



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

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

December 1, 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 Main Brief**

Dear Secretary Chiavetta:

Enclosed for filing please find the **Main Brief of the Bureau of Investigation and Enforcement** for the above-captioned proceeding.

Copies 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 me.

Respectfully,

A handwritten signature in black ink, appearing to read "Gina L. Miller", is written over the typed name.

Gina L. Miller  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney ID No. 313863  
(717) 787-8754  
[ginmiller@pa.gov](mailto:ginmiller@pa.gov)

Erika L. McLain  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney ID No. 320526  
(717) 783-6170  
[ermclain@pa.gov](mailto:ermclain@pa.gov)

GLM/jfm  
Enclosures

cc: Hon. Angela T. Jones, Office of Administrative Law Judge (*via email only*)  
Hon. F. Joseph Brady, Office of Administrative Law Judge (*via email only*)  
Pamela McNeal, Legal Assistant, Office of Administrative Law Judge (*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 Approval of its Acquisition of the	:	Docket No. A-2019-3015173
Wastewater System Assets of the Delaware	:	
County Regional Water Quality Control	:	
Authority	:	

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**MAIN BRIEF  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Gina L. Miller  
Prosecutor  
PA Attorney ID No. 313863

Erika L. McLain  
Prosecutor  
PA Attorney ID No. 320526

Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, Pennsylvania 17120

Dated: December 1, 2020

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## **I. STATEMENT OF THE CASE**

### **A. Procedural History**

On March 3, 2020, Aqua Pennsylvania Wastewater, Inc. (“Aqua”) filed with the Pennsylvania Public Utility Commission (“Commission”) its Application pursuant to Sections 1102, 1329, and 507 of the Public Utility Code (“Code”), for approval of the following requests: (1) approval of the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”) situated within all or part of 49 municipalities within portions of Chester and Delaware Counties, Pennsylvania; (2) approval of the right of Aqua to begin to offer, render, furnish and supply wastewater service to the public in portions of Delaware County and Chester County, Pennsylvania; (3) an order approving the acquisition that includes the ratemaking rate base of the DELCORA wastewater system assets pursuant to Section 1329 of the Code; and (4) assignments of 163 municipal contracts, between Aqua and DELCORA, pursuant to Section 507 of the Code,<sup>1</sup> approval of the APA, and approval the terms of a Memorandum of Understanding (“MOU”) it has entered with DELCORA.<sup>2</sup>

The Bureau of Investigation and Enforcement (“I&E”) filed a Notice of Appearance in this proceeding on April 2, 2020. I&E serves as the Commission’s prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Code.<sup>3</sup> I&E’s participation in this proceeding is warranted because its outcome will produce a direct and immediate

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<sup>1</sup> Aqua Application, pp. 20-21.

<sup>2</sup> Id. at 20.

<sup>3</sup> 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* See *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

ratemaking determination and because, absent imposition of the conditions I&E recommends, Aqua's Application violates the Code.

On March 26, 2020, the Office of Small Business Advocate ("OSBA") filed a Notice of Appearance and Intervention. The Office of Consumer Advocate ("OCA") filed a Protest and Notice of Appearance on April 2, 2020. Petitions to Intervene were filed by the County of Delaware, Pennsylvania ("Delaware County") on May 18, 2020 and DELCORA on June 25, 2020. Additionally, Protests were filed by the following parties: Southwest Delaware County Municipal Authority ("SWDCMA"),<sup>4</sup> Edward Clark, Jr. on behalf of Treasure Lake Property Owners Association,<sup>5</sup> Ross Schmucki,<sup>6</sup> Upland Borough,<sup>7</sup> Lower Chichester Township,<sup>8</sup> Cynthia Pantages on behalf of C&L Rental Properties,<sup>9</sup> Trainer Borough,<sup>10</sup> Edgmont Township,<sup>11</sup> Sunoco Partners Marketing and Terminals L.P./Energy Transfer,<sup>12</sup> Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark, Corporation ("Kimberly Clark").<sup>13</sup>

On May 14, 2020, Delaware County filed a complaint against DELCORA and the DELCORA Rate Stabilization Trust in the Delaware County Court of Common Pleas, docketed at CV-2020-003185 ("Delaware County's lawsuit").<sup>14</sup> Shortly after, Delaware

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<sup>4</sup> Filed on July 17, 2020.

<sup>5</sup> Filed on July 30, 2020.

<sup>6</sup> Filed on July 31, 2020.

<sup>7</sup> Filed on August 7, 2020.

<sup>8</sup> Filed on August 7, 2020.

<sup>9</sup> Filed on August 11, 2020.

<sup>10</sup> Filed on August 17, 2020.

<sup>11</sup> Filed on August 21, 2020, it should be noted that Edgmont Township filed a Petition to Intervene on June 15, 2020 but withdrew its Petition to Intervene on August 21, 2020.

<sup>12</sup> Filed on August 28, 2020.

<sup>13</sup> Filed on August 31, 2020.

<sup>14</sup> *County of Delaware, Pennsylvania's Petition for a Stay of the above-referenced Section 1329 Application for Aqua's Acquisition of the Delaware County Regional Water Quality Authority's Wastewater System Assets* ("Delaware County's Petition"), A-2019-3015173, ¶16.



County amended its lawsuit to enforce an ordinance that would dissolve DELCORA,<sup>15</sup> and Aqua intervened in the Delaware County lawsuit seeking to protect its interests in its APA with DELCORA.<sup>16</sup>

On June 11, 2020, while the Delaware County lawsuit was pending, the Commission issued a Secretarial Letter indicating that Aqua's Application had been conditionally accepted pending the filing of requisite documents and individualized notification of the proposed acquisition to all affected customers. On June 23, 2020 Delaware County filed a Petition for Reconsideration of the Commission staff determination of the conditional acceptance. Aqua filed its Answer to Delaware County's Petition for Reconsideration on July 9, 2020. A Secretarial Letter was issued on July 14, 2020 stating that the docket was inactive and that the Delaware County Petition for Reconsideration would be accepted when the docket became active. On July 15, 2020, Delaware County amended its Petition incorporating its previous Petition and adding new and additional information.

The Commission issued a Secretarial Letter accepting Aqua's Application as complete on July 27, 2020 and the matter was assigned to the Office of Administrative Law Judge ("OALJ"). Administrative Law Judge Angela Jones ("ALJ Jones") was subsequently assigned to this proceeding<sup>17</sup> and she issued an Order on August 3, 2020 establishing September 2, 2020 as the date for a Prehearing Conference.

On August 4, 2020, Aqua filed its Answer to the Amended Petition for Reconsideration of Delaware County. On August 7, 2020, Delaware County filed a

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<sup>15</sup> Id. at 18.

<sup>16</sup> Id. at 19-25.

<sup>17</sup> On November 18, 2020, ALJ. Joseph Brady was added to preside alongside ALJ Jones in this case.

Petition to Stay the instant proceeding until January 31, 2021 and a request for Commission review of a material question. I&E filed a letter in support of the Delaware County Petition to Stay on August 13, 2020. The OCA filed a brief in support of the Delaware County Petition to Stay on August 14, 2020. Aqua and DELCORA filed briefs in opposition of the Petition to Stay. On August 24, 2020, Delaware County filed a Reply Brief to the Aqua and DELCORA briefs in opposition. On August 27, 2020, Aqua and DELCORA filed Answers in opposition to the Delaware County Petition to Stay.

On August 14, 2020, the OCA filed an Expedited Motion to Extend the Statutory deadline by 60 days or to March 26, 2021 pursuant to Governor Wolf's Emergency Order. ALJ Jones issued an Order on August 18, 2020 directing the parties to respond to the Motion by August 24, 2020. On August 24, 2020, Aqua and DELCORA filed Answers in Opposition and Delaware County and the OSBA filed Answers in Support of the OCA's Expedited Motion.

On August 27, 2020, the Commission issued an Opinion and Order denying Delaware County's Amended Petition of Reconsideration. On August 31, 2020, the Commission issued an Opinion and Order declining to answer the material question and therefore denying the Petition for Stay of the proceeding. On August 31, 2020, Chief ALJ Charles Rainey issued an Order granting the OCA's Motion for Extension.

A telephonic Prehearing Conference took place on September 2, 2020. During the hearing, the parties and ALJ Jones adopted a litigation schedule and identified other procedures necessary for the conduct of this case. On September 4, 2020, ALJ Jones

issued Order #2, which, inter alia, set forth the following schedule for this case:

Public Input Hearings	Sept. 16, 2020
Protestant Direct Testimony	Sept. 29, 2020
Rebuttal Testimony	Oct. 20, 2020
Surrebuttal Testimony	Nov. 2, 2020
Evidentiary Hearings	Nov. 9&10, 2020
Main Briefs	Dec. 1, 2020
Reply Briefs	Dec. 14, 2020

I&E notes that it served direct, rebuttal, and surrebuttal testimony identified in Appendix A in accordance with the above-referenced deadlines. Additionally, I&E's counsel attended both of the public input hearings held via a web-based platform on at 1:00 p.m. and 6:00 p.m. on September 16, 2020.

On September 4, 2020, Aqua filed its Petition for Reconsideration of Chief ALJ Rainey's Extension Order. Answers in opposition to Aqua's Petition for Reconsideration were filed by the OSBA<sup>18</sup> and the OCA.<sup>19</sup> The Commission denied Aqua's Petition for Reconsideration via Opinion and Order issued on October 8, 2020.

On September 25, 2020, Edgmont Township, Lower Chichester Township, SWDCMA, Trainer Borough, and Upland Borough (collectively "Municipal Protestants") filed a Motion for Summary Judgment. On October 15, 2020 Aqua and DELCORA filed Answers in Opposition to the Motion for Summary Judgment. On the same day, Delaware County filed an Answer in Support of the Motion. On October 16, 2020, I&E filed a Letter addressing Aqua's Answer to the Motion. On October 30, 2020, ALJ Jones issued an Order denying the Municipal Protestant's Motion for Summary Judgment.

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<sup>18</sup> Filed on September 20, 2020.

<sup>19</sup> Filed on September 22, 2020.

On November 3, 2020, I&E contacted Aqua's and DELCORA's counsel to discuss settlement of all or part of this case. Although Aqua and DELCORA's counsel had one brief discussion with I&E thereafter, neither a full nor partial settlement of any of I&E's outstanding issues could be achieved.

On November 3-6, 2020, several of the Municipal Protestants filed lawsuits against DELCORA and the DELCORA Rate Stabilization Trust in Delaware County Court of Common Pleas for breach of contract and to assert certain property interests that conflict with DELCORA's representations in the APA. These lawsuits, (collectively the "Municipal lawsuits") are comprised of the following individual actions: (1) SWDCMA v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-0074691;<sup>20</sup> (2) Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007552;<sup>21</sup> and Upland Borough v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007596.<sup>22</sup>

On November 9-10, 2020, ALJ Jones conducted evidentiary hearings via web-based platform, with telephonic access available. At the hearing, testimony and exhibits were entered into the record and cross examination was conducted. I&E entered the documents identified in "Appendix A" into the evidentiary record.<sup>23</sup> Pursuant to the procedural schedule and in accordance with Commission regulations at Section § 5.501, I&E submits this Main Brief.

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<sup>20</sup> Municipal Protestants Ex. 11.

<sup>21</sup> Municipal Protestants Ex. 12.

<sup>22</sup> Municipal Protestants Ex. 13.

<sup>23</sup> Hearing TR. at 498-501.

## **B. Overview of the Proposed Transaction**

Aqua's Application requests that the Commission grant approval for multiple acquisition-related requests. Aqua's first request arises under Section 1102, as it requests permission for it to acquire DELCORA's wastewater assets and to obtain the Certificates of Public Convenience necessary for it to begin to offer wastewater service to the public in the DELCORA territory.<sup>24</sup> The DELCORA assets consist of, inter alia, DELCORA's wastewater collection, transmission and treatment system assets as defined in the Agreement. The assets are located in Delaware and Chester Counties.<sup>25</sup> In total, through this acquisition, Aqua is seeking to provide service to DELCORA's approximately 16,000 wastewater customers.<sup>26</sup>

In its second request, pursuant to Section 1329, Aqua seeks to utilize the fair market value process to establish the ratemaking rate base of DELCORA's assets at \$276.5 million.<sup>27</sup> In accordance with Section 1329, the \$276.5 million amount represents the lower of Aqua and DELCORA's negotiated purchase price, and the average of two fair market value appraisals completed by each of these parties' utility valuation experts ("UVEs"). The average of the UVEs appraisals was \$358,538,503. The average was calculated using the value assigned by Aqua's UVE, Harold Walker, III of Gannett Fleming Valuation and Rate Consultants, LLC who valued the DELCORA assets at \$408,883,000, and DELCORA's UVE, Dylan W. D'Ascendis of Scott Madden, Inc.,

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<sup>24</sup> Aqua Application, p. 20.

<sup>25</sup> Aqua Application, p. 4.

<sup>26</sup> Aqua Application, p. 7.

<sup>27</sup> Aqua Application, p. 18.

who valued the assets at \$308,194,006.<sup>28</sup>

In an additional request, pursuant to 66 Pa. C.S. § 507 (“Section 507”), Aqua is seeking approval to enter into an Asset Purchase Agreement (“APA”) with DELCORA to and to assume the 163 municipal contracts identified in APA Section 4.15 that DELCORA has pledged to assign.<sup>29</sup> As part of its Section 507 request, Aqua asks the Commission to approve its MOU with DELCORA and “to allow Aqua to apply DELCORA customer assistance payments on DELCORA customer bills.”<sup>30</sup> The operative version of the MOU outlines Aqua’s commitment, by use of proceeds from the DELCORA Rate Stabilization Trust (“Trust”) to reflect a billing discount (“Aqua bill discount”) on DELCORA customers after the effective date of new rates resulting from Aqua’s next base rate case.<sup>31</sup>

## **II. BURDEN OF PROOF**

Aqua, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application.<sup>32</sup> In a case such as this one, pending before an administrative tribunal, Courts have held that a “litigant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”<sup>33</sup> In order to meet its burden of proof, Aqua must “present evidence more convincing, by even the smallest amount, than that presented by any opposing party.”<sup>34</sup> To satisfy its burden, Aqua must demonstrate, by a preponderance

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<sup>28</sup> Aqua Application, p. 18.

<sup>29</sup> Id. at pp. 19-20.

<sup>30</sup> Id. at 20.

<sup>31</sup> Aqua St. No. 2-R, Ex. E.

<sup>32</sup> 66 Pa. C.S. § 332(a).

<sup>33</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

<sup>34</sup> *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.<sup>35</sup> Specifically to this case, Aqua has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, and 1329 of the Code. Absent imposition of the conditions I&E recommends, Aqua cannot meet its burden because its Application will not comply with any of the applicable sections of the Code.

### **III. STATEMENT OF QUESTIONS INVOLVED**

1. Should Aqua's Application be granted only on a conditional basis?

Suggested Answer: Yes. Aqua's Application should only be granted if Aqua is required to provide the I&E recommended cost of service study of the DELCORA system in its next base rate case and closing of the transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that pending litigation will not change DELCORA's status as a bona fide seller or result in changes to the terms of the APA for which Aqua is seeking approval.

2. Does the Aqua/Decora Trust billing arrangement violate Section 1303 of the Public Utility Code?

Suggested Answer: Yes. The proposed billing arrangement violates Section 1303 because it expressly requires Aqua to charge acquired customers less than tariffed rates.

3. Instead of proposing a billing arrangement to circumvent tariffed rates, could Aqua have proposed a statutorily-permissible rate stabilization plan for acquired customers?

Suggested Answer: Yes. Section 1329 of the Code expressly permits an acquiring utility to propose a rate stabilization plan, but Aqua has disavowed that option.

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<sup>35</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

4. Could the Delaware County lawsuit against DELCORA invalidate DELCORA's status a bona fide seller under Section 1329 of the Code?

Suggested Answer: Yes. Delaware County's lawsuit seeks to dissolve DELCORA and a determination remains pending.

5. Could current litigation against DELCORA result in its inability to transfer all of the assets it purports to convey to Aqua in this case?

Suggested Answer: Yes. Several of the Municipal Protestants have alleged breach of contract claims in Delaware County Court alleging ownership interests in assets that DELCORA purports to convey to Aqua in the APA.

#### **IV. SUMMARY OF ARGUMENT**

At the outset, I&E notes that Aqua's Application is unprecedented in that while it asks the Commission to approve it, the named seller, DELCORA, is simultaneously being sued on multiple fronts, each one of which could have a direct and immediate impact upon the proposed transaction. To be sure, DELCORA's status as a municipal authority, and the terms of the APA subject to approval here, remain uncertain while the Delaware County lawsuit and the Municipal lawsuits are pending. Alongside this uncertainty, Aqua asks the Commission to approve not only this complex transaction, but to permit it to circumvent the Code's mandate requiring utilities to charge tariffed rates in favor of the MOU commitment it pledged to discount DELCORA customers' rates. I&E submits that the Commission must protect Aqua's ratepayers from assuming the risk of the litigation against DELCORA and reject Aqua's attempt to circumvent the Code by adopting the conditions I&E recommends.

As a preliminary matter, I&E initially recommended that approval of Aqua's Application be conditioned upon it performing a specified cost of service study. As the evidentiary record reveals, during the course of litigation, I&E and Aqua reached an



agreement on this issue whereby Aqua has committed to the following term:

In its next base rate case, Aqua must file cost of service calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.

As explained further below, the above term is consistent with the goals and intent of I&E's original recommendation. Accordingly, I&E requests that the Commission condition Aqua's Application upon this cost of service study commitment.

Additionally, the Commission must condition approval of Aqua's Application upon the rejection of Aqua's bill discount proposal because it would directly result in Aqua illegally issuing acquired customers bills that are lower than the applicable tariffed rates. Although Section 1329 Code provided Aqua with a legal method for stabilizing the rates of acquired DELCORA customers, Aqua has rejected it in favor of the MOU-based bill discount. As I&E will demonstrate below, no matter how Aqua attempts to couch its bill discount proposal, it would still result in impacted customers paying less than tariffed rates and therefore violate Section 1303 of the Code. Furthermore, Aqua's attempts to equate its bill discount proposal to low-income customer bill credits or to other Commission-approved bill credits issued for the limited purpose of recompensing customers are without merit and warrant rejection.

Finally, I&E recognizes that all of the affirmative public benefits alleged in this case arise under the APA and depend upon DECLORA's authority to enter the APA as a bona fide seller, to convey the system property it purports to convey and to assign all of

the contracts it purports to assign. Because DELCORA's authority to act as a seller, specifically its ability to convey all of the system property and its authority to assign certain contracts, is being questioned on multiple fronts of litigation, the alleged benefits of Aqua's Application may not materialize. I&E avers that such an outcome is not only contrary to the public interest, but it imposes a "bait and switch" result upon captive ratepayers who may be forced to pay full freight for a \$276.5 million transaction that may result in very different terms than what they paid to receive, or be required to fund a legal battle in pursuit of a transaction that may never materialize. Therefore, in order to ensure that the benefits will materialize as alleged, I&E submits that, as a condition of approval, the closing of the transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation will not change DELCORA's status as a bona fide seller or result in any changes to the APA.

## **V. ARGUMENT**

### **A. Section 1329**

#### **1. Introduction**

While the crux of the issues that I&E identified are not directly related to Section 1329, some of the issues implicate the statute. As an example, in addressing the Aqua bill discount, I&E notes that Aqua forfeited the rate stabilization option provided for under Section 1329(g). Additionally, I&E notes that pending the outcome of the Municipal litigation, which involves certain Municipal Protestants' assertion of property rights that DELCORA purports to convey through the APA, the UVEs appraisals may assume incorrect facts. Because I&E addresses these issues in the context of recommended conditions, they are more thoroughly explained below in Section 2(C).

## **2. Section 1329 - Legal Principles**

Section 1329 of the Public Utility Code prescribes the process used to determine the fair market value of a municipal utility that is the subject of an acquisition. Section 1329 provides a framework for valuing, for ratemaking purposes, water and wastewater systems that are owned by a municipal corporation or authority that are to be acquired by an investor-owned water or wastewater utility under the Commission's jurisdiction. It allows the rate base of the municipal system being purchased to be incorporated into the rate base of the purchasing investor-owned utility at the lesser of either the purchase price or the fair market value as established by the two independent appraisals conducted by two utility valuation experts. Notably, a Commission Order approving a transaction under Section 1329 is permitted to include "[a]dditional conditions of approval."<sup>36</sup>

## **3. Aqua's Application**

Aqua seeks to utilize the fair market value process to establish the ratemaking rate base of DELCORA's assets at \$276.5 million. In accordance with Section 1329, the \$276.5 million amount represents the lower of Aqua and DELCORA's negotiated purchase price, and the average of two fair market value appraisals completed by each of these parties' UVEs. The average of the UVEs appraisals was \$358,538,503. The average was calculated using the value assigned by Aqua's UVE, Harold Walker, III of Gannett Fleming Valuation and Rate Consultants, LLC who valued the DELCORA assets at \$ \$408,883,000, and DELCORA's UVE, Dylan W. D'Ascendis of Scott

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<sup>36</sup> 66 Pa. C.S. § 1329(d)(3)(ii); Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township ("Aqua/New Garden Section 1329 Case"), Docket No. A-2016-2580061, p. 69 (Order entered June 29, 2017).

Madden, Inc., who valued the assets at \$ \$308,194,006.<sup>37</sup>

I&E has not challenged the UVEs appraisals in this case; however, as I&E explains in further depth below in Section 2(C), *Recommended Conditions*, the UVEs' reliance on the Pennoni Engineering Assessment<sup>38</sup> to calculate the original cost and related accrued depreciation of the DELCORA system may invalidate the cost approaches of their appraisals. Specifically, consistent with Section 1329's mandate that the UVEs incorporate the requisite engineering assessment shall be incorporated into the appraisal under the cost approach,<sup>39</sup> any faulty assumptions in the Engineering Assessment are then carried forward to the UVEs appraisals. Because the UVEs' appraisals were predicated, at least in part, on the assumption contained in the Engineering Assessment that DELCORA's transferrable assets included the collection system assets of Upland Borough, Trainer Borough, and Edgmont Township,<sup>40</sup> if DELCORA does not own or cannot transfer those assets, the UVEs' appraisals are flawed, unreliable, and must be rejected. I&E submits that while the Municipal lawsuits remain pending, DELCORA's ownership and ability to transfer the assets at issue will remain uncertain.

## **B. Section 1102/1103 Standards – Public Interest**

### **1. Section 1102/1103 - Legal Principles**

The Code requires that the Commission issue a Certificate of Public Convenience as a prerequisite to offering service, abandoning service, and certain property transfers by

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<sup>37</sup> Aqua Application, p. 18.

<sup>38</sup> Aqua Application, Ex. D.

<sup>39</sup> 66 Pa. C.S. § 1329(a)(4).

<sup>40</sup> Aqua Application, Exhibit D, Pennoni & Associates, Engineering Assessment and Original Cost of DELCORA Sewerage Facilities, Section 4.06; Aqua's Application, Exhibit R, pp. 4-6; Aqua Application, Ex. Q, p. 27.

public utilities or their affiliated interests.<sup>41</sup> The standards for the issuance of a Certificate of Public Convenience are set forth in Sections 1102 and 1103 of the Code.<sup>42</sup> A Certificate of Public Convenience shall be granted “only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.”<sup>43</sup> These provisions have been interpreted by the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.<sup>44</sup>

Additionally, pursuant to Section 1103, Aqua must show that it is technically, legally, and financially fit to own and operate the assets it will acquire from DELCORA.<sup>45</sup> In addition to assessing fitness, the Commission should consider the benefits and detriments of the transaction “with respect to the impact on all affected parties”<sup>46</sup> including existing customers. To ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.<sup>47</sup> I&E submits that Aqua’s Application will only be in the public interest if the Commission conditions its approval on the conditions that I&E recommends.

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<sup>41</sup> 66 Pa. C.S. § 1102(a).

<sup>42</sup> 66 Pa. C.S. § 1103.

<sup>43</sup> 66 Pa. C.S. § 1103(a).

<sup>44</sup> *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).

<sup>45</sup> *Seaboard Tank Lines v. Pa. PUC*, 502 A. 2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. PUC*, 138 A.2d 240, 243 (Pa. Super. 1958).

<sup>46</sup> *Middletown Twp. v. Pa. P.U.C.*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984).

<sup>47</sup> 66 Pa. C.S. § 1103(a).

## **2. Fitness**

I&E does not challenge that Aqua is technically, legally, and financially fit to own and operate any of the assets that DELCORA may have the authority to convey.

## **3. Affirmative Public Benefits**

All of the affirmative public benefits alleged in this case arise under the APA and depend upon DECLORA's authority to enter the APA as a bona fide seller, to convey the system property it purports to convey and to assign all of the contracts it purports to assign. Because DELCORA's authority to act as a seller, its ability to convey all of the system property, and its authority to assign certain contracts all is being questioned on multiple fronts of litigation, the alleged benefits of Aqua's Application may not materialize. Therefore, in order to ensure that the benefits will materialize as alleged, I&E submits that any approval of Aqua's Application be subject to the conditions I&E addressed below under Section 2(C), *Recommended Conditions*. Absent adoption of I&E's conditions, there is no assurance that the alleged affirmative public benefits will ever materialize. I&E avers that such an outcome is not only contrary to the public interest, but it imposes a "bait and switch" result upon captive ratepayers who are forced to pay full freight for a transaction that may result in very different terms than what they paid to receive.

## **4. Public Interest**

### **a. Common Pleas Litigation**

Because the crux of I&E's arguments regarding the potential impact of both the pending Delaware County lawsuit and the Municipal lawsuits is that conditions of approval must be attached to Aqua's Application in order to protect ratepayers from the

uncertain impact of the combined litigation's impact upon the transaction, I&E has thoroughly addressed these topics below under Section 2(C), *Recommended Conditions*. Because all of the affirmative public benefits alleged in this case arise under the APA and depend upon DECLORA's authority to enter the APA as a bona fide seller, all of which are now being questioned on multiple fronts, the alleged benefits may not materialize.

#### **b. Rate Stabilization Trust**

Because the crux of I&E's argument against the DELCORA Trust is that a condition must be attached to reject Aqua's illegal bill discount proposal necessary to distribute its proceeds, I&E has thoroughly addressed this topic below under Section 2(C), *Recommended Conditions*. However, to the extent that Aqua relies upon the DELCORA Trust as an affirmative public benefit of the transaction, such reliance is misplaced because the Delaware County lawsuit and/or the Municipal lawsuits could either significantly reduce the Trust's available proceeds or produce a result that abolishes the Trust arrangement entirely. Assuming, arguendo, that the Trust survives litigation on multiple fronts, the unrefuted record here indicates that unaccounted for liabilities may well significantly diminish or completely absorb Trust benefits<sup>48</sup> making reliance upon it as an affirmative public benefit untenable.

#### **5. Environmental Aspects of the Proposed Transaction**

I&E has not addressed this issue.

#### **6. Conclusion – Public Interest and Benefit**

Because of the multiple lawsuits against DELCORA, it is uncertain whether, and,

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<sup>48</sup> Sunoco St. No. 2-SR, pp. 16-20.

if so, which public benefits alleged may actually materialize. For the reasons explained above, applicable legal standards and the public interest require that Aqua's Application be granted only on a conditional basis. I&E identifies these conditions and their bases below.

### **C. Recommended Conditions**

It is well-settled that in order to ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.<sup>49</sup> Importantly, the Commission is granted great latitude when determining conditions imposed on award of certificate of public convenience.<sup>50</sup> In order to ensure that the transaction is in the public interest, and consistent with the Code, I&E initially recommended that it only be approved subject to the following three conditions:<sup>51</sup>

- (1) Aqua should provide a separate cost of service study for the DELCORA system that segregates the City of Chester and further segregates the City of Chester by sanitary and stormwater costs, identifies the plant in service costs at the time the DELCORA system was purchased, identifies the cost of any plant retirements, and identifies the cost of any plant investment.
- (2) To the extent that it relies upon Aqua issuing acquired customers bills that are lower than the applicable tariffed rates, Aqua and DELCORA's proposal for an irrevocable trust should be rejected.

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<sup>49</sup> 66 Pa. C.S. § 1103(a).

<sup>50</sup> *Rheems Water Co. v. Pa. PUC*, 620 A.2d 609, 153 Pa.Cmwlth. 49 (Cmwlth.1993).

<sup>51</sup> I&E St. No. 1, pp. 25-26.



- (3) Closing of the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change (1) DELCORA's status as a bona fide seller and (2) will not result in any change to the terms of the APA for which Aqua seeks approval in this case.

Through testimony, I&E was able to reach a resolution of its first condition regarding cost of service ('Stipulated Cost of Service Condition.'). Accordingly, I&E will identify the Stipulated Cost of Service Condition below and will thereafter substitute it in place of I&E's originally-recommended cost of service condition.

### **I. Cost of Service**

To protect ratepayers, I&E recommended that Aqua provide a cost of service study for the DELCORA system that segregates the City of Chester and further segregates the City of Chester by sanitary and stormwater costs, identifies the plant in service costs at the time the DELCORA system was purchased, identifies the cost of any plant retirements, and identifies the cost of any plant investment.<sup>52</sup> As I&E witness Gumby explained, the recommended cost of service study was necessary because it would be beneficial in the following ways: (1) determining the cost to operate the DELCORA wastewater system separately; (2) calculating the costs of the Aqua's different services; (3) separating the costs between Aqua's different customer classes and service areas; (4) attributing costs to Aqua's different customer classes and service areas (5) determining how costs will be recovered from the Aqua's different customer classes and service areas; and (6) establishing the existence and extent of subsidization (inter and

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<sup>52</sup> I&E St. No. 1, p. 23.

intra-class) and assist in determining the appropriate amount of revenue requirement to be shifted from wastewater customers to water customers, which Aqua has utilized in past base rate cases.<sup>53</sup>

In response to I&E's recommendation regarding the cost of service study, Aqua witness Packer accepted I&E's recommendation to provide separate cost of service studies for the DELCORA system and the combined sewer system of the City of Chester, with the clarification that the separate COSS' will be consistent with typically filed ratemaking exhibits.<sup>54</sup> Mr. Packer further testified that Aqua agreed to file cost of service study calculations separately for the Aqua system "with typically filed rate making exhibits" including Rate Base (Measure of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.<sup>55</sup> I&E witness Gumby indicated that Aqua's agreement to file the cost of service study calculations Mr. Packer identified satisfied her recommendation.<sup>56</sup>

Accordingly, the I&E and DELCORA's agreed cost of service condition is as follows:

In its next base rate case, Aqua must file cost of service calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.

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<sup>53</sup> I&E St. No. 1, pp. 18-19.

<sup>54</sup> Aqua St. No. 2-R, p. 20.

<sup>55</sup> Aqua St. No. 2-R, p. 21

<sup>56</sup> I&E St. No. 1-SR, pp. 2-3.

I&E submits that the cost of service term is in the public interest because, as witness Gumby explained, the cost of service study is necessary to protect ratepayers because without it, the cost to operate the DELCORA wastewater system will not be known, and therefore the appropriate ratemaking recommendations for those costs cannot be proposed or implemented when Aqua files its next base rate case.

## **II. The Aqua Bill Discount Violates Section 1303 of the Code**

I&E recommended that to the extent that it relies upon Aqua issuing bills that are lower than the applicable tariffed rates, Aqua and DELCORA's proposal for an irrevocable trust should be rejected. As explained earlier, the irrevocable bill discount at issue is not enshrined in Aqua's APA, but it is memorialized in a MOU that Aqua asks the Commission to approve, "if necessary."<sup>57</sup> A draft of the pro forma MOU was included in Aqua's Application as Exhibit B to Aqua Statement No. 2, the Direct Testimony of William A. Packer, and it summarized the purpose of the MOU as follows:

The purpose of this MOU is to set forth the Parties' general understanding and agreement regarding how Aqua Wastewater can assist with applying a payment to DELCORA customers bills from the net proceeds to be received by DELCORA from Aqua Wastewater from the sale of the Sewer System under the Sewer System Sale Agreement.<sup>58</sup>

Although DELCORA witness Willert alleges that the Commission has no jurisdiction over the trust arrangement<sup>59</sup> or over the use of the sale proceeds for the benefit of DELCORA wastewater utility ratepayers,<sup>60</sup> both Aqua's position and the

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<sup>57</sup> Aqua St. No. 1, p. 4; I&E Ex. No. 1, Sch. 2, p. 1.

<sup>58</sup> Aqua St. No. 2, Appendix B, p. 1.

<sup>59</sup> Aqua St. No. 5, p. 12.

<sup>60</sup> OCA Ex. RCS-8, p. 122.

language of the MOU contradict his claim. More specifically, the draft MOU included in the direct testimony that accompanied Aqua's Application explicitly contemplates Commission approval under 66 Pa. C.S. § 507 as follows:

[The MOU] "shall be filed with the Pennsylvania Public Utility Commission ("PUC") under Section 507 of the Pennsylvania Public Utility Code ("Code"), 66 Pa. C. S. § 507."<sup>61</sup>

Notably, Aqua provided an executed version of an "Information Sharing" MOU between Aqua and DELCORA dated August 27, 2020,<sup>62</sup> and while it does not contemplate those parties seeking the Commission's approval under Section 507, Aqua witness Packer claims that "[i]n this case, Aqua and DELCORA have presented the MOU for review and approval, and expect that the Commission would condition its approval on any modifications of the MOU that it deemed necessary."<sup>63</sup>

However, despite the ambiguous and conflicting positions of Aqua and DELCORA of whether Commission approval is needed for any MOU approving Aqua's role in administering trust proceeds as billing credits to acquired customers, I&E asserts that the Commission has clear jurisdiction to deny Aqua's proposal. First, the executed "Information Sharing" MOU that witness Packer provided in his exhibit accompanying his rebuttal testimony indicates that "DELCORA and Aqua have sought approval of the PUC to put a Customer Assistance Amount on Aqua's bills to DELCORA customers" and it outlined an information sharing process that the parties would follow "if the

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<sup>61</sup> Aqua St. No. 2, Appendix B, p. 1.

<sup>62</sup> Aqua St. No. 2-R, Exhibit E.

<sup>63</sup> Aqua St. No. 2-R, p. 16.

Commission approves the request. . . .”<sup>64</sup> Furthermore, as explained below in the description of its proposal, the billing arrangement it has promised DELCORA represents a clear violation of Section 1303 Code, and the Commission is charged with enforcing the Code.<sup>65</sup>

#### **a. Aqua’s Bill Discount Proposal**

Although Aqua purports that its post-acquisition plan is to adopt DELCORA’s existing rates until after the conclusion of its next base rate case when it will thereafter move those customers to the full tariffed rates approved by the Commission,<sup>66</sup> the bill discount it proposes relies on a direct deviation from tariffed rates. More specifically, in order to accommodate DELCORA’s request for Aqua to apply customer assistance payments from the Trust to DELCORA customers as outlined in the aforementioned MOUs, Aqua and DELCORA have agreed to the following process:

If the PUC authorizes a Customer Assistance Amount Calculation to be included on Aqua’s bill to DELCORA Customers, the purpose of this Memorandum is to set forth the process by which the Customer Assistance Amount is calculated and distributed so that the effect of the rate to be paid by DELCORA Customers for Wastewater Utility Services will increase by no more than three percent (3%) compounded annually on the Rate Case Effective Date and each anniversary of such date during the DELCORA Customer Assistance Trust Payment Period.<sup>67</sup>

I&E notes that Aqua and DELCORA define “Rate Case Effective Date” as “Aqua’s first base rate case applicable to the DELCORA customers”<sup>68</sup> and they define

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<sup>64</sup> Aqua St. No. 2-R, Ex. Exhibit E, p. 2.

<sup>65</sup> 66 Pa. C.S. § 501(a).

<sup>66</sup> Aqua St. No. 2, pp. 4-5.

<sup>67</sup> Aqua Ex. 2-R, Sch. E, p. 3, Section 2.1.

<sup>68</sup> Id. at p. 1.

the DELCORA Customer Assistance Trust Payment Period as “the period beginning on the Rate Case Effective Date and ending on the date in which the assets of the Trust are reduced to zero (0).”<sup>69</sup> Accordingly, Aqua and DELCORA have agreed that Aqua will apply the bill discount to DELCORA customers’ bill from the date that DELCORA customers’ rates would increase as a result of a Final Order in an Aqua base rate case until the time that the trust proceeds were spent.

To facilitate the MOU-based bill discount, Aqua indicated its intent to include a payment line item directly on the impacted customers’ bills.<sup>70</sup> In order to better understand how the payment would be reflected, I&E requested that Aqua provide a sample bill. The sample bill that Aqua provided to I&E clarified that through its bill discount, Aqua proposes to charge impacted DELCORA customers less than the tariffed rates by using a line item to directly discount the DELCORA customer bills.<sup>71</sup>

#### **b. Section 1303 of the Code**

I&E submits that Aqua’s proposal violates Section 1303 of the Code, and therefore it must be rejected. Section 1303 provides as follows:

[n]o public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto.<sup>72</sup>

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<sup>69</sup> Id. at p. 3, ¶1.1(g).

<sup>70</sup> Aqua St. No. 2, p. 5.

<sup>71</sup> I&E Ex. No. 1, Sch. 4.

<sup>72</sup> 66 Pa. C.S. § 1303.

Pennsylvania Courts have strictly interpreted Section 1303 as “mean[ing] that public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility.”<sup>73</sup> Here, as exemplified by examination of the sample bill Aqua provided,<sup>74</sup> by way of its bill discount, Aqua will charge DELCORA customers less than tariffed rates. I&E submits that permitting Aqua and DELCORA to contract around Section 1303 via a MOU or any other device would render Section 1303 meaningless, an outcome that is wholly inconsistent with the guiding principle of statutory interpretation that the General Assembly does not intend a result that is absurd or unreasonable.<sup>75</sup>

#### The PAWC/Scranton Acquisition Case

As I&E witness Gumby explained,<sup>76</sup> a similar rate adjustment issue was the subject of litigation in the Pennsylvania American Water Company (“PAWC”) acquisition of the Scranton Sewer Authority (“SSA”) wastewater system.<sup>77</sup> Although the PAWC/SSA acquisition case was not filed under Section 1329, PAWC’s Asset Purchase Agreement with SSA included a provision for a Variance Adjustment, a potential adjustment to the \$195 million purchase price ten years following the Closing of this transaction. If, over this ten-year period, there was a positive difference between the annual revenues in the Authority’s former service area and a 1.9% compound annual

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<sup>73</sup> *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044, 1050 (Pa. Cmwlth. 2002) quoting *Pennsylvania Public Utility Commission*, 663 A.2d 281, 284 (Pa. Cmwlth. 1995).

<sup>74</sup> *Id.*

<sup>75</sup> 66 Pa. C.S. § 1922.

<sup>76</sup> I&E St. No. 1, pp. 15-18.

<sup>77</sup> Joint Application of Pennsylvania-American Water Company and the Sewer Authority of the City of Scranton for Approval of (1) the transfer, by sale, of substantially all of the Sewer Authority of the City of Scranton’s Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania (“Scranton Acquisition Case”), Docket No. A-2016-2537209 (Recommended Decision Entered August 17, 2016).

growth rate (CAGR) in annual revenues, PAWC would have pay the difference to SSA in accordance with the following Asset Purchase Agreement Provision:

Within thirty (30) days of final resolution of the calculation of the Variance Adjustment, Seller shall notify Buyer whether the adjustment to the Purchase Price in the amount of the Variance Adjustment shall be paid directly to Seller or distributed to Buyer's then-current wastewater customers in the Service Area.....**If Seller elects distribution of the adjustment of the Purchase Price for the Variance Adjustment to Buyer's then-current wastewater customers in the Service Area, Buyer shall at its sole cost and expense, subject to PaPUC approval and applicable Law, timely implement procedures and protocols reasonably acceptable to Seller and then make a one-time equal, flat-rate distribution to all customers then being served by Buyer in the Service Area their proportionate share of the Variance adjustment as mutually agreed by Buyer and Seller.... In the event the PaPUC fails to allow Buyer to timely implement procedures and protocols and make distributions to customers in the Service Area as aforesaid, Buyer shall pay the Variance Adjustment as an adjustment to the Purchase Price directly to Seller within thirty (30) days of the final resolution of the calculation of the Variance Adjustment...[and] Buyer shall also timely pay Seller the reasonable costs of (i) hiring a third-party administer and pay the Variance Adjustment to wastewater customers in the Service Area and (ii) establishing the processes and protocols to make such payment as described herein.**<sup>78</sup>

By way of the above provision of PAWC and SSA's asset purchase agreement, PAWC agreed that, if SSA so desired, it will pay the Variance Adjustment directly to ratepayers in the former SSA territory. However, in contemplation of the fact that the Commission may not approve of this term, as an alternative, PAWC agreed to distribute the Variance Adjustment to the SSA and to pay for a third-party to administer and pay the Variance

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<sup>78</sup> Scranton Acquisition Case, Docket No. A-2016-2537209, APA at 58, ¶707(e) (emphasis added).



Adjustment to those customers. I&E argued that both the direct and indirect payment provisions offend Section 1303 of the Code and should not be approved.<sup>79</sup>

Specifically, I&E argued that if PAWC directly paid the Variance Adjustment to customers in the former SSA territory, the payment would operate as a de facto rate refund to SSA customers. Those customers would be paying Commission approved tariff rates for ten years. However, upon receipt of the Variance Adjustment payment, the SSA customers would have ultimately paid less for utility service than prescribed under PAWC's tariff which is prohibited by the Public Utility Code. While the PAWC/Scranton Asset Purchase Agreement provided an alternative route for PAWC's distribution to customers in the former SSA territory by way of PAWC's agreement to distribute the Variance Adjustment to the SSA and to pay for a third-party to administer the Variance Adjustment to those same customers, it too offended Section 1303. Although not a direct disbursement, the alternate arrangement still violates Section 1303 which prohibits a public utility from "directly or indirectly, by any device whatsoever" from charging a greater or less rate for service than what is specified in its tariff.<sup>80</sup>

Ultimately, the PAWC/SSA Variance Adjustment was litigated, and Administrative Law Judges David A. Salapa and Steven K. Haas adopted I&E's position that the proposed Variance Adjustment violated Section 1303. A review of the ALJs' recommended decision indicates that they determined that regardless of whether variance adjustments were paid to impacted customers by a third party administrator or paid by PAWC directly to customers, the attempted use of sale proceeds to provide a buffer

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<sup>79</sup> Scranton Acquisition Case, Docket No. A-2016-2537209, I&E Main Brief, pp. 15-17, 19-21.

<sup>80</sup> Scranton Acquisition Case, Docket No. A-2016-2537209, I&E Main Brief, pp. 20-21.

against future rate increases constituted de facto refunds that would impermissibly lead to customers paying less than tariffed rates:

Here, PAWC is obligated by the APA to refund to the SSA service area customers, after ten years, an amount equal to the variance adjustment. The refund will be paid by PAWC to the customers either directly or through a third party administrator mechanism. In either case, the end result is the same. The SSA service area customers will realize a price break from PAWC's tariffed rates for service received during the previous ten years. Consistent with Philadelphia Suburban, we find this to be in impermissible violation of Section 1303.<sup>81</sup>

I&E notes that in this case, similar rationale applies, although Aqua's bill discount proposal presents a much more immediate and direct violation of Section 1303 than the Variance Adjustment proposal that the ALJs rejected in the PAWC/SSA acquisition case. Here, Aqua does not propose to apply sales proceeds to acquired customers after they have paid tariffed rates for ten years. Instead, vis a vis its MOU with DELCORA, Aqua proposes to directly discount acquired customers' rates from Aqua's applicable tariffed rates via a line item, as soon as DELCORA customers are subject to an approved Aqua base rate increase. Although there is no guaranteed date for when Aqua will pursue a base rate case in the future, there is also no evidence to suggest that Aqua will not be seeking rate relief for the next decade, especially in the wake of the COVID-19 pandemic. Additionally, the PAWC/Scranton Variance Adjustment provided only for a hypothetical refund to acquired customers who paid tariffed rates for 10 years because it was payable only if there was a positive difference between the annual revenues in the

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<sup>81</sup> Scranton Acquisition Case, Docket No. A-2016-2537209, Recommended Decision, p. 39 (August 17, 2016). I&E notes that in response to the ALJs' determination, PAWC elected to withdraw its Variance Adjustment; therefore, it was not an issue reviewed by the Commission.

Authority's former service area and a 1.9% compound annual growth rate (CAGR) in annual revenues. Conversely, in this case, Aqua's bill proposal guarantees a deviation from acquired customers paying tariffed rates as soon as, and for and as long as, the arrangement remains in place. Therefore, Aqua's proposal extends far beyond what the ALJs have already determined was an impermissible violation of Section 1303 in the PAWC/Scranton acquisition case and it too should be denied.

### **c. Aqua's Faulty Comparisons Fail to Support its Bill Discount**

Aqua attempts to couch its bill discount as being on par with low-income programs available to utility customers, such as Aqua's Helping Hands program, LIHEAP funding, and customer assistance programming.<sup>82</sup> Aqua witness Packer alleges that the Commission has permitted "tariffed charges to be reduced by line item payments or credits on a customer's bill that reflect third party funds provided to the utility, just as is being proposed by the MOU."<sup>83</sup> Mr. Packer also attempts to equate the Aqua bill discount to a one-time bill credit provided to its acquired Peoples' customers as a result of settlement in the Aqua/Peoples Gas acquisition proceeding.<sup>84</sup> However, as I&E witness Gumby explained, there are fundamental differences between Aqua's MOU-based promise to discount the rates of acquired DELCORA customers and applying regulatorily-approved and needs-based funding awards to low-income utility customers.<sup>85</sup>

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<sup>82</sup> Aqua St. No. 2, p. 6; Aqua St. No. 2-R, pp. 16-18.

<sup>83</sup> Aqua St. No. 2-R., p. 16.

<sup>84</sup> Id. at p. 18. Referencing *Joint Application of Aqua America Inc., Aqua Pennsylvania Inc., Aqua Pennsylvania Wastewater Inc., and Peoples Natural Gas Company LLC for All of the Authority and Necessary Certificates of Public Convenience to Approve a Change in Control of Peoples Natural Gas Company LLC by Way of the Purchase of All of LDC Funding LLC's Membership Interests by Aqua America Inc.*, Docket No. A-2018-3006061 et seq., Ordering Paragraph No. 6 (Jan 24, 2020). I&E refers to this as the Aqua/Peoples acquisition hereinafter.

<sup>85</sup> I&E St. No. 1-SR, pp. 10-12.

Additionally, Aqua's billing credits to acquired customers, which were tied to recompensing customers for infrastructure repair and replacement costs and costs savings benefits, is also fundamentally different than the privately-negotiated bill discount that is tied only to Aqua's agreement to charge acquired DELCORA customers less than tariffed rates. Below, I&E explains in further detail why low-income assistance programs and the Aqua/Peoples rate credits are not analogous to the proposed billing discount, and why they fail to justify its approval.

**(i) Aqua's Bill Discount is Distinguishable from Low-Income Programming Credits**

Witness Packer's reliance upon application of low-income funding to customer bills as support for Aqua's bill discount proposal is fatally flawed because low-income funding provides a regulatorily-approved bill credit to qualifying customers based on need, which is a complete departure from Aqua's proposal. As I&E witness Gumby explained, low-income programs are "based on financial need and are not applied unilaterally to newly-acquired customers based on billed usage, which is clearly a discount or rate subsidy."<sup>86</sup> To illustrate her point, I&E witness Gumby recognized that LIHEAP, one of the programs that Aqua witness Packer referenced, is a federally-funded program tailored to addressing low-income energy costs that is not even applicable to water and wastewater utilities.<sup>87</sup> LIHEAP has set parameters for recipients' income-eligibility, with income-eligibility capped at (1) no more than the greater of 150 percent

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<sup>86</sup> I&E St. No. 1-SR, p. 11.

<sup>87</sup> Id., citing to <https://www.acf.hhs.gov/ocs/resource/liheap-fact-sheet-0>

of the Federal Poverty Guidelines (“FPG”) or 60 percent of the State Median Income; and (2) no less than 110 percent of FPG.<sup>88</sup>

Similarly, another program Aqua witness Packer relies upon, Aqua’s Helping Hand program, is also clearly tied to customer financial need and contains a clear set of criteria to determine customer eligibility.<sup>89</sup> Notably, Aqua relies upon the following parameters of eligibility for eligibility for Helping Hand assistance, with eligibility contingent on all three criteria being met: (1) household income is less than 200 percent of the federal poverty level; (2) account is more than 21 days past due; and customer has at least \$110 in unpaid Aqua bills.<sup>90</sup> Therefore, like LIHEAP programming, and unlike its proposed bill discount in this case, Aqua’s Helping Hand Program is demonstrably based upon financial need.

Additionally, I&E witness Gumby refuted Mr. Packer’s attempt to analogize the Aqua bill discount to Commission-approved customer assistance programs (“CAP”). Specifically, witness Gumby explained that the funding for and approval of CAP is grounded in regulation, subject to defined parameters of affordability, and subject to Commission approval and oversight.<sup>91</sup> To be sure, CAPs are a collection method, not a discount, as exemplified in the regulatory definition of CAP:

An alternative collection method that provides payment assistance to low-income, payment troubled utility customers. CAP participants agree to make regular monthly payments that may be for an amount that is less than the current bill in exchange for continued provision of electric utility services.<sup>92</sup>

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<sup>88</sup> Id.

<sup>89</sup> Id., citing to <https://www.aquaamerica.com/our-states/pennsylvania/helping-hand.aspx>

<sup>90</sup> Id.

<sup>91</sup> I&E St. No. 1-SR, p. 11.

<sup>92</sup> 52 Pa.Code § 54.72.

Aside from the fact that CAPs are not simply the type of line-item bill discounts Aqua witness Packer portrays, like the other low-income programming he referenced, they too have defined parameters of income eligibility. Specifically, customers may be eligible for participation in a utility's CAP if their status as a ratepayer or new application is verified, and their household income is verified to be at or below 150% of the FPG.

As demonstrated above, the application of low-income program funding to customers' bills is completely distinguishable from Aqua's bill discount proposal. In this case, Aqua's bill discount proposal does not reflect a regulatorily-approved, needs-based credit to eligible customers. On the contrary, Aqua's billing arrangement simply operates as an arbitrary discount from tariffed rates for acquired customers, not based on need, but based on a commitment made to DELCORA in the MOU. Accordingly, Aqua's reliance upon low-income programming credits as a basis to support its billing discount proposal is without merit and it should be rejected.

**(ii) The Aqua Billing Discount is Distinguishable from the Aqua/Peoples Rate Credits**

Additionally, despite Aqua witness Packer's claims to the contrary, the Commission-approved one-time bill credits applicable to impacted customers of the Aqua/Peoples acquisition case also fail to justify the Aqua billing discount proposed here. The Aqua/Peoples billing credits that Mr. Packer references are memorialized in Ordering Paragraph 6 (33) and 6 (41) of the Commission's Final Order issued in the Aqua/Peoples acquisition case on January 24, 2020, as follows:

33. Complete rehabilitation of the bare steel in the system is estimated to cost \$120 million in present dollars. Up to \$120 million for the rehabilitation of the bare steel in the system is eligible for full recovery subject to Commission

scrutiny and approval in a base rate proceeding. During the repair and replacement of the system, if it becomes apparent that this estimate is no longer sufficient, based on the actual extent of the rehabilitation effort, the Peoples Companies and the statutory advocates will meet to discuss. If an agreement cannot be reached, the Peoples Companies will submit a filing to the Commission for decision for those amounts over the \$120 million. All parties will retain their rights to either challenge or support such a filing. **Regardless of the actual capital spent to rehabilitate the systems, Aqua America agrees to provide all Peoples Companies' customers a rate credit of \$13 million. The rate credit will appear on the Peoples Companies' customers' bills within a prompt and reasonable time period following the closing date of the Proposed Transaction, but in no event later than the end of the year in which the Proposed Transaction is closed.** The Joint Applicants will file a written notification with the Commission's Secretary to inform the Commission when the rate credit begins appearing on customers' bills.<sup>93</sup>

41. Separate and apart from the \$13 million rate credit provided in Paragraph 33 above, **Aqua America will provide a one-time \$10 million rate credit to the Peoples Companies' natural gas customers, Aqua PA Water customers, and Aqua PA Wastewater customers.** The rate credit will appear on customer bills within a prompt and reasonable time period following the closing date, but in no event later than the end of the year in which the Proposed Transaction is closed. The Joint Applicants will file a written notification with the Commission's Secretary to inform the Commission when the rate credit begins appearing on customers' bills.<sup>94</sup>

As is semantically evident from the Ordering Paragraph 6 (33) above, the Commission directed Aqua to provide Peoples Companies' customers with a rate credit, not a rate discount. Further review of the Commission Order indicates that the rate credit

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<sup>93</sup> Aqua Peoples Acquisition Case, Public Version of Opinion and Order, p. 210.

<sup>94</sup> Id. at pp. 210-211, ¶ 6(41).

at issue was to be provided to the Peoples Natural Gas' customers, and Peoples Natural Gas' residential customers Aqua was acquiring, and that it resulted in a Settlement term intended to recompense those residential customers for the costs of infrastructure repair. More specifically, the Commission's Order clarifies that it approved the proposed \$13 million rate credit because it was tied to the costs that ratepayers would bear for remediation of the Goodwin and Tombaugh (G/T) Gathering Systems:

Moreover, we find that the cost to customers due to the G/T Systems' remediation as provided for in the Settlement, ultimately projected to possibly increase the monthly bill of the average Peoples Natural Gas residential customer by approximately 1%, or \$1 per month, along with the \$13 million rate credit to existing customers to partially offset costs associated with remediation, justifies ensuring that these residential customers and local businesses on the G/T Systems continue to receive low cost gas service, reducing the high UFG levels, and improving the system from a gas safety perspective by replacing all the bare steel lines on an accelerated basis.<sup>95</sup>

As demonstrated above, the \$13 million rate credit afforded to acquired Peoples' customers in the Aqua/Peoples acquisition case was not the result of a jurisdictional utility's arbitrary and contractual agreement to discount acquired customers rates. Instead, the rate credit was specifically designed to redress specific infrastructure cost issues for a targeted group of customers who had borne and would continue to bear those costs. Accordingly, the \$13 million rate credit to Peoples' customers is completely distinguishable from Aqua's bill discount proposal.

Similarly, the \$10 million rate credit referenced in Paragraph 6 (41) of the Commission's Final Order in the Aqua/Peoples acquisition was also specifically designed

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<sup>95</sup> Id. at p. 73.



to compensate impacted customers for a specific purpose. The Commission explained the intent of the rate credit directly in the Final Order as follows:

However, the record shows that this rate credit was not intended to serve as a direct offset to future costs related to the Settlement commitments identified by the OSBA and I&E. Rather, this **rate credit was intended to capture the potential cost savings connected with long-term operational efficiencies, or synergies, resulting from the Proposed Transaction, and to pass them along to customers in the immediate future.** While this rate credit may indirectly serve to offset other costs, the appropriate comparison of this immediate \$10 million rate credit is to the Joint Applicant's original position that there will be no immediate, adverse rate impact to customers resulting from this Proposed Transaction. Thus, as a result of this Settlement provision, customers will experience an immediate benefit to their rates, in the form of a rate credit, as opposed to rate neutrality.<sup>96</sup>

Accordingly, unlike the self-described, non-jurisdictional “offset” to rates that Aqua proposes,<sup>97</sup> through the above passage, the Commission expressly indicates that its approval of the Aqua/Peoples \$10 million customer rate credit is rooted in the fact that the credit was not an offset against future costs, but was instead directly tied to cost savings synergies that will be realized through the transaction. Accordingly, as the bill discount, or “offset” that Aqua proposes is not predicated on cost savings synergies, but as a buffer against acquired customers’ future rates, it actually proposes an arrangement that the Commission expressly repudiated in the Settlement term above. As demonstrated here, Aqua’s reliance upon the Aqua/Peoples billing credits as rationale for approval of its MOU-based bill discount is without merit and should be rejected.

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<sup>96</sup> Id. at p. 176 (emphasis added).

<sup>97</sup> Aqua Response to the County of Delaware’s Petition for Reconsideration of Staff Action by Secretarial Letter Dated June 11, 2020 Conditionally Accepting Aqua’s Section 1329 Application, p. 5, ¶ 19.

**d. Aqua Disavowed the Legal Rate Stabilization Option  
Afforded Under Section 1329**

Section 1329 Code already provides Aqua with a permissible method for stabilizing the rates of those customers; however, Aqua rejected it in favor of its proposed illegal billing discount arrangement. As a Section 1329 Applicant, Aqua could have availed itself of the option to propose a rate stabilization plan, which the Pennsylvania General Assembly permitted Applicants to propose alongside a required tariff.<sup>98</sup> More specifically, Section 1329 raises the prospect of rate stabilization in the context of the acquired utility's tariffed rates because it expressly requires an Applicant to submit "a tariff containing a rate equal to the existing rates of the selling utility at the time of the acquisition, and a rate stabilization plan, if applicable to the acquisition."<sup>99</sup> A "rate stabilization" plan as defined by Section 1329 is "[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case."<sup>100</sup> Notably, the term "rate stabilization plan" does not appear anywhere else in the Code and the option to propose one does not exist outside of the Section 1329 context.

I&E submits that when the Pennsylvania General Assembly afforded Section 1329 Applicants with a special option to propose a rate stabilization plan, it did so with the understanding that rate stabilization for acquired customers would not otherwise be permissible without offending Section 1303. I&E notes that its interpretation of the "rate stabilization" provision of Section 1329 is consistent with a key tenet of statutory interpretation that guides legislative intent. More specifically, the principle of statutory

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<sup>98</sup> 66 Pa. C.S. § 1329(d)(1)(v).

<sup>99</sup> Id.

<sup>100</sup> 66 Pa. C.S. § 1329(g).

construction that supports I&E's position that Aqua's ability to deviate from charging acquired customers less than tariffed rates lies only through the filing of a rate stabilization plan is the recognition that the "particular controls the general" as set forth by 1 Pa. C.S. § 1933 (emphasis added):

Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, **the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later** and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

In this case, application of the above principle to Section 1303 of the Code, which prohibits deviation from tariffed rates, and Section 1329(g), which provides for deviation from tariffed rates only in the limited context of Section 1329 rate stabilization plans, leads to the conclusion that Aqua may only deviate from charging acquired customers tariffed rates within the context of a rate stabilization plan. The result is clear because the special provision, the rate stabilization plan of Section 1329(g), affords Aqua with an opportunity to propose to charge acquired customers less than full tariffed rates, and this directly conflicts with Section 1303's prohibition against circumventing tariffed rates. Furthermore, from a time perspective, the rate stabilization plan outlined in Section 1329(g), which became effective on July 13, 2016, was a much later enacted statute than the general provision, Section 1303, which became effective almost 38 years earlier, on August 30, 1978. Here, the general provision, Section 1303 significantly predates the special provision of Section 1329(g), meaning that it is appropriate to deduce that the General Assembly intended to provide the rate stabilization option as an exception to the

Section 1303 provision that would otherwise prohibit Applicants like Aqua from charging acquired customers less than tariffed rates. However, Section 1329 did not provide Aqua with an opportunity to attempt to circumvent Section 1303 by contracting with DELCORA to charge its customers less than tariffed rates instead of proposing a rate stabilization plan.

To be sure, Aqua has expressly and continuously disclaimed any proposal of a rate stabilization plan in this case, despite the fact that its billing arrangement is being implemented to facilitate the goal of having DELCORA customers' rates be set such that "customer rate increases are stabilized at an annual increase of 3% for 8-12 years after the transaction closes."<sup>101</sup> For purposes of illustration, when Aqua submitted its Application, it expressly stated that it was not proposing a rate stabilization plan.<sup>102</sup> Additionally, in her direct testimony, Aqua witness Erin M. Feeney stated that Aqua did not propose a rate stabilization plan or include one in the proposed tariff.<sup>103</sup> Finally, in response to Delaware County's Petition for Reconsideration of Staff Action by Secretarial Letter Dated June 11, 2020 Conditionally Accepting Aqua's Section 1329 Application,<sup>104</sup> Aqua vigorously denied that it was proposing a rate stabilization plan and instead explained that the trust arrangement involved a non-jurisdictional "offset" to tariffed rates.<sup>105</sup>

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<sup>101</sup> Aqua Ex. W1, St. No. 5, p. 10.

<sup>102</sup> Aqua's Application, p. 8, ¶36.

<sup>103</sup> Aqua St. No. 3, p. 6.

<sup>104</sup> The crux of the County of Delaware's argument was that Aqua's Application had, in fact, proposed an unsupported rate stabilization plan; therefore, the County argued that conditional acceptance of Aqua's application should be rescinded.

<sup>105</sup> Aqua Response to the County of Delaware's Petition for Reconsideration of Staff Action by Secretarial Letter Dated June 11, 2020 Conditionally Accepting Aqua's Section 1329 Application, p. 5, ¶ 19.

I&E notes that Aqua’s disclaimer of a rate stabilization plan in favor of the MOU-based billing arrangement it proposes is not just disingenuous, but it also works to deprive the Commission of critical information that it is required to measure. As I&E witness Gumby explained,<sup>106</sup> when Section 1329 applicants propose to stabilize acquired customers’ rates, the Commission requires the applicant to provide supporting information in order for the Commission to properly examine the impact of stabilization.<sup>107</sup> Specifically, the Commission has mandated that if rate stabilization is proposed, the applicant must provide the following: “testimony, schedules, and work papers that establish the basis for the plan and its impact on existing customers who need to cover the revenue requirement that would be shifted to them under the plan.”<sup>108</sup> In this case, although Aqua proposed a billing arrangement intended to stabilize the rates of acquired DELCORA customers,<sup>109</sup> by denying that the proposed billing arrangement is a rate stabilization plan, Aqua has dodged the requirement of providing the Commission with the materials necessary to evaluate the plan.

To be sure, the basis for Aqua’s proposed billing arrangement ensures that the Commission will never be able to effectively evaluate its calculation and impact because rate stabilization will be predicated entirely on an unquantifiable trust balance. As Aqua witness Willert admits, the trust fund balance available to fund Aqua’s billing discount will be determined only after DELCORA pays off “outstanding debt,”<sup>110</sup> an amount that

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<sup>106</sup> I&E St. No. 1-R, p. 4.

<sup>107</sup> *Implementation of Section 1329 of the Public Utility Code, Final Implementation Order*, M-2016-2543193, p. 27 (Order entered October 27, 2016).

<sup>108</sup> *Id.*

<sup>109</sup> Aqua St. No. 2, p. 3.

<sup>110</sup> Aqua St. No. 5, p. 2.

Aqua and DELCORA have not quantified in the record. Alongside the failure to identify the amount of debt that will diminish the amount of rate relief funding available through the Trust discount, witness Willert casts further doubt about available funding by indicating that after DECLORA debt is paid through sale proceeds, the “majority” of sale proceeds will be available to fund the Aqua billing discount.<sup>111</sup> I&E submits that witness Willert’s statement demonstrates that DELCORA contemplates use of at least some sale proceeds for other unidentified purposes. For these reasons, the Trust balance available to fund Aqua’s billing discount is unquantifiable, making the Commission’s review of the basis for and impact of rate stabilization impossible. Accordingly, I&E respectfully requests that the Commission reject Aqua’s bill discount arrangement.

### **III. Litigation on Multiple Fronts Implicates DELCORA’s Status and APA Commitments**

#### **A. DELCORA’s Authority to Act as Seller May be Invalidated**

I&E recommended that closing of the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change DELCORA’s status as a bona fide seller.<sup>112</sup> Although Aqua argues that it is unaware of the Commission ever issuing an order requiring a guarantee like the one I&E recommends,<sup>113</sup> I&E submits that the situation presented in this case represents a scenario that does not appear to have previously been before the Commission. Specifically, this

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<sup>111</sup> Id.

<sup>112</sup> I&E St. No. 1, pp. 9-10.

<sup>113</sup> I&E St. No. 2-R, p. 10.

appears to be the first acquisition case before the Commission whereby the seller, DELCORA, is a defendant in active, pending litigation that may negate its ability to consummate the transaction.

The litigation at issue is summarized in Delaware County’s Petition for a Stay of this proceeding which was filed on August 7, 2020. Specifically, Delaware County’s Petition alleges that “[p]ursuant to Section 5619 of the Municipality Authorities Act (“Authorities Act”), the County has the exclusive right, power and authority to terminate DELCORA.”<sup>114</sup> The County's Petition indicates that the Delaware County lawsuit is currently pending in the Court of Common Pleas of Delaware County which, *inter alia*, may result in the termination of DELCORA.<sup>115</sup>

Delaware County explains that while it created DELCORA in October of 1971,<sup>116</sup> on June 3, 2020, it enacted an Ordinance 2020-4 “directing the orderly termination of DELCORA.”<sup>117</sup> Currently, Delaware County is seeking a Court Order enforcing Ordinance 2020-4 to terminate DELCORA.<sup>118</sup> Despite DELCORA’s denial that the outcome of the pending litigation has any bearing upon its status as a bona fide seller or the validity of the APA,<sup>119</sup> Aqua is now seeking a determination of these issues by the Delaware County Court. Specifically, Aqua has intervened in the Delaware County lawsuit seeking to ensure that its transaction with DELCORA would close before DELCORA is terminated and to seek a declaration that the APA is a valid and an

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<sup>114</sup> Delaware County’s Petition, ¶ 15.

<sup>115</sup> Delaware County’s Petition, ¶38.

<sup>116</sup> Id. at § 38.

<sup>117</sup> Id. at § 36.

<sup>118</sup> Id. at §§16-18.

<sup>119</sup> *Brief of the Delaware County Regional Water Quality Control Authority in Opposition to the Petition of the County of Delaware for A Stay, Request for Commission Review and Answer to A Material Question*, A-2019-3015173, p. 7.

enforceable agreement.<sup>120</sup> It is I&E's understanding that no determination has been reached by the Delaware County Court and I&E is uncertain of when these issues will be fully resolved.

While I&E will not opine upon the merits of the Delaware County lawsuit, a deep dive into its legal underpinnings and into DELCORA and Aqua's responses is not necessary here. Instead, all that is relevant here is the fact that pending a result of the Delaware County lawsuit, DELCORA may be dissolved and the APA may be determined to be invalid and unenforceable. The practical impact of the uncertain outcome of the Delaware County litigation is that the parties and the ALJs have already spent a great deal of time and resources in litigating and considering Aqua's Application without knowing for certain whether DELCORA has the legal authority to act as the seller of the assets at issue. I&E submits that the uncertainty would only be further compounded, at the expense of ratepayers, if the Commission approves Aqua's Application, in reliance upon DELCORA's representations and commitments in this case, only to learn at a later time that they are invalid and unenforceable.

Significantly, Section 1329 defines a "Selling utility" as follows:

"a water or wastewater company located in this Commonwealth, owned by a municipal corporation or authority that is being purchased by an acquiring public utility or entity as the result of a voluntary arm's-length transaction between the buyer and seller." Under the facts alleged in the County's Petition,<sup>121</sup> DELCORA's status as a qualifying "selling utility" is in dispute because DELCORA's very existence as a municipal authority is at

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<sup>120</sup> *Aqua's Answer in Opposition to the Petition of the County of Delaware for Stay*, A-2019-3015173, p. 5, § 26 (August 27, 2020).

<sup>121</sup> Delaware County's Petition, ¶¶ 15, 21, 30, 38.



issue while dissolution remains possible. I&E submits that the Commission should not approve Aqua's Application unless Aqua and DELCORA can provide the Commission with a guarantee that DELCORA's purported status as bona fide seller is valid.

Although DELCORA attempts to dismiss I&E's argument that DELCORA may not qualify as a Section 1329 "Seller" as "a novel legal argument" that it is "without any foundation in the law," <sup>122</sup> I&E submits that it is axiomatic that a purported seller must have authority to sell property that it seeks approval to convey. There is no Section 1329 precedent that applies to this situation because until now, no other applicant has asked the Commission to approve a transaction in which the seller's status as an existing municipal authority is under direct attack in a pending lawsuit. However, reliance upon axioms is not necessary in this context because a simple review of the APA between DELCORA and Aqua indicates that when they entered into it on September 17, 2019, their agreement was, in part, contingent on certain representations that DELCORA made under the heading "Representations and Warranties of the Seller." Specifically, DELCORA's representations and warranties included the following pertinent provision:

Section 4.01. Organization

The Seller is duly organized and existing under the Municipal Authorities Act and incorporated by appropriate legal action by the Seller.<sup>123</sup>

Accordingly, the plain language of the APA that Aqua asks the Commission to approve demonstrates that Aqua relied upon DELCORA's representation that its status as a seller was within the context of its existing as a municipal authority.

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<sup>122</sup> *Brief of the Delaware County Regional Water Quality Control Authority in Opposition to the Petition of the County of Delaware for A Stay, Request for Commission Review and Answer to A Material Question*, A-2019-3015173, pp. 6-7.

<sup>123</sup> Aqua Application, Ex. B-1, p. 17.

Although Aqua and DELCORA entered the APA over one year ago, well before Delaware County initiated its lawsuit to dissolve DELCORA, the representation DELCORA makes about its status as an entity organized under the Municipality Authorities Act is now at issue. Therefore, DELCORA's assertion that questions about its status as a bona fide seller are without merit belie its own contractual commitment in the APA.

While Aqua and DELCORA may attempt to argue that DELCORA met the definition of "seller" when it signed the APA in 2019, the pertinent fact here is that Aqua is asking the Commission to approve the APA now, when DELCORA may be dissolved. Accordingly, in order to protect the public interest I&E submits that as a condition of approval, the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change DELCORA's status as a bona fide seller.<sup>124</sup> Accordingly, in order to protect the public interest, the Commission should not permit the transaction to close until Aqua and DELCORA can provide the Commission with a guarantee that DELCORA is a bona fide seller.

**B. Aqua and DELCORA Must Guarantee that the APA Presented for Approval is Viable**

Along a similar vein, I&E recommended that closing of the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not result in any change to the terms of the APA for which Aqua seeks

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<sup>124</sup> I&E St. No. 1, pp. 9-10.

approval in this case.<sup>125</sup> As I&E explained above, Aqua is actively seeking a declaration in Delaware County Court that the APA is a valid and enforceable agreement.<sup>126</sup> I&E submits that a lack of resolution of Aqua's inquiry of validity and enforceability independently warrants a grant of I&E's recommendation; however, additional concerns regarding the APA provide further support for I&E's position.

During the course of this case, evidence was presented that DELCORA made material misrepresentations about the assets it is empowered to convey to Aqua. Specifically, DELCORA represented that there will be no "excluded assets" in this transaction,<sup>127</sup> but as explained further below, the record in this case reveals that DELCORA does not have authority to transfer all of the system assets it purports to convey. Despite this, the APA specifically indicates that DELCORA will sell Aqua all of the assets of its System other than "Excluded Assets" as referenced, in pertinent part, below:

WHEREAS, Buyer, in reliance upon the representations, warranties and covenants of the Seller herein, desires to purchase and acquire from the Seller, and the Seller, in reliance upon the representations, warranties and covenants of Buyer herein, desires to sell, transfer and convey to Buyer all of the assets of the System (other than the Excluded Assets), and in connection therewith, Buyer has agreed to assume certain ongoing obligations and liabilities of the Seller related to such acquired assets, all on the terms and conditions set forth in this Agreement.<sup>128</sup>

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<sup>125</sup> I&E St. No. 1, pp. 9-10.

<sup>126</sup> *Aqua's Answer in Opposition to the Petition of the County of Delaware for Stay*, A-2019-3015173, p. 5, § 26 (August 27, 2020).

<sup>127</sup> Aqua Application, Ex. B-1, Sch. 2.02(g).

<sup>128</sup> *Id.* at p. 2.

The above APA provision memorializes DELCORA's commitment to transfer all system assets to Aqua other than those that are excluded. Since the APA does not identify any excluded assets, DELCORA has committed to transfer all system assets to DELCORA.

Although the APA does not specifically define "system assets," it provides the following clarification: "[s]ystem" has the meaning specified in the recitals to this Agreement and shall include the Acquired Assets and exclude the Excluded Assets.<sup>129</sup> The "Acquired Assets" that DELCORA promises to convey are set forth in Section 2.01 of the APA and include, *inter alia*, the following:<sup>130</sup>

- (a) all real property and appurtenant interests necessary for the operation of the System, including without limitation (i) good and marketable fee simple title to the Owned Real Property described and identified on Schedule 4.09 hereof, and (ii) all Easements, including without limitation those identified on Schedule 4.09;
- (b) all sanitary wastewater related treatment, disposal, sludge receiving assets and conveyance facilities, including but not limited to the Seller's buildings, pipes, pipelines, treatment facilities, odor control stations, pumping stations, lift stations, holding tanks, storage tanks, plants, structures, improvements, fixtures, and all hereditaments, tenements and appurtenances belonging, appertaining or relating to the Acquired Assets;
- (c) all contracts, licenses and leases identified on Schedule 4.15 to which the Seller is a party (the "Assigned Contracts").

I&E submits that while the above APA terms memorialize DELCORA's commitment to transfer all property necessary to operate the system and all contracts identified in

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<sup>129</sup> Id. at p. 10.

<sup>130</sup> Id. at p. 12, Section 2.201 (a)-(c).

Schedule 4.15 of the APA, the facts of this case demonstrate that DELCORA does not have the authority to convey all such property and contracts. As further explained below, DELCORA cannot currently convey all of the assets it proposes to sell to Aqua, assets which underlie not only the APA but also the valuations that support Aqua's Application. I&E notes that the Municipal lawsuits pending in Delaware County Court relate to ownership of property interests and contracts that DELCORA purports to convey under the APA. Accordingly, the Commission should not permit the transaction to proceed to closing unless Aqua and DELCORA can guarantee that pending litigation will not result in any change to the terms of the APA, including any deletion of system assets that DELCORA promised to convey.

**C. Under the APA, DELCORA Attempts to Impermissibly Convey the Municipal Protestants' Property and Contracts**

I&E notes the Commission has discretionary power to determine the reasonableness, legality and validity of the APA;<sup>131</sup> unfortunately, existing disputes regarding DELCORA's ability to convey all of the property and to assign all of the contracts identified in the APA will make such a determination impossible. The record in this case reveals that multiple municipalities within the DELCORA "system" have asserted property and contractual rights that DELCORA now impermissibly attempts to convey to Aqua. These rights include the following:

- Edgmont Township has an existing contract with DELCORA that identified specific terms of the finance, design, construction, installation, ownership, operation, maintenance and repair duties and responsibilities for the

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<sup>131</sup> 66 Pa. C.S. § 507.

Crum Creek Sewer District System, which DELCORA purports to convey. The Edgmont contract included a buyback provision that a buy-back provision in case DELCORA ever did decide to sell or stop operating the system, plus a requirement that Edgmont would have to consent to any assignment of the contract. Edgmont has not consented to any assignment.<sup>132</sup>

- Lower Chichester Township has an existing contract with DELCORA that defines parameters for DELCORA will ‘bill the township for service, what costs can be billed to the township, operation of the treatment plant, industrial pretreatment, obtaining grant funding, and so on.” Lower Chichester Township has not consented to any assignment of its contract.<sup>133</sup>
- Upland Borough has an existing contract for DELCORA to service and maintain the Upland Borough wastewater/sewer system, and the agreement provides, among other things, that in the even that DELCORA does not continue to operate the wastewater system, the system in Upland will be turned back over to Upland. Upland Borough has not consented to any assignment of its contract.<sup>134</sup>
- Trainer Borough has an existing contract with DELCORA, which, inter alia, provides for DELCORA’s operation of the Trainer Borough system and which provides that the customers of DELCORA located in Trainer Borough shall bear none of the costs of the collection of sewage outside the service area of Trainer Borough. Also, the contract provides that if DELCORA fails to operate the wastewater system, then certain assets will revert to Trainer’s ownership, unless Trainer declines to take ownership in which case the Trainer system reverts to the County of Delaware or any other agency, as may be dictated by law. Trainer Borough has not consented to any assignment of its contract.<sup>135</sup>

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<sup>132</sup> Edgmont St. No. 1, pp. 3-5.

<sup>133</sup> Lower Chichester St. No. 1, pp. 3-5.

<sup>134</sup> Upland St. No. 1, pp. 1-3.

<sup>135</sup> Municipal Protestant Exhibits, Exhibit 2, pp. 12-13.

- Southwest Delaware County Municipal Authority (“SWDCMA”) has an existing contract with DELCORA that memorializes the rates SWDCMA agreed to pay DELCORA. The rate agreement was reached recognition of SWDCMA’s contribution of 60%, or approximately \$12 million of the costs of the Chester Ridley Creek Pump Station which was necessary to were built to connect SWDCMA, a neighboring authority, and another township to the DELCORA system. SWDCMA has not consented to any assignment of its contract.<sup>136</sup>

I&E notes that the APA does not recognize the above property interests retained by Edgmont Township, Upland Borough and Trainer Borough. Instead, the APA ignores those property interests by failing to identify them as excluded assets in Schedule 2.02(g) when, in fact, they cannot be conveyed without the permission of Upland Borough and Trainer Borough. Additionally, by way of Section 4.15 of the APA, “Assigned Contracts,” DELCORA purports to transfer the above-mentioned contracts of Edgmont Township, Lower Chichester Township, Upland Borough, Trainer Borough, and SWDCMA without their requisite permission for such assignment.

Importantly, through the Municipal lawsuits, SWDCMA, Lower Chichester Township, and Upland Borough have each initiated a breach of contract action against DELCORA in Delaware County Court seeking to enforce their contract rights and to enjoin DELCORA from closing the transaction.<sup>137</sup> The Municipal lawsuits are now pending. I&E submits that the outcome of the Municipal lawsuits may directly and materially alter the property and contractual rights that DECLORA has promised to assign to Aqua. If the Commission approves Aqua’s Application, including the APA,

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<sup>136</sup> SWDCMA St. No. 1, pp. 1-5.

<sup>137</sup> Municipal Protestants Exhibits 11-13, respectively.

prior to the resolution of the municipal actions, the transaction that the Commission approves may be materially different than the transaction that DELCORA is empowered to enter.

#### **D. Property Ownership's Impact on Valuation**

A significant concern is implicated by DELCORA's contested ability to sell property of Edgmont Township, Upland Borough, and Trainer Borough because the engineering report that underlies the fair market valuations of each of the UVEs in this case assumes that the property of those entities is owned by DELCORA. As an example, Section 4.06 of the Engineering Assessment as follows:

##### **4.06 COLLECTION SYSTEM**

DELCORA owns all or part of the collection systems in the following service areas: City of Chester, Chester Township, Borough of Marcus Hook, Borough of Rose Valley, Upland Borough, Parkside Borough, Trainer Borough, Edgmont Township, Pocopson Township, and Springhill Farms (Chadds Ford Township). The collection system consists of gravity piping and laterals within the right of way. A map of the collection system can be found in Appendix A, Figure A1. Collection system related cost data can be found in Section 8 for the gravity mains, manholes and force mains under account codes 361.21, 361.23, and 360.21 respectively.<sup>138</sup>

The Engineering Assessment's assumption of DELCORA's ownership of the Upland Borough, Trainer Borough, and Edgmont Township's assets has real valuation consequences if inaccurate. The valuation consequences arise because every faulty assumption made in the report carried forward to the UVEs' appraisals. Specifically, DELCORA's UVE, Dylan W. D'Ascendis of Scott Madden, Inc. relied upon the

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<sup>138</sup> Aqua Application, Exhibit D, Pennoni & Associates, Engineering Assessment and Original Cost of DELCORA Sewerage Facilities, Section 4.06.



Engineering Assessment's description of assets for his original cost calculation, and he relied upon the conclusion that DELCORA owns the collection system assets of Upland Borough, Trainer Borough, and Edgmont Township's.<sup>139</sup> Additionally, Aqua's UVE, Harold Walker, III of Gannett Fleming Valuation and Rate Consultants, LLC indicated that Gannett Fleming relied upon the Pennoni Engineering Assessment to calculate the original cost and related accrued depreciation of the DELCORA system as of December 31, 2019<sup>140</sup> and that he also relied upon it for the identification of DELCORA assets and their condition.<sup>141</sup>

Because the UVEs' appraisals were predicated, at least in part, on the assumption that DELCORA's transferrable assets included the collection system assets of Upland Borough, Trainer Borough, and Edgmont Township, if DELCORA does not own or cannot transfer those assets, the valuations are flawed, unreliable, and they must be rejected. The only cure for ensuring the integrity of those valuations would be for DELCORA to guarantee the Commission that it actually owns and can transfer the assets. Accordingly, absent a guarantee that the APA is enforceable against the Municipal Protestants, Aqua, and ultimately its ratepayers, stand to get a lot less than they will pay for, a result that is not in the public interest. The Commission can ensure that Aqua's captive ratepayers, who were powerless to negotiate the APA, do not bear the burden of the risk of paying for property and rights that cannot be conveyed to Aqua by adopting I&E's recommended condition.

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<sup>139</sup> Aqua Application, Exhibit R, pp. 4-6.

<sup>140</sup> Aqua Application, Ex. Q, p. 27.

<sup>141</sup> Id. at p. 3.

I&E acknowledges that a threshold question that the Commission must answer in this case is whether granting Aqua's Application would affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way and be in the public interest.<sup>142</sup> I&E submits that it is impossible to make these requisite determinations when both DELCORA's status as a seller, and its authority to make the commitments that underlie the APA for which Aqua is seeking approval, are uncertain and subject to the outcome of pending litigation. I&E envisions a possibility whereby a Commission-determined public benefit of the transaction may be reversed by a subsequently-issued order of the Delaware County Court. The Commission can ensure that this outcome does not materialize to the detriment of Aqua's customers by conditioning any approval of Aqua's Application on the closing of the transaction not being permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not result in any change to the terms of the APA for which Aqua seeks approval in this case.

#### **D. Section 507 Approvals**

##### **1. Legal Principles**

Aqua's request to assume enumerated municipal contracts currently held by DELCORA is subject to review under Section 507 of the Code. Under Section 507, other than contracts to furnish service at tariffed rates, any contract between a public utility and a municipal corporation must be filed with the Commission at least 30 days prior to its

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<sup>142</sup> *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972); 66 Pa. C.S. § 1103(a).

effective date to be valid. Upon receipt of the filing, and prior to the effective date of the contracts, the Commission may institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. If this Commission decides to institute such proceedings, the contracts at issue will not become effective until the Commission grants its approval.

## **2. Municipal Protestants' Contracts**

Because they directly related to nature of the conditions that I&E has recommended be imposed any approval of Aqua's Application, I&E addressed the Municipal Protestants' Contracts above in "Section C: Recommended Conditions."

## **3. Contracts Other Than Municipal Protestants' Contracts**

I&E acknowledges that Aqua's Application requests Section 507 approval of the APA dated September 17, 2019 and to the First Amendment to the APA dated February 24, 2020.<sup>143</sup> Because it directly relates to the nature of the conditions that I&E has recommended be imposed any approval of Aqua's Application, I&E addressed the APA above in "Section C: Recommended Conditions."

## **VI. CONCLUSION WITH REQUESTED RELIEF**

The proposed transaction, as filed, will not affirmatively promote the public interest in a substantial way and violates the Code. Conditions must be imposed prior to granting the requested certificates of public convenience to protect the interests of Aqua, Aqua's existing customers, and the regulated community. Accordingly, if the transaction

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<sup>143</sup> Aqua's Application, p. 19, ¶ 73.

is approved, I&E respectfully requests that the Administrative Law Judges recommend that the Commission condition its approval on the following terms:

- (1) In its next base rate case, Aqua must file cost of service calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods;
- (2) To the extent that it relies upon Aqua issuing acquired customers bills that are lower than the applicable tariffed rates, Aqua and DELCORA's proposal for an irrevocable trust should be rejected; and
- (3) Closing of the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change (1) DELCORA's status as a bona fide seller and (2) will not result in any change to the terms of the APA for which Aqua seeks approval in this case.

Respectfully submitted,



Gina L. Miller

Prosecutor

PA Attorney ID No. 313863

Erika L. McLain

Prosecutor

PA Attorney ID No. 320526

Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Dated: December 1, 2020

**List of the Bureau of Investigation and Enforcement  
Sponsored Testimony and Exhibits**

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- I&E Statement No. 1: the Direct Testimony of Lisa A. Gumby
- I&E Exhibit No. 1: the Exhibit to accompany the Direct Testimony of Lisa A. Gumby
- I&E Statement No. 1-R: the Rebuttal Testimony of Lisa A. Gumby
- I&E Statement No. 1-SR: the Surrebuttal Testimony of Lisa A. Gumby
- Verification Statement of Lisa A. Gumby

\*I&E notes that each of the above-referenced documents were admitted into the evidentiary record in this case during the hearing held on November 10, 2020.

## Proposed Findings of Fact

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### 1. Parties

- a. I&E serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Pennsylvania Public Utility Code. 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* *See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).
- b. The I&E analysis in the proceeding is based on its responsibility to represent the public interest. This responsibility requires balancing the interest of ratepayers, the utility company, and the regulated community as a whole. I&E St. No. 1, p. 1; I&E St. No. 1, pp. 1-2.
- c. Aqua furnishes wastewater services to 35,000 customers in Pennsylvania. Aqua St. No. 1, p. 2.

### 2. The DELCORA System

- a. The DELCORA system consists of 180 miles of gravity collection system mains and related infrastructure, including 24 pumping stations. The system services 49 municipalities in Delaware and Philadelphia Counties and three small areas in Chester County. The system has 16,000 customers consisting of municipal, retail/wholesale, industrial, and commercial users. Aqua St. No. 6, pp. 3-4.

### 3. The Asset Purchase Agreement and the First Amendment to the Asset Purchase Agreement

- a. Aqua's negotiated purchase price for the DELCORA system is \$276,500,000. Aqua St. No. 1, p. 8.
- b. In this case, Aqua is requesting to establish a ratemaking rate base level of \$276.5 million for the DELCORA system. Aqua's Application, p. 18.

### 4. The Application and the UVE's Appraisals

- a. Aqua selected Gannett Fleming Valuation and Rate Consultants, to perform an appraisal of the DELCORA system. Aqua's Application, Ex. AA1.
- b. DELCORA selected ScottMadden, Inc. to perform an appraisal of the DELCORA system. Aqua's Application, Ex. AA2.
- c. Aqua's UVE, Harold Walker, III of Gannett Fleming Valuation and Rate Consultants, LLC valued the DELCORA assets at \$408,883,000. Aqua's Application, Ex. Q, p. 1 (Letter dated Feb. 20, 2020).

- d. DELCORA's UVE, Dylan W. D'Ascendis of Scott Madden, Inc., who valued the assets at \$308,194,006. Aqua's Application, Ex. R, p. 1 (Letter dated Feb. 20, 2020).
- e. The average of the UVE appraisals of the DELCORA system was \$358,538,503. Aqua's Application, Aqua's Application, p. 18.
- f. As expressly required by Section 1329(a)(4), both UVEs relied upon the Pennoni Engineering Assessment to calculate the original cost of the DELCORA system. Aqua's Application, Exhibit R, pp. 4-6; Aqua Application, Ex. Q, p. 27.
- g. Any faulty assumptions about DELCORA's ownership of property made in the Pennoni Engineering Assessment carried forward into each of the UVEs cost approach calculations.
- h. The Pennoni Engineering Assessment expressly identified Upland Borough, Trainer Borough, and Edgmont Township's assets as DELCORA inventory. Aqua's Application, Exhibit D, Pennoni & Associates, Engineering Assessment and Original Cost of DELCORA Sewerage Facilities, Section 4.06.
- i. In this case, Upland Borough, Trainer Borough, and Edgmont Township have asserted ownership rights to assets DELCORA purports to convey to DELCORA and which are enshrined in the Pennoni Engineering Assessment's inventory listing. Edgmont St. No. 1, pp. 3-5; Municipal Protestant Exhibits, Exhibit 2, pp. 12-13; and Upland St. No. 1, pp. 1-3.

**5. Aqua's Financial, Technical and Legal Fitness**

- a. Aqua alleges that it is financially, technically, and legally fit to own and operate the DELCORA system and it sets forth the basis for those claims in its direct testimony. Aqua St. No. 3, pp. 3-5; Aqua St. No. 4, pp. 10-12.
- b. I&E has not challenged Aqua's financial, technical and legal fitness to own and operate the DELCORA system.

**6. Affirmative Public Benefits of a Substantial Nature**

- a. Aqua alleges that multiple public benefits will arise under the transaction. Aqua St. No. 2, pp. 13-14; Aqua St. No. 5, pp. 5-6.
- b. Other than the DELCORA Trust/Aqua Bill Discount, I&E has not contested the potential public benefits that could arise under the transaction. However, whether these benefits may materialize depends upon the outcome of pending litigation on multiple fronts surrounding DECLORA's authority to enter the APA as a bona fide seller, to convey the system property it purports to convey and to assign all of the contracts it purports to assign.

- c. The DELCORA Trust/Aqua Bill Discount is not an affirmative public benefit because the Delaware County lawsuit and/or the Municipal lawsuits could either significantly reduce the Trust's available proceeds or produce a result that abolishes the Trust arrangement entirely. Even if the DELCORA Trust/Aqua Bill Discount survives pending litigation, unrefuted record here indicates that unaccounted for liabilities may well significantly diminish or completely absorb Trust benefits making reliance upon it as an affirmative public benefit untenable. Sunoco St. No. 2-SR, pp. 16-20.

## **7. Cost of Service Study**

- a. Without a cost of service study, the Commission's ability to evaluate the rate impact of the acquisition upon existing Aqua customers and its options of addressing that impact to provide any appropriate relief to existing customers, could be compromised. I&E St. No. 1, pp. 18-19.
- b. A cost of service study for the DELCORA system that separates capital expenses and operating costs for sanitary and storm water functions would help the Commission determine DELCORA's revenue requirement to provide service to its different customer classes, and extend rate making options that may not exist without such a study. I&E St. No. 1, pp. 18-19.
- c. The goal of a cost of service study is to determine a utility's revenue requirement to provide service to its different customer classes. I&E St. No. 1, pp. 18-19.
- d. Through the litigation process, I&E and Aqua reached an agreement that satisfied I&E cost of service study recommendation. It is as follows:

In its next base rate case, Aqua must file cost of service calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.

- Aqua St. No. 2-R, p. 20; I&E St. No. 1-SR, pp. 2-3.

## **8. Rate Stabilization Plan**

- a. A "rate stabilization" plan as defined by Section 1329(g) is "[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case."



- b. Aqua has not proposed a rate stabilization plan in this case. Aqua's Application, p. 8, ¶36; Aqua St. No. 3, p. 6; Aqua Response to the County of Delaware's Petition for Reconsideration of Staff Action by Secretarial Letter Dated June 11, 2020 Conditionally Accepting Aqua's Section 1329 Application, p. 5, ¶ 19.
- c. Section 1329(g)'s rate stabilization provision provides the only permissible mechanism for an Applicant to stabilize acquired customers' rates. 66 Pa. C.S. §1329(g).

**9. The Asset Purchase Agreement**

- a. On September 17, 2019, Aqua and DELCORA entered into the Asset Purchase Agreement ("APA"), incorporated in Aqua's Application as "Exhibit B-1." Aqua and DELCORA entered into an amendment to the APA on February 20, 2020 which addressed limited matters related to DECLORA's implied warranties of merchantability and fitness of a particular purpose, and was incorporated as Exhibit B-2 to Aqua's Application.
- b. DECLORA makes the following representation in the APA: "The Seller is duly organized and existing under the Municipal Authorities Act and incorporated by appropriate legal action by the Seller." Aqua Application, Ex. B-1, p. 17, Section 4.01.
- c. The APA specifically indicates that DELCORA will sell Aqua all of the assets of its System other than "Excluded Assets." Aqua Application, Ex. B-1, p. 2.
- d. The APA does not identify any excluded assets. Aqua Application, Ex. B-1, Sch. 2.02(g).
- e. Several of the Municipal Protestants allege ownership of collection system assets that DELCORA purports to convey through the APA. Edgmont St. No. 1, pp. 3-5; Upland St. No. 1, pp. 1-3; Municipal Protestant Exhibits, Exhibit 2, pp. 12-13.
- f. Schedule 4.15 of the APA lists 163 municipal contracts that DELCORA purports to assign. The Municipal Protestants allege that they have not consented to such assignment. Edgmont St. No. 1, pp. 3-5; Upland St. No. 1, pp. 1-3; Municipal Protestant Exhibits, Exhibit 2, pp. 12-13, Lower Chichester St. No. 1, pp. 3-5, SWDCMA St. No. 1, pp. 1-5.

**10. Delaware County's Lawsuit against DELCORA**

- a. On May 14, 2020, Delaware County filed a complaint against DELCORA and the DELCORA Rate Stabilization Trust in the Delaware County Court of Common Pleas, docketed at CV-2020-003185 ("Delaware County's lawsuit"). Shortly after, Delaware County amended its lawsuit to enforce an

ordinance that would dissolve DELCORA. *County of Delaware, Pennsylvania’s Petition for a Stay of the above-referenced Section 1329 Application for Aqua’s Acquisition of the Delaware County Regional Water Quality Authority’s Wastewater System Assets* (“Delaware County’s Petition”), A-2019- 3015173, ¶¶16-18.

- b. Aqua has intervened in the Delaware County lawsuit seeking to ensure that its transaction with DELCORA would close before DELCORA is terminated and to seek a declaration that the APA is a valid and enforceable agreement. *Aqua’s Answer in Opposition to the Petition of the County of Delaware for Stay*, A-2019-3015173, p. 5, § 26 (August 27, 2020).
- c. The Delaware County lawsuit remains pending.

## 11. The Municipal lawsuits against DELCORA

- a. On November 3-6, 2020, several of the Municipal Protestants filed lawsuits against DELCORA and the DELCORA Rate Stabilization Trust in Delaware County Court of Common Pleas for breach of contract and to assert certain property interests that conflict with DELCORA’s representations in the APA. These lawsuits, (collectively the “Municipal lawsuits”) are comprised of the following individual actions: (1) SWDCMA v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-0074691; (2) Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007552; and Upland Borough v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007596. Municipal Protestants Ex. 11-13.
- b. Through the Municipal lawsuits, SWDCMA, Lower Chichester Township, and Upland Borough have each initiated a breach of contract action against DELCORA in Delaware County Court seeking to enforce their contract rights and to enjoin DELCORA from closing the transaction. Municipal Protestants Exhibits 11-13, respectively.
- c. The Municipal lawsuits are now pending.

## 12. Aqua’s Bill Discount Proposal

- a. By way of a MOU, Aqua and DELCORA have agreed that Aqua will apply the bill discount to DELCORA customers’ bill from the date that DELCORA customers’ rates would increase as a result of a Final Order in an Aqua base rate case until the time that the DELCORA Trust proceeds are spent. Aqua Ex. 2-R, Sch. E, p. 3, Section 2.1.
- b. Notwithstanding the lawsuits against DELCORA and the DELCORA Trust, because of unidentified debt and unaccounted for liabilities, it is uncertain whether, and if so, how much of alleged DELCORA Trust

proceeds will be available to fund Aqua's Bill Discount. Sunoco St. No. 2-SR, pp. 16-20; Aqua St. No. 5, p. 2.

- c. To facilitate the MOU-based bill discount, Aqua indicates its intent to include a payment line item directly on the impacted customers' bills. Aqua St. No. 2, p. 5.
- d. The sample bill that Aqua provided to I&E clarified that through its bill discount, Aqua proposes to charge impacted DELCORA customers less than the tariffed rates by using a line item to directly discount the DELCORA customer bills.
- e. Although Aqua purports that its post-acquisition plan is to adopt DELCORA's existing rates until after the conclusion of its next base rate case when it will thereafter move those customers to the full tariffed rates approved by the Commission, the bill discount it proposes relies on a direct deviation from tariffed rates.

## Proposed Conclusions of Law

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### 1. Commission Jurisdiction

- a. The Commission has jurisdiction over the subject matter of this proceeding. 66 Pa.C.S. §§ 507, 102, 1103, 1329.
- b. I&E serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Pennsylvania Public Utility Code. 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* See *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

### 2. Burden of Proof

- a. Aqua, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application. 66 Pa. C.S. § 332(a).
- b. In a case such as this one, pending before an administrative tribunal, Courts have held that a "litigant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).
- c. To satisfy its burden, Aqua must demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).
- d. Aqua has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, 1329 of the Code.

### 3. Legal Standards

- a. The Commission must issue a certificate of public convenience as prerequisite to offering service, abandoning service and certain property transfers by public utilities or their affiliated interests. 66 Pa. C.S. § 1102.
- b. The standards for the issuance of a Certificate of Public Convenience are set forth in Sections 1102 and 1103 of the Code. Under these Sections, a Certificate of Public Convenience shall be granted "only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S. §§ 1102-1103.

- c. These provisions have been interpreted by the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way. *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).
- d. Under Section 1103, Aqua must show that it is technically, legally, and financially fit to own and operate the assets it will acquire from DELCORA. *Seaboard Tank Lines v. Pa. PUC*, 502 A. 2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. PUC*, 138 A.2d 240, 243 (Pa. Super. 1958).
- e. In assessing Aqua’s Application, the Commission should consider the benefits and detriments of the transaction “with respect to the impact on all affected parties” including existing customers. *Middletown Twp. v. Pa. P.U.C.*, 482 A.2d 674, 682 (Pa. C Cmwlth. 1984).
- f. To ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable. 66 Pa. C.S. § 1103(a).
- g. Section 1329 provides a framework for valuing, for ratemaking purposes, water and wastewater systems that are owned by a municipal corporation or authority that are to be acquired by an investor-owned water or wastewater utility under the Commission’s jurisdiction. It allows the rate base of the municipal system being purchased to be incorporated into the rate base of the purchasing investor-owned utility at the lesser of either the purchase price or the fair market value as established by the two independent appraisals conducted by two utility valuation experts. 66 Pa. C.S. § 1329.
- h. Section 1329’s fair market valuation approach dictates that once the buyer and the seller agree to its use, they must engage the services of a licensed engineer to assess the tangible assets of the seller. The licensed engineer assessment is then presented to two UVEs, one to represent the buyer and one to represent the seller, to conduct independent analyses based on the Uniform Standards of Professional Appraisal Practice, employing the cost, market and income approaches. For ratemaking purposes, the valuation will be the lesser of the fair market value or the negotiated purchase price. 66 Pa. C.S. § 1329.
- i. Aqua’s request to assume enumerated municipal contracts alleged to be currently held by DELCORA is subject to review under Section 507 of the Code. Under Section 507, other than contracts to furnish service at tariffed rates, any contract between a public utility and a municipal corporation must be filed with the Commission at least 30 days prior to its effective

date to be valid. Upon receipt of the filing, and prior to the effective date of the contracts, the Commission may institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. If this Commission decides to institute such proceedings, the contracts at issue will not become effective until the Commission grants its approval. 66 Pa. C.S. §507.

#### 4. Aqua's Bill Discount

- a. As a Section 1329 Applicant, Aqua could have availed itself of the option to propose a rate stabilization plan, which the Pennsylvania General Assembly permitted Applicants to propose alongside a required tariff. 66 Pa. C.S. § 1329(d)(1)(v).
- b. Section 1329(g)'s rate stabilization provision provides the only permissible mechanism for an Applicant to stabilize acquired customers' rates. 66 Pa. C.S. §1329(g);via application of guiding principles of legislative intent at 1 Pa. C.S. ¶1933.
- c. Aqua's proposed bill discount ensures that the Commission will never be able to effectively evaluate its calculation and impact because rate stabilization will be predicated entirely on an unquantifiable trust balance.
- d. Public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility. *Philadelphia Suburban Water Co. v. Pennsylvania Public Commission*, 808 A.2d 1044, 1050 (Pa. Cmwlth. 2002) quoting *Pennsylvania Public Utility Commission*, 663 A.2d 281, 284 (Pa. Cmwlth. 1995).
- e. Section 1303 of the Code provides as follows: "[n]o public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto."
- f. Aqua's bill discount proposal violates Section 1303 of the Code; therefore, it must be rejected.
- g. Permitting Aqua and DELCORA to contract around Section 1303 via a MOU or any other device would render Section 1303 meaningless, an outcome that is wholly inconsistent with the guiding principle of statutory interpretation that the General Assembly does not intend a result that is absurd or unreasonable. 66 Pa. C.S. § 1922.

#### 5. DELCORA's Status as Seller

- a. Section 1329 defines a "Selling utility" as follows: 'a water or wastewater company located in this Commonwealth, owned by a municipal corporation or authority that is being purchased by an acquiring public utility or entity

as the result of a voluntary arm's-length transaction between the buyer and seller.”

- b. As a result of the Delaware County lawsuit, DELCORA may no longer exist as a municipal authority at the time of closing.

**6. Asset Purchase Agreement**

- a. DELCORA’s representations and warranties set forth in the APA are being actively contested in the pending Delaware County lawsuit and in the Municipal lawsuits.
- b. DELCORA’s authority to consummate the APA as a municipal authority is at issue in the Delaware County lawsuit.
- c. If DELCORA does not own, and therefore cannot convey the Upland Borough, Trainer Borough, and SWDCMA collection assets, it is in breach of its APA representations and warranties.
- d. If DELCORA does not have authority to convey all of the municipal contracts appearing on Schedule 4.15 of the APA, it is in breach of its APA representations and warranties.
- e. During the course of this case, evidence was presented that DELCORA made material misrepresentations about the assets it is empowered to convey to Aqua.

### Proposed Ordering Paragraph

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#### IT IS ORDERED THAT:

Aqua's Application is approved subject to the following terms:

- (1) In its next base rate case, Aqua must file cost of service calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods;
- (2) To the extent that it relies upon Aqua issuing acquired customers bills that are lower than the applicable tariffed rates, Aqua and DELCORA's proposal for an irrevocable trust is rejected; and
- (3) Closing of the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change (1) DELCORA's status as a bona fide seller and (2) will not result in any change to the terms of the APA for which Aqua seeks approval in this case.



**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 Approval of its : Docket No.: A -2019-3015173  
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 **Main Brief** dated December 1, 2020, in the manner and upon the persons listed below:

**Served via Electronic Mail Only**

Thomas T. Niesen, Esq.  
Thomas Niesen & Thomas. LLC  
212 Locust Street, Suite 302  
Harrisburg, PA 17101  
[tniesen@tntlawfirm.com](mailto:tniesen@tntlawfirm.com)  
*Counsel for*  
*Aqua Pennsylvania Wastewater, Inc.*

John F. Povilaitis, Esq  
Alan M. Seltzer, Esq.  
Buchanan Ingersol & Rooney, PC  
409 North Second Street, Suite 500  
Harrisburg, PA 17101-1357  
[john.povilaitis@bipc.com](mailto:john.povilaitis@bipc.com)  
[alan.seltzer@bipc.com](mailto:alan.seltzer@bipc.com)  
*Counsel for*  
*Aqua Pennsylvania Wastewater, Inc.*

Alexander R. Stahl, Esq.  
Aqua Pennsylvania, Inc.  
762 West Lancaster Avenue  
Bryn Mawr, PA 19010  
[astahl@aquaamerica.com](mailto:astahl@aquaamerica.com)

Adeolu A. Bakare, Esq.  
Robert F. Young, Esq.  
Kenneth R. Stark, Esq.  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108-1166  
[abakare@mcneeslaw.com](mailto:abakare@mcneeslaw.com)  
[ryoung@mcneeslaw.com](mailto:ryoung@mcneeslaw.com)  
[kstark@mcneeslaw.com](mailto:kstark@mcneeslaw.com)  
*Counsel for Delaware County*

Thomas Wyatt. Esq.  
Matthew S. Olesh, Esq.  
Obermayer Rebmann Maxwell & Hippel LLP  
Centre Square West  
1500 Market Street, Suite 3400  
Philadelphia, PA 19102  
[thomas.wyatt@obermayer.com](mailto:thomas.wyatt@obermayer.com)  
[matthew.olesh@obermayer.com](mailto:matthew.olesh@obermayer.com)  
*Counsel for Delaware County Regional*  
*Water Quality Control Authority*

Christine Maloni Hoover, Esq.  
Erin L. Gannon, Esq.  
Harrison W. Breitman, Esq.  
Santo G. Spataro, Esq.  
Office of Consumer Advocate  
555 Walnut Street  
5th Floor Forum Place  
Harrisburg, PA 17101  
[OCADelcora@paoca.org](mailto:OCADelcora@paoca.org)

Steven C. Gray, Esq.  
Office of Small Business Advocate  
555 Walnut Street, 1st Floor  
Harrisburg, PA 17101  
[sgray@pa.gov](mailto:sgray@pa.gov)

Kenneth D. Kynett, Esq.  
Charles G. Miller, Esq.  
Petrikin, Wellman, Damico, Brown & Petrosa  
William Penn Building  
109 Chesley Drive  
Media, PA 19063  
[kdk@petrikin.com](mailto:kdk@petrikin.com)  
[cgm@petrikin.com](mailto:cgm@petrikin.com)  
*Counsel for*  
*Edgmont Township, Delaware County*

Scott J. Rubin, Esq.  
333 Oak Lane  
Bloomsburg, PA 17815-2036  
[scott.j.rubin@gmail.com](mailto:scott.j.rubin@gmail.com)  
*Counsel for Southwest Delaware County*  
*Municipal Authority, Lower Chichester Twp,*  
*Upland Borough, Edgmont Twp. & Trainer*  
*Borough*

Robert W. Scott, Esq.  
Robert W. Scott PC  
205 North Monroe Street  
P.O. Box 468  
Media, PA 19063  
[rscott@robertwscottpc.com](mailto:rscott@robertwscottpc.com)  
*Counsel for Borough of Ambler*

Thomas J. Sniscak, Esq.  
Kevin J. McKeon, Esq.  
Whitney E. Snyder, Esq.  
Melissa A. Chapaska, Esq.  
Hawke McKeon & Sniscak LLP  
100 North Tenth Street  
Harrisburg, PA 17101  
[tjsniscak@hmslegal.com](mailto:tjsniscak@hmslegal.com)  
[kjmckeon@hmslegal.com](mailto:kjmckeon@hmslegal.com)  
[wesnyder@hmslegal.com](mailto:wesnyder@hmslegal.com)  
[machapaska@hmslegal.com](mailto:machapaska@hmslegal.com)  
*Counsel for Sunoco Partners Marketing &*  
*Terminals, L.P./ Energy Transfer*

Michelle M. Skjoldal Esq.  
Justin G. Weber, Esq.  
Troutman Pepper Hamilton Sanders LLP  
100 Market Street, Ste 200  
P.O. Box 1181  
Harrisburg, PA 17108-1181  
[michelle.skjoldal@troutman.com](mailto:michelle.skjoldal@troutman.com)  
[justin.weber@troutman.com](mailto:justin.weber@troutman.com)  
*Counsel for Kimberly-Clark Corp. &*  
*Kimberly-Clark Pennsylvania, LLC*

Jason T. Ketelsen, Esq.  
Troutman Pepper Hamilton Sanders LLP  
3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103  
[jason.ketelsen@troutman.com](mailto:jason.ketelsen@troutman.com)  
*Counsel for Kimberly-Clark Corp. &*  
*Kimberly-Clark Pennsylvania, LLC*

Marc D. Machlin, Esq.  
Troutman Pepper Hamilton Sanders LLP  
2000 K Street, NW, Suite 600  
Washington DC 20006  
[marc.machlin@troutman.com](mailto:marc.machlin@troutman.com)  
*Counsel for Kimberly-Clark Corp. &  
Kimberly-Clark Pennsylvania, LLC*

Brian Kalcic  
Excel Consulting  
225 S. Meramec Ave.  
Suite 720T  
St. Louis, MO 63105  
[excel.consulting@sbcglobal.net](mailto:excel.consulting@sbcglobal.net)  
*Consultant for OSBA*

Ralph C. Smith  
Larkin & Associates, PLLC  
15728 Farmington Road  
Livonia, MI 48154  
[OCADelcora@paoca.org](mailto:OCADelcora@paoca.org)  
*Consultant for OCA*

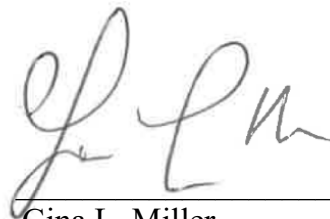
Cynthia Pantages  
C&L Rental Properties, LLC  
30 S. Lake Drive  
P.O. Box 516  
Lake Harmony, PA 1862456t  
[cyndipantages@gmail.com](mailto:cyndipantages@gmail.com)

Ross Schmucki  
218 Rutgers Avenue  
Swarthmore, PA 19081  
[rschmucki@gmail.com](mailto:rschmucki@gmail.com)

Edward Clark, Jr.  
Treasure Lake Property Owners Association  
13 Treasure Lake  
Dubois, PA 15801  
[gm@treasurelake.us](mailto:gm@treasurelake.us)

Patricia Kozel  
15 Hazzard Run Road  
Lake Harmony, PA 18624  
[pattyk6@icloud.com](mailto:pattyk6@icloud.com)  
*Complainant*

Lawrence and Susan Potts  
11 Chestnut Street  
P.O. Box 522  
Lake Harmony, PA 18624  
[susie01213@aol.com](mailto:susie01213@aol.com)  
*Complainants*



---

Gina L. Miller  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney ID No. 313863