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December 1, 2020

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

**RE: Docket No. A-2019-3015173; Application of Aqua Pennsylvania
Wastewater, Inc. – Delaware County Regional Water Quality Control
Authority**

Dear Secretary Chiavetta:

We serve as counsel to the Delaware County Regional Water Quality Control Authority (“DELCORA”) in the above matter and are submitting, with this letter, DELCORA’s Main Brief in support of Aqua Pennsylvania Wastewater, Inc.’s Application.

This document is being served via electronic mail on the Administrative Law Judges presiding over this matter and all parties of record. The document was also filed electronically with the Public Utility Commission on this date.

Very truly yours,

Matthew S. Olesh

cc: The Honorable Angela Jones, Administrative Law Judge
The Honorable F. Joseph Brady, Administrative Law Judge
All parties of record

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Honorable Angela T. Jones and the Honorable F. Joseph Brady, Presiding

Application of Aqua Pennsylvania Wastewater
pursuant to Sections 507, 1102, and 1329 of the
Pennsylvania Public Utility Code for Approval of
the Acquisition of the Delaware County Regional
Water Quality Control Authority

A-2019-3015173

**MAIN BRIEF OF
THE DELAWARE COUNTY REGIONAL
WATER QUALITY CONTROL AUTHORITY**

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Dated: December 1, 2020

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I. STATEMENT OF THE CASE

Pursuant to the procedural schedule established and in accordance with Commission Regulations at 52 Pa. Code §5.501, the Delaware County Regional Water Quality Control Authority (“DELCORA”) hereby submits this Main Brief in support of the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua”), filed with the Public Utility Commission (“Commission”) pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (the “Application”), that is the subject of this proceeding. DELCORA respectfully requests that the Commission approve the Application.

A. Procedural History

This proceeding concerns Aqua’s Application, filed with the Commission on March 3, 2020, for approval of its acquisition of the wastewater system assets of DELCORA and the right of Aqua to provide wastewater services to areas served by DELCORA pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (the “Proposed Transaction”). The Application was assigned Docket No. A-2019-3015173.

The Office of the Small Business Advocate (“OSBA”) filed a Notice of Appearance and Notice of Intervention on March 27, 2020. On April 2, 2020, the Office of Consumer Advocate (“OCA”) and the Bureau of Investigation and Enforcement (“I&E”) each filed a Notice of Appearance. On that same date, April 2, 2020, the OCA filed a Protest in this proceeding. DELCORA itself filed its petition to intervene on June 25, 2020

Through July and August 2020, the following municipalities located in Delaware County—currently served by DELCORA—filed Protests in this proceeding: Edgmont Township, Lower Chichester Township, Trainer Borough, Upland Borough, and the Southwest Delaware County Municipal Authority (“SWDCMA”) (collectively, the “Municipal Protestants”). Additionally, on August 31, 2020, the County of Delaware, Pennsylvania (the “County”) filed a Protest in this

proceeding.¹ Lastly, the following customers and operators currently served by DELCORA all filed a Protest in this proceeding: the Sunoco Partners Marketing and Terminals LP/Energy Transfer (“SPMT”), Kimberley-Clark Pennsylvania LLC, Treasure Lake Property Owners Association, C&L Rental Properties LLC, Ross F. Schmucki, Patricia Kozel, Lawrence and Susan Potts, and Peter Ginopolas.

Administrative Law Judge Angela T. Jones was assigned to preside over the proceeding. An Initial Prehearing Conference was held on September 2, 2020.

The following parties submitted testimony on behalf of Aqua and DELCORA: (1) Robert Willert, the Executive Director of DELCORA; (2) John Pileggi, the Chief Financial Officer of DELCORA; (3) Michael DiSantis, the Director of Operations and Maintenance; (4) Marc A. Lucca, the President of Aqua; (5) William C. Packer, the Vice President – Controller of Aqua; (6) Erin M. Feeny, the Manager of Rates and Planning at Aqua; (7) Mark J. Bubel, Sr., a Project Engineer III at Aqua; (8) Dylan D’Ascendis, the Utility Valuation Expert (“UVE”) engaged by DELCORA; (9) Harold Walker III, the UVE engaged by Aqua; and (10) Jason B. Miller, Senior Group Director and Head of Innovation for Ramboll U.S. Consulting, Inc.

An evidentiary hearing was held on November 9, 2020 and November 10, 2020. At the hearing, testimony and exhibits were entered into the record and cross examination was conducted. On November 18, 2020, Administrative Law Judge F. Joseph Brady was also assigned to preside over the proceeding.

B. Overview of the Proposed Transaction

DELCORA owns and operates an extensive system of pump stations, force mains, and sewers that provide the core infrastructure for the transmission of wastewater to its treatment

¹ The County had previously sought to intervene in this proceeding.

facilities in Delaware County and the treatment facilities of the City of Philadelphia; DELCORA also owns and operates smaller systems in Chester County (collectively, the “System”). DELCORA, by and through the System, currently provides wastewater collection and treatment services to approximately 16,000 direct retail customers, and overall, collects, conveys, and treats 197,000 Equivalent Dwelling Units (the “DELCORA Customers”) from all classes, including retail, wholesale, municipal, industrial, and commercial.

Two factors primarily contributed to DELCORA’s decision to explore the sale of its System: (1) the prohibitively high expense DELCORA will incur if it continues to have its Eastern Service Area treated by the Philadelphia Water Department (“PWD”); and (2) the costs DELCORA would incur to repair its Delaware County infrastructure to comply with the current requirements and regulations set forth by the Environmental Protection Agency (“EPA”). Aqua’s extensive experience in large scale capital investment projects over multi-year periods and already robust presence in Delaware and Chester counties made Aqua a viable candidate for sale of the System. However, more importantly, the primary driving force encouraging DELCORA to enter into the Proposed Transaction was the parties’ agreement to place the majority of the sale proceeds into an irrevocable trust for the exclusive purpose of providing monetary distributions for the bills of DELCORA Customers (the “DELCORA Customer Trust”).

Aqua proposed to acquire the System. After arms-length negotiations concluded, Aqua and DELCORA entered into an Asset Purchase Agreement (“APA”) on September 19, 2020, and a First Amendment to the APA on February 24, 2020, providing for the sale of the assets, properties and rights of the System for a purchase price of \$276,500,000.

Pursuant to the APA, the acquired DELCORA Customers will be charged DELCORA’s existing rates at closing of the Proposed Transaction. DELCORA proposes to take the majority of the proceeds from the Proposed Transaction and place them into the DELCORA Customer Trust

for the benefit of the DELCORA Customers, and has requested to apply payments to the DELCORA Customers from the irrevocable trust through Aqua's billing process.

The Application asks the Commission for an order approving the Proposed Transaction and permit Aqua to begin to offer, render, furnish, and supply wastewater service to DELCORA Customers. As noted in Aqua's brief, the significant public benefits of the Proposed Transaction far outweigh any concerns and/or deficiencies, all of which can be addressed as part of final Commission approval.

II. BURDEN OF PROOF

The Public Utility Code requires Commission approval via the issuance of a certificate of public convenience in order for a public utility to acquire property that is used or useful in the public service.² Under Section 315(c) and 332 of the Public Utility Code, the burden of proof rests with the applicant. The Pennsylvania Supreme Court has held that "burden of proof" means a duty to establish a fact by a preponderance of the evidence, meaning that the party has presented evidence more convincing than the evidence by the opposing party.³ Once a presumption as to a particular fact is established, the burden of proof shifts to the opposing party to rebut the presumption.⁴

III. STATEMENT OF QUESTIONS INVOLVED

Question No. 1

Pursuant to Section 1329 of the Public Utility Code, is the \$276,500,000 negotiated purchase price the appropriate ratemaking rate base for DELCORA's wastewater treatment and collection system?

² 66 Pa.C.S. § 1102(a)(3).

³ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

⁴ *In Re Byerly*, 270 A.2d 186 (Pa. 1970).

Suggested Answer to Question No. 1

Yes. The \$276,500,000 negotiated purchase price is the appropriate ratemaking rate base determined pursuant to Section 1329(c)(2) of the Public Utility Code, being the lesser of the purchase price and the average UVE fair market value appraisals.

Question No. 2

Is the Proposed Transaction necessary or proper for the service, accommodation, convenience or safety of the public?

Suggested Answer to Questions No. 2

Yes. The acquisition is necessary and in the best interests of DELCORA Customers.

Question No. 3

Should Aqua be permitted to show distributions from the DELCORA Customer Trust directly on customer bills?

Suggested Answer to Questions No. 3

Yes, making distributions such that they are reflected as a payment on customer bills is the most efficient way to optimize and maximize the proceeds of the DELCORA Customer Trust and provide a substantial affirmative benefit to the public.

Question No. 4

Pursuant to Section 507 of the Public Utility Code, is the assignment of the contracts between DELCORA and the Municipal Protestants to Aqua reasonable, legal and valid, and can the Proposed Transaction proceed in the event that the consent of the Municipal Protestants is required for such assignment but not given?

Suggested Answer to Questions No. 4

Yes. The assignment of the contracts is reasonable, legal, and valid pursuant to 507 of the Public Utility Code, but if consent is required and not provided, Section 2.06 of the APA

specifically provides a mechanism for the Proposed Transaction to close nonetheless.

IV. SUMMARY OF ARGUMENT

The Public Utility Code requires Commission approval via the issuance of a Certificate of Public Convenience for a public utility to expand its service territory and to acquire a property used or useful in the public service. A Certificate of Public Convenience will issue if the Commission finds or determines that the granting of a certificate is necessary or property for the service, accommodation, convenience, or safety of the public.

Aqua has satisfied its burden of proof and demonstrated by a preponderance of the evidence that the Proposed Transaction and initiation of wastewater service to DELCORA Customers will affirmatively promote the service, accommodation, convenience, or safety of the public in substantial ways – including, application of payments from the DELCORA Customer Trust for the DELCORA Customers. Additionally, DELCORA engaged in a thoughtful and deliberative process that allowed it to conclude that the Proposed Transaction was in the best interest of the DELCORA Customers.

The Proposed Transaction and Aqua's initiation of wastewater service to DELCORA Customers will bring numerous substantial benefits to the public served by the System and will further the public interest. The primary benefit is the Proposed Transaction's creation of the DELCORA Customer Trust, which will contain the majority of the sale proceeds and will be used to ensure that the effect of the payment will provide for a gradual increase in rates for an extended period of time. DELCORA made the correct judgment that the mounting costs on the horizon related to the separation of DELCORA's system from PWD and compliance with the EPA's regulations and requirements will cause a financial strain on DELCORA Customers for the next decade. Entering into the Proposed Transaction will mitigate those costs and protect DELCORA Customers by using a majority of the purchase price to offset rate increases.

In addition to the benefit of the DELCORA Customer Trust, the Proposed Transaction has numerous other benefits. For example, Aqua's currently has an ample presence in the requested territory, which will generate operational efficiencies for DELCORA Customers. Additionally, Aqua has long-standing capital improvement programs and ample experience with improving/correcting wastewater systems and a proven record of environmental stewardship, which will benefit in repairing the System to comply with current EPA requirements and regulations. Lastly, Aqua has committed to preserve the jobs of DELCORA's employees in the service area—completely avoiding disruption of employment due to the Proposed Transaction.

Moreover, pursuant to Section 1329(c)(2) of the Public Utility Code, the \$276,500,000 purchase price reflects the fair market value of DELCORA's System and should serve as Aqua's ratemaking rate base. This price was carefully and deliberately negotiated by DELCORA in order to ensure that in addition to receiving fair market value for DELCORA's asset, that the sale price would result in the most favorable rates possible for DELCORA Customers during the length of the DELCORA Customer Trust. At all times, the interests of DELCORA's ratepayers has been paramount.

Finally, the assignment of the contracts between DELCORA and the Municipal Protestants is reasonable, legal, and valid pursuant to Section 507 of the Public Utility Code. To the extent that consent of any Municipal Protestant is required for the assignment of their respective contract, and such consent is not provided before closing, their respective assets can be removed from the purview of the Proposed Transaction, and DELCORA can continue to service them in accordance with their contract(s), with *de minimus* impact, unless the contract contains a reversionary interest or purchase option the customer elects to exercise.

V. ARGUMENT

A. Section 1329

Aqua and DELCORA agreed to use the process set forth in Section 1329 of the Public Utility Code, 66 Pa.C.S. § 1329, to determine the fair market value of wastewater system assets and the ratemaking rate base.⁵ As such, with Commission approval of the Proposed Transaction, the ratemaking rate base for DELCORA System will be the lesser of the fair market value for the System, as defined by Section 1329(g), and the negotiated purchase price of the System. Here, the negotiated purchase price will serve as the ratemaking rate base as it is lesser than the fair market value appraisal of the System, and there is no evidence of record that this price is too high.

1. Section 1329 - Legal Principles

Section 1329 of the Public Utility Code addresses the valuation of water and wastewater system assets owned by a municipal corporation or authority that are acquired by investor-owned water and wastewater utilities or entities.⁶ More specifically, Section 1329 provides a voluntary process to establish the ratemaking rate base determined by the fair market valuation of an acquired water or wastewater system at the time of acquisition, rather than requiring the ratemaking rate base to be tied to the original cost of construction of the water or wastewater system. This voluntary valuation process helps mitigate the risk that a utility will be unable to fully recover investments made when water or wastewater assets are acquired from a municipal corporation or authority.

Pursuant to Section 1329(a)(2), two independent UVEs—one engaged by the buyer and one engaged by the seller—shall perform two separate, distinct appraisals of the water or wastewater system being acquired for the purpose of establish the system’s fair market value. The UVEs engaged for appraisals of a water or wastewater system must be selected from a list of

⁵ Aqua Application, ¶ 57.

⁶ See generally 66 Pa.C.S. § 1329.

qualified UVEs maintained by the Commission.⁷ Each UVE will conduct an independent fair market value appraisal using the Uniform Standards of Professional Appraisal Practice using three different approaches: cost, market, and income.⁸ For ratemaking purposes, the valuation must be the lesser of the fair market value (*i.e.*, the average of the two independently conducted UVE appraisals) or the negotiated purchase price.⁹

2. Aqua's Application

As set forth in paragraph 57 of Aqua's Application, Aqua and DELCORA agreed to use Section 1329 process to determine the fair market value of the assets and the ratemaking rate base.

Aqua engaged Harold Walker III of Gannett Fleming Valuation and Rate Consultants, LLC as its UVE, who arrived at a fair market appraisal of \$408,883,000.¹⁰ DELCORA engaged Dylan D'Ascendis of ScottMadden, Inc. as its UVE, who arrived at a fair market appraisal of \$308,194,006.¹¹ The average of the UVEs appraisals is \$358,538,503.¹² The negotiated purchase price of DELCORA's System was \$276,500,000.¹³ As such, the ratemaking rate base for DELCORA Customers upon Commission approval of the Proposed Transaction is \$276,500,000.

The results of the Gannett analyses and calculations for each applicable valuation approach are as follows:¹⁴

<u>Valuation Approach</u>	<u>Indicated Value</u>	<u>Weight</u>	<u>Weighted Value</u>
Cost Approach	\$399,664,113	33.33%	\$131,889,157
Market Approach	\$438,337,696	33.34%	\$149,034,817
Income Approach	\$387,754,301	33.33%	\$127,958,919
		100%	\$408,882,893
			\$408,882,893

⁷ 66 Pa.C.S. § 1329(g).

⁸ 66 Pa.C.S. § 1329(a)(3).

⁹ 66 Pa.C.S. § 1329(c)(2).

¹⁰ Aqua Application, ¶ 60.

¹¹ Aqua Application, ¶ 60.

¹² Aqua Application, ¶ 60.

¹³ Aqua Application, ¶ 59.

¹⁴ Aqua Statement No. 8 at 11.

The results of the ScottMadden analyses and calculations for each applicable valuation approach are as follows:¹⁵

<u>Valuation Approach</u>	<u>Indicated Value</u>	<u>Weight</u>	<u>Weighted Value</u>
Cost Approach	\$292,413,993	45%	\$131,586,297
Market Approach	\$613,520,480	5%	\$30,676,024
Income Approach	\$291,863,370	50%	\$145,931,685
		100%	\$308,194,006

The Commission's Order approving Aqua's acquisition of the DELCORA wastewater system should include a determination that the ratemaking rate base is \$276,500,000—being the lesser of the negotiated purchase price and the average of \$358,538,503 UVE appraisals.

3. Challenges to UVE Appraisals

DELCORA endorses, adopts and incorporates by reference the section of Aqua's main brief relating to challenges to UVE appraisals. Again, there is no evidence of record that the purchase price for the System is too high.

4. Conclusion

The ratemaking rate base determined pursuant to Section 1329(c)(2) is \$276,500,000. Any criticisms of the appraisals put forth by the parties to this proceeding should be rejected and given no weight for the reasons set forth in Aqua's Main Brief.

B. Section 1102/1103 Standards – Public Interest

Aqua has demonstrated through a preponderance of the evidence that its acquisition of DELCORA's System and its initiation of wastewater treatment services to DELCORA Customers will affirmatively promote the service, accommodation, convenience, or safety of the public. More specifically, the Proposed Transaction will promote the public interest—and the Commission's general goal—to regionalize and consolidate wastewater operations within the Commonwealth.

¹⁵ Aqua Statement No. 9, Table 4, at 20.

Thus, DELCORA respectfully requests that the Commission issue a Certificate of Public Convenience to Aqua to acquire DELCORA's System and initiate service to DELCORA Customers.

1. Section 1102/1103 - Legal Principles

Aqua is seeking a Certificate of Public Convenience to expand its service territory to DELCORA Customers and to acquire property used or useful in public service, as required under 66 Pa.C.S. § 1102(a)(1) and 1102(a)(3). The burden of proving entitlement to such a certificate is on Aqua.

The Commission will issue a Certificate of Public Convenience pursuant to Section 1102 when the Commission finds that the granting of such certificate "is necessary or proper, for the service, accommodation, convenience, or safety of the public."¹⁶ Courts have interpreted this provision to require a showing that the proposed transaction will "affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way."¹⁷ More specifically, the Pennsylvania Supreme Court explained that the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome or impossible; rather, the Commission properly applies a preponderance of the evidence standard to make factually-based determinations (including predicted ones informed by expert judgment) concerning certification matters.¹⁸

The party acquiring the assets to be used in public service and obligation to provide service must be technically, legally, and financially fit.

¹⁶ 66 Pa.C.S. § 1103(a).

¹⁷ *City of York v. Pennsylvania Pub. Util. Comm'n*, 295 A.2d 285, 828 (1972) (quoting 66 Pa.C.S. § 1103).

¹⁸ *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040, 1055–1056 (Pa. 2007).

2. Fitness

Aqua PA, the parent company to Aqua, is a Class A wastewater public utility, and therefore, Aqua's fitness to own and operate a public utility is presumed; however, Aqua has presented substantial evidence that it legally, financially, and technically fit.

With respect to legal fitness, Aqua is a public utility lawfully operating under Commissions granted certificates of public fitness. There are no pending legal proceedings challenging Aqua's certificated rights to provide safe and adequate service to customers.

As for financial fitness, Aqua has a total utility plant assets of \$282 million and annual revenues of \$21 million. Additionally, in 2019, Aqua PA's—Aqua's parent company—operating income of approximately \$252 million, a net income of \$194 million, and cash flows from operations totaling approximately \$268 million. Aqua PA also has short-term credit facility of \$100 million and access to equity capital, which Aqua as a subsidiary to Aqua PA also has access.

Lastly, to be considered “technically fit,” an applicant must have the capacity to meet the need for the proposed service in a satisfactory fashion.¹⁹ More specifically, an applicant must possess sufficient staff and facilities or operating skills to make the proposed service feasible, profitable, and a distinct service to the public.²⁰ Aqua is technically fit to own and operate DELCORA's wastewater system. Notably, Aqua currently operates 37 wastewater treatment plants throughout the Commonwealth of Pennsylvania—21 of which are in proximity to DELCORA's system allowing for operational efficiency upon the Commission's approval of the Application. Thus, Aqua is fit to own and operate the System as this acquisition will easily fold into Aqua's existing wastewater operations in the Commonwealth.

¹⁹ *Application of Adgebole Ige, t/a Globe Limousine Service*, 75 Pa. PUC 45 (1991).

²⁰ *Id.*

3. Affirmative Public Benefits

Aqua presented substantial evidence in support of the affirmative public benefits of the Proposed Transaction. For example, the testimony of William C. Packer, the Vice President of Aqua included as Aqua Statement No. 2, provided extensive examples of the affirmative public benefits that DELCORA Customers are expected to receive as a result of the acquisition. Additionally, the benefits of the Proposed Transaction from DELCORA's perspective are included at Aqua Statement No. 5—the testimony of Robert Willert, the Executive Director of DELCORA.

From DELCORA's perspective, the affirmative benefits—expounded on below—include the following: (1) mitigating future rate increases for DELCORA Customers through the establishment of the DELCORA Customer Trust; (2) Aqua currently has a presence in the requested territory, which will generate operational efficiencies; (3) Aqua has long-standing capital improvement programs and its experience with improving/correcting wastewater systems; (4) Aqua has committed to preserve the jobs of DELCORA employees; and (5) Aqua's proven record of environmental stewardship for the operations of wastewater systems, which will assist in repairing the Delaware County infrastructure to comply with current EPA requirements and regulations.

a. Rate Stabilization Trust / DELCORA Customer Trust

The primary benefit of the Proposed Transaction, and the driving force behind DELCORA's decision to sell its System, is the relief that the DELCORA Customer Trust will provide to DELCORA Customers in the form of customer assistance payments to help offset future rate increases tied to rising costs that DELCORA will inevitably face.

The Proposed Transaction creates a vehicle to protect DELCORA Customers for several years to come, *i.e.*, the DELCORA Customer Trust. The DELCORA Customer Trust will be for the exclusive benefit of DELCORA Customers. The Trust's sole purpose is to provide monetary

distributions to be applied to DELCORA Customers' bills as a customer assistance payment line item. After paying DELCORA's outstanding debt, the majority of the sale proceeds from the Proposed Transaction will fund the DELCORA Customer Trust. The DELCORA Customer Trust will automatically terminate when the entire Trust corpus has been distributed to DELCORA Customers. The Proposed Transaction and the DELCORA Customer Trust is a significant benefit to DELCORA Customers, particularly when compared with the bills that DELCORA Customers would face if it either remained with PWD or ended its partnership with PWD and did not enter into the Proposed Transaction with Aqua.²¹

As detailed in Mr. Willert's direct testimony, the prospect of inevitable, large and escalating costs were the primary reason why DELCORA entered into the Proposed Transaction. DELCORA currently faces a situation that has no good outcome: either (a) remain in partnership with PWD, which serves DELCORA's eastern service area, and bear the responsibility for at least \$606 million resulting from PWD's long-term control plan, or (b) implement the infrastructure improvements needed for DELCORA to disconnect from PWD's system and service the eastern area on its own, which would cost approximately \$450 million. In either scenario, DELCORA Customers would face the prospect of escalating rates to pay for these significant costs.²²

The Proposed Transaction solves this problem for DELCORA Customers' benefit. Costs will still be incurred to disconnect DELCORA's System from PWD. However, after the payment of DELCORA's outstanding debt and other obligations, the purchase price of DELCORA's system will be used to mitigate the impact of those costs that will be felt by DELCORA Customers by way of the DELCORA Customer Trust. The Trust will provide payments as a line item on DELCORA Customers' bills the effect of which will provide a 3% increase per year for as long as

²¹ Aqua Statement No. 5, at 10-12.

²² Aqua Statement No. 5, at 5-9.

the Trust is funded.²³

The impact on DELCORA Customers has always been, and remains, DELCORA's primary consideration. Employing the DELCORA Customer Trust to use the sale proceeds for their direct benefit is DELCORA's way of ensuring that this consideration is properly addressed.

b. Other Affirmative Public Benefits

The benefits of the Proposed Transaction are not solely financial. For example, the Proposed Transaction promotes the Commission's policy of consolidation and regionalization of its wastewater assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities.²⁴ Aqua already serves nearly 500,000 people in Delaware County, and approximately 200,000 people in Chester County—rendering the merger of DELCORA's System and Aqua's existing system in the requested territory less onerous and without disruption to DELCORA Customers' expectation of excellent service.²⁵ As Mr. Willert stated in his testimony, merging Aqua's existing operations in Delaware and Chester counties with DELCORA's System will create large-scale operational efficiencies, combined billing processes, and capital replacement planning/execution.²⁶ Additionally, Aqua made a commitment to preserve jobs by hiring all DELCORA employees. This commitment benefits the public in two ways: (1) DELCORA Customers' expectation for excellent service will not be disrupted with a transition from DELCORA to Aqua employees; and (2) it will preserve jobs for the employees in the community.²⁷

Lastly, Aqua's environmental stewardship will benefit the public at large. For example, the

²³ Aqua Statement No. 5, at 11-12.

²⁴ See *McCloskey v. Pa. P.U.C.*, 195 A.3d 1055, 1065 (Pa. Cmwlth. 2018) (citing *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040 (Pa. 2007)).

²⁵ Aqua Statement No. 5, at 13

²⁶ Aqua Statement No. 5, at 13.

²⁷ Aqua Statement No. 5, at 13-14.

Proposed Transaction—and more importantly, disconnecting from the PWD—will provide for water discharge into the Delaware River at a location that is less environmentally sensitive.²⁸

4. Public Interest

a. Common Pleas Litigation

The ongoing litigation between DELCORA, Aqua and the County in the Delaware County Court of Common Pleas (the “Common Pleas Litigation”) does not present any reason for the Commission to withhold approval of the Proposed Transaction – if anything, it serves the public interest for the Commission to see its process through to completion independent of the outcome of that litigation.

The County initially filed the Common Pleas Litigation (pending at Docket No. 2020-003185) in an attempt to challenge the legality of the DELCORA Customer Trust. It subsequently passed Ordinance No. 2020-4 (the “Ordinance”), which seeks to take back ownership of DELCORA’s wastewater conveyance and treatment system and terminate DELCORA pursuant to Pennsylvania’s Municipality Authorities Act, 53 Pa.C.S. §§ 5601 *et seq.* (the “MAA”), and has since amended its lawsuit to bring a mandamus claim in an effort to compel DELCORA to comply with that Ordinance. In addition, both DELCORA and Aqua have brought counterclaims reaffirming DELCORA’s ability to enter into the APA under the MAA.

The existence of the Common Pleas Litigation should not bear on the Commission’s consideration of the instant Application. The Common Pleas Litigation is in its final stages, with trial scheduled to be completed by December 2, 2020. Even if the County were to be successful

²⁸ Aqua Statement No. 5, at 14; *see, e.g., 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 Limerick Township*, Docket No. A-2017-2605434 (Opinion and Order entered November 29, 2017); *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 Cheltenham Township*, Docket No. A-2019-3008491 (Opinion and Order entered November 5, 2019).

in the Common Pleas Litigation, it would have no bearing on the APA or the Proposed Transaction.

Regarding the DELCORA Customer Trust, DELCORA created it because it is the best vehicle by which DELCORA could return the transaction proceeds to its customers. Even if the Trust was somehow held to be invalidly created – and DELCORA is confident that the formation and proposed operation of the Trust are consistent with all applicable law – it would not invalidate the Proposed Transaction itself, nor would it mean that DELCORA is unable to accomplish its goal of using the Proposed Transaction proceeds to benefit DELCORA Customers. It simply means that DELCORA would choose another vehicle to do so prior to closing of the Proposed Transaction, something that it is both capable of doing and legally empowered to do. *See* 53 Pa.C.S. §§ 5607(d)(4), (13).

Similarly, nothing about the County’s efforts to terminate DELCORA should impact the Commission’s review of the Proposed Transaction. This is because under the MAA, the County may only take back ownership of DELCORA’s system “upon the assumption by the municipality of all the obligations incurred by the authorities with respect to [it].” 53 Pa.C.S. § 5622(a). The APA is unquestionably an obligation of DELCORA that the County must “assume” before it can terminate DELCORA. Thus, if DELCORA is ultimately supplanted by the County, it will mean that the County necessarily is standing in DELCORA’s shoes with respect to the implementation of the APA and the Trust.²⁹

Finally, the counterclaims brought by DELCORA and Aqua in the Common Pleas Action are limited to seeking an affirmation of the APA as an obligation that must be assumed by the County before it can proceed to terminate DELCORA under the MAA. They in no way limit or abrogate the Commission’s jurisdiction over this matter. Rather, they “[relate] to issues over

²⁹ Aqua Statement No. 5-R, at 3.

which the Commission has no jurisdiction” and “[involve] legal issues which at present appear to be beyond our ken.” *See* August 31, 2020 PUC Decision denying County Petition for Stay of PUC proceedings, pp. 30-31.

b. Rate Stabilization Trust / DELCORA Customer Trust

As discussed above, one of the reasons that the Proposed Transaction is in the public interest is because the transaction proceeds will be used for the benefit of DELCORA’s ratepayers by way of the DELCORA Customer Trust. As a threshold matter, DELCORA is not asking the Commission to approve the Trust Agreement or the Trust payments. The Trust is non-jurisdictional to the Commission and merely reflects DELCORA’s decision as to how to use the Proposed Transaction sale proceeds.

Aqua and DELCORA are only asking the Commission to approve as an administrative request, if required and only to the extent necessary, the presentation of the customer assistance payment as a line item on the Aqua bill to DELCORA Customers. DELCORA has determined that this is the optimal way for the Trustee to make distributions to Aqua for the benefit of ratepayers. Doing so will maximize the amount of money that can be used for customer assistance payments by minimizing unnecessary administrative expense.³⁰

The alternative to reflecting payments on customer bills is to send checks to DELCORA Customers. This is an impractical and inefficient solution. As a threshold matter, the payment amounts have not been determined, and cannot be determined until Aqua determines and receives approval for whatever rates it will charge to DELCORA Customers in the coming years. Given the structure of the DELCORA Customer Trust, which will provide payments to DELCORA Customers the effective of which will provide a 3% increase per year, the distributions are not pre-

³⁰ Aqua Statement No. 5-R, at 4.

determined, but rather will be calculated on an ongoing basis. Moreover, customer usage is of course not known in advance. As a result, if checks were to be sent to ratepayers, they would need to be sent with such frequency that the administrative expenses involved would needlessly diminish the DELCORA Customer Trust funds available for customer assistance payments. The application of payments directly on customer bills eliminates this logistical headache, providing a mechanism by which the payments are automatically received by DELCORA Customers.

In addition, the application of customer assistance payments on bills will ensure that the payments are actually received by DELCORA Customers. If payments were to be mailed in the form of checks, some amount of those checks would inevitably be lost. Moreover, it is similarly inevitable that not all customers deposit the checks, particularly if rate increases and the resulting trust distributions are small.

Finally, placing the distribution amounts on DELCORA Customer bills maximizes transparency, as it gives DELCORA Customers a snapshot of the rates that have been approved by the Commission and the amounts that have been paid for their benefit to blunt the impact of any rate increases.

In short, the request in the Application to allow for the reflection of distributions on customer bills is in the public interest and should be permitted by the Commission.

c. Other

DELCORA endorses, adopts and incorporates by reference the section of Aqua's main brief relating to other reasons why the Proposed Transaction is in the public interest.

5. Environmental Aspects of the Proposed Transaction

The Proposed Transaction will not cause any environmental compliance issues. As discussed in detail by Aqua, the environmental concerns raised by interveners Sunoco and KCC can be readily addressed and should not stand in the way of approval of the Proposed Transaction.

Rather, the Proposed Transaction is necessary specifically because of the environmental compliance requirements that DELCORA is facing in the upcoming years. Part of the increased costs DELCORA will be facing in the short term are costs that are required to remedy wet weather issues in DELCORA's service area, as identified by the EPA.³¹ Just as is the case with respect to the costs that will be incurred in order to separate DELCORA's system from PWD (which is necessary due to the increased share of the PWD's long term control plan that DELCORA would need to bear if it remained with PWD), the Proposed Transaction will help provide relief to DELCORA Customers for the costs that will inevitably be incurred to ensure environmental compliance.³²

6. Conclusion – Public Interest and Benefit

Aqua has demonstrated by a preponderance of the evidence that it is legally, financially, and technically fit to acquire the DELCORA System. Additionally, the parties have demonstrated that the Proposed Transaction will affirmatively promote the service, accommodation, convenience, of safety of the public in numerous ways. As such, DELCORA supports Aqua's position that the Commission should issue a *Certificate of Public Convenience* in connection to the Proposed Transaction.

C. Recommended Conditions

DELCORA endorses, adopts and incorporates by reference the section of Aqua's main brief relating to conditions for approval. Moreover, DELCORA wishes to specifically address the OCA's proposed condition that DELCORA demonstrate that it has the legal authority to transfer the wastewater utility assets and related contracts to Aqua.

It is beyond dispute that DELCORA has this authority. Under the MAA, DELCORA is

³¹ Aqua Statement No. 5, at 8-9.

³² Aqua Statement No. 7, at 9.

specifically empowered to “exercise all powers necessary or convenient for the carrying out of the purposes set forth” in the MAA. 53 Pa.C.S. § 5607(d). This broad grant of power specifically includes the power to “sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by [DELCORA].” 53 Pa.C.S. § 5607(d)(4). DELCORA is also specifically empowered to “make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business.” 53 Pa.C.S. § 5607(d)(13).³³

Thus, under governing statutory law, it is beyond dispute that DELCORA has the authority to enter into the APA and sell its assets to Aqua, and in doing so transfer its existing contracts to Aqua.³⁴

I&E proposes a condition that “Aqua and DELCORA provide the Commission with a guarantee that the pending County Court litigation 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.” As addressed above, such guarantee is not necessary. *See supra* pp. 17-18.

D. Section 507 Approvals

DELCORA endorses, adopts and incorporates by reference the section of Aqua’s main brief relating to Section 507 approvals. However, DELCORA does wish to address the arguments of the Municipal Protestants that they have not yet consented to the assignment of their respective contracts to Aqua, and that this failure to consent stands in the way of PUC approval of the Proposed Transaction.

It is not disputed that consent from the five Municipal Protestants is needed in order to assign their contracts to Aqua. Aqua and DELCORA have been, and have continued to be, in

³³ Aqua Statement 5-R, at 4–5.

³⁴ *See also* 53 Pa.C.S. § 5607(d)(17) (explicitly stating that DELCORA has the power “[t]o do all acts and things necessary or convenient for the promotion of its business and the general welfare of the authority to carry out the powers granted to it by this chapter or other law”).

discussions with these parties to address any concerns and obtain their consents.

However, the APA specifically anticipated this scenario and provides for a mechanism for the Proposed Transaction to close if any of these consents are required but not provided. Under Section 2.06 of the APA, if the consent for DELCORA to assign any service agreement is required but is not provided (“Nonassignable Assets”), DELCORA will continue to be the legal owner of those assets after closing. Aqua will become the economic/beneficial owner of the Nonassignable Assets and provide service to these customers as an agent/subcontractor of DELCORA.

Nothing in any of the service contracts at issue prevent this arrangement. As detailed in Aqua’s main brief, it is wholly permissible under governing law. DELCORA will continue to be responsible for providing service and fulfilling its obligations under any such contracts, and Aqua will act as DELCORA’s agent and/or subcontractor to provide services and perform DELCORA’s obligations under the service agreements.

Finally, DELCORA recognizes that some of the contracts at issue have reversionary rights and/or rights of first refusal. The record is clear that in the event that these contingencies are exercised, the impact to the Proposed Transaction would be negligible. As Mr. D’Ascendis, DELCORA’s UVE, testified at the November 10, 2020 hearing regarding the Application, his appraisal for the fair market valuation of DELCORA’s assets was based on DELCORA continuing operations as is.³⁵ He specifically testified that any change to the extent of DELCORA’s operations before closing would not have an impact on his recommended valuation.³⁶ Nothing of record sufficiently rebuts this. Consequently, even if any such rights are exercised by the Municipal Protestants, it would not be a reason to delay or otherwise deny the Application.

In sum, consent issues regarding the Municipal Protestants’ contracts do not provided a

³⁵ See Transcript of Evidentiary Hearing of November 10, 2020, p. 485: 1–7.

³⁶ See *id.*, pp. 485:8 – 487:10.

basis for the Commission to deny the Application.

E. Other Approvals, Certificates, Registrations and Relief, If Any, Under the Code

DELCORA endorses, adopts and incorporates by reference the section of Aqua's main brief relating to other approvals, certificates, registrations and relief under the Code.

VI. CONCLUSION WITH REQUESTED RELIEF

For all of the reasons set forth herein, as well as all of the reasons set forth in Aqua's brief, DELCORA respectfully requests that the Commission approve of the Application and grant Aqua's requested relief.

Respectfully submitted,

/s/ Thomas Wyatt

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Dated: December 1, 2020

Appendix A – List of DELCORA Sponsored Testimony

Aqua Statement No. 5 – Testimony of Robert Willert

Aqua Statement No. 6 – Testimony of John Pileggi

Aqua Statement No. 7 – Testimony of Michael DiSantis

Aqua Statement No. 9 – Testimony of Dylan D’Ascendis

Aqua Statement No. 5-R – Rebuttal Testimony of Robert Willert

Aqua Statement No. 6-R – Rebuttal Testimony of John Pileggi

Aqua Statement No. 7-R – Rebuttal Testimony of Michael DiSantis

Aqua Statement No. 9-R – Rebuttal Testimony of Dylan D’Ascendis

Appendix B – Proposed Findings of Fact

DELCORA endorses, adopts and incorporates by reference the proposed findings of fact submitted by Aqua.

Appendix C – Proposed Conclusions of Law

DELCORA endorses, adopts and incorporates by reference the proposed conclusions of law submitted by Aqua.

Appendix D – Proposed Ordering Paragraphs

DELCORA endorses, adopts and incorporates by reference the proposed ordering paragraphs submitted by Aqua.

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

**Application of Aqua Pennsylvania
Wastewater, Inc. Pursuant to Sections
1102, 1329 and 507 of the Public Utility
Code for Approval of its Acquisition of
the Wastewater System Assets of the
Delaware County Regional Water
Quality Control Authority**

A-2019-3015173

CERTIFICATE OF SERVICE

I, Matthew Olesh, Esq., hereby certify that I have served a true and correct copy of the foregoing letter upon the following parties by electronic mail.

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Dated: December 1, 2020