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September 22, 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**

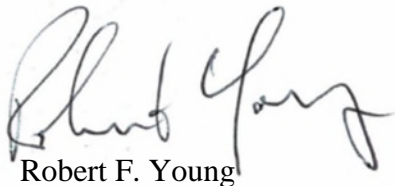
Dear Secretary Chiavetta:

Attached for filing with the Pennsylvania Public Utility Commission is a Motion of the County of Delaware to Dismiss Objections and/or Compel the Answering of County Interrogatories Set VIII Nos. 6-7 by Aqua Pennsylvania Wastewater, Inc., in the above-referenced matter.

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 
Robert F. Young

RFY/ams

Enclosure

c: Honorable Angela T. Jones
Certificate of Service

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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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Robert F. Young
Counsel to the County of Delaware,
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Dated this 22nd day of September, 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	:	Docket No. A-2019-3015173
for, inter alia, approval of the acquisition of	:	
the wastewater system assets of the	:	
Delaware County Regional Water Quality	:	
Control Authority:	:	

NOTICE TO PLEAD

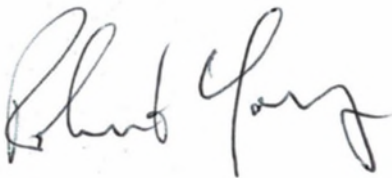
TO: John F. Povilaitis
Alan M. Seltzer
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409 North Second Street, Suite 500
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Pursuant to the Prehearing Order in this case, you are hereby notified to file a written response to the enclosed Motion to Dismiss Objections and/or Compel the Answering Of County Interrogatories Set VIII Nos. 6-7 by Aqua Pennsylvania Wastewater, Inc. ("Motion") within two (2) calendar days from service of this Notice, or by such other due date established by the Presiding Officer. If you do not file a written response denying the enclosed Motion, the Administrative Law Judge may rule on this Motion without further input.

File with:
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:
Honorable Angela T. Jones
Office of Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
801 Market Street
Philadelphia, PA 19107

Dated: September 22, 2020



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Robert F. Young, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania	:	
Wastewater, Inc. pursuant to Sections 507,	:	
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Delaware County Regional Water Quality	:	
Control Authority:	:	

**MOTION OF THE COUNTY OF DELAWARE TO DISMISS OBJECTIONS AND/OR
COMPEL THE ANSWERING OF COUNTY INTERROGATORIES SET VIII NOS. 6-7
BY AQUA PENNSYLVANIA WASTEWATER, INC.**

To Administrative Law Judge Angela T. Jones:

NOW COMES the County of Delaware, Pennsylvania (the “County”), by and through counsel, pursuant to 52 Pa. Code § 5.342(g) and Paragraph 8(c) of the Prehearing Conference Order issued by Presiding Administrative Law Judge (“ALJ”) Angela T. Jones on August 3, 2020,¹ who files this Motion to Dismiss Objections and Compel Aqua Pennsylvania Wastewater, Inc. (“Aqua”) to Answer the County’s Interrogatories Set VIII, Numbers 6-7.² In support thereof, the County submits the following:

I. INTRODUCTION

On September 10, 2020 Counsel for the County served Set VIII (erroneously labelled as Set VII) on counsel for Aqua and the parties of record.³ Set VIII contained 12 interrogatories,

¹ Paragraph 8(c) states “Motions to dismiss objections and/or direct the answering of interrogatories shall be filed within two (2) calendar days of service of the written objections.”

² The County has provided Aqua with a modified Interrogatory No. 9 to which no objection has been filed. Additionally, Aqua and the County have informally resolved the Objection to Interrogatory Nos. 1-5 and 8. Accordingly, the instant motion addresses Aqua’s objections to Interrogatory Nos. 6 - 7.

³ The County’s interrogatories are available in Attachment 1 to this Motion.

numbered 1 through 12. On September 15, 2020 counsel for Aqua contacted counsel for the County regarding objections to Set VIII numbers 1-9.⁴ On September 16, 2020 Aqua filed Answers and Objections to County-VIII. Aqua and the County believe that all issues have been resolved but for Aqua's objections to County-VIII-6 and County-VIII-7 which are the subject of this motion.⁵

As has been discussed in greater detail in several filings by the County in this Docket, on May 14, 2020 the County initiated litigation against DELCORA in the Court of Common Pleas of Delaware County at Docket No. CV-2020-003185 (the "Common Pleas Action"). Aqua has intervened in the Common Pleas Action and the litigation is ongoing.

Although Aqua is represented by different law firms in this proceeding than in the Common Pleas Action, the County and DELCORA are represented by the same firms before the Commission and in the Common Pleas Action. There has been substantial discovery occurring in the Common Pleas Action. Through September 10, 2020 Aqua produced to the County over 44,000 pages of Bates numbered documents and approximately 100,000 pages of non-Bates numbered documents. The vast majority of these documents are emails and email chains which Aqua produced as PDF files without live links to the attachments therein.⁶

⁴ Aqua's objections to the County's interrogatories are available in Attachment 2 to this Motion.

⁵ Aqua and the County have attempted to resolve the issues in this Motion. On Friday, September 18, 2020, Aqua and the County agreed to an extension of time until Monday, September 21, 2020 for the filing of this Motion. On Monday, September 21, 2020, Aqua and the County agreed to a further extension of time until Tuesday September 22, 2020 to resolve as many of the objections as possible.

⁶ We appreciate Aqua's counsel's willingness to direct the County to the related attachments by Bates Number. However, as noted by Aqua's counsel, Aqua's Bates Numbered documents are not in their native file formats. The interrogatories in County Set VIII requested the production of working files. See 52 Pa.Code § 5.349(a)(1) (allowing the requesting party to obtain information in "reasonable usable form").

This is not a fishing expedition. The interrogatory requests at issue are based upon three specific documents produced by Aqua in the Common Pleas Action. The County possesses the base document in each of the two interrogatories at issue: County-VIII-6 is based upon Aqua 06084 and County-VIII-7 is based upon Aqua 04587. Moreover, due to Aqua's identification of certain attachments by Bates Number, counsel for the County can confirm that it possesses (in PDF form) some of the attachments requested by County-VIII-6(a) and County-VIII-7(a).

Unfortunately, PDF versions of an Excel Spreadsheet or PowerPoint presentation do not provide the same level of information and usable data as the file contains in its native form. Producing PDFs of spreadsheets creates viewing and access issues by moving columns and rows from a single spreadsheet tab onto multiple 8 ½" x 11" pages. The formulas, inputs, and rationale that is viewable in an Excel file is not accessible in PDF form.

This Motion requests Aqua be ordered to fully comply with the County's interrogatories. Specifically, subsections (b) and (c) of County-VIII-6-7 which seek the production of specific files in their native form (*i.e.*, Excel spreadsheets) referenced as attachments to each base document, other versions of the files, and working files of "charts, tables and graphs" contained in the documents.⁷

II. ARGUMENT

The crux of Aqua's objections to County Set VIII-6 and VIII-7 are to interrogatory subsections rather than to privilege or relevance of the base documents that are the described in the County's requests. Aqua makes the same two objections to each interrogatory. First, Aqua contends that the requested attachments to the base documents "are neither relevant to nor likely

⁷ The provision of working PowerPoint presentations will allow the County to analyze and identify the sources and assumptions within the charts, tables and graphs embedded in the presentations.

to lead to any information relevant to the transaction Aqua actually undertook with DELCORA....” See Aqua Objections at 2-5. Aqua’s second objection is that the attachments are protected from discovery pursuant to 52 Pa.Code §5.323(a).⁸ *Id.*

Aqua carries the same general objections in its objections to County Set VIII-6 and VIII-7, and fails to explain or plead any of its objections with any specificity. More importantly, at no point in Aqua’s objections does it object to the County’s interrogatories requesting production of working files. Therefore, Aqua has waived any objection to producing working spreadsheets and live presentations.

Lastly, Aqua’s two general objections are inconsistent. If Aqua’s second objection is factually accurate – and the requested files “relate to conclusions or opinions of Aqua’s representatives regarding the value or merit of Aqua’s claims, strategy, tactics and possible defenses in this proceeding and constitute material in support of Aqua’s witnesses’ testimony and exhibits” – the files are both relevant and likely to lead to relevant information. Whether such relevant information is protected from discovery is a different issue. Such relevant information would be admissible unless protected by a valid privilege (which Aqua has not asserted in its objections).

We will first address Aqua’s second argument as our response is common to all three interrogatories. Thereafter, we will separately discuss the relevancy of each interrogatory.

I. The Interrogatories Seek Materials Discoverable Under Section 5.323(a)

Aqua is relying on Section 5.323(a), which states:

§ 5.323. Hearing preparation material.

- (a) *Generally*. Subject to this subchapter and consistent with Pa. R.C.P. 4003.3 (relating to scope of discovery trial preparation material generally), a party may obtain discovery of any matter discoverable under § 5.321(b) (relating to scope) even though prepared in anticipation of litigation or hearing by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery may not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery may not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits, whether or not final versions of the testimony or exhibits are offered into evidence.

Aqua does not contend that its objections relate to “the mental impressions of a party’s attorney” or any other privilege. Therefore, only the last sentence of Section 5.323 is potentially relevant.⁹

In its Order promulgating Section 5.323(a) of its regulations, the Commission stated:

The Commission's final regulations at § 5.324(a) and 5.323(a) must be read in light of § 5.321 and Pa. R.C.P. 4003.3--4003.5, which formed the basis for these regulations. The apparent "allowance" language of § 5.324(a) contrasted with the apparent "preclusion" language in § 5.323(a) is resolved by reference to the Civil Rules and § 5.321(a). Section 5.321(c) allows discovery not otherwise privileged and identification is provided. **These regulations allow the discovery of hearing preparation material and expert testimony so long as they are not privileged.** Section 5.321(a) establishes the privilege exclusion, § 5.323(a) permits discovery so long as the material is not privileged or mental impressions for hearing preparation, and § 5.324(a) applies the rule for discovery but expands it to hearing preparation material. **The rules when read together allow the discovery of opinions so long as they are not privileged. This explains the apparent preclusion in § 5.323(a) with the apparent inclusion in § 5.324(a).**

Final Rulemaking Order, Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission, Docket No.

⁹ Aqua's objections contain an inherent, but unproven assumption - that Aqua employees are included within the Section 5.323(a) term “representative of a party other than the party’s attorney”. The County does not concede that utility employees are such “representatives.” To the contrary, the term refers to outside consultants and expert witnesses. See *PUC v Pennsylvania American Water Co.*, Order on Motion to Compel, Docket No. R-2011-2232243, dated July 21, 2011.

L-00020156, Public Meeting held December 15, 2005, Order entered January 4, 2006, at page 71 (emphasis added).

Each of Aqua's objections make the following statement "[t]he documents sought in Interrogatory No. [#] relate to preliminary assessments by Aqua of a potential transaction with DELCORA." Aqua then goes on to assert that the material is "protected from discovery pursuant to 52 Pa. Code § 5.323(a)." ¹⁰ This conclusory assertion is incorrect as a matter of law.

A similar discovery dispute arose in Pennsylvania American Water Company's (PAWC) 2011 rate case. ALJ Jones identified the standard of review in discovery disputes as follows:

[P]arties may obtain discovery of any unprivileged matter which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party. 52 Pa.Code § 5.321(c). We note that, as contended by the OCA, the Commission has applied a liberal standard with respect to relevancy. *See, Pa. P.U.C. v. Equitable Gas Co.*, 61 Pa. P.U.C. 468, 477 (1986). Also, as stated by the Commonwealth Court in *Koken v. One Beacon Insurance Company*, 911 A.2d 1021, 1025 (2006), relevancy depends upon the nature and facts of the individual case, and any doubts are to be resolved in favor of relevancy and permitting discovery.

Order on Motion to Compel, Docket No. R-2011-2232243, dated July 21, 2011, at page 12.

PAWC objected to an OCA interrogatory regarding budgets and forecasting "to the extent that it is asking for PAWC's assessment of the likelihood of success of its positions in litigation and/or mental impressions with respect to claims or defenses in this or future rate proceedings." *Id.* At 15. OCA sought to dismiss the objection by asserting that "budgets and forecasts are prepared to manage a corporation and not as trial preparation material ... to the extent that PAWC

¹⁰ The requested documents include PowerPoint presentations (those with file extension .pptx) and Excel spreadsheets (those with the file extension .xlsx). The County does not know if these presentations were made for internal, external or mixed internal/external purposes or if Aqua provided the presentations to DELCORA and/or DELCORA customers. Nonetheless, even if the presentations were made solely to internal Aqua staff, they are discoverable as discussed above.

witnesses may have relied on this information to prepare the instant rate request, the material is discoverable and likely admissible.” *Id.* Judge Jones agreed with “OCA that the information requested by OCA Set II – 128(g) is discoverable to the extent PAWC witnesses may have relied on this information to prepare the instant rate request” and dismissed the objection.

The same result should occur in the instant matter. A utility’s analysis of a potential acquisition is business conducted to manage the utility and not prepared as privileged trial preparation material. To highlight this point, we note that the base documents for each interrogatory all precede the execution of the Asset Purchase Agreement on September 17, 2019. County-VIII-6 is based upon Aqua 06084, an email sent on September 8, 2019. County-VIII-7 is based upon Aqua 04587, identifying attachments whose file names were dated in July and August 2019.

Accordingly, the challenged interrogatories are not prohibited by Section 5.323(a). To the contrary, even if the interrogatories sought “hearing preparation material” (which they do not) the ALJ should dismiss Aqua’s objections and grant this motion to compel answers.

II. The Interrogatories Seek Material Relevant to Aqua’s Application and to the County’s Protest.

County-VIII-6 requests:

Please provide a copy of the document provided in discovery in the Court of Common Pleas case at Bates Number AQUA 06084. Regarding the document provided in response to this COUNTY VII-6, please provide:

- a. A copy of all attachments referenced, linked, or otherwise identified in the document, including the files labeled “Project Grey Seal Rate Stabilization Trust Analysis v4.pdf” and “Project Grey Seal Rate Stabilization Trust Analysis v4.pptx”.

- b. All prior and subsequent versions of the documents provided in response to County VII-6(a).
- c. Working Excel files of all charts, tables and graphs displayed in the documents in COUNTY VII-6(a).

Aqua objects to County-VIII-6 as follows:

...The documents sought in Interrogatory No. 6 relate to preliminary assessments by Aqua of a potential transaction with DELCORA. As such, they are neither relevant to nor likely to lead to any information relevant to the transaction Aqua actually undertook with DELCORA, which is the basis of the issues before the Commission in this proceeding. To the extent Delaware County maintains these materials relate to claims in the proceeding before the Commission, Aqua objects to the requests in Interrogatories 6(a), 6(b) and 6(c) to provide the referenced all attachments, references and links and earlier or later versions thereof, if any, because such attachments, documents and/or links relate to conclusions or opinions of Aqua's representatives regarding the value or merit of Aqua's claims, strategy, tactics and possible defenses in this proceeding and constitute material in support of Aqua witnesses' testimony and exhibits. Such material is protected from discovery pursuant to 52 Pa. Code § 5.323(a).

See Attachment 2 (Aqua's Objections to County Set VIII).

"Project Grey Seal" is Aqua's internal name for its project to acquire DELCORA. Answer to County-Set VIII-1. The question of whether the documents and the files related to them are relevant or calculated to lead to relevant material is answered by merely looking at four words in the title of each document: Rate Stabilization Trust Analysis.

Although Aqua has been somewhat inconsistent regarding the existence and relevancy of the proposed rate stabilization trust¹¹, the Commission has unambiguously stated that rate stabilization is a disputed factual issue in this proceeding and properly subject to discovery:

[A]s is now evident from the Petition, the Amended Petition and the responsive pleadings, the County and the Company present a factual dispute of whether a rate stabilization plan exists and whether it is applicable to the Application. At this stage of the Application proceeding, therefore, it would be premature and potentially violative of due process for the Commission to make a determination about this factual dispute without the development of a full evidentiary record.

Notwithstanding the six-month consideration period set forth in Section 1329, there is sufficient time for the Parties to conduct discovery and present their testimony and arguments regarding the rate stabilization plan question during the normal administrative litigation process.

Opinion and Order, Docket No. A-2019-3015173, Public Meeting held August 27, 2020, entered August 27, 2020, at page 16. Aqua's relevancy-based objection to County-VIII-6 is specious and should be rejected.

County-VIII-7 requests:

Please provide a copy of the documents provided in discovery in the Court of Common Pleas case at Bates Number AQUA 04587. Regarding the document provided in response to this COUNTY VII-7, please provide:

- a. A copy of all attachments referenced or otherwise identified in the document, including the files labeled "Project Grey Seal Rate Detail_v8 3 2019.pdf.awsec", "Project Gray Seal 07112019 v1.5.pptx.awsec", "Project Gray Seal 07112019 v1.4.pptx.awsec" and "Project Gray Seal 07112019 v1.4.pptx.awsec".
- b. All prior and subsequent versions of the documents provided in response to County VII-7(a), regardless of the naming convention being different.

¹¹ Aqua's Application includes the trust amongst the substantial public benefits of the transaction." See, e.g., Aqua Application, Exhibit W-1 (Direct Testimony of Robert Willert) at page 11, lines 13-17. In other filings, Aqua asserts the Trust is not subject to PUC jurisdiction. See Aqua Brief in Opposition to Material Question at 4.

- c. Working Excel files of all charts, tables and graphs displayed in the documents in COUNTY VII-7(a).

Aqua objects to County-VIII-7 as follows:

...The documents sought in Interrogatory No. 7 relate to preliminary assessments by Aqua of a potential transaction with DELCORA. As such they are neither relevant to, nor likely to lead to any information relevant to the transaction Aqua actually undertook with DELCORA, which is the basis of the issues before the Commission in this proceeding. To the extent, Delaware County maintains these materials relate to claims in the proceeding before the Commission, Aqua objects to the requests in Interrogatories 7(a), 7(b) and 7(c) to provide the referenced all attachments, references and links and earlier or later versions thereof, because such attachments, documents and/or links relate to conclusions or opinions of Aqua's representatives regarding the value or merit of Aqua's claims, strategy, tactics and possible defenses in this proceeding and constitute material in support of Aqua witnesses' testimony and exhibits. Such material is protected from discovery pursuant to 52 Pa. Code § 5.323(a)...

See Attachment 2 (Aqua's Objections to County Set VIII).

Aqua's Application was made pursuant to Section 507, 1102 and 1329 of the Public Utility Code. Aqua's Application asserts that "The public interest and need will be served by allowing Aqua, in lieu of DELCORA, to provide wastewater service in the Requested Territory and to address the issues of regulatory requirements and capital expenditures." Aqua Application ¶56(j) at page 17. 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). The information sought by this interrogatory is relevant to the issues of public need and public benefits as claimed in the Application and DELCORA's intervention in support of the Application, and questioned by the County's Protest against the Application.

Aqua submitted the testimony of Robert Willert, DELCORA's Executive Director, in support of its Application:

Q. Please further describe the benefits of the Proposed Transaction.

- A. The impact on bills for DELCORA's customers was one of the driving forces behind this transaction and is the primary benefit. The majority of the sale proceeds will be placed in an irrevocable trust for the benefit of DELCORA's customers. It is my understanding that this is a relatively unique feature for a transaction of this nature and provides a substantial benefit to our customers. Given the considerable remedial costs expected over the next 15 years, rates will be increasing no matter who owns and operates the System.

Aqua Application, Exhibit W1 at page 11.

Aqua and DELCORA describe the effects on DELCORA's ratepayers as one of the public benefits to the transaction. One of the fundamental factual questions in this proceeding is whether DELCORA ratepayers will benefit from the acquisition by Aqua. Aqua and DELCORA want to focus attention on the Trust disbursements providing credits to mitigate Aqua's increased rates until 2028. However, the County believes the long-term rate implications of the acquisition are extremely negative for DELCORA's ratepayers.

Additionally, in order for the County to fully investigate the existence (or non-existence) of a rate stabilization plan, it is necessary for the County to review Aqua's rate analyses for its proposed acquisition. The Applicant's rate projections and analyses are relevant and critical to the County's Protest and development of its case. Such rate analyses can provide the Commission with a more comprehensive record upon which to render a decision in this matter and determine whether or not Aqua's application provides substantial affirmative public benefits and is in the public interest. Therefore, Aqua's objection to answering this interrogatory should be dismissed.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the County's Motion to Dismiss Objections and Compel Aqua Pennsylvania Wastewater, Inc. ("Aqua") to Answer the County's Interrogatories Set VIII, Numbers 6-7 by providing full and complete responses to the interrogatories, including but not limited to the electronic production of native files.

Respectfully submitted,

McNEES WALLACE & NURICK LLC



By _____
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Dated: September 22, 2020