CWA Responds to Frivolous AQUA Lawsuit

Attached is a letter from CWA's attorney to AQUA attorneys and PUC testimony

- In 2018 AQUA asked the PUC (Public Utility Commission) permission to raise its water customer's rates 15.4%. In May of 2019 the PUC granted AQUA the right to increase rates 9.5%.

- In April of 2019 AQUA filed a lawsuit objecting to CWA's proposed rate increase; however, AQUA already included in THEIR rate increase request before the PUC in August of 2018 that they would be paying 10% more in purchasing water from CWA (See attached transcript of testimony of Erin M. Feeney (AQUA) to PUC).

- When AQUA went in front of PUC for their rate increase they indicated that a 10% CWA rate increase was reasonable.

- The CWA Board of Directors didn't announce a proposed rate increase of 10% until January 2019. How did AQUA know about CWA's proposed rate increase over 5 months prior to it being publicly announced?

- AQUA's rate increase was approved by the PUC and goes into effect in July 2019. CWA's proposed rate increase has not gone into effect because the City of Chester hasn't accepted the settlement offer and no court approval.

- AQUA purchases approximately $750,000 of water per year from CWA and resells that water to its customers at a cost of over $2.5 million for a markup of over 345%. An approximate profit of $1.75 million.

- When asked about the profit they make off reselling CWA water to their customers, AQUA representative stated "The allegation that we are making a profit off the water is just not true." Then where is the $1.75 million going?

- It is uncertain if some AQUA customers are aware they have been drinking CWA water for over 67 years, yet paying AQUA rates

- CWA has been in negotiations with the City of Chester, they have not accepted CWA's offer. The CWA 10% rate increase would not go into effect until after court approval.

Conrad O'Brien

Kevin Dooley Kent
Attorney at Law
Direct Dial: 215.523.8306
Direct Fax: 215.523.9706
kkent@conradobrien.com

April 16, 2019

Joel L. Frank, Esquire
Lamb McErlane PC
24 E. Market Street, Box 565
West Chester, PA 19381-0565

Rocco P. Imperatrice, III, Esquire
Imperatrice, Amarant & Bell, P.C.
3405 West Chester Pike
Newtown Square, PA 19073

RE: Aqua Pennsylvania, Inc., v. Chester Water Authority and the City of Chester, No. CV-2019-002924

Dear Counsel:

We represent Defendant Chester Water Authority ("CWA") in Aqua's recently filed lawsuit challenging a potential 10% rate increase CWA may impose if it reaches a settlement agreement with the City of Chester and if that agreement receives Court approval. Aqua's lawsuit is baseless. The fundamental factual premise of Aqua's lawsuit is a challenge to that yet-to-be-imposed rate increase. Yet, Aqua already:

- Anticipated that 10% rate increase to its purchases of water from CWA, and included the 10% CWA rate increase *last year* as part of Aqua's rate base in its rate case to the PUC;
- Conceded the reasonableness of that 10% CWA rate increase in Aqua's settlement of the rate case; and,
- Included that 10% CWA rate increase in the rates Aqua will be charging its customers starting next month.

In short, Aqua's core factual allegations are flatly contradictory to Aqua's own statements to its regulator in its recent rate case. Pursuant to Pa. R. Civ. P. 1023.1, the CWA demands that Aqua immediately withdraw its suit. If Aqua fails to do so, the CWA intends seek costs, fees, and sanctions against Aqua under 42 Pa. C.S.A. § 8351, et seq.

Aqua filed suit on April 3, 2019. As an initial matter, Aqua's suit is not yet ripe because the 10% rate increase is subject to Court approval if and when a settlement is reached with the City of Chester. The CWA and the City are in ongoing discussions and the settlement has not yet been finalized, let alone submitted to the Court for approval. Thus, the 10% CWA rate increase is not in effect and to the extent it goes into effect, it will be some time from now after conditions precedent are met.

More importantly, Aqua's suit is meritless because it hinges on allegations that are flatly contradictory to Aqua's own recent filings and statements to the PUC, which are the subject of a settlement agreement in the PUC matter.

To put this in perspective, Aqua purchases approximately $750,000 of water per year from the CWA and resells that water to Aqua customers at a much higher rate. Based on the numbers Aqua provided in its recent rate case, last year Aqua purchased $741,756 of CWA water. Aqua charged its own customers $2,563,282 for reselling them this same water, which means Aqua's markup was 345%. Because Aqua charged such a huge markup, Aqua's margin on the CWA water was $1,821,526. Even if Aqua had to absorb a 10% increase in cost to purchase CWA water, Aqua will still reap a considerable margin of $1,747,350 for reselling CWA water. But even this analysis gives Aqua too much credit. As explained below, Aqua itself has taken steps to ensure that it will *not* absorb the 10% CWA cost increase, leaving undisturbed Aqua's massive markup on CWA water.

The central premise of Aqua's complaint is that this $75,000 potential increase in costs will somehow "damage" Aqua. This is precisely how Marc Lucca, president of Aqua Pennsylvania, characterized the lawsuit to the press the day after filing: "[The CWA's] actions have affected our customers, my business ... and frankly, they get nothing more for it…I have to pass along $75,000 more in costs to my customers and there's absolutely no benefit that they get." Aqua Pa. sues to block Chester Water Authority deal with Chester, Delco Times, April 4, 2018, available at https://www.delcotimes.com/business/aqua-pa-sues-to-block-chester-water-authority-deal-with/article_979e2968-5700-11e9-a771-3b470fffb93c.html. "According to Aqua officials, this hike would result in $75,000 being directly passed onto their customers with no corresponding benefits. And, that's why they filed the lawsuit in Delaware County Common Pleas Court on Wednesday." *Id.* In response to additional reporter questions, Mr. Lucca again "emphasiz[ed] the $75,000 in costs that will be passed onto his customers." *Id.* Mr. Lucca repeated virtually the same points for a story on Philly.com the same day. *See* 'Unholy alliance': Aqua sues to block $60M Chester bailout as it pursues takeover of public water system, philly.com, April 4, 2019, available at https://www.philly.com/business/aqua-suit-blocks-chester-water-authority-bailout-impoverished-city-20190404.html.

The problem with Aqua's suit, and Mr. Lucca's crocodile tears to the press, is that Aqua itself *already* sought PUC approval months ago to pass on this $75,000 cost increase to its customers and has affirmatively argued that doing so was in the public interest. Specifically,

Aqua has already built the $75,000 cost increase into its own new rate case which will raise its customers' rates by more than 15% next month. Thus, Aqua will at a minimum fully recover this potential cost increase, and has suffered no "damages" from CWA's actions.

Specifically, on August 17, 2018, Aqua filed a request for a $71.8 million increase in its water and wastewater rates. PA PUC Docket No. R-2018-3003558 (water) and R-2018-3003561 (wastewater). As part of its filing, and as required by PUC regulations, Aqua included thousands of pages of exhibits detailing its actual and projected costs. It also included written direct testimony from its witnesses. As relevant here, Erin M. Feeney gave testimony to the PUC in support of Aqua's rate case. Exhibit A, Testimony of E. Feeney. Aqua employs Ms. Feeney as a "Financial Analyst II." *Id.* at 1:2-7. Among other things, Ms. Feeney testified regarding Aqua's projected increase in its purchased water cost from the CWA. *Id.* at 7:1-9. She specifically testified that Aqua projected a 10% increase in its cost to purchase water from the CWA. *Id.* In conjunction with this testimony, Aqua also submitted a spreadsheet with financial calculations supporting Aqua's projected 10% increase in cost to purchase water from the CWA. Exhibit B, "Schedule C-7.1 of Exhibit 1-A"

On November 20, 2018, the intervening parties in Aqua's rate case filed their written direct testimony and exhibits, proposing changes to Aqua's claims. Testimony was filed by the Office of Consumer Advocate, the Office of Small Business Advocate (part of the state Commerce Dept.), the PUC investigatory staff (known as the Bureau of Investigation & Enforcement), and two consumer groups. None of the parties proposed an adjustment to *Aqua's claim* of a 10% increase in purchased water costs from the CWA.

On February 8, 2019, all of the parties who filed testimony agreed to a settlement with Aqua and a Joint Petition for Settlement was filed with the PUC. "The Settlement Rates are designed to produce [for Aqua] additional annual operating revenue of $47 million ($42.3 million for water operations and $4.7 million for wastewater operations)...." Aqua Rate Case Settlement, ¶15. "[U]nder the Settlement Rates, a portion of the wastewater revenue requirement totaling $7,087,745 is being allocated to water customers." *Id.* at ¶16. The parties, including Aqua, also spent more than a full page arguing that "the settlement is in the public interest." *Id.* at ¶¶53-54. On March 18, 2019, the Administrative Law Judge assigned to the case issued a Recommended Decision that recommended approval of the settlement. According to the terms of the settlement agreement, Aqua's new rates are expected to go into effect by May 24, 2019.

Aqua's rate case has several significant, case-dispositive implications for Aqua's present lawsuit.

First, before its own regulator Aqua affirmatively argued that a 10% increase in the CWA's rates is reasonable. Aqua's argument on this point was not disputed.

Second, Aqua fully anticipated the proposed 10% CWA rate increase and built it into Aqua's rate case. So even if CWA's rate increase goes into effect, Aqua will have no "damages" because it will be passing along that cost to its customers. Through its rate case settlement Aqua

is granted the ability to raise its own rates to fully offset a 10% increase in purchased water costs from the CWA.

What may be most galling about Aqua's case is that if the CWA's rates are not increased, then Aqua itself will reap an additional 10% arbitrage profit, above its already massive resale margin, on the backs of its customers. This seems to be exactly what Aqua is trying to accomplish through its lawsuit: maintain the status quo in its purchased water costs while simultaneously raising its own rates to increase revenue. Indeed, even if CWA's rates go up, Aqua will reap that 10% windfall for some period of time because *Aqua is raising its rates first.* Specifically, Aqua will start passing along the rate increase to its customers next month. However, Aqua's own costs will not go up until CWA implements the rate increase, which is months away and contingent on finalization of the CWA's settlement with the City.

Third, Aqua's own position in its rate case renders its President Marc Lucca's recent media statements (and the statements that Aqua's general counsel verified in its complaint) completely false. Mr. Lucca is clearly not concerned with "pass[ing] along $75,000 more in costs to my customers." Aqua already proposed that, months ago, and affirmatively argued in its recent rate case settlement that doing so was in the public's best interest.

For all of these reasons, Aqua should immediately withdraw its lawsuit. If Aqua does not do so and the CWA is forced to incur additional expenses defending this action, the CWA will seek costs, fees, and sanctions against Aqua under 42 Pa. C.S.A. § 8351, et seq.

Sincerely,

Kevin Dooley Kent

Kevin Dooley Kent

Cc: Kevin Greenberg, Esquire, Counsel for City of Chester

AP STATEMENT NO. 3

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

AQUA PENNSYLVANIA, INC.

DOCKET NO. R-2018-3003068

DIRECT TESTIMONY OF ERIN M. FEENEY

With Regard To
Various Expense Adjustments

August 17, 2018

Q. Please explain the adjustment to Purchased Water Expense detailed in Schedule C-7.1 of Exhibit 1-A.

A. The purchased water expense claim was generally derived by taking HTY gallons, adjusted to reflect the termination of purchases from the Bucks County Water and Sewer Authority as discussed by Mr. Packer in AP Statement No. 1, and then applying current rates - adjusted to reflect the following projected increases from the Philadelphia Water Department (9%), Chester Water Authority (10%), Downingtown Municipal Authority (2%), and Aqua Ohio (3.5%) that are expected to become effective in 2019 for all, and in 2020 for Downingtown and Aqua Ohio - to estimated FTY and FPFTY levels.

Q. Explain the adjustment to Purchased Wastewater Treatment Expense in Schedule C-7.1 of Exhibit 1-B.

A. The Company's claim for purchased wastewater treatment expense normalizes the cost of services provided by two wastewater treatment providers for the Company's Beech Mountain and Village at Valley Forge service areas. The service providers are Butler Township Sewer Authority and Upper Merion Sewer.

Q. Please explain the Water Production Adjustment on Schedule C-7.2 of Exhibit 1-A.

A. The Company sets forth an adjustment to operating expenses to reflect changes in power and chemical costs due to changes in water production. As a result of eliminating the portion of the Company's purchased water sourced from Bucks County Water and Sewer Authority – Bensalem, the Company is claiming the production costs associated with producing its own water in the FTY and FPFTY. Additionally, the Company has set forth an adjustment to

Witness: Erin M. Feeney
Date: 11/9/2018

AQUA PENNSYLVANIA, INC.

OFFICE OF CONSUMER ADVOCATE

DATA REQUEST SET VII

DOCKET NO. R-2018-3003558 & R-2018-3003561

OCA-VII-27: O&M Expense - Purchased Water Expense. Refer to page 7 of the direct testimony of Company witness Feeney and Schedule C-7.1 from Exhibit 1-A.

a. Show how the projected increases of (1) 9% - Philadelphia Water Department, (2) 10% - Chester Water Authority, (3) 2% - Downingtown Municipal Authority, and (4) 3.5% - Aqua Ohio were derived. Show detailed calculations.

b. Since the amounts reflected on Schedule C-7.1.i are hard coded, provide a schedule electronically in Excel (with formulas intact) that shows how the FTY and FPFTY gallons and amounts shown on this schedule were derived. Show detailed calculations.

RESPONSE:

a. See details below:
   1. For the Philadelphia Water Department, please refer to OCA-VII-27 - Attachment 2, which is the Department's notice of change in wholesale rates for the years ending August 31, 2019 and 2020.
   2. Chester Water Authority's last rate increase occurred in 2010, which approximated 8-9%. The Company anticipates that the Authority will increase its rates as of January 1, 2019 by 10%.
   3. The Company projected that the rates of the Downingtown Municipal Authority would increase at the rate of inflation, and for it projection, used a round 2.00% CPI inflation factor. As calculated in Exhibit 1-A, Schedule C-4.1.i, the inflation rates for the FTY and FPFTY are 2.075% and 2.150%, respectively.
   4. For Aqua Ohio, please refer to the Company's response to I&E-RE-101 and I&E-RE-102.

b. Please refer to the electronic file "OCA-VII-27 - Attachment 1 Purchased Water by Supplier.xlsx"