



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

October 16, 2020

Via Electronic Filing

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

Re: Application of Aqua Pennsylvania Wastewater Inc. pursuant to Sections 507, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority
Docket No. A-2019-3015173
I&E Letter in Response to Aqua's Opposition to the Municipal Protestants' Motion for Summary Judgment

Dear Secretary Chiavetta:

The Commission's Bureau of Investigation and Enforcement ("I&E") is compelled to submit this letter in order to correct Aqua Pennsylvania Wastewater Inc's ("Aqua") misuse of I&E's position as a basis to deny the Municipal Protestants' Motion for Summary Judgment.¹ While I&E did not take a position on the Motion for Summary Judgment, by way of its Answer, Aqua has unfairly and inaccurately characterized I&E's litigation position in this case as a basis to deny Summary Judgment.² Because Aqua's attempt to use I&E's position to overcome Summary Judgment is not only wholly inconsistent with the I&E's of-record position regarding DELCORA's status as a

¹ Motion for Summary Judgment of Municipal Protestants, A-2019-3015173 (September 25, 2020). I&E notes that the "Municipal Protestants" include Edgmont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority, Trainer Borough (Trainer), and Upland Borough.

² I&E recognizes that the Commission's regulations do not appear to contemplate a response to a party's Answer in Opposition to Summary Judgment; however, this letter is necessary to correct Aqua's misrepresentation of I&E's position as an avenue to avoid Summary Judgment, which cannot stand. If Your Honor or the Commission will require I&E to submit a more formal response and/or participate in an oral argument or discussion regarding this matter, I&E stands ready to do so as directed.

qualified seller,³ the public interest requires that I&E respond to Aqua's inappropriate reliance on I&E to survive Summary Judgment.

By way of further explanation, Aqua attempts to argue that the Municipal Protestants have not met the applicable standard necessary to warrant a grant of Summary Judgment because there are material facts in dispute which can only developed through an evidentiary record.⁴ To support this argument, Aqua cites, in part, to I&E's position recommending that Aqua's Application be accepted on a conditional basis. Additionally, Aqua claims that on behalf of retail customers, "statutory advocates"⁵ have not opposed Aqua's Application, but instead have only recommended that it be approved with certain conditions.⁶ Through these references, Aqua attempts to convert I&E's litigation position into support for this case to go forward despite the now-apparent fact that DELCORA is contractually prohibited from selling all of the property Aqua seeks to acquire. I&E notes that all of this is occurring at the expense of ratepayers. Not only is Aqua's attempt to mischaracterize I&E's position inaccurate, but it directly conflicts with the letter that I&E submitted in this case on August 13, 2020.

In its letter, I&E expressed concerns that DELCORA's status as a qualified seller under Section 1329(d)(1) appeared to be at issue and it recommended that Aqua's Application should not move forward until, inter alia, DELCORA's status as a qualifying seller was verified. I&E also cautioned that if DELCORA was not empowered to sell all of the assets outlined in Aqua's Application, then the resources of parties, the ALJ, and the Commission would be unduly burdened by developing a record regarding a transaction that for assets that Aqua may not legally acquire. Now, with the benefit of the Municipal Protestants' Motion for Summary Judgment, and Aqua's response, it is clear that Aqua does not have authority to acquire all the property contemplated in Aqua's Application. Further, it is now clear that any evidentiary record established would be contrived and inaccurate because it would be predicated on Aqua's acquisition of assets that DELCORA does not have the right to sell.

³ *I&E Letter in Support of the County of Delaware's Petition for Stay*, A -2019-3015173 (August 13, 2020).

⁴ Aqua Answer in Opposition to Summary Judgment Motion of Municipal Protestants, A-2019-3015173, ¶11 (October 15, 2020).

⁵ I&E reads Aqua's use of "statutory advocate" to include I&E, consistent with the regulatory definition of this term set forth in 52 PA. Code §1.8 that includes "the Office of Trial Staff. As a result of Act 11 of 2012, the former Office of Trial Staff is now known as I&E.

⁶ Aqua Answer in Opposition to Summary Judgment Motion of Municipal Protestants, A-2019-3015173, ¶15 (October 15, 2020).

To be sure, with the benefit of Aqua’s response now available, the record is clear that Aqua does not have the right to acquire all of the property contemplated in the Asset Purchase Agreement with DELCORA, because DELCORA is contractually prohibited from selling some of the property. The record is clear because, *inter alia*, Aqua does not deny that Edgmont had the right of first refusal to purchase a portion of the assets that DELCORA now seeks to sell to Aqua.⁷ On the contrary, Aqua acknowledges that Edgmont has the right to “purchase certain limited facilities.” Similarly, Aqua appears to acknowledge DELCORA has an existing contract that provides for Trainer Borough or, another entity it designates, to resume ownership of certain system assets in the event that Delcora no longer operates those system assets.⁸ Instead of refuting Trainer Borough’s right of reversion, Aqua merely claims that it should not stop DELCORA from selling “the Trainer system. . . .”⁹ Despite Aqua’s claims to the contrary, its admissions regarding other parties’ rights to property it now seeks to acquire warrants rejection of its Application.

In I&E’s view, Aqua’s admissions are relevant for three reasons. These reasons include the following: (1) Aqua’s Application seeks approval to acquire assets that it appears to admit are not legally transferrable; (2) Aqua’s Application relies on two fair market value appraisals that determined the fair market value of the entire “DELCORA system,” and now certain portions of that system may not be acquired, compromising the integrity of the valuations; and (3) by seeking approval of the Asset Purchase Agreement, Aqua is requesting that the Commission approve an Asset Purchase Agreement that directly breaches DELCORA’s obligations to the Municipal Protestants. I&E submits that these results do not only fail to comport with I&E’s position requiring the alleged need to develop an evidentiary record for this case, but they contradict applicable legal standards and are antithetical to the public interest.

Accordingly, I&E requests that Aqua’s reliance upon I&E’s litigation position as a basis to survive the Municipal Protestants’ well-plead Motion for Summary Judgment be rejected.

⁷ Aqua Answer in Opposition to Summary Judgment Motion of Municipal Protestants, A-2019-3015173, ¶17 (October 15, 2020).

⁸ Aqua Answer in Opposition to Summary Judgment Motion of Municipal Protestants, A-2019-3015173, ¶¶22-23 (October 15, 2020).

⁹ Aqua Answer in Opposition to Summary Judgment Motion of Municipal Protestants, A-2019-3015173, ¶23 (October 15, 2020).

Copies of this letter are being served on parties of record per the attached Certificate of Service. *Due to the temporary closing of the PUC's offices, I&E is only providing electronic service.* Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. L. Miller', written in a cursive style.

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GLM/ELM/ac
Enclosure

cc: Honorable Angela T. Jones (*ALJ, PUC Philadelphia – via email only*)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania	:	
Wastewater Inc. pursuant to Sections 507,	:	
1102 and 1329 of the Public Utility Code for	:	Docket No.: A-2019-3015173
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 am serving the foregoing **Letter** dated October 16, 2020, in the manner and upon the persons listed below.

Served via Electronic Mail Only

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