PENNSYLVANIA

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

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|  | Public Meeting held October 8, 2020 |
| Commissioners Present:  Gladys Brown Dutrieuille, Chairman  David W. Sweet, Vice Chairman  John F. Coleman, Jr.  Ralph V. Yanora | |
| Application of Aqua Pennsylvania Wastewater, Inc., pursuant to Sections 507, 1103, and 1329 of the Public Utility Code for Approval of its Acquisition of  the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority | A-2019-3015173 |
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**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration of Staff Action (Reconsideration Petition), filed by Aqua Pennsylvania Wastewater, Inc. (Aqua or Company) on September 4, 2020, in the above-captioned proceeding. The Reconsideration Petition was filed in response to the Order of Chief Administrative Law Judge (CALJ) Charles E. Rainey, Jr., dated August 31, 2020 (*Extension Order*), which granted the Expedited Motion for an Extension of the Statutory Suspension Period filed by the Office of Consumer Advocate (OCA) on August 17, 2020 (Expedited Motion).[[1]](#footnote-1) On September 10, 2020, the Office of Small Business Advocate (OSBA) filed an Answer in opposition to the Reconsideration Petition. On September 22, 2020, the OCA, also filed an Answer in opposition to the Reconsideration Petition. On September 24, 2020, the County of Delaware, Pennsylvania (County) filed a letter agreeing with the arguments in the Answers of the OSBA and the OCA. For the reasons below, we shall deny the Reconsideration Petition.

**Background**

On March 6, 2020, the Governor Tom Wolf, issued the Proclamation of Disaster Emergency pursuant to Section 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. §§ 7101, *et seq*. (*Executive Order*) to address the exigencies created by the COVID-19 global pandemic.

On March 15, 2020, the Commonwealth’s Deputy Secretary for Human Resources and Management issued an Executive Order implementing protocols for remote telework for state offices in Dauphin County and the Capital Complex, including the Commission’s offices, as amended, beginning March 16, 2020, and extending at least through a period effective as of the entry date of this Opinion and Order.

On March 19, 2020, the Governor’s Office issued an order closing all businesses that were not life sustaining.[[2]](#footnote-2)

On March 20, 2020, the Commission issued the *Suspension of Regulatory and Statutory Deadlines: Modification to Filing and Service Requirements* *– Emergency Order*, Docket No. M-2020-3019262 (March 20, 2020) (*Emergency Order*); *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) (*Ratification Order*), to furnish guidance on the conduct of Commission proceedings during the pendency of the COVID-19 disaster emergency. Specifically, the *Emergency Order* directs, in part, that:

Parties to proceedings before the Commission are encouraged to cooperate regarding the suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines in connection with the performance of any obligation prescribed by the Public Utility Code or other applicable law.

*Emergency Order* at 4. The *Emergency Order* further provides that:

[I]n pending rate case litigation, the Chief ALJ 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 ALJ’s decision would then be subject to review by the Commission.

*Emergency Order* at 2. Additionally, in response to the *Executive Order*, the Commission adopted broader electronic filing practices, ceased paper service on and by the Commission for the duration of the emergency, and has encouraged other flexible procedures to allow the Commission to continue to operate through the emergency.

On April 13, 2020, the Pennsylvania Supreme Court ruled that the Governor’s *Executive Order* is a legal exercise of authority granted to the Governor under the Emergency Management Services Code. *See* *Friends of Danny DeVito et al. v. Tom Wolf, Governor, et al*., \_\_\_Pa.\_\_\_, 227 A.3d 872, 886 (2020) (*DeVito*)(citing 35 Pa. C.S. § 7301(f)).[[3]](#footnote-3)

Beginning in late May 2020, the reopening phase began under Governor Wolf’s program that has allowed Counties to move towards reopening businesses and government locations through a series of progressively less-restrictive reopening protocols under the Governor’s Red-Yellow-Green designations.

On June 3, 2020, Governor Wolf renewed the *Executive Order* for an additional ninety days.[[4]](#footnote-4)

On July 1, 2020, the Commonwealth’s Secretary of the Department of Health issued an Order[[5]](#footnote-5) and on July 15, 2020, the Governor[[6]](#footnote-6) and the Secretary of Health[[7]](#footnote-7) each signed new orders, effective July 16, 2020, for statewide targeted mitigation efforts in response to the recent rise in COVID-19 cases. These Orders included, *inter alia*, mandating the use of universal face coverings in public, beginning immediately, and further directing the continuation of telework within the Commonwealth.

On August 31, 2020, Governor Wolf renewed the *Executive Order* for an additional ninety days.[[8]](#footnote-8) As of the entry date of this Opinion and Order, the Commission’s office buildings remain closed due to the COVID-19 pandemic emergency, however, the Commission remains fully operational with its staff teleworking.

**History of the Proceeding**

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

On April 2, 2020, the OCA filed a Protest to the Application and counsel for the OCA and the Commission’s Bureau of Investigation and Enforcement (I&E) filed their respective Notices of Appearance.

On May 18, 2020, the County filed a Petition to Intervene in the Application proceeding.[[9]](#footnote-9) DELCORA filed a Petition to Intervene on June 6, 2020. Thereafter, by Secretarial Letter dated June 11, 2020 (*June 2020 Secretarial Letter*), the Commission notified Aqua of the conditional acceptance of the Application for filing. However, the Commission directed the Company: (1) to proceed to provide notice of the filing of the Application; (2) to amend its Application to include certain supplemental materials; and (3) to ensure verification of the supplemental materials.

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

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

County Reconsideration Petition at 1-2.

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

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

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

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

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

On August 4, 2020, Aqua filed its Answer to the County Amended Reconsideration Petition. On August 7, 2020, the County filed a Petition for Stay and Request for Commission Review and Answer to a Material Question (Interlocutory Petition).[[10]](#footnote-10) On August 13, 2020, I&E filed a letter in support of the Interlocutory Petition. Additionally, the OCA filed its brief in support of the Interlocutory Petition on August 14, 2020.

Also, on August 14, 2020, the OCA filed its Expedited Motion, which requested an extension of the suspension period by sixty days. The OCA filed the Expedited Motion pursuant to the *Emergency Order* and the *Ratification Order*. According to the OCA, the suspension is necessary to meet the mounting challenges resulting from the COVID-19 pandemic and will ensure that the OCA has sufficient time to investigate and support its position in the Application proceeding. The OCA submitted that its Expedited Motion should not be viewed as an alternative resolution to the issues raised in the Interlocutory Petition. Expedited Motion at 4.

On August 17, 2020, Aqua and DELCORA filed their respective briefs in opposition to the Interlocutory Petition.

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 Expedited Motion.

On August 24, 2020, Aqua filed an Answer in Opposition to the Expedited Motion 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-19 pandemic, Aqua submitted that the OCA failed to justify application of that authority here. Also, on August 24, 2020, the OSBA and the County filed Answers in support of the Expedited Motion and DELCORA filed an Answer opposing the Expedited Motion.

By Opinion and Order entered August 27, 2020, the Commission denied both the County Reconsideration Petition and the County Amended Reconsideration Petition. Also, on August 27, 2020, Aqua and DELCORA each filed Answers to the Interlocutory Petition. Subsequently, on August 31, 2020, the Commission issued an Opinion and Order in which the Commission declined to answer the material question posed by the Interlocutory Petition filed by the County (*August 31, 2020 Order*).

Also, on August 31, 2020, CALJ Rainey issued the *Extension Order*. In the *Extension Order*, CALJ Rainey noted that due to the circumstances of the COVID-19 pandemic the Commission’s *Emergency Order* authorized the CALJ to establish reasonable deadlines under the circumstances after consideration of the positions of the Parties and the ALJ. Upon review of the positions of the Parties and after obtaining the position of the presiding ALJ, the CALJ found the OCA’s request for a sixty-day extension of the statutory deadline to be reasonable. Accordingly, the *Extension Order* granted the Expedited Motion and extended the statutory suspension period in this case by sixty days or until March 26, 2021. *Extension Order* at 2.

As indicated above, on September 4, 2020, Aqua filed its Reconsideration Petition of the *Extension Order*. On September 10, 2020, and September 22, 2020, the OSBA and the OCA filed their respective Answers in opposition to the Reconsideration Petition.

**Discussion**

**Legal Standards**

In the *Emergency Order*, in pertinent part, we declared that while the *Emergency Order* is in effect, any decision by a Commission Bureau Director, including the CALJ, to suspend, extend, waive or change “any regulatory, statutory or procedural deadline,” is reviewable by the Commission pursuant to Section 5.44 of the Commission’s Regulations upon the filing of a petition for reconsideration of staff action by an affected party.[[11]](#footnote-11) *Emergency Order* at 2, 4, OP No. 6.

When evaluating appeals from a Commission staff action under 52 Pa. Code § 5.44, the applicable legal standard is that the moving party has the burden of proof.[[12]](#footnote-12) *See, e.g., Application of Airquest*, Docket No. A-2015-2493073 (Order entered December 8, 2016) (request for reconsideration of secretarial letter denying application for failure to comply with conditions); *Application of Dep’t of Transportation (Norfolk),* Docket No. A-2018-3003795 (Order entered November 14, 2019) (request for reconsideration of secretarial letter approving application with conditions).

In the *Emergency Order*, the Commission delegated authority to Bureau Directors, including the CALJ, to suspend, extend, waive, or change any statutory or regulatory deadline which may hinder, rather than further, the mission of the Commission. Specifically, we stated as follows:

Similar to other actions where we have delegated various duties to Commission bureaus, we now delegate the authority to determine the suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines to individual Commission Bureau Directors whose bureaus are tasked with matters before the Commission. Each Bureau Director will make decisions regarding the necessity of modifying such deadlines. Modifications may result from a request by a party or the tribunal/bureau staff itself.

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.

*Emergency Order* at 2, 4, Ordering Paragraph (OP) No. 4 (emphasis added).

We encouraged parties appearing before us in proceedings to cooperate regarding procedural extensions, stating as follows:

Parties to proceedings before the Commission are encouraged to cooperate regarding the suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines in connection with the performance of any obligation prescribed by the Public Utility Code or other applicable law.

*Emergency Order* at 4, OP No. 1 (emphasis added).

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

# Reconsideration Petition and Answers

In its Reconsideration Petition, Aqua contends that the circumstances of this proceeding are not hampering the Commission from meeting the six month statutory compliance date set forth in Section 1329(d)(2) of the Code. As a result, the Company submits that the *Extension Order* should be reconsidered and the Expedited Motion should be denied. Reconsideration Petition at 7.

In support, Aqua argues that the OCA’s expressed concerns about its inability to conduct an adequate investigation during the six month review period and its due process allegations are unsupported by the facts. Aqua avers that the proceeding was moving forward irrespective of the COVID-19 pandemic, citing its hand delivery of electronic and paper copies of the Application, exhibits and work paper files in Excel format to the statutory advocates. Additionally, the Company submits that it submitted supplemental information to Commission staff requests on seven separate occasions and both Aqua and DELCORA responded to extensive discovery requests of approximately 250 interrogatories. Thus, the Company asserts that the OCA and the other Parties had already conducted extensive discovery by the time of the prehearing conference held on September 2, 2020. *Id*. at 4-5.

Further, Aqua submits that throughout the month of August, the Parties were aware that testimony of the non-applicants would be required as early as September 4, 2020. As an example, the Company notes that the OCA in its prehearing memorandum filed on August 31, 2020, presented a litigation schedule proposing that, absent a stay, other Parties’ direct testimony be due on September 9, 2020. Similarly, I&E presented a litigation schedule, absent a stay, proposing a due date of September 4, 2020, for other Parties’ direct testimony. According to Aqua, once the date for the other Parties’ testimony was established, the remaining dates in the schedule could have been addressed as they always are in these types of proceedings. *Id*. 5-6.

Although recognizing that there may be circumstances preventing the Commission from meeting a statutory compliance date such as those outlined in the *Emergency Order*, Aqua submits that the facts do not support the claims that the COVID‑19 pandemic is hampering review of the Company’s Application in this proceeding or raising due process concerns and that the Commission must issue an order on its Application within six months. *Id*. at 4, 6 (citing *Application of Aqua Pennsylvania Wastewater, Inc. – New Garden Township*, Docket No. A-2016-2580061 (Order entered February 15, 2017) (*New Garden*)).

Additionally, the Company references the Commission’s *August 31, 2020 Order* in which we declined to answer the material question posed by the Interlocutory Petition filed by the County and stated, in part, that “[g]ranting a stay in this proceeding would impede the expeditious consideration of the Application as contemplated under Section 1329.” Reconsideration Petition at 6 (quoting *August 31, 2020 Order* at 32).

In its Answer to the Reconsideration Petition, the OSBA challenges the Company’s contention that the proceeding was moving forward irrespective of the COVID-19 pandemic. According to the OSBA, the pandemic has put residential customers on the unemployment and food lines, devasted small businesses, and shut down industrial production. The OSBA argues that the statutory advocates have been dealing with the overwhelming challenges created by the pandemic since March of 2020. The OSBA submits that investigations have become complicated because of the work from home requirements for its attorneys, staff and expert witnesses which have materially affected the OSBA’s ability to meet statutory deadlines. “Without the procedural extensions granted in this and other cases, it would have been impossible for the OSBA to effectively participate in cases before the Commission.” OSBA Answer at 3.

The OSBA argues that the proposed litigation schedule included in the ALJ’s Prehearing Conference Order dated August 17, 2020, was subject to change by the Parties. The OSBA also asserts that the Commission has consistently extended the procedural schedule in other cases due to the pandemic. The OSBA argues that given the over-crowded case calendar and in light of the extensions granted in other cases, it fully expected the CALJ to extend the procedural schedule in this case. *Id*. at 3 (citing *Pa. PUC, et al., v. Columbia Gas of Pennsylvania, Inc.*, Docket Nos. R-2020-3018835, *et al.* (Order entered August 20, 2020) (*Columbia Gas*)).

Describing Aqua’s view of the impact of the COVID-19 pandemic as being distorted, the OSBA contends the Expedited Motion was submitted accurately and in good faith. The OSBA argues that the Commission should uphold the *Extension Order* due in part to the OSBA’s over-taxed resources. OSBA Answer at 4.

The OCA argues that the Commission’s *Emergency Order* applies to the current proceeding and that the CALJ carefully considered the positions of all the Parties to determine whether to extend the statutory suspension period by sixty days. Since the *Extension Order* does not contain any errors of law and is reasonable, the OCA requests that the Commission deny the Reconsideration Petition. The OCA adds that the sixty-day extension is necessary to meet the mounting challenges resulting from the COVID-19 pandemic and will ensure the OCA and the Parties have sufficient time and resources to adequately support their positions in this proceeding and to develop a complete record for the Commission’s consideration. OCA Answer at 7, 17.

The OCA asserts that, consistent with the Governor’s *Executive Order*, the Commission’s *Emergency Order* reflects a determination that statutory deadlines prescribed by the Code or applicable law may be waived, suspended, or extended. Regarding Aqua’s argument that the decision in *New Garden* requires the Commission to issue an order for Section 1329 applications within six months, the OCA contends that *New Garden* is not applicable to this proceeding. Specifically, the OCA argues that *New Garden* was not decided during a disaster emergency where the Governor issued a proclamation explicitly permitting suspension of regulatory statutes and, after which, the Commission issued an accompanying *Emergency Order* explicitly permitting the extension of statutory deadlines. OCA Answer at 8.

In addition, the OCA objects to the Company’s contention that the extension of the statutory suspension period is contrary to the model litigation schedule set forth in the ALJ’s Prehearing Conference Order. The OCA submits that Aqua’s argument is an apparent challenge to the Governor’s *Executive Order* which is not properly before the Commission. According to the OCA, the issue properly before the Commission is whether the considerations discussed in the *Emergency Order* support extending the statutory suspension period by sixty days. The OCA notes that the *Emergency Order* does not confer unlimited authority to ignore Pennsylvania law, but permits the CALJ to allow an extension of statutory deadlines of up to ninety days. Here, the OCA continues, the CALJ complied with the *Emergency Order* in determining that a sixty-day extension to the statutory suspension period was appropriate for this proceeding. OCA Answer at 9-10.

The OCA also emphasizes that the original deadlines based on the statutory suspension period would have confined the litigation time to approximately six weeks. During this limited period, the Parties would be required to schedule and hold public input hearings, develop and respond to testimony, engage in settlement discussions, participate in evidentiary hearings, and litigate the issues in main and responsive briefs. In support of the apparent impact of the six week time frame, the OCA notes that the Company did not provide responses to the OCA’s interrogatories, served over two months prior, until the Commission conditionally accepted Aqua’s Application. The OCA argues that the six-week litigation schedule during the COVID-19 pandemic does not promote due process or further the public interest. In particular, the OCA emphasizes that its personnel are working remotely and do not have usual access to physical files, photocopying, U.S. mail, and support staff which impairs the ability to investigate Aqua’s filing. *Id*. at 10-11.

The OCA further identifies particular challenges to a six week litigation schedule and explains that providing additional time to analyze these issues will be critical:

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. Also, projections contained in the Utility Valuation Expert’s valuations may require additional adjustments as a result of the COVID-19 pandemic. 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.

OCA Answer at 11 (citing Expedited Motion at 7).

The OCA also highlights the arguments of other Parties that if the deadline were not modified, it would prevent the development of a full and complete record. Noting the position of the Municipal Protestants, the OCA states that Aqua and DELCORA will not be prejudiced by granting a sixty-day extension because it would still require a Commission final decision by the end of March 2021, which is within the outside date for closing contemplated in the Asset Purchase Agreement in the Application by approximately four months. Moreover, the OCA references the arguments of the County in support of the Expedited Motion such as the complexity of and the massive volume of documents contained in the Application and in response to discovery, the growing number of Parties, and the expectation that the hearings will be conducted remotely. OCA Answer at 12-13.

Next, the OCA objects to the Company’s argument pertaining to the OCA’s inclusion of the proposed procedural schedule in its Prehearing Memorandum. The OCA submits that the Prehearing Memorandum was due at noon on August 31, 2020, the same day the *Extension Order* was issued and thus it did not have time to adjust its filing to address the CALJ’s granting of the extension. The OCA proffers that it is unreasonable and inaccurate for the Company to assert that the submission of a litigation schedule that complied with the ALJ’s prior preconference order somehow undermines the OCA’s arguments. OCA Answer at 13-14.

The OCA also addresses Aqua’s arguments that denial of the County’s Interlocutory Petition in the *August 31, 2020 Order* supports adhering to the statutory suspension period. The OCA argues that the *August 31, 2020 Order* did not address whether the Commission has the authority and whether it should exercise such authority to extend the suspension period in a Section 1329 proceeding pursuant to the *Emergency Order*. Rather, the OCA highlights that the Commission explicitly recognized that such a matter remained to be addressed by the OALJ. Moreover, the OCA contends that if the Commission had granted the County’s requested stay in its Interlocutory Petition it would have likely exceeded the procedural schedule in this proceeding beyond the sixty-day extension requested by the OCA and for an indefinite amount of time until the complaint proceeding in the Court of Common Pleas of Delaware County and the resulting appeals were resolved. In contrast, the OCA submits its sixty-day extension was in accordance with the *Emergency Order*. OCA Answer at 14-15.

**Disposition**

As a preliminary matter, Aqua acknowledges the authority of the Commission to extend statutory deadlines during the extraordinary circumstances of the COVID-19 pandemic. Reconsideration Petition at 4. Indeed, the Commission has previously determined that our authority under the *Emergency Order* is derived from the Governor’s *Executive Order*, which was issued pursuant to the Emergency Management Services Code, 35 Pa. C.S. § 7101.[[13]](#footnote-13) Further, we have held that the provisions of the *Executive Order* are applicable to the Code since it is a regulatory statute. Therefore, the Commission, as the agency with the oversight and enforcement responsibilities of the Code, may exercise the authority conferred by the *Executive Order*. *See* *Columbia Gas* at 18-19; *see also Pa. PUC v. Pennsylvania-American Water Company*, Docket Nos. R‑2020-3019369 and R-2020-3019371 (Order entered August 20, 2020).

We implemented this authority pursuant to the *Emergency Order* by stating:

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

*Emergency Order* at 2, 4, Ordering Paragraph (OP) No. 4 (emphasis added). To date, the *Emergency Order* remains in full force and effect.

Accordingly, there is no apparent dispute here that the Commission has the authority to extend the statutory deadline set forth in Section 1329 of the Code pursuant to the parameters of the *Executive Order* and the *Emergency Order*. The question is whether the CALJ properly exercised his delegated authority in this proceeding. We find that his ruling was appropriate under the circumstances.

In light of the extraordinary circumstances faced by the stakeholders and the Commission during the COVID-19 pandemic, the CALJ’s determination to extend the statutory period by sixty days was entirely reasonable. As the statutory advocates have persuasively argued, the failure to extend the deadline would appear to prevent the development of a full and complete record. It is evident that the remote working conditions experienced by the Parties and the resulting limits on access to physical files, photocopying, U.S. Postal Services, support staff, and other office-related services impede the ability to meet traditional litigation deadlines.

We also appreciate the concerns raised by the OCA that the originally proposed schedule would have required the full litigation of the Application to essentially a six-week period. Such a compressed schedule during the delays and limits imposed by the pandemic would necessarily delay the ultimate consideration and resolution of the proceeding which includes the determination of whether the Application results in affirmative public benefits. In this regard, we acknowledge the challenges raised by the statutory advocates including the limited access to informal letters and informal complaints pertaining to the Application since the notice provided by the Company to its customers indicated that such responses could be mailed to the Commission. *See* OCA Answer at 12. The closure of the Commission’s offices and the resulting delays in processing items physically mailed to the Commission could further delay timely review of such responses by the stakeholders.

Contrary to the Company’s suggestion, we do not believe our statement in the *August 31, 2020 Order* – that granting a stay of the Application proceeding as requested by the County in its Interlocutory Petition would impede the expedited consideration of the Application as contemplated in the Code – requires the reconsideration of the *Extension Order*. First, the relief contemplated in the Interlocutory Petition was to stay any consideration of the Application until the conclusion of the complaint proceeding in the Common Pleas Court of Delaware County. Effectively, it would have halted this proceeding until the ultimate resolution of the Common Pleas proceeding and would have potentially extended the ultimate resolution of the Application proceeding well beyond the limited sixty-day extension requested by the OCA. Second, we explicitly stated in the *August 31, 2020 Order* that we were not considering the Expedited Motion of the OCA because it was pending before the OALJ and that there may be circumstances under the *Emergency Order* necessitating the extension of the statutory period set forth in Section 1329 of the Code. Here, the OCA has satisfied the requirements for establishing that such circumstances are present and that the sixty day extension is warranted.

Finally, it is noteworthy that Aqua is the only Party seeking reconsideration of the *Extension Order*. Lacking in the Company’s Reconsideration Petition is any argument that granting the sixty day extension will cause prejudice to the consideration of its Application.

Based on the foregoing analysis, we shall affirm the CALJ’s decision in the *Extension Order* to grant the OCA’s request for an additional sixty days in the procedural schedule.

**Conclusion**

For the reasons set forth above, we shall deny the Reconsideration Petition, consistent with the discussion in this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration of Commission Staff Action, filed by Aqua Pennsylvania Wastewater, Inc. on September 4, 2020, is denied, consistent with this Opinion and Order.

2. That the *Order Granting the Office of Consumer Advocates’ Expedited Motion for an Extension of the Statutory Suspension Period for Aqua Pennsylvania Wastewater Company’s Application to Acquire Delaware County Regional Water Quality Control Authority’s Wastewater System Assets*, issued on August 31, 2020, by Chief Administrative Law Judge Charles E. Rainey Jr., in the above-captioned proceeding, is affirmed, consistent with this Opinion and Order.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: October 8, 2020

ORDER ENTERED: October 8, 2020

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1. The *Extension Order* provided that any Party dissatisfied with the ruling may file a Petition for Reconsideration of Staff Action pursuant to 52 Pa. Code § 5.44. [↑](#footnote-ref-1)
2. *See Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining*, as amended; *see also Order of the Secretary of the Pennsylvania Department of Health Regarding the Closure of All Businesses That Are Not Life Sustaining*, effective March 19, 2020, as amended. [↑](#footnote-ref-2)
3. *But see* *County of Butler v. Thomas W. Wolf*, No. 2:20-cv-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020) (*County of Butler*) (stay at home provisions and elements of orders closing non-life-sustaining businesses violated the Fourteenth Amendment), *appeal docketed*, No. 20-2936 (3d Cir. Sept. 23, 2020). The pending issues in the federal court appeal in *County of Butler* do not pertain to the suspension of statutory and regulatory compliance deadlines authorized in the *Executive Order*. [↑](#footnote-ref-3)
4. *See* *Amendment to Proclamation of Disaster Emergency* renews the Proclamation for an additional ninety (90) days from June 3, 2020. [↑](#footnote-ref-4)
5. *See Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, effective July 1, 2020. [↑](#footnote-ref-5)
6. *See Order of the Governor of the Commonwealth of Pennsylvania Directing Targeted Mitigation Measures*, effective July 16, 2020. [↑](#footnote-ref-6)
7. *See Order of the Secretary of the Pennsylvania Department of Health Directing Mitigation Measures*, effective July 16, 2020. [↑](#footnote-ref-7)
8. *See* *Amendment to Proclamation of Disaster Emergency* renews the Proclamation for an additional ninety (90) days from August 31, 2020. [↑](#footnote-ref-8)
9. Subsequently, on August 31, 2020, the County filed a Protest to the Application. [↑](#footnote-ref-9)
10. In its Interlocutory Petition, the County requested that the Commission answer the following material question in the affirmative:

    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?

    Interlocutory Petition at 2. [↑](#footnote-ref-10)
11. Under the *Emergency Order*, review pursuant to Section 5.44 applies for any extension granted up to ninety days. Beyond ninety days, any request for a suspension, extension, waiver or change of any regulatory, statutory or procedural deadline may only be considered upon expedited certification of the question by the CALJ or Bureau Director directly to the Commission. *See Emergency Order* at 2, 4, OP No. 5. [↑](#footnote-ref-11)
12. The Commission’s *Emergency Order* providing authority to Bureau Directors and the CALJ provides that the decisions of Bureau Directors, which would be issued as Secretarial Letters or as an order, are subject to Commission review under 52 Pa. Code § 5.44. While we note that normally orders of the CALJ or any ALJ are subject to interlocutory review under 52 Pa. Code § 5.302, since both Sections 5.302 and 5.44 ultimately place the burden of proof on the petitioner, the outcome would be the same under either standard. 52 Pa. Code §§ 5.302, 5.44. [↑](#footnote-ref-12)
13. As the Pennsylvania Supreme Court recently stated in *DeVito*, *supra*, regulatory statutes “prescribing the procedures of the conduct of Commonwealth business,” as well as “orders, rules or regulation of any Commonwealth agency” may be suspended while the Governor’s *Executive Order* is in effect “if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.” *DeVito*, 227 A.3d at 886 (citing 35 Pa. C.S. § 7301(f)). [↑](#footnote-ref-13)