

December 14, 2017

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

In re: Docket No. A-2017-2605434
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

Dear Secretary Chiavetta:

We are counsel to Aqua Pennsylvania Wastewater, Inc. in the above matter and are submitting, via electronic filing with this letter, the Company's Petition for Reconsideration of the Opinion and Order entered November 29, 2017. Copies of the Petition for Reconsideration are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By



Thomas T. Niesen

cc: Certificate of Service (w/encl.)
Office of Special Assistants (w/encl.)
The Honorable Steven K. Haas (w/encl.)
Alexander R. Stahl, Esquire (via email, w/encl.)

**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 :**

**PETITION OF AQUA PENNSYLVANIA WASTEWATER, INC.
FOR RECONSIDERATION OF THE OPINION AND
ORDER ENTERED NOVEMBER 29, 2017**

AND NOW comes Aqua Pennsylvania Wastewater, Inc. (“Aqua”), by its attorneys, and, pursuant to Section 703(g) of the Public Utility Code, 66 Pa. C.S. §703(g), and 52 Pa. Code § 5.572, petitions the Pennsylvania Public Utility Commission (“Commission”) for reconsideration of its Opinion and Order entered November 29, 2017. In support thereof, Aqua submits as follows:

I. INTRODUCTION

1. This matter concerns the Application of Aqua pursuant to Sections 1102 and 1329 of the Public Utility Code, 66 Pa. C.S. §1102 and §1329. The Application sought Commission approval of Aqua’s acquisition of the wastewater system assets of Limerick Township (“Township”), Montgomery County, and the right of Aqua to provide wastewater service in portions of the Township. It also asked the Commission to approve ratemaking rate base of \$75,100,000 for the Township wastewater system assets pursuant to Section 1329(c)(2) of the Public Utility Code based on the separate Fair Market Value (“FMV”) Appraisal Reports of the

two Utility Valuation Experts (“UVE”): Gannett Fleming Valuation and Rate Consultants, LLC (“Gannett”) and Herbert, Rowland & Grubic, Inc. (“HRG”).¹

2. By Recommended Decision dated September 18, 2017 (“Recommended Decision”), Administrative Law Judge Steven Haas recommended that the Commission approve the Application with certain conditions. In respect to ratemaking rate base, Judge Haas found that the Gannett and HRG FMV Appraisal Reports were performed in compliance with the Uniform Standards of Professional Appraisal Practice (“USPAP”), employing the cost, market and income approaches.² Irrespective of this finding, Judge Haas recommended several adjustments to the HRG FMV appraisal based on testimony sponsored by the Office of Consumer Advocate (“OCA”), applying a “*reasonableness*” standard.³ These adjustments reduced the ratemaking rate base from \$75,100,000 to a recommended \$64,373,378.⁴

3. By Opinion and Order entered November 29, 2017 (“Order entered November 29”), the Commission adopted the Recommended Decision and granted Aqua’s Application. The Commission approved: (a) Aqua’s acquisition of the Limerick wastewater system assets, (b) Aqua’s right to begin to offer, render, furnish and supply wastewater service to the public in portions of Limerick Township, Montgomery County, and (c) a ratemaking rate base of \$64,373,378 for the Limerick wastewater system assets to be incorporated in Aqua’s next base rate case pursuant to 66 Pa. C.S. § 1329(c)(2).⁵ In doing so, the Commission explained that the Findings of Fact and Conclusions of Law from the Recommended Decision are incorporated by

¹ Section 1329(a) of the Public Utility Code provides that two UVEs, chosen from a list maintained by the Commission, shall perform separate appraisals of the selling utility for the purpose of establishing its fair market value.

² Recommended Decision, Finding of Fact No. 52, slip op. at 11. Section 1329(a)(3) of the Public Utility Code provides that each Utility Valuation Expert shall determine fair market value in compliance with USPAP, employing the cost, market and income approaches.

³ Recommended Decision, Conclusion of Law No. 12, slip op. at 52.

⁴ Recommended Decision, Ordering Paragraph No. 4, slip op. at 53.

⁵ Order entered November 29, slip op. at 82.

reference and adopted without comment unless expressly or by necessary implication rejected or modified.⁶

4. Aqua has contended, throughout this proceeding, that the clear and unambiguous language of Section 1329 precludes the Commission from adopting adjustments to the FMV Appraisal Reports of the UVEs. In disposing of this issue, the Commission, however, concluded in its Order entered November 29 that Section 1329 “does not prevent a review of the UVE assumptions for reasonableness” and, as set forth above, adopted adjustments to the HRG FMV Appraisal Report.⁷

5. Aqua submits that the Commission, for the reasons set forth herein and below, should reconsider its Order entered November 29, apply the clear and unambiguous language of Section 1329 as enacted by the General Assembly, accept the FMV Appraisal Reports without adjustment and approve a ratemaking rate base of \$75,100,000 for the Township wastewater system assets.

II. LEGAL STANDARDS FOR RECONSIDERATION

6. The Commission’s standards for granting a petition for reconsideration are set forth in *Duick v. Pennsylvania Gas & Water Company*, 56 Pa. P.U.C. 553, 559 (1982) (“*Duick*”), (quoting *Pennsylvania Railroad Co. v. Pa. P.S.C.*, 179 A. 850, 854 (Pa. Super. Ct. 1935) (“*Pennsylvania Railroad Co.*”)):

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the court in the *Pennsylvania Railroad Company* case, wherein it was stated that “[p]arties ..., cannot be permitted by a second motion to review and reconsider, to raise the same

⁶ Order entered November 29, slip op. at 12.

⁷ The Commission also considered but did not adopt adjustments proposed by the OCA to the Gannett FMV Appraisal Report. Order entered November 29, slip op. at 37 and 46 – 53.

questions which were specifically decided against them....” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

Additionally, a petition for reconsideration is properly before the Commission where it pleads an error of law, the existence of newly discovered evidence, or a change in circumstances. *Application of Philadelphia Suburban Water Company*, Docket No. A-212370F0065 (Order entered December 10, 2001) (citing *Pennsylvania Railroad Co. and Duick*).

7. Under the *Duick* standards, a petition for reconsideration may properly raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559; *Application of Aqua Pennsylvania Wastewater, Inc.*, Docket No. A-2016-2580061, Opinion and Order entered October 5, 2017, slip op. at 7.

III. ARGUMENT

A. **The Commission Must Apply the Clear and Unambiguous Language of Section 1329 and Preclude Challenges to the FMV Appraisal Reports**

8. The Commission addresses the issue of “Ability to Challenge Fair Market Value Appraisals” in Section III.D.1 of the Order entered November 29. It, initially, summarizes the Exceptions of Aqua and, then, the Reply Exceptions of the OCA and its Bureau of Investigation and Enforcement. Its “Disposition” of the issue is presented in Subsection III.D.1.c where it

concludes, as set forth above, that “Section 1329 does not prevent a review of the UVE assumptions for *reasonableness*.”⁸

9. The Commission’s conclusion that Section 1329 permits a review of UVE assumptions for *reasonableness* is a clear error of law. The conclusion is not supported by any statutory language. With its application of a *reasonableness* standard that is not mentioned or included in the legislation enacted by the General Assembly, the Commission has engaged in an impermissible rewriting of the statute. It has replaced the USPAP standard and, in effect, created a discretionary standard for itself in regard to FMV Appraisal Reports – a self-introduced standard – that was not intended by the General Assembly. This self-introduced standard of *reasonableness* contradicts the very specific USPAP standard provided by the General Assembly for fair market value transactions and, ultimately, will lead to never ending inquiry into the underlying assumptions of the UVEs, which, again, was not intended by the General Assembly. The Commission may not override the legislated standard.

10. The Commission’s error is manifested, moreover, by the way it arrived at its conclusion. In disposing of the issue, the Commission cited, and appeared to rely on, a contention of the OCA that Section 1329 “does not prohibit a review of the assumptions utilized by the UVEs for reasonableness and conformance to the standards of the industry being valued.”⁹ There is no support for this contention in Section 1329. The General Assembly, through Section 1329, did not create an “industry” standard. The “standard,” rather, as enacted by the General Assembly is “compliance with [USPAP] employing the cost, market and income approaches.”¹⁰

⁸ Order entered November 29, slip op. at 36 (emphasis added).

⁹ Order entered November 29, slip op. at 36 (emphasis added).

¹⁰ 66 Pa. C.S. § 1329(c)(3).

11. Section 1329(c)(2) of the Public Utility Code, moreover, expressly provides that the “ratemaking rate base of the selling utility *shall* be the lesser of the purchase price negotiated by the acquiring public utility or entity and the selling utility or the [FMV] of the selling utility.”¹¹ Nowhere within Section 1329 is that ratemaking rate base subject to adjustments – regardless of their purported reasonableness. The Commission cannot insert or read into the statute words that do not appear in the text if the existing text makes sense and the implied reading would change the existing meaning or the effect of the actual language. *Pa School Boards Ass’n, Inc. v. Cmwlth., Public School Employees’ Retirement Bd.*, 863 A.2d 432, 439 (Pa. 2004). The Commission lacks the power to adopt discretionary adjustments to the FMV Appraisal Reports.¹²

12. As a clear error of law, the Commission should reconsider its Order entered November 29, reject and decline to apply a “*reasonableness*” standard, accept the FMV Appraisal Reports without adjustment and approve a ratemaking rate base of \$75,100,000. Statutory and decisional law requires the Commission to follow and apply the clear and unambiguous language enacted by the General Assembly.¹³ The standard for FMV Appraisals as enacted by the General Assembly is compliance with USPAP, employing the cost, market and income approaches.

¹¹ 66 Pa. C.S. § 1329(c)(2) (emphasis added).

¹² See *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 Authority*, Docket No. A-2016-2580061, Order entered February 15 at 22-23 (recognizing the “clear and unambiguous” mandatory language of Section 1329(d) and refusing to extend the deadline period for Commission review of Section 1329 applications).

¹³ The Statutory Construction Act of 1972 explains that “[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). In order to ascertain the intent of the General Assembly, the ruling body should first look at the plain language of the statute. *Commonwealth v. Segida*, 985 A.2d 871, 874 (Pa. 2009). When the language of the statute is free from all ambiguity, the letter of the statute is to be followed. 1 Pa. C.S. § 1921(b).

B. The Commission, in Adjusting the HRG FMV Appraisal, Overlooked and Failed to Appropriately Consider and Apply the Unbiased Independence of the Utility Valuation Expert

13. The Commission, in adjusting the HRG FMV Appraisal erred, overlooked and failed to properly consider the unbiased independence of the UVEs. The UVEs are authorized by statute to prepare FMV Appraisal Reports.¹⁴ The General Assembly required the use of two independent UVEs and directed an expedited timeframe to process fair market value transactions under Section 1329 for a number of reasons. First, the UVE is independent and qualified by the Commission. The UVE is not a witness in a rate case. The UVE is an independent expert using the information provided to it from an Engineer's Assessment of utility plant. The two UVEs then use their independent expertise to come to separate fair market valuations based on that information. The assumptions that they independently use may very well be different. That is why the General Assembly then required an averaging – to account for varying differences of assumption or inadvertent errors.

14. To become a UVE and participate in the Section 1329 fair market value process, a UVE *must* establish its qualifications. The Commission explained as follows in its Final Implementation Order:¹⁵

To be included on the registry, the UVEs must establish their qualifications. UVE applicants must: (1) demonstrate the education and experience necessary for providing utility valuations; (2) acknowledge a fiduciary duty to provide a thorough, objective, and fair valuation; (3) demonstrate compliance with Pennsylvania laws; (4) demonstrate financial and technical fitness, such as professional licenses, technical certifications, and/or names of current or past clients with a description of dates and types of services provided. In addition, as to the qualifications for the UVE, we agree with Aqua that, for applicants to be included on the Commission's UVE list, they must have adequate utility valuation and appraisal experience. In our review of the qualifications, we shall ensure that the UVEs have adequate utility valuation and

¹⁴ Section 1329(a) of the Public Utility Code, 66 Pa. C.S. §1329(a).

¹⁵ Implementation of Section 1329 of the Public Utility Code, Docket No. M-2016-2543193, Final Implementation Order entered October 27, 2016 ("*Final Implementation Order*").

appraisal experience as opposed to just expertise in appraisals of other types of property. We also will require that the UVE have a bachelor's degree in a related field and relevant professional experience. As to OCA's request for more specific standards for establishing financial and technical fitness of the UVE applicant, we shall closely review the UVE applications submitted and revise, as necessary, those standards in the future.¹⁶

15. The UVE application process also assures that the UVE is unbiased. We quote, again, from the *Final Implementation Order*:

As pointed out by OCA, it is critical for the Commission to be able to determine that there will not be any affiliation between a UVE and a buyer/seller in the underlying transaction or affiliates of the buyer and seller. Therefore, the Commission will require a list of current **and** past clients, rather than current **or** past clients as provided in the Tentative Implementation Order. As to OCA's comment concerning the UVEs fiduciary duty, we would note that a fiduciary duty is the highest standard of care and the fiduciary must not have a conflict of interest. Similarly, the fiduciary must not profit from his position as a fiduciary. Therefore, we shall also require the UVE to verify that neither the UVE nor the UVE's firm, including affiliates, have a conflict of interest that would compromise, or have the appearance of compromising, the UVE's professional judgment and ability to perform the valuation in an unbiased manner.¹⁷

16. HRG and Gannett are qualified by the Commission to act as UVEs.¹⁸ They are the independent and unbiased experts that have prepared FMV Appraisal Reports in compliance with USPAP employing the cost, market and income approaches as required by Section 1329.¹⁹ Their independence and absence of bias is established through the UVE application process and confirmed through formal verifications included with Aqua's Application as Exhibits T1 and T2.²⁰

17. Section 1329 requires that the UVE FMV Appraisal Reports be included with the Application.²¹ The inclusion of the Reports with the Application, however, does not align the Reports or the UVEs with the interests of either the acquiring utility or the selling municipality.

¹⁶ *Final Implementation Order*, slip op. at 9 – 10.

¹⁷ *Final Implementation Order*, slip op. at 11 (emphasis in original).

¹⁸ Recommended Decision, Finding of Fact No. 35.

¹⁹ Recommended Decision, Finding of Fact No. 52.

²⁰ Aqua Exhibit No. 1, Exhibit T1 and Exhibit T2.

²¹ Section 1329(d)(1)(i) of the Public Utility Code, 66 Pa. C.S. §1329(d)(1)(i).

The UVEs remain independent and unbiased throughout the process, their sole purpose being compliance with USPAP employing the cost, market and income approaches.

18. Instead of accepting the independent and unbiased FMV Appraisal Reports of the qualified UVEs, the Commission considered adjustments proposed by OCA witnesses to the HRG and Gannett Reports and, then, “cherry picked” adjustments proposed by OCA witnesses to the HRG Report. Adopting adjustments like this is similar to what happens in a rate case and Aqua respectfully contends that this is not the process intended by the General Assembly. The process intended by the General Assembly was designed to provide a clear framework with a prescriptive formula to calculate ratemaking rate base that would ultimately encourage consolidation in the highly fragmented water and wastewater industry.

19. The OCA witnesses are not qualified or certified by the Commission to act as UVEs and are not legally qualified or certified to adjust the HRG FMV Report. The testimony of the OCA witnesses, moreover, was biased in favor of the result favored by the OCA. The OCA witnesses are neither independent nor unbiased. As such, the Commission’s adoption of the OCA witnesses’ adjustments is a direct violation of the clear statutory mandate in Section 1329 and contravenes the purpose of having UVEs in the first place.

20. The General Assembly created a new fair market value procedure to encourage the acquisition of municipal water and wastewater systems. This new procedure differs from the traditional rate case type procedure and includes public interest protections by requiring the averaging of the two UVE appraisals and comparing them to the purchase price.

21. By allowing a non-UVE to become involved in the appraisal process, the Commission has injected traditional rate case type procedures into the fair market value process and ignored a General Assembly directive limiting fair market value appraisal reporting to

qualified UVEs. The Commission has also ignored its own internal UVE application safeguards that assure that only independent and unbiased UVEs are involved in establishing fair market value in Section 1329 proceedings. Simply stated, only a qualified UVE is independent, unbiased and legally competent to address fair market value in compliance with USPAP, employing the cost, market and income approaches.

22. The Commission overlooked the independence and absence of bias of its qualified UVEs. The Commission should reconsider its Order entered November 29, recognize the UVEs as the independent and unbiased experts qualified to present FMV Appraisal Reports, accept the HRG FMV Appraisal Report without adjustment and approve a ratemaking rate base of \$75,100,000 for the Limerick Township wastewater system assets.

C. The Order Entered November 29 Is Internally Inconsistent

23. Section 1329(a)(3), 66 Pa. C.S. § 1329(a)(3), provides that each UVE “shall determine fair market value in compliance with [USPAP], employing the cost, market and income approaches.” A record was developed as to this determination. The FMV Appraisal Reports were submitted with the Application and Judge Haas found, in Finding of Fact No. 52 of his Recommended Decision, that the Gannett and HRG Appraisals were performed in compliance with USPAP employing the three approaches.²² Aqua asserts that this is the review specifically required by the General Assembly. With Finding of Fact No. 52, the Commission has complied with its review of the fair market value appraisals.

24. The Order entered November 29 incorporates all Findings of Fact by reference and adopts them without comment unless they are either expressly or by necessary implication rejected or modified.²³ No exception was filed challenging Finding of Fact No. 52 and it is not

²² Recommended Decision, Finding of Fact No. 52.

²³ Recommended Decision, slip op. at 12.

discussed further in the Order entered November 29. The Commission, in adjusting the HRG FMV Appraisal overlooked the unchallenged Finding that the HRG FMV Appraisal is in compliance with USPAP, employing the cost, market and income approaches.

25. Inconsistent with Finding of Fact No. 52 and as explained above, the Order entered November 29 adjusted the HRG fair market value appraisal result reducing it from \$76,890,000 to \$48,648,708. Specifically, the Order reduces the HRG income approach result from \$77,855,000 to \$36,560,000, the cost approach result from \$90,050,000 to \$62,321,571 and the market approach result from \$62,760,000 to \$47,064,553.

26. The Order entered November 29 offers no explanation as to how the adjustments to the HRG FMV Appraisal Report are necessary to bring the HRG FMV Appraisal into compliance with USPAP employing the cost, income and market approaches. In point of fact, no adjustments to the HRG Appraisal Report are needed to bring the Report into compliance. The Report, in the unadjusted form prepared by HRG, was found by Judge Haas and the Commission to be in compliance with USPAP employing the cost, market and income approaches.

27. The Commission should reconsider its Order entered November 29 and accept the HRG FMV Appraisal Report without modification. The standard for FMV Appraisals as enacted by the General Assembly is compliance with USPAP, employing the cost, market and income approaches. The HRG FMV Appraisal Report complies with USPAP, employing the cost, market and income approaches. There is no permitted basis upon which the Report may be adjusted.

IV. CONCLUSION

WHEREFORE Aqua Pennsylvania Wastewater, Inc. respectfully requests that the Pennsylvania Public Utility Commission reconsider its Opinion and Order entered November 29,

apply the clear and unambiguous language of Section 1329 as enacted by the General Assembly, accept the HRG FMV Appraisal Report without adjustment in compliance with USPAP employing the cost, market and income approaches, approve a ratemaking rate base of \$75,100,000 for the Limerick Township wastewater system assets and grant such other relief as may be just, reasonable and appropriate under the circumstances.

Respectfully submitted,



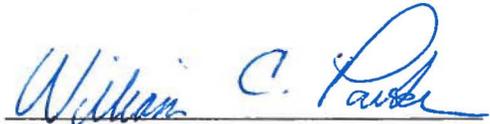
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Counsel for Aqua Pennsylvania Wastewater, Inc.

Dated: December 14, 2017

VERIFICATION

I, William C. Packer, Vice President – Controller of Aqua Pennsylvania, Inc., hereby state that the facts set forth in the Petition for Reconsideration are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).



William C. Packer
Vice President - Controller
Aqua Pennsylvania, Inc.

Dated: December 14, 2017

**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 have this 14th day of December, 2017, served a true and correct copy of the foregoing Petition of Aqua Pennsylvania Wastewater, Inc. for Reconsideration of the Opinion and Order entered November 29, 2017, upon the persons and in the manner set forth below:

VIA ELECTRONIC AND FIRST CLASS MAIL

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