**BEFORE THE**

**PENNSYLVANIA PUBLIC UTLIITY COMMISSION**

Application of Aqua Pennsylvania Wastewater, Inc. :

for Approval of its Acquisition of Delaware County :

Regional Water Quality Control Authority’s : A-2019-3015173

Wastewater Assets, inter alia, Pursuant to Sections :

507, 1102 and 1329 of the Public Utility Code :

**ORDER DENYING**

**MOTION FOR**

**SUMMARY JUDGMENT**

RELEVANT BACKGROUND

Application

On September 17, 2019, Aqua Pennsylvania Wastewater, Inc. (Aqua or Applicant) and the Delaware County Regional Water Quality Control Authority (DELCORA) entered into an Asset Purchase Agreement (APA) that is attached to Aqua’s Application as Exhibit B-1. The purpose of the APA is for Aqua to purchase various DELCORA assets used to provide wastewater service in portions of Delaware and Chester Counties, and for Aqua to begin providing wastewater service to the public in DELCORA’s service territory. Application at 20. The Application requests Commission approval of the purchase of DELCORA’s assets and assignment to Aqua of the listed contracts of DELCORA.

DELCORA provides retail wastewater service (collection, transmission, and treatment) to approximately 16,000 individual residences and businesses. Application ¶ 8.

In addition, DELCORA provides wholesale wastewater service (transmission and treatment) to numerous municipal corporations, as defined at 66 Pa.C.S. § 102 (municipal corporation), that own and operate wastewater collection systems in portions of 49 municipalities. Application ¶ 8.

Wholesale service is provided by DELCORA under contracts with each municipal corporation, copies of which are attached to the Application as the “F” exhibits.[[1]](#footnote-2) The DELCORA assets proposed to be sold to Aqua include physical assets (such as treatment plants, sewer mains, pump stations, and related facilities), and DELCORA’s contractual rights under each of the contracts listed in Exhibit 4.15 to the APA and included in the “F” exhibits to the Application. APA Section 2.01.

The following five municipal corporations protested the Application:

1. On July 17, 2020, Southwest Delaware County Municipal Authority (SWDCMA) filed a Protest to the Application;
2. On August 7, 2020, Upland Borough (Upland) filed a Protest to the Application;
3. On August 7, 2020, Lower Chichester Township (Lower Chichester) filed a Protest to the Application;
4. On August 17, 2020, Trainer Borough (Trainer) filed a Protest to the Application; and
5. On August 21, 2020, Edgmont Township (Edgmont) filed a Protest to the Application.[[2]](#footnote-3)

These municipal corporations are collectively the Municipal Protestants.

Aqua’s Application seeks a certificate of public convenience (CPC) to provide wastewater service to the entire service territory of DELCORA’s service area. Application at 20. DELCORA’s right to provide wastewater service in various locations, including in the areas governed by Municipal Protestants, is based on the terms and conditions of the contracts between numerous municipal corporations and DELCORA.

Abbreviated Procedural History

By Secretarial letter dated December 30, 2019, the Pennsylvania Public Utility Commission (Commission) acknowledged receipt of Aqua’s Letter/Notice of Licensed Engineer and Utility Valuation Expert Engagement Concerning Acquisition of the DELCORA, Delaware and Chester Counties Sanitary Wastewater Collection and Treatment System, filed on December 26, 2019 at this docket. Aqua requested Commission approval of its acquisition of the wastewater system assets of DELCORA and approval of the ratemaking rate base of these assets as determined by Sections 1102 and 1329 of the Public Utility Code. Aqua also requested approval of contracts, including assignments of contracts pursuant to Section 507 of the Public Utility Code. Aqua sent several requests for extension of time to file the requisite data for the application which were granted

On July 27, 2020, the Commission by Secretarial Letter accepted the application as complete for review. This matter was assigned to me in the Office of Administrative Law Judge (OALJ).

On September 2, 2020, an Initial Prehearing Conference convened where, among other things, a procedural schedule was developed for this proceeding. By Order dated September 4, 2020, the procedural schedule was confirmed.

On September 25, 2020, Scott Rubin, Esquire, on behalf of the Municipal Protestants, filed a Motion for Summary Judgment (Motion) at this proceeding. Pursuant to 52 Pa.Code § 5.102(a), the Motion was filed with a Notice to Plead.[[3]](#footnote-4)

Pursuant to 52 Pa.Code § 5.102(b),[[4]](#footnote-5) Answers to the Motion were due on or before October 15, 2020. The following three parties filed timely Answers to the Motion:

* + 1. Aqua,
		2. DELCORA, and
		3. County of Delaware, Pennsylvania (DE County).

On October 16, 2020, counsel for the Commission’s Bureau of Investigation and Enforcement (I&E) filed a letter specific to the response filed by Aqua to the Motion.

This matter is ripe for ruling.

PLEADINGS

1. Motion

The Motion relies on the precedent of *Bobtown Sewage Co. v. Pa. Pub. Util. Comm’n,* 171 A.2d 625 (Pa.Super. 1961)(*Bobtown*). Bobtown Sewage Co., the applicant, is denied a CPC because it cannot render sewage service. The sewage facilities were acquired by another entity through eminent domain “by proper proceedings under the Municipal Authorities Act.” *Id,* at 626. In *Bobtown*, the court found, “since the plaintiff is not now in a position to render the service, there is ample evidence to sustain the order of the [C]ommission [denying the application]. *Id,* at 627.

The Municipal Protestants contend that similar to *Bobtown*, Aqua is not in a position to render service. Motion at 4. The Municipal Protestants have contracts with DELCORA that are active after March 26, 2021, the expiration date of this proceeding. All of the contracts with DELCORA and the Municipal Protestants prevent assignment without prior consent. The Edgmont system agreement gives rights of first refusal, meaning, they can choose to purchase the facilities that serve them from DELCORA prior to DELCORA selling the facilities to another party. Trainer’s contractual interest reverts to Trainer, Delaware County or any other agency as may be dictated by law if DELCORA fails to operate its system facilities. The Upland system reverts to Upland if DELCORA fails to operate its. No Municipal Protestant has exercised its contractual right. Motion at 6, ¶¶ 25, 31 (Edgmont); at 8, ¶ 40 (Lower Chichester); at 9, ¶ 49 (SWDCMA); at 10, ¶ 58 (Trainer); and at 11, ¶ 67 (Upland).

The Municipal Protestants emphasize that their contracts are with DELCORA, not the Applicant. The Municipal Protestants have not agreed to assign the services they receive from DELCORA to Aqua. Consequently, the Municipal Protestants assert that the Applicant cannot prevail in this Application because, like in *Bobtown*, the Applicant does not possess the right to use the facilities to render service. That right rests with DELCORA. Thus, the Municipal Protestants assert that the Application must be dismissed as a matter of law in its entirety without prejudice to file a subsequent application.

1. Answers
	1. Aqua

Aqua references testimony at the public input sessions stating that the majority of witnesses are in favor of the Application at issue. Aqua then references submitted testimony of the public advocates, the I&E, the Office of Consumer Advocate (OCA), and the Office of Small Business Advocate (OSBA), that shows they could recommend approval of the Application with conditions. The Applicant therefore contends that the Municipal Protestants “are outliers…to thwart a transaction with… public benefits.” Aqua Answer at 4, ¶ 12.

The Applicant distinguishes *Bobtown* from the instant proceeding in that a hearing was held and only after the evidence was obtained was the application denied by the Commission. The Applicant contends that the same should occur at this docket. Aqua Answer at 5-6, ¶ 15. Furthermore, the Municipal Protestants do not represent the entire DELCORA customer base. Five of the six municipal authorities served by DELCORA have already consented to assignment in this Application. SWDCMA is the only municipal authority that has declined to consent to the assignment. Thus, the Applicant contends the situation here contrasts with *Bobtown* where the entire system ownership by the applicant was questioned. Aqua Answer at 5. The Applicant asserts that *Bobtown* does not support the Motion.

The Applicant contends that there is nothing that prohibits the rights of DELCORA to continue to provide wastewater service with Aqua acting as an agent of DELCORA. Aqua Answer at 7, ¶ 20; 8, ¶ 21. Rather, Aqua and DELCORA anticipated such a possibility in the APA Section 2.06 where Aqua would act as the agent of DELCORA if a municipality refused assignment of system assets by the closing of the transactions in the instant proceeding. Aqua Answer at 10, ¶ 26. This arrangement is a matter in dispute as to its legality. Aqua Answer at 10, ¶ 28. Thus, this dispute warrants a record to develop the finding of facts, briefs presenting legal argument and resolution, which would not occur if the Motion were granted. *Id.* The Applicant asserts that the revisionary rights of Trainer and Upland do not bar the transaction between it and DELCORA. Answer at 9-10. The Applicant states that the right of first refusal held by Edgmont does not bar the sale of the entire DELCORA system facilities. Aqua Answer at 6, ¶ 17.

* 1. DELCORA

DELCORA argues that there are material facts in dispute, and therefore, the Motion cannot be granted. DELCORA Answer at 3. “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 [has not affirmatively denied consent.]” *Id,* at 3-4.

DELCORA contends that the record does not indicate that the Municipal Protestants will never provide the consent; only that the consent has not been provided to date. *Id,* at 4. Although the consents of the Municipal Protestants have not been obtained, that fact does not necessarily mean they will never be obtained. Id at XX. Furthermore, DELCORA asserts that the Commission may approve the Application on conditions deemed appropriate for the public interest, and therefore, outright denial of the instant Application based on the lack of consent may be an unsupported remedy. Id, at 5-6.

DELCORA asserts that this situation is distinguished from *Bobtown,* where the applicant was not in a position to acquire the entire facilities necessary to render service. DELCORA *Id,* at 4-5. In contrast with the instant Application, the Municipal Protestants have only a component or subset of the facilities at issue. DELCORA states “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.” Id, at 6.

DELCORA concludes, “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.” Id, at 2.

* 1. DE County

DE County filed an Answer is support of the Motion. DE County asserts that the municipal contracts between the municipal corporations and DELCORA “do not appear to be in dispute.” DE Answer at 2, ¶ 6. DE County contends that parties “should not be required to further exhaust time and financial resources litigating a proceeding regarding an [A]pplication for a [CPC] when the acquiring party cannot demonstrate it has legal authority to acquire substantial System assets.” *Id.*

DE County posits, “The Municipal Protestants have demonstrated that the relevant facts regarding the … contractual terms of their agreements with DELCORA are not in dispute. The Municipal Protestants have demonstrated that Aqua does not have clear authority to acquire several components of the DELCORA System.” Id, at 3, ¶ 8. DE County concludes that the Motion should be granted.

1. I&E Letter

The I&E letter was written not in compliance with procedure to respond to the Motion, but in the “public interest to respond to Aqua’s inappropriate reliance on I&E to survive Summary Judgment.” I&E letter at 2. I&E states that Aqua has mischaracterized the position of I&E. *Id,* at 3. I&E articulates three facts from the pleadings and submitted testimony:

(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 [APA], Aqua is requesting that the Commission approve an [APA] that directly breaches DELCORA’s obligations to the Municipal Protestants.

*Id* (emphasis in original). I&E requests that any reliance by Aqua on I&E’s legal position as a basis to survive the Motion should be rejected. *Id.*

DISPOSITION

1. Applicable Law

52 Pa.Code § 5.102(c) & (d) states,

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

 (c)  *Motion for summary judgment*. A motion for summary judgment must be based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits. Documents not already filed with the Commission shall be filed with the motion.

 (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 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.

   (3)  *Form of decision*. The presiding officer will grant, in whole or in part, the motion in the form of an initial or recommended decision which shall be subject to exceptions as set forth in § 5.533 (relating to exceptions). Denial of a motion will be in the form of a written order.

As stated by the Pennsylvania Supreme Court in *Continental Insurance Company v. Schneider, Inc. et al.,* 873 A.2d 1286 (Pa. 2005), summary judgment may only be entered if the record clearly demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining the absence of a genuine issue of fact, the evidence must be viewed in the light most favorable to the non-moving party and any doubt must be resolved against the entry of judgment. The courts will accept as true all well-pleaded facts in the non-movant’s pleadings and give the non-moving party the benefit of all reasonable inferences. *Wright v. North American Life Assurance Co.,* 372 Pa. Super. Ct. 272 (1988); *Bobb v. Kraybill,* 354 Pa. Super. Ct. 361 (1986); *see also, South River Power Partners, L.P. v. West Penn Power Co.,* 86 Pa PUC 477, 483 (1986). Also, the courts are not to decide issues of fact but to determine whether such material issues of fact exist. *Sanders v. Loomis Armored, Inc.,* 418 Pa. Super. Ct. 375 (1992). It is the moving party which has the burden of proving the absence of a genuine factual issue. *Campbell v. Eitak, Inc.,* 893 A.2d 749 (Pa.Super. 2006).

1. Ruling

It is noted that only the Municipal Protestants supplied attachments which were interrogatory responses to their pleaded Motion. No other party, that responded to the Motion, Aqua, DELCORA, DE County and I&E had any attachment to their response. Yet, these same parties, Aqua, DELCORA, DE County and I&E refer to information that has been submitted through testimony but not filed with the Commission. 52 Pa.Code § 5.102(c), *supra,* requires that the Motion consider the pleadings and any attachments but must be documents **filed** with the Commission.

The need for the parties to refer to submitted testimony that is not yet filed underscores the need for a record. Even DE County and I&E both in their quest to support the Motion, sow seeds of uncertainty. I&E states not all the assets at issue in the Application **appear** to be legally transferable. I&E letter at 3 (emphasis added). DE County states the contracts between the municipal corporations and DELCORA do not **appear** to be in dispute. DE County at 2, ¶ 6 (emphasis added). Either they are facts or not, there should be no uncertainty. If there is uncertainty, then material facts need to be developed.

Furthermore, I agree with DELCORA that there is nothing definitive in these pleadings showing that DELCORA will not obtain the rights in the Application pending. Contrasted with *Bobtown*, there was certainty that Bobtown Sewage Co., as the Applicant, did not have the rights for which is applied. The certainty was shown through the record evidence. There is nothing in the pleadings or attachments where any municipal corporation states affirmatively that they will not assign the contractual rights or will not agree to Aqua acting as an agent for DELCORA for a period of time or will exercise their right to operate those facilities that they protected by their contract with DELCORA. Thus, there are material facts that remain to be developed by the record.

Additionally, if any municipal corporation should determine that it will exercise its rights, which are protected by contract with DELCORA, then DELCORA does not possess the rights to transfer the facilities or the customers it serves to Aqua at this time. Therefore, the valuation of the assets and future income included in utility valuation expert appraisals included in the Application, the service territory of this Application and the rates to be charged by Aqua in the requested territory for direct retail and wholesale customers may not be correct as presented, specifically Aqua’s tariff at Exhibit G of the Application will need to be modified. In the opinion of the undersigned, this situation would require the Application to be amended and resubmitted, as appropriate, and the statutory timeframe would begin anew.

CONCLUSION

 The pleadings and attachments associated with the Motion result in material questions of fact that remain to be established. *Bobtown*, as the only legal precedent referenced as controlling the outcome of the Motion does not support that the Application be dismissed based solely on legal grounds.

ORDER

 THEREFORE,

 IT IS ORDERED:

1. That the Motion for Summary Judgment filed by Scott Rubin, Esquire on behalf of Edgmont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority, Trainer Borough and Upland Borough, as Protestants in the case captioned *Application of Aqua Pennsylvania Wastewater, Inc. for Approval of its Acquisition of Delaware County Regional Water Quality Authority’s Wastewater Assets, inter alia, Pursuant to Sections 507, 1102 and 1103 of the Public Utility Code,* Docket No. A-2019-3015173, is denied.
2. That the case captioned *Application of Aqua Pennsylvania Wastewater, Inc. for Approval of its Acquisition of Delaware County Regional Water Quality Authority’s Wastewater Assets, inter alia, Pursuant to Sections 507, 1102 and 1103 of the Public Utility Code,* Docket No. A-2019-3015173, remains set for hearing.

Date: October 30, 2020 /s/

 Angela T. Jones

 Administrative Law Judge

Application of Aqua Pennsylvania Wastewater, Inc. to acquire DELCORA wastewater asserts

Docket No. A-2019-3015173

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**Revised 10-8-20**

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1. The “F” exhibits also include contracts between DELCORA and municipal corporations that sold their collection systems to DELCORA, in some cases subject to a reversionary interest. [↑](#footnote-ref-2)
2. Edgmont had initially filed a Petition to Intervene on June 15, 2020 but withdrew the Petition and replaced it with a protest. [↑](#footnote-ref-3)
3. 52 Pa.Code § 5.102(a) states, “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.” [↑](#footnote-ref-4)
4. 52Pa.Code § 5.102(b) states, “ An answer to a motion for judgment on the pleadings or summary judgment, …may be filed within 20 days of the date of service of the motion. The answer to a motion for summary judgment may be supplemented by depositions, answers to interrogatories or further affidavits and admissions.” [↑](#footnote-ref-5)