

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

 @pa_oa

 /pennoca

FAX (717) 783-7152
consumer@paoca.org

September 22, 2020

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

Re: Application of Aqua Pennsylvania Wastewater, Inc.
pursuant to Sections 507, 1102 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
Docket No. A-2019-3015173

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Answer and Verification to Aqua Pennsylvania Wastewater, Inc.'s Petition for Reconsideration of Staff Action in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Harrison W. Breitman
Harrison W. Breitman
Assistant Consumer Advocate
PA Attorney I.D. # 320580
E-Mail: HBreitman@paoca.org

Enclosures:

cc: The Honorable Angela T. Jones (**email only**)
Office of Special Assistants (**email only**: ra-OSA@pa.gov)
Certificate of Service

*296587

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Answer to Aqua Pennsylvania Wastewater, Inc.'s Petition for Reconsideration of Staff Action, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 22nd day of September 2020.

SERVICE BY E-MAIL ONLY

Gina L. Miller, Esquire
Erika L. McLain, Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Steven C. Gray, Esquire
Office of Small Business Advocate
555 Walnut Street
1st Floor, Forum Place
Harrisburg, PA 17101-1923

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

Alexander R. Stahl, Esquire
Kimberly A. Joyce, Esquire
Aqua Pennsylvania, Inc.
762 West Lancaster Avenue
Bryn Mawr, PA 19010

Thomas Wyatt, Esquire
Matthew S. Olesh, Esquire
Obermayer Rebmann Maxwell & Hippel LLP
Centre Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102

Kenneth D. Kynett, Esquire
Charles G. Miller, Esquire
Petrikin Wellman Damico Brown & Petrosa
The William Penn Building
109 Chesley Drive
Media, PA 19063

Adeolu A. Bakare, Esquire
Robert F. Young, Esquire
Kenneth R. Stark, Esquire
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Thomas J. Sniscak, Esquire
Kevin J. McKeon, Esquire
Whitney E. Snyder, Esquire
Melissa A. Chapaska, Esquire
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101

Cynthia Pantages
C&L Rental Properties, LLC
30 S Lake Drive
P.O. Box 516
Lake Harmony, PA 18624

Ross F. Schmucki
218 Rutgers Avenue
Swarthmore, PA 19081

Justin G. Weber, Esquire
Michelle M. Skjoldal, Esquire
Troutman Pepper Hamilton Sanders LLP
100 Market Street, Suite 200
P.O. Box 1181
Harrisburg, PA 17108-1181

Marc D. Machlin, Esquire
Troutman Pepper Hamilton Sanders LLP
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006

Robert W. Scott, Esquire
Law Offices of Robert W. Scott, P.C.
205 North Monroe Street
P.O. Box 468
Media, PA 19063
Representing the Borough of Swarthmore

Patricia A. Kozel
15 Hazzard Run Road
Lake Harmony, PA 18624
E-Mail: pattyk6@icloud.com

/s/ Harrison W. Breitman
Harrison W. Breitman
Assistant Consumer Advocate
PA Attorney I.D. # 320580
E-Mail: HBreitman@paoca.org

Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-Mail: CHoover@paoca.org

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
E-Mail: EGannon@paoca.org

Edward L. Clark, Jr., General Manager
Treasure Lake Property Owners Association
13 Treasure Lake
DuBois, PA 15801

Scott J. Rubin, Esquire
333 Oak Lane
Bloomsburg, PA 17815

Jason T. Ketelsen, Esquire
Troutman Pepper Hamilton Sanders LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103

John F. Povilaitis, Esquire
Alan M. Seltzer, Esquire
Buchanan Ingersoll & Rooney, PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357

Lawrence and Susan Potts
11 Chestnut Street
P.O. Box 522
Lake Harmony, PA 18624
E-Mail: susie01213@aol.com

Santo G. Spataro
Assistant Consumer Advocate
PA Attorney I.D. # 327494
E-Mail: SSpataro@paoca.org

Counsel for:
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
Dated: September 22, 2020
*296590

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

THE OFFICE OF CONSUMER ADVOCATE'S ANSWER TO
AQUA PENNSYLVANIA WASTEWATER, INC.'S PETITION FOR
RECONSIDERATION OF STAFF ACTION

I. INTRODUCTION

In accordance with 52 Pa. Code Sections 1.31 and 5.61, the Office of Consumer Advocate (“OCA”) files the following Answer to Aqua Pennsylvania Wastewater, Inc.’s (“Aqua” or “Company”) Petition for Reconsideration of Staff Action (“Petition”) in the above-captioned proceeding. The OCA opposes Aqua’s request for reconsideration of Chief Administrative Law Judge (“CALJ”) Charles E. Rainey’s Order Granting OCA’s Expedited Motion for an Extension of the Statutory Period of Aqua’s Application (“CALJ Order”) issued on August 31, 2020 pursuant to the Pennsylvania Public Utility Commission’s (“PUC” or “Commission”) Emergency Order dated March 20, 2020.¹ After considering the positions of all parties and the presiding Administrative Law Judge (“ALJ”), the Chief Administrative Law Judge found that the OCA’s request for a sixty (60) day extension was reasonable under the circumstances. Copies of the CALJ

¹ Suspension of Regulatory and Statutory Deadlines; Modification to Filing and Service Requirements, Docket No. M-2020-3019262, Emergency Order (Mar. 20, 2020) (Emergency Order).

Order and the OCA's Expedited Motion for an Extension of the Statutory Period of Aqua's Application ("OCA Motion") are attached as Appendices A and B to this Answer. The OCA submits that Aqua's Petition for Reconsideration of Staff Action should be denied.

II. BACKGROUND

On March 6, 2020, Governor Tom Wolf issued a Proclamation of Disaster Emergency in response to COVID-19. The Governor's Proclamation of Disaster Emergency recognized that the statutes and regulations that govern procedures for Commonwealth agency business may be suspended if strict compliance "would in any way prevent, hinder, or delay necessary action in coping with this emergency."² On March 20, 2020, the Commission issued its Emergency Order, finding that additional measures must be taken to ensure continued operations. The Emergency Order states as follows:

These measures are intended to prevent regulatory or statutory procedural rules, including those providing for the calculation of time periods for final Commission action, from interfering with the overall conduct of Commission business in the public interest during the emergency.

Emergency Order at 1-2. The Commission's Emergency Order authorizes the suspension, extension, waiver, or change of any regulatory, or statutory, procedural deadline for a maximum period of ninety (90) days. Emergency Order at 2. The Commission directed that its Bureau Directors are delegated authority to suspend, extend, waive or change a statutory or regulatory deadline which may hinder, rather than further, the mission of the Commission, after consultation with all the interested parties, as deemed necessary and appropriate. Emergency Order at 4

² Commonwealth of Pennsylvania, Office of the Governor, Proclamation of Disaster Emergency (Mar. 6, 2020), available at: <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf> (Proclamation of Disaster Emergency).

(ordering paragraph 4). The Commission provided that review of those orders would be done by appeal of a staff action. Emergency Order at 4 (ordering paragraph 6); 52 Pa. Code § 5.44.

On March 15, 2020, Governor Wolf issued an Executive Order implementing telework protocol for state employees beginning March 16, 2020, and the closing of all state offices in Dauphin County and the Capitol Complex.³ On August 31, 2020, Governor Wolf signed an Amendment to the Proclamation of Disaster Emergency, renewing his ninety (90) day disaster declaration for the COVID-19 pandemic.⁴ The Commission's offices are closed and accessibility to the OCA's office is limited. Both Commission and OCA employees are working from home, with limited exception.

III. PROCEDURAL HISTORY

On March 3, 2020, Aqua filed an Application under Sections 507, 1102, and 1329 of the Public Utility Code seeking Commission approval of the acquisition of the Delaware County Regional Water Quality Control Authority's ("DELCORA" or "Authority") wastewater system assets.

Through its Application, Aqua seeks Commission approval under Section 1329 to include the purchase price of \$276,500,000 for the Authority's system in its ratemaking rate base. According to the prehearing conference orders issued by the ALJ, the anticipated public meeting date for the Commission to determine whether to approve Aqua's Application was originally January 14, 2021.

³ <https://www.governor.pa.gov/newsroom/gov-wolf-puts-statewide-covid-19-mitigation-efforts-in-effect-stresses-need-for-every-pennsylvanian-to-take-action-to-stop-the-spread>.

⁴ Commonwealth of Pennsylvania Governor's Office, Amendment to Proclamation of Disaster Emergency (Aug. 31, 2020) available at: <https://www.governor.pa.gov/wp-content/uploads/2020/09/20200831-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf>

Aqua is a regulated public utility company, and furnishes wastewater service to approximately 35,000 customer accounts. DELCORA owns and operates sanitary and combined wastewater collection and treatment systems that provide service to retail and wholesale customers in parts of Delaware and Chester Counties, including direct retail service to approximately 16,000 customers. DELCORA provides wholesale conveyance and treatment service to municipal and municipal authority customers within all or part of 49 municipalities. To date, Formal Protests, Notices of Appearance, and Petitions to Intervene were submitted by the OCA, I&E, the Office of Small Business Advocate, DELCORA, the County of Delaware, Pennsylvania (“Delaware County”), Edgemont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority, and Upland Borough.

As stated above, on March 6, 2020, Governor Tom Wolf issued a Proclamation of Disaster Emergency, which recognized that the statutes and regulations that govern procedures for Commonwealth agency business may be suspended if strict compliance “would in any way prevent, hinder, or delay necessary action in coping with this emergency.”⁵

On March 15, 2020, Governor Wolf issued an Executive Order implementing telework protocol for state employees beginning March 16, 2020, and the closing of all state offices in Dauphin County and the Capitol Complex.⁶ The Commission’s offices and the OCA’s office in Harrisburg remain closed and all employees are to work from home, with limited exception.

On July 27, 2020, the Commission accepted Aqua’s Application for filing. On August 3, 2020, the Administrative Law Judge issued a Prehearing Conference Order, which scheduled an Initial Prehearing Conference for September 2, 2020. On August 7, 2020, Delaware County filed

⁵ Proclamation of Disaster Emergency.

⁶ <https://www.governor.pa.gov/newsroom/gov-wolf-puts-statewide-covid-19-mitigation-efforts-in-effect-stresses-need-for-every-pennsylvanian-to-take-action-to-stop-the-spread>.

a Petition for a Stay of the Application and Request for Commission Review and Answer to the Material Question (“Petition for Stay”). Delaware County’s Petition requests that the Commission stay the instant proceeding until there is a final determination in the pending Delaware County Court of Common Pleas proceeding at Docket No. CV-2020-003185, on the basis that the determination will resolve disputed issues that bear on Aqua’s Application.

The ALJ issued a Prehearing Conference Order on August 3, 2020. On August 14, 2020, the OCA filed an Expedited Motion for an Extension of the Statutory Suspension Period of Aqua’s Application (“Motion”) requesting a 60-day extension.

On August 17, 2020, the ALJ issued a Further Prehearing Order indicating that a Prehearing Conference was scheduled for Wednesday, September 2, 2020, and instructing the parties to submit prehearing memoranda on or before noon on Monday, August 31, 2020.

On August 20, 2020, Edgmont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority, Trainer Borough, and Upland Borough (collectively, “Municipal Protestants”) filed an Answer in support of the OCA’s Motion. On August 24, 2020, Aqua filed an Answer in opposition to the OCA’s Motion. On August 24, 2020, the Office of Small Business Advocate (“OSBA”) filed an Answer in support of the OCA’s Motion. On August 24, 2020, DELCORA filed an Answer in opposition to the OCA’s Motion. On August 24, 2020, Delaware County filed an Answer in support of the OCA’s Motion.

The CALJ issued the CALJ Order granting OCA’s Motion on August 31, 2020. The OCA served its Prehearing Memorandum on August 31, 2020. On August 31, 2020, the Commission entered an Order denying Delaware County’s Petition for Stay and declining to answer Delaware County’s material question. On September 2, 2020, a Prehearing Conference was held before the ALJ. At the Prehearing Conference the ALJ and the parties discussed the procedural schedule

going forward due to the CALJ Order. Tr. at 29-45. On September 4, 2020, the ALJ issued a Prehearing Conference Order, which set the procedural schedule for this proceeding.

The Company filed a Petition for Reconsideration of Staff Action on September 4, 2020. The OCA submits that the CALJ fully considered the positions of the ALJ and all parties in making a determination on the OCA's Motion. The OCA now files this Answer to the Company's Petition for Reconsideration of Staff Action and, for the reasons set forth below, respectfully requests that Aqua's Petition be denied.

IV. ANSWER

The OCA commends the Commission on its prompt and important action of issuing the Emergency Order to address the modification of regulatory and statutory deadlines in light of the COVID-19 pandemic. As the Commission properly recognized in its Emergency Order, Governor Wolf's Proclamation of Disaster Emergency authorizes and directs the suspension of "the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions...would in any way prevent, hinder, or delay necessary action in coping with this emergency." Emergency Order at 1 quoting Proclamation of Disaster Emergency.

The Emergency Order discusses the Governor's Proclamation of Disaster Emergency and its relation to statutory deadlines as follows:

Under the Proclamation of Disaster Emergency, it is both necessary and appropriate to provide this flexibility to ensure operations continue as smoothly as possible and to prevent any regulatory statute or rule prescribing procedures for the conduct of Commission business from unreasonably interfering with the public interest.

Emergency Order at 3.

The OCA submits that the Commission's Emergency Order clearly addressed the issues surrounding statutory deadlines. The Emergency Order is broad in its discussion of statutory and regulatory deadlines and does not limit extensions to procedural deadlines, as it states:

All statutory and regulatory deadlines may be suspended, extended, waived or changed during the pendency of the Proclamation of Disaster Emergency.

Emergency Order at 4 (ordering paragraph 2).

Further, the Commission has addressed the procedure under which extension of statutory deadlines could be granted, stating as follows:

All Bureau Directors are hereby delegated the authority to suspend, extend, waive or change a statutory or regulatory deadline which may hinder, rather than further, the mission of the Commission, after consultation with all interested parties, as deemed necessary and appropriate.

Suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines shall not exceed ninety (90) days except upon expedited certification of the question by the Chief Administrative Law Judge or Bureau Director to the Commission.

Emergency Order at 4 (ordering paragraphs 4 and 5).

The OCA submits that the CALJ complied with the Emergency Order and carefully considered the positions of all parties to determine whether to extend the statutory suspension period by 60 days pursuant to the Emergency Order. Aqua argues that reconsideration should be granted because the application of the Commission's authority to extend the statutory review period in this proceeding "is not justified." Petition at 4. The CALJ's Order, however, does not contain any errors of law and is reasonable. The OCA respectfully requests that the Commission deny the Company's Petition.

A. The Emergency Order Applies to the Current Proceeding.

Aqua appears to argue that the statutory suspension period contained in Section 1329 of the Public Utility Code cannot be unilaterally waived or extended by the Commission. See,

Petition at 3-4. Governor Wolf, however, determined that due to the global pandemic's impact upon operations, statutes and regulations that govern procedures for Commonwealth business may need to be altered or waived. Proclamation of Disaster Emergency at 2.

Aqua cites to the Commission's decision in New Garden in support of its argument that the Commission must issue an order for Sections 1329 applications within six months. Petition at 4.⁷ The New Garden decision is not dispositive here, however, because it was not decided during a disaster emergency, where the Governor issued a proclamation explicitly permitting suspension of regulatory statutes and, following from which, the Commission issued an accompanying Emergency Order explicitly permitting the extension of statutory deadlines. Under the Emergency Order, statutory deadlines are permitted to be extended at the request of a party by the CALJ upon consideration of the positions of the parties or *sua sponte* by the Commission. See, Emergency Order.

The Proclamation of Disaster Emergency recognized that the statutes and regulations that govern procedures for Commonwealth agency business may be suspended if strict compliance "would in any way prevent, hinder, or delay necessary action in coping with this emergency."⁸ The Commission's Emergency Order addresses the Proclamation of Disaster Emergency as follows:

Under the Proclamation of Disaster Emergency, it is both necessary and appropriate to provide this flexibility to ensure operations continue as smoothly as possible and to prevent any regulatory statute or rule prescribing procedures for the conduct of Commission business from unreasonably interfering with the public interest.

Emergency Order at 3.

⁷ Citing *Application of Aqua Pennsylvania Wastewater, Inc. - New Garden Township*, Docket No. A-2016-2580061, Opinion and Order entered February 15, 2017, at 23.

⁸ Proclamation of Disaster Emergency.

Consistent with the Governor’s Disaster proclamation, the Commission’s Emergency Order reflects a determination that statutory deadlines prescribed by the Public Utility Code or applicable law may be waived, suspended, or extended. The Emergency Order states as follows:

Suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines shall not exceed ninety (90) days except upon expedited certification of the question by the Chief Administrative Law Judge or Bureau Director to the Commission.

For example, in pending rate case litigation, the Chief Administrative Law Judge is authorized to establish reasonable deadlines under the circumstances after consideration of the positions of the parties and the presiding Administrative Law Judge. The Chief Administrative Law Judge’s decision would then be subject to review by the Commission.

Emergency Order at 2 (emphasis in original).

In recognition of the extraordinary circumstances which arose due to the COVID-19 pandemic, the Commission ordered as follows:

All statutory and regulatory deadlines may be suspended, extended, waived or changed during the pendency of the Proclamation of Disaster Emergency.

Emergency Order at 4.

The Company appears to argue in its Petition that an extension to the statutory suspension period is contrary to the “model litigation schedule.” See Petition at 5. In effect, Aqua’s argument is against the Governor’s Proclamation of Disaster Emergency Order and that argument is not properly before the Commission.⁹ Rather, the issue properly before the Commission is whether the considerations discussed in the Emergency Order support extending the statutory suspension period by 60 days.

⁹ The OCA notes that the Governor’s Proclamation of Disaster Emergency Order has been upheld by the Supreme Court of Pennsylvania. See Friends of Devito v. Wolf, 2020 Pa. LEXIS 1987.

The Commission's Emergency Order does not confer unlimited authority to ignore Pennsylvania law, but instead allows the CALJ to allow an extension of statutory deadlines of up to ninety days. The Emergency Order states:

Suspension, extension waiver or change of any regulatory, statutory or procedural deadlines shall not exceed ninety (90) days except upon expedited certification of the question by the Chief Administrative Law Judge or Bureau Director to the Commission.

Emergency Order at 4 (ordering paragraph 5). The OCA submits that the CALJ complied with the Commission's Emergency Order in determining that a 60-day extension to the statutory suspension period was appropriate for the instant proceeding.

The OCA further submits that there is sufficient evidence contained in the OCA's Motion, OSBA's Answer to OCA's Motion, the Municipal Protestant's Answer to OCA's Motion, Delaware County's Answer to OCA's Motion, the Governor's Proclamation of Disaster Emergency, the Commission's Emergency Order, and the CALJ Order which support a 60-day extension due to extraordinary circumstances and the range and significance of issues raised by the Application under review. Motion at 6-8.

Under the original deadlines based on the statutory suspension period, the parties would have had approximately six weeks to schedule and hold public input hearings, develop and respond to testimony, engage in settlement discussions, hold evidentiary hearings, and litigate the issues in main and responsive briefs. Motion at 6-7. The OCA further notes that Aqua did not provide responses to the OCA's interrogatories, served over two months prior, until the Commission conditionally accepted Aqua's Application.¹⁰ Motion at 7. A six week litigation schedule in the

¹⁰ The OCA served interrogatory Sets I and II on May 5, 2020. The Commission conditionally accepted Aqua's Application on June 11. On July 10, 2020, partial responses were received in response to OCA Set II. On July 24, 2020, responses to Set I were provided. The remainder of responses to Set II were received on July 27, 2020.

midst of these extraordinary circumstances does not promote due process or further the public interest. Due to the ongoing COVID-19 pandemic, the OCA's office personnel are encouraged to work remotely. Accordingly, the OCA does not have its usual access to physical files, photocopying, U.S. mail, and support staff, among other services. As such, the COVID-19 pandemic impairs the OCA's ability to investigate Aqua's filing.

This proceeding further presents some particular challenges. Given the financial and economic impact of COVID-19 on Aqua's existing ratepayers and DELCORA's current ratepayers, it is particularly important to ensure that the ratemaking rate base and the imposed conditions established in this proceeding for the Authority's system are reasonable and to determine whether the Application results in affirmative public benefits. Motion at 7. Also, projections contained in the Utility Valuation Expert's valuations may require additional adjustments as a result of the COVID-19 pandemic. Motion at 7. In addition, as noted by the OCA in its Motion, the OCA submits that the ongoing proceeding at the Delaware County Court of Common Pleas presents further challenges and complications in evaluating Aqua's Application. Motion at 7. Providing additional time to analyze these issues will be critical going forward.

B. The CALJ Properly Determined to Extend the Statutory Suspension Period.

Aqua argues that the Commission should reconsider the CALJ's Order and decline to "stay the proceeding." Petition at 6. In support, Aqua argues that the ALJ's prehearing conference orders were based on a model litigation schedule and included "non-negotiable dates." Petition at 5. Aqua notes that the proceeding was moving forward "irrespective of the COVID pandemic" and that discovery was answered by Aqua and DELCORA. Petition at 4. Aqua further notes that the OCA presented a proposed litigation schedule in its prehearing memorandum filed August 31,

2020. Petition at 5. Aqua also claims that the due process concerns raised by the OCA are countered by the fact that the OCA conducted extensive discovery. Aqua Petition at 5.

The due process concerns discussed in the OCA's Motion were not resolved by the OCA's presentation of a proposed procedural schedule that was prepared during the pendency of the CALJ's decision. The Commission acknowledged in its Emergency Order that the closure of the Commission's office "presents many challenges for the Commission, the regulated community, and the public." Emergency Order at 1. The Emergency Order further states:

Given the unprecedented nature of this emergency, the Commission is aware that some deadlines or obligations may hinder the public service mission of the Commission and its affected stakeholders.

Emergency Order at 2. The Commission's Emergency order indicates that its public service mission and the impact on affected stakeholders should be considered in determining whether a deadline should be modified. The OCA submits that necessity of extending statutory deadlines in light of the global pandemic was discussed and decided upon explicitly in both the Proclamation of Disaster Emergency and the Commission's Emergency Order.

As discussed above, the OCA and other parties showed conclusively that if the deadline were not modified, it would prevent the development of a full and complete record. In the OCA's Motion, the OCA noted that its office personnel are working remotely and the OCA does not have its usual access to physical files, photocopying, U.S. mail, and support staff, among other services. Motion at 7.¹¹ OSBA's Answer to OCA's Motion noted that all of OSBA's employees and witnesses are teleworking from home, which adds additional time to each task. OSBA Answer at 5. Moreover, OSBA noted that "[i]t would literally be impossible for the OSBA to submit testimony if the ALJ's proposed procedural schedule was adopted." OSBA Answer at 5. The

¹¹ For example, the OCA's access to informal letters and informal complaints that the notice to customers indicated could be mailed to the Commission is delayed due to the closure of the Commission's office.

Municipal Protestant's Answer to OCA's Motion noted that access to municipal government offices is limited due to the pandemic, which affects the Municipal Protestants' ability to fully prepare for and participate in the proceeding. Municipal Protestant Answer at 2-3. The Municipal Protestants further noted that Aqua and DELCORA will not be unduly prejudiced by granting a 60-day extension of the statutory deadline as a 60-day extension would necessitate a Commission final decision by the end of March 2021, which is within the "outside date" for closing contemplated in the Asset Purchase Agreement underlying the proposed transaction by approximately four months. Municipal Protestant Answer at 4. Delaware County's Answer to OCA's Motion noted that the complexity of Aqua's Application, the massive volume of documents contained in the Application and provided through discovery, the growing number of parties, and the expectation that hearings will be conducted remotely further supports the OCA's Motion. Delaware County Answer at 4.

With regard to Aqua's argument about the proposed procedural schedule contained in the OCA's Prehearing Memorandum, that schedule was prepared before the CALJ's Order was issued and in compliance with the dates and directives contained in the Presiding ALJ's August 3, 2020 Prehearing Conference Order. The CALJ's Order was issued on the morning of August 31, 2020 and, due to the noon deadline to file prehearing memoranda on the same date, the OCA did not alter the contents of its Prehearing Memorandum or the schedule proposed therein before filing. The OCA recognized the impact of the CALJ's Order in its e-mail serving the Prehearing Memorandum, stating:

The OCA's Prehearing Memorandum was prepared before the Chief ALJ issued an order granting the OCA's motion for a 60 day extension to the statutory suspension period in this proceeding. As such, the OCA is prepared to discuss the procedural schedule at the Prehearing Conference on Wednesday, September 2.

Thus, Aqua's contention that the OCA's submission of a litigation schedule proposing deadlines to comply with the ALJ's prehearing conference order somehow undermines the arguments contained in the OCA's Motion, is both unreasonable and inaccurate.¹²

At the conclusion of its Petition, Aqua makes the additional argument that the Commission's denial of Delaware County's Petition for Stay supports adhering to the statutory suspension period. Aqua quotes from the Commission's Order entered August 31, 2020, in which the Commission declined to answer Delaware County's material question¹³ and concluded that granting a stay in this proceeding would impede expeditious consideration of the Application as contemplated under Section 1329. Petition at 6. The Order, however, does not address whether the Commission has the authority and should exercise its authority to extend the suspension period in a Section 1329 proceeding pursuant to the Emergency Order. The Commission explicitly recognized that separate matter remained to be addressed by the Office of Administrative Law Judge, stating:

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

¹² A copy of the OCA's service e-mail for its Prehearing Memorandum is attached as Appendix C.

¹³ Delaware County's Petition for Stay posed 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?

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.¹⁴

Importantly, had the Commission granted Delaware County's Petition for Stay it would have likely extended the procedural schedule in this proceeding beyond the 60-day extension requested by the OCA and for an indeterminate amount of time – because the Court of Common Pleas proceeding is, as of the submission of this Answer, still ongoing and subject to potential appeals. The OCA's Motion, in direct contrast, requested a 60-day extension in accordance with the Commission's Emergency Order.

The CALJ properly applied and adhered to the Commission's Emergency Order. The Commission determined that its Emergency Order would run with the timing of the Proclamation of Disaster Emergency. Emergency Order at 4 (ordering paragraph 2). It also provided that extensions of deadlines would not exceed 90 days, except upon expedited certification of the question by the CALJ or Bureau Director to the Commission. Emergency Order at 4 (ordering paragraph 5). Moreover it provided that, following the Proclamation of Disaster Emergency, all deadlines suspended may be extended by an additional thirty days. Emergency Order at 4 (ordering paragraph 3). Additionally, on the same day that both the Commission's August 31 Order and the CALJ's Order were issued, Governor Wolf signed an amendment to the Proclamation of Disaster Emergency, renewing his ninety-day disaster declaration due to the COVID-19 pandemic.¹⁵

¹⁴ PUC Order and Opinion re: Delaware County Petition for Stay (Aug. 31, 2020).

¹⁵ Commonwealth of Pennsylvania Governor's Office, Amendment to Proclamation of Disaster Emergency (Aug. 31, 2020) available at: <https://www.governor.pa.gov/wp-content/uploads/2020/09/20200831-TWW-amendment-to-COVID-disaster-emergency-proclamation.pdf>

The OCA submits that the CALJ was properly acting under the authority as delegated by the Commission. The CALJ discussed his delegated authority as follows in his order:

By Emergency Order dated March 20, 2020, in response to the COVID-19 pandemic, the Commission authorized the Chief ALJ in pending rate case litigation to establish reasonable deadlines under the circumstances after consideration of the positions of the parties and the presiding ALJ. *See, Emergency Order Re Suspension of Regulatory and Statutory Deadlines; Modification to Filing and Service Requirements*, M-2020-3019262, at 2.

CALJ Order at 2.

The CALJ established a reasonable deadline under the circumstances, after consideration of the positions of the parties and the presiding ALJ. In his Order ruling on the OCA's Motion, the CALJ determined as follows:

After reading the responses of the parties and also obtaining the position of the presiding ALJ, I find OCA's request for a 60-day extension of the statutory deadline to be reasonable under the circumstances. I therefore grant OCA's Motion. The statutory deadline in this case is extended by 60-days or until March 26, 2021.

CALJ Order at 2. Moreover, the limitations contained in the Governor's Proclamation of Disaster Emergency were given favorable treatment by the Pennsylvania Supreme Court:

We note that the Emergency Code temporarily limits the Executive Order to ninety days unless renewed and provides the General Assembly with the ability to terminate the order at any time. 35 Pa.C.S. § 7301(c). Moreover, the public health rationale for imposing the restrictions in the Executive Order, to suppress the spread of the virus throughout the Commonwealth, is a stop-gap measure and, by definition, temporary.¹⁶

The Commission did not override Section 1329 and it did not provide unlimited authority to extend the statutory deadlines. On the contrary, the Commission's Emergency Order correctly addressed the Governor's Proclamation of Disaster Emergency and provided specific time-frames and procedures to extend statutory deadlines due to extraordinary circumstances and permitted

¹⁶ Friends of Devito v. Wolf, 2020 Pa. LEXIS 1987 *51.

extensions of up to ninety days. Emergency Order at 2, 4. The situation surrounding COVID-19 is unprecedented, and the OCA submits that the Emergency Order issued by the Commission, delegating authority to the CALJ to modify statutory deadlines in light of the Governor's Proclamation of Disaster Emergency and due to the extraordinary circumstances faced by the Commission and interested stakeholders, is reasonable.

V. CONCLUSION

For the reasons set forth above, the OCA respectfully requests that the Commission deny Aqua's Petition for Reconsideration of Staff Action. A sixty (60) day extension is necessary to meet the mounting challenges resulting from the COVID-19 pandemic. It will also ensure that the OCA and all parties have sufficient time and resources to adequately investigate and support their positions in this proceeding and develop a full and complete record for the Commission's consideration.

Respectfully submitted,

/s/ Harrison W. Breitman
*295616

Counsel for:
Tanya J. McCloskey
Acting Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048

Dated: September 22, 2020

Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-Mail: CHoover@paoca.org

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
E-Mail: EGannon@paoca.org

Santo G. Spataro
Assistant Consumer Advocate
Attorney I.D. # 327494
E-Mail: SSpataro@paoca.org

Harrison W. Breitman
Assistant Consumer Advocate
PA Attorney I.D. # 320580
E-Mail: HBreitman@paoca.org

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 Approval of its Acquisition	:	Docket No. A-2019-3015173
of the Wastewater System Assets of the Delaware	:	
County Regional Water Quality Control Authority	:	

VERIFICATION

I, Harrison W. Breitman, Assistant Consumer Advocate of the Office of Consumer Advocate, hereby state that the facts above set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

DATED: September 22, 2020
*296589

Signature: /s/ Harrison W. Breitman
Harrison W. Breitman
Assistant Consumer Advocate
PA Attorney I.D. # 320580
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101