

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

A-2019-3015173

**ANSWER OF THE DELAWARE COUNTY REGIONAL
WATER QUALITY CONTROL AUTHORITY IN OPPOSITION TO
THE MUNICIPAL PROTESTANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to 52 Pa. Code § 5.102, the Delaware County Regional Water Quality Control Authority (“DELCORA”) submits this Answer in opposition to the Motion for Summary Judgment of Edgmont Township (“Edgmont”), Lower Chichester Township (“Lower Chichester”), Southwest Delaware County Municipal Authority (“SWDCMA”), Trainer Borough (“Trainer”), and Upland Borough (“Upland”) (collectively, the “Municipal Protestants”).

I. Introduction

The Municipal Protestants’ Motion for Summary Judgment (the “Motion”) should be denied because it is grounded in a faulty premise: that the existence of contracts between the Municipal Protestants and DELCORA warrants denial of the entire application submitted by Aqua Pennsylvania Wastewater, Inc. (“Aqua”). This is simply incorrect. Municipal Protestants’ Motion should be denied because (a) by their own admission, the question of whether the consents at issue will be provided remains open, and (b) even if the consents will never be provided (which is not alleged in the Motion), the Commission could address the situation in its final order, potentially through imposition of a condition for approval it deems appropriate, not for the application to be denied in its entirety.

DELCORA does not dispute the existence of the contracts with the Municipal Protestants

or their terms. DELCORA respectfully submits, however, that these contracts are not an absolute bar to Aqua's Application and the relief requested therein. Rather, the contracts allow for each of the Municipal Protestants to provide consent to assignment to Aqua. None of the Municipal Protestants claim that they absolutely refuse to consent to such assignment. Rather, the Municipal Protestants use veiled, cryptic language that leaves the question of whether or not they will ultimately consent unanswered. Indeed, their Motion is riddled with use of the word "may," suggesting that whether or not their consents will be provided is an open question. There is thus no basis to say that Aqua is not in any position to provide the services set forth in its Application, particularly as to the Municipal Protestants.

If the consents cannot be obtained, it does not mean that Aqua's Application must be denied as a matter of law on summary judgment. Rather, approval of the Application can be conditioned on either obtaining consents to assignment and in the alternative, continuing to provide service to the Municipal Protestants consistent with the terms of the respective agreements.

In short, while there may not be any dispute as to the fact that certain consents to assignment have not yet been provided, it remains a disputed issue of material fact whether they may yet be provided. Since the unresolved material issue of fact is whether these consents may still be obtained, and because Aqua's Application can proceed even if they are not obtained, the Municipal Protestants' Motion must be denied.

II. Applicable Legal Standard

Pursuant to Section 5.102 of the Commission's Rules of Administrative Practice and Procedure, the entry of summary judgment is appropriate only "if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment

as a matter of law.” 52 Pa. Code § 5.102(d)(1). The record must be examined in the light most favorable to the nonmoving party, which need only set forth facts showing that there is a genuine issue for trial in order to defeat the motion. *James Regan v. Suez Water Pennsylvania Inc.*, Docket No. C-2020-3021136, Order of Deputy Chief Administrative Law Judge Joel H. Cheskis Denying Motion for Summary Judgment, dated September 22, 2020, citing *First Mortgage Co. of Pennsylvania v. McCall*, 313 Pa. Superior Ct. 54, 56, 459 A.2d 406, 408 (1983).

Here, the record shows that material facts remain in dispute and there is a genuine issue for trial. As a result, the Municipal Protestants’ Motion must be denied.

III. Material Facts in Dispute

DELCORA does not dispute the existence of the cited contracts or the fact that they contain provisions requiring each of the Municipal Protestants to consent to the assignment of their respective contracts with DELCORA. However, DELCORA notes that each Municipal Protestant refuses to say whether or not consent is forthcoming, or whether it will never be provided:

- Edgemont: DELCORA and Aqua “may” never have the right to proceed with the assignment of DELCORA’s rights in its contract with Edgemont (*see* Motion, ¶¶ 32-33);
- Lower Chichester: DELCORA and Aqua “may” never have the right to proceed with the assignment of DELCORA’s rights in its contract with Lower Chichester (*see* Motion, ¶¶ 41-42);
- SWDCMA: DELCORA and Aqua “may” never have the right to proceed with the assignment of DELCORA’s rights in its contract with SWDCMA (*see* Motion, ¶¶ 50-51);
- Trainer: DELCORA and Aqua “may” never have the right to proceed with the assignment of DELCORA’s rights in its contract with Trainer (*see* Motion, ¶¶ 59-60); and
- Upland: DELCORA and Aqua “may” never have the right to proceed with the assignment

of DELCORA's rights in its contract with Upland (*see* Motion, ¶¶ 68-69).

Thus, whether or not the requisite consents will ever be provided is an open question of material fact. By the Municipal Protestants' own admission, the fact that their consents have not yet been provided does not mean that they will not be forthcoming. Essentially, all the Municipal Protestants have established is that they have not yet given consent, but may still do so.

IV. Argument

A. The Fact that Consents to Assignment Have Not Yet Provided Does Not Mean That Aqua's Application Should Be Denied.

The Municipal Protestants' Motion should be denied because it simply cannot be said that Aqua is not in a position to acquire the facilities necessary to render the proposed service. As a result, this case is distinguishable from *Bobtown Sewage Co. v. Pennsylvania Public Utility Com.*, 171 A.2d 625 (Pa Super. 1961) – the *sole* authority upon which the Municipal Protestants rely for their Motion.

The Municipal Protestants' Motion is grounded *solely* on the argument that DELCORA has not obtained the requisite consents needed for the assignment of its contracts with the Municipal Protestants to Aqua. As discussed above, the record does not indicate that the Municipal Protestants will never provide these consents, only that they have not done so to date. As a result, it simply cannot be said that Aqua is “not in a position to acquire the facilities necessary to render the proposed service,” as was the case in *Bobtown Sewage*. 171 A.2d at 626.

Bobtown Sewage involved facts that are completely distinct from the instant Application. In that case, a private company sought to acquire a sewer system from another private company in Dunkard Township, Pennsylvania, and submitted an application to the PUC for this purpose. Before it could do so, however, Dunkard created a municipal authority, which subsequently acquired ownership of the sewer system by eminent domain. As a result, the Court recognized

that the sale anticipated by the application to the PUC was an impossibility. Since the selling company no longer had ownership of the system, the applicant company was not in a position to purchase the system and render service.

This is entirely distinguishable from the Application in this proceeding. Here, DELCORA clearly has rights pursuant to contracts with the Municipal Protestants. DELCORA also has the clear right to assign those interests to Aqua upon consent of the Municipal Protestants. The situation is thus completely inapposite to that in *Bobtown Sewage*, where the seller was divested of any and all ownership interest in the entire system that was to be sold as a result of the eminent domain process.

In even further stark contrast, the Municipal Protestants here simply do not state whether or not they will ultimately consent to the assignments. Until it can be conclusively established that those consents will not be provided, it is impossible for any party to say that Aqua is not in a position to acquire the facilities necessary to render the service proposed in its application. In fact, it is quite the opposite – Aqua remains in a position to assume DELCORA's contracts and, as a result, acquire the facilities necessary to render the service proposed in its application when the consents are obtained.

As the Municipal Protestants appear to readily concede, the fact that the consents at issue have not yet been obtained does not mean that they will never be obtained. There is thus no basis for the entry of summary judgment on Aqua's Application.

B. Even if the Consents to Assignment Are Not Obtained, the Commission May Consider if Conditions to Approval of the Application are Warranted.

Even if the Municipal Protestants' position had any merit and/or they conclusively stated that they will not consent to the assignment of their contracts with DELCORA (which they do not do), the correct remedy would not be the denial of Aqua's Application as a whole. Rather, the

Commission may consider if a condition to the Application as proposed is necessary and appropriate.

Again, the contrast with *Bobtown Sewage* could not be more stark. In that case, ownership of the *entirety* of the sewer system that was the subject of the application was taken by a municipal authority via the eminent domain process. Here, the Municipal Protestants' systems are but small component parts of the greater DELCORA system that Aqua seeks to acquire. As a result, even if the consents at issue are not obtained and Aqua cannot acquire these component parts, it still may proceed with its acquisition of the remainder of DELCORA's system.

This is even more apparent in light of the facts alleged in the Municipal Protestants' Motion. As set forth in the Motion, each of the Municipal Protestants has different contractual terms with DELCORA, with different outcomes if consent is not provided. For example, Edgemont alleges that it has a "right of first refusal" to purchase the facilities used to provide services to its residents (and has not determined if it will exercise that right). *See* Motion, ¶¶ 27, 31. In contrast, Upland alleges that its collection system reverts back to its ownership if the system is no longer operated by DELCORA. *See* Motion, ¶ 65. For other municipalities, neither is the case.

There are thus distinct outcomes for each municipality at issue in the Motion, making the entry of summary judgment inappropriate. For each situation, any conclusive lack of consent would not mean that Aqua's application must be denied – only that Application approval may need to be conditioned should the Commission see merit in any of the Municipal Protestants' arguments. None of those contracts, however, provide for recourse that would require the denial of Aqua's Application on the whole.

C. Joinder to Aqua's Answer

DELCORA joins and incorporates by reference in its entirety the answer submitted by Aqua to the Motion.

V. Conclusion

For the reasons set forth herein, DELCORA respectfully requests that the Municipal Protestants' Motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew Olesh, Esq., hereby certify that I have served a true and correct copy of the foregoing motion response upon the parties list below in accordance with the requirements of 52 Pa. Code §§ 1.54 (relating to service by a party) via electronic mail.

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