
**IN THE
COMMONWEALTH COURT OF PENNSYLVANIA**

Docket No. 876 C.D. 2025

WILLIAM FERGUSON,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

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

James H. Cawley (PA Atty ID No. 6896)
1020 Kent Drive
Mechanicsburg, PA 17050
(717) 439-8776

Attorney for Petitioner William Ferguson

Date: November 10, 2025

Table of Contents

	<u>Page</u>
I. Introduction	1
II. Statement of Jurisdiction	4
III. Order in Question	4
IV. Statement of Scope and Standard of Review.....	5
V. Statement of Questions Involved.....	6
VI. Statement of the Case	7
A. Form of Action	7
B. Procedural History	7
C. Chronological Statement of Facts.....	10
1. Complainant William Ferguson	10
2. Aqua’s Acquisition of New Garden Sewer Assets	10
3. Aqua’s Search for a Replacement for Trucking Treated Wastewater.....	10
4. Aqua’s 2021 Rate Case	12
5. New Garden Township Board of Supervisors Meeting on November 21, 2022	15
6. Ferguson’s “Trucking Expense” Complaint	18
7. Aqua’s Answer and New Matter, and Ferguson’s Answer to New Matter	19
8. Testimony of Aqua’s Manager of Rates, Erin Feeney	19
9. The ALJ’s Summary Dismissal of Ferguson’s Complaint	22
10. Ferguson’s Exceptions to the ALJ’s Initial Decision	22
11. Ferguson’s Petition to Reopen the Record	24
12. Ferguson’s Motion to Strike Portions of Aqua’s Reply Exceptions	24
13. The Commission’s Opinion and Order	25
VII. Summary of Argument.....	25

VIII. Argument

Regarding Question 1: Aqua’s rate case misconduct caused an unincurred expense to be included in Aqua’s rates and deprived the Commission of critical information necessary for it to set just and reasonable rates, rendering them unlawful, null and void *ab initio*, and subject to refunds under Section 1312(a).

A. Ferguson proved that Aqua violated Section 1301(a) by causing an unincurred expense to be included in New Garden Township customers’ rates, rendering them unjust, unreasonable, unlawful, and null and void *ab initio*.....31

1. The Commission’s Order.....31

2. Ferguson’s claim and burden of proof.....31

3. Fundamental ratemaking principles.....32

4. Duty of disclosure by public utilities.....34

B. Ferguson proved that Aqua’s claimed trucking expense ceased during its 2021 rate case, necessitating its withdrawal with notice to the Administrative Law Judge and the active parties to the case36

1. Ferguson’s testimony and exhibits.....36

2. Aqua failed to overcome Ferguson’s *prima facie* case with evidence of co-equal value or weight.....38

C. Summary.....41

Regarding Question 2: The Commission’s decision is unsupported by substantial evidence because it relies on Aqua’s reasons for including the trucking expense claim in its *initial* rate case filing and on Aqua’s alleged *post-rate case* outcomes in its New Garden Township division, but not on evidence justifying Aqua’s non-disclosure of the cessation of the trucking expense and its failure to withdraw that expense claim *during the case*.

A. The Commission’s Order clearly erred by adopting Aqua’s arguments that lacked evidentiary support, relied on irrelevant post-rate case outcomes, and failed to justify Aqua’s misconduct during its 2021 rate case42

B. Summary.....46

<p>Regarding Question 3: Because of Aqua’s rate case misconduct and the resulting unjust and unreasonable rates, the Commission incorrectly applied the rule against retroactive ratemaking and related doctrines.....</p> <p>A. The rule against retroactive ratemaking and closely related doctrines.</p> <p>B. Exceptions to the retroactive ratemaking prohibitions.....</p> <p>C. Summary.....</p>	<p>46</p> <p>47</p> <p>48</p> <p>51</p>
<p>Regarding Question 4: The Commission abused its discretion and acted capriciously by denying nonlawyer Ferguson’s Petition to Reopen the Record by faulting Ferguson, acting <i>pro se</i>, for not obtaining the information through adequate discovery and cross-examination of Aqua’s witness, and by baldly stating that the public interest did not require any additional discovery or hearing, although the integrity of the Commission’s ratemaking process was at stake.....</p>	<p>53</p>
<p>IX. Conclusion.....</p>	<p>57</p>

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<i>Barasch v. Pa. Pub. Util. Comm'n</i> , 491 A.2d 94 (Pa. 1985).....	33, 48
<i>Barasch v. Pa. Pub. Util. Comm'n</i> , 493 A.2d 653 (Pa. 1985)	34
<i>California ex rel. Lockyer v. FERC</i> , 383 F.3d 1006 (9 th Cir 2004).....	51
<i>Cheltenham & Abington Sewerage Co. v. Pa. Pub. Util. Comm'n</i> , 5 A.2d 334 (Pa. 1942)	48
<i>City of Lancaster Sewer Fund v. Pa. Pub. Util. Comm'n</i> , 793 A.2d 978 (Pa. Cmwlth. 2022)	33
<i>Coal. for Affordable Util. Servs. & Energy Efficiency in Pa. v.</i> <i>Pa. Pub. Util. Comm'n</i> , 120 A.3d 1087 (Pa. Cmwlth. 2015).....	5
<i>Exxon v. FERC</i> , 182 F.3d 30 (D.C. Cir. 1999)	48
<i>Federal Power Comm'n v. Hope Natural Gas. Co.</i> , 320 U.S. 591 (1944)	33
<i>Jones Motor Co. v. Pa Pub. Util. Comm'n</i> , 195 A.2d 125 (Pa. Super. 1963).....	5
<i>Kennecott Copper Corp. v. EPA</i> , 612 F.2d 1232 (10 th Cir. 1979).....	41
<i>MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah</i> , 840 P.2d 765 (Utah 1992).....	50
<i>Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n</i> , 437 A.2d 76 (1981)	48
<i>Nelson v. State Bd. of Veterinary Med.</i> , 938 A.2d 1163 (Pa. Cmwlth. 2007).....	5, 55

<i>Pennsylvania Elec. Co. v. Pa. Pub. Util. Comm’n</i> , 502 A.2d 130 (Pa. 1985).....	24, 33, 45, 49, 52
<i>Philadelphia Industrial and Commercial Gas Users Group v. Pa. Pub. Util. Comm'n</i> , 342 A.3d 140 (2025), 2025 Pa. Commw. LEXIS 133	56
<i>Popowsky v. Pa. Pub. Util. Comm’n</i> , 642 A.2d 648 (Pa. Cmwlth. 1994)	49
<i>Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.</i> , 846 P.2d 1245 (Utah 1992)	51
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	48
<i>Turpen v. Oklahoma Corp. Comm’n</i> , 769 P.2d 1309 (Okla. 1989).....	49
<i>Wise v. Pacific Gas & Elec. Co.</i> , 77 Cal. App. 4 th 287 (1999)	51
Administrative Decisions	
<i>Dale Sattar v. Aqua Pennsylvania, Inc.</i> , Docket No. C-2010-2169756 (order entered July 28, 2011)	55
<i>Pa. Pub. Util. Comm’n v. Aqua Pennsylvania Wastewater, Inc.</i> , Docket No. R-2024-3047822 (order entered Feb. 7, 2025), 2025 PA. PUC LEXIS 45	45
<i>Pa. Pub. Util. Comm’n v. Philadelphia Electric Co.</i> , 59 Pa. PUC 256, 1985 Pa. PUC LEXIS 64	34
<i>Petition of UGI Utilities, Inc.-Elec. Div. For Approval Of Its Energy Efficiency And Conservation Plan</i> , Dkt. No. M-2010-2210316, 2011 Pa. PUC LEXIS 1690 (Rec. Dec. issued July 13, 2011).....	47
<i>Use of Fully Projected Future Test Year, 53 Pa. Code Chapter 53</i> , Docket No. L-2012-2317273, 55 Pa.B. 6180, 2025 PA. PUC LEXIS 16.....	35

State Statutes

Administrative Agency Law

2 Pa.C.S. § 50554
2 Pa.C.S. § 7025

Public Utility Code

66 Pa.C.S. § 315(a).....33
66 Pa.C.S. § 315(e).....12
66 Pa.C.S. § 331(g).....54
66 Pa.C.S. § 332(a).....23, 32, 43
66 Pa.C.S. § 332(b).....54
66 Pa.C.S. § 332(d).....13
66 Pa.C.S. § 332(e).....54
66 Pa.C.S. § 335(c).....41
66 Pa.C.S. § 50534
66 Pa.C.S. § 701.....7, 25, 31, 32, 41, 54-57
66 Pa.C.S. § 703(e).....56
66 Pa.C.S. § 1301(a).....28, 31, 33, 42, 54, 57
66 Pa.C.S. § 1308(d).....12, 33, 45, 47
66 Pa.C.S. § 1309(a).....24, 31, 47
66 Pa.C.S. § 1312(a).....3, 24, 31, 32, 42, 52, 57
66 Pa.C.S. §§1350-1360 (Act 11 of 2012).....20, 44

Regulations

52 Pa. Code § 1.2..... 54

52 Pa. Code § 1.36(e) 34

52 Pa. Code § 5.102..... 38

52 Pa. Code § 5.332..... 35

52 Pa. Code § 5.411 35

52 Pa. Code § 5.535..... 53

52 Pa. Code § 53.53..... 34, 35

52 Pa. Code §§ 53.51 – 53.53..... 34

52 Pa. Code § 69.321..... 13

Other Authorities

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION
OF THE COMMITTEE ON ADJUDICATION REGARDING *NONLAWYER ASSISTANCE
AND REPRESENTATION IN AGENCY ADJUDICATIONS* (DECEMBER 17, 2024)..... 54

JAMES H. CAWLEY & NORMAN J. KENNARD, GUIDE TO RATEMAKING
(Pa. P.U.C. 2018) 12, 13, 33

I. INTRODUCTION

The importance of this case cannot be overstated. The primary issue is trust, which serves as the foundation of public utility regulation. It is the essential prerequisite for all interactions between the Public Utility Commission and the public utilities it oversees.

Here, Aqua Pennsylvania Wastewater (“Aqua”) betrayed principles of trust and transparency by failing to withdraw an annual \$1.2 million wastewater trucking expense in its 2021 rate increase request when the company replaced the trucking with a pipeline during the rate case. It also concealed the pipeline project and its reactivation from the active parties in the case. As the expense claim aligned with the historic trucking costs, no party challenged it, and the Commission incorporated the \$1.2 million expense into the revenue increase approved in its final order. Aqua’s new tariff, implementing that order, set the recovery of that exact amount solely on the 2,115 customers in Aqua’s New Garden Township division. These customers paid a total of \$3.3 million before the rate was superseded in Aqua’s 2024 rate case.

The Commission has broad powers to inspect utility property, request various reports, and audit books of account, but it cannot be everywhere at once as utilities operate. It is absent from utility inner sanctums, construction projects, and accounting departments. Instead, it depends on utilities being truthful and candid in all their dealings with it and parties to Commission proceedings. A utility’s betrayal of that trust hampers or prevents the Commission from maintaining the necessary

balance between investor and consumer interests, particularly in ratemaking, where the Commission must establish “just and reasonable” rates.

The obligations of trust are embodied in the Regulatory Compact, an informal, unwritten agreement between private utilities and the government in the early 20th century. It aimed to prevent wasteful duplication, predatory pricing, and other anticompetitive practices, as well as the public nuisance of wires and pipelines from competing utilities cluttering streets and skylines. Privately owned utilities agreed to take the risk of investing in infrastructure needed to provide safe, reliable, and adequate service in exchange for government regulators supporting those investments through timely recovery of prudently incurred costs, reasonable returns on appropriately invested capital, and regulatory treatment that was generally fair, predictable, and balanced between the interests of utilities and customers.

It was understood from the beginning that, for utilities to receive fair and honest treatment from regulators, they must be fair and honest in their dealings with regulators. Since utilities have unique knowledge of their operations and financial records, and regulators with limited resources cannot constantly oversee all utilities within their jurisdiction, trust and transparency are vital to the Compact's success.

This case was improbably initiated by William Ferguson, a nonlawyer *pro se* complainant who, through his extensive knowledge and experience, managed to describe the facts and seek restitution sufficiently to meet the legal requirements of the Public Utility Code. He succeeded in overcoming Aqua’s inapplicable legal

defenses and irrelevant excuses for its rate case misconduct, despite the Commission's failure to accommodate his nonlawyer *pro se* status and its strict application of technical rules of evidence and rules of practice and procedure, which were designed to bring order and fairness to its proceedings, not to confer an unfair advantage on utility lawyers skilled in their use.

Ferguson prevailed with overwhelming *prima facie* evidence, consisting of an inadvertent “smoking gun” admission by an Aqua Vice President and other corroborating evidence that Aqua could not and did not refute.

Aqua should be ordered to disgorge its ill-gotten overcharges. This Court should reverse and remand the case to the Commission for a calculation of refunds under Section 1312(a) of the Public Utility Code.

II. STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over this appeal pursuant to Section 702 of the Administrative Agency Law, 2 Pa.C.S. § 702, and Section 763(a)(1) of the Judicial Code, 42 Pa.C.S. § 763(a)(1).

III. ORDER IN QUESTION

IV. Conclusion

In light of the above discussion, we shall: (1) deny the Complainant's Exceptions; (2) adopt the ALJ's Initial Decision; (3) dismiss the Complaints; (4) deny the Complainant's Petition to Reopen the record; and (5) deny the Complainant's Motion to Strike, consistent with this Opinion and Order: THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by William Ferguson on April 21, 2025, to the Initial Decision of Administrative Law Judge Eranda Vero, issued on March 31, 2025, at Docket Nos. C-2023-3043108 and C-2023-3043109, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Eranda Vero, issued on March 31, 2025, at Docket Nos. C-2023-3043108 and C-2023-3043109, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaints filed by William Ferguson, on September 9 [sic], 2023, at Docket Nos. C-2023-3043108 and C-2023-3043109, are dismissed.

4. That the Petition to Reopen Proceeding, filed by William Ferguson on May 9, 2025, is denied.

5. That the Motion to Strike Certain Portions of the Reply Exceptions, filed by William Ferguson on May 9, 2025, is denied.

6. That this proceeding be marked closed.

(SEAL)

ORDER ADOPTED: June 18, 2025

ORDER ENTERED: June 18, 2025

BY THE COMMISSION,

/s/ Matthew L. Homsher

Secretary

IV. STATEMENT OF SCOPE AND STANDARDS OF REVIEW

This Court's scope of review is governed by Section 702 of the Administrative Agency Law, 2 Pa.C.S. § 702: "After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence."

For issues of law, the standard of review is *de novo*; the scope of review is plenary. *Coal. for Affordable Util. Servs. & Energy Efficiency in Pa. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1094-95 (Pa. Cmwlth. 2015).

The Court may also reverse a PUC decision when "it is the result of an abuse of discretion or of capricious action." *Jones Motor Co. v. Pa Pub. Util. Comm'n*, 195 A.2d 125, 131 (Pa. Super. 1963). "Capricious disregard occurs when the fact-finder deliberately ignores relevant, competent evidence." *Nelson v. State Bd. of Veterinary Med.*, 938 A.2d 1163, 1170 n.13 (Pa. Cmwlth. 2007).

V. STATEMENT OF QUESTIONS INVOLVED

The Commission answered each question in the negative.¹

Question 1: Error of Law – Did Aqua’s rate case misconduct cause an unincurred expense to be included in Aqua’s rates and deprive the Commission of critical information necessary for it to set just and reasonable rates, rendering them unlawful, null and void *ab initio*, and subject to refunds under Section 1312(a)?

Question 2: Lack of Substantial Evidence – Is the Commission’s decision unsupported by substantial evidence because it relies on Aqua’s reasons for including the trucking expense claim in its *initial* rate case filing and on Aqua’s alleged *post-rate case* outcomes in its New Garden Township division, but not on evidence justifying Aqua’s nondisclosure of the cessation of the trucking expense and its failure to withdraw that expense claim *during the case*?

Question 3: Error of Law – Because of Aqua’s rate case misconduct and the resulting unjust and unreasonable rates, did the Commission incorrectly apply the rule against retroactive ratemaking and related doctrines?

Question 4: Abuse of Discretion and Capricious Action – Did the Commission abuse its discretion and act capriciously by denying nonlawyer Ferguson’s Petition to Reopen the Record by faulting Ferguson, acting *pro se*, for not obtaining the information through adequate discovery and cross-examination of Aqua’s witness, and by baldly stating that the public interest did not require any additional discovery or hearing, even though the integrity of the Commission’s ratemaking process was at stake?

¹ All references to statutory sections refer to the Public Utility Code, 66 Pa.C.S. § 101 *et seq.*, unless otherwise indicated.

VI. STATEMENT OF THE CASE

A. Form of Action

This is an appeal of a June 18, 2025, Order entered by the Commission in Docket Nos. C-2023-3043108 and C-2023-3043109, *William Ferguson v. Pennsylvania Public Utility Commission* (“Order”) (Tab A), specifically regarding the part of the Order related to Docket No. C-2023-3043109 (the “Trucking Expense” complaint).

B. Procedural History

The two consolidated Public Utility Code Section 701, 66 Pa.C.S. § 701, formal complaints were both filed on **September 19, 2023**, by William Ferguson (“Ferguson”), acting *pro se*, who is a customer of Aqua Pennsylvania Wastewater, Inc. (“Aqua”) in its New Garden Township, Chester County, division, alleging misconduct by Aqua in its 2021 rate case. (R. 16a) On **October 10, 2023**, Aqua filed an Answer and New Matter to the expense complaint. (R. 26a) On October 25, 2023, Ferguson replied to Aqua’s New Matter. (R. 40a) On **October 27, 2023**, a telephonic hearing before Administrative Law Judge Eranda Vero was scheduled for **December 12, 2023**, but on **November 15, 2023**, Aqua moved, without Ferguson’s objection, for a continuance of the hearing and referral of the complaint to the Commission’s Mediation Unit. ALJ Vero granted the motion on **November 21, 2023**, and consolidated Ferguson’s two complaints.

Mediation before another ALJ proceeded until **April, 2024**, without success. A telephonic hearing was therefore scheduled for **July 23, 2024**.

On **July 10, 2024**, Aqua moved to consolidate Ferguson’s complaints with Aqua’s pending base rate proceeding filed in 2024, alleging that they raised common issues of fact and law. The Commission canceled the scheduled July 23 hearing on July 12, even before Ferguson filed his Answer in opposition to consolidation on July 24, 2024, which detailed how his Trucking Expense complaint applied only to Aqua’s 2021 rate case misconduct.

On **October 22, 2024**, ALJ Vero denied Aqua’s motion to consolidate Ferguson’s complaints with Aqua’s 2024 base rate case. She also set the complaints for a hearing, which was scheduled for **November 25, 2024**.

On **November 15, 2024**, Aqua moved to convert the evidentiary hearing scheduled for November 25 to a prehearing conference or to delay the hearing for approximately 30 days. On **November 18, 2024**, Ferguson opposed Aqua’s motion because Aqua had already overly delayed action on his request “that the PUC initiate an investigation and, when validated, take enforcement action to refund excess charges to New Garden customers.” On **November 20, 2024**, ALJ Vero denied Aqua’s motion.

A telephonic hearing finally convened as scheduled on **November 25, 2024**, before ALJ Vero. Ferguson appeared *pro se*, testified, and sponsored exhibits in support of his complaint. Aqua was represented by experienced legal counsel and presented the testimony of Erin M. Feeney, Aqua’s Manager of Rates.

The record closed on **December 30, 2024**, and ALJ Vero issued her Initial Decision (R. 450a) on **March 31, 2025**, which did not address the merits of Ferguson's allegations. Instead, ALJ Vero completely adopted Aqua's legal arguments and found that Ferguson's claims were barred by law and no relief could be granted, and, therefore, he failed to prove that Aqua had violated a statute, regulation, Commission order, or tariff as Section 701 requires.

On **April 21, 2025**, Ferguson filed Exceptions to the Initial Decision (R. 470a), to which Aqua filed Reply Exceptions on May 1, 2025. (R. 498a)

On **May 9, 2025**, Ferguson filed a Petition to Reopen the Record for the Purpose of Taking Additional Evidence (R. 530a), to which Aqua filed an Answer (R. 539a) on **May 19, 2025**.

On **May 9, 2025**, Ferguson also filed a Motion to Strike certain portions of Aqua's Reply Exceptions (R. 525a) , to which Aqua filed an Answer (R. 547a) on **May 29, 2025**.

By Opinion and Order (Tab A) entered **June 18, 2025**, the Commission (1) denied Ferguson's Exceptions; (2) adopted the ALJ's Initial Decision; (3) dismissed both of Ferguson's Complaints; (4) denied his Petition to Reopen the Record; and (5) denied his Motion to Strike.

Ferguson filed a Petition for Review with this Court on **July 17, 2025**. Aqua intervened on **July 22, 2025**.

C. Chronological Statement of Facts

1. Complainant William Ferguson. Ferguson holds both undergraduate and graduate degrees in Chemical Engineering from Ohio State University. (R. 83a) He retired after 37 years with DuPont, including 17 years in chemical plant engineering, which gave him familiarity with “pipes and pumps”—a skill highly relevant to this case. (R. 83, 142a-145a) Because of his extensive knowledge of business, accounting, and chemical operations, he later became one of DuPont’s most senior business analysts. Importantly, he does not have a law degree, unlike the two experienced principals of a leading public utility law firm who zealously opposed him as required under the Rules of Professional Responsibility.

2. Aqua’s Acquisition of New Garden Sewer Assets. By Order entered **December 3, 2020**, at Docket No. A-2016-2580061, the Commission authorized Aqua to acquire the wastewater system assets of New Garden Township and the New Garden Township Sewer Authority (“Authority”). Closing occurred on December 21, 2020, with Aqua’s ownership and tariff taking effect the following day, **December 22, 2020**. (R. 8a, 64a, 74a, 80a)

3. Aqua’s Search for a Replacement for Trucking Treated Wastewater. The Authority operated sewage treatment lagoons at its South End and East End plants. Both plants treated the wastewater and then irrigated the treated water onto nearby fields. Starting around 2015, the fields around the South End facility began to lose their capacity to absorb the full load of its lagoon. To prevent overflow, the

Authority began trucking treated wastewater from the South End to the East End facility, at a cost of about \$100,000 per month. (R. 20a) This continued until the system was sold to Aqua on December 20, 2020. (R. 8a-10a, 60a-61a, 63a-64a) The Authority left the South End lagoon “literally filled to the brim.” (R. 64a)

After acquiring the system, Aqua immediately looked for a way to eliminate the monthly trucking expense. (R. 74a) It discovered that a pipeline had been built earlier between the South End and East End plants, but it had been dormant for 15 years. (R.82a-83a) Aqua began exploring whether the pipeline could be renovated to connect the two treatment plants, eliminating the need to truck wastewater. (R. 74a) Aqua Wastewater’s 2021 Annual Report to the Commission showed that Aqua spent \$666,833 on the “New Garden Dry Line Activation” project, with an in-service date **by the end of 2021**. (R. 74a, 241a (line 21)-243a). It was filed on August 1, 2022,² confirming the project had been completed earlier. The project took approximately 8-10 months, and the trucking costs ended once it was finished. (R. 80a, 249a) Aqua’s President later wrote its New Garden customers: “After several months, we replaced hauling with a pipeline connecting the two treatment plants.” (R. 240a) Aqua trucked 6,000-gallon loads 12 hours a day for 8 to 10 months, costing over \$800,000, consistent with the Authority’s \$100,000 per month costs. When the pipeline was activated, the trucking stopped. (R. 74a, 240a) (8-10 months from December 22, 2020:

² See <https://www.puc.pa.gov/pcdocs/1754255.pdf> at PDF pages 1 and 24.

August-October 2021). The trucking ended within the first year of Aqua owning the system. (R. 249a)

Ferguson obtained this information from a public presentation on November 21, 2022, by Todd Duerr, Aqua’s Vice President of Production, who oversaw the project. (R. 249a #2) During the hearing in this case, Ferguson was about to read a transcript of the relevant parts of a video of the presentation posted online, but Aqua’s counsel stopped him, objecting on hearsay and relevancy grounds. ALJ Vero overruled the objections and directed Ferguson to proceed using a Summary he had prepared of Duerr’s presentation, “along with the link” to the online video. (R. 74a-77a; 247a-249a)

4. Aqua’s 2021 Rate Case. On August 20, 2021, to obtain the Commission’s approval to include the recently acquired New Garden Township wastewater assets in its rate base and begin recovering the costs of operating those assets, as well as for other reasons, Aqua filed a base rate case at Docket Nos. R-2021-3027385 and R-2021-302738 pursuant to Code Section 1308(d) seeking increases in all its water and wastewater rates based on a Fully Projected Future Test Year (“FPFTY”)³ ending March 31, 2023.

³ Section 315(e) defines a Fully Projected Future Test Year as “the 12-month period beginning with the first month that the new rates will be placed in effect after application of the full suspension period permitted under section 1308(d) (relating to voluntary changes in rates).” The concept of “test years” is explained in JAMES H. CAWLEY & NORMAN J. KENNARD, A GUIDE TO UTILITY RATEMAKING 85-88 (Pa. P.U.C. 2018): https://www.puc.pa.gov/General/publications_reports/pdf/Ratemaking_Guide2018.pdf (“RATEMAKING GUIDE”).

On August 25, 2021, the company submitted its extensive rate case supporting documentation as required by the Commission’s regulations. This included an ambiguously worded annual “Purchased Wastewater Treatment Expense” of \$1,200,000 for its recently acquired New Garden Township division, detailed in Volume 2, Exhibit 1-G, Schedules C-1, page 1, Line 22, and C-7.1, Line 22 (R. 236a-237a, 238a-239a, 250a-253a). These documents covered the period through the end of the rate case’s FPFTY ending March 31, 2023. Neither schedule clarified what the “Purchased Wastewater Treatment Expense” specifically entailed, though Schedule C-7.1 identified Brandywine Septic as the service provider.

The rate case filings did not mention or include expense claims for the “New Garden Dry Line Activation” project.

Six public input hearings by phone regarding the rate case were held, with ALJ Mary D. Long presiding. During the call on November 12, 2021, Ferguson and two of his neighbors coordinated their comments and questioned Aqua personnel on the call, including Todd Duerr, Aqua’s Vice President of Production. (R. 78a, 164a) They did so under oath so their comments and questions could be considered as evidence by the ALJ and the Commission.⁴ (R. 149a-150a) Ferguson asked about the “Purchased Wastewater Treatment Expense” because it represented over 63 percent of the projected operating expense for the New Garden Township division in one line item.

⁴ See Section 332(d); 52 Pa. Code § 69.321 (relating to public input hearings in rate proceedings—statement of policy); RATEMAKING GUIDE at 59.

(R. 78a-79a, 247a) After the hearings in the rate case concluded, Aqua, in its January 11, 2022, Main Brief to ALJ Long (R. 12a-13a, 79a, 247a-248a), described Ferguson’s and his neighbors’ testimony as follows:

Geoffrey Meyer, Peter Mrozinski and Bill Ferguson are neighbors and wastewater customers who testified at the public input hearing. They expressed concerns with the rate application filing and asked several questions. For example, they expressed concerns about purchased wastewater expense for New Garden. *Mr. Duerr explained that purchased wastewater expense related to New Garden is **costs for pumping and hauling wastewater for treatment at another location**.* The customers also expressed concerns about the size and complexity of the rate filing. However, the Company followed the standard filing procedures as set forth in the Commission’s regulations. Rate increase applications by their nature are lengthy and complex filings, which the Company bears the burden to support. In order to better address these concerns, the Company has reached out to these customers. AP St. 9-R at 32-33.

(R. 12a-13a) (Emphasis added.)

Thus, Ferguson only asked about the Purchased Wastewater Treatment Expense during the public input call on November 12, 2021. The expense matched the \$100,000/month cost that the Authority had been paying before selling the assets to Aqua. (R. 248a) As a result, no party involved in Aqua’s rate case challenged the expense claim. (R. 164a-165a) ALJ Long’s February 18, 2022, Recommended Decision (at pages 12-13) simply summarized Ferguson’s testimony (Aqua Exh. A; R. 254a-255a), and that decision made no mention of the “Purchased Wastewater Treatment Expense.” Neither did the final rate case Order entered by the Commission on May 16, 2022.⁵

⁵ Aqua Exhibit B, available at <https://www/puc/pa.gov/pdocs/1744354.pdf> (512 pages).

The final Order authorized Aqua to develop a tariff to recover a revenue requirement of \$4,428,399 (\$4.4 million) annually from Aqua’s 1,916 residential and 199 non-residential (total of 2,115)⁶ New Garden Township wastewater customers. (R. 124) Aqua submitted its compliance tariff on May 23, 2022, which became effective for service on and after May 19, 2022. The Commission issued a Secretarial Letter dated June 3, 2022, allowing the tariff to become effective by operation of law. (R. 418a-419a) Instead of allocating the annual \$1.2 million “Purchased Wastewater Treatment Expense” across all of Aqua’s water and wastewater customers, it was included in the \$4.4 million to be annually recovered from Aqua’s 2,115 New Garden Township wastewater customers. (R. 247a) The \$1.2 million accounted for 63% of Aqua’s projected \$1,881,734 annual operating expenses for its New Garden Township division (R. 247a) and 27% of the \$4.4 million revenue.

These authorized rates remained in effect beyond Aqua’s FPFTY projections ending March 31, 2023, that is, until February 22, 2025, which is the effective date of new rates approved in Aqua’s next rate case filed in May 2024, and totaled \$3.3 million (\$1.2 million annually for two years and nine months). (R. 80a-82a).

5. New Garden Township Board of Supervisors Meeting on November 21, 2022. The public outcry over the resulting spike in sewer rates led the New Garden Township Board of Supervisors to hold a public meeting on November 21, 2022, to

⁶ Aqua Exh. 5-B, available at <https://www.puc.pa.gov/pcdocs/1860148.pdf> at PDF p. 180. Aqua Exhibit 5-B is not in the Reproduced Record because of its length but is available at this link which contains the hearing transcript and all admitted hearing exhibits.

discuss the increase. Aqua Pennsylvania President Marc Lucca and the company's Vice President and Controller William Packer spoke at the meeting as did Aqua's Vice President of Production, Todd Duerr, who gave a slide presentation. A member of the "very large crowd" sitting in the front row (R. 68a) video recorded the entire meeting, including Duerr's presentation, and posted it on Facebook at this link:

<https://www.facebook.com/Ginny4PA/videos/1221133465137182> (deleted; see below). Ferguson later downloaded the video to an mp4 file and included the Facebook link in Exhibit E of his complaint in this case (R. 21a) and in Exhibit E admitted into evidence in the evidentiary hearing on his complaint. (R. 249a, top ¶)

Sometime after that hearing, Facebook deleted the link, likely because of the video's length or its time online (the link still worked as of April 21, 2025, when Ferguson filed Exceptions to the ALJ's Initial Decision). Ferguson reposted only a short segment of the video—

<https://www.facebook.com/100088163386207/videos/531383126665874/> —at the 1 hour, 31 minute, 40 second mark of the originally posted video, where Duerr describes Aqua's "New Garden Dry Line Activation" project and the time when Aqua's annual Purchased Wastewater Treatment Expense of \$1.2 million ceased:

If you look at the far right of the picture [slide showing a map] with the red squiggly line on there when this system was built there was a thought that this water could be used to irrigate other areas of the Township. Now it never came to fruition but somebody put in a 10,000, 11,000-foot pipeline, which is represented there [pointing to the map]. So we found out about this. The engineers and operations team got with some of the Township folks and they ...they plotted this line out. We really did not know where it was. They had to go out and find it. Then we didn't know if it was going to hold water. It

has to hold water under pressure. **So, they spent the better part of eight months while we were pumping and hauling to find the line, fix ... fix damaged portions of the line – it hadn't been used ever - and make it ... make it water-tight. And when they did that, that pumping and hauling that was costing a million dollars a year stopped immediately.** Because they were able to stand up pump stations connect that pump up to the pipeline there and pump the water to the East End and Kennett Square Borough. **So that eliminated that ongoing cost right away. That ... that was done within the first year of operation.** (Emphasis added.)⁷

As noted, Aqua's first year of operation began with its ownership of the New Garden Township wastewater assets on December 22, 2020, and ended on December 22, 2021, during Aqua's 2021 rate case (the record closed on January 24, 2022).⁸ During the hearing in this case, ALJ Vero recognized the significance of Duerr's testimony, and overruled the objection of Aqua's counsel that admission into evidence of Ferguson's Exhibit E (referencing the Facebook link) would be "cumulative" of testimony he had already given. (R. 204a). She earlier observed that Duerr's testimony fell within the admission against interest exception to hearsay evidence. (R. 77a)

Following the November 21, 2022, Board of Supervisor's public meeting, Aqua's President, Marc Lucca, wrote a letter on December 9, 2022, to the company's New Garden customers in which he explained that "[u]pon taking ownership" of the New Garden sewer assets, "the condition of the facilities required" that Aqua

⁷ Aqua's entire twenty-four-minute presentation is at this link: <https://www.facebook.com/100088163386207/videos/1356890655984111>. Mr. Duerr's presentation begins at the 1:55 minute/seconds mark and ends at the 13:55 mark.

⁸ Aqua Exhibit B, available at <https://www.puc.pa.gov/pdocs/1744354.pdf> at PDF page 17.

immediately obtain “PA Department of Environmental Protection [approval] to improve operations.” (R. 240a) He continued:

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.*

Id. (emphasis added).

6. Ferguson’s “Trucking Expense” Complaint. Motivated by the spike in Aqua’s wastewater rates, Ferguson examined Aqua’s 2021 rate case filings, leading to his “Trucking Expense” complaint at Docket No. C-2023-3043109. He alleged that Aqua, in its 2021 base rate case, claimed it was incurring a \$1.2 million annual expense for trucking treated wastewater from one treatment facility in the township to another for final disposal, and that it would continue to incur this expense at least until March 31, 2023, the end of its FPFTY. (R. 19a-21a, 247a-249a)

Ferguson claimed that the expense actually stopped during the case when Aqua shifted to piping treated wastewater instead of trucking it, after renovating an abandoned pipeline connecting the two township locations, but Aqua failed to withdraw the claim at any time during the proceeding, even though it supplemented the record as late as four days before the record closed. (R. 14a-15a)

In his hearing testimony, Ferguson stated that Aqua “concealed a very important fact to this case....[It] withheld significant information relative to the case, and it significantly benefited their revenue and profits ... above what the PUC would have otherwise authorized.” (R. 85a, 152a)

He requested that the Commission investigate and verify his findings regarding Aqua's failure to eliminate its trucking expense after it ceased to exist during the rate case, and that the Commission grant appropriate relief to Aqua's New Garden Township customers if overcharges are found to have occurred. (Tab A at 4 citing Ferguson's Complaint at 9 [Ferguson's Exhibit E at 6] (R. 21a, 249a))

7. Aqua's Answer and New Matter, and Ferguson's Answer to New Matter. On October 10, 2023, Aqua filed an Answer and New Matter to the expense complaint, denying its material allegations. (R. 26a) The New Matter did not mention Aqua's "New Garden Dry Line Activation" project or specify when Aqua's annual Purchased Wastewater Treatment Expense of \$1.2 million ended, which occurred when trucking was replaced by piping the treated wastewater in the newly renovated pipeline.

8. Testimony of Aqua's Manager of Rates, Erin Feeney. Ms. Feeney, Aqua's Manager of Rates, was its only hearing witness. She testified that she was deeply involved in preparing Aqua's 2021 rate case, filed on August 20, 2021, including the separate presentation of New Garden Township wastewater expenses and revenues as Exhibit 1-G. (R. 157a-158a; 114-115; Ferguson Exhibits A, Exhibit 1-G, Schedule C-1, line 22 (R. 236a-237a) and B, Exhibit 1-G, Schedule C-7.1, line 1 (R. 238a-239a); Aqua Exhibit 1-G, R. 250a)

Ms. Feeney testified that Aqua “addressed” Ferguson’s “sworn” public input hearing testimony as a part of its 2021 rate case without providing any details. (R. 165a-166a)

Referencing an exhibit that Aqua filed in its 2024 rate case, she claimed that Aqua collected \$4.3 million rather than the \$4.4 million authorized in its 2021 rate case. (R. 173a-175a; Aqua Exhibit E, R. 420a)

She then stated that the rates approved by the Commission’s 2021 rate case order were insufficient because New Garden Township wastewater customers paid less than the cost of providing them service. She said this occurred because the order allocated some of the wastewater revenues to be recovered from the water customers of the company under Act 11 of 2012, which had “the effect of decreasing rates for wastewater customers.” (R. 176a)

She described these post-rate case shortfalls as “regulatory lag,” which she said is “part of the risk of being a utility” (R. 180a-181a), presumably meaning that the company must provide service at rates approved by the Commission and try to recover higher level of expenses in its next rate case. Ms. Feeney testified that Aqua did just that in its 2024 rate case. (R. 173a-175a & Aqua Exh. E, (R. 420a))

Ms. Feeney also testified that Aqua incurred greater expenses than those included in its 2021 rate case filings “when the trucking costs went away.” (R. 194a) However, she did not say when that key event happened or when those expenses occurred.

She testified that, at the time of the 2021 rate case filing, she was aware of an enormous ongoing expense for “hauling” wastewater but that “no solution had been found yet ... we believed that the expense would continue to occur until the end of the fully-projected future test year,” which was “the best information that we [knew] at the time using rate-making estimates.” (R. 186a) She was aware of the Dryline Activation Project, but “we were not sure if ... that would be a viable solution.” (*Id.*)

Therefore, none of Aqua’s 2021 rate case exhibits included any expense claim for Aqua’s “New Garden Dry Line Activation” project, only the projected \$1.2 million annual expense for the Purchased Wastewater Treatment in Ferguson’s Exhibits A and B (which are identical to Aqua’s Exhibit 1-G). This is because “we believe[d] that the expenses for trucking were going to continue. So no other expenses for any capital projects were included in the filing.” (R. 194a) Consequently, the \$1.2 million annual expense, based on the Authority’s experienced monthly costs, was solely for pumping wastewater from the South End lagoon into trucks for hauling to the East End plant (as Vice President for Production Duerr stated on the November 12, 2021, public input conference call, R. 248a).

Ms. Feeney further testified that, after Aqua files a rate case, “if expenses are found during the time that the record is open and they’re significant, we would go back and correct the filing. 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) But when asked

whether she had any knowledge of the pipeline's activation progress or milestones, she replied, “No.” (R. 187a-188a)

After her testimony ended, ALJ Vero asked this question:

By the time Aqua filed its compliance tariff filing on the 2021 base rate case, was it aware of the change in expenses with regard to New Garden facility and trucking expenses? Was the rate making department aware of it?

(R. 197a)

Ms. Feeney replied:

So at the time that the compliance tariff was filed, the only task that we had with the compliance tariff filing was to take the revenue requirement that was authorized in the final order of the rate case, which was issued on May 16th, and ensure that rates were designed to collect that revenue.

So the compliance tariff is just a proof of revenue to prove out that the tariff rates equal exactly what we're authorized to collect. *There was no change at that point to expenses or revenue, any components of the case.*

(R. 197a (emphasis added)).

9. The ALJ's Summary Dismissal of Ferguson's Complaint. Without addressing the merits, ALJ Vero determined that Ferguson's claims were barred by law and that no relief could be granted, and for that reason, he failed to demonstrate that Aqua violated any statute, regulation, Commission order, or tariff as required by Section 701. (R. 467a-468a; Tab A at 5-6, 15)

10. Ferguson's Exceptions to the ALJ's Initial Decision. Ferguson's Exceptions argued that:

a. He carried his burden of proof under Section 332(a) to demonstrate a Section 701 violation by Aqua of a Commission-administered law, regulation, or order by making a *prima facie* case, which Aqua failed to rebut with at least coequal evidence. (R. 481a-482a, 485a-490a)

b. He overcame the presumption that tariff provisions approved by the Commission are *prima facie* reasonable by showing Aqua's misconduct in its 2021 rate case, which prevented the Commission from setting just and reasonable rates. (R. 479a, 484a-485a)

c. His complaint challenged the reasonableness of Aqua's existing tariffed rates applied solely to the New Garden Township customers because of Aqua's misconduct during the 2021 rate case conducted under Section 1308(d), although he did not learn (and could not have learned because of Aqua's concealment) of them until after the completion of the rate case. (R. 485a) Therefore, he was entitled to relief under Sections 701, 1309(a), and 1312(a). (R. 480-481a)

d. The rule against retroactive ratemaking did not apply because of Aqua's 2021 rate case misconduct, based on case law precedent, and because there was at least one exception to the rule that the Commission failed to apply. That misconduct also made the resulting rates unreasonable under Section 1309(a) and liable for refunds under Section 1312(a). (R. 482a-483a).

e. The prohibition against single-issue ratemaking was not violated under the general rule that "*without more*," "there may be no [retroactive] line by line

examination” of “particular items of expense or revenue” and variations in “an isolated item of revenue or expense” to support a claim for refunds (quoting *Phila. Elec. Co. v. Pa. Pub. Util. Comm’n*, 502 A.2d 722, 727-728 (Pa. Cmwlth. 1985) (emphasis added), because Aqua’s 2021 rate case misconduct constituted the “more” which made refunds possible. (R. 484a-485a).

11. Ferguson’s Petition to Reopen the Record. As allowed by the Commission’s regulations, Ferguson requested a very limited reopening of the record before the Commission’s decision. He argued that the public interest required a limited reopening and limited discovery regarding “the end date of [Aqua’s] trucking of sewage and the start date of piping it” because “the essential facts have not been adequately elucidated which has allowed Aqua to make evasive and disingenuous arguments that, if not countered with the complete facts, will produce an unjust result and a disincentive for honest rate case behavior” and will create a precedent that “a public utility has no obligation to update its initial expense claims during a rate case, even when it knows them to no longer be accurate, if no active party to the case has challenged the claim[s].” (R. 532a) Ferguson provided three examples of Aqua’s “evasive and disingenuous arguments” to support this point. (R. 534a-538a)

12. Ferguson’s Motion to Strike Portions of Aqua’s Reply Exceptions. Since parts of Aqua’s Reply Exceptions conflicted with the clear provisions of Sections 1309(a) and 1312(a), which together permit the Commission to grant

prospective relief, refunds, or a combination of both, Ferguson filed a motion to strike them. (R. 525a)

13. The Commission’s Opinion and Order. The Commission’s Order entered on June 18, 2025, (1) denied Ferguson’s Exceptions; (2) adopted the ALJ’s ID; (3) dismissed both of Ferguson’s Complaints; (4) denied his Petition to Reopen the Record; and (5) denied his Motion to Strike. Its rulings are described in the Argument addressing each issue. (Tab A)

VII. SUMMARY OF ARGUMENT

The importance of this case for public utility regulation in Pennsylvania cannot be overstated, because Aqua’s rate case misconduct undermined the trust essential to the regulatory system's functioning and, if left unchecked, will only encourage like behavior by Aqua and other utilities.

The case arose when William Ferguson, a retired senior business analyst for DuPont, sought to understand why wastewater rates for himself and Aqua Pennsylvania Wastewater’s other 2,114 customers in New Garden Township, Chester County, had risen so sharply after the Public Utility Commission finalized Aqua’s 2021 rate case, with higher rates taking effect on May 19, 2022.

One of two formal complaints (consolidated for hearing and decision) that Ferguson filed with the Commission in September 2023 under Section 701 of the Public Utility Code stated that Aqua included in its 2021 rate case projected costs, for the period after the Commission’s rate order, a \$1.2 million annual trucking expense.

This expense was for pumping treated wastewater into trucks and hauling it to another treatment plant in New Garden Township, continuing the same practice at the same costs as those incurred by the New Garden Sewer Authority from which Aqua acquired the sewer system at the end of 2020.

Ferguson did not contest including this expense in Aqua's initial rate case filing but argued that Aqua replaced the pumping and trucking with a renovated pipeline connecting the two treatment plants. However, Aqua did not disclose to the rate case parties or the presiding Administrative Law Judge that reactivating the pipeline had replaced the pumping and trucking expense during the rate case. This meant that Aqua should have withdrawn the claim, but it did not, likely because no party challenged it. The expense was included in the final approved rates and was solely allocated to New Garden customers, who paid a total of \$3.3 million before the rate changed after Aqua's next rate case.

The annual \$1.2 million expense did not include the costs of pipeline renovation, for which Aqua made no claim in the 2021 rate case.

The Commission's Order (Tab A at 32) dismissed Ferguson's trucking complaint "on the basis that the claims therein would violate the prohibition of retroactive ratemaking and single-issue ratemaking," and because he "failed to meet his burden of proof that Aqua violated a statute, regulation, Commission Order, or tariff" as Public Utility Code Section 701 requires.

The Commission's decision should be reversed and remanded for a calculation of refunds because:

- Ferguson carried his burden to establish a *prima facie* case that Aqua had violated the law and Commission regulations by proving that the transition from pumping and trucking to piping occurred during the rate case, which Aqua, through its only witness (the company's Manager of Rates) failed, even with co-equal evidence, to refute (she testified that she had no knowledge of the renovation project's milestones).
 - Aqua's factual defense consisted of irrelevant reasons it included the expense in its *initial* filing and why it thought it would continue through March 31, 2023, and an equally irrelevant variety of *post-rate* outcomes (e.g., its revenues were lower and the cost of serving New Garden customers was greater than it had projected and that were allowed in the rate order; it incurred additional expenses not included in the 2021 rate case).
 - Aqua presented no evidence regarding the pipeline reactivation, including when it began and when the transition to piping occurred.
 - Aqua's own Todd Duerr, Vice President of Production, who best knew the key facts, did not testify, but Ferguson's evidence included, among other proofs, a video (and exact transcription

thereof) of Duerr’s slide show presentation to a public meeting in which he stated that the pipeline project was completed within eight months (“within the first year of operation”) of Aqua’s ownership of the assets, and that the \$1.2 million ended at that point, which occurred during the rate case.

- Aqua’s Manager of Rates never mentioned Duerr’s public presentation or addressed what he said, nor did she address Ferguson’s other proofs, which included a letter from Aqua’s President and its 2021 Annual Report to the Commission indicating that the pipeline project was completed by the end of 2021.
- Ferguson thereby fulfilled the requirements of Section 701 by “setting forth any act or thing done *or omitted to be done* by any public utility in violation ... of any law which the [C]ommission has jurisdiction to administer, or of any regulation or order of the [C]ommission.”
 - Aqua’s failure to withdraw the superseded expense and its subsequent inclusion in rates violated Section 1301(a), which requires that “[e]very rate made, demanded, or received by any public utility ... shall be just and reasonable, and in conformity with regulations or orders of the [C]ommission.”

- Pennsylvania case law states that an unincurred expense cannot be included in rates; if it is included, it is unjust, unreasonable, and unlawful.
- The Commission's regulations require candid and truthful filings and testimony by public utilities in all proceedings.
- Aqua's concealment of the transition to piping and its failure to withdraw the nonexistent claim deprived the Commission of vital information needed to establish just and reasonable rates for New Garden customers. Had the Commission been aware of the conclusion of the expense, it certainly would not have imposed a fictitious expense on those customers.
- The Commission further erred as a matter of law by invoking the rule against retroactive ratemaking and related prohibitions because Aqua's rate case misconduct rendered the New Garden rates unlawful and null and void *ab initio*. Under such circumstances, Ferguson properly sought not only prospective relief but retrospective relief, and refunds of the ill-gotten overcharges made by Aqua.
- Including an unincurred expense in rates is unlawful, no matter how it occurs, and customers are entitled to refunds of the unlawful amount.

- Relief from the rate order affecting New Garden customers is allowed by an established exception to the rule against retroactive ratemaking. This exception applies to unanticipated, extraordinary, nonrecurring, and significant expenses that exceed those included in a utility's last rate case and is often invoked by utilities between rate cases to recover extraordinary weather damages. Additionally, this exception permits customers to receive refunds of extraordinary increases in a utility's revenue, especially if the utility concealed the receipt of that revenue.
- The Commission's Order shows no regard or concern for Ferguson's status as a nonlawyer *pro se* complainant. Although not legally required, it applied strict rules of evidence, ignored his relevant and reasonably probative evidence, and failed to waive its regulations or take official or judicial notice of facts. Additionally, it did not explain its reasons for rejecting his alternative request to reopen the record for limited discovery and a hearing on the key issue in the case—the transition date to piping—even though the integrity of the Commission's ratemaking process was at stake.

VIII. ARGUMENT

Question 1: Error of Law – Did Aqua’s rate case misconduct cause an unincurred expense to be included in Aqua’s rates and deprive the Commission of critical information necessary for it to set just and reasonable rates, rendering them unlawful, null and void *ab initio*, and subject to refunds under Section 1312(a)?

A. Ferguson proved that Aqua violated Section 1301(a) by causing an unincurred expense to be included in New Garden Township customers’ rates, rendering them unjust, unreasonable, unlawful, and null and void *ab initio*.

1. The Commission’s Order. The Commission’s Order found that Ferguson “failed to meet his burden of proof that Aqua violated a statute, regulation, Commission Order, or tariff” as Section 701 required. (Tab A at 17, 31, 32)

2. Ferguson’s claim and burden of proof. Pursuant to Section 701, nonlawyer pro se complainant Ferguson alleged, in plain English if not by citation of statutory provisions, that Aqua’s failure to withdraw its initially claimed but mid-case-expired trucking expense during its 2021 rate case entitles New Garden Township customers to both prospective and retroactive relief.

Prospective relief because, under Section 701, Ferguson was required to set forth an “act or thing done *or omitted to be done*” by Aqua “in violation ... of [a] law which the commission has jurisdiction to administer [i.e., the Public Utility Code].” (Emphasis added.) Under Section 1309(a), Ferguson needed to prove that Aqua’s existing rates (those approved in its 2021 rate case) were in violation of “any provision of law.” If he prevailed, the Commission would “determine the just and reasonable

rates ... to be thereafter observed and in force.” Also, as discussed below at page 46, if the existing rates are unreasonable because of the public utility’s misconduct, an exception to the prospective nature of rates is created, allowing refunds to be ordered under Section 1312(a) if the Commission determines “that any rate received by a public utility was unjust or unreasonable.”

Retrospective relief because the rates imposed solely on New Garden Township customers could not be just and reasonable due to Aqua’s failure to withdraw its trucking expense claim when it ceased to exist and its concealment of that cessation. This misconduct resulted in an unincurred expense being included in rates, depriving the Commission of essential information necessary to set just and reasonable rates. Ferguson needed to prove that the rates assigned solely to New Garden Township wastewater customers by the Commission’s 2021 rate case order included an unincurred expense (\$1.2 million annually), making them unlawful, invalid *ab initio*, and subject to refunds under Section 1312(a).

Overall, Ferguson had the burden under Section 332(a) to prove his allegations by establishing under Section 701 a *prima facie* case “setting forth any act or thing done *or omitted to be done* by [Aqua] in violation of any law which the [C]ommission has jurisdiction to administer [i.e., the Public Utility Code], or any regulation or order of the [C]ommission.” (Emphasis added.)

3. Fundamental ratemaking principles. The most fundamental ratemaking principle is that “[e]very rate made, demanded, or received by any public

utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission.” Section 1301(a). Determining just and reasonable rates involves “a balancing of investor and consumer interests.” *Federal Power Comm’n v. Hope Natural Gas. Co.*, 320 U.S. 591, 604 (1944); *Philadelphia Elec. Co. v. Pa. Pub. Util. Comm’n*, 502 A.2d 130, 133 (Pa. 1985).

Pursuant to the just and reasonable standard, a utility may obtain “a rate that allows it to recover those expenses that are reasonably necessary to provide service to its customers as well as a reasonable rate of return on its investment.” *City of Lancaster Sewer Fund v. Pa. Pub. Util. Comm’n*, 793 A.2d 978, 982 (Pa. Cmwlth. 2022). Pursuant to Section 315(a), the burden of proof to establish the justness and reasonableness of every element of a public utility's rate increase request rests solely upon the public utility in all Section 1308(d) proceedings (as here).

It is axiomatic that “[a]n agency order imposing a rate which is not just and reasonable is unlawful. This Court will not affirm an unlawful agency decision.” *Barasch v. Pa. Pub. Util. Comm’n*, 491 A.2d 94, 107 (Pa. 1985).

“[Operating and Maintenance] expenses are usually the largest category of base rate expenses, as these expenses encompass all reasonable and normal expenses incurred to provide regulated service....The items claimed must be reasonable and necessary; therefore, if expenses are not incurred ... they should be ... disallowed and not recoverable through rates.” RATEMAKING GUIDE at 106-107.

It is a reversible error to charge customers for even theoretical expenses, let alone nonexistent ones. *Barasch v. Pa. Pub. Util. Comm'n*, 493 A.2d 653, 657 (Pa. 1985) (“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.”).

4. Duty of disclosure by public utilities. The Commission has interpreted Section 505 (relating to duty to furnish information to commission) together with its regulation at 52 Pa. Code § 53.53 (relating to information to be furnished with proposed general rate increase filings in excess of \$1 million) as authority for alleging that a utility “fail[ed] to reveal all relevant evidence concerning the economic viability and status of its ... investments in the course of the Commission’s investigations into the lawfulness, justness, and reasonableness of [the utility’s] rates” *in the utility’s last rate case. Pa. Pub. Util. Comm’n v. Philadelphia Electric Co.*, Dkt. No. C-850128, 59 Pa. PUC 256, 1985 Pa. PUC LEXIS 64 at ¶¶ 83 & 91.

Also, to preserve the integrity of the ratemaking process and to ensure that public utility filings are truthful and complete, the Commission’s regulations include: 52 Pa. Code § 1.36(e) (“An individual who executes a pleading, submittal or other document knowing that it contains a false statement and who causes it to be filed in the Commission shall be subject to prosecution for the [c]ommission of a misdemeanor of the second degree in violation of 18 Pa.C.S. § 4904(a).”); 52 Pa. Code §§ 53.51 – 53.53 (ratemaking regulations requiring the submission and maintenance

of complete and accurate data); 52 Pa. Code § 5.411 (“Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.”); and 52 Pa. Code § 5.332 (imposing a continuing requirement to supplement discovery responses with after-acquired information).

The Commission recently strengthened its information disclosure regulations at 52 Pa. Code § 53.53, effective upon publication in the PENNSYLVANIA BULLETIN of August 30, 2025,⁹ by amending Subchapter E (“Information Furnished with the Filing of Rate Changes”) to include a new Exhibit E (“Filing Requirements For Public Utilities Seeking A Major Rate Increase”).¹⁰ The General Filing Requirements at Section III(A)(6) explicitly provide what was already implicit in § 53.53: “Supplement the filing with the most recent information if more recent year-end information becomes available during the course of the current base rate case.”¹¹

Finally, it is almost too plain for argument that a public utility cannot recover in rates an expense that it never incurred. It follows that Aqua was required to disclose to the parties and Administrative Law Judge Long that its trucking expense had ceased. The resulting revenue requirement included the nonexistent \$1.2 million annual expense, and the approved tariff assigned the entire amount to be recovered

⁹ *Use of Fully Projected Future Test Year*, 53 Pa. Code Chapter 53, Docket No. L-2012-2317273, 55 Pa.B. 6180, 6253, Ordering ¶ 7, 2025 PA. PUC LEXIS 16, *256-57.

¹⁰ *Id.*, 55 Pa.B. at 6259.

¹¹ *Id.*, 55 Pa.B. at 6260.

from New Garden Township wastewater customers (who paid \$3.3 million of overcharges in the following two years and nine months).

B. Ferguson proved that Aqua’s claimed trucking expense ceased during its 2021 rate case, necessitating its withdrawal with notice to the Administrative Law Judge and the active parties to the case.

1. Ferguson’s testimony and exhibits. Ferguson’s hearing testimony and exhibits proved that Aqua’s trucking expense claim ceased during its 2021 rate case:

- Aqua took operational control of the Sewer Authority’s system on December 22, 2020, and immediately began looking to replace the Authority’s monthly \$100,000 pumping (from the South End plant’s lagoon) and trucking expense with a cheaper alternative. Aqua’s Ms. Feeney carefully avoided discussing any details of the “New Garden Dry Line Activation Project,” i.e., renovation of the moribund pipeline connecting the South End and East End treatment facilities, so the start date of the pipeline project is not known, but work likely began soon after December 22, 2020, because of the South End lagoon’s lack of capacity.
- Aqua trucked 6,000-gallon loads 12 hours a day for 8-10 months, but when the pipeline was activated, the trucking stopped. Eight to ten months from December 22, 2020, was **August – October, 2021**, during Aqua’s rate case. The record in the rate case closed on **January 24, 2022**.
- Aqua’s 2021 Annual Report to the Commission, filed on August 1, 2022, indicated completion of the pipeline project by **year-end 2021**. (R. 241a-243a)

- Aqua’s Vice President of Production, Todd Duerr, clearly stated at a public meeting held by the New Garden Township Board of Supervisors on November 21, 2022, that work on the pipeline continued for “the better part of eight months while we were pumping and hauling to find [and fix] the line.” The date when the pipeline project shifted from “finding” to “fixing” is unknown, but once the pipeline was made “water-tight” and operational, “that pumping and hauling that was costing a million dollars a year stopped immediately. ... So that eliminated that ongoing cost right away. That ... that was done within the first year of operation.” That anniversary occurred on December 22, 2021, consistent with Aqua’s 2021 Annual Report that the project was completed by the end of 2021. (R. 249a)
- In his December 9, 2022, letter (R. 240a), Aqua President Marc Lucca, who introduced Duerr at the November 21, 2022, Supervisors’ meeting and stayed for Duerr’s presentation (as shown in the meeting video), confirmed Duerr’s statement that activating the pipeline “eliminated that ongoing cost right away. That ... that was done within the first year of operation.” (Ferguson Exhibit E, p. 6, Facebook link in top paragraph, R. 249a) Lucca explained that, because of the condition of the South End lagoon, Aqua had to “immediately” obtain DEP approval “to improve operations,” which it did “[a]fter several months ... [by] replac[ing] hauling with a pipeline connecting the two treatment plants.” (*Id.*) The need for immediate action indicates that the pipeline work began soon after

December 22, 2020, when Aqua took over, and that “[a]fter several months” meant within the first year of operation, as Duerr described in Lucca’s presence at the meeting.

- Aqua’s rate case schedules (Ferguson Exhibits A and B (R. 236a-237a, 238a-239a)) projected an annual \$1.2 million trucking expense through March 31, 2023, the end of its FPFTY.

2. Aqua failed to overcome Ferguson’s *prima facie* case with evidence of co-equal value or weight. After Ferguson established the legal sufficiency of his claim (i.e., a *prima facie* case), Aqua’s Ms. Feeney, its sole witness, was required to rebut Ferguson’s evidence with evidence of co-equal value or weight (*see* Tab A at 7-8).

Before discussing her testimony, it is important to note three significant non-occurrences in the case that should lead to negative inferences about Aqua’s defenses. First, Aqua did not quickly resolve the case shortly after Ferguson’s complaint was filed by moving for summary judgment or judgment on the pleadings under Section 5.102 of the Commission’s Rules of Administrative Practice and Procedure 52 Pa. Code § 5.102, and claiming, *supported solely by documents within its possession*, that pipeline activation took place after January 24, 2022, the date when Aqua’s 2021 rate case record closed. Instead, it unnecessarily prolonged the case for a year and a half by raising an overabundance of inapplicable legal defenses and irrelevant excuses to distract from and avoid revealing the transition date from trucking to piping.

Second, Aqua did not present the testimony and supporting exhibits of its Vice President of Production, Todd Duerr, who oversaw the pipeline project and could have definitively refuted Ferguson’s evidence with his firsthand knowledge. Instead, it presented Manager of Rates Feeney, who denied any knowledge of the pipeline project’s milestones. (R. 188a: “I’m not an operations expert, so I don’t know what the inner workings of that project were.”).

Third, Ms. Feeney made no effort to dispute Mr. Duerr’s November 21, 2022, public meeting testimony that the pipeline project was completed within the first year of Aqua’s ownership of the Authority’s assets, and that the annual \$1.2 million trucking expense ceased immediately after that completion, which occurred while Aqua’s rate case was underway. Aqua, of course, was aware of what Duerr said in the presentation (its President and its Controller also spoke at the public meeting), and it was on notice from Exhibit E to Ferguson’s complaint (R. 21a) that Duerr’s remarks were the focus of his case and that a video of his presentation had been publicly posted (and was still posted on the day of the evidentiary hearing in this case) on Facebook. Yet, Ms. Feeney never referenced Duerr’s presentation or the video.

Ms. Feeney’s testimony completely failed to rebut Ferguson’s evidence, even co-equally, by establishing the transition date from pumping and trucking wastewater to piping it, using documents solely within Aqua’s control, and by having Mr. Duerr testify as to the pipeline activation date. Without such evidence, Ferguson’s proofs that the transition date occurred during the rate case prevail and

support the conclusion that Aqua concealed the truth from the Commission and prevented it from making an informed decision when it set rates for New Garden's customers.

Ms. Feeney did testify that, “[d]uring 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) What is “significant” is, of course, in the eye of the beholder. This testimony directly contradicted Duerr's public meeting presentation remarks and Aqua's 2021 Annual Report (which she filed, R. 242a), indicating the pipeline project was completed by year-end 2021. Because Ms. Feeney admitted that she knew nothing about the pipeline construction milestones, she could not credibly speak to any “significant changes.” In any case, the Commission's Order did not quote Ms. Feeney's statement or rely on it for its decision.

Lastly, Ms. Feeney gave a similar answer to ALJ Vero's direct question about Aqua's “rate making department's” awareness of any change in the claimed trucking expense when “the compliance tariff was filed” to implement the rate case order. (R. 197a) Rather than giving a “yes” or “no” answer, Ms. Feeney embarked on a disquisition of the purpose of compliance tariffs, explaining that the compliance tariff's purpose is “just a proof of revenue to prove out that the tariff rates equal exactly what we're authorized to collect.” (*Id.*) In other words, the rate case order determined revenue and expense levels to establish a higher authorized total revenue requirement,

which the compliance tariff implements through rates for different customer classes. Ms. Feeney stated, “There was no change *at that point* to expenses or revenue, any components of the case.” (*Id.*; emphasis added.) She was either reiterating her earlier “no significant changes” statement or providing assurance that the proposed tariff rates matched the authorized revenue requirement elements. Either way, she did not contradict Duerr’s clear presentation or Aqua’s 2021 Annual Report, and the Commission did not mention this exchange or rely on it for its decision.

Since the Commission’s decision nowhere relies on either of Ms. Feeney’s statements for a finding or conclusion, they do not fall within the Commission’s broad discretion to determine what evidence to believe. Any reliance on those statements now would be an impermissible *post hoc* rationalization contrary to Section 335(c) (requiring all decisions to include a statement of “findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record”). “It is fundamental that an agency explain the facts and policy concerns underlying its decisions and conclusions Such explanations must appear in the record and may not be supplied in the form of after-the-fact rationalizations.” *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1236 (10th Cir. 1979).

C. Summary. Ferguson overwhelmingly met his burden of proof by “setting forth any act or thing done *or omitted to be done*” by [Aqua] in violation of Section 701 (Aqua failed to disclose and withdraw its no-longer-existing trucking expense).

Aqua’s failures also deprived the Commission of critical information needed to establish just and reasonable rates, making the rates imposed solely on New Garden Township customers unlawful, null and void *ab initio*, and subject to refunds under Section 1312(a). Aqua also violated 1301(a) (and case law) by causing an unincurred expense to be included in New Garden Township customers’ rates, which Aqua “made, demanded, or received,” even though they were unjust and unreasonable.

Regarding Question 2: The Commission’s decision is unsupported by substantial evidence because it relies on Aqua’s reasons for including the trucking expense claim in its *initial* rate case filing and on Aqua’s alleged *post-rate case* outcomes in its New Garden Township division, but not on evidence justifying Aqua’s non-disclosure of the cessation of the trucking expense and its failure to withdraw that expense claim *during the case*.

- A. The Commission’s Order clearly erred by adopting Aqua’s arguments that lacked evidentiary support, relied on irrelevant post-rate case outcomes, and failed to justify Aqua’s misconduct during its 2021 rate case.**

The Order completely adopted Aqua’s assertions that it committed no Section 701 violation because (1) at the time of its 2021 rate case, it used the data available to it; (2) after the trucking expense ended (a date Aqua never revealed), it incurred additional costs that were not included in its 2021 rate case filing for additional power, labor, outside contractor costs, and hydrostatic testing (quoting Aqua’s Erin Feeney (R. 194a)); and (3) Ferguson failed to account for the fact that the \$1.2 million annual cost did not include “the costs required to upgrade the pipeline”; Ferguson did not “acknowledge that the costs Aqua incurred may have exceeded the monthly rates

estimated by New Garden [Township or its Sewer Authority], as costs may have increased, and [New Garden Township or its Sewer Authority] left the wastewater storage completely full” (Tab A at 24-25).

These assertions lack record evidence, do not address events during the rate case proceeding, or are irrelevant. They therefore do not constitute co-equal evidence to counter Ferguson’s overwhelming *prima facie* evidence of Aqua’s misconduct.

As to (1) above, in its initial rate case filing, Aqua properly used the “data available to it,” the Authority’s \$1.2 million annual cost to pump the treated wastewater from the South End lagoon into trucks for hauling to the East End plant.

Aqua’s speculative assertion in (3) above that Aqua’s costs may have been greater than those of the Authority has no evidentiary basis in the record because Aqua made no such claim, and its own Exhibit 1-G schedules projected the trucking cost to be \$1.2 million through March 31, 2023.

The fact that the Authority left the South End lagoon full verifies the immediacy of beginning the pipeline project (as described by Aqua’s President, R. 240a) and its start very soon after Aqua took operational control on December 22, 2020. It found a solution, but Ms. Feeney was careful not to state the date it became effective.

As to (2) above, Aqua repeatedly made two assertions to support its argument that Ferguson did not prove that the rates approved in its 2021 rate case were unreasonable. The Commission’s Order accepted these assertions as valid reasons to find that Ferguson failed to carry his burden of proof under Section 332(a):

- Aqua collected fewer revenues from New Garden operations than it was authorized for calendar year 2023 (Tab A at 22, 23, 24 & 28, based on Ms. Feeney's testimony at R. 173a-174a). This was true (a 0.8% shortfall, from Aqua's 2024 rate case data) but completely beside the point, as explained shortly.
- The rates charged by Aqua for New Garden operations did not actually reflect the full cost of service for those operations (Tab A at 22, 23, 24 25, 28, based on Ms. Feeney's testimony at R. 175a-176a), which was true only because of the so-called Act 11 "shift." The 2021 rate case order found full annual cost of service for the New Garden operations to be \$5,427,536.¹² But to avoid "rate shock" to New Garden wastewater customers, the Commission under Act 11 directed Aqua to collect \$4.4 million from New Garden wastewater customers and \$999,136 from Aqua's water customers.¹³ Thus, New Garden wastewater customers did not pay the "full cost of service," but Aqua did not suffer any shortfall. It just collected the authorized total revenue of \$5,427,536 from two customer sources.

The Commission's reliance on Aqua's assertions was clear error because *post-rate case outcomes have nothing to do with whether Aqua's trucking expense ceased during the rate case or with Aqua's failure to withdraw it.* The assertions

¹² See <https://www.puc.pa.gov/pcdocs/1744354.pdf> at PDF page 503.

¹³ *Id.* at PDF page 439.

were made to distract from the need to address that issue, and Ms. Feeney’s testimony is a model of evasion to achieve that goal (as was *not* putting Mr. Duerr on the stand).

That post-rate case variances in projected expenses approved by the Commission constitute “regulatory lag” was acknowledged by Ms. Feeney. (R. _a). Aqua’s only remedy was to seek a higher level of expenses in its next rate case, which it did in its 2024 rate case¹⁴ as Ms. Feeney testified. (R. 180a-181a) The same is true of “the costs required to upgrade the pipeline,” which Aqua did not claim in its 2021 rate case filings.

Once rates are set in a Section 1308(d) rate case (“Commission-made rates”), a utility is prohibited from charging its customers more if its projected costs, reflected in the new level of allowed revenue approved in the rate order, turn out *higher* and/or its revenues turn out *lower* than it projected in the rate case order. *Philadelphia Elec. Co. v. Pa. Pub. Util. Comm’n*, 502 A.2d 722, 727-28) (Pa. Cmwlth. 1985).

Yet, the Commission committed utility ratemaking heresy and obviously erred by adopting Aqua’s outlandish argument that higher-than-projected post-rate case expenses (and serving at less than the approved cost of service) justified leaving in place rates based on a non-existent annual expense. The Commission (which normally deserves to be given deference for its expertise) bought Aqua’s incredible argument

¹⁴ See *Pa. Pub. Util. Comm’n v. Aqua Pennsylvania Wastewater, Inc.*, Dkt. No. R-2024-3047822 (order entered Feb. 7, 2025), 2025 PA. PUC LEXIS 45 at *3 (Aqua sought greater revenues because, since the end of the FPFTY in its 2021 rate case (March 31, 2023) through the end of its FPFTY in its 2024 rate case (December 31, 2025), it will have invested over \$950 million in water and wastewater utility infrastructure).

that the \$1.2 million phony expense revenue just provided a fortuitous offset to the revenue deficiency caused by Aqua’s failure to project a higher expense level in its initial 2021 rate case filing.

B. Summary.

The Commission’s decision is not supported by substantial evidence, only irrelevant pre- and post-rate case factual assertions, but nothing regarding the key fact in issue upon which the case turns—Aqua’s misconduct DURING the rate case, which Ferguson proved and Aqua did not rebut, even co-equally.

Question 3: Error of Law – Because of Aqua’s rate case misconduct and the resulting unjust and unreasonable rates, did the Commission incorrectly apply the rule against retroactive ratemaking and related doctrines?

The Commission’s Order dismissed Ferguson’s complaint “on the basis that the claims therein would violate the prohibition of retroactive ratemaking and single-issue ratemaking” (Tab A at 32), but those rules do not apply when the rates set by the Commission are unjust and unreasonable because of the utility’s misconduct during the ratemaking process. That misconduct nullified the fundamental assumption of retroactivity prohibitions—the propriety of the process that created the rate. Additionally, as a matter of equity, courts at the state and federal levels have specifically decided that the rule against retroactive ratemaking and related doctrines cannot be used by a party that has concealed or failed to disclose material information relevant to setting a rate.

A. The rule against retroactive ratemaking and closely related doctrines.

All public utility ratemaking is *prospective* in effect, whether the proposed rate change is initiated under Section 1308(d) *by the utility* (as in Aqua’s 2021 rate case) or under Section 1309(a) *by the Commission or a complainant* (note the word “thereafter” in both subsections), unless a judicially-recognized exception applies, which is the case here, as explained below).

The prospective effect of rates is protected by the rule against retroactive ratemaking:

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.

Philadelphia Elec. Co. v. Pa. Pub. Util. Comm’n, 502 A.2d 722, 727-28 (Pa. Cmwlth. 1985) (emphasis added).

Closely related (effectively identical) rules are the prohibition on “single-issue ratemaking” and the doctrine of “Commission-made rates.” Single-issue ratemaking occurs “when only one element of the general ratemaking equation is examined between rate cases and the customers’ rates are adjusted to reflect a change in that element.”¹⁵ Commission-made rates are those “stamped with antecedent Commission approval; it was such rates that were held to be immune from retroactive alteration.”

¹⁵ *Petition of UGI Utilities, Inc.-Elec. Div. For Approval Of Its Energy Efficiency And Conservation Plan*, Dkt. No. M-2010-2210316, 2011 Pa. PUC LEXIS 1690 at *28 (Rec. Dec. issued July 13, 2011).

Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n, 437 A.2d 76, 79 (1981) (referring to *Cheltenham & Abington Sewerage Co. v. Pa. Pub. Util. Comm'n*, 25 A.2d 334, 337 (Pa. 1942) (a “commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission.”))).

B. Exceptions to the retroactive ratemaking prohibitions.

The rules prohibiting retroactive ratemaking are not absolute. State and federal courts have recognized limited exceptions to the rules: *the mistake as a matter of law, windfall, and misconduct exceptions*.

The *mistake as a matter of law exception* exists because the ill effects of retroactivity “must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). The rule is exemplified in our Supreme Court’s emphatic statements that “[a]n agency order imposing a rate which is not just and reasonable is unlawful. This Court will not affirm an unlawful agency decision.” *Barasch v. Pa. Pub. Util. Comm'n*, 491 A.2d 94, 107 (Pa. 1985). Aqua’s rates imposed on New Garden Township customers were unjust and unreasonable and therefore unlawful and void not merely retroactively but *ab initio*. When a rate-setting commission is wrong as a matter of law, there “is a strong equitable presumption in favor of retroactivity that would make the parties whole.” *Exxon v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999).

The *windfall exception* is encompassed within Pennsylvania's exception for extraordinary and unforeseen expenses or revenues. Utilities have been the chief beneficiaries of this exception, but it can also benefit utility customers.

The Commission and this Court have recognized a broad exception for unanticipated, extraordinary, nonrecurring, and substantial expenses, *Philadelphia Electric, supra*, 502 A.2d at 728 (collecting cases); *Popowsky v. Pa. Pub. Util. Comm'n*, 642 A.2d 648, 652 (Pa. Cmwlth. 1994) (collecting cases), such as severe storm damages, employee replacement and training costs for startup of new generating unit, cost of installing leased computer, storm drainage expense, cold weather maintenance expenses for thawing and repairing frozen mains, and the like.

These are examples of the utility being allowed to recover expenses that exceed the normalized level of expenses approved in the utility's last rate case. But the exception is a two-way street that can benefit the utility's customers for unforeseeable and extraordinary *increases* in the utility's revenue. For example, in *Turpen v. Oklahoma Corp. Comm'n*, 769 P.2d 1309 (Okla. 1989), a public utility received extensive funds from reimbursements as part of a divestiture. The court determined that the gain caused by the reimbursements was an unexpected windfall. Because the excessive gain was not attributable to any mistakes in past ratemaking or faulty rate case projections (that would require correction in a subsequent rate case), the court stated that "the commission would not be engaged in prohibited retroactive rate making if it considered the proper treatment of the reimbursements." *Id.* at 1332.

Similarly, the Utah Supreme Court in *MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah*, 840 P.2d 765 (Utah 1992), held that the rule against retroactive ratemaking “does not apply where justice and equity require that adjustments be made for unforeseen windfalls or disasters not caused by the utility.” *Id.* at 772.

The same is true here. Aqua’s misconduct was rewarded with a substantial revenue windfall (\$3.3 million through the effective date of its 2024 rate case rates) that did not result from any fault in the ratemaking process. Aqua’s failure to withdraw an expense claim that had ceased to exist was extraordinarily abnormal behavior for a regulated public utility, no one anticipated it happening, it was a one-time occurrence, and the amount was substantial for Aqua’s New Garden Township customers. Aqua’s ill-gotten revenue windfall should be refunded to them under the same exception that has so often benefitted utilities at the expense of their customers.

An explicit misconduct exception has not been adopted by Pennsylvania’s courts, although the rule set forth in *Barasch* (an unjust and unreasonable rate is unlawful, 491 A.2d at 107) encompasses a misconduct exception. State and federal courts have established a specific exception *when a utility fails to disclose information pertinent to the setting of the rate*. The Utah Supreme Court, in *MCI Telecommunications, supra*, for the same reasons of justice and equity that it allowed MCI to recover extraordinary expenses for disasters not its doing, also recognized an exception to the rule against retroactive ratemaking where a utility fails to disclose critical material information in the rate-setting process.

In that case, the Public Service Commission of Utah rejected a claim for refunds of MCI's overearnings resulting from a change in its federal income tax rate, the effect of which the utility had not fully disclosed to the Commission. The Court reversed, stating:

A utility that misleads or fails to disclose information pertinent to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected. The rule against retroactive ratemaking was not intended to permit a utility to subvert the integrity of rate-making proceedings. If a utility misleads the Commission or the Division by withholding relevant rate-making information, the rates fixed by the Commission cannot be based on reasonable projections of the utility's revenues and expenses. 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.

MCI Telecommunications, 840 P.2d at 775 (citation omitted). *Accord*, *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1254 (Utah 1992); *see also California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015-16 (9th Cir 2004) (holding that FERC could award refunds to energy purchasers where wholesalers failed to file required reports during the wholesale rate setting process); *Wise v. Pacific Gas & Elec. Co.*, 77 Cal. App. 4th 287, 299-300 (1999) (reversing PUC dismissal of a consumer complaint seeking retroactive refunds for amounts the utility had charged for a regulator replacement program that the utility had subsequently canceled, where the utility had failed to reveal information regarding cancellation of the program).

Aqua’s failure to disclose the cessation of its trucking expense during its rate case, resulting in unlawful rates, provides this Court with an opportunity to apply the *Barasch* rule to specific instances of utility misconduct that compromise the integrity of the ratemaking process.

C. Summary.

The Commission wrongly rejected (Tab A at 28) Ferguson’s argument that Aqua’s rate case misconduct constituted the “more” in the exception to the general retroactive ratemaking prohibition defined in *Philadelphia Electric*—that a utility’s excess revenue cannot be refunded “without more,” i.e., without a compelling reason for allowing the refund.

Aqua’s misconduct (including an unincurred expense in rates; failing to disclose information pertinent to the setting of the rate; demanding and receiving unjust and unreasonable rates) resulted in unjust, unreasonable, and unlawful rates for New Garden Township customers. That misconduct therefore fell within Pennsylvania’s established exception to the rule against retroactive ratemaking as an undeserved windfall for Aqua and an inequitable and unjust exaction on its customers (a compelling reason for awarding refunds to them). The Commission erred by invoking the rule against retroactive ratemaking and related doctrines to dismiss Ferguson’s complaint. In the interest of equity and fairness, the Court should remand this case to the Commission for the calculation of refunds under Section 1312(a).

Question 4: Did the Commission abuse its discretion and act capriciously by denying nonlawyer Ferguson’s Petition to Reopen the Record by faulting Ferguson, acting *pro se*, for not obtaining the information through adequate discovery and cross-examination of Aqua’s witness, and by baldly stating that the public interest did not require any additional discovery or hearing, although the integrity of the Commission’s ratemaking process was at stake?

Ferguson, a nonlawyer who represented himself throughout the proceeding, petitioned (with the assistance of legal counsel) the Commission to reopen the record for the purpose of conducting limited discovery and taking additional testimony concerning the key factual issue in the case: “the end date of [Aqua’s] trucking of sewage and the start date of piping it.” (R. 88a)

Continuing its treatment of Ferguson as if he had graduated first in his class from a top law school, the Commission (again adopting Aqua’s arguments completely) rejected the petition because:

- The petition contained “four pages of improper replies” under Section 5.535 of the Commission’s Rules of Administrative Practice and Procedure. (Tab A at 16)
- Ferguson could have obtained the information he sought by asking Aqua’s witness at the hearing, but failed to do so in his cross-examination and re-cross-examination of her. (Tab A at 17)
- The information sought “was discoverable, and thus available, prior to the closing of the record.” (*Id.*)

- Without elaboration: "In addition, we are not persuaded by the Complainant's assertion that reopening the record is in the public interest." (*Id.*)

The Commission's entire Order displays this same lack of appreciation of and concern for Ferguson's *pro se* status, even though it provides no nonlawyer assistance and representation to nonlawyer *pro se* Section 701 complainants regarding the Commission's practices and procedures.¹⁶ The Order ignores the Administrative Agency Law, which plainly states that the Commission is not bound by the technical rules of evidence, 2 Pa.C.S. § 505, which were applied here, although the Public Utility Code provides that all relevant evidence of reasonably probative value is admissible. 66 Pa.C.S. § 332(b) ("Any oral or documentary evidence may be received [except] irrelevant, immaterial or unduly repetitious evidence").

Section 332(e) also provides for *official notice of facts* (as defined in Section 331(g)) with an opportunity for affected parties (like Aqua) "to show that the facts are not properly noticed or that alternative facts should be noticed," and preserves the Commission's right to take *judicial notice of facts* as well. Instead of elevating form over substance, the Commission should have applied these powers.

The Commission's denial of Ferguson's petition is also contrary to its previous treatment of such Section 701 nonlawyer *pro se* complainants under Section 1.2 (relating to liberal construction), 52 Pa.Code § 1.2, of its practice and procedure rules,

¹⁶ This is a problem on the federal level as well. *See, e.g.*, the Recommendation of the Committee on Adjudication of the Administrative Conference of the United States regarding *Nonlawyer Assistance and Representation in Agency Adjudications* (December 17, 2024), available at <https://www.acus.gov/document/nonlawyer-assistance-and-representation-agency-adjudications>.

which permit the Commission “at any stage of an action or proceeding [to] disregard an error or defect of procedure which does not affect the substantive rights of the parties,” 52 Pa. Code § 1.2(a), and to “waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party” (§ 1.2(c)). Especially pertinent is §1.2(d): “These liberal construction provisions apply with particularity in proceedings involving pro se litigants.”

The Commission usually applies these provisions by basing its decision solely on the evidence developed in the evidentiary hearing. *See, e.g., Dale Sattar v. Aqua Pennsylvania, Inc.*, Docket No. C-2010-2169756 (order entered July 28, 2011), available at <https://www.puc.pa.gov/pcdocs/1140807.docx>. Instead of doing that here, the Commission rejected the petition because of Ferguson’s lack of administrative litigation skills and knowledge of the Commission’s rules of practice and procedure (which are hallmarks of *pro se* Section 701 formal complainants in Commission proceedings). In doing so, it abused its discretion and acted capriciously—even when the integrity of its own ratemaking process was at stake.

“Capricious disregard occurs when the fact-finder deliberately ignores relevant, competent evidence.” *Nelson v. State Bd. of Veterinary Med.*, 938 A.2d 1163, 1170 n.13 (Pa. Cmwlth. 2007). That occurred when the Commission denied Ferguson’s modest request to reopen the record for the limited purpose of bringing into better light the key factual question of the case, which Aqua, when it had a nonlawyer inquiring, deftly kept hidden in darkness.

Moreover, it failed to explain why the petition was not in the public interest and good cause had not been shown, even though the petition (and Ferguson’s entire complaint) called into question the integrity of the ratemaking process due to Aqua’s seriously deficient conduct. Because a lack of explanation contravenes Section 703(e) (“[The Commission’s] findings shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding, and whether proper weight was given to the evidence.”), this Court recently berated the Commission for this same shortcoming. *Philadelphia Industrial and Commercial Gas Users Group v. Pa. Pub. Util. Comm'n*, 342 A.3d 140 (2025), 2025 Pa. Commw. LEXIS 133, *27-*28 (noting that a Section 703(e) violation authorizes the Court to return the matter to the Commission for a sufficient explanation).

In sum, without making lawful accommodations for nonlawyer *pro se* complainants like Ferguson, Section 701 is an empty promise of relief for all but those who can afford experienced legal counsel and the costs of lengthy litigation.

IX. CONCLUSION

Because Ferguson proved that Aqua violated Section 1301(a) (thereby fulfilling the requirements of Section 701) and Commission regulations requiring truthfulness and candor in ratemaking proceedings, and because the Commission improperly invoked the rule against retroactive ratemaking and related doctrines, the Court should reverse the Commission's Order and remand the case for a refund calculation under Section 1312(a).

Alternatively, the Court should remand the case for limited discovery and hearing on the key factual issue of when Aqua's trucking of treated wastewater ended and piping of it began. This alternative should be adopted only if absolutely necessary, not only because of the excessive time and expense that Aqua has already caused Ferguson (acting voluntarily and without compensation as a citizen advocate for the benefit of all the wastewater customers of New Garden Township), but also because the number of customers who move away or die without receiving a refund increases with each passing day of this litigation. If relief comes, it will be welcomed, but it will be too late for those customers.

For the foregoing reasons, William Ferguson respectfully requests that this Court reverse and set aside the Commission's Order and remand the case for a refund calculation under Section 1312(a), or, alternatively, remand the case to the Commission for further limited discovery and hearing, and grant such further relief as may be just and reasonable under the circumstances.

Respectfully submitted,

/s/ James H. Cawley

James H. Cawley (PA Atty ID No. 6896)
1020 Kent Drive
Mechanicsburg, PA 17050
(717) 439-8776

Attorney for Petitioner William Ferguson

Date: November 10, 2025

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 13,938 words.

/s/ James H. Cawley_____

James H. Cawley
Pa. Attorney I.D. No. 6896

Dated November 10, 2025

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.

/s/ James H. Cawley

James H. Cawley
Pa. Attorney I.D. No. 6896

Dated November 10, 2025

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.

VIA E-MAIL AND HAND DELIVERY:

David E. Screven, Esquire
Chief Counsel

Sharon E. Webb, Esquire
Deputy Chief Counsel

Colin W. Scott, Esquire
Assistant Counsel

Hayley E. Hinken, Esquire
Assistant Counsel

Pennsylvania Public Utility Commission
Commonwealth Keystone Building
3rd Floor West
400 North Street
Harrisburg, PA 17120

E-mail: dscreven@pa.gov

E-Mail: sharonwebb@pa.gov

E-Mail: colinsscott@pa.gov

E-Mail: hhinken@pa.gov

Michael W. Hassell, Esquire

Garrett P. Lent, Esquire

17 North Second Street, 12th Floor
Harrisburg, PA 17101

E-mail: mhassell@postschell.com

E-mail: glent@postschell.com

/s/ James H. Cawley

James H. Cawley

Date November 10, 2025

TAB "A"

Inapplicable portions of the Opinion and Order regarding the Revenue Complaint at Dkt. No. C-2023-3043108 are shaded.

The Opinion and Order is available on the Public Utility Commission's website at

<https://www.puc.pa.gov/pcdocs/1883654.pdf>