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October 15, 2020

Via Electronic Filing

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

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

Dear Secretary Chiavetta:

We are counsel to Aqua Pennsylvania Wastewater, Inc. in the above matter and are submitting, via electronic filing with this letter, the Company's Answer in Opposition to Motion for Summary Judgment of Municipal Protestants. Copies of the Answer are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By 

Thomas T. Niesen

cc: Certificate of Service (w/encl.)
The Honorable Angela T. Jones, Administrative Law Judge (via email, w/encl.)
Alexander R. Stahl, Esquire (via email, w/encl.)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge Angela T. Jones, Presiding

Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for approval of the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority	: Docket No. A-2019-3015173
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**ANSWER OF AQUA PENNSYLVANIA WASTEWATER, INC. IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT OF MUNICIPAL PROTESTANTS**

AND NOW comes Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”) and, pursuant to 52 Pa. Code § 5.102, answers the Motion for Summary Judgment of the Municipal Protestants.¹ In opposition to the Motion, Aqua submits as follows:

I. HISTORY OF PROCEEDING

1. This proceeding concerns the Application of Aqua, filed with the Public Utility Commission (“Commission”) on March 3, 2020, pursuant to Sections 1329, 1102 and 507 of the Public Utility Code (“Code”).

2. The Application asks the Commission to approve, *inter alia*, Aqua’s acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”) and the assignment of certain contracts to Aqua.²

¹ The Municipal Protestants include Edgmont Township (“Edgmont”), Lower Chichester Township (“Lower Chichester”), Southwest Delaware County Municipal Authority (“SWDCMA”), Trainer Borough (“Trainer”) and Upland Borough (“Upland”).

² The contracts to be assigned are identified on Schedule 4.15 of the Asset Purchase Agreement between Aqua and DELCORA and are attached to Aqua’s Application as Exhibit F1 through Exhibit F163.

3. DELCORA uses the wastewater system assets to provide retail wastewater service to approximately 16,000 customers in parts of Delaware and Chester Counties and wholesale conveyance and treatment service to municipal and municipal authority customers within all or part of 49 municipalities.

4. Protests to the Application were filed by Edgmont on August 19, 2020, Lower Chichester on August 7, 2020, SWDCMA on July 17, 2020, Trainer on August 17, 2020 and Upland on August 7, 2020.³

5. Each of the Municipal Protestants has a contract with DELCORA, although, as discussed below, the contractual terms are not at all uniform and vary from contract to contract.

6. On September 25, 2020, the Municipal Protestants filed a Motion for Summary Judgment (“Motion”) claiming they have not consented to the assignment of their contracts to Aqua and therefore Aqua’s entire Application must be dismissed as a matter of law, without prejudice.

II. THE STANDARDS FOR SUMMARY JUDGMENT

7. Section 5.102 of the Commission’s Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.102, provides for the filing of motions for summary judgment and judgment on the pleadings stating as follows:

§ 5.102 Motions for summary judgment and judgment on the pleadings.

(a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

³ Protests were also filed by the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the County of Delaware, Sunoco Partners and Marketing Terminals and Kimberly-Clark. The Commission’s Bureau of Investigation and Enforcement filed a Notice of Appearance.

(d) *Decisions on Motions.*

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered 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.

(2) *Standard for grant or denial in part.* The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with the 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 on one or more but not all outstanding issues.

8. Established precedent explains that, when disposing of a motion for summary judgment, the record must be examined in the light most favorable to the nonmoving party, in this case, Aqua. To avoid a motion for summary judgment, the nonmoving party need only set forth facts showing that there is a genuine issue for trial.⁴

9. The Commission, in practice, avoids the disposition of matters by summary judgment preferring, instead, the creation of a record allowing parties to present evidence and argument for its consideration. Consistent with this established practice, the Commission, in this proceeding, has made clear its desire for development of a complete record. In its Opinion and Order entered August 31, 2020 in this proceeding declining to answer a material question or to issue a stay requested by Delaware County, the Commission emphasized that:

... the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage.⁵

⁴ *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).

⁵ Opinion and Order entered August 31, 2020, p. 9.

10. In contrast to the effort of these five Municipal Protestants to preliminarily dismiss Aqua's entire Application for authority to provide retail wastewater service to 16,000 customers and wholesale conveyance and treatment service within all or part of 49 municipalities, testimony at the public input sessions on September 16, 2020 was largely supportive of the transaction and its affirmative public benefits.

11. In still further and, indeed, stark contrast to the efforts of the Municipal Protestants to claim that there are no issues of fact and that Aqua's entire Application should be dismissed as a matter of law, is the extensive testimony served by the other parties on September 29, 2020. That testimony undeniably raises numerous factual issues which can only be decided based on a fully developed evidentiary record. Of special import is the testimony of the statutory advocates. I&E does not oppose the Application but, rather, recommends certain conditions if the Commission determines to approve it.⁶ In its testimony, OCA states that, *as proposed*, Aqua has not supported the Application but then presents a list of conditions if the Commission approves it.⁷ OSBA recommends, as a condition for approval, that the Commission require Aqua to begin to consolidate DELCORA's rates with the Company's system-wide average wastewater rates in its next base rate case.⁸

12. The Municipal Protestants, in short, have failed to show that there is no genuine issue as to a material fact and that they are entitled to summary judgment as a matter of law. The testimony at the public input hearing and the written direct testimony of other parties demonstrate that the Municipal Protestants are outliers who are attempting to thwart a transaction with obvious public benefits, which may ultimately be approved with conditions. The motion for

⁶ See I&E Statement No. 1 at 25.

⁷ See OCA Statement No. 1 at 10-12.

⁸ See OSBA Statement No. 1 at 1-2.

summary judgment should be denied.

III. BOBTOWN SEWAGE

13. The Municipal Protestants cite *Bobtown Sewage Co. v. Pa. P.U.C.*, 195 Pa. Super. 330, 171 A. 2d 625 (1961) (“*Bobtown*”) as “applicable law.” *Bobtown*, however, does not support the Motion. In *Bobtown*, the Commission held a hearing and only after taking evidence did it deny the buyer’s application. The Commission, similarly, should hold a hearing here thereby providing the parties with a full opportunity to develop an evidentiary record, brief issues and present arguments, as was apparently done in *Bobtown*.

14. In *Bobtown*, the Superior Court explained, moreover, that the Bobtown buyer was not in a position to render service because of the pendency of an eminent domain proceeding to acquire the entire wastewater system. The circumstances here are markedly different. The five Municipal Protestants do not (and cannot) speak for the entire DELCORA retail and wholesale customer base. DELCORA has wholesale contracts with six large municipal authorities comprising the vast majority of Equivalent Dwelling Units (“EDUs”) served.⁹ Five of the six authorities have already consented to the assignment of their contracts in connection with this transaction.¹⁰ Only the sixth authority, SWDCMA, has declined to consent and, instead, protested Aqua’s Application. This is hardly the *Bobtown* situation where the ownership of the entire system was expected to transfer to a non-Commission jurisdictional entity. Concerning retail customers, the statutory advocates, as set forth above, do not oppose the transaction but instead offer conditions for approval.

15. *Bobtown*, in sum, does not support the efforts of the five Municipal Protestants to have this entire Application decided on summary judgment. *Bobtown*, in fact, supports the

⁹ The DELCORA system serves 197,000 EDUs. See Application Exhibit W2, Aqua Statement No. 6 at 4.

¹⁰ See Application Exhibits F158-F162.

opposite. The Commission held hearings in *Bobtown* and it should hold hearings here. Public testimony supports the Application and the parties have submitted various positions, including conditions for approval, for Commission consideration with respect to the Application that can only be addressed through a complete and well-developed evidentiary record.

IV. THE FIVE MUNICIPAL CONTRACTS

Edgmont Contract

16. Edgmont asserts that it has a contract with DELCORA to provide service to the Crum Creek Sewer District; that DELCORA cannot assign the contract without Edgmont's consent; that Edgmont has not consented to the assignment of the contract to Aqua; and that Edgmont has a right of first refusal to purchase the facilities in the event that DELCORA attempts to sell the facilities.¹¹

17. Edgmont offers no explanation for how its right of first refusal prevents DELCORA from selling the entire DELCORA system. In fact, it does not. The right of first refusal simply provides Edgmont with an opportunity to purchase certain limited facilities. It creates no opportunity for Edgmont to stop a sale transaction for other parts of the DELCORA system. It does not prevent DELCORA from selling its system as contended by Edgmont.

18. Edgmont's further claim that there is no deadline for it to exercise its right of first refusal is, moreover, certainly in dispute. The DELCORA/Edgmont contract does not provide Edgmont with an unlimited time to decide whether or not to exercise its right of first refusal.¹²

¹¹ Motion pp. 5-6.

¹² Aqua would work with Edgmont and seek to get the contract assigned at closing, but, if it does not consent to the assignment, Edgmont may exercise its right under its contract and have its system transferred to them. At that time, if Aqua's Application is approved and if Edgmont desires service from Aqua, Edgmont will be required to apply for service to Aqua and a tariffed rate will be established. Since Edgmont would not be part of the DELCORA transaction, it would not receive payments under the Trust.

Lower Chichester Contract

19. Lower Chichester asserts that it has a contract dated April 12, 1977, with DELCORA for treatment that is currently in effect; that the contract expires on April 1, 2022 subject to renewal by mutual consent; that DELCORA cannot assign the contract without consent of Lower Chichester; that Lower Chichester has not consented to the assignment of the contract to Aqua; and, without Lower Chichester's consent to the assignment of the treatment agreement, Aqua has no right to acquire facilities used to provide wholesale service to Lower Chichester.¹³

20. The Lower Chichester/DELCORA contract expires in April 2022, just eighteen months from now. If Lower Chichester declines to assign its contract, DELCORA would continue to provide wastewater treatment service to Lower Chichester during this eighteen month period under the contract with Aqua acting as its agent pursuant to the terms of the Asset Purchase Agreement between Aqua and DELCORA unless the Commission authorizes Aqua to charge Lower Chichester tariffed Aqua rates prior to the end of the contract. The Lower Chichester/DELCORA contract does not prohibit an agency arrangement. Upon the expiration of the term of the Lower Chichester/DELCORA contract, Lower Chichester may apply for service from Aqua and will be charged the Company's then-prevailing Commission-approved and tariffed rates for service.

SWDCMA Contract

21. SWDCMA asserts that it has a contract dated December 21, 2009, as amended on December 17, 2013, with DELCORA for treatment that is currently in effect; that the contract expires on December 20, 2034, subject to renewal by either party; that DELCORA cannot assign

¹³ Motion pp. 7-8.

the contract without consent of SWDCMA; that SWDCMA has not consented to the assignment of the contract to Aqua; and, without SWDCMA's consent to the assignment of the treatment agreement, Aqua has no right to acquire facilities used to provide wholesale service to SWDCMA.¹⁴

21. Although the SWDCMA contract has a longer term, expiring in 2034, if SWDCMA declines to assign its contract, DELCORA would continue to provide wastewater treatment service to SWDCMA under the contract with Aqua acting as its agent pursuant to the terms of the Asset Purchase Agreement between Aqua and DELCORA unless the Commission authorizes Aqua to charge SWDCMA tariffed Aqua rates prior to the end of the contract. The SWDCMA/DELCORA contract does not prohibit an agency arrangement. Upon the expiration of the term of the SWDCMA/DELCORA contract, SWDCMA may apply for service from Aqua and will be charged the Company's then-prevailing Commission-approved and tariffed rates for service.

Trainer Contract

22. Trainer asserts that it sold its wastewater system to DELCORA in 2005; that it is now a retail customer of DELCORA; that Trainer has a reversionary interest in the system if DELCORA fails to operate the system, unless Trainer declines to take ownership in which case the Trainer system reverts to the County of Delaware or any other agency; and that Trainer has not entered into an assignment agreement with DELCORA.¹⁵

23. Trainer offers no explanation for how its reversionary right prevents DELCORA from selling the system. In fact, it does not. The reversionary right simply provides for the Trainer facilities to possibly revert to Trainer, the County or any other agency. It creates no right

¹⁴ Motion pp. 8-9.

¹⁵ Motion pp. 9-10.

for Trainer to stop a sale transaction for other parts of the DELCORA system. It does not prevent DELCORA from selling the Trainer system if Trainer, the County or any other agency declines to accept the reverted Trainer system.¹⁶

Upland Contract

24. Upland asserts that it entered into a contract to sell the Upland system in 1975 with amendments in 1983 and 1985; that its contract is currently in effect running until 2022; that it has a reversionary interest in the system if DELCORA fails to operate the system; and that it has not consented to assign the DELCORA/Upland contract to Aqua.¹⁷

25. Upland offers no explanation for how its reversionary right prevents DELCORA from selling the system. In fact, it does not. The reversionary right simply provides for the Upland facilities to possibly revert to Upland. It creates no right for Upland to stop a sale transaction for other parts of the DELCORA system. It does not prevent DELCORA from selling the Upland system if Upland declines to accept the reverted Upland system.¹⁸

V. THE AQUA/DELCORA APA

26. Aqua and DELCORA anticipated the possibility of a non-assigning municipality in Section 2.06 of the Asset Purchase Agreement, which is proposed for approval by the Commission. The Section, which is reproduced at pages 12 and 13 of the Motion, provides that

¹⁶ Aqua would work with Trainer and seek to get the contract assigned at closing, but, if it does not consent to the assignment, Trainer may exercise its right under its contract and have its system transferred to them. At that time, if Aqua's Application is approved and if Trainer desires service from Aqua, it will be required to apply for service to Aqua and a tariffed rate will be established. Since Trainer would not be part of the DELCORA transaction, it would not receive payments under the Trust.

¹⁷ Motion pp. 11-12.

¹⁸ Aqua would work with Upland and seek to get the contract assigned at closing, but, if it does not consent to the assignment, Upland may exercise its right under its contract and have its system transferred to them. At that time, if Aqua's Application is approved and if Upland desires service from Aqua, it will be required to apply for service to Aqua and a tariffed rate will be established. Since Upland would not be part of the DELCORA transaction, it would not receive payments under the Trust.

in the event the assignment of a contract is not obtained prior to Closing then DELCORA and Aqua shall use commercially reasonable efforts to obtain an assignment and, until an assignment is made, Aqua shall, as agent or subcontractor, pay, perform and discharge the liabilities and obligations of DELCORA. Under Section 2.06 of the Asset Purchase Agreement, if a Municipal Protestant does not agree to an assignment of its contract by Closing or elect to have the system transferred to itself, legal ownership of its system would continue with DELCORA, but Aqua would obtain economic/beneficial ownership of these Nonassignable Assets at Closing and operate the wastewater system as DELCORA's agent/subcontractor.

27. The contract terms between DELCORA and the Municipal Protestants cited by the Municipal Protestants at pages 13 through 15 of the Motion do not preclude or prohibit DELCORA from establishing an agent/subcontractor relationship to operate the system. Under such a relationship, DELCORA would continue to be the service provider with Aqua acting as agent/ subcontractor under DELCORA's direction.

28. The Municipal Protestants claim that, under their service agreements, DELCORA may not provide service to them through the agent/subcontractor arrangement with Aqua described in Section 2.06 of the Asset Purchase Agreement. This is a disputed point between Aqua and the Municipal Protestants that warrants full development on the record and briefing which would not occur if summary judgment were granted.¹⁹ The relationship would not be a "fiction." The creation and implementation of the relationship would be under and subject to Section 2.06. Again, the Municipal Protestants have failed to support their Motion.

VI. CONCLUSION

29. The issue presented by the Motion is whether there is a genuine issue as to a

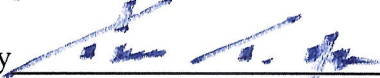
¹⁹ Motion p. 16.

material fact and whether the Municipal Protestants are entitled to relief – a denial of Aqua’s Application, in its entirety – as a matter law. This Answer, the testimony at the public input hearings, the written testimony of other parties and, indeed, the Motion itself identify many issues of fact for Commission consideration and resolution only after the development of a full evidentiary record with all standard due process protections for all parties. The parties should be given full opportunity to develop the record as already directed by the Commission in its Opinion and Order entered August 31, 2020.

WHEREFORE, Aqua Pennsylvania Wastewater, Inc. requests that Administrative Law Judge Jones and the Public Utility Commission deny the Motion for Summary Judgment of the Municipal Protestants and grant Aqua Pennsylvania Wastewater, Inc. such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

AQUA PENNSYLVANIA WASTEWATER, INC.

By 

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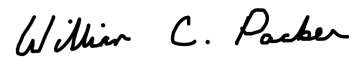
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Counsel for Aqua Pennsylvania Wastewater, Inc.

Date: October 15, 2020

VERIFICATION

I, William C. Packer, Vice President – Controller of Aqua Pennsylvania, Inc., hereby state that the facts set forth in the foregoing Answer of Aqua Pennsylvania Wastewater, Inc. in Opposition to the Motion for Summary Judgment of the Municipal Protestants 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).

Handwritten signature of William C. Packer in cursive script.

William C. Packer
Vice President – Controller
Aqua Pennsylvania, Inc.

Dated: October 15, 2020

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of October, 2020, served a true and correct copy of the foregoing Answer of Aqua Pennsylvania Wastewater, Inc. to the Motion for Summary Judgment of the Municipal Protestants, upon the persons and in the manner set forth below:

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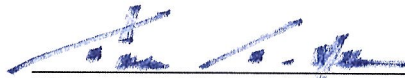
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