million identified by Aqua are not an appropriate benchmark by which to measure how much the GSA would need to invest in plant to satisfy the terms of its Consent Order and Agreement with the Pennsylvania Department of Environmental Protection. OCA St. 1SR at 8-9; OCA R.B. at 9. Instead, the GSA can implement the more cost-effective solution identified by Aqua which is included within the \$20 million Aqua plans on investing into the GSA within the first 10 years of ownership. *Id.* Aqua agreed that the GSA can implement its more cost-effective alternative. Aqua St. 2-R at 10-11; OCA R.B. at 9-11. As a result, Aqua’s calculation of a 200% increase is the speculative conclusion that the GSA would need to invest \$46 million to upgrade its wastewater treatment plant, a conclusion which is unsupported by evidence of record. Aqua Exc. at 13. Greenville’s similar conclusion is also unsupported by evidence. Greenville Exc. at 14. While there was clear evidence of the known and measurable rate

harm that would flow from the transaction, there was insufficient evidence to reach a credible conclusion regarding the amount that rates would need to increase under continued GSA ownership.

Nevertheless, the Recommended Decision's conclusion that even the 200% increase put forward by Aqua – if accepted as true – remains substantially less than the long-term rate impact that GSA customers will experience under Aqua ownership is supported by substantial evidence. R.D. at 96; OCA M.B. at 13-16; OCA R.B. at 26-27. ALJs Hoyer and Arnold, in reaching this conclusion, examined the significant increases in revenue deficiencies which have accumulated for Aqua's previously approved Section 1329 acquisitions, demonstrating that Aqua has continuously understated the revenue deficiencies that accrue for acquired systems, in addition to Aqua's proposed capital improvements, and Aqua's frequent base rate cases. R.D. at 95-96; OCA M.B. at 23; OCA R.B. at 26.

Aqua attempts to disguise the fact that systems acquired under Section 1329 by Aqua quickly accumulate revenue deficiencies in excess of those presented in the proceeding in which the acquisition was approved by calling the comparison "unfair." Aqua Exc. at 10. OCA witness Hoover presented the following table which demonstrates the difference between the revenue deficiency in Aqua's three most recent acquisitions under Section 1329 – those of the Shenandoah water system, and the Lower Makefield and East Whiteland wastewater systems – in comparison to the revenue deficiency for those systems as claimed in Aqua's most recent general rate case filing, filed in May 2024:

	Shenandoah	Lower Makefield	East Whiteland
Revenue deficiency at time of closing	\$865,000	\$2,828,000	\$5,011,000
Revenue deficiency in 2024 BRC	\$2,267,908	\$3,526,708	\$6,992,719
Increase in revenue deficiency at close vs. in 2024 base rate case	\$1,402,908	\$698,708	\$1,981,719

OCA St. 1 SR at 11. While it is true that macroeconomic trends may explain *some* difference between the revenue deficiency for a system at the time of closing and in the next base rate proceeding, the amount of time passing between the approval of these acquisitions and Aqua’s currently pending rate case is likely too short to explain *all* of the difference. The following table shows the number of months between the approval of the acquisition of each of these systems and the first rate case in which Aqua included the systems, the pending 2024 rate case:

	Shenandoah	Lower Makefield	East Whiteland
Month in which acquisition was approved	June 2023	January 2022	July 2022
Number of months between approval and 2024 rate case filing (May 2024)	11	28	22

Id. Notably, the Shenandoah rate zone demonstrated the most substantial increase in revenue deficiency, percentagewise, despite being the most recent. *Id.* at 6. The evidence presented in this case clearly shows it is possible that Aqua may be under-projecting the revenue deficiency – and attendant rate impact – to systems it acquires at the time it applies to acquire them. ALJs Hoyer and Arnold accurately assessed that, based off of the demonstrated difference in revenue deficiencies between a system at the time of acquisition and at the time of inclusion in a general rate filing, Aqua is likely to demand more revenue from the customers of that system, including the GSA, than indicated at the time of the acquisition filing. R.D. at 95.

The Company failed to consider that its rebuttal to the OCA's evidence was not sufficient to detract from the clear trend that Aqua historically (1) sees substantial increases in post-acquisition revenue deficiencies in subsequent base rate proceedings and (2) is likely under-projecting the revenue deficiency at the time of filing an application to acquire a system. Aqua Exc. at 9-10. With respect to its continued under-projections, Aqua's argument that its revenue deficiency calculations comply with the requirements of the Commission's Act 12 Implementation Order conflates the necessary – meeting the requirements to submit an application under Section 1329 – with the sufficient – providing an accurate projection of the likely revenue deficiency. Aqua Exc. at 10. Importantly, if Aqua seeks to create rate consolidation of GSA customers with its Rate Zone 1, then the **180.85%** increase proposed in this case is only slightly over half of the overall rate increase GSA customers would need to experience to become consolidated prior to any future increase to Rate Zone 1 rates. OCA M.B. at 25; OCA R.B. at 25; OCA St. 1SR at 10. Clearly, ALJs Hoyer and Arnold correctly weighed the evidence to find that the **180.85%** increase established by Aqua's testimony in this case was only the first of many substantial increases GSA customers would see under Aqua's ownership. R.D. at 96.

While it is unlikely that GSA customers would complain about their comparatively low rates, Aqua argues that the reason the proposed rate impact in this case is so high is because Greenville has maintained the same rates for quite some time. Aqua Exc. at 12-13. The Recommended Decision did not elaborate on this issue, as Aqua points out, because it is simply not relevant. *Id.* The GSA has been able to provide adequate, safe, and reliable service to its customers and make improvements to its wastewater treatment plant when it has needed to, including \$2.8 million spent recently on the engineering design for an upgrade to its treatment plant, all done *without any increases to rates*. R.D. at 102; OCA M.B. at 21-22; OCA R.B. at 10-

11; OCA St. 1 at 14; OCA Exh. CMH-6. Rate increases may be necessary in order to fund future upgrades to the wastewater treatment plant, but Aqua's attempt to color the current level of rates – which have proven to be sufficient to maintain safe and reliable service – as an indication that the GSA is poorly governed is not supported by the evidence. Aqua Exc. at 12.

With respect to Aqua's alleged economies of scale, while it is true that having a larger customer base over which to spread costs would be a benefit to current Aqua customers, it is unclear how substantial the benefit is from adding GSA customers to the overall customer base. Aqua Exc. at 17-18; OCA M.B. at 24-26; OCA R.B. at 24-26. The acquisition of the GSA system will result in an additional 2,283 customers to Aqua's over 60,000 wastewater customers; this increase of less than 4% in customer base provides little room for subsidization of more costly-to-run systems, even if the GSA revenue deficiency is lower than the Company-wide average. OCA M.B. at 24. Further, the proposed transaction would not result in the types of economies of scale sought by the Commission's policy favoring regionalization and consolidation, such as combining and/or closing treatment plants. R.D. at 108; OCA M.B. at 24; I&E St. 1 at 13. The Recommended Decision accurately described Aqua's proposed economies of scale as nominal, considering Aqua presented no evidence to demonstrate that the incremental increase in customer base would or could result in substantial benefits other than lowering its weighted average cost per customer. R.D. at 107-08; OCA M.B. at 24-26; OCA R.B. at 24-26.

In sum, in support of their conclusion that the rate impact of the instant Application constitutes a substantial harm which is not outweighed by the largely incidental benefits which would result, ALJs Hoyer and Arnold found that:

- The correct rate impact to GSA customers for the Commission to consider is 180.85%.

- The long-term rate impact is likely to be much higher than 180.85% because of Aqua’s frequent rate cases and historic underestimation of revenue deficiencies in acquisition proceedings.
- The long-term rate impact under Aqua ownership is likely to be higher than if GSA were to spend \$46 million on upgrades to its wastewater treatment plant and subsequently increased rates by 200%.
- The long-term rate impact resulting from the transaction is not likely to be offset by the reduced cost per customer of the acquired GSA customers, who would represent less than 4% of Aqua’s overall customer base.

R.D. at 94-96, 107. The arguments raised by Aqua and Greenville in their Exceptions regarding the rate impact in this proceeding should be rejected, as the factual averments they presented fail to amount even to aspirational statements with respect to the potential impacts from the proposed acquisition. Aqua Exc. at 6-13; Greenville Exc. 8-13.

E. The Recommended Decision Correctly Weighed the Benefits from the Transaction Against the Known Harm to Find, on Net, that Affirmative Public Benefit Would Not Result in Some Substantial Way.

Aqua and Greenville contend that the Recommended Decision provided disproportionate weight to the rate impact of the instant transaction, as compared to the insubstantial benefits described above. Aqua Exc. at 7, 9, 14; Greenville Exc. at 8-13. While it is true that some benefit would arise out of the instant transaction – namely access by GSA customers to Aqua’s customer assistance program – ALJs Hoyer and Arnold properly weighed the benefits of the transaction against the known and significant harms. R.D. at 105-06. The *number* of harms compared to the *number* of benefits is not the standard required by Section 1103 of the Public Utility Code, despite Aqua’s contention to the contrary. Aqua Exc. 7, 14. Instead, the benefits which would result from the transaction – those that are unique to the transaction, do not merely arise out of the acquiring utility’s fitness, and involve benefits beyond the capacity of the acquired system – must be weighed against the known harms so that on net there can be said that there is affirmative public benefit in some substantial way. *Cicero*, 300 A.3d at 1119. While aspirational statements can suffice as substantial evidence of affirmative benefits, they do not “**always** constitute affirmative public

benefits that will be **substantial** enough to outweigh known harms.” *Id.* at 1120 (emphasis in original); OCA M.B. at 11-12, 19, 29, 34; OCA R.B. at 18-20. Here, Aqua’s aspirational statements of benefit paled in comparison to the known and quantified rate harm and its claim to the contrary is unsupported by relevant law. Aqua Exc. at 5-6.

In their well-reasoned decision, ALJs Hoyer and Arnold methodically sifted between those benefits alleged by Aqua and Greenville that would result from Aqua’s fitness or that Greenville is capable of providing from those benefits which would arise out of this transaction, specifically. R.D. at 106-12. When weighing the benefits specific to this transaction against the known rate harm, it is clear that the instant transaction would not affirmatively benefit the public in some substantial way. For these reasons, the OCA respectfully requests that Aqua Exception 1 and Greenville Exceptions 1-12 be denied.

Reply to Aqua Exception 2 and 3: ALJs Hoyer and Arnold correctly determined that the issues presented under the Section 1329 and 507 portions of Aqua’s Application were moot when the Application was not approved under Section 1102 of the Public Utility Code. R.D. at 112-13.

In their Recommended Decision, ALJs Hoyer and Arnold found that the issues presented under the Section 1329 and 507 portions of Aqua’s application were moot because the Application was deficient under Section 1103 of the Public Utility Code. R.D. at 112-13. Importantly, applications under Sections 1329 and 507 of the Public Utility Code are closely intertwined with the application brought under Section 1102; it stands to reason that when a utility’s application to extend its service territory is denied, then there is no need to establish the value of that extension or approve the contracts needed to extend it. Yet, Aqua excepted to ALJs Hoyer and Arnold’s decision that, because Aqua was not permitted to acquire the wastewater system assets of the GSA, it need not seek approval for the valuation of the GSA’s assets and the asset purchase agreement and related contracts. Aqua Exc. at 21-25. Aqua argues that the Commission should approve the

ratemaking rate base averred in its Application and the asset purchase agreement and related contracts described in its Application. *Id.* Aqua does not identify any error of fact or law committed by ALJs Hoyer and Arnold in reaching the determination that the Section 1329 and 507 approvals requested by Aqua were moot as the Application itself was not approved and does not include citations to relevant facts or legal authority to demonstrate that ALJs Hoyer and Arnold somehow erred. *Id.*

ALJs Hoyer and Arnold did not commit an error of fact or law by determining that the issues in this proceeding raised under Sections 1329 and 507 were rendered moot by the denial of the Application. The Commission recently came to the same conclusion. In deciding on Pennsylvania-American Water Company's proposed acquisition of the wastewater assets of the Borough of Brentwood, the Commission determined that when an application under Sections 1102, 1329, and 507 fails to demonstrate that substantial affirmative public benefit would result as required by Section 1103 of the Public Utility Code, then the approvals sought under Sections 1329 and 507 are moot and need not be decided upon. *Brentwood Order* at 132. Aqua did not aver that ALJs Hoyer and Arnold's determination in this proceeding needed to differ from the Commission's treatment of the same issue in the *Brentwood Order*.

Notwithstanding the above, Aqua contested the OCA's position, raised in its Main Brief, that Aqua's testimony is inconsistent with respect to the warranties provided in the Asset Purchase Agreement. Aqua Exc. at 24. The OCA incorporates by reference the portions of its Main and Reply Briefs which discuss this issue. OCA M.B. at 10, 32-34, 49-50; OCA R.B. at 39-40. While Aqua attempts to state that the OCA's arguments are misplaced, it fails to reconcile its competing positions regarding whether or not hazardous conditions exist at the GSA which would be remediated through Aqua's efforts. Aqua Exc. at 25. Either there is or is not a hazardous condition;

if there is, a material portion of the asset purchase agreement between the GSA and Aqua is violated and if there is not, then it is even less likely the public would benefit from Aqua changing how the GSA is run in this respect. OCA M.B. at 10, 32-34, 49-50; OCA R.B. at 39-40; App. Exh. B at Section 4.13. It is unclear from Aqua's and Greenville's testimony which is the case, but in either event, the ALJs did not err in reaching their conclusion that these issues do not need to be decided because the public would not affirmatively benefit from approval of the Application in some substantial way.

Therefore, Aqua's Exceptions 2 and 3 should be denied.

Reply to Greenville Exceptions 1, 3-7, and 9: ALJs Hoyer and Arnold applied the correct legal standard to determine whether Aqua's Application would result in affirmative benefits to the public in some substantial way, as required by Section 1103 of the Public Utility Code's implementing caselaw, including the consideration of the rate impact resulting from a proposed transaction. R.D. at 92-112; OCA M.B. at 10-29; OCA R.B. at 5-28.

In Greenville's Exceptions, it repeatedly misapplies the law concerning Section 1103 acquisitions. Exceptions 1, 3-7, and 9 all contain averments concerning Section 1103 which demonstrate that Greenville fundamentally misunderstands how the Commission applies and has interpreted Section 1103. More specifically, Greenville erroneously relegates Pennsylvania caselaw implementing Section 1103 to "caselaw dicta" concerning the *City of York* standard in Exception 1, the balancing test of benefits and harms in Exceptions 4 and 7, rate impacts in Exceptions 5, 6, and 9, and the correct test to apply in Exception 3. Greenville Exc. at 4. The OCA incorporates by reference the legal standards articulated and applied in its Main and Reply Briefs. OCA M.B. at 5-8, 11-40; OCA R.B. at 2, 5-28.

Greenville argues that the legal standard applied by ALJs Hoyer and Arnold for approval of the Application is not found in the language of Section 1103. Greenville's Exception 1 states, "Aqua failed to establish that a substantial affirmative public benefit will result from this transaction." Greenville Exc. at 5. Greenville then states, concerning substantial affirmative public

benefits, “It is to be noted that the language of this Finding is not required by [S]ection 1103.” Greenville Exc. at 5. Later in Exception 1, Greenville states, “Section 1103 does not require the Judges to Find (sic) substantial public benefits. . .” Greenville Exc. at 8.

The *City of York* standard requires the Commission, when assessing an application brought under Section 1102(a) of the Public Utility Code to find that a proposed merger would “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” See *City of York v. Pa. PUC*, 295 A.2d 825, 828 (Pa. 1972) (*City of York*). ALJs Hoyer and Arnold correctly applied the *City of York* standard as Pennsylvania courts and the Commission have done for over half a century when determining if an Application under Section 1102 meets the requirements of the Public Utility Code.

In its Exception 4, Greenville states, “The weighing of benefits against a perceived harm is not addressed in [S]ection 1103.” Greenville Exc. at 9. In Exception 7, Greenville states that Section 1103 does not require a finding about whether a buyer has demonstrated that its planned improvements to the Seller’s system outweigh the increase in rates. Greenville Exc. at 11. Greenville is incorrect because, for this transaction, as in any acquisition under Section 1103, Aqua must show that the benefits to the public from approval of the transaction will outweigh the harms in some substantial way. See *City of York*, 295 A.2d at 828; 66 Pa. C.S. §§ 1102, 1103; OCA M.B. at 5-8. The Recommended Decision correctly concluded that Aqua has not done so here. R.D. at 111.

Greenville states in Exception 5, “The language of [S]ection 1103 does not require that rate changes be addressed in the approval or denial of an Application for a Certificate.” Greenville Exc. at 10. In Exception 6 Greenville states that language concerning any rate impact this transaction would have on GSA costumers is “not addressed in [S]ection 1103 of the Code. One could interpret

that omission [is] an indication th[at] the legislature [considers analyses] of rate increases at this point in the process as not relevant.” Greenville Exc. at 11. In Exception 9 Greenville states “rates are not addressed in [S]ection 1103 and should not be considered in isolation of other criteria.” Greenville Exc. at 13. Greenville’s conclusions are incorrect and inconsistent with relevant law. OCA M.B. at 5-8, 12-16, 38-40; OCA R.B. at 27-28.

ALJs Hoyer and Arnold correctly applied the standard as articulated by the Commonwealth Court when it reversed the Commission’s decision regarding Aqua’s proposed acquisition of the New Garden system when the Commission failed to consider rate impact in its initial determination. The Court stated:

Simply, by approving the sale and then putting off the consideration of the impact on rates to a later rate base proceeding, the Commission cannot do 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. It is in this proceeding that the Commission is charged with deciding whether the impact on rates based on the OCA's undisputed evidence was outweighed by the other positive factors that the acquisition served a substantial public benefit. Because it did not do so, this matter is remanded to the Commission to make that determination, including the propriety of the rate restriction on New Garden ratepayers set forth in the APA.

McCloskey v. Pa. PUC, 195 A.3d 1055, 1067 (Pa. Cmwlth. 2018) (*New Garden Appeal*).

Greenville’s position that Section 1103 does not address rate impacts ignores the requirements of Section 1103. Consistent with the *New Garden Appeal*, ALJs Arnold and Hoyer properly considered rate impacts in weighing the benefits claimed by Aqua and Greenville with the evidence provided by other parties. R.D. at 94-112. While Greenville is correct that rate impact should not be considered in isolation of other criteria, the thorough analysis in the Recommended Decision appropriately weighs the rate impact of this transaction of **180.85%** against the benefits averred by Aqua and Greenville to find that, on net, affirmative public benefit would not result in some

substantial way. *Compare* Greenville Exc. at 13 with R.D. at 94-112; OCA M.B. at 38-40; OCA R.B. at 27-28.

Greenville further misapplies the *City of York* standard in Exception 3, arguing that the Recommended Decision’s finding that the GSA can meet its consent order and agreement obligations without Aqua’s intervention “is irrelevant to the criteria set forth in [S]ection 1103. A standard that requires Sellers to be incapable of running their systems before being allowed to sell is not what the legislature intended. Such a standard encourages Sellers to neglect their systems. The standard to be applied here is whether or not the proposed sale is ‘Proper’.” Greenville Exc. at 8. The Recommended Decision applied no legal standard requiring the GSA to be nonviable in order for a sale of the system to warrant approval of the Application; rather, the Recommended Decision concludes that the GSA is capable of performing the upgrades to the system which Aqua and Greenville allege that it cannot, a conclusion which is supported by record evidence – as outlined in more detail *supra* – and correctly considered to not be a benefit arising out of the proposed transaction under Section 1103’s implementing caselaw. R.D. at 112; *Cicero*, 300 A.3d at 1119; OCA M.B. 21-22, 34-35; OCA R.B. at 9.

ALJs Arnold and Hoyer performed an analysis consistent with the requirements of the Public Utility Code and Section 1103. The proposed transaction must affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way. *See, generally, City of York*. Benefits to the public must be specific to the transaction, and not arise out of the acquiring utility’s fitness, and those benefits, on net, must outweigh the known or likely harms that would result from the transaction, including potential rate harm, in some substantial way. *Cicero*, 300 A.3d at 1119. ALJs Arnold and Hoyer’s analysis correctly determined that the evidence did not establish that any benefit to be realized from the proposed transaction would

outweigh the harms to current Aqua water and wastewater customers or existing Greenview Sewer Authority customers as required by *City of York*. R.D. at 113. Therefore, the portions of Greenville’s Exceptions 1, 3-7, and 9 which allege that the Recommended Decision applied the incorrect legal standard when assessing the instant Application should be denied.

III. CONCLUSION

For the reasons stated above, the well-reasoned Recommended Decision of ALJs Hoyer and Arnold should be approved and the Application and Exceptions of Aqua and Greenville should be denied because Aqua and Greenville failed to meet their burden of proof that the proposed acquisition of the GSA would result in substantial affirmative public benefit.

Respectfully Submitted,

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Dated: October 22, 2024

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