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September 4, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

In re: Docket No. A-2019-3015173
Application of Aqua Pennsylvania Wastewater, Inc. – DELCORA

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 Petition for Reconsideration of Staff Action concerning the Order of Chief Administrative Law Judge Rainey Granting the Expedited Motion of the Office of Consumer Advocate for an Extension of the Statutory Suspension Period for this matter. Copies of the Petition are 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 Charles E. Rainey, Jr., Chief Administrative Law Judge (via email, w/encl.)
The Honorable Angela T. Jones, Administrative Law Judge (via email, w/encl.)
Alexander R. Stahl, Esquire (via email, w/encl.)
John F. Povilaitis, 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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**PETITION OF AQUA PENNSYLVANIA WASTEWATER, INC. FOR
RECONSIDERATION OF STAFF ACTION**

AND NOW comes Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”) and, pursuant to 52 Pa. Code § 5.44, submits this Petition for Reconsideration of the Order of Chief Administrative Law Judge Rainey, dated August 31, 2020, granting the Office of Consumer Advocate’s (“OCA”) Expedited Motion for an Extension of the Statutory Suspension Period (“Order”). Aqua submits the following in support of the Petition:

I. BACKGROUND

1. This proceeding concerns the Application of Aqua filed March 3, 2020, pursuant to Sections 1329, 1102 and 507 of the Public Utility Code (“Code”).
2. The Application asks the Commission to, *inter alia*, issue an order and certificates of public convenience approving Aqua’s acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”) and ratemaking rate base pursuant to Section 1329(c)(2) of the Code.
3. Following its filing, the Application was considered “inactive” as the Commission’s Bureau of Technical Utility Services (“TUS”) conducted a completeness review.

In response to TUS information requests, Aqua filed supplemental information with the Commission on May 6, 7, 8, 13, 22 and 28 and June 8, 2020. Copies of the supplemental information were served on the OCA.

4. Thereafter, upon consideration of the Application and supplemental information, the Commission, by Secretarial letter dated June 11, 2020, advised that it had conditionally accepted the Application for filing. The Commission directed Aqua to proceed to provide notice of the filing of the Application and certain supplemental materials.

5. Aqua (and DELCORA) provided the requisite customer notice. By letter dated July 23, 2020, Aqua confirmed completion and satisfaction of the notice requirements and the conditions set forth in the Secretarial letter of June 11, 2020, and asked the Commission to finally accept the Application.

6. By Secretarial letter dated July 27, 2020, the Commission acknowledged receipt of Aqua's letter of verification/confirmation and finally accepted Aqua's Application for Commission consideration.

7. Upon final acceptance on July 27, 2020, the Application proceeding became "active." Having finally accepted the Application on July 27, 2020, Section 1329(d)(2) of the Code requires the Commission to issue a Final Order on the Application within six months (180 days) or by January 23, 2021.

8. The matter was assigned to Administrative Law Judge Angela T. Jones and a telephonic prehearing conference was scheduled for September 2, 2020. Judge Jones issued a Further Corrected Prehearing Conference Order on August 17, 2020, with a litigation schedule that would conclude the proceeding within the required six months.¹

¹ The Further Corrected Prehearing Conference Order, dated August 17, 2020, followed the issuance of an initial Prehearing Conference Order dated August 3, 2020.

9. On August 17, 2020, the OCA filed an Expedited Motion for an Extension of the Statutory Suspension Period (“Motion”) contending that COVID-19 has placed its “ability to conduct an adequate investigation of Aqua’s application at issue”² and that the “global pandemic is the type of extraordinary event that, despite the OCA’s best efforts, warrants an extension of the statutory period in the interest of due process.”³

10. Aqua filed an Answer in Opposition to the Motion on August 24, 2020, emphasizing that Section 1329(d)(2) of the Code requires the Commission to issue a Final Order in this Application proceeding by January 23, 2021. While acknowledging the authority of the Commission to extend statutory deadlines during the extraordinary circumstances of the COVID pandemic, Aqua submitted that the OCA failed to justify application of that authority here.

11. By Order dated August 31, 2020, Chief Administrative Law Judge Rainey granted the OCA’s Motion concluding, “[a]fter reading the responses of the parties and obtaining the position of the presiding ALJ”, that the OCA’s request was “reasonable under the circumstances” and extended the statutory deadline by 60-days until March 26, 2021.⁴

12. The Order advises that any party dissatisfied with it may file a Petition for Reconsideration of Staff Action pursuant to 52 Pa. Code § 5.44.⁵

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

13. Section 1329(d)(2) of the Code provides that the Commission “shall issue a final order on an application submitted under ... section [1329] within six months of the filing date ...

² OCA Motion at 1-2.

³ OCA Motion at 2.

⁴ Order at 2.

⁵ Order at 2 and Ordering Paragraph 3.

The Commission 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*).

14. Judge Rainey’s Order, however, states that the Commission, by Emergency Order dated March 20, 2020, in response to the COVID-19 pandemic, has authorized the Chief ALJ to establish reasonable deadlines under the circumstances after consideration of the positions of the parties and presiding ALJ.⁶ While we acknowledge the authority of the Commission to extend statutory deadlines during the extraordinary circumstances of the COVID pandemic, we submit that application of that authority here to extend the statutory review period is not justified.

15. This Application proceeding, in point of fact, was moving forward irrespective of the COVID pandemic. Coincident with the filing of the Application, Aqua, on March 3, 2020, hand carried electronic and paper copies of the Application, Exhibits and Work Paper Files in Excel Format to the OCA⁷ and other statutory advocates. Subsequent to the March 3 filing, Aqua, on seven separate occasions, submitted supplemental information in response to Staff information requests.⁸ Extensive discovery – approximately 250 interrogatories – were asked by other parties and answered by Aqua and DELCORA.

⁶ Order at 2.

⁷ Upon agreement with the OCA, the paper copy did not include DEP related Exhibits (E series, L, M series, N series, O series and P series exhibits, which were provided in electronic format.)

⁸ In response to TUS information requests, Aqua filed supplemental information with the Commission on May 6, 7, 8, 13, 22 and 28 and June 8, 2020. Copies of the supplemental information were served on the OCA.

16. A prehearing conference was scheduled for September 2, 2020. Judge Jones issued Prehearing Conference Orders dated August 3, 2020 and August 17, 2020 that included a proposed litigation schedule based on the “model litigation schedule” for Section 1329 proceedings, including certain non-negotiable dates. Significantly, the schedule proposed by Judge Jones, based on the “model litigation schedule,” provided for the submission of direct testimony of non-applicants on September 4, 2020.

17. Thus, throughout the month of August, the parties were aware that testimony of non-applicants would be required as early as September 4, 2020. In its prehearing memorandum, filed August 31, 2020, OCA presented a litigation schedule proposing that, absent a stay, other parties’ direct testimony be due on September 9, 2020. I&E, similarly, in its prehearing memorandum, filed August 31, 2020, presented a litigation schedule proposing that, absent a stay, other parties’ direct testimony be due on September 4, 2020. Delaware County in its prehearing memorandum, filed August 31, 2020, stated that, in the event the parties are unable to agree on a procedural schedule, the County does not oppose the schedule presented in Judge Jones Further Corrected Prehearing Conference Order.⁹

18. In short, while the OCA’s Motion expresses concern with its ability to conduct an adequate investigation of Aqua’s Application and then contends that an extension to the six month review period is warranted in the interest of due process, the facts suggest otherwise. The OCA (and other parties) had conducted extensive discovery and, by the time of the prehearing conference on September 2, 2020, the OCA (and other parties) were prepared to provide their direct testimony on September 4, 2020 or other mutually agreeable date, consistent with the “model litigation schedule.” Once the date for other parties’ testimony was established the

⁹ The Further Corrected Prehearing Conference Order provided for direct testimony of non-applicants by September 4, 2020.

remaining dates in the schedule, including the dates for public input hearings could have been addressed as they always are in these type proceedings.¹⁰

19. Accordingly, Aqua submits that the Commission should reconsider Chief Judge Rainey's Order and decline to stay this proceeding. The facts do not support claims that the COVID-19 pandemic is hampering review of Aqua's Application or raising due process concerns.

III. CONCLUSION

20. In its Order entered August 31, 2020, declining to answer Delaware County's Petition for Stay and Request for Review and Answer to a Material Question, the Commission explained as follows, while recognizing that there may be circumstances which could prevent the Commission from meeting a statutory compliance date such as those outlined in its COVID-19 *Emergency Order*:¹¹

"... 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 Granting a stay in this proceeding would impede the expeditious consideration of the Application as contemplated under Section 1329.

¹⁰ However, at the Prehearing Conference, which was held as scheduled on September 2, 2020, a litigation schedule reflective of Chief Judge Rainey's Order and a sixty day extension to the review period was adopted with Aqua advising the parties and Judge Jones of its intention to ask the Commission to reconsider the Order.

¹¹ Order entered August 31, 2020 at 31-32.

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.

21. The circumstances of this proceeding are not hampering the Commission from meeting the six month statutory compliance date and Aqua submits that Chief Judge Rainey's Order should be reconsidered and the Expedited Motion of the Office of Consumer Advocate should be denied.

WHEREFORE Aqua Pennsylvania Wastewater, Inc. requests that the Public Utility Commission grant this Petition for Reconsideration of Staff Action.

Respectfully submitted,

AQUA PENNSYLVANIA WASTEWATER, INC.

By 

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Date: September 4, 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 4th day of September, 2020, served a true and correct copy of the foregoing Petition of Aqua Pennsylvania Wastewater, Inc. for Reconsideration of Staff Action, upon the persons and in the manner set forth below:

VIA ELECTRONIC MAIL

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