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August 31, 2020

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA ELECTRONIC FILING

**RE: 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
Docket No. A-2019-3015173**

Dear Secretary Chiavetta:

Attached for filing with the Pennsylvania Public Utility Commission in the above-referenced proceeding is the Protest of the County of Delaware.

As shown by the attached Certificate of Service and per the Commission's March 20, 2020, Emergency Order, all parties to this proceeding are being duly served via email only due to the current COVID-19 pandemic. Upon lifting of the aforementioned Emergency Order, we can provide parties with a hard copy of this document upon request.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Adeolu A. Bakare

Counsel to the County of Delaware, Pennsylvania

c: Administrative Law Judge Angela T. Jones
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

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Certificate of Service

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Adeolu A. Bakare
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Dated this 31st day of August, 2020, in Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**PROTEST OF
THE COUNTY OF DELAWARE, PENNSYLVANIA**

Pursuant to Section 5.51 of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") Regulations, 52 Pa. Code § 5.51, the County of Delaware, Pennsylvania (the "County" or "Protestant"), hereby files this Protest ("Protest") in the above-captioned proceeding concerning the Application ("Application") of Aqua Pennsylvania Wastewater, Inc. ("Aqua"), seeking Commission approval for the acquisition of the Wastewater System Assets ("System") of the Delaware County Regional Water Quality Control Authority ("DELCORA" or "Authority"), and the right of Aqua to provide wastewater service to the areas served by the Authority. In support of this Protest, the County states as follows.

I. INTRODUCTION AND BACKGROUND

1. Delaware County is a political subdivision of the Commonwealth of Pennsylvania, with administrative offices located at Government Center, 226A, 201 W. Front Street, Media, Pennsylvania, 19063. The County is the incorporating municipality of DELCORA and is also a DELCORA customer.¹

¹ DELCORA is a municipal authority created by the County under the Municipality Authorities Act of 1945 (now codified in the Municipality Authorities Act, 53 Pa. C.S. §5601 et seq.) ("Authorities Act").

2. The names and address of the County's attorneys are:

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3. On December 30, 2019, the Commission established Docket No. A-2019-3015173 for document management purposes only when it acknowledged receipt of Aqua's Letter/Notice of Licensed Engineer and Utility Valuation Expert Engagement regarding the proposed acquisition.

4. On March 3, 2020, Aqua filed an Application seeking Commission approval to acquire DELCORA and provide wastewater service to areas served by DELCORA.

5. Through the Application, Aqua sought PUC approval of the ratemaking rate base of the assets used to serve DELCORA's 16,000 customer connections and numerous wholesale customers pursuant to Section 1329(c)(2) of the Public Utility Code, 66 Pa. C.S. § 1329. Application at ¶ 8. In total, DELCORA collects, conveys and treats approximately 197,000 Equivalent Dwelling Units for retail, wholesale, municipal, commercial, and industrial rate classes. Aqua Statement No. 5 (Direct Testimony of Robert Willert) at 4. Aqua also requested Commission approval of the Asset Purchase Agreement ("APA") between Aqua and the Authority pursuant to Section 507 of the Public Utility Code, 66 Pa. C.S. § 507. Application at ¶ 3. Aqua further requested approval to apply disbursements from a Rate Stabilization Trust ("Trust") to customers acquired from DELCORA through Aqua's billing process. *See*

Application at ¶ 36; Aqua Statement No. 2 (Direct Testimony of William C. Packer), Appendix B.

6. On May 18, 2020, the County filed a Petition to Intervene in this proceeding.

7. On June 11, 2020, the Commission issued a Secretarial Letter ("June 11 Secretarial Letter") conditionally accepting Aqua's Application, subject to Aqua's completion of the notifications and conditions established in the June 11 Secretarial Letter. The June 11 Secretarial Letter expressly stated it was a staff determination subject to reconsideration by the Commission by a petition made pursuant to Section 5.44 of the Commission's procedural regulations.

8. On June 23, 2020, the County filed a Petition for Reconsideration of Staff Action requesting that the Commission rescind staff's conditional acceptance of Aqua's Application. The County asked the Commission to reissue the June 11 Secretarial Letter with this additional condition placed upon Aqua: that Aqua 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 statements²). The County explained that DELCORA's formation of the Trust and the associated plan to stabilize post-transaction rates through Trust disbursements to Aqua was a "rate stabilization plan" *required* to be included in an application made pursuant to Section 1329 of the Public Utility Code. The County asserted that the failure to identify and document the rate stabilization plan renders the Application deficient under Section 1329.

9. On July 9, 2020, Aqua filed an Answer ("July 9 Answer") to the County's June 23 Petition. In its Answer, Aqua claimed that its Application does not propose a rate stabilization

² See, e.g., Aqua Statement No. 2 (Direct Testimony of William C. Packer) and Aqua Statement No. 3 (Direct Testimony of Erin M. Feeney).

plan and argued that DELCORA's plan to "stabilize" rates through the Trust is not a PUC-jurisdictional rate stabilization plan within the context of Section 1329. July 9 Answer at 4.

10. On July 14, 2020, the Commission issued a Secretarial Letter ("July 14 Secretarial Letter") stating that the instant docket "is currently inactive pending the satisfaction of the conditions established by the Commission in its June 11, 2020 Secretarial Letter..." and "[i]f Aqua satisfies all of these conditions and Docket No. A-2019-3015173 becomes active as a result of the satisfaction of the conditions, the Petition for Reconsideration of Staff Action filed by the County of Delaware, Pennsylvania, and any responsive filings thereto, will be accepted into the docket and assigned for formal action and disposition." (footnote omitted).

11. On July 14, 2020, the County filed an Answer and Reply to a New Matter raised in Aqua's July 9 Answer to the County's June 23 Petition ("July 14 Reply").

12. On July 23, 2020, Aqua filed a letter with the Commission asserting that Aqua has satisfied the conditions identified in the June 11 Secretarial Letter and requesting the Commission "finaliz[e] acceptance of the Application by July 27, 2020, at the latest, and publish notice of the filing of the Application in the Pennsylvania Bulletin on August 15, 2020...."

13. On July 27, 2020, the Commission issued a Secretarial Letter ("July 27 Secretarial Letter") accepting Aqua's Application without addressing the County's Petition for Reconsideration. The July 27 Secretarial Letter accepted the Application and activated the above-captioned docket.³

14. Also, on July 27, 2020, the Commission issued a hearing notice, which reflected the assignment of the docket to the Commission's Office of Administrative Law Judge before Administrative Law Judge Angela Jones.

³ The July 27 Secretarial Letter also noted that the Commission will publish notice of the Application in the August 15, 2020, edition of the *Pennsylvania Bulletin* with a protest deadline of August 31, 2020.

15. On August 7, 2020, the County filed a Petition for a Stay ("Petition for Stay") requesting that the Commission stay all substantive proceedings in the above-referenced docket until there is a final determination in the pending Court of Common Pleas Action resolving disputed issues regarding the Trust and/or the County's termination of DELCORA.

16. On August 13, 2020, the Commission's Bureau of Investigation and Enforcement ("I&E") filed a letter in support of the County's Petition for Stay. I&E asserted that a stay is warranted given the uncertainty in DELCORA's status, authority to convey the assets Aqua seeks to acquire, and authority to agree to the terms of the Asset Purchase Agreement that underlies Aqua's Application.

17. On August 14, 2020, the Office of Consumer Advocate ("OCA") filed a brief in support of the County's Petition for Stay. OCA asserted that a stay would promote judicial efficiency by reducing the time and expense of litigating the PUC proceeding in light of the ongoing Court of Common Pleas proceeding. OCA also filed a motion requesting the Chief Administrative Law Judge grant a 60-day extension of the Section 1329 six-month consideration period pursuant to the Commission's COVID-19 Emergency Order issued on March 20, 2020 at Docket No. M-2020-3019262.

18. Notice of Aqua's Application was published in the *Pennsylvania Bulletin* on August 15, 2020. 50 Pa.B. 4220 (Aug. 15, 2020). The Notice established a deadline of August 31, 2020, for the filing of protests. *Id.*

19. On August 27, 2020, the Commission entered an Order denying the County's Petition for Reconsideration and confirming the Petition for Stay remains under consideration.

20. On August 31, 2020, the Commission's Chief Administrative Law Judge issued an Order granting OCA's Motion to Extend.

II. PROTEST

Legal Standards

21. Parties objecting to the approval of an application filed with the Commission may file a protest to the application. 52 Pa. Code § 5.51(a). A protest to an application must: (1) set out clearly and concisely the facts from which the alleged interest or right of the protestant can be determined; (2) state the grounds of the protest; and (3) set forth the facts establishing the protestant's standing to protest. 52 Pa. Code § 5.52(a).

22. As the only incorporating municipality of DELCORA, the County has standing to file this Protest to protect its interests and rights.

23. Per Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), Aqua bears the burden to demonstrate that the application is in the public interest and should be approved under Sections 507, 1102, 1103, and 1329 of the Public Utility Code, 66 Pa. C.S. §§ 507, 1102, 1103, and 1329.

24. The Commission will only grant a certificate under Section 1103 if it finds that doing so is "necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S. § 1103. The applicant must show it is technically, legally, and financially fit to provide the additional services by virtue of the transaction. *Id.*

25. Per the longstanding precedent in *City of York v. PUC*, the applicant seeking to acquire utility facilities must demonstrate that the proposed transaction will "affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." *City of York v. PUC*, 295 A.2d 825, 828 (1972).

26. Per Section 507 of the Public Utility Code, 66 Pa. C.S. § 507, contracts or agreements between a public utility and a municipal corporation must be filed with the PUC at

least 30 days prior to the effective date of the agreement. The PUC will consider the reasonableness, legality, and any other matter affecting the validity of the agreement.⁴

27. Section 1329 of the Public Utility Code, 66 Pa. C.S. § 1329, addresses a voluntary process to determine the fair market value of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities. If the parties agree to use the Section 1329 process, an "acquiring public utility" and the seller of the municipal system each select a utility valuation expert (UVE) from a list of experts maintained by the Commission. Per Sections 1329(a) and (b), fair market value is determined by the results of two separate, independent appraisals conducted by utility valuation experts. The appraisals are then averaged to determine the fair market value. 66 Pa. C.S. § 1329(g). The fair market value is the value the acquiring utility will use as the rate base for the acquired assets in its next base rate case. 66 Pa. C.S. § 1329(c)(2).

28. Section 1329(g) of the Code defines an "acquiring public utility" as a water or wastewater public utility subject to regulation under the Code "that is acquiring a selling utility as the result of a voluntary arm's-length transaction between the buyer and seller." 66 Pa. C.S. § 1329(g). A "selling utility" is defined "[a] water or wastewater company located in this Commonwealth, owned by a municipal corporation or authority that is being purchased by an acquiring public utility or entity as the result of a voluntary arm's-length transaction between the buyer and seller." *Id.* Accordingly, the selling utility, DELCORA, must have clear legal authority to sell its assets and must do so through an arm's-length transaction.

29. Sections 1329 and 1102 of the Public Utility Code, when read together, require an applicant to show not only that no harm will come from the proposed transaction, but also

⁴ See *Joint Application of PAWC and City of Scranton et al.*, Docket No. A-2016-2437209, at p. 12 (Order issued Oct. 6, 2016) (hereinafter "Scranton Order"); see also *Aqua Application for approval of Limerick Township assets*, Docket No. A-2017-2605434 (Order entered Nov. 29, 2017).

establish that substantial affirmative benefits flow to ratepayers. *McCloskey v. PUC*, 195 A.3d 1055, 1064 (Pa. Cmwlth. Ct. 2018).

Grounds for the Protest

30. Aqua has not met its burden to show approval of the application is in the public interest. Accordingly, the Commission should deny the Application as unjust, unreasonable, unlawful, and not in the interest of the DELCORA ratepayers, Aqua ratepayers, and the general public. At minimum, the Commission should schedule hearings on the Application to develop a record of the various deficiencies raised below.

31. As a threshold matter, Commission review of Aqua's Application would be premature at this time. As indicated above, the County filed a Petition for Stay requesting that the Commission stay all substantive proceedings at this docket pending resolution of the Delaware County Court of Common Pleas proceedings concerning the legality of the Trust and Aqua's attempts to enjoin the County from enforcing its Ordinance terminating DELCORA prior to closing on the proposed transaction. As the Application relies on the Trust as a principle affirmative benefit and presumes the continued existence of DELCORA, the Commission cannot weigh the applicable affirmative benefits until the courts resolve these disputed issues. *See* Aqua Statement No. 5 (Direct Testimony of Robert Willert) at page 11, lines 13-17.

32. With regards to the substantive transaction, the County is concerned that the circumstances of the proposed transaction run contrary to the public interest. Viewing the proposed \$276 million purchase price in the context of the respective \$308 and \$409 million valuations commissioned by DELCORA and Aqua suggests that the proposed transaction was not conducted at arm's length as required under Section 1329 of the Public Utility Code. This concern is further amplified by the lack of any competitive bidding process preceding

negotiations between Aqua and DELCORA. In this case, the purchase price is tens of millions of dollars below both parties' valuations and 22% lower than the average of the two valuations. While competitive bidding is not an explicit condition of Section 1329, the Commission's public interest analysis should require that some assurance of a competitive or market-based bidding process was employed when the sale of a public asset is at issue.

33. The County's concerns regarding the relationship between Aqua and DELCORA extend to the Rate Stabilization Trust and the related rate stabilization plan discussed in Aqua's Application. While the County is litigating the Trust issues before the Court of Common Pleas, this matter may impact the Commission's review of Aqua's Application to the extent Aqua and DELCORA claim rate stabilization is a benefit of the transaction and DELCORA intends to continue operating as an administrator of the Trust following closing of the transaction. As discussed above and detailed in the County's Petition for Reconsideration, the Application documents lack detail as to the guidelines of the rate stabilization plan and the discretion reserved by Aqua or DELCORA to make decisions impacting the timing and amount of rate stabilization funding provided to former DELCORA customers. It is not entirely clear whether the rate stabilization, if approved, would be administered by Aqua Wastewater, Inc. or an unregulated affiliate. These uncertainties raise serious questions regarding the benefits of the proposed rate stabilization plan.

34. The County also questions other affirmative benefits cited by Aqua and DELCORA. Aqua and DELCORA consistently present the proposed transaction as an inevitable and necessary response to meet rising capital costs. The Application indicates that DELCORA faces future capital expenses ranging from \$405 million to \$606 million to either expand DELCORA's treatment capacity or pay for necessary capital costs for maintaining capacity in

Philadelphia Water Department's treatment system. See Aqua Statement No. 5 at pp 7-10 (Direct Testimony of Robert Willert). However, the Application fails to demonstrate any inability on the part of DELCORA to access financing necessary to complete these capital projects.

35. The matter of access to capital is particularly relevant where Aqua seeks to acquire a wastewater system of DELCORA's size. Unlike prior transactions through which regulated public utilities acquired small, frequently financially and operationally troubled, municipal sewer systems under Section 1329, DELCORA is a large and sophisticated municipal utility system comparable in size to Aqua's main division for wastewater operations. See Aqua Statement No. 2 at 11 (Direct Testimony of William C. Packer). As such, the economies of scale generally observed as affirmative benefits in other municipal transactions may not apply here.

36. For the foregoing reasons, the Application is not in the public interest, violates the Public Utility Code and the Municipality Authorities Act, and should be denied by the Commission.

37. In the alternative, the County requests that the Commission assign the Application to the Office of Administrative Law Judge for development of a record and evidentiary hearings on the issues identified by the County and any other matters relevant to the Application.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the County of Delaware, Pennsylvania, respectfully requests that the Pennsylvania Public Utility Commission grant this Protest, deny the Application, and grant any other relief as it deems necessary.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

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