COMMENTS ABOUT THE TENTATIVE SUPPLEMENTAL IMPLEMENTATION ORDER FROM HENRY YORDAN, JULIE FRISSORA, AND ROBERT SWIFT, RESIDENT INTERVENORS IN AQUA'S 2021 APPLICATION TO PURCHASE WILLISTOWN TOWNSHIP'S WASTEWATER SYSTEM

Docket #: M-2016-2543193 – Valuation of Acquired Municipal Water and Wastewater Systems—Act 12 of 2016 Implementation

March 18, 2024

I. Introduction

We are writing to submit our personal and professional comments regarding the PA Public Utility Commission's (PUC) Tentative Supplemental Implementation Order (TSIO) for 66 Pa.C.S., Section 1329 (1329).[1] We appreciate the opportunity to submit these comments.

The TSIO, if amended with our suggestions detailed in sections II to IV below, could lessen the negative impact of 1329 on ratepayers. It is important to state at the outset, however, that an administrative order is unlikely to meaningfully protect the citizens of Pennsylvania from the ravages of Section 1329 acquisitions by investor-owned utilities of *healthy* municipal water and wastewater systems. The healthy system acquisitions that have been approved to date have resulted, or will soon result, in gigantic rate increases for ratepayers without any improvement in

[1]When Willistown entered into an Asset Purchase Agreement to sell its sewer assets to Aqua PA in 2021, the three of us intervened *pro se* in the PUC litigation to approve the sale under the requirements of sections 1329, 66 Pa.C.S., S.1102 and S.1103 (1102 and 1103) of the PA Public Utility Code. Through our intervention and repeated contact with the Office of Consumer Advocate, we accumulated substantial experience about public utility operations and rate making, about the internal workings of the PUC, and about the challenges involved in organizing the community to evaluate 1329 transactions. Mr. Yordan received his academic training in Economics (Princeton, Bachelors degree) and business and finance (Stanford MBA degree) and his professional experience in finance at JP Morgan, Merrill Lynch and Deutsche Bank. Ms. Frissora received a Bachelors degree from Cornell and a Masters degree from St. Joseph University, and she dedicated her career to organizing large implementation teams in the health care IT industry. Mr. Swift received his academic training at Haverford College (Bachelor's degree) and NYU School of Law (Law degree) and is a partner at his law firm Kohn Swift & Graf in Philadelphia.

quality of service or financial viability of the systems. Financially healthy municipal systems have access to bond markets to finance maintenance and upgrade needs of those systems at dramatically lower cost than for-profit utilities. *Most local officials of financially healthy communities choose to sell the municipal water and wastewater assets not because the sale is beneficial to ratepayers or because the municipality is incapable of operating the assets, but because* ***the 1329 statute provides an irresistible incentive to raise revenue for the municipality without having to transparently raise taxes****, while leaving the ratepayers to pay for the funds received by the municipal government through significantly higher water and sewer rates.* No implementation order can curb the powerful incentive of local officials acting against the interests of ratepayers in order to satisfy an insatiable desire for cash.[2] Only repeal of 1329 can do that. *The TSIO can give the unfortunate impression that the PUC is "reforming" 1329 administratively, thus relieving PA legislators from the imperative of repealing a statute that has caused so much harm to ratepayers across the Commonwealth.* Distressed systems or systems owned by distressed municipalities that do not have the financial resources to continue operating have other statutes that can be used to sell the systems, statutes that have been around for decades.

II. Reasonableness Review Ratio (RRR):

A. The RRR concept establishes a ratio of market valuation to book value for a sample of publicly traded investor-owned utilities, a ratio that is currently about 1.7. Calling this ratio a "reasonable ratio" in the context of 1329 acquisitions implies that paying that market multiple to purchase a municipal system is reasonable and not harmful to the rate-paying public. Nothing could be

[2] In Willistown, only half of residents are connected to the sewer. The sale of the sewer, therefore, had the effect of leaving half of residents to foot the bill while the other half collected on the benefit of the revenue raised by the politicians for other projects.

further from the truth. The selling utility customers have already paid to build the system being sold, and now the buying utility will add the price paid for the system to its rate base, and rates will be increased when a rate of return is awarded for the increase in the rate base. *The ratepayers will effectively pay for the system a second time through higher rates in perpetuity*. In the case of Willistown, the expected 86% increase in sewer rates in Aqua's first rate case after the acquisition was almost entirely attributable to the initial price paid by Aqua of $17.5 million. Over time, the 30-year net present value cost to ratepayers of the expected initial 86% rate increase was $52 million, or three times as large as the sale price. The $52 million is the amount ratepayers have to pay in the first 30 years, in current dollars, for a system that was already paid for. Capital spending for future repairs and improvements would generate *additional* rate increases.

If Aqua had paid 1.7 times book value for the Willistown system instead of 3.9 times book value (the actual premium to book value in the actual price), the net present value cost to ratepayers would have declined to $23 million. But that amount, while lower than $52 million, still constitutes a substantial amount paid for assets that selling utility ratepayers had previously paid for. The customers of the selling utility will not have to shoulder this cost if the system remains in the municipality's hands. There is nothing reasonable about paying for the same asset a second time, even if the amount "could have been worse."

B. The harm to ratepayers through increased rates extends beyond the initial rate increase required to reimburse the acquiring utility for the initial investment. Every future capital investment made by an investor-owned utility will be financed at a dramatically higher cost than a financially healthy selling municipality could achieve in the tax-exempt bond market. In Willistown's case, Aqua's assumed weighted average cost of capital, after gross-up for income

taxes, was 10.43% *per annum*. Willistown's cost of bond financing at the time was a dramatically lower 3.5%. Aqua's significantly higher cost of capital is attributable to the substantial profit that its investors are allocated by the PUC rate cases. Healthy municipalities have no shareholders to feed and thus their cost of capital is markedly lower. Even if a municipality transferred its system to an investor-owned utility without compensation (thereby eliminating the initial rate base increase for the acquiring utility), rate base additions for future investments in the system will result in substantially higher rate increases under the ownership of an investor-owned utility compared to a municipal-owned system with access to tax-exempt bond financing.

C. We also believe there is little value in "non-binding guidelines," as proposed by the TSIO with respect to the RRR. History suggests that non-binding guidelines are not meaningful vehicles for public protection in 1329 acquisition approval deliberations. Until the PUC's denial of PA American Water's acquisition of Brentwood Borough's (Brentwood) wastewater assets, the PUC commissioners had overturned every decision of the PUC's own administrative law judges (ALJ) that favored ratepayers by recommending denial of acquisition approval. In contrast, all ALJ decisions that favored the industry by recommending approval were approved by the PUC commissioners. The lack of symmetry is striking.

In conclusion, for the reasons stated above, ***the RRR concept, as currently conceived and drafted, should be removed from the TSIO entirely****. No premium over book value in the initial price for the system is justifiable for rate-making purposes given that the acquired ratepayers have already paid for the system. Suggesting that a market premium is reasonable, which we believe the RRR does, implies that forcing ratepayers to pay for the same assets a second time is reasonable. It is not. When a transaction is completed, the ONLY barometer that should be used to judge its*

"reasonableness" is Pa 66 C.S., 1102 (1102)*, not an administrative pronouncement like the TSIO. We contend that no acquisition of a healthy system owned and operated by a financially healthy municipality with access to bond markets can ever meet the 1102 threshold, especially after the Commonwealth Court decision in the recent Cicero vs. PA PUC East Whiteland case (Cicero).* If the PUC disagreed, it must litigate the dispute.

III. Public Hearings

There were three public meetings in Willistown where the effects of its proposed 2021 sewer sale were discussed. The first meeting was a special meeting intended to be the ONLY public meeting before the ordinance was scheduled for a vote 10 days later. The meeting was announced by a *postcard* that said:

> The Willistown Township Board of Supervisors will hold a Special Public Meeting on October 29th at 7 pm via Zoom. The purpose of the Meeting is to review and discuss the results of a Sanitary Sewer Evaluation and future plans.

The bidding process had been conducted for months prior to the meeting, without informing the ratepayers that a process to sell the sewer had begun. The single bidder, Aqua, had been selected as the winner. Even when the postcard was sent, the local officials did not announce that a sale of the system was intended. The secrecy and silence surrounding the deliberations of the supervisors were deafening.

The presentation to the public was delivered by PFM Financial Advisors, a firm that specializes in these transactions, and is hired by most municipalities *with a fee arrangement contingent on a successful closing of a sale*. Their bias was evident in the original presentation that contained a series of false claims and misleading analysis, designed to steer an uninformed public into trusting

that the acquisition was in the best interests of ratepayers. Importantly, no rate impact notice was provided at the time of the public meeting. A segment of the public who opposed the transaction used the next two regularly scheduled meetings to voice opposition during Public Comment, thereby slowing approval of the ordinance by a few weeks. However, the compressed timeframe prevented community awareness and organizing efforts and the supervisors voted to approve the ordinance on December 14 after denying a citizen request to extend debate by 30 days.

Public meetings are appropriate for a transaction that disposes of what for most municipalities is their most valuable asset. But the short period permitted for public comment, and the lack of meaningful information provided, did not allow sufficient time for the public to understand fully the impact of the transaction, especially when township officials and its advisors only presented information that supported their desired outcome. When local officials wish to mislead the public into a harmful transaction and fulfill the objective of raising large amounts of cash without public accountability, they can stymie the ability to uncover necessary information by slowing down their response to Right-to-Know (RTK) requests under the PA Sunshine Act. In Willistown, resolution of an RTK can take two months.

In order for the public meeting requirements to have effect, there needs to be sufficient time for the public to gather and evaluate accurate factual information through RTKs and other means, and not rely on the financial advisor propaganda to form judgments. Six weeks was not nearly sufficient time for Willistown ratepayers to gather and analyze the relevant facts. Citizens have busy lives and they have no staff or budget.

A minimum of three public meetings should be required. The ratepayers of the selling entity should be required to receive notice 30 days before the first meeting, together with information described in section IV below. There should be an interval of 60 days between the first and the second and the second and third meetings. The dates for the 2nd and 3rd meetings should be included on the original notice*. Such timing would afford the public the time to request information under the Sunshine Act and to evaluate such information over a more reasonable* ***five-month period****.* The PUC itself (an entity with far more resources than any group of private citizens could marshal) takes longer than five months to conduct its own evaluation of proposed acquisitions.

The in-person public meetings must be hosted by the selling utility or municipality and be conducted as a hearing, not an open house or other formats where conversations and statements are not recorded. Transcripts of each meeting should be made available on the selling utility's website within 5 business days of each meeting. A live streaming option should be required for each meeting at a location with ample in-person capacity.

Operationally, the Applicant buying utility should be required to submit with the Application the text of the required notice sent and a sworn affidavit stating that the three public meetings took place, and that the required notice of the meetings was in fact mailed to arrive on time.

IV. Rate Impact Notice

The selling utility customers' ability to influence the decision to sell is meaningful only before the ordinance is approved and the Asset Purchase Agreement (APA) is signed. Current PUC procedures require mailing of the rate impact notice at the end of the Application review just

before it is declared final. The TSIO moves the timing of this notice to the filing of the Application. This change is not meaningful for greater involvement by the selling utility's ratepayers. By the time the Application is filed, the APA has been signed and there is no ability for the ratepayers to influence the decision to sell, except by becoming a litigant during the PUC judicial review, as we did in the Willistown case. Litigants already have access to a draft of the rate impact notice when the Application is filed and in the Willistown case the calculation of the rate impact was included in Appendix A to Mr. Packer's testimony, also filed with the Application. The change proposed by the TSIO thus provides no benefit to the litigants and no meaningful benefit to the selling utility's ratepayers.

The TSIO would have tangible impact, with respect to delivery of the rate impact notice, if it required the selling utility to deliver the rate impact notice to acquired customers with the notice letter delivered 30 days before the first public meeting, as requested in Section III. We propose that the TSIO rate impact notice requirement be moved up to this date. The acquiring utility should deliver the notice to its existing customers at that time also, detailing a potential impact under Act 11. The winning bidder has all the information necessary to quantify the rate impact notice at this stage of the process. ***Spreadsheets detailing how the rate impact calculation is made should be posted on the municipality's website 30 days prior to the first public meeting.*** Delivery of the rate impact notice and supporting documentation at this earlier time, together with the timeline proposed in the previous section, will give ratepayers five months to conduct their own analysis and impact of the proposed transaction. It also affords the opportunity to conduct community awareness and organizing efforts before the APA is signed.

Operationally, the Applicant buying utility should be required to submit with the Application (a) the text of the rate impact notice and a sworn affidavit that the rate impact notice was mailed from a post office located near the selling utility customers[3][4] 33 days before the first public meeting to discuss the sale and (b) a sworn affidavit that the spreadsheets detailing the rate impact calculations were made available on the selling municipality's website by the date of the first public meeting.

V. Conclusion

The Public Meeting and Rate Impact Notice requirements included in the TSIO would provide meaningful protection to the customers of the selling utility if the PUC adopts the two recommendations outlined here: (a) three public meetings, with a 30-day notice provided for the first one and 60 days between the next two and (b) delivery of the rate impact notice and supporting documentation at the time the public is notified of the first public meeting and five months before the APA could be signed. These would be important administrative contributions to a better functioning of 1329 while the legislative branch considers and debates its repeal, which we think should be an imperative as previously mentioned.

The RRR concept should be removed entirely. It *incorrectly* gives the impression that transactions would become reasonable because the premium to book value paid by the acquiring utility is potentially reduced. *No premium above book value should be deemed reasonable for ratemaking*

[3] In the Willistown case, the notices were mailed from Niagara Falls, NY in late December and it took 10 days for them to arrive. This "remote mailing" practice should be strictly prohibited.

[4] Willistown also included its own cover letter with the rate impact notice. The letter stated: "we believe the potential estimated increase set forth *in the enclosed notice* does not give a clear view of the future rate increases over the next several years." The language in the cover letter casts doubt on the accuracy of the PUC notice requirements. The TSIO should prohibit the use of editorial comments beyond the requirements of the notice.

purposes. Reasonableness and public benefit have been appropriately ensconced into the laws of the Commonwealth through 1102 and whether or not an acquisition is reasonable and benefits the public within the confines of that law should be decided by a Court, not an administrative order from a regulatory body.

Respectfully yours,

Henry Yordan
Julie Frissora
Robert Swift