



THOMAS, NIESEN & THOMAS, LLC

*Attorneys and Counsellors at Law*

THOMAS T. NIESEN  
Direct Dial: 717.255.7641  
tniesen@tntlawfirm.com

August 17, 2020

*Via Electronic Filing*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

In re: Docket No. A-2019-3015173

Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329 and 507  
of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets  
of the Delaware County Regional Water Quality Control Authority

---

Dear Secretary Chiavetta:

We are counsel to Aqua Pennsylvania Wastewater, Inc. in the above matter and, pursuant to 52 Pa. Code Section 5.302(b), are submitting, with this letter via electronic filing, its Brief in Opposition to the Petition of the County of Delaware for Review and Answer to Material Question. A copy of the Brief is being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Thomas T. Niesen

cc: Certificate of Service (w/encl.)  
The Honorable Angela T. Jones, Administrative Law Judge (via email, w/encl.)  
Ra-OSA@pa.gov (w/encl.)  
Alexander R. Stahl, Esquire (via email, w/encl.)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania : Docket No. A-2019-3015173  
Wastewater, Inc. Pursuant to Sections :  
1102, 1329 and 507 of the Public Utility :  
Code for Approval of its Acquisition of the :  
Wastewater System Assets of the Delaware :  
County Regional Water Quality Control :  
Authority :

**BRIEF OF AQUA PENNSYLVANIA WASTEWATER, INC. IN OPPOSITION TO  
PETITION OF THE COUNTY OF DELAWARE FOR REVIEW AND  
ANSWER TO MATERIAL QUESTION**

Thomas T. Niesen, Esquire  
PA Attorney ID # 31379  
Thomas, Niesen & Thomas, LLC  
212 Locust Street, Suite 302  
Harrisburg, PA 17101

*Attorney for  
Aqua Pennsylvania Wastewater, Inc.*

DATED: August 17, 2020

## **TABLE OF CONTENTS**

I.	HISTORY OF PROCEEDING .....	1
II.	THE COUNTY HAS FAILED TO SATISFY THE REQUIREMENTS FOR INTERLOCUTORY REVIEW AND ANSWER TO A MATERIAL QUESTION .....	2
III.	THE COMMISSION MAY NOT STAY THE PROCEEDING AND THEREBY EXTEND THE RESOLUTION OF THE PROCEEDING BEYOND THE SIX MONTH REVIEW PERIOD .....	5
IV.	PROPOSED ANSWER TO THE MATERIAL QUESTION, IF THE COMMISSION DECIDES TO ADDRESS IT .....	6
A.	Process Gas Does Not Support the County Petition .....	6
1.	The Pending County Court Action Involves Matters in Dispute .....	7
2.	The County Will Not Suffer Irreparable Harm Absent A Stay .....	9
3.	A Stay Will Substantially Harm Aqua .....	10
4.	A Stay Will Adversely Affect the Public Interest .....	10
B.	Primary Exclusive Jurisdiction Does Not Support the County Petition .....	11
V.	THE COUNTY’S REQUEST FOR A STAY SHOULD BE DENIED .....	12
VI.	CONCLUSION .....	13

## **TABLE OF CITATIONS**

### **Cases**

<i>Application of Aqua Pennsylvania Wastewater, Inc. - New Garden Township</i> , Docket No. A-2016-2580061, Opinion and Order entered February 15, 2017 .....	5
<i>Elkin v. Bell Tel. Co.</i> , 491 Pa. 123, 420 A. 2d 371 (1980) .....	11
<i>Firearm Owners Against Crime v. Lower Merion Twp.</i> , 151 A. 3d 1172 (Pa. Cmwlth. 2016) .....	10
<i>In re: Application of Knights Limousine Service, Inc.</i> , 59 Pa. P.U.C. 538 (1985) .....	3
<i>In re Condemnation by the Comm. of Pa.</i> , 131 A. 3d 625 (Pa. Commw. Ct. 2016) .....	6
<i>In re: Sale of Real Estate by Lackawanna County Tax Claim Bureau</i> , 22 A. 3d 308 (Pa. Commw. Ct, 2011), <i>appeal denied</i> , 613 Pa. 648, 32 A.3d 1279 (Pa. 2011) .....	6
<i>Pa. P.U.C. et al. v. Duquesne Light Company</i> , Docket No. R-2018-3000124, et al., Order entered June 14, 2018; 2018 Pa. PUC LEXIS 217 (Pa. P.U.C. June 14, 2018) .....	3
<i>Pa. P.U.C. v. Process Gas Consumers Group</i> , 467 A. 2d 805 (Pa. 1983) .....	6
<i>Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.</i> , 2014 WL 3763971 (Pa.P.U.C.) .....	3
<i>Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan</i> , Docket No. M-00072021 (Order entered October 23, 2009) .....	2
<i>West Penn Power Co. v. Pa. P.U.C.</i> , 104 Pa. Commw. 21, 521 A. 2d 75 1987 Pa. Commw. LEXIS 1934 .....	5

### **Statutes**

Section 1329 of the Public Utility Code .....	<i>Passim</i>
---	---------------

### **Regulations**

52 Pa. Code § 5.302 .....	1, 2
52 Pa. Code § 5.302(b) .....	1, 12
52 Pa. Code § 5.303 .....	2
52 Pa. Code § 5.501 .....	2

## **I. HISTORY OF PROCEEDING**

This proceeding concerns the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”), filed with the Public Utility Commission (“Commission”) on March 3, 2020, pursuant to Sections 1329, 1102 and 507 of the Public Utility Code (“Code”).

The Application asks the Commission to approve, *inter alia*, Aqua’s acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”).

By Secretarial Letter dated July 27, 2020, the Commission, upon acknowledging that Aqua had provided individualized customer notice of the Application, finalized its acceptance of the Application for Commission consideration.

Upon the final acceptance of the Application on July 27, 2020, the Commission is now required, pursuant to Section 1329 of the Code, to issue a Final Order on the Application within six months (180 days) or by January 23, 2021.

On August 7, 2020, the County of Delaware (the “County”)<sup>1</sup> filed a Petition for Stay of the proceeding, including a request, pursuant to 52 Pa. Code Section 5.302 (“Section 5.302”), for review and answer to the following Material Question:

Should Aqua's Application be stayed until there is a final determination in the pending Court of Common Pleas Action at Docket No. CV-2020-003185 regarding (1) the County's complaint against DELCORA's creation of a Rate Stabilization Trust; and (2) the County's Ordinance 2020-4 (providing for the orderly termination of DELCORA pursuant to the Municipality Authorities Act), each issue directly bearing on Aqua's PUC Application?

Aqua submits this Brief pursuant to 52 Pa. Code Section 5.302(b). Aqua opposes the County’s Petition and Request for Interlocutory Review and Answer to a Material Question. The

---

<sup>1</sup> The County filed a Petition to Intervene in the proceeding on May 18, 2020.

Commission should decline to answer the Material Question or, if it does so, answer it in the negative. The proceeding should not be stayed.

**II. THE COUNTY HAS FAILED TO SATISFY THE REQUIREMENTS  
FOR INTERLOCUTORY REVIEW AND ANSWER  
TO A MATERIAL QUESTION**

Section 5.302 provides an avenue for the Commission to address, in limited and special circumstances, a “material” question during the pendency of a proceeding. In clear language, Section 5.302 requires a petitioner to assert, in not more than three pages, “the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.”<sup>2</sup>

Petitions for interlocutory review are generally not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage.<sup>3</sup>

The standards for interlocutory review are well established by Commission decision.

“Section 5.302(a) requires that the petitioning party “state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice - that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

---

<sup>2</sup> The County Petition totals 18 pages, a clear violation of the three page limitation and reason enough, by itself, to warrant denial of the Petition.

<sup>3</sup> *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009), mimeo at 3.

Pursuant to 52 Pa. Code § 5.303, the Commission may take one of the following courses of action on requests for interlocutory review and answer to a material question:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.”<sup>4</sup>

The Commission does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons.<sup>5</sup>

The County’s Petition fails to explain how it is being prejudiced or how interlocutory review would expedite the conduct of this Section 1329 proceeding. It fails to identify extraordinary circumstances or compelling reasons for interlocutory review. The Petition, accordingly, should be denied.

Interlocutory review will certainly not expedite the conduct of the proceeding. The County, through its Petition, is asking the Commission to *delay* the proceeding by staying it until there is a final determination in its pending action before the Court of Common Pleas of Delaware County. The County’s Petition is inconsistent with the recognized criteria for interlocutory review.

The County, moreover, is not prejudiced by this proceeding. The County’s Court of Common Pleas Complaint is not being prejudged by Commission consideration of Aqua’s

---

<sup>4</sup> *Pa. P.U.C. et al. v. Duquesne Light Company*, Docket No. R-2018-3000124, et al., Order entered June 14, 2018; 2018 Pa. PUC LEXIS 217 (Pa. P.U.C. June 14, 2018).

<sup>5</sup> *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.*, 2014 WL 3763971 (Pa.P.U.C.) citing *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

Application. The Commission has no jurisdiction to address the County's Court of Common Pleas issues, in any event.<sup>6</sup>

The County's concern with "protracted and inefficient litigation and potential re-litigation at the PUC were the Commission to deny this Petition for Stay"<sup>7</sup> is not "substantial prejudice." The County initiated the County Court litigation and voluntarily intervened in this proceeding. The Commission should not presume that the County will prevail in County Court litigation, which involves "disputed issues," as acknowledged by the County.<sup>8</sup> Pertinent to matters before this Commission are the substantial public benefits averred by Aqua in support of its Application. Those benefits include not just rate matters but also matters of continuing reasonable and adequate wastewater service. The Commission should move forward with its review and consideration of those public benefits.

In further support of a stay, the County also cites the Commission's Emergency Order addressing regulatory and statutory deadlines during the COVID pandemic.<sup>9</sup> COVID pandemic restrictions are not hampering the processing of Aqua's Application. The Commission processed Aqua's Application remotely. Discovery, by the County and other parties, has been asked and answered by electronic mail. A telephonic prehearing conference is scheduled for September 2, 2020. COVID restrictions provide no bases for staying this proceeding.

In sum, Aqua submits that the County has failed to present extraordinary circumstances or compelling reasons for the Commission to grant interlocutory review and stay the proceeding. The Commission should deny the Petition in its entirety and allow the proceeding to move forward in

---

<sup>6</sup> The County acknowledges that the legality of the Trust and the County's effort to terminate DELCORA are "properly before the Court of Common Pleas and not the Commission." County Petition at 10.

<sup>7</sup> County Petition at 10.

<sup>8</sup> County Petition at 1.

<sup>9</sup> County Petition at 16-17.



the normal course providing all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments.

**III. THE COMMISSION MAY NOT STAY THE PROCEEDING AND THEREBY  
EXTEND THE RESOLUTION OF THE PROCEEDING BEYOND  
THE SIX MONTH STATUTORY REVIEW PERIOD**

Section 1329(d)(2) provides that the Commission “shall issue a final order on an application submitted under ... section [1329] within six months of the filing date ... “ Having finally accepted the Application on July 27, 2020, the Commission is now required to issue a Final Order within six months (180 days) or by January 23, 2021. Contrary to the clear statutory language, the County contends that the Commission has discretionary authority under the Code to stay the proceeding beyond the six month review period.<sup>10</sup>

The six month deadline is an integral part of Section 1329, which was enacted to encourage the acquisition of municipal water and wastewater systems. As such, the statutory deadline is mandatory and not directory.<sup>11</sup> This is, in fact, a settled issue. The Commission previously addressed the six month deadline in *Application of Aqua Pennsylvania Wastewater, Inc. – New Garden Township*, Docket No. A-2016-2580061, Opinion and Order entered February 15, 2017, mimeo at 23, holding that the clear and unambiguous, express language of the statute “*requires* that once a utility applicant invokes Section 1329 and provides the information required under Section 1329(d), the Commission *must issue an order within six months*” (*emphasis added*).

A stay of the proceeding, consequently, would violate clear and unambiguous statutory wording and prior Commission precedent.<sup>12</sup> Again, and as set forth above, the Commission should

---

<sup>10</sup> County Petition at 7-8.

<sup>11</sup> See *West Penn Power Co. v. Pa. P.U.C.*, 104 Pa. Commw. 21, 521 A. 2d 75 1987 Pa. Commw. LEXIS 1934.

<sup>12</sup> The six month review period, moreover, may not be ignored for litigation scheduling purposes as suggested by the County. “To hold that a provision is directory, rather than mandatory, does not mean that it is optional – to be ignored at will. Both mandatory and directory provisions of the legislature are meant to be followed. It is only in the

deny the Petition in its entirety and allow the proceeding to move forward in the normal course providing all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments.

**IV. PROPOSED ANSWER TO THE MATERIAL QUESTION, IF THE COMMISSION DECIDES TO ADDRESS IT**

While Aqua believes that the Commission should decline to answer the Material Question, Aqua presents the following for Commission consideration in the event the Commission decides to address the Question. In support of the merits of an affirmative answer to the Material Question, The County relies on *Pa. P.U.C. v. Process Gas Consumers Group*, 467 A. 2d 805 (Pa. 1983) (“*Process Gas*”) and the doctrine of primary exclusive jurisdiction. The Commission should answer the Material Question in the negative, if it decides to address it.

**A. *Process Gas* Does Not Support the County Petition**

*Process Gas* addresses the criteria for a stay of a Commission Order pending appeal of that Order and, consequently, has no application to the circumstances here where the County is asking the Commission to stay an Application proceeding pending the resolution of a County Court proceeding. The County acknowledges the differing circumstances of *Process Gas* but suggests, without support, that *Process Gas* may assist the Commission in rendering a decision on its Petition for Stay.<sup>13</sup>

*Process Gas* identifies four criteria that may be considered in determining whether a stay is warranted pending appeal. A grant of a stay is warranted if:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.

---

effect of non-compliance that a distinction arises.” *In re Condemnation by the Commonwealth of Pa.*, 131 A. 3d 625, 631-32 (Pa. Commw. Ct. 2016) (citing *In re: Sale of Real Estate by Lackawanna County Tax Claim Bureau*, 22 A. 3d 308 (Pa. Commw. Ct. 2011), *appeal denied*, 613 Pa. 648, 32 A. 3d 1279 (Pa. 2011)).

<sup>13</sup> County Petition at 8.

2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
4. The issuance of a stay will not adversely affect the public interest.

Each criterion is discussed below.

**1. The Pending County Court Action Involves Matters in Dispute**

The County contends that it is likely to prevail on the merits in its County Court action challenging DELCORA's formation of the Trust<sup>14</sup> and termination of DELCORA.<sup>15</sup> The Commission should not presume that the County will prevail in that litigation, which involves "disputed issues," as acknowledged by County.<sup>16</sup>

In its Answer, New Matter and Counterclaim to the County's Amended County Court Complaint ("Aqua Answer"), Aqua avers that:

- The Asset Purchase Agreement ("APA") was properly authorized and properly entered into by DELCORA in full compliance with the law and the Municipal Authorities Act and constitutes a binding, enforceable agreement and contractual obligation of DELCORA;
- The APA is fundamentally based upon DELCORA having the knowledge required to make the representations and warranties upon which Aqua relied in agreeing to the APA and establishing the terms thereof, including the purchase price;
- Thus, the APA contains multiple provisions which in effect mandate that DELCORA proceed to closing on the sale to Aqua prior to any dissolution of DELCORA by the County, which provisions can only be satisfied by DELCORA prior to closing, and not the County...

Consistent with the above and in furtherance of it, Aqua's Answer in the County Court action includes a Count I request that the County Court declare that the APA is a valid, binding

---

<sup>14</sup> County Petition Section III.A.

<sup>15</sup> County Petition Section III.B.

<sup>16</sup> County Petition at 1.

and enforceable agreement and that closing on the APA **must** occur prior to termination of DELCORA by the County. Aqua has also filed a Petition for Preliminary Injunctive Relief asking the County Court to enjoin and restrain the County from terminating DELCORA prior to closing and enjoin and restrain the County from interfering in any way with Aqua's existing contractual relationship with DELCORA.

The County's challenge to DELCORA's corporate authority to establish the Customer Trust is also in dispute. In its Answer with New Matter/Counterclaim to the County's Amended Complaint, DELCORA avers that:

- DELCORA was authorized to create the Trust by its Amended Articles of Incorporation, as the County concedes. DELCORA has the capacity to create the Trust because its intent was to create a trust relationship and convey assets to the trustee for management and disposition;
- The Trust's purpose is lawful and consistent with public policy. Section 7735 of the U[niform] T[rust] A[ct] provides for a trust with a charitable purpose such as "the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community." Providing credit to customer's bills in the form of rate reduction is a benefit to the community and a permissible purpose. Moreover, the Trust promotes the public policy of economically benefiting DELCORA customers by reducing the rates that they would otherwise pay for a number of years into the future.
- DELCORA will not maintain control of the funds in the Trust, as they will be titled in the name of the Trust and DELCORA has no right to withdraw funds or otherwise benefit from the Trust once the contribution is completed. Its rights and powers with respect to the Trust assets are strictly limited. The creation of the Trust had nothing to do with the composition of the County Council, or the identity of future Council members. It is not a violation of the law.

We emphasize that Aqua is not asking the Commission to address the foregoing. The Commission has no jurisdiction to do so. Aqua submits the foregoing only to show that it is not at all "likely" that the County will prevail on the merits of its Complaint at County Court. To the contrary, it is entirely likely that the County will **not** prevail.

## **2. The County Will Not Suffer Irreparable Harm Absent a Stay**

The County contends that it will suffer irreparable injury through the protracted and unnecessary litigation that would occur were the Commission to deny its Petition for Stay. Litigation may be inconvenient, time consuming and even expensive but it is not irreparable harm. The underlying assumption in the County's contention is that it will prevail in County Court but, again, as set forth above, it is entirely likely that the County will *not* prevail. The County, in fact, acknowledges that the County Court proceeding involves "disputed issues."<sup>17</sup>

Countering the County's claim of litigation "harm" are the substantial benefits of the transaction that will occur if this proceeding moves forward in the normal course, as it should, and the Commission approves Aqua's Application. As summarized from the Application:

- The acquisition is consistent with the Commission's long-standing policy supporting the consolidation/regionalization of water/wastewater systems.
- Aqua has years of experience operating wastewater treatment and collection systems in a safe, reliable and efficient manner. Aqua has the managerial, technical, and financial resources to improve the DELCORA wastewater system.
- DELCORA customers will benefit by becoming part of a larger-scale, efficiently operated, water and wastewater utility. Aqua is projecting lower operating and maintenance costs that will likely be realized through reductions in cost for wastewater treatment through the investment in the expansion of the Western Regional Treatment Plant ("WRTP") and force main to divert flows to the WRTP from Philadelphia Water Department.
- DELCORA customers will also benefit through customer service enhancements and protections provided by Aqua.
- The acquisition will benefit Aqua's existing customers and is significant to Aqua's existing wastewater platform.
- Planned capital projects will provide benefits by removing significant and increasing costs of contributing to PWD's Long Term Control Plan ("LTCP"). The elimination of treatment expense to PWD will result in greater control over treatment costs in the future. By investing capital now to expand the WRTP, Aqua and DELCORA will, in essence, be in control of their own destiny.

---

<sup>17</sup> County Petition at 1.

- The acquisition will not have any immediate impact on the rates of either existing customers of Aqua or DELCORA customers. While the increase in rate base may ultimately require an increase in revenue, the hypothetical impact on rates is outweighed by the recognized benefits of Aqua's ownership including its expertise and ability to raise capital; the furtherance of consolidation/regionalization of wastewater services; and the spreading of costs over a larger customer base.
- The acquisition furthers the objective of the General Assembly with the enactment of Section 1329.
- DELCORA has agreed to sell its Assets. The public interest and need will be served by allowing Aqua, in lieu of DELCORA, to provide wastewater service in the Requested Territory and to address the issues of regulatory requirements and capital expenditures.

The County will not suffer irreparable harm by engaging in administrative litigation over these substantial benefits. The public's interest in the transaction and the substantial benefits of it are properly before the Commission. The County voluntarily intervened in the proceeding. The Commission should move forward with review of the benefits in the normal course.

### **3. A Stay Will Substantially Harm Aqua**

Aqua has a fully binding and enforceable agreement to acquire the DELCORA system. Its Application for Commission approval requires a final order from the Commission within six months of the date the Application was fully accepted by the Commission. A stay of proceeding would frustrate Aqua's desire to close the proceeding within a reasonable time after the Commission completes the statutory six month review. A stay of proceeding that extends the review period beyond the six month review period would, moreover, violate statutory law. Violations of law constitute per se irreparable harm.<sup>18</sup>

### **4. A Stay Will Adversely Affect the Public Interest**

The General Assembly, through Section 1329, has encouraged the sale of public water and wastewater assets at market rates. The proposed transaction, which is a sale of a municipal

---

<sup>18</sup> See *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A. 3d 1172, 1180 (Pa. Cmwlth. 2016).

wastewater system at market rates, will further a recognized statutory objective. A stay of the Commission review process, accordingly, would adversely affect the public interest. The proceeding should not be stayed.

**B. Primary Exclusive Jurisdiction Does Not Support the County Petition**

The County contends further that, as an alternative to the application of the *Process Gas* criteria, the doctrine of primary jurisdiction supports the issuance of a stay.<sup>19</sup> The doctrine of primary jurisdiction is typically applied in civil proceedings where a litigant is seeking damages caused by an alleged lack of reasonable utility service. The civil court refers the service question to the Commission. The Commission, which has no jurisdiction to award monetary damages, addresses the service issue applying its special experience and expertise. Once the Commission has determined the regulatory issue within its jurisdiction, then the civil litigation continues, guided in scope and direction by the nature and outcome of the agency.<sup>20</sup>

The doctrine does not support the County's attempt to stay a Commission proceeding. The doctrine exists so that courts can have the benefit of the agency's views on issues within the agency's competence.

“ ‘The principles of the doctrine of primary jurisdiction are well settled. The United States Supreme Court “ . . . recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge . . . . The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed.” Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Trans-Atlantic, 400 U.S. 62, 68, 91 S.Ct. 203, 208 [ 27 L.Ed.2d 203] (1970) (footnote and citations omitted). The doctrine “ . . . requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.” United States v. Western Pacific Railroad Co., 352 U.S. 59, 68, 77 S.Ct. 161, 165 [ 1 L.Ed.2d 126] (1956). (further citations omitted).’ ”<sup>21</sup>

---

<sup>19</sup> County Petition, Section III.C.

<sup>20</sup> See *Elkin v. Bell Tel. Co.*, 491 Pa. 123, 420 A. 2d 371 (1980).

<sup>21</sup> *Elkin, supra*, 491 Pa. at 132, 420 A. 2d at 376.

While the doctrine would allow a civil court to refer a matter of utility service to the Commission, it does not contemplate a stay of a Commission proceeding addressing issues of public interest for sewer service.

**V. THE COUNTY'S REQUEST FOR A STAY SHOULD BE DENIED**

The County asks the Commission to stay this proceeding until there is a final determination in its pending County Court action.<sup>22</sup> The County has failed to explain how it is being prejudiced or how interlocutory review will expedite the conduct of this Section 1329 proceeding. The practical effect of a stay would be to extend the consideration of the Application beyond the statutorily required six month review period. Doing so would violate the intent of the General Assembly as presented in Section 1329. A stay of the proceeding, moreover, would be harmful to Aqua and the public interest. The County's request for stay should be denied.

---

<sup>22</sup> Although Aqua has made its opposition position clear, we include this Section V specifically addressing a stay in compliance with 52 Pa. Code Section 5.302(b), which directs parties to address, in their brief, whether a stay of proceedings is required to protect the substantial rights of a party.



## **VI. CONCLUSION**

Aqua Pennsylvania Wastewater, Inc. opposes, for all the reasons set forth above, the County of Delaware's Petition for Stay and Request for Interlocutory Review and Answer to a Material Question. The Commission should decline to answer the Material Question or, if it does so, answer it in the negative. The proceeding should not be stayed.

Respectfully submitted,

**AQUA PENNSYLVANIA WASTEWATER, INC.**

By 

Thomas T. Niesen, Esquire  
Thomas, Niesen & Thomas, LLC  
212 Locust Street, Suite 302  
Harrisburg, PA 17101  
tniesen@tntlawfirm.com  
*Counsel for Aqua Pennsylvania Wastewater, Inc.*

Date: August 17, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Application of Aqua Pennsylvania : Docket No. A-2019-3015173**  
**Wastewater, Inc. Pursuant to Sections :**  
**1102, 1329 and 507 of the Public Utility :**  
**Code for Approval of its Acquisition of the :**  
**Wastewater System Assets of the Delaware :**  
**County Regional Water Quality Control :**  
**Authority :**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 17<sup>th</sup> day of August, 2020, served a true and correct copy of the foregoing Brief of Aqua Pennsylvania Wastewater, Inc. in Opposition to the Petition of the County of Delaware for Review and Answer to Material Question, upon the persons and in the manner set forth below:

**VIA ELECTRONIC MAIL**

Gina L. Miller, Prosecutor  
Erika L. McLain, Prosecutor  
Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
ginmiller@pa.gov  
ermclain@pa.gov

Christine Maloni Hoover  
Erin L. Gannon  
Senior Assistant Consumer Advocates  
Harrison G. Breitman  
Santo G. Spataro  
Assistant Consumer Advocates  
Office of Consumer Advocate  
choover@paoca.org  
egannon@paoca.org  
hbreitman@paoca.org  
sspataro@paoca.org

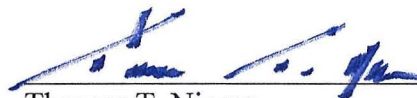
Erin L. Fure  
Daniel A. Asmus  
Assistant Small Business Advocates  
Office of Small Business Advocate  
efure@pa.gov  
dasmus@pa.gov

Adeolu A. Bakare, Esq.  
Robert F. Young, Esq.  
Kenneth R. Stark, Esq.  
McNees Wallace & Nurick LLC  
abakare@mcneeslaw.com  
ryoung@mcneeslaw.com  
kstark@mcneeslaw.com

Kenneth D. Kynett, Esq.  
Charles G. Miller, Esq.  
Petrikin, Wellman, Damico, Brown & Petrosa  
kdk@petrikin.com  
cgm@petrikin.com

Thomas Wyatt, Esq.  
Matthew S. Olesh, Esq.  
Obermayer Rebmann Maxwell & Hippel, LLP  
Thomas.Wyatt@obermayer.com  
Matthew.Olesh@obermayer.com

Scott J. Rubin, Esq.  
scott.j.rubin@gmail.com



---

Thomas T. Niesen

PA Attorney ID No. 31379

*Counsel for Aqua Pennsylvania Wastewater, Inc.*