

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

**Application of Aqua Pennsylvania
Wastewater, Inc.**

Public Meeting of December 12, 2024
3041695-OSA
Docket No. R-2025-3041695

STATEMENT OF VICE CHAIR KIMBERLY BARROW

This matter concerns the Application filed with the Commission by Aqua Pennsylvania, Inc. (Aqua or Company) on November 17, 2023, pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (Code), 66 Pa.C.S. §§ 507, 1102, and 1329 (as amended, the Application). In its Application, Aqua requested Commission approval of the Asset Purchase Agreement (APA) dated April 27, 2023 for acquisition of substantially all of the assets, properties and rights related to the wastewater collection and treatment system (the System) owned by Greenville Sewer Authority (GSA),¹ and the right of the Company to provide wastewater service in the areas served by the GSA, through the issuance of a Certificate of Public Convenience (CPC) under Section 1102, 66 Pa.C.S. § 1102. The Application also requested, pursuant to Section 1329(c)(2), the Commission's approval to utilize fair market value (FMV) for the ratemaking rate base of the System.²³ Aqua also requested approval of other municipal agreements to be assumed by Aqua as a result of the transaction, pursuant to Section 507 of the Code, 66 Pa.C.S. § 507.

In the Recommended Decision issued on October 3, 2024, Administrative Law Judge (ALJ) Alphonso Arnold III and Deputy Chief ALJ Mark A. Hoyer (collectively, the ALJs) recommended that the Commission deny the Application because Aqua did not meet its burden of establishing that there is an affirmative public benefit resulting from the acquisition of the GSA System.⁴ Exceptions were filed by Aqua, GSA and the Borough of Greenville (Borough). Reply Exceptions were filed by the Commission's Bureau of Investigation and Enforcement (I&E) and the Office of Consumer Advocate (OCA).

In considering the matter before us, I note that mergers and acquisitions of public utilities are especially complicated transactions and are governed by Sections 1102 and 1103 of the Code, 66 Pa. C.S. §§ 1102 and 1103, which provide that acquisitions must provide a substantial affirmative public benefit. However, because the targeted system is municipally owned, we must

¹ The GSA assets consist of, *inter alia*, the assets, properties, and rights of the GSA used in the system and all treatment and collection facilities, pipes, pumping stations, generators, improvements, manholes and pipelines and billing-and collections-related assets necessary to run the wastewater system. Application ¶ 25.

² Under 66 Pa.C.S. § 1329, FMV is the lesser of the negotiated purchase price in the APA, or the average of the appraisal of the GSA's Utility Valuation Expert (UVE) and the appraisal of Aqua's UVE. In this proceeding Aqua is seeking to establish a ratemaking rate base of \$18,000,000 for the GSA's System assets based on the negotiated purchase price, as the negotiated purchase price of \$18,000,000 is less than the average of the fair market value appraisals, which is \$20,977,920 (determined by $\$18,695,839$ presented in the appraisal of ScottMadden, Inc. (ScottMadden) and $\$23,260,000$ presented in the appraisal of Gannett Fleming Valuation and Rate Consultants, LLC (Gannett Fleming). $[(\$18,695,839 + \$23,260,000) / 2 = \$20,977,920]$. Greenville St. 2 (Revised) at 14; Aqua St. 3 (Revised) at 21; Aqua St. 6 (Revised) at 13; Application at ¶ 57.

³ 66 Pa.C.S. § 1329.

⁴ R.D. at 1.

also apply the valuation criteria found in Section 1329 of the Code, 66 Pa. C.S. § 1329. It is the intersection of the long-established Sections 1102 and 1103, with Section 1329, that I wish to discuss.

Section 1329 of the Code establishes a process to assign a dollar value to municipal water and wastewater systems to be acquired by certificated public utilities. Under Section 1329, the value of water and wastewater system assets to be included in the acquiring utility's rate base for ratemaking purposes will be the lesser of the purchase price negotiated by the acquiring utility and seller or the "fair market value" of the selling utility's system. 66 Pa. C.S. § 1329(c)(2).

Section 1102(a)(3) of the Code requires a utility to first obtain a CPC from the Commission prior to a utility or an affiliated interest of a utility to acquire or transfer, to any person or corporation by any method, property used or useful in the public service.⁵ Section 1103(a) of the Code establishes the standard for granting a Certificate required under Section 1102:

A certificate of public convenience shall be granted ... 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*. The commission, in granting such a certificate, may impose such conditions as it may deem to be just and reasonable.⁶

According to the Pennsylvania Supreme Court, satisfying the standard of Section 1103(a) requires the Commission to find that the proposed transaction will "affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way."⁷ In establishing this precedent, the Court held that the statute's clear command is that the Commission must find that the granting of a certificate "will affirmatively benefit the public."⁸

Factors that the Supreme Court identified in *City of York* for the Commission to consider in determining whether there is an affirmative public benefit are the likely effects of the proposed merger on future rates to consumers along with the likely effect upon service to consumers.⁹

The Pennsylvania Commonwealth Court recently held that the Commission must perform "the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, including the impact on rates, to determine if there is a substantial public benefit."¹⁰ While *McCloskey* held that rate impact must be addressed, it recognized that "the Commission is charged with deciding whether the impact of rates ... is outweighed by ... other positive factors that ... served [as] a substantial public benefit."¹¹ Even more recently, in *Cicero v. Pa. PUC*, 910 C.D. 2022 (Pa. Cmwlth. 2023) (*Cicero*), the Commonwealth Court, upheld prior precedent that

⁵ 66 Pa. C.S. § 1102(a)(3).

⁶ 66 Pa. C.S. § 1103(a) (emphasis added); see also, *Seaboard Tank Lines v. Pa. PUC*, 502 A.2d 763, 764-65 (Pa. Cmwlth. 1985).

⁷ *City of York v. Pa. PUC*, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972) (*City of York*).

⁸ *Id.* (overruling in part, *Northern Pennsylvania Power Co. v. Pa. PUC*, 333 Pa. 265, 267, 5 A.2d 133, 134).

⁹ *City of York*, 295 A.2d at 829.

¹⁰ *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1066-1067 (Pa. Cmwlth. 2018), appeal denied, 207 A.3d 290 (Pa. 2019) (*McCloskey*) (emphasis added).

¹¹ 195 A.3d at 1067.

the substantial affirmative benefits of a proposed acquisition must outweigh the acknowledged harms resulting from the acquisition.

Here, the ALJs recommended that the Commission deny the Application due to the Company's failure to show that its ownership of the GSA System would affirmatively promote the service, accommodation, convenience, or safety of the public. The ALJs concluded that when weighing all the factors for and against the transaction to GSA customers, existing Aqua customers, and to the public-at-large, that Aqua failed to demonstrate that a substantial affirmative public benefit will result from the acquisition. According to the ALJs, the record supports that the acquisition will significantly negatively impact existing customers while not providing substantial affirmative benefits.¹²

The ALJs highlighted two core issues that appropriately address the basis of their recommended denial of the Application. First, the ALJs highlighted the rate impact of the Application. The purchase price for the GSA System is \$18,000,000. The ratemaking rate base determined pursuant to Section 1329(c)(2) is the purchase price of \$18,000,000, being the lesser of the negotiated purchase price and the average of the fair market value appraisals which is \$20,977,920.¹³ The record indicates that the \$18 million purchase price is \$13,465,362 or 397% higher than the net book value of the GSA System assets as used by ScottMadden and \$11,145,561 or 263% higher than the original cost new less depreciation of the wastewater system's utility plant in service as of May 31, 2023, of \$6,854,439 used by Gannett.^{14 15} In addition, if the Application is approved, Aqua calculates the GSA System will generate an annual revenue deficiency of \$2,223,000 that may be recovered from GSA customers, Aqua water customers, Aqua wastewater customers, or all three.¹⁶

The ALJs noted Aqua's acknowledgment that the rates of the GSA customers would eventually increase as a result of this transaction. Notably, Aqua plans to recover 100% of the \$2.223 million revenue requirement deficiency from GSA customers, estimating that that the average GSA customer's bill would increase by 180.85% from \$23 per month to \$64.68 per month after Aqua's next base rate case following the acquisition of the GSA System. Aqua further estimated that the average current bill for its existing wastewater customers could increase by \$1.35 or 1.60%, and that of its water customers could increase by \$0.09 or 0.12%, after Aqua's next base rate case following acquisition of the GSA system.¹⁷

More importantly, the ALJs found the evidence presented by the OCA persuasive in that Aqua has likely understated the potential rate impacts of this transaction based on the fact that Aqua has historically under-projected the revenue deficiencies for its acquired systems. For example, the OCA noted that Aqua's projected revenue deficiencies for three of its recent acquisitions in Lower Makefield (wastewater), Shenandoah Water, and East Whiteland Township (wastewater)

¹² R.D. at 94, 110.

¹³ Determined by \$23,260,000 presented in the Gannett Fleming appraisal and \$18,695,839 presented in the ScottMadden appraisal.

¹⁴ Aqua engaged the services of Gannett Fleming Valuation and Rate Consultants, LLC (Gannett). GSA engaged the services of ScottMadden, Inc. (ScottMadden). Both firms were pre-certified as authorized UVEs and are on the list of qualified appraisers maintained by the Commission.

¹⁵ Aqua St. No. 6-R, at 5; OCA St. 1 at 5.

¹⁶ Aqua St. 3, at Appendix A; OCA St. 1SR, at 19.

¹⁷ R.D. at 94-95.

were under projected by \$706,082, \$1,4 million, and \$1,98 million, respectively. Hence, the ALJs concluded that it is likely that Aqua under projected the annual revenue deficiency for the GSA System as well as the rate increases that Aqua estimated are necessary to recover the deficiency.¹⁸ This means the 181% rate increase to GSA customers does not reflect the additional rate increases that are likely to result from other pending and future Aqua acquisitions, the \$20.4 million that Aqua plans to invest into the GSA system over ten years, all of which will be flowed through to GSA customers via base rate proceedings following the acquisition of the GSA system.¹⁹

Second, the ALJs assessed whether the positive impact of this acquisition outweighs the negative rate impacts outlined above. The ALJs noted that despite Aqua's argument that the GSA System is in need of significant infrastructure investment and suffers from various operational and safety deficiencies and GSA's claim that the System is distressed, underfunded, and non-viable, there is sufficient evidence to the contrary. Aqua proposed to make various improvements to the GSA System as part of this transaction in order to address these alleged deficiencies and professed that the planned improvements would result in substantial public benefits. Specifically, Aqua highlighted the significant infrastructure improvements needed by the GSA System in order to comply with the Consent Order and Agreement (COA) that GSA entered into with the Department of Environmental Protection (DEP).²⁰ Aqua also, *inter alia*, committed to make significant improvements to address the safety and operational deficiencies on the GSA System, including:

- Hazardous chemical storage, labeling, safety and dichlorination issues;
- Wastewater treatment plant ventilation, physical safety, and security concerns;
- Insufficiency emergency/standby power generation;
- Limited quantity and availability of licensed operators, and limited access to training and redundancy of operators;
- Limited or lacking process control testing;
- Permit compliance issues;
- Lack of emergency preparedness training;
- Lack of safety and security equipment training;
- Inadequate supervisory control and data acquisition and operator alarm systems; and
- Lack of asset management or compliance management software systems.

¹⁸ R.D. at 94-95.

¹⁹ Aqua files requests to increase its rates on average every three years. See Docket Nos. R-2018-3003561, R-2021-3027386, and R-2024-3047824 (currently pending).

²⁰ GSA entered into the COA with the DEP on December 21, 2021, because GSA reported discharges from the GSA Wastewater Treatment Plant (WWTP) that exceeded the limits in the National Pollution Discharge Elimination System (NPDES) Permit, and informed the DEP that it could not presently comply with the maximum effluent limits for Total Residual Chlorine. GSA is in breach of the COA, as of March 6, 2024, for its failure to implement the DEP-approved plan for upgrades to the WWTP to correct the discharges. Aqua proposed to implement a flow meter based dichlorination chemical feed system and add flow control to the existing gas chlorine feed system so that the GSA system can comply with the COA.

Nevertheless, the record evidence demonstrates that GSA is capable of fulfilling its obligations under the COA without Aqua's ownership and that the reason that GSA did not move forward under the COA and make the DEP-approved upgrades to its system was because it entered into the APA with Aqua. For instance, GSA planned to spend approximately \$46 million to upgrade its system prior to entering into the APA with Aqua, the bulk of which was planned to address the COA. GSA also devoted \$2.8 million to engineering design for upgrading its treatment plant prior to entering into the APA.²¹

Notably, GSA is currently providing safe, adequate, and reliable service to its customers and is capable to continue to provide such service. Nothing in the record suggests that GSA would be incapable of continuing to provide safe, adequate, and reliable service to its customers without Aqua's intervention. The ALJs explained that many of the benefits Aqua proposed in this transaction, *i.e.*, improvements to physical and cyber security, improvements to customer service, are services that GSA is already providing to its customers in an adequate and efficient manner. More importantly, the ALJs noted that while Aqua might operate its systems in a different manner than how GSA runs its system, the GSA System is being run effectively and upgrading the System so that it runs more like an Aqua system is not an affirmative public benefit.²² Further, in terms of the investments Aqua proposed to make to GSA's infrastructure, the ALJs opined that GSA is capable of completing upgrades to its system without adding to the financial burden of current GSA customers having to fund Aqua's purchase. The ALJs concluded that although GSA indicated that performing upgrades to its system will cost an estimated \$45.6 million and result in an immediate increase in its customers rates of 200%, GSA customers will likely experience an even greater increase in rates in the near future if this transaction were to be approved.²³ ²⁴ Further, Aqua's calculation of a 200% increase is speculative and unsupported, as Aqua has noted that GSA can implement its more cost-effective alternative (\$20.4 million) without Aqua's intervention.²⁵ Also, GSA customers' rates will not increase immediately as a result of this proceeding (*i.e.* not until the next base rate proceeding, including the GSA System), even if the 200% increase put forward by Aqua is accepted as true.

The Court explained that where there are known harms, the transaction must have benefits that differ substantially from the benefits already being provided by the existing system operator to support approving the transaction.²⁶ The Court clarified that:

Where ... **there are no benefits that differ substantially** from the benefits already being provided by the existing system operator, those alleged benefits arise as a result of the acquiring utility's

²¹ R.D. at 97-98.

²² R.D. at 110-112.

²³ Aqua argued this transaction will have the benefit to GSA customers of avoiding this immediate rate increase. GSA and the Borough also argued that if the transaction is not approved, GSA will increase the rates of its customers by 200% to fund the needed capital improvements. *Id.* at 51-52, 58, 95-95.

²⁴ *Id.* at 112.

²⁵ Aqua St. 2-R at 10-11.

²⁶ Cicero at 21.

fitness, rather than from the actual transaction, and where there are acknowledged or known harms that will result from the transaction, there are insufficient net benefits to support approving the transaction and granting the [Certificate] under Section 1103(a).²⁷

The Court further explained that providing the same services as are already being provided, or providing for upgrades that the existing system operator is capable of providing, are not substantial affirmative benefits consistent with *City of York*, especially if the existing system is already operating safely and reliably.²⁸

Although the stated benefits to this transaction by Aqua outnumber the harms, those benefits do not outweigh the harms.²⁹ The vast majority of the benefits of this transaction accrue to the municipality, with some benefit to GSA's customers. All of the harms resulting from the transaction accrue to acquired customers and existing Aqua customers in the form of substantial rate increases. GSA's customers may get better service, but as highlighted, *supra*, this record suggests that the municipality has the ability to improve that service and infrastructure itself without impacting rates to the degree that this transaction will.

Earlier I said that it is the intersection of Sections 1102, 1103, and 1329 that concerns me. I have no quarrel with Section 1329, the Legislature enacted it as a tool to be utilized to encourage the consolidation of the water and wastewater companies in this state. Properly implemented Section 1329 has the potential to improve water and wastewater service to millions of Pennsylvania's citizens. My quarrel is with the runaway valuations carried out under the cover of Section 1329 and industry consolidation. The benefits analysis required by 1102 and 1103 in this case would be fairly straightforward if the financial value assigned to this system was anywhere in the neighborhood of what I consider realistic. As earlier indicated, the book value of this system is \$6,854,439, yet Aqua's ratepayers are being told by evaluators that it is worth \$18,000,000, which is approximately 2.63 times greater than the depreciated original cost of the GSA's System. Granted, Act 11 of the Code allows the cost of these transactions to be spread across a larger customer base to diminish the impact of the rate increases arising from the transactions. Yet, we cannot deny the fact that the rate increases from these transactions are still substantial.

I understand that the Commission's Regulations provide that "[t]he Commission believes that further consolidation of water and wastewater systems within this Commonwealth may, with appropriate management, result in greater environmental and economic benefits to customers." 52 Pa. Code § 69.721(a). However, as I&E noted, the GSA's System will not be physically interconnected to any other Aqua system, and thus, any economies of scale that might be achieved by combining treatment plants and/or closing a treatment plant will not be achieved through this acquisition. Further, 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,

²⁷ Id. at 20 (emphasis in original).

²⁸ Id. at 19.

²⁹ Id.

but to consolidate systems in a way that benefits customers.^{30 31} Our Policy Statement under 69 Pa. Code § 69.721 recognizes the uncertainty of whether affirmative benefits will result by citing our language that the consolidation of water and wastewater systems “may” benefit customers.

I note that transactions such as this one can also be conducted through the traditional acquisition process described in Sections 1102 and 1103 of the Code, and the Commission has made provision for incentives for applicable utilities in our Policy Statement under 69 Pa. Code § 69.721 (g).³²

Therefore, I agree with the recommendation of the ALJs and will vote to approve their recommendation.

December 12, 2024


Kimberly Barrow, Vice Chair

³⁰ Brentwood at 76.

³¹ *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 (Opinion and Order entered February 22, 2024) (*Brentwood*).

³² (g) *Acquisition incentives*. In its efforts to foster the acquisitions of smaller, less viable water and wastewater systems by larger more viable systems, the Commission, under 66 Pa.C.S. § 523 (relating to performance factor consideration), has broad latitude to allow the acquiring utility to request a rate of return premium in a subsequent rate case. The allowance of a rate of return premium, as an acquisition incentive for an acquisition that falls outside of the parameters of 66 Pa.C.S. § 1327 (relating to acquisition of water and sewer utilities), may be requested by those utilities that have a demonstrated track record of acquiring and improving the service provided to the customers of smaller and less viable water systems. The allowance of additional rate of return basis points may be awarded based on sufficient supporting data submitted by the utility within its rate case filing.