



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

August 18, 2017

Secretary Rosemary Chiavetta  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections  
1102 and 1329 of the Public Utility Code for Approval of its Acquisition of  
the Wastewater System Assets of Limerick Township  
Docket No. A-2017-2605434

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Dear Secretary Chiavetta:

Enclosed please find the Bureau of Investigation and Enforcement's (I&E) **Reply Brief** in the above-captioned proceeding.

Copies are being served on parties as identified in the attached certificate of service. If you have any questions, please contact me at (717) 783-6156.

Sincerely,

Carrie B. Wright  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney I.D. #208185

CBW/snc  
Enclosure

cc: Certificate of Service  
ALJ Steven Haas

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania :  
Wastewater, Inc. Pursuant to Sections :  
1102 and 1329 of the Public Utility :  
Code for Approval of its Acquisition of : Docket No. A-2017-2605434  
the Wastewater System Assets of :  
Limerick Township :  
:

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**REPLY BRIEF  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: August 18, 2017

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## I. STATEMENT OF THE CASE

### A. Introduction

On May 19, 2017 Aqua filed the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”), pursuant to Sections 1102 and 1329 of the Public Utility Code,<sup>1</sup> for approval of: 1) the acquisition of the wastewater systems assets of Limerick Township (“Limerick”), 2) the right of Aqua Pennsylvania Wastewater, Inc. to offer, render, furnish and supply wastewater service to the public in a portion of Limerick Township, Montgomery County, Pennsylvania and 3) for an order approving the acquisition that includes the ratemaking rate base of the Limerick wastewater system assets pursuant to Section 1329(c)(2) of the Public Utility Code (“Application”). By Secretarial Letter dated May 31, 2017, the Pennsylvania Public Utility Commission (“Commission”) acknowledged receipt of the Application.

### B. History of the Proceeding

The Bureau of Investigation and Enforcement (“I&E”) incorporates the procedural history as set forth in its Main Brief submitted on August 11, 2017. Main Briefs were also submitted by Aqua and the Office of Consumer Advocate (“OCA”). Pursuant to the procedural schedule and in accordance with Commission regulations at Section § 5.501, I&E now submits this Reply Brief.

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<sup>1</sup> 66 Pa. C.S. § 1102 (“Section 1102”); 66 Pa. C.S. § 1329 (“Section 1329”).

## II. LEGAL STANDARDS

### A. Burden of Proof

As noted in the I&E Main Brief, the Public Utility Code (“Code”) mandates that the party seeking affirmative relief from the Commission bears the burden of proof.<sup>2</sup> To satisfy that burden, there is a duty to demonstrate by a preponderance of the evidence that the proposed transaction complies with Pennsylvania law.<sup>3</sup> Therefore, as the party requesting relief, Aqua has the burden of proving that the proposed transaction satisfies Sections 1102, 1103, and 1329 of the Code. A review of the evidence and arguments presented by the parties demonstrates that Aqua has failed in its burden.

### B. Standard for Approval

The Code requires that the Commission issue a certificate of public convenience as a prerequisite to offering service, abandoning service and certain property transfers by public utilities or their affiliated interests.<sup>4</sup> 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.”<sup>5</sup> These provisions have been interpreted by the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in

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<sup>2</sup> 66 Pa. C.S. § 332(a).

<sup>3</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Commw. 1990).

<sup>4</sup> 66 Pa. C.S. § 1102(a).

<sup>5</sup> 66 Pa. C.S. § 1103(a).

some substantial way.<sup>6</sup> To ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.<sup>7</sup>

Aqua has failed to demonstrate that the Application meets the criteria that it serves the public interest within the meaning of Sections 1102 and 1103 of the Code. Because Aqua has failed to establish that the transaction serves the public interest, there is no reason for the Commission to establish a ratemaking rate base under Section 1329.

### III. SUMMARY OF THE ARGUMENT

Aqua is seeking to acquire the Limerick system, which is a wastewater system that provides sewage collection and treatment services to approximately 5,434 residential/commercial customers within portions of Limerick Township, Montgomery County. The Application, as filed, is not in the public interest. The Company has not alleged any substantial, affirmative public benefits that will be produced by the acquisition as required by *City of York*.<sup>8</sup>

Because the information contained within this filing is insufficient to establish that the acquisition is in the public interest and will result in affirmative benefits to Aqua's existing customers, I&E recommends that the Application be rejected. In the alternative, should the Commission approve Aqua's Application, I&E continues to recommend that that Aqua be required to file a separate cost of service study ("COSS") for the Limerick system in its next base rate case. Further, I&E contends that the Application cannot be

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<sup>6</sup> *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).

<sup>7</sup> 66 Pa. C.S. § 1103(a).

<sup>8</sup> *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).

approved as filed because Aqua failed to include a request for the requisite approvals for municipal contracts under Section 507 of the Public Utility Code that are needed for Aqua to assume operation of the Limerick system.

#### IV. ARGUMENT

##### A. Aqua's Acquisition is Contrary to the Public Interest

As noted in the I&E Main Brief<sup>9</sup> as well as the Office of Consumer Advocate's Main Brief,<sup>10</sup> Aqua has failed to show that this acquisition would result in affirmative public benefits which is a requirement to satisfy Section 1102 of the Code.<sup>11</sup> As noted in the I&E Main Brief, the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.<sup>12</sup> As explained in OCA's Main Brief, affirmative public benefits are demonstrated when the benefits of the transaction outweigh the negative impacts resulting from the transaction.<sup>13</sup>

##### 1. The Acquisition of the Limerick System Will Harm Aqua and Its Current Ratepayers.

Limerick Township stands to benefit from this acquisition given that it will receive \$28.9 million and Aqua is projected to spend \$8.3 million for capital improvements to the system over the next ten years that Limerick Township will not have to fund. What is not

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<sup>9</sup> I&E MB pp. 5-12.

<sup>10</sup> OCA MB pp. 51-62.

<sup>11</sup> I&E MB pp. 5-12.

<sup>12</sup> *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).

<sup>13</sup> *Application of CMV Sewage Co. Inc.*, 2008 PaPUC LEXIS 950.



clear is how existing Aqua customers, Limerick customers, and Aqua itself will benefit from this transaction.

As noted in the I&E Main Brief, Aqua has committed to holding Limerick rates constant for at least three years and, under this plan, Limerick will be operated at a loss of \$4.7 million.<sup>14</sup> Essentially, Aqua has committed existing ratepayers to subsidize a financially well positioned, well-functioning municipal system that Aqua wants to purchase at approximately 63%<sup>15</sup> more than the net book value of the system. Additionally, Aqua anticipates spending \$8.3 million on capital improvements to Limerick over ten years.<sup>16</sup> In total, over a ten-year period, the cost to existing Aqua customers to acquire Limerick will be approximately \$27.8 million.<sup>17</sup>

In its Main Brief, the Company alleges that I&E calculation of the net loss to Aqua because of this acquisition is incorrect and that the Company would actually have a positive net income.<sup>18</sup> This is simply incorrect and was refuted by I&E Witness Apetoh in surrebuttal testimony. In rebuttal, Aqua Witness Packer states that prior to any rate relief, in 2018 Limerick would be operating at a loss of about \$1 million.<sup>19</sup> As noted by I&E witness Apetoh, the Company calculated this by subtracting the \$1.4 million interest expense in 2018 from the \$0.4 million operating income from 2018, arriving at a \$1.0 million loss.<sup>20</sup> However, Mr. Apetoh correctly notes regarding this calculation:

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<sup>14</sup> I&E MB, pp. 5-6.

<sup>15</sup> OCA St. 1, p. 3.

<sup>16</sup> OCA MB, p. 53.

<sup>17</sup> I&E MB, p. 6.

<sup>18</sup> Aqua MB, p. 31.

<sup>19</sup> Aqua St. 1R, p. 13.

<sup>20</sup> I&E St. 1-SR, p. 8.

This calculation only includes the interest on 50% of the \$73.5 million rate base (\$73.5 million X 50% X 4.0% interest rate = \$1.4 million). It fails to account for any return on the other 50% of the rate base or \$3.7 million (\$73.5 million X 50% X 10%).

Therefore:

...the Company failed to account for the \$3.7 million of return on the other half of the \$73.5 million rate base. The \$1.0 million loss described by the Company in rebuttal plus the \$3.7 million equals the \$4.7 million that I described in my direct testimony.<sup>21</sup>

While Aqua is a large company that could potentially absorb these losses, these projected losses will ultimately impact Aqua's rate of return and likely lead to the filing of base rate cases which will lead to higher rates for existing customers.<sup>22</sup>

As noted above, and in the I&E Main Brief, this is not a system that needs to be acquired by a larger utility. It appears the system is well run and financially stable. There appear to be no Department of Environmental Protection violations that need to be addressed. As such, it is imprudent to allow Aqua to acquire this system at the expense of its existing ratepayers, especially given that Limerick appears to have the means to operate successfully without Aqua's intervention. Moreover, Aqua is projecting to approximately double Limerick customer's rates to \$70 per month in the future.<sup>23</sup>

Existing Aqua customers, Limerick customers, and even Aqua itself will not realize any immediate benefit from this acquisition. The only real beneficiary in this

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<sup>21</sup> I&E St. No. 1-SR, p. 8.

<sup>22</sup> I&E St. No. 1-SR, pp. 9-10.

<sup>23</sup> Aqua St. No. 1, p. 14.

acquisition is Limerick Township. Because the harm to Aqua and its existing ratepayers is substantial, I&E continues to recommend this Application be rejected.

**2. The Acquisition Does Not Provide the Requisite Affirmative Public Benefits.**

The benefits alleged by Aqua are largely unsubstantiated. First, Aqua alleges that the Commission's support for the consolidation/regionalization of water and wastewater systems throughout the Commonwealth and Aqua's track record of acquiring and improving wastewater and water systems over time should be considered a public benefit.<sup>24</sup> The simple fact that the Commission has expressed an interest in consolidating and regionalizing water and wastewater systems throughout the Commonwealth does not in any way imply that every acquisition of a water or wastewater system produces affirmative public benefits. Likewise, the fact that in the past Aqua has successfully acquired and improved other water and wastewater systems does not imply that every acquisition by Aqua should be viewed as being in the public interest. In every instance, the burden is on Aqua to demonstrate by a preponderance of the evidence that the subject acquisition will result in affirmative public benefits. Here, Aqua has failed to demonstrate how acquiring Limerick produces such benefits; therefore, the Application must be rejected.

Second, the Company alleges long-term operational efficiencies and customer growth and cost sharing as a public benefit.<sup>25</sup> These vague generalizations of what might

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<sup>24</sup> Aqua MB, p. 27.

<sup>25</sup> Aqua MB, p. 28.

occur at some unknown point in the future do not amount to the requisite showing of affirmative public benefits. The Commission simply cannot rely on Aqua's speculation about potential growth in the Limerick area or vague assertions that there may be some operational efficiencies to determine that this acquisition is in the public interest and provides substantial, affirmative public benefits.

Further, Aqua alleges that Limerick has agreed to the sale and the public interest will be served by allowing Aqua, rather than Limerick, to provide service and to address regulatory requirements and necessary capital expenditures. However, Limerick's willingness to sell this asset simply cannot be viewed as an affirmative public benefit. In general, a willing seller and a willing buyer are present in most acquisitions filed with the Commission. A willing seller and a willing buyer is merely a requirement for this application to exist in the first place, but does not demonstrate a showing of a public benefit. Similarly, Aqua's willingness to complete the identified capital improvements cannot be viewed as an affirmative public benefit especially when, as in this case, there is no record evidence suggesting that Limerick is unable to provide adequate service to its customers or make the necessary capital expenditures to the system on its own.

While Aqua's Application fails to identify affirmative benefits for existing customers under the transaction, there are identifiable detriments. This is important because, in its public interest analysis, the Commission must consider the benefits and

**detriments** of the transaction “with respect to the impact on all affected parties”<sup>26</sup> including existing customers. The detriments of this acquisition are noted above.

Additionally, as identified by OCA, Aqua’s projections are showing that rates will increase for existing customers for 15 years. Then in year 16 customers might save a mere \$0.03 as a result of this acquisition.<sup>27</sup> Saving pennies in year 16 is certainly not a substantial public benefit.

Simply put, having more customers to spread costs across at some unknown future date and saving \$0.03 approximately 16 years after this acquisition does not create the affirmative public benefits necessary to approve this transaction. Aqua has failed to provide any information to show that the benefits of this acquisition outweigh the detriments. Therefore, I&E recommends that the Application be denied as Aqua has failed to show substantial public benefits associated with this acquisition.

**B. In the Alternative, if this Acquisition is Approved, the Entirety of the Limerick Plant Should be Placed into Rate Base and Not a Regulatory Asset**

In Main Brief, both I&E and OCA opposed the Companies rate stabilization plan which proposes to place \$6,000,000 of plant related to Limerick in rate base and the remaining \$15,100,000 into a regulatory asset.<sup>28</sup> As noted in the OCA’s Main Brief, while Aqua currently has regulatory assets in rate base, neither was specifically approved by the Commission and neither is used for deferring plant in service for plant that, at some point, will be placed into rate base.<sup>29</sup>

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<sup>26</sup> *Middletown Twp. v. Pa. P.U.C.*, 482 A.2d 674, 682 (Pa. Commw. 1984) (emphasis added).

<sup>27</sup> OCA MB p 55.

<sup>28</sup> I&E MB, pp. 12-15, OCA MB, pp. 45-50.

<sup>29</sup> OCA MB p. 50.

As noted in the I&E Main Brief, this regulatory asset mechanism is atypical and inconsistent with established ratemaking principles.<sup>30</sup> While it is possible that a temporary benefit might be derived from this treatment, that benefit is minimal and is overshadowed by the fact that, depending on when the Company chooses to file a base rate case, the Company may end up recovering more from ratepayers than it would have if the full amount had initially been placed into rate base. Delaying the recovery of the Limerick plant creates a mismatch between the life of the asset and the recovery of the asset. Furthermore, it is inconsistent with Section 1329 which maintains that the rate base of the selling utility shall be incorporated into the rate base of the buying utility in the Company's next base rate case.<sup>31</sup> Given that the Company has provided no sound evidence as to why the Commission should deviate from traditional ratemaking principles in this instance, I&E maintains that the Commission should require that Aqua place the full amount in rate base when Aqua's next base rate case is filed, if the Commission approves this acquisition.

**C. The Failure of Aqua to Seek the Requisite Section 507 Approvals is a Fatal Flaw**

In Main Brief, I&E highlighted that Aqua failed to request the appropriate Section 507 approvals to allow it to assume the municipal contracts that need to be in place for Aqua to operate the Limerick system.<sup>32</sup> In its Main Brief, Aqua attempts to evade this argument by pointing to the catch all Wherefore Clause to the Application where Aqua

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<sup>30</sup> I&E MB, p. 13.

<sup>31</sup> I&E MB, p. 14.

<sup>32</sup> I&E MB pp.15-17.

requested that the Commission "...issue certificates of public convenience authorizing the acquisition, an Order approving the Application that includes the ratemaking rate base of \$75,100,000 and such other approvals, certificates, registrations and relief, if any, that may be required..."<sup>33</sup> However, this vague catch all clause is simply insufficient to cure the glaring error in Aqua's Application.

As noted above, and in the I&E and OCA Main Briefs, the burden falls squarely on Aqua as the party seeking affirmative relief from the Commission.<sup>34</sup> By using this catch all phrase and not specifically requesting all the requisite approvals, Aqua has shifted its burden to the Commission to ferret out which contracts need Section 507 approvals and, quite frankly, whatever other approvals Aqua may have forgotten to seek in this Application. This is improper given Aqua's size and sophistication. As noted by Aqua Witness Packer in his Direct Testimony:

Aqua PA is the second largest investor owned regulated water/wastewater utility operating in the Commonwealth of Pennsylvania. Aqua PA provides water and wastewater utility service to approximately 455,000 customers consisting of 435,000 water customers and 20,000 wastewater customers. Aqua PA employs over 600 highly trained utility professionals...<sup>35</sup>

As is clearly evidenced by this statement, Aqua is not a small "mom and pop" type organization, but the one of the largest investor owned utilities in this state. As such Aqua should be expected to appropriately seek the needed approvals in a transaction of this nature and not pass this requirement to the Commission.

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<sup>33</sup> Aqua MB p. 52.

<sup>34</sup> I&E MB p. 2, OCA MB pp. 3-4.

<sup>35</sup> Aqua St. 1, p. 5.

Further, as Aqua should be aware, this catch all phrase is clearly ineffective. As noted in the Company's Main Brief, I&E filed a Petition for Reconsideration of Aqua's requested acquisition of *New Garden*<sup>36</sup> based, in part, on the fact that Aqua also failed to seek the required Section 507 approvals in that proceeding as well. As part of that Petition for Reconsideration, I&E pointed out that the Commission has not at this point granted any certificates of filing as would be required under Section 507 in the *New Garden* proceeding. If Aqua's catch all phrase did in fact work, those certificates of filing would have been granted.

I&E continues to maintain that Aqua's failure to seek the necessary approvals is a fatal flaw in its Application. Aqua simply cannot be allowed to pass its burden on to the Commission. As a large investor owned utility, the Commission must be able to rely on Aqua to ask for the approvals required to close on this transaction. It is improper and burdensome for Aqua to rely on the Application's catch all provision and require the Commission to rummage through its Application to identify anything that Aqua might have forgotten.

#### **D. Ratemaking Rate Base Determinations Under Section 1329**

Although I&E did not challenge the ratemaking rate base identified in this Application, it disagrees with the Company's argument in Main Brief that OCA, and implicitly I&E, in Section 1329 proceedings are not able to challenge the appraisals

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<sup>36</sup> *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township and the New Garden Township Sewer System*, Docket No. A-2016-2580061 (Order Entered June 29, 2017)



contained within these filings.<sup>37</sup> I&E fundamentally rejects Aqua’s argument that Section 1329, by implication, requires the Commission to abdicate its obligations and authority under the Code, or that Section 1329 somehow impliedly transfers those obligations and authority to Utility Valuation Experts (“UVE”). Importantly, none of these arguments actually comport with the plain language of Section 1329.

The Pennsylvania Statutory Construction Act provides that the object of all statutory interpretation is to determine the General Assembly's intent based on the express words used in the statute.<sup>38</sup> The plain language of Section 1329 contemplates a thorough Commission review of the valuation process in two ways. First, Section 1329 states that “each utility valuation expert shall determine fair market value in compliance with the Uniform Standards of Professional Appraisal Practice, employing the cost, market and income approaches.”<sup>39</sup> These enumerated requirements are important because absent parties’ ability to investigate the underlying basis of the UVEs’ fair market value appraisals, it will not be possible for the Commission to determine whether the UVEs complied with Section 1329. Instead, the perfunctory review advocated by Aqua would require the Commission to accept any submitted appraisal on its face without any ability to verify its basis. Moreover, the de minimis review advocated by Aqua remains inconsistent with the timeline and procedure contemplated in Section 1329 and by the Commission. As previously explained, Section 1329 provides the Commission with six months from the filing of a Section 1329 application to issue an

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<sup>37</sup> Aqua MB p. 38-45.

<sup>38</sup> 1 Pa. C.S. § 1921(a),

<sup>39</sup> 66 Pa. C.S. § 1329(a)(3).

order.<sup>40</sup> I&E submits that Section 1329’s six-month timeline contemplates “the development of a full and complete record for the Commission’s review.”<sup>41</sup>

Additionally, Aqua made this similar argument in its *New Garden* proceeding, disputing the fact that the Commission and other parties may review and analyze the fair market value appraisals of the UVEs to ensure that the public interest is protected. The Commission disagreed, stating in part “...we find that Section 1329 permits the Commission and the Parties to develop a record pertaining to the review and analysis of the fair market value appraisals of the UVEs.”<sup>42</sup> As such, the Commission has recently determined that the parties to these proceedings, such as I&E and OCA, have the ability and the authority to challenge the UVE appraisals.

Moreover, Aqua’s argument that the role of UVEs is to somehow protect the public interest in Section 1329 proceedings<sup>43</sup> is without merit and must be rejected. Nothing in Section 1329 imposes any duty upon UVEs to protect the public interest and there is simply no basis to conclude that Section 1329 somehow confers a statutory duty upon UVEs, individuals hired to perform an appraisal for compensation, to protect the public interest. Instead, I&E has the duty to represent the public interest in ratemaking and service matters, and enforcing compliance with the Code.<sup>44</sup> Additionally, nothing in the UVE qualification process operates as a guarantee that every appraisal that qualified

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<sup>40</sup> 66 Pa. C.S. § 1329(d)(2).

<sup>41</sup> *Final Implementation Order*, M-2016-2543193, p. 35 (Order entered October 27, 2016).

<sup>42</sup> *New Garden Order*, p. 35.

<sup>43</sup> Aqua Main Brief, p. 38

<sup>44</sup> 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* See *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

UVEs provide will be free of errors or free of subjective adjustments that may inflate the fair market value of the appraised property. For these reasons, it is imperative that parties, and ultimately the Commission, have the ability to review and analyze the UVE evaluations.

## V. CONCLUSION

The proposed transaction as filed will not affirmatively promote the public interest in a substantial way. Therefore, I&E recommends that the Application be denied. In the alternative, if the Commission approves Aqua's Application, I&E respectfully requests that the Commission: (1) require Aqua to provide a separate cost of service study for the Limerick system as part of its next base rate filing; and (2) deny Aqua's request for regulatory asset treatment, and instead, require that the resulting rate base amount determined in this proceeding be incorporated in Aqua's rate base in its next base rate filing.

Respectfully submitted,



Carrie B. Wright  
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Prosecutor  
PA Attorney ID No. 208185

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Aqua Pennsylvania :  
Wastewater, Inc. Pursuant to Sections :  
1102 and 1329 of the Public Utility Code : Docket No. A-2017-2605434  
for Approval of its Acquisition of the :  
Wastewater System Assets of Limerick :  
Township :

**CERTIFICATE OF SERVICE**

I hereby certify that I am serving the foregoing **Reply Brief** dated August 18 2017, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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