

August 27, 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 are submitting, via electronic filing with this letter, the Company's Answer in Opposition to the Petition of the County of Delaware for Stay. A copy of the Answer 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**

Administrative Law Judge Angela T. Jones, Presiding

Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for approval of the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority	: Docket No. A-2019-3015173 : : : : : :
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**ANSWER OF AQUA PENNSYLVANIA WASTEWATER, INC. IN OPPOSITION TO
PETITION OF THE COUNTY OF DELAWARE FOR STAY**

AND NOW comes Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”) and, pursuant to 52 Pa. Code § 5.61(e), answers the Petition of the County of Delaware for Stay. In opposition to the Petition, Aqua submits as follows:

I. HISTORY OF PROCEEDING

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

2. 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”).

3. 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.

4. 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.

5. On August 7, 2020, the County of Delaware (the “County”)¹ filed a Petition for Stay of the proceeding, citing 52 Pa. Code Section 5.41 (Petitions Generally). The Petition also included a request, pursuant to 52 Pa. Code Section 5.302 (Petition for Interlocutory Review and Answer to a Material Question) (“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?

6. On August 17, 2020, Aqua filed a Brief, pursuant to 52 Pa. Code Section 5.302(b), opposing the County’s Petition and Request for Interlocutory Review and Answer to a Material Question. Pursuant to 52 Pa. Code Section 5.303, the County’s Petition and Material Question requesting a stay is on a track to be addressed by the Commission by September 6, 2020.²

7. As the County’s Petition was also filed pursuant to 52 Pa. Code Section 5.41 (Petitions Generally), Aqua herein answers the County’s Petition pursuant to 52 Pa. Code Section 5.61. Section 5.61(e) of Title 52 provides that, in answering a Petition, a party should advise the Commission of its position on the issues raised in the Petition.

8. In opposition to the Petition, Aqua restates its position as presented in its Brief in Opposition filed with the Commission on August 17, 2020.³ The proceeding should not be stayed.

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

² Pursuant to 52 Pa. Code Section 5.303, the Commission will act on a petition for interlocutory review and answer within 30 days of receipt of the petition.

³ In addition to the position presented herein, Aqua also contends that the County has failed to satisfy the requirements for interlocutory review and answer to a material question under 52 Pa. Code Section 5.302, as presented in Section II of Aqua’s Brief in Opposition. Aqua does not believe that it is necessary for it to restate Section II of its

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

9. 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.⁴

10. 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.⁵ 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*).

11. A stay of the proceeding, consequently, would violate clear and unambiguous statutory wording and prior Commission precedent.⁶ The Commission should deny the Petition in

Brief and its contention that the County has failed to satisfy the requirements for interlocutory review in this Answer. Rather, if required, Aqua respectfully incorporates Section II of its Brief in Opposition herein by reference.

⁴ County Petition at 7-8.

⁵ See *West Penn Power Co. v. Pa. P.U.C.*, 104 Pa. Commw. 21, 521 A. 2d 75 1987 Pa. Commw. LEXIS 1934.

⁶ 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 effect of non-compliance that a distinction arises.” *In re Condemnation by the Commonwealth of Pa.*, 131 A. 3d 625,

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.

III. THE COUNTY FAILED TO JUSTIFY A STAY

12. 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 in support of its Petition. Neither supports the County’s request.

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

13. *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.⁷

14. *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.
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.

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)).

⁷ County Petition at 8.

15. Each criterion is discussed below.

1. The Pending County Court Action Involves Matters in Dispute

24. The County contends that it is likely to prevail on the merits in its County Court action challenging DELCORA's formation of the Trust⁸ and termination of DELCORA.⁹ The Commission should not presume that the County will prevail in that litigation, which involves "disputed issues," as acknowledged by County.¹⁰

25. 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...

26. 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 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

⁸ County Petition Section III.A.

⁹ County Petition Section III.B.

¹⁰ County Petition at 1.

contractual relationship with DELCORA.

27. 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.

28. 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

29. 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.”¹¹

30. 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.
- 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.

¹¹ County Petition at 1.

- 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.

31. 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

32. 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.¹²

4. A Stay Will Adversely Affect the Public Interest

33. 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 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

34. The County contends further that, as an alternative to the application of the *Process*

¹² See *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A. 3d 1172, 1180 (Pa. Cmwlth. 2016).

Gas criteria, the doctrine of primary jurisdiction supports the issuance of a stay.¹³ 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.¹⁴

35. 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).’ ”¹⁵

36. 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.

¹³ County Petition, Section III.C.

¹⁴ See *Elkin v. Bell Tel. Co.*, 491 Pa. 123, 420 A. 2d 371 (1980).

¹⁵ *Elkin*, *supra*, 491 Pa. at 132, 420 A. 2d at 376.

IV. CONCLUSION

WHEREFORE Aqua Pennsylvania Wastewater, Inc. requests that the Public Utility Commission deny the Petition of the County of Delaware for a Stay.

Respectfully submitted,

AQUA PENNSYLVANIA WASTEWATER, INC.

By 

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Date: August 27, 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 27th day of August, 2020, served a true and correct copy of the foregoing Answer of Aqua Pennsylvania Wastewater, Inc. to the Petition of the County of Delaware for Stay, upon the persons and in the manner set forth below:

VIA ELECTRONIC MAIL

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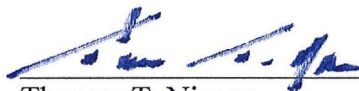
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