PENNSYLVANIA

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

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| Commissioners Present:  Gladys Brown Dutrieuille, Chairman  David W. Sweet, Vice Chairman  John F. Coleman, Jr.  Ralph V. Yanora | |
| Application of Aqua Pennsylvania Wastewater, Inc., pursuant to Sections 507, 1103, and 1329 of the Public Utility Code for Approval of its Acquisition of  the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority | A-2019-3015173 |
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**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Stay and Request for Commission Review and Answer to a Material Question (Interlocutory Petition), filed by the County of Delaware, Pennsylvania (County) on August 7, 2020, in the above-captioned proceeding. On August 13, 2020, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a letter in support of the Interlocutory Petition (I&E Letter). The Office of Consumer Advocate (OCA) filed a brief in support of the Interlocutory Petition on August 14, 2020. On August 17, 2020, Aqua Pennsylvania Wastewater, Inc. (Aqua or Company) and the Delaware County Regional Water Quality Control Authority (DELCORA) each filed a brief in opposition to the Interlocutory Petition.

In the Interlocutory Petition, the County requests that the Commission review and answer 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 [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?

The County asks that the Commission answer the material question in the affirmative. Interlocutory Petition at 2.

For the reasons discussed below, we shall decline to answer the material question or to issue a stay of the proceeding as requested by the County.

**History of the Proceeding**

This matter concerns the Application of Aqua filed on March 3, 2020, pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (Code), 66 Pa. C.S. §§ 507, 1102, and 1329. In its Application, Aqua requests the issuance of an Order and Certificates of Public Convenience approving the Company’s acquisition of the wastewater system assets of DELCORA and the resulting ratemaking rate base pursuant to Section 1329(c)(2) of the Code.

On April 2, 2020, the OCA filed a Protest to the Application and counsel for the OCA and I&E filed their respective Notices of Appearance.

On May 18, 2020, the County filed a Petition to Intervene in the Application proceeding. DELCORA filed a Petition to Intervene on June 6, 2020. Thereafter, by Secretarial Letter dated June 11, 2020 (*June 2020 Secretarial Letter*), the Commission notified Aqua of the conditional acceptance of the Application for filing. However, the Commission directed the Company: (1) to proceed to provide notice of the filing of the Application; (2) to amend its Application to include certain supplemental materials; and (3) to ensure verification of the supplemental materials.

On June 23, 2020, the County filed a Petition for Reconsideration of Staff Action (Reconsideration Petition) requesting the rescission of the *June 2020 Secretarial Letter* and the reissuance of an amended Secretarial Letter with the following additional condition:

Require Aqua to comply with Section 1329(d)(1)(v) of the Public Utility Code and amend its Application to include all relevant documents related to the Rate Stabilization Plan (referenced in Paragraph 36 of the Application and in various direct testimony statements) prior to filing a verification letter with the Commission.

Reconsideration Petition at 1-2.

On July 9, 2020, Aqua filed an Answer to the Reconsideration Petition averring that there is no Rate Stabilization Plan referenced in Paragraph 36 of the Application or in various direct testimony statements. The Company objected to the County’s Reconsideration Petition arguing, in part, that the Petition was not ripe for review. Answer to Reconsideration Petition at 6.

By Secretarial letter dated July 14, 2020, the Commission notified the Parties that the docket was inactive but, if Aqua satisfied all of the conditions in the *June 2020 Secretarial Letter*, and the docket became active as a result of that satisfaction, the Reconsideration Petition, and any responsive filings, would be accepted into the docket and assigned for formal action and disposition.

On July 15, 2020, the County filed an Answer and Reply to the Answer of Aqua to the Reconsideration Petition or, in the alternative an Amended Petition for Reconsideration of Staff Action (Amended Reconsideration Petition) incorporating the averments of the initial Reconsideration Petition and averring “new and additional information concerning developments in a civil court proceeding that arose after the County filed its Petition.” Amended Reconsideration Petition at 2.

On July 23, 2020, Aqua filed a letter confirming completion and satisfaction of the notice requirements and conditions set forth in the *June 2020 Secretarial Letter* and requested that the Commission finally accept the Application.

By Secretarial Letter dated July 27, 2020, the Commission acknowledged receipt of the Company’s completion of the requirements and conditions of filing and accepted Aqua’s Application for consideration. By Hearing Notice dated July 27, 2020, the Office of Administrative Law Judge (OALJ) scheduled an Initial Call-in Telephonic Prehearing Conference for September 2, 2020, before Administrative Law Judge (ALJ) Angela Jones.

On August 4, 2020, Aqua filed its Answer to the Amended Reconsideration Petition.

As noted above, the County filed its Interlocutory Petition on August 7, 2020. On August 13, 2020, I&E filed its letter in support of the Interlocutory Petition. Additionally, the OCA filed its brief in support of the Interlocutory Petition on August 14, 2020.[[1]](#footnote-2)

The Commission published notice of the Application in the August 15, 2020, edition of the *Pennsylvania Bulletin*, which stated that any protests and petitions to intervene must be filed by August 31, 2020. 50 *Pa. B*. 4220.

On August 17, 2020, Aqua and DELCORA filed their respective briefs in opposition to the Interlocutory Petition.[[2]](#footnote-3)

By Opinion and Order entered August 27, 2020, the Commission denied both the Reconsideration Petition and the Amended Reconsideration Petition. Also, on August 27, 2020, Aqua and DELCORA each filed Answers to the Interlocutory Petition. Since the County also filed its Interlocutory Petition pursuant to 52 Pa. Code § 5.41, pertaining to petitions generally, Aqua and DELCORA submit that their Answers advise the Commission, pursuant to 52 Pa. Code § 5.61(e), that they oppose the County’s request for a stay. In its Answer, Aqua requests that the County’s request for a stay be denied and in support restates the Company’s positions presented in its’ brief in opposition to the Interlocutory Petition. DELCORA’s Answer also requests that the Commission deny the stay request and in support attaches its brief in opposition to the Interlocutory Petition.

**Discussion**

**Preliminary Matters**

As a preliminary matter, we note that 52 Pa. Code § 5.302(a) specifies that a “party” to a proceeding may file a petition for interlocutory review. Likewise, a “party” to a proceeding is permitted to file a brief supporting or opposing the petition for interlocutory review. 52 Pa. Code § 5.302(b). Here, the County and DELCORA filed their Petitions to Intervene on May 18, 2020, and June 6, 2020, respectively. To date, the Commission has not ruled on these intervention petitions.

Intervention is governed by Sections 5.71 to 5.76 of our Regulations, 52 Pa. Code §§ 5.71-5.76. A party may file an answer to a petition to intervene within twenty days of service. 52 Pa. Code § 5.66. Failure to file an answer to a petition to intervene may be deemed a waiver of objection to the granting of the petition. *Id*. In this proceeding, no Party has filed an objection to the Petitions to Intervene filed by the County and DELCORA.[[3]](#footnote-4) Moreover, none of the filings pertaining to the proceeding raise any objections to the intervention status of either the County or DELCORA. Accordingly, we find that any objections have been waived and, thus, we shall grant the Petitions to Intervene of the County and DELCORA.

Next, we acknowledge that the County’s Interlocutory Petition does not comply with the three-page limit set forth in 52 Pa. Code § 5.302(a). Aqua objects to the Interlocutory Petition, in part, for failure to comply with this limitation because the filing totals eighteen pages. Aqua Brief at 2.

Section 5.302(b) of our Regulations permits any party to file a brief in support of, or opposition to, the petition for interlocutory review within ten days of service of the petition and such brief shall not exceed fifteen pages. 52 Pa. Code § 5.302(b). Here, the County did not file a brief in support of the Interlocutory Petition pursuant to Section 5.302(b). However, since the County’s Interlocutory Petition does not exceed the total page allowance for both a petition for interlocutory review and a brief in support – and in order to secure a just and speedy resolution of the matter pursuant to 52 Pa. Code § 1.2(a) – we shall accept the Interlocutory Petition as filed.

Regarding the County’s filing of a Reply to the Briefs of Aqua and DELCORA, Section 5.302(d) of our Regulations prohibits such a filing unless specifically directed by the Commission. 52 Pa. Code § 5.302(d). Here, the Commission did not authorize the filing of additional briefs and the County requests that we waive this Regulation. However, waiving Section 5.302(d) to allow the County to file an additional brief would necessarily require us, in the interest of ensuring due process, to offer similar filing opportunities for the other Parties. Doing so would unnecessarily delay the disposition of the Interlocutory Petition which the County has requested prior to September 2, 2020. Accordingly, we shall decline to waive 52 Pa. Code § 5.302(d) or to consider the County’s Reply to the Briefs of Aqua and DELCORA filed on August 24, 2020.

Finally, we note that any issue not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC*,625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**Legal Standards**

During the course of a proceeding and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review and answer to a material question which has arisen or is likely to arise. The standards for interlocutory review are well established. *See* 52 Pa. Code § 5.302(a). Section 5.302(a) of the Commission’s Regulations 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) (*Bell Atlantic*); *Pa. PUC v.* *Frontier Communications of Pa. Inc.,* Docket No. R-00984411 (Order entered February 11, 1999) (*Frontier Communications*); *In* *re:* *Knights Limousine Service, Inc*., 59 Pa. P.U.C. 538 (1985) (*Knights Limousine*).

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.

Generally, Petitions for Interlocutory Review are 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. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3.

The interlocutory review standard has also been interpreted in *Knights Limousine* , where the Commission stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. The Commission has determined that such a showing may be accomplished by a petitioner by its proving that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and R- 2009-2139884 (Order entered April 15, 2010).

# Positions of the Parties

**The County**

In its Interlocutory Petition, the County argues that there are complex disputed issues in another proceeding pending before the Court of Common Pleas of Delaware County at Docket No. CV-2020-003185 (Common Pleas Action). The County submits that the issues in the Common Pleas Action must be resolved prior to adjudication of the Application. Accordingly, the County requests that the Commission answer the material question in the affirmative and issue a stay of this proceeding until January 31, 2021, or such earlier time until the Court in the Common Pleas Action enters a final order in that proceeding. Interlocutory Petition at 17-18.

The County begins by outlining the procedural history of the Common Pleas Action. It asserts that on or about October 20, 1971, the County created DELCORA and pursuant to Section 5619 of the Municipality Authorities Act (Authorities Act), 53 Pa. C.S § 5619, it has the exclusive right, power and authority to terminate DELCORA. On May 14, 2020, while this proceeding was inactive, the County initiated the Common Pleas Action by filing a complaint against DELCORA and the Trust, asserting that DELCORA’s creation of the Trust violates DELCORA’s articles of incorporation, was *ultra vires,* and violates the Authorities Act. Interlocutory Petition at 5-6.

The County continues that on June 3, 2020, the County Council approved and enacted Ordinance 2020-4 (Ordinance) directing the orderly termination of DELCORA. Thereafter, on June 15, 2020, the County filed an Amended Complaint in the Common Pleas Action, seeking a court order enforcing the Ordinance to terminate DELCORA. Also, on June 15, 2020, Aqua filed a petition to intervene in the Common Pleas Action, stating that the Asset Purchase Agreement (APA) in this proceeding “is structured in such a way as to protect DELCORA’s customers by capping all rate increases for customers at 3% per year, by placing the proceeds of the sale (after paying down DELCORA’s obligations) into an independently managed irrevocable trust for the benefit of these customers, with Univest Bank and Trust Co. serving as trustee (“Univest”).” Interlocutory Petition at 6 (quoting Aqua petition to intervene in Common Pleas Action at ¶ 5).

The County notes, however, that Aqua asserted in its Answer to the Reconsideration Petition in this proceeding that the Commission does not have jurisdiction over the Trust. Additionally, the County states that Aqua’s petition to intervene in the Common Pleas Action provides that “[a]lthough the Amended Complaint and the Ordinance do not expressly purport to challenge or attack the enforceability of the APA, the practical effect of the relief requested in the Amended Complaint and the Ordinance constitutes a direct attack on the APA if in fact the County is permitted to terminate DELCORA prior to closing on the APA.” Interlocutory Petition at 6 (quoting Aqua petition to intervene in Common Pleas Action at ¶ 22).

The County states that an order issued in the Common Pleas Action on July 2, 2020, granted Aqua’s petition to intervene and held “this Court determines that Aqua has a real financial interest, referred to as a third-party beneficiary of the DELCORA Trust Agreement” and that “the impact of this case on the agreement between Aqua and DELCORA will be direct, significant and real.” Interlocutory Petition at 7 (quoting Common Pleas Action Order at 2).

The County further emphasizes that it did not name Aqua as a party to the Common Pleas Action, but rather the Company inserted itself as an intervenor into the Common Pleas Action. Since successfully intervening in the Common Pleas Action, Aqua has made itself an active participant and on July 22, 2020, filed a petition for preliminary injunction in the Common Pleas Action. According to the County, Aqua does not challenge the County’s right to ultimately terminate DELCORA, but seeks to enjoin the County from terminating DELCORA prior to closing on the Application in this proceeding. Interlocutory Petition at 7.

The County asserts that on July 29, 2020, the judge in the Common Pleas Action issued an interim stay and scheduled dates for hearings on the County’s Complaint (regarding the Trust) and Aqua’s preliminary injunction (regarding termination of DELCORA), commencing with an initial hearing on September 9, 2020, and ending with a final hearing on October 21, 2020. *Id*.

Next, the County argues that consideration of the Application before the Common Pleas Action is premature for two reasons. First, there are unresolved issues regarding DELCORA’s formation and administration of the Trust intended to administer the Rate Stabilization Plan; and second, there are unresolved issues regarding the termination of DELCORA. Interlocutory Petition at 8-13.

Regarding the purported unresolved issues of the Trust, the County submits that there is no dispute of DELCORA’s formation and administration of the Trust, which is intended to fund the Rate Stabilization Plan, as being integral to the transaction structured by Aqua and DELCORA. The County submits that the Memorandum of Understanding (MOU) included in the Application demonstrates that the rate stabilization to be provided by Aqua in the form of “customer assistance payments” is contingent on distributions from the Trust which is the subject of legal challenge in the Common Pleas Action. Interlocutory Petition at 9.[[4]](#footnote-5)

The County requests that we apply the standard for stay requests set forth in *Pa. PUC v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983) (*Process Gas*).[[5]](#footnote-6) Under the first prong of *Process Gas*, the County argues that it is likely to succeed on the merits in demonstrating in the Common Pleas Action that the Trust agreement and the APA were entered into in violation of the Authorities Act. In support, the County references its allegations that DELCORA violated the Authorities Act by:

(1) creating the Trust when it had no power to do so; (2) devising a funding structure through which DELCORA would continue to exist and hold and distribute public monies, even after transferring the sewer system it was created to operate; (3) adopting a funding process in the Trust which is contrary to and violates DELCORA’s Articles of Incorporation; and (4) refusing to comply with the mandates of County Ordinance 2020-4.

Interlocutory Petition at 9.

The County submits that, as the only incorporating municipality of DELCORA, the County has clear legal rights and a vested interest in the legality of the Trust and the termination of DELCORA, which are properly set forth in the Common Pleas Action and not in the Commission’s Application proceeding. Under the second *Process Gas* standard, the County asserts that it will suffer irreparable injury through the protracted and unnecessary litigation that would occur if the Commission denies the stay request. Moreover, the County argues that the Commission, the ALJ and other intervenors would be faced with a six-month litigation schedule while key components of the Application remain subject to the Common Pleas Action. Interlocutory Petition at 10.

The County adds that the Company and DELCORA view the Trust as a key justification for the Application and that the Trust confers benefits on DELCORA customers. According to the County, the determination of such benefits is critical to the Commission’s review and adjudication of the public interest component of the Application. The County submits, however, its’ challenges to the Trust remain pending in the Common Pleas Action and the Commission cannot effectively discharge its’ duties to adjudicate the Application while fundamental components of the Application remain uncertain pending active litigation. *Id*.

Regarding the last two prongs of *Process Gas*, the County proffers that a stay will not substantially harm the Parties or adversely impact the public interest. The County contends that all the Parties would benefit from a clear resolution of the legality of the Trust and the termination of DELCORA prior to adjudication of the Application, which involves both disposition of the funds from the contested Trust and a transfer of assets from DELCORA. As to any concerns about the stay impacting the potential transaction, the County submits that the APA contemplates that the closing will occur after any necessary litigation. *Id*. at 10-11 (citing the APA at 8 (defining “Outside Date” for closing as occurring sixty days following the unappealable resolution of any litigation concerning the transaction)).

In addition, the County argues that judicial economy and administrative efficiency support the issuance of a stay thereby serving the public interest. Interlocutory Petition at 10.

Regarding its second argument that consideration of the Application before the resolution of the Common Pleas Action is premature, the County contends that the Ordinance directs the orderly termination of DELCORA. The Ordinance requires the winding down of DELCORA’s operations including the satisfaction of outstanding debts and obligations and the removal of any impediments to its termination. The County notes, however, that Aqua has filed a preliminary injunction in the Common Pleas Action seeking to enjoin the enforcement of the Ordinance and the termination of DELCORA in advance of the closing in the Application proceeding. Interlocutory Petition at 11-12.

In applying the *Process Gas* standards for a stay, the County argues that it will succeed in enforcing the Ordinance and terminating DELCORA. Since it is the only incorporating municipality of DELCORA, the County contends that it has a clear right to terminate DELCORA; and, regardless of the potential sale transaction, the County is entitled to a writ of mandamus to require DELCORA to comply with the Ordinance. Similar to its prior *Process Gas* arguments, the County argues that denial of the stay will cause irreparable harm to the Commission, the ALJ and other intervenors to proceed with a compressed six-month litigation schedule while the ultimate existence of the counterparty to the APA remains subject to litigation. The County asserts that enforcement of the Ordinance could have significant impacts on the proposed transaction, highlighting Aqua’s argument in its petition to intervene in the Common Pleas Action that the Company’s entry into the APA was conditioned on DELCORA remaining a counterparty. The County also reiterates its prior arguments that the proposed stay would not harm the Parties to the Application proceeding or the public interest. Interlocutory Petition at 12-13.

As an alternative to the *Process Gas* factors, the County argues that the doctrine of primary jurisdiction also supports the issuance of the proposed stay. The County contends that the doctrine of primary jurisdiction is a jurisprudential rule allowing administrative agencies and courts of common pleas to defer to each other when litigation, parties, and jurisdictional issues overlap. Here, the County submits that it is not suggesting the Commission lacks jurisdiction over a Section 1329 application, but that the Commission may not have jurisdiction over many substantive issues fundamental to the Application herein. Accordingly, the County requests that the Commission defer the exercise of its jurisdiction by staying this proceeding and allowing the critical non-jurisdictional issues to proceed in the Common Pleas Action. *Id*. at 13-14.[[6]](#footnote-7)

As a final matter, the County addresses the six-month time frame for issuance of an order on the Application under Section 1329 and the Commission’s *Emergency Order*. Regarding the Section 1329 timeframe for disposition of the Application, the County submits that the ongoing litigation in the Common Pleas Action presents extraordinary circumstances warranting the exercise of Commission discretion to grant the requested stay. According to the County, the unusual circumstances involve Aqua’s implication of the subject matter of the Application in the Common Pleas Action. Thus, the County continues, it would be appropriate for the Commission to stay the proceeding because the procedural deadlines in Section 1329 are directory and not mandatory. Interlocutory Petition at 16 (citing *Public Service Water Co. v. Pa. PUC*, 645 A.2d 423 (Pa. Cmwlth. 1994)).

As to the *Emergency Order*, the County asserts that the Interlocutory Petition will occur during the COVID-19 pandemic and the Commission has already acknowledged that strict adherence to deadlines may not be possible. Under these circumstances, the County submits that an order staying all substantive proceedings in this matter would be in the public interest. Interlocutory Petition at 17.

**I&E and OCA**

In its letter in support of the Interlocutory Petition, I&E emphasizes that the final hearings in the Common Pleas Action are not set to conclude until October 21, 2020, but that the Prehearing Conference in this proceeding is scheduled for September 2, 2020. If the stay is denied, I&E submits that the Parties in this proceeding will be engaging in discovery, serving written testimony, and litigating the merits of the Application prior to the conclusion of the Common Pleas Action. I&E argues that this will likely result in the Parties, the ALJ, and the Commission expending significant time in litigating and considering the Application without knowing for certain whether DELCORA has the legal authority to act as a qualifying “selling utility” as defined in Section 1329 of the Code. I&E Letter at 1-2.

I&E supports the Interlocutory Petition for two reasons. First, I&E contends that the Commission will be prevented from determining if the Application affirmatively promotes the service, accommodation, convenience or safety of the public in some substantial way and be in the public interest because the seller’s status and authority to make commitments that underlie the APA are uncertain and subject to the outcome of pending litigation. According to I&E, it envisions the possibility of a Commission determination about the public benefits of the transaction being reversed by a subsequently-issued order in the Common Pleas Action. *Id*. at 2.

In its second supporting reason, I&E agrees with the County that the Commission, the ALJ, and intervenors would be irreparably harmed by being compelled to litigate the complex Application involving a voluminous record and truncated statutory timeframe subject to the risk of litigation in the Common Pleas Action. Additionally, I&E argues that the Commission’s six-month consideration period under Section 1329(d)(2) of the Code is not triggered in this proceeding because DELCORA’s status as a “selling utility” appears to be directly at issue in the Common Pleas Action. I&E Letter at 2.

The OCA also supports the Interlocutory Petition for the same reasons asserted by the County. Additionally, the OCA highlights that Aqua described the benefits of the transaction in its Application. Specifically, the Company submitted testimony that the “impact on bills for DELCORA’s customers was one of the driving forces behind the transaction and is the primary benefit.” OCA Brief at 2 (quoting Aqua St. No. 5 at 11). The OCA further notes Aqua’s testimony describing how the sale proceeds will be placed in an irrevocable trust for the benefit of DELCORA’s customers and how “this is a relatively unique feature for a transaction of this nature and provides a substantial benefit to our customers.” *Id*. The OCA contends that, since the Trust is being claimed as a primary benefit of the proposed transaction for customers and a unique feature of the transaction, the disputed legality of the Trust in the Common Pleas Action will impact the Application and could come into contact with the Commission’s determination in this proceeding. OCA Brief at 2.

The OCA also argues that approval of the Application without resolving the issues in the Interlocutory Petition could lead to irreparable harm for existing Aqua and DELCORA customers. In support, the OCA notes that the Common Pleas Action encompasses the same APA as this proceeding and includes many of the same Parties. The OCA also contends that, regardless of the outcome in the Common Pleas Action, a stay would promote judicial efficiency by lessening the time and expense that the Commission and the Parties will expend litigating issues in this proceeding which are subject to ongoing litigation in the civil proceeding. *Id*. at 3.

In further support of the Interlocutory Petition, the OCA proffers that the issuance of a stay until the issues in the Common Pleas Action are resolved would promote a settlement in this proceeding. The OCA reasons that during the pendency of the ongoing Common Pleas Action the Parties may be less inclined to settle while the issues in that proceeding remain unresolved. According to the OCA, after conclusion of the Common Pleas Action, any issues that may overlap between the Common Pleas Action and this proceeding would be resolved which would lead to more certainty between the Parties and the Commission in determining whether a settlement is in the public interest. *Id*.

**Aqua**

Aqua makes two threshold objections to the Interlocutory Petition. First, the Company argues that the County has failed to satisfy the requirements for interlocutory review and answer to a material question; and second, the Commission is prevented from staying the proceeding and thereby extending the resolution of the proceeding beyond the six-month statutory review period. Aqua Brief at 2-6.

Regarding the standards for interlocutory review, Aqua asserts that the County fails to explain how it is being prejudiced or how interlocutory review would expedite the conduct of this Section 1329 proceeding. Since the County fails to identify extraordinary circumstances or compelling reasons for interlocutory review, the Company proffers that the Interlocutory Petition should be denied without addressing the material question. Aqua Brief at 3.

Rather than expedite the proceeding, Aqua contends that the County is seeking to delay it until a final determination in the Common Pleas Action which is inconsistent with the recognized criteria for interlocutory review. In addition, the Company asserts that the County is not being prejudiced by this proceeding and that the Commission has no jurisdiction to address the issues in the Common Pleas Action. In this regard, Aqua highlights the County’s admission that the legality of the Trust and the County’s effort to terminate DELCORA are properly before the court in the Common Pleas Action and not before the Commission. *Id*. at 4 (citing Interlocutory Petition at 10).

In response to the County’s argument that denial of the stay would lead to protracted litigation and potential re-litigation of issues, Aqua submits that such concerns do not constitute substantial prejudice. Moreover, the Company argues that the Commission should not presume that the County will prevail in the Common Pleas Action which involve disputed issues and that the pertinent matter for consideration in this proceeding is whether there are substantial public benefits in support of the Application. According to Aqua, these public benefits include rate issues as well as the continuation of reasonable and adequate wastewater service. The Company contends that the Commission should move forward with its review and consideration of those public benefits. *Id*. at 4.

Regarding the County’s citation to the *Emergency Order*, Aqua argues that the COVID-19 pandemic restrictions are not hampering the processing of the Company’s Application. Rather, Aqua continues, remote processing, discovery via electronic mail, and the scheduling of a telephonic prehearing conference all indicate that the COVID-19 restrictions provide no bases for staying this proceeding. *Id*.

As to the second threshold objection, Aqua asserts that Section 1329 requires the Commission to issue a final order within six months of the acceptance of the Application, *i.e.*, by January 23, 2021. Aqua argues that the six-month timeframe is an integral part of Section 1329, which was enacted to encourage the acquisition of municipal water and wastewater systems. The Company characterizes the statutory time period as a mandatory deadline and not a directory pronouncement. Aqua Brief at 5 (citing *West Penn Power Co. v. Pa. PUC*, 521 A.2d 75 (Pa. Cmwlth. 1987)). Additionally, Aqua contends that the six-month review period may not be ignored for litigation scheduling purposes as suggested by the County. In support, the Company submits that all statutory provisions are meant to be followed regardless of whether the provision is directory or mandatory. Aqua Brief at 5-6 (citing *In re Condemnation by the Com. of Pa.*, 131 A.3d 625, 631-32 (Pa. Cmwlth. 2016) (*In re Condemnation*) (“It is only in the effect of non-compliance that a distinction [between directory and mandatory language] arises.”) (internal citations omitted)).

Aqua also asserts that Commission precedent supports the conclusion that the Commission must issue a final order in a Section 1329 proceeding within six months. Aqua Brief at 5 (citing *Application of Aqua Pennsylvania Wastewater, Inc. – New Garden Township*, Docket No. A-2016-2580061 (Order entered February 15, 2017)).

If the Commission decides to answer the material question, Aqua requests that it be answered in the negative. In support, Aqua argues that the *Process Gas* criteria for a stay do not support the Interlocutory Petition. As an initial matter, the Company submits that *Process Gas* addresses the standards for a stay of a Commission order pending appeal and has no application to the circumstances of this matter where the County is seeking a Commission stay of the Application proceeding pending the resolution of the Common Pleas Action. Aqua states that the County acknowledges the differing circumstances for applying *Process Gas*, but the County suggests without support that *Process Gas* may assist the Commission in rendering a decision on the Interlocutory Petition. Aqua Brief at 6.

Addressing the *Process Gas* factors, Aqua argues that the pending Common Pleas Action involves matters in dispute and, thus, the Commission should not presume that the County will prevail in that litigation. Citing to its averments in the Common Pleas Action, Aqua submits that it has requested a ruling in the Common Pleas Action declaring the APA to be a valid, binding and enforceable agreement and that closing on the APA must occur prior to termination of DELCORA by the County. Aqua also notes that it has filed a preliminary injunction in the Common Pleas Action requesting the court to enjoin and restrain the County from terminating DELCORA prior to closing and to enjoin and restrain the County from interfering in any way with the Company’s existing contractual relationship with DELCORA. Aqua Brief at 7-8.

Aqua also references DELCORA’s averments in response to the County’s challenge to DELCORA’s authority to establish the Trust. Here, Aqua emphasizes that it is not requesting the Commission to address these issues; rather, the Company asserts it is highlighting these averments to show that it is not likely that the County will prevail in the Common Pleas Action. *Id*. at 8.

Under the second *Process Gas* factor, Aqua argues that the County will not suffer irreparable harm absent a stay. Noting the County’s contention that it will suffer protracted and unnecessary litigation, Aqua asserts that litigation may be inconvenient, time consuming, and expensive, but it is not irreparable harm. The Company also discounts the underlying assumption in the County’s contention that it will likely prevail in the Common Pleas Action. Aqua proffers that it is entirely likely that the County will not prevail in the civil action. As a counter to the alleged litigation harm, Aqua cites to various proffered benefits to the transaction set forth in the Application which provide benefits to DELCORA’s customers and are in the public interest. Aqua Brief at 9-10.

Regarding the third *Process Gas* factor, Aqua argues that a stay will cause substantial harm to the Company. Aqua contends that it has a binding and enforceable agreement to acquire the DELCORA system and its Application requires a final order from the Commission within six months of the date of being fully accepted. According to Aqua, a stay would frustrate the Company’s desire to close the proceeding within a reasonable time after the Commission completes its six month review. Aqua argues that a stay extending the review period beyond six months would constitute a violation of law, which constitutes *per se* irreparable harm. *Id*. at 10 (citing *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Cmwlth. 2016)).

As to the final *Process Gas* factor, Aqua submits that the General Assembly has encouraged the sale of public water and wastewater assets at market rates pursuant to Section 1329 of the Code. The Company argues that it is furthering this recognized statutory objective in its proposed transaction which is a sale of a municipal wastewater system at market rates. Thus, Aqua proffers that a stay would adversely affect this public interest. Aqua Brief at 10-11.

Regarding the County’s alternative argument that the doctrine of primary jurisdiction supports a stay, Aqua notes that the doctrine is typically applied in civil proceedings where a litigant is seeking damages caused by an alleged lack of reasonable utility service. Under that scenario, the court may refer the service question to the Commission, which has no jurisdiction to award monetary damages but can address the service issue applying its special expertise. After the Commission determines the regulatory issue within its jurisdiction, the civil litigation continues guided in scope and direction by the Commission. *Id*. at 11 (citing *Elkin v. Bell Tel. Co.*, 491 Pa. 123, 420 A.2d 371 (1980) (*Elkin*)).

Aqua argues that the doctrine of primary jurisdiction – which exists so that the courts can have the benefit of the agency’s views on issues within the agency’s competence – does not support the County’s attempt to stay a Commission proceeding. According to the Company, the doctrine would allow a civil court to refer a matter of utility service to the Commission but does not contemplate a stay of a Commission proceeding addressing issues of public interest for wastewater service. Aqua Brief at 11‑12.

**DELCORA**

In its brief, DELCORA requests that the Commission deny the Interlocutory Petition and in support presents four main arguments. First, DELCORA asserts that the six-month consideration period for the Application set forth in Section 1329(d)(2) of the Code is mandatory. Second, DELCORA submits that even if the Commission were to disregard the statutory mandate of a six-month review, a stay is unwarranted here because the Commission’s review of the Application is not dependent on the disposition of the Common Pleas Action. Third, DELCORA contends that even if the *Process Gas* test were to be applied, the County fails to satisfy it. Fourth, DELCORA argues that the doctrine of primary jurisdiction does not support a stay because the County asserted the Commission’s jurisdiction as a defense in the Common Pleas Action. DELCORA Brief at 5-15.

In its first argument, DELCORA contends that there are no exceptions to the statutory six-month requirement for the issuance of a Commission final order pertaining to the Application. Additionally, DELCORA attempts to distinguish the caselaw pertaining to mandatory and directory statutory provisions. According to DELCORA, the County ignores the well-established holding that distinctions between mandatory and directory deadlines are drawn only in the context of determining the consequences of missing such a deadline. DELCORA argues that the Commission may not disregard a statutory deadline at the start of an administrative proceeding regardless of the characterization of the statutory language. DELCORA Brief at 5-6 (citing *In re Condemnation*, 131 A.3d at 631-32).

DELCORA submits that granting a stay would be unprecedented, violate clear legal principles, and set a dangerous precedent for Section 1329 applications before the Commission. Additionally, DELCORA objects to I&E’s argument that the six-month statutory review period has not been triggered because DELCORA’s status as a selling utility under Section 1329(d)(1) appears to be at issue in the Common Pleas Action. DELCORA contends that I&E’s argument has no legal support. DELCORA also avers that it is presently the selling utility and that a counterparty to Aqua in the APA will always be present. DELCORA Brief at 6-7.

In its second argument, DELCORA proffers that a stay is unwarranted because the Commission’s review of the pending transaction is in no way dependent on the disposition of the issues in the Common Pleas Action. As support, DELCORA asserts that the APA is a valid, enforceable agreement and the County concedes that the Common Pleas Action will not alter this fact. Here, DELCORA cites to the County’s answer to Aqua’s preliminary injunction in the Common Pleas Action and emphasizes the County’s averments that its’ amended complaint does not challenge the APA or the sale of assets from DELCORA to Aqua. DELCORA Brief at 7, Exh. D at ¶¶ 51-52.

DELCORA submits that the issues before the Commission which pertain to the APA and the sale of assets from DELCORA to Aqua are distinct and severable from the issues in the Common Pleas Action. According to DELCORA, the APA was validly executed by both DELCORA and Aqua and that DELCORA had the legal authority under the Authorities Act to do so. *Id*. at 7-8 (citing 53 Pa. C.S. § 5607(d)(13)).

In further support of its second argument, DELCORA argues that the County’s attempt to terminate DELCORA does not prevent the Commission from reviewing the instant transaction with Aqua. DELCORA contends that the Authorities Act is clear that the County can only terminate DELCORA after assumption of DELCORA’s binding obligations under the APA. Since those obligations would survive DELCORA’s termination, the consideration of DELCORA’s termination in the Common Pleas Action would have no bearing in this proceeding and does not support the issuance of a stay. DELCORA Brief at 8-9 (citing 53 Pa. C.S. §§ 5619, 5622).

Continuing with its second main argument, DELCORA contends that nothing about the County’s challenge to the Trust in the Common Pleas Action provides a legal basis for the Commission to stay this proceeding. DELCORA asserts that it has committed to applying the proceeds of the transaction to be used for the benefit of its ratepayers via the Trust. According to DELCORA, the fact that the validity of the Trust is being challenged in the Common Pleas Action is ultimately irrelevant to this proceeding because the APA is not conditioned on the Trust’s validity. If the Trust is held to be invalid, DELCORA continues, the transaction can go forward with or without the Trust component. DELCORA explains that, absent the Trust, the money paid to DELCORA will still be available for its ratepayers’ benefit and be applied for that purpose in another way not requiring Commission jurisdiction. DELCORA Brief at 9-10.

Regarding its third main argument pertaining to *Process Gas*, DELCORA states that the application of the test to this proceeding would be unwarranted and without precedent. However, DELCORA continues, if the Commission were to apply *Process Gas* to the Interlocutory Petition, the County has not satisfied it. DELCORA Brief at 11.

As to the first prong of the *Process Gas* standard – of whether there is a strong showing of success on the merits – DELCORA argues that the County simply makes bald, conclusory averments that the Trust violates DELCORA’s articles of incorporation, is an invalid governmental entity, and violates the Authorities Act and the Uniform Trust Act. In response, DELCORA attaches copies of its articles of incorporation and the Trust agreement and makes legal arguments that the Trust does not violate the articles of incorporation and cannot be deemed a governmental entity. DELCORA Brief at 11-12 (citing Exhs. G and H). Additionally, DELCORA makes legal arguments that the Trust does not violate either the Authorities Act or the Uniform Trust Act. According to DELCORA, the County’s claim that it has made out a strong showing of being likely to prevail on the merits is false. DELCORA Brief at 12-13.

Under the second Process Gas standard, DELCORA argues that the County has failed to show or sufficiently allege that it will suffer irreparable harm if a stay is denied. DELCORA submits that the County’s concerns of protracted and unnecessary litigation in the absence of a stay are unfounded for three reasons. First, DELCORA contends that having to litigate an action does not constitute irreparable harm. Second, by operation of the six-month time limit under Section 1329 of the Code, the County’s claim of a protracted proceeding are incorrect. Third, DELCORA contends that the County has not specified what would be different in this proceeding if the County were successful in the Common Pleas Action. *Id.* at 13.

According to DELCORA, the Commission is able to consider whether the Application is in the public interest both with and without the prospect of the Trust. Moreover, DELCORA asserts that the County has not explained how the proposed transaction would be impacted if DELCORA is terminated and the County replaces DELCORA as a party to the APA. DELCORA further alleges that the County has consistently stated that the Commission’s ruling on the APA and the sale needs to occur before the County can step into the shoes of DELCORA as a party to the APA. *Id*. (citing Exh. C, Response Nos. 3, 6, 7).

Regarding the final *Process Gas* prong – substantial harm to other interested parties – DELCORA reiterates the argument that violation of the six-month consideration period under 66 Pa. C.S. § 1329(d)(2) would itself constitute *per se* irreparable harm. DELCORA also contends that the Interlocutory Petition is a delay tactic that will cause significant harm to DELCORA and its ratepayers. DELCORA Brief at 14.

In support, DELCORA cites to the testimony of its’ Executive Director submitted with the Application who stated that the sale to Aqua resulted in large part because DELCORA was facing expenses of at least $606 million to remain with the Philadelphia Water Department (PWD) which handles a portion of DELCORA’s wastewater flow. DELCORA notes that, in contrast, separation from PWD will cost approximately $450 million. As a result, DELCORA explains, it decided to leave PWD and enter into the APA to facilitate the separation. DELCORA asserts that the work to separate from PWD must occur immediately to be in a position to disconnect from PWD in 2028, when DELCORA’s current contract with PWD ends. *Id.* (citing Aqua St. No. 5 at 6-9).

DELCORA argues that any delay in these proceedings would delay this critical work. DELCORA warns that such a scenario could have drastic implications for its ratepayers who would face the burden of bearing even more significant capital improvement costs. In addition, DELCORA asserts that there would be a risk that the work would not be completed by 2028 thereby leaving DELCORA without a way to treat a portion of its wastewater at that time. DELCORA submits that it faces real-life consequences for its ratepayers as opposed to supposed harms alleged by the County involving the payment of attorney fees for litigation in proceedings it decided to initiate or intervene in. DELCORA Brief at 14-15.

In its last main argument, DELCORA incorporates the arguments of Aqua opposing the application of the doctrine of primary jurisdiction. Additionally, DELCORA alleges that the County’s own pleadings unequivocally assert as a defense in the Common Pleas Action that the APA is subject to the Commission’s exclusive jurisdiction. As an example, DELCORA cites to and attaches a copy of the County’s preliminary objections to the counterclaims of DELCORA. *Id*. at 15, Exh. J. at ¶ 19.

In summary, DELCORA submits that the Commission is fully capable of reviewing the Application before it, while the court in the Common Pleas Action hears the claims related to the Trust and the Ordinance. DELCORA argues that both proceedings can, and should, proceed concurrently. DELCORA Brief at 15.

**Disposition**

Upon review, we decline to answer the material question set forth in the Interlocutory Petition. First, the County has not shown that granting interlocutory review will prevent substantial prejudice. The pertinent consideration is whether the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *See*, *Bell Atlantic*, *Frontier Communications*, and *Knights Limousine*, *supra.* Here, the County alleges that it will suffer irreparable injury through protracted and unnecessary litigation that would occur if the Commission were to deny the stay request. Thus, this alleged prejudice is associated with having to participate as an intervenor in the Application proceeding if the Commission denies its Interlocutory Petition. However, the Commission has found that the time, effort, and expense associated with having to litigate a case does not typically amount to substantial prejudice for purposes of granting interlocutory review.[[7]](#footnote-8)

The County also alleges that the Commission, the ALJ, and the other intervenors would be faced with the prospect of litigating the Application subject to a six-month review period while key components of the Application remain subject to and conditioned upon the outcome of the Common Pleas Action. Again, the obligations and responsibilities of the Parties related to the administrative litigation schedule before the Commission are not considered substantial prejudice in our evaluation of interlocutory review petitions. Moreover, the conclusion that key components of the Application are pending and first require resolution in the Common Pleas Action is speculative at the present posture of this proceeding.

The County’s claims of prejudice rests on the assumption that it will prevail in the Common Pleas Action. This contention is further premised on its arguments in support of its stay under the *Process Gas* criteria. Although the Commission has adopted the standards of *Process Gas* in reviewing petitions which seek to stay the effect of Commission Orders, the Interlocutory Petition herein does not seek the stay of any particular Commission Order. Despite this, the County requests that we apply *Process Gas* and impose a stay of the entire Application proceeding until the disposition of the Common Pleas Action. A review of the first prong of *Process Gas* makes clear that such a request is inappropriate because it requires the evaluation of the likely success of a newly asserted cause of action in another tribunal relating to issues over which the Commission has no jurisdiction. The *Process Gas* criteria more properly pertain to stay requests of Commission Orders and not to the evaluation of the likely success of a civil complaint proceeding involving legal issues which at present appear to be beyond our ken.

Nonetheless, the County invites us to make a determination that it will likely be successful in its Common Pleas Action and that proceeding any further on the Application may cause the Parties to suffer substantial injury. In contrast, Aqua and DELCORA argue that the County’s Common Pleas Action will just as likely prove unsuccessful and that both actions can, and should be, considered concurrently. Plainly, we are unable to engage in speculating the winners of the County Pleas Action. This does not mean, however, that the Commission is authorized to sit back and wait for some future ruling by the Common Pleas Court particularly when the General Assembly has established a time frame for a Commission determination of a Section 1329 proceeding. Such a delay could as likely prove harmful to the Parties if this proceeding were to be stayed – and the Parties and the Commission were denied the timely opportunity to investigate and evaluate the Application – and the court in the Common Pleas Action later determines that the County’s amended complaint should be dismissed.

In applying the additional factors for evaluating petitions for interlocutory review, we also determine that the County has not shown that granting interlocutory review will expedite the conduct of the proceeding. Section 1329(d)(2) of the Code states that the Commission “shall issue a final order on an application submitted under this section within six months of the filing date of an application meeting the requirements of subsection (d)(1).” 66 Pa. C.S. § 1329(d)(2). The Commission issued the Secretarial Letter finally accepting the Application for filing on July 27, 2020, and Section 1329(d)(2) requires the Commission to issue a final Order on the Application within six months of the filing acceptance date.

The Parties argue whether the language of Section 1329(d)2) is mandatory or directory. However, we need not resolve that dispute in this Opinion and Order because the Commission has already taken the appropriate steps to help ensure compliance with the legislative directive. *See*, *e.g.*, *Further Corrected Prehearing Conference Order* dated August 17, 2020 (setting forth a proposed litigation schedule but indicating a required date for the issuance of a final Commission determination by the Public Meeting of January 14, 2021). In this regard, we acknowledge that both mandatory and directory provisions of the General Assembly are meant to be followed and it is only in the effect of non-compliance that a distinction arises. *See In re Condemnation*, 131 A.2d at 631-32.[[8]](#footnote-9) Granting a stay in this proceeding would impede the expeditious consideration of the Application as contemplated under Section 1329.

Finally, we decline the invitation to apply the doctrine of primary jurisdiction in this matter. This doctrine generally applies to a court refraining from hearing a case in order to protect the integrity of the regulatory scheme and to allow the initial resolution of a dispute before an administrative agency. *County of Erie v. Verizon North, Inc.*, 879 A.2d 357, 363 (Pa. Cmwlth. 2005). As the Pennsylvania Supreme Court has explained, a purpose of the doctrine is to make use of an administrative agency’s experience and expertise in complex areas and to promote consistency and uniformity in the area of administrative policy. *Elkin*, 420 A.2d at 376. We are not persuaded to apply the doctrine in reverse – that is, to refrain from hearing the Application proceeding and defer to a determination in the Common Pleas Action. In our view, taking such an action would not protect the integrity of the regulatory scheme pertaining to the consideration of the Application under Section 1329. Rather, it would potentially impede the timely regulatory review process intended by the General Assembly.

**Conclusion**

For the reasons set forth above, we shall grant the Petitions to Intervene filed by the County and DELCORA, and shall decline to answer the material question or to issue a stay of the proceeding as requested by the County in the Interlocutory Petition, consistent with the discussion in this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition to Intervene filed by the County of Delaware, Pennsylvania on May 18, 2020, is granted, consistent with this Opinion and Order.

2. That the Petition to Intervene filed by the Delaware County Regional Water Quality Control Authority on June 6, 2020, is granted, consistent with this Opinion and Order.

3. That with regard to the Petition for Stay and Request for Commission Review and Answer to a Material Question filed by the County of Delaware, Pennsylvania on August 7, 2020, we shall decline to answer 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?

4. That this matter is returned to the Office of Administrative Law Judge for such proceedings as may be necessary.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 31, 2020

ORDER ENTERED: August 31, 2020

1. Also, on August 14, 2020, the OCA filed an Expedited Motion for an Extension of the Statutory Suspension Period of Aqua’s Application (Expedited Motion) which requested an extension of the suspension period by sixty days. The OCA filed the Expedited Motion pursuant to the *Suspension of Regulatory and Statutory Deadlines: Modification to Filing and Service Requirements* *– Emergency Order*, Docket No. M-2020-3019262 (March 20, 2020); *see also*, *Suspension of Regulatory and Statutory Deadlines: Modification to Filing and Service Requirements* *– Ratification Order*, Docket No. M-2020-3019262 (Order adopted March 26, 2020) (*Emergency Order*). According to the OCA, the suspension is necessary to meet the mounting challenges resulting from the COVID-19 pandemic and will ensure that the OCA has sufficient time to investigate and support its position in the Application proceeding. The OCA submits that its Expedited Motion should not be viewed as an alternative resolution to the issues raised in the Interlocutory Petition. Expedited Motion at 4. In the Procedural Order dated August 18, 2020, ALJ Jones directed the Parties to address the Expedited Motion in writing by August 24, 2020. To date the Expedited Motion remains pending before the OALJ. [↑](#footnote-ref-2)
2. On August 24, 2020, the County filed a Reply to the Briefs of Aqua and DELCORA. For the reasons discussed below, we shall decline to consider this additional filing. [↑](#footnote-ref-3)
3. Both Petitions to Intervene were filed before the Application was finally accepted for filing on July 27, 2020, and when the docket became active. However, even if we were to apply the later date of July 27, 2020, for purpose of starting the clock for responses, no objections have been filed in this matter as of the date of this Opinion and Order. Pursuant to 52 Pa. Code § 5.75(b), we are taking action on the Petitions to Intervene of the County and DELCORA in order to address the Interlocutory Petition and the responses thereto and to provide timely guidance to the ALJ and the Parties on the Interlocutory Petition issues prior to the Prehearing Conference. [↑](#footnote-ref-4)
4. The County cites to the MOU contained in the Direct Testimony of William C. Packer as follows:

   3. Aqua Wastewater shall calculate the customer assistance payment amount for each DELCORA customer and the total customer assistance payment amount for each billing period, and shall provide its calculation, along with any and all information necessary to confirm the calculation of both payment amounts to the designated calculation agent.

   4. DELCORA shall timely direct the Trustee under the Trust Agreement to transfer to Aqua Wastewater by Fedwire amount equal to the total customer assistance amount confirmed by the designated calculation agent for the applicable billing period.

   *Id.* (citing Aqua St. No. 2, App. B). [↑](#footnote-ref-5)
5. In *Process Gas*, the Pennsylvania Supreme Court held that the courts of the Commonwealth should apply the following criteria when considering the issuance of a stay: (1) the petitioner makes a strong showing of being likely to prevail on the merits; (2) the petitioner has shown that without the requested relief it will suffer irreparable injury; (3) the issuance of the stay will not substantially harm other interested parties; and (4) the issuance of the stay will not adversely affect the public interest. 467 A.2d at 809. [↑](#footnote-ref-6)
6. The County notes that neither DELCORA nor Aqua raised the doctrine of primary jurisdiction in the Common Pleas Action and, therefore, they waived raising it. To the contrary, the County continues, Aqua intervened in the Common Pleas Action by asserting that the County’s Amended Complaint and the Ordinance were a direct attack on the APA. Interlocutory Petition at 15. [↑](#footnote-ref-7)
7. *See, e.g., Mobilfone of Northeastern PA, Inc. v. Paul Kelly d/b/a American Teletronix*, 67 Pa. P.U.C. 256 (1988); *Petition of West Penn Power Company d/b/a Allegheny Power*, Docket No. P-2010-2158084 (Order entered November 8, 2010); and *Alderwoods (Pennsylvania), Inc., v. Duquesne Light Company*, Docket Nos. P-2016-2541570 and C-2016-2522634 (Order entered October 13, 2016). [↑](#footnote-ref-8)
8. However, we recognize that there may be circumstances which could prevent the Commission from meeting a statutory compliance date such as those outlined in the *Emergency Order*. Furthermore, this Opinion and Order does not address the OCA’s Expedited Motion, and the responses thereto, pertaining to the *Emergency Order* because that matter is currently pending before the OALJ. [↑](#footnote-ref-9)