IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 876 C.D. 2025

WILLIAM FERGUSON,

Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONER

Appeal from the Order of the Pennsylvania Public Utility Commission entered June 18, 2025 at Docket Nos. C-2023-3043108 & C-2023-3043109

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I. SUMMARY OF ARGUMENT

Respondent and Intervenor construct an elaborate defense around procedural doctrines—burden of proof, retroactive ratemaking and, for the first time, the hearsay rule. Both rely (contrary to the fundamental tenets of public utility ratemaking) on Aqua's irrelevant beliefs at the time it filed the rate case and on Aqua's equally irrelevant post-rate case results. As a further diversion, both also disingenuously allege that Ferguson failed to account for additional costs that Aqua incurred in reactivating the pipeline, even though Aqua made no claim for them in its 2021 rate case and concealed the project from all parties to the rate case. All the while, they studiously avoid Ferguson's corroborated proofs of Aqua's substantive misconduct at the heart of his complaint.

The following is a summary of the fundamental flaws in the Commission's decision—reliance on irrelevant evidence, failure to address the central factual issue, and misapplication of governing legal principles:

1. The three pillars of the Commission's decision have no validity.

First: Aqua's initial projections were reasonable when filed in August 2021 and the best information the company had at the time. Tab A 11, 24, 25, 28, 29, 30; PUC Br. 31.

- The reasonableness of August 2021 projections tells us nothing about Aqua's obligations when one of them became obsolete during the rate case. The

question is not whether Aqua's August 2021 filing was accurate, but whether Aqua was required to update that filing when circumstances changed. Pet. Br. 34-36.

Second: Aqua's revenues were less than authorized (Tab A 22-23, 25, 28, 29; Aqua Br. 7, 25, 38 n.121), and its costs were greater than authorized (Tab A 24-25; PUC Br. 32-33, 39; Aqua Br. 24 n.69, 25, 31, 37).

- Normal post-rate case variances are wholly irrelevant to whether Aqua concealed information during the rate case itself. Pet. Br. 42-46.
- Regarding such variances as relevant would undermine Section 505's disclosure requirements, 52 Pa. Code § 53.53's truthfulness obligations, and 52 Pa. Code § 5.332's duty to supplement discovery. Pet. Br. 34-35.
- Aqua seeks to exploit minor revenue and cost variances as justification to retain $3.3 million it collected by deception for an expense it did not incur. Established utility ratemaking requires that adverse revenue and expense variances from authorized rates be corrected by seeking prospective relief from the Commission, which Aqua did in 2024, including recovery of its pipeline activation costs that it did not claim in its 2021 rate case.

Third: Aqua incurred additional costs regarding the pipeline reactivation. Tab A 24-25, 31; PUC Br. 24 (citing R. 194a), 31-32 (quoting Tab A 24 & 31); Aqua Br. 32-33 (quoting Tab A 24-25, which cites R. 194a).[1]

- Ferguson could not account for costs that Aqua never documented, disclosed, or tried to recover. Pet. Br. 27, 42.
- Aqua said nothing about the pipeline project, leaving the Commission to approve rates based on the false assumption that trucking would continue through March 31, 2023, the end of its Fully Projected Future Test Year. Pet. Br. 12-13, 15, 18, 38.

None of these bases of the Commission's decision addresses Ferguson's actual claim: that Aqua failed to disclose during the rate case the cessation of the trucking expense and the activation of the pipeline, thereby deceiving the Commission into approving rates based on a non-existent expense. Pet. Br. 42-46.

2. The Commission cannot ignore the central factual issue. The Commission's decision never addresses the crucial factual question: When did trucking cease and the pipeline become operational?

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[1] The Commission's brief gives a fourth reason, but the Commission's decision makes no mention of it: Ms. Feeney's testimony that she and her rate case team "did not become aware of any significant changes to an increase or decrease of expenses that would result in us updating the filing." R. 193a-194a; PUC Br. 31-32.

Ferguson presented three convincing pieces of evidence on this point. Each piece of evidence shows completion during the rate case (from August 20, 2021, filing through January 24, 2022, record closure).

The Commission's response? Silence. The Opinion and Order contains no findings about when the pipeline became operational. It also lacks analysis of Duerr's testimony, Lucca's letter, or Aqua's 2021 Annual Report. Additionally, it does not determine whether the pipeline was completed before the record closed.

An agency decision that does not address the core factual issue raised by a party violates fundamental principles of administrative law. *SEC v. Chenery Corp*., 332 U.S. 194, 196-97 (1947). The Commission cannot rely on "substantial evidence" deference for a finding it never made.

3. Irrelevant evidence is not substantial evidence. The Commission argues that "the mere fact that conflicting evidence may appear in the record does not mean that substantial evidence was lacking," PUC Br. 54, and that Ferguson's challenge amounts to "a thinly veiled request to reweigh the evidence on appeal," PUC Br. 50.

This characterization fundamentally mischaracterizes Ferguson's argument. The issue isn't conflicting evidence—it's that the Commission depended on evidence that didn't have a logical link to the disputed issue.

This is not about weighing witness credibility but about Aqua's evidentiary inadequacy. The question is not whether Ms. Feeney was more credible than Ferguson, but whether her testimony was sufficient to equal or overcome Ferguson's multiple, corroborated proofs. Ms. Feeney's direct testimony omitted any mention of the pipeline project, Duerr's public statements made in his official capacity, Lucca's corroborating letter, or her filing of Aqua's 2021 Annual Report. Her ***only*** acknowledgment of the project came during Ferguson's cross-examination, when she stated that Aqua was unsure whether the project would be a viable solution. R. 187a.

Evidence regarding post-rate-case revenues, expenses, and unclaimed costs is not relevant to whether Aqua disclosed pipeline activation during the rate case. Evidence about the reasonableness of August 2021 projections is not relevant to Aqua's obligations once the basis for a significant expense projection ended.

Supporting evidence for irrelevant findings does not meet the requirements of Administrative Agency Law Section 704, 2 Pa.C.S. § 704.

4. Deference does not extend to legal error. The Commission claims it is entitled to near-infallible deference. PUC Br. 50-55. But no deference is due because of its unsupported factfinding and fundamental legal errors.

First, the Commission misapplied the burden of proof by treating Aqua's rates as presumptively reasonable even when obtained through nondisclosure. Pet. Br. 31-

42. Commission-approved rates are not presumed valid when the utility hides material information during the rate case.

Second, the Commission improperly applied Pennsylvania ratemaking principles by allowing Aqua to include a non-existent expense in rates. Section 1301(a) states that rates must be "just and reasonable." Pennsylvania courts have consistently ruled that rates based on expenses "not actually incurred" violate this standard. *Barasch v. Pa. Pub. Util. Comm'n*, 493 A.2d 653, 656-57 (Pa. 1985); Pet. Br. 33-34. This is not a matter of expert regulatory judgment; it is a basic application of statutory law.

Third, the Commission rejected the exceptions to retroactive ratemaking. Pet. Br. 46-52. The Commission's blanket application of the retroactive ratemaking ban, without addressing these exceptions, constitutes arbitrary disregard and a clear legal error.

Questions of law receive plenary review. The Commission's expertise does not insulate legal errors from correction.

5. The underlying justifications for granting deference are absent.

The Court should grant no deference to the Commission's decision on the facts and the law because *the Commission's arguments are **not** grounded in the Commission's expertise and experience,* which are the underlying justifications for

granting deference, but on Aqua's litigation positions that advance red herring arguments for lack of any evidence contrary to Ferguson's three definitive proofs.

To prevent creating a precedent that would be enormously damaging to public utility regulation in Pennsylvania, the Commission's decision should be reversed and the matter remanded for calculation of refunds under Section 1312(a). Reversal will not affect the Commission's 2021 rate order. Rather, it will require Aqua to refund its ill-gotten overcharges with interest, as the Commission directs.

Alternatively, the matter should be remanded for a limited reopening of the record to address the key factual issue of the case: the transition date from trucking to piping.

II. ARGUMENT

A. The Commission and Aqua Misapply the Burden of Proof and Ignore Ferguson's *Prima Facie* Case

1. The *Prima Facie* Reasonableness Doctrine Does Not Shield Rates Procured Through Misconduct

The Commission and Aqua base their burden of proof argument on the principle that Commission-approved rates are "*prima facie* reasonable" and that challengers bear a "heavy burden" to prove otherwise. PUC Br. 25-33; Aqua Br. 36-39. This principle does not apply when a utility obtains Commission approval through a violation of its disclosure obligations.

The Commission's error lies in treating the "*prima facie* reasonableness" principle as insulating Aqua from any inquiry into *how those rates were obtained*.

When a utility conceals information that a major expense claim has become baseless, the resulting rates cannot enjoy presumptive validity because the Commission is deprived of the necessary information to determine whether the claimed expense is prudent, necessary, and substantiated. Concealment of vital information forfeits a presumption of "just and reasonable" under Section 1301(a).

Further, such concealment contravenes Public Utility Code Section 505, which imposes a comprehensive affirmative duty on utilities to supply accurate and truthful information to the Commission "in aid of any … inquiry, investigation, or hearing … and shall furnish any and all other information to the [C]omission, as the [it] may require."

Consequently, when Aqua concealed the cessation of the trucking expense, the resulting rates on New Garden Township customers lost any presumption of reasonableness.

2. Ferguson Presented Overwhelming *Prima Facie* Evidence That Aqua Failed to Rebut

Ferguson's *prima facie* case rested on multiple corroborating proofs, all pointing to the same conclusion: the trucking expense ceased during the 2021 rate case. That required Aqua to withdraw the expense, but it did not. *Aqua did not address, let alone refute, ANY of these proofs*:

a. Todd Duerr's November 21, 2022 Presentation

The centerpiece of Ferguson's evidence is the presentation of Aqua Vice President Todd Duerr on official Aqua business at a November 21, 2022 public meeting of the New Garden Township Board of Supervisors. R. 20a-21a, 74a-77a, 248a-249a. Duerr stated that Aqua "spent **the better part of eight months** while we were pumping and hauling to find the line [and] fix damaged portions of the line…And when they did that, **that pumping and hauling that was costing a million dollars a year stopped immediately. So that eliminated that ongoing cost right away… *that was done within the first year of operation.*"** Pet. Br. 16-17 (emphasis added).

This testimony clearly establishes that trucking stopped within the first year of ownership. That means no later than December 22, 2021, during the pendency of the 2021 rate case (filed August 20, 2021; record closed January 24, 2022). Pet. Br. 10-12, 15-18, 36-38, 40-41. Aqua could have withdrawn its $1.2 million expense claim right up to the time it moved to admit a post-hearing exhibit, just four days before the ALJ closed the record, but did not. R. 14a-15a.

(1) The Commission's and Aqua's Responses Are *Post Hoc* Rationalizations

The Commission dismisses Duerr's statements as "unsworn" and wrongly claims that Ferguson's case is based *solely* on Duerr's *alleged* assertions. PUC Br. 38-39; 54. Aqua similarly attacked Duerr's statements as unsworn, "merely out-of-court statements and not 'testimony' in any meaningful sense," which "was properly

objected to as hearsay," noting that its objection was overruled by the ALJ. Aqua Br. 35-36; R. 61a-62a. These arguments lack merit because they are impermissible *post hoc* rationalizations, and Duerr's statements are admissible hearsay under two exceptions to the hearsay rule.

Remarkably, Aqua never directly challenged—with either testimony or documentation—Duerr's statements at the November 21, 2022, Board of Supervisors public meeting. Ms. Feeney avoided discussing the pipeline project except evasively on Fergeson's cross-examination, and admitted having no knowledge of the pipeline project's details (R. 187a, lines 2-4), other than that Aqua was not certain it was a viable alternative to trucking wastewater (R. 185a-187a). Pet. Br. 39-41.

Aqua's Answer and New Matter to Ferguson's complaint, its Answers to Ferguson's Petitions to Strike and Reopen the Record, and its Reply Exceptions are all silent regarding Duerr and his public presentation.

Neither ALJ Vero's Initial Decision nor the Commission's decision makes any mention of Duerr or his public presentation. The Initial Decision did not reach the merits of Ferguson's allegations, instead dismissing his complaint as a matter of law. During the hearing, ALJ Vero denied hearsay and other objections by Aqua's counsel.[2] Aqua filed no exceptions to her Initial Decision, and ordering paragraph

[2] R. 61a-62a (admission against interest); 75a-76a (admission against interest); 76a (relevance); 204a-205a & 210a (cumulative evidence).

No. 2 of the Commission's decision adopted the Initial Decision "consistent with this Opinion and Order" without discussing or modifying her evidentiary rulings.

The Commission and Aqua challenge Duerr's statements as unsworn and/or hearsay, PUC Br. 38-39; Aqua Br. 35-36, but the issue was not presented to the Commission or stated by it as a supporting reason for its decision. Therefore, the challenges constitute *post hoc* rationalizations in support of the Commission's decision on appeal.

Pennsylvania courts adhere to the foundational principle of administrative law announced in *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947): "[A] determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *See*, *e.g*., *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 690 (Pa. 2020) (Wecht, J. concurring) (holding that a court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack (citing *Kisor v. Wilkie*, 588 U.S. 558, 579 (2019)).

(2) The Admission Against Interest and Party-Opponent Hearsay Exceptions Apply. ALJ Vero properly overruled Aqua's hearsay objections as admissions against interest by Duerr. *Chapman v. UCBR*, 20 A.3d 603, 610 n.8 (Pa. Cmwlth. 2011). The same exception applies to Lucca's letter and Aqua's 2021 Annual Report (both discussed below).

The party-opponent hearsay exception contained in Pa. Rule of Evidence 803(25) also applies. It gives full probative weight to admissions by a party-opponent, if the admission was made by the party in an individual or representative capacity, was made by a person whom the part authorized to make a statement on the subject, and was made by the party's agent or employee on a matter within the scope of that relationship and while it existed. Aqua Vice President Duerr, who attended the Board of Supervisors meeting as an official representative of the company (along with its President and Controller), was such a party. *S.K. v. Pa. Dep't of Educ*., 342 A.3d 801, 812 (Pa. Cmwlth. 2025) ("If a proponent successfully establishes that objected-to hearsay falls within a recognized hearsay exception, … then the evidence becomes admissible hearsay that can support an agency's finding of fact without additional corroboration.").

Consequently, Duerr's statements, as contemporaneously recorded and posted on social media, as evidenced by the Facebook link contained in Ferguson's Exhibit E, R. 244a-249a (but marked and admitted into evidence as Exhibit F; see R. 206a)

and discussed in Petitioner's Brief at 16, enjoy full probative weight as admissible hearsay that supports Ferguson's *prima facie* case as corroborated by Aqua President Marc Lucca's December 9, 2022 letter, and by Aqua's 2021 Annual Report to the Commission.

Duerr's statements strongly established when trucking *began and ended*. Because the South End treatment plant lagoon was "literally filled to the brim" (R. 64a) when Aqua acquired it, "pumping and hauling" as done by the Sewer Authority had to continue unabated. According to Duerr, the "immediate" end to pumping and hauling occurred less than ("the better part of") eight months later in August, 2021, the same month that Aqua filed its 2021 rate case.

b. Marc Lucca's December 9, 2022 Letter

Ferguson also presented a December 9, 2022, letter from Aqua President Marc Lucca to New Garden customers, which corroborated Duer's statements. The letter stated: "Initially, we had to truck excess treated wastewater from one wastewater treatment plant to another which cost more than $800,000. After several months, we replaced hauling with a pipeline connecting the two treatment plants." R. 24a, 240a; Pet. Br. 17-18.

Lucca's reference to "several months" of trucking after Aqua acquired the system (December 22, 2020) corroborates Duerr's "the better part of eight months" timeline, given his mention of the $800,000 cost. The Sewer Authority's $100,000

per month cost for pumping and hauling (R. 20a) served as the basis for Aqua's $1.2 million annual projected cost to do the same. That monthly cost incurred over eight months equals $800,000. Eight months from Aqua's December, 2020, acquisition date confirms Duerr's placement of the transition in August, 2021, when Aqua filed its rate case.

c. Aqua's 2021 Annual Report

Aqua's own 2021 Annual Report filed with the Commission showed that the "New Garden Dry Line Activation" project had an in-service date by the end of 2021. R. 241a-243a; Pet. Br. 11. This official filing further corroborates that the transition from trucking to piping occurred during the rate case.

d. Aqua's Failure to Present Todd Duerr

Aqua bore the burden of producing evidence to rebut Ferguson's *prima facie* case. Having failed to call Duerr, Aqua cannot now rely on Ferguson's failure to propound written interrogatories addressed to him, to subpoena him, or to cross-examine Ms. Feeney more expertly. None of those *pro se* infirmities negates the enormity of Duerr's admissions, Lucca's corroborations, and Aqua's official reporting to the Commission of the pipeline 2021 year-end completion date. Together, they completely overshadow Aqua's absurd excuses for its indefensible failure to disclose the cessation of its claimed trucking expense.

e. Aqua's Baseless Accusation of "Smears"

Aqua accuses Ferguson of "smears" and "unsupported claims about the truthfulness and veracity of Aqua and its witnesses," citing only two examples in Ferguson's Brief at pages 36 and 40. Aqua Br. 12, 26.

Ferguson's arguments are factually accurate and professionally restrained. Ferguson did not attack Ms. Feeney's character, honesty, or competence.

B. The Commission's Decision Was Not Supported by Substantial Evidence Because It Failed to Address Duerr's and Lucca's Unequivocal Admissions Against Interest or Aqua's 2021 Annual Report, and Instead Relied on Ms. Feeney's Irrelevant and Admittedly Uninformed Testimony

1. Ms. Feeney's Testimony Failed to Rebut Ferguson's *Prima Facie* Case with At Least Co-Equal Evidence

The Commission and Aqua both defend Ms. Feeney's testimony as adequate to rebut Ferguson's *prima facie* case. PUC Br. 25-33; Aqua Br. 36-38. These arguments are untenable when measured against the evidentiary record and fundamental principles of administrative fact-finding.

a. Ms. Feeney's Admitted Lack of Knowledge

Ms. Feeney explicitly disclaimed knowledge of the very facts at the core of this dispute. When asked whether she had any knowledge of the pipeline project's progress, she answered, "No." R. 187a. When questioned about whether Aqua authorized a pipeline project, she testified: "I'm not an operations expert, so I don't know what the inner workings of that project were." R. 188a. When asked about

company policy regarding communicating significant changes during a rate case, she evaded the question. R. 186a-187a.

b. What Ms. Feeney Did Not Address

Ms. Feeney made no effort to address or refute any of Ferguson's three principal proofs, but it is especially remarkable that she ignored Todd Duerr's November 21, 2022, presentation, which clearly showed that trucking ended within the first year. Pet. Br. 16-17, 37.

Aqua was fully aware of Duerr's statements. Two other company officers presented with Duerr at the meeting. Ferguson's complaint prominently featured them, with a link to the video recording. R. 21a; Pet Br. 15-17. Yet, Ms. Feeney never mentioned Duerr's presentation, never tried to clarify or correct his statements, and never explained why Aqua chose not to call him as a witness.

c. Ms. Feeney's Testimony Regarding "Significant Changes"

Ms. Feeney testified that "during the time that the [2021 rate case] record was open, we did not become aware of any significant changes to an increase or decrease of expenses that would result in us updating the filing." R. 193a-194a; Pet. Br. 20-21. This statement is problematic on multiple levels:

First, the termination of an expense that accounts for 63% of the New Garden division's operating costs is undeniably "significant." Pet. Br. 13, 40.

Second, Ms. Feeney's statement is directly contradicted by all three elements of Ferguson's evidence – all of which were created by Aqua itself. Therefore, Aqua's own records show that the pipeline was operational before the record closed.

Third, Ms. Feeney admitted she lacked knowledge of the pipeline project details. R. 187a-188a. How then could she credibly testify about what constituted a "significant change" regarding a project she knew nothing about? A witness cannot claim ignorance of project facts while asserting those facts were insignificant.

Fourth, the Commission's Opinion and Order never quoted or relied upon this testimony, and it would be a *post hoc* rationalization to do so on appeal. Pet. Br. 40.

d. Ms. Feeney's Evasive Response to the ALJ's Direct Question

When ALJ Vero asked Ms. Feeney directly whether Aqua's ratemaking department was aware of any change in trucking expenses when the compliance tariff was filed, Ms. Feeney provided a nonresponsive answer that completely avoided the question. R. 197a; Pet. Br. 40-41. The ALJ inquired about awareness of expense changes, but Ms. Feeney discussed revenue calculations. This evasiveness cannot carry the same weight as Ferguson's multiple, corroborated proofs.

2. The Commission's Reliance on Irrelevant Post-Rate Case Under-Recovery of Revenues and Higher Cost of Service Contradicts Fundamental Utility Ratemaking Principles

The Commission repeatedly justifies its decision on Ms. Feeney's testimony that Aqua collected $4.3 million in 2023 revenues from New Garden operations versus the $4.4 million authorized (a *de minimis* difference in any event), and recovered less than the cost of service during the same period. Tab 22-23, 25, 28, 29; Pet. Br. 20-22. The Commission concludes that this shows Ferguson failed to prove that the approved rates were unreasonable. PUC Br. 21, 25-26, 30, citing Tab A 25; Aqua Br. 36-38.

The key question is not whether Aqua's actual revenues and expenses in the Fully Projected Future Test Year (the first year the approved rates were in effect) were higher or lower than the approved rates, *but whether those rates were based on the expenses Aqua actually incurred*. Had Aqua updated its filing as required, eliminating the trucking expense that was ultimately approved and directly and solely included in the rates of the New Garden Township wastewater customers, the company's overall allowed revenue would have been lower by that exact amount. Subsequent performance against the allowed revenue is totally irrelevant.

"The fundamental principle of base ratemaking is that rates should be set so that a utility has a reasonable opportunity *to recover the costs* ***prudently incurred*** *in providing service*….The items claimed must be reasonable and necessary; therefore,

if expenses are ***not incurred*** … they should be … disallowed and not recoverable through rates."[3]

The remedy for inadequate revenues and higher-than-projected costs to provide service is to file another rate case, which Aqua did in 2024, to obtain Commission approval for prospective rates reflecting more accurate revenue and expense levels. *See*, *e.g.*, *Petition of Elizabethtown Water Co.*, 527 A.2d 354, 364 (N.J. 1987) ("When existing rates are insufficient to provide a fair rate of return, the proper remedy for the utility is to file an application for higher rates."); *Utah Dep't of Bus. Reg. v. Pub. Serv. Comm'n*, 720 P.2d 420, 421 (Utah 1986) (holding that if overestimates or underestimates occur, they are "taken into account at the next general rate proceeding in an attempt to arrive at a just and reasonable future rate.").

Neither the Commission nor Aqua cites any state utility regulatory agency or state or federal judicial decision in support of this outlandish argument because none exists.

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[3] JAMES H. CAWLEY & NORMAN J. KENNARD, A GUIDE TO UTILITY RATEMAKING 102, 106-107 (Pa.P.U.C. 2018) (emphasis added), https://www.puc.pa.gov/General/publications_reports/pdf/Ratemaking_Guide2018.pdf.

3. The Commission Improperly Relied on Aqua's Alleged Additional Costs Incurred After the Transition from Trucking to Piping

Both the Commission (Tab A 24-25, 31; PUC Br. 24, 31-32) and Aqua (Aqua Br. 32-33 (quoting Tab A 24-25, which cites R. 194a)) attempt to excuse Aqua's failure to withdraw its trucking expense claim by asserting that Aqua incurred additional costs after trucking stopped. It was Aqua's burden to prove this claim to overcome Ferguson's *prima facie* evidence. But the record is devoid of such countervailing evidence. Aqua never quantified such costs or established when trucking ended to enable their calculation, and, most detrimentally, it made no claim for them in its 2021 rate case. Most critically, it failed to demonstrate how such additional costs could justify including a non-existent expense in rates. This argument is nothing but unsupported makeweight and totally wrong.

D. Recognized Exceptions to Retroactive Ratemaking Apply When Utility Misconduct Produces Unlawful Rates

1. The Rule Against Retroactive Ratemaking Is Not Absolute

The Commission and Aqua view retroactive ratemaking as an absolute barrier to Ferguson's requested relief. PUC Br. 34-41; Aqua Br 16-26. While retroactive ratemaking is generally forbidden, courts have recognized exceptions when equitable considerations surpass the policy supporting rate finality.

But these policies assume the utility acted in good faith and that rates were based on accurate information. When, as in this case, a utility obtains rates through

misconduct—by hiding material information or failing to correct known inaccuracies—the fairness of the retroactive ratemaking principle breaks down. As the Public Utility Commission of Utah recognized, as related in *MCI Telecommunications Corp. v. Pub. Serv. Comm'n*, 840 P.2d 765, 775 (Utah 1992), "We would agree that certain exceptions to the rule [against retroactive ratemaking] are reasonable; for example, where it could be demonstrated that the utility had misrepresented important ratemaking information or otherwise misled regulators."

State and federal courts have recognized the reality of utility monopolistic misconduct through the exceptions to the rule set forth below.

2. Ferguson Did Not Waive His Arguments Regarding Exceptions to Retroactive Ratemaking and Related Doctrines

Aqua argues that Ferguson, at best, only claimed and preserved for appeal the Commission's rejection of the misconduct exception to the rule against retroactive ratemaking and "only vaguely suggested" that the windfall and mistake of law exceptions applied to the case by citing *Philadelphia Electric Co. v. Pa. Pub. Util. Comm'n*, 502 A.2d 722, 727-728 (Pa. Cmwlth. 1985)]." Aqua Br. 20-21.

Ferguson did more than "vaguely suggest" the applicability of the windfall and mistake of law exceptions in his Exceptions (R. 482a-485a) and principal brief (Pet. Br. 48 (mistake of law exception), 49-52 (misconduct exception), 49 (windfall exception is encompassed within the extraordinary and nonrecurring expense exception)).

In his Exceptions, Ferguson relied on the "without more" phrase in *Philadelphia Electric,* which states at 502 A.2d 727-728 (emphasis added):

> The general rule is that there may be no line examination of the relative success or failure of the utility to have accurately projected its particular items of expense or revenue and an excess over the projection of an isolated item of revenue or expense may not be, ***without more***, the subject of the Commission's order of refund or recovery, respectively, on the occasion of the utility's subsequent rate increase requests.

R. 484a (emphasis added).

The Court made plain in *Philadelphia Electric*, that "without more" referred to the ***"extraordinary and nonrecurring" expense exception*** where something "more" has occurred to justify an exception to prospective-only ratemaking, and cited several cases where utilities were permitted to recover such expenses retroactively. 502 A.2d at 728.

Ferguson clearly preserved the *misconduct exception* to the ban on retroactive ratemaking by arguing in his Exceptions that:

> Even if there had been such a "line by line examination" of isolated items, the "without more" caveat quoted above in *Philadelphia Electric* would apply. Such an examination is permitted if something "more" exists. **That something "more" was Aqua's extraordinary misconduct.** That same misconduct also excludes Ferguson's complaints from the prohibition because such misbehavior is (fortunately) an extraordinary and non-recurring occurrence….

R. 485a (emphasis added).

Ferguson's Exceptions also preserved the ***mistake as a matter of law exception*** by relying on Sections 1309(a) and 1312(a) to obtain proper relief. Both

sections require proof that existing rates (i.e., Commission-made in the previous rate case) are unjust, unreasonable, or violate the law or Commission regulations. R. 476a, 478a, 480a, 483a. Such proof involves core Section 1301(a), which states that "every rate made, demanded, or received by any public utility shall be just and reasonable." The Commission's approval of rates that included the non-existent trucking expense was a legal error in violation of Section 1301(a). Correcting that error through refunds under Section 1312(a) *does not constitute retroactive ratemaking—it corrects an unlawful rate that should never have been approved*.

Finally, Ferguson maintained the **windfall exception** because ill-gotten utility overcharges are implied in a formal complaint seeking refunds under Section 1312(a), which Ferguson reaffirmed in his Exceptions. R. 476a, 480a. Additionally, as discussed below, a utility's significant undeserved revenue gain is the "customer benefit" aspect of the "extraordinary and nonrecurring" exception, which the Commission has so far only applied to allow utilities to recover extraordinary *losses*. As explained below regarding the windfall exception, Pennsylvania courts have long held that it applies equally to utility *gains*, even though no cases have reached the courts to confirm its symmetrical application in favor of utility customers.

Thus, the Commission erred by rejecting Ferguson's Exception No. 3 regarding the "something more" caveat, saying, "We disagree with the Complainant

that something 'more' exists here allowing for reexamination" of rate items in the 2021 rate case. Tab A 28.

3. The Mistake as a Matter of Law Exception Applies

The Pennsylvania Supreme Court has held that when rates are based on legal error, correction does not constitute retroactive ratemaking. In *Barasch v. Pa. Pub. Util. Comm'n*, 491 A.2d 94 (Pa. 1985), the Court addressed whether including projected instead of actual tax expenses violated Pennsylvania law. The Court explained: "An agency order imposing a rate which is not just and reasonable is unlawful. This Court will not affirm an unlawful agency decision." *Id*. at 107; Pet. Br. 48.

Aqua argues that *Barasch* addressed only the "actual taxes paid doctrine" and has no broader relevance. Aqua Br. 23-24. This interpretation nullifies *Barasch's* significance and contradicts the Court's subsequent decision in *Barasch v. Pa. Pub. Util. Comm'n*, 493 A.2d 653 (Pa. 1985), which clarified that the Court's point was not limited to tax expenses and that "the basic rate-making maxim [is] that only expenses which, in fact, are actually paid or payable by the utility may be included for the purposes of ratemaking." *Id*., 493 A.2d at 656. Moreover: "In computing the cost of operation and service, the Commission considers evidence of the actual expenses, properly adjusted when the evidence warrants…." *Id*. (quoting *City of*

Pittsburgh v. Pa. Pub. Util. Comm'n, 128 A.2d 372, 386 (Pa. Super. 1956)). The Court continued:

> Where an expense is not actually incurred, *be it for taxes or otherwise*, it is improper to include it in the rates charged to the ratepayers. … It is a violation of basic rate-making principles to charge ratepayers for theoretical expenses which in practice the utility bears no liability. *This is true no matter the category of expense*.

Id., 493 A.2d at 657 (emphasis added); *see also City of Lancaster (Sewer Fund) v. Pa. Pub. Util. Comm'n*, 793 A.2d 978, 983 (Pa. Cmwlth. 2002) ("The Commission did not permit the City to charge ratepayers a greater expense than the City actually spent as the Commission did in *Barasch* [493 A.2d at 656].").

The Pennsylvania Superior Court and this Court long ago adopted the same principle. This Court said this in *Cohen v. Pa. Pub. Util. Comm'n*, 468 A.2d 1143, 1150 (Pa. Cmwlth. 1983) (emphasis added):

> However, a utility may pass along to its customers only those expenses or costs it actually incurs. Riverton Consolidated Water Co. v. Pennsylvania Public Utility Commission, 186 Pa. Superior Ct. 1, 20, 140 A.2d 114, 123 (1958). Any other approach would permit the utility, *by charging higher rates than necessary, to gain a profit from its customers under the guise of recovering operating expenses*.

Here, Section 1301(a) requires that "every rate made, demanded, or received by any public utility shall be just and reasonable." Ferguson demonstrated that Aqua's rates included a $1.2 million expense that the company was not actually incurring, allowing Aqua "to gain a profit from its customers under the guise of recovering operating expenses."

The Commission's approval of rates including this non-existent expense was legal error contrary to Section 1301(a). Correction of that error through refunds under Section 1312(a) does not constitute retroactive ratemaking—it remedies an unlawful rate that should never have been approved.

4. The Windfall Exception Applies

a. The Exception Applies to A Utility's *Wrongfully Obtained* Revenue Gains Symmetrically with Its Recovery of Its Extraordinarily Incurred Costs

In response to Ferguson's claim that Aqua received a $3.3 million windfall by collecting an annual trucking expense it was not incurring (Pet. Br. 15, 50-51), the Commission argues that it recognizes an exception to the rule against retroactive ratemaking that allows a utility to recover its extraordinary and nonrecurring *higher costs*, but not an exception that allows customers to obtain refunds of a utility's extraordinary and nonrecurring *increased revenues* wrongly gained by misconduct in its last rate case. PUC Br. 37.

Critically, Ferguson's claim of a windfall exception is confined to instances, as here, where the utility has collected or retained revenues *improperly*, i.e., revenues it should not have received in the first place because of its wrongful conduct during the rate proceeding that approved them. It is the same as the "extraordinary and nonrecurring" exception recognized by the Commission, which allows recovery of a utility's extraordinary losses, but instead allows recovery of customers'

extraordinary overpayments obtained by the utility through rate case misconduct (*a windfall by wrongdoing*).

Pennsylvania courts have held that the extraordinary and nonrecurring exception recognized by the Commission is symmetrical. It applies equally to a utility's previously incurred "extraordinary losses **or gains**." *See*, *e.g.*, *Popowsky v. Pa. Pub. Util. Comm'n*, 868 A.2d 606, 609 (Pa. Cmwlth. 2006); *Popowsky v. Pa. Pub. Util. Comm'n*, 695 A.2d 448, 452 (Pa. Cmwlth 1997); *Popowsky v. Pa. Pub. Util. Comm'n*, 642 A.2d 648, 652 (Pa. Cmwlth. 1994); *Pike County Light and Power Co. v. Pa. Pub. Util. Comm'n*, 487 A.2d 118, 121 (Pa. Cmwlth. 1985).

b. Post-Rate Case Revenue and Expense Variances Do Not Defeat the Windfall Exception

Aqua (mirrored by the Commission, PUC Br. 37-38) argues that no windfall occurred for the same reasons already rebutted in Part II(B)(2&3) above, and because two of the cases cited by Ferguson are factually distinguishable. Aqua Br. 24-26. The more pertinent of the two cases is discussed next.

5. The Misconduct Exception Applies and Should Be Adopted in Pennsylvania

Multiple state and federal courts have acknowledged that utilities cannot use retroactive ratemaking protections when their own misconduct led to the disputed rates. These rulings are grounded in fundamental equitable principles that Pennsylvania courts should adopt.

No court has developed a more extensive body of case law on this subject than the Supreme Court of Utah, the leading case being *MCI Telecommunications Corp. v. Public Service Commission of Utah*, 840 P.2d 765 (Utah 1992). Pet. Br. 50-51. The Commission dismisses *MCI Telecommunications* as an out-of-state authority that is not binding on Pennsylvania courts. PUC Br. 37. Aqua cites *Elder v. Orluck*, 515 A.2d 517, 522 (Pa. 1986), to support the idea that "the practices and policies of other jurisdictions have little if any relevance for Pennsylvania." Aqua Br. 22. These arguments fail for several reasons.

First, *Elder v. Orluck* is inappropriate because it focused on Pennsylvania's workers' compensation law, which the legislature enacted with specific provisions that differ significantly from those of other states. The Court's statement was specific to statutory interpretation, where Pennsylvania made unique legislative choices, not a broad prohibition on considering other states' decisions.

Second, Aqua confuses two distinct concepts: (1) binding authority (which sister-state decisions lack), and (2) persuasive authority (which they clearly can possess). Pennsylvania courts regularly and appropriately consider sister-state decisions on first-impression issues, especially when multiple jurisdictions have addressed similar questions with sound reasoning and core legal principles.[4]

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[4] *See*, *e.g.*, *William Penn School District v. Pa. Dep't of Education*, 170 A.3d 414, 443 (Pa. 2017) (citing *Danson v. Casey*, 399 A.2d 360, 365 n.10 (citing cases from Ohio, New York,

Third, Pennsylvania law already mandates the disclosure obligations underlying the misconduct exception (66 Pa.C.S. § 505: a comprehensive affirmative duty on utilities to provide accurate and truthful information to the Commission); 52 Pa. Code § 53.53: utilities must submit truthful and complete information; 52 Pa. Code § 5.332: parties are required to supplement discovery with after-acquired information).

Fourth, when multiple jurisdictions independently reach the same conclusion based on fundamental legal principles, it confirms the validity of those principles rather than their irrelevance.

Aqua attempts (Aqua Br. 25-26) to factually differentiate *MCI Telecommunications* by arguing that there was no windfall here because Aqua recovered less revenue than it was authorized to collect for New Garden Township operations, while *MCI* involved undisclosed overearnings. Additionally, in *MCI*, the court found the commission's failure to hold a misconduct hearing to be arbitrary and remanded the case for such a hearing. Ferguson was given a hearing, and the ALJ and Commission concluded he failed to prove misconduct. These arguments are unconvincing for these reasons:

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and California)); *Commonwealth v. Edmunds*, 586 A.2d 887, 894-95 (Pa. 1991); *Commonwealth v. French*, 578 A.2d 1292, 1295, 1304-1305 (Pa. Super. 1990), *aff'd*, 611 A.2d 175, 177 & 178 n.6 (Pa. 1992).

First, the *MCI Telecommunications* principle is not limited to cases of overearnings. The Court's decision focused on whether the utility concealed "information pertinent to whether a rate-making proceeding should be initiated, or that is material to findings made by the Commission during the rate-making proceeding." 840 P.2d at 775.

Second, the question is not whether Aqua over-earned, but whether it improperly collected revenue for a non-existent expense. That Aqua may have underearned on other line items does not eliminate the windfall from this particular deception.

Third, the *MCI* court remanded the case for a hearing after establishing the governing principle: “The rule against retroactive rate making was designed to ensure the integrity of the rate-making process, not to shelter a utility’s improperly obtained revenues.”

Fourth, and most importantly, allowing utilities to retain revenues obtained through nondisclosure will only encourage others to do the same. The *MCI Telecommunications* exception is specifically designed to prevent such misbehavior.

D. The Commission Abused Its Discretion by Denying Ferguson's Petition to Reopen When the Integrity of the Ratemaking Process Was at Stake

Ferguson petitioned to reopen the record because he believed that a limited reopening of the record was necessary to counter Aqua’s “disingenuous arguments”

in its Reply Exceptions. He provided two examples (R. 532a, 535a-536a), which the Commission ignored as improper "replies to replies." Tab A 16.

The Commission found that Ferguson failed to demonstrate good cause for reopening the record or that it was in the public interest to do so under §§ 5.431(b) & 5.571(d) of its Practice and Procedure regulations (Tab A 9, 17; PUC Br. 48; Aqua Br. 40-41), because he had the opportunity to present his case in the evidentiary hearing but did not meet his burden of proving that Aqua had violated a statute, regulation, Commission Order or tariff.

First, contrary to *Phila. Indus. & Comm. Gas Users Grp. v. Pa. Pub. Util. Comm'n*, 342 A.3d 140, 152-153 (Pa. Cmwlth. 2024) (regarding the sufficiency of the Commission's adjudication and its duty to explain its decisions), the Commission *failed to explain why Ferguson was wrong in claiming that the public interest would be served* by a limited reopening to establish the transition date to piping *when the integrity of the ratemaking process was at stake because of Aqua's deception*.

When the integrity of the Commission's ratemaking process is at risk, the public interest in accurate fact-finding takes precedence over concerns about procedural regularity. Regulatory integrity, deterrence, customer protection, and precedential impact concerns are implicated. The Commission's curt conclusion that "we are not persuaded by the Complainant's assertion that reopening the record is in the public interest" (Tab A 17) is clearly unreasonable given the overwhelming

evidence of Aqua's deceptive non-disclosure and its harmful example to other utilities.

The Commission's decision to deny reopening despite Ferguson's compelling evidence constitutes a capricious disregard of relevant, competent evidence, *Jones Motor Co. v. Pa. Pub. Util. Comm'n*, 195 A.2d 125, 131 (Pa. Super. 1963).

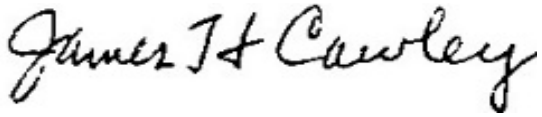
Second, the Commission's reasoning unfairly burdens Ferguson because he acted *pro se*. The Commission criticizes Ferguson for failing to conduct discovery and for not cross-examining Ms. Feeney more effectively. PUC Br. 48-50. However, Ferguson is entitled to accommodations under the Commission's regulations, specifically 52 Pa. Code § 1.2, which requires a "liberal construction" of rules for *pro se* litigants. Further, Pennsylvania courts may liberally construe materials filed by a *pro se* litigant. *Kozicki v. U.C.B.R.*, 299 A.3d 1055, 1063 (Pa. Cmwlth. 2023). The Commission's denial of a limited reopening to discover and present as evidence the pipeline construction documents foreclosed such liberal treatment.

The Commission cannot simultaneously promote its *pro se* accommodations (PUC Br. 42-46) while holding Ferguson to the discovery standards and litigation abilities expected of Aqua's experienced counsel. This inconsistency amounts to an abuse of discretion. *Nelson v. State Bd. of Veterinary Med.*, 938 A.2d 1163, 1170 (Pa. Cmwlth. 2007) (abuse of discretion occurs when agency makes a "manifestly unreasonable" decision).

III. CONCLUSION

For the reasons set forth in Petitioner's opening brief and this Reply Brief, the Commission's Opinion and Order entered June 18, 2025 should be reversed, and this matter should be remanded to the Commission for a calculation of refunds under Section 1312(a).

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that the foregoing Brief of Petitioner complies with the word count requirement of Pa.R.A.P. 2135(a)(1). Based on the word count of the word processing system used to prepare it, the Brief of Petitioner, excluding the cover page, Table of Contents, and Table of Authorities, contains 6,997 words.

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CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

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Date: April 27, 2026

PROOF OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons named and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121.

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