

333 OAK LANE
BLOOMSBURG, PA 17815
SCOTT.J.RUBIN@GMAIL.COM

SCOTT J. RUBIN
ATTORNEY • CONSULTANT

TEL: (570) 387-1893
FAX: (570) 387-1894
CELL: (570) 850-9317

July 17, 2020

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Re: Application of Aqua Pennsylvania Wastewater,
Inc. pursuant to Sections 507, 1102, and 1329 of
the Public Utility Code for, inter alia, approval of
the acquisition of the wastewater system assets of
the Delaware County Regional Water Quality
Control Authority, Docket No. A-2019-3015173

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced proceeding please find the Protest of
Southwest Delaware County Municipal Authority.

This document is being served on the Attorney General of Pennsylvania, in accordance
with 71 P.S. § 732-204, and on all parties of record. The document was filed electronically with
the Commission on this date.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott J. Rubin", written in a cursive style.

Enclosure

cc: Joshua Shapiro, Attorney General of Pennsylvania
All parties of record

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Aqua Pennsylvania Wastewater,	:	
Inc. pursuant to Sections 507, 1102 and 1329 of	:	
the Public Utility Code for, inter alia, approval of	:	
the acquisition of the wastewater system assets of	:	Docket No. A-2019-3015173
the Delaware County Regional Water Quality	:	
Control Authority	:	

PROTEST OF
SOUTHWEST DELAWARE COUNTY MUNICIPAL AUTHORITY

Pursuant to 52 Pa. Code §§ 5.51, *et seq.*, Southwest Delaware County Municipal Authority (“SWDCMA”) hereby files a Protest to the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua”) to acquire the assets of Delaware County Regional Water Quality Control Authority (“DELCORA”) and to begin providing service to DELCORA’s customers. In support of this Protest, SWDCMA states as follows:

1. SWDCMA is a municipal authority organized under the provisions of the Municipality Authorities Act, 53. Pa. C.S. §§ 5601, *et seq.*, with its principal place of business at 1 Gamble Lane, Aston, Pennsylvania.
2. SWDCMA provides wastewater service to retail customers in Aston Township and in portions of Chester Township, Concord Township, Upper Chichester Township, Brookhaven Borough, and Chester Heights Borough, all located in Delaware County, Pennsylvania.
3. SWDCMA collects wastewater from its customers and transports the wastewater to DELCORA for treatment.

4. SWDCMA is a wholesale customer of DELCORA in DELCORA's Western Service Region.

5. SWDCMA will be represented in this case by, and all documents should be served upon its attorney:

Scott J. Rubin
333 Oak Lane
Bloomsburg, PA 17815
Phone: (570) 387-1893
Mobile: (570) 850-9317
e-mail: scott.j.rubin@gmail.com

6. SWDCMA transports wastewater to DELCORA for treatment pursuant to the terms of a contract entered into by SWDCMA and DELCORA on December 21, 2009.

The contract is attached to the Application as Exhibit F110.

7. The contract between SWDCMA and DELCORA was amended on December 17, 2013. The amendment is attached to the Application as Exhibit F111. Collectively Exhibits F110 and F111 will be referred to herein as "the Contract."

8. The term of the Contract is 25 years from the original date of the contract, renewable at the option of either party for additional 25-year terms. The current term of the contract, therefore, runs until December 20, 2034.

9. Under the terms of the Contract, DELCORA has certain obligations, including but not limited to obligations to accept SWDCMA's wastewater flows (so long as the flows meet DELCORA's quality standards) and maintain DELCORA's facilities in accordance with regulatory requirements. Exhibit F110, Sections 3.02 and 7.01.

10. DELCORA's obligations cannot be assigned without the consent of SWDCMA. Exhibit F110, Section 9.11.

11. SWDCMA has not consented to DELCORA's assignment of the Contract to Aqua.

12. Aqua has no right to file the Contract with the Commission under Section 507 of the Public Utility Code, 66 Pa. C.S. § 507, as if it were a contract between Aqua and SWDCMA, since SWDCMA has not consented to the assignment of the Contract by DELCORA.

13. Under the terms of the Contract and DELCORA's rate schedules, SWDCMA has made millions of dollars in capital contributions to DELCORA, some of which paid for existing DELCORA facilities and some of which are being held by DELCORA to pay for the construction of facilities in the future.

14. On information and belief, SWDCMA avers that a substantial amount of the capital contributed by SWDCMA to DELCORA to fund future capital improvements is being held by DELCORA in cash or cash equivalents. Specifically, according to DELCORA's audited financial statement for the year end December 31, 2019, DELCORA had cash and cash equivalents at year-end 2019 totaling more than \$103 million.

15. The Asset Purchase Agreement between Aqua and DELCORA (Exhibit B1 to the Application) states that Aqua will not receive any of the cash or cash equivalents held by DELCORA. Exhibit B1, section 2.02.

16. Neither the Asset Purchase Agreement nor (to the best of SWDCMA's knowledge) any other agreement makes any provisions to refund SWDCMA's capital contributions to SWDCMA.

17. To the best of SWDCMA's knowledge, the calculation of the net original cost of DELCORA's plant is based on the original cost of the plant less accumulated depreciation, without considering contributions from SWDCMA or other DELCORA customers. See Application ¶ 22.

18. Aqua estimates that the first rate increase to SWDCMA, as a Western region wholesale customer, would be 12.55%.

19. Based on Aqua's history in other acquisitions, SWDCMA would expect that projected increase to be just the first of many rate increases that would adversely affect SWDCMA and its retail customers.

20. Based on information and belief, SWDCMA avers that there would be little or no need for a rate increase under Aqua ownership if Aqua gave SWDCMA full credit for the contributions SWDCMA has made to DELCORA and with which DELCORA has purchased the property, plant, and equipment included in Aqua's purported rate base for the Western wholesale service area.

21. SWDCMA understands that Section 1329(d)(5) of the Public Utility Code, 66 Pa. C.S. § 1329(d)(5), purports to permit Aqua to ignore the contributions of SWDCMA and other customers to the value of the property proposed to be acquired by Aqua.

22. Section 1329(d)(5) was enacted on April 14, 2016, effective June 13, 2016, as part of Act 12 of 2016.

23. To the extent that Section 1329(d)(5) is interpreted to permit Aqua to ignore the value of property contributed by SWDCMA to DELCORA, then Section 1329(d)(5) would unconstitutionally impair DELCORA's obligations to SWDCMA under the Contract (which predated the enactment of Act 12 by more than six years), in violation of

Article I, Section 17, of the Pennsylvania Constitution (“No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.”). Pa. Const. art. I, § 17 (emphasis added).

24. SWDCMA submits this Protest to oppose the proposed transaction for the following reasons:

A. DELCORA does not have the legal right to transfer the property used to serve SWDCMA under the Contract without SWDCMA’s consent, which consent has not been given;

B. DELCORA does not have the legal right to transfer the Contract to Aqua without SWDCMA’s consent, which consent has not been given;

C. There is no contract or agreement between SWDCMA and Aqua, and SWDCMA has not agreed that DELCORA can assign the Contract or any other agreements to Aqua, therefore Aqua’s request to file and have the Commission approve the agreements between SWDCMA and DELCORA in Exhibits F109, F110, F111, F112, F113, F132, and F133 is a nullity and cannot be approved under 66 Pa. C.S. § 507;

D. It is not consistent with the public convenience and necessity for Aqua to acquire the assets and contracts of DELCORA, in violation of 66 Pa. C.S. §§ 1101, *et seq.*;

E. The acquisition of DELCORA’s assets and contracts by Aqua would not provide an affirmative benefit to the public, but rather it would be detrimental to the public including SWDCMA and its retail customers, in violation of the standards enunciated by the courts in *City of York v. Pa. PUC*, 295 A.2d 825, 828 (Pa. 1972) (the Public Utility Code “requires that the proponents of a merger demonstrate that the merger

will affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way”) and *McCloskey v. Pa. PUC*, 195 A.3d 1055 (Commw. Ct. 2018), appeal denied, 207 A.3d 290 (Pa. 2019); and

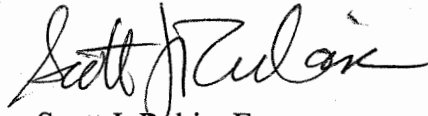
F. The proposed application of Section 1329(d)(5) of the Public Utility Code would deprive SWDCMA of the benefit of the Contract and impair the rights of SWDCMA under the Contract in violation of Pa. Const. art. I, § 17.

25. Counsel consents to the service of documents by electronic mail at the email address listed above, as provided in 52 Pa. Code § 1.54(b)(3).

WHEREFORE, SWDCMA respectfully requests the Commission to deny the Application, prevent DELCORA from transferring to Aqua the property used to provide service to SWDCMA; prevent DELCORA from transferring its obligations under the Contract to Aqua; find that there is no contract between SWDCMA and Aqua; find that the proposed transaction does not promote the service, accommodation, convenience, or safety of the public in some substantial way; if the transaction is approved, require Aqua to give credit to SWDCMA for the value of property contributed by SWDCMA to

DELCORA; find that the application of 66 Pa. C.S. § 1329(d)(5) to the facts and circumstances of this case would be a violation of Art I, § 17 of the Pennsylvania Constitution; and grant such other relief as is warranted under the circumstances.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott J. Rubin".

Scott J. Rubin, Esq.
Pa. Supreme Court ID: 34536
333 Oak Lane
Bloomsburg, PA 17815
scott.j.rubin@gmail.com
(570) 387-1893

Counsel for:
Southwest Delaware County Municipal Authority

Dated: July 17, 2020

VERIFICATION

I, Leonard Balestrieri, the Chairman of the Board of Directors of the Southwest Delaware County Municipal Authority, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

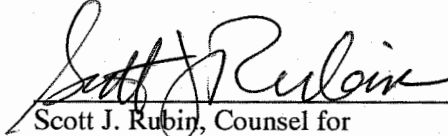
Date: July 17, 2020


Leonard Balestrieri, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Protest upon **Joshua Shapiro, Attorney General of Pennsylvania, Strawberry Square 16th Floor, Harrisburg, PA 17120 Attn: Civil Law Division**, in accordance with 71 P.S. § 732-204, due to the Protest's challenge to the constitutionality of 66 Pa. C.S. § 1329(d)(5).

July 17, 2020
Date



Scott J. Rubin, Counsel for
Southwest Delaware County Municipal Authority

I hereby certify that I have this day served a true copy of the foregoing Protest upon the following parties by electronic mail (where an email address is shown) and first-class mail.

Alexander R. Stahl
Aqua Pennsylvania
762 W. Lancaster Ave.
Bryn Mawr, PA 19010
astahl@aquaamerica.com
Representing Aqua PA Wastewater

Thomas Niesen
Thomas Niesen & Thomas LLC
212 Locust St., Suite 302
Harrisburg, PA 17101
tniesen@tntlawfirm.com
Representing Aqua PA Wastewater

Thomas Wyatt / Matthew Olesh
Obermayer Rebmann Maxwell & Hippel LLP
1500 Market St., Suite 3400
Philadelphia, PA 19102
thomas.wyatt@obermayer.com, matthew.olesh@obermayer.com, angela.swavely@obermayer.com
Representing DELCORA

Gina Miller / Erika McLain
Pa. Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
ginmiller@pa.gov, ermclain@pa.gov
Representing Bureau of Investigation & Enforcement

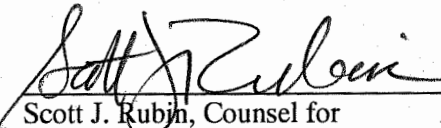
Christine Hoover / Erin Gannon / Santo Spataro / Harrison Breitman
Office of Consumer Advocate
555 Walnut St., 5th Fl.
Harrisburg, PA 17101
choover@paoca.org, egannon@paoca.org, sspataro@paoca.org, hbreitman@paoca.org
Representing Office of Consumer Advocate

Erin Fure / Daniel Asmus
Office of Small Business Advocate
555 Walnut St., 1st Fl.
Harrisburg, PA 17101
efure@pa.gov, dasmus@pa.gov
Representing Office of Small Business Advocate

Adeolu Bakare / Robert Young / Kenneth Stark
McNees Wallace & Nurick LLC
PO Box 1166
Harrisburg, PA 17108-1166
abakare@mwn.com, lcharleton@mwn.com, kstark@mcneeslaw.com, dnafiger@mcneeslaw.com
Representing Delaware County

Kenneth Kynett / Charles Miller
Petrikin, Wellman, Damico, Brown & Petrosa
109 Chesley Dr
Media, PA 19063
cgm@petrikin.com
Representing Edgmont Township

July 17, 2020
Date



Scott J. Rubin, Counsel for
Southwest Delaware County Municipal Authority