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December 1, 2020

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA ELECTRONIC FILING

**RE: 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
Docket No. A-2019-3015173**

Dear Secretary Chiavetta:

Attached for filing with the Pennsylvania Public Utility Commission in the above-referenced proceeding is the Main Brief of the County of Delaware.

As shown by the attached Certificate of Service and per the Commission's March 20, 2020, Emergency Order, all parties to this proceeding are being duly served via email only due to the current COVID-19 pandemic. Upon lifting of the aforementioned Emergency Order, we can provide parties with a hard copy of this document upon request.

Sincerely,

McNEES WALLACE & NURICK LLC

By 

Adeolu A. Bakare

Counsel to the County of Delaware, Pennsylvania

c: Administrative Law Judge Angela T. Jones
Administrative Law Judge F. Joseph Brady
Pamela McNeal, ALJ Assistant
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

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Dated this 1st day of December, 2020, in Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania	:	
Wastewater, Inc. pursuant to Sections	:	
507, 1102 and 1329 of the Public Utility	:	Docket No. A-2019-3015173
Code for, inter alia, approval of the	:	
Acquisition of the wastewater system	:	
Assets of the Delaware County Regional	:	
Water Quality Control Authority	:	

**MAIN BRIEF OF
THE COUNTY OF DELAWARE, PENNSYLVANIA**

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I. STATEMENT OF THE CASE

A. Procedural History

By Secretarial letter dated December 30, 2019, the Pennsylvania Public Utility Commission ("Commission" or "PUC") acknowledged receipt of Aqua Pennsylvania Wastewater, Inc.'s ("Aqua") Letter/Notice of Licensed Engineer and Utility Valuation Expert Engagement Concerning Acquisition of the Delaware County Regional Water Quality Control Authority's ("DELCORA"), Delaware and Chester County Sanitary Wastewater Collection and Treatment System ("DELCORA System Assets" or "DELCORA Assets"), filed on December 26, 2019.

On March 3, 2020, Aqua filed an Application seeking Commission approval of its proposed acquisition of DELCORA's wastewater system assets of DELCORA, proposed service in Delaware and Chester Counties, and proposed ratemaking rate base of DELCORA Assets under Sections 1102 and 1329 of the Public Utility Code ("Application"). The Application also requested approval of contracts, including assignments of contracts pursuant to Section 507 of the Public Utility Code.

On March 26, 2020, the Office of Small Business Advocate ("OSBA") filed a Notice of Appearance and Intervention.

On April 2, 2020, the Office of Consumer Advocate ("OCA") filed a Protest and Notice of Appearance. Also, on April 2, 2020, the Commission's Bureau of Investigation and Enforcement ("I&E") filed a Notice of Appearance.

On May 18, 2020, Delaware County ("County" or "Delaware County") filed a Petition to Intervene in this proceeding.

On June 11, 2020, a Secretarial letter was sent to the Applicant affirming conditional acceptance of the application pending filing of requisite documents.

The County accepts and incorporates by reference the procedural history of events occurring from June 11, 2020, through September 4, 2020, as summarized in Prehearing

Conference Order #2 issued by Presiding Administrative Law Judge ("ALJ") Angela T. Jones on September 4, 2020, including the Petition to Intervene filed by DELCORA on June 25, 2020; the Protest filed by the County on August 3, 2020; and the various Protests filed by Edgmont Township, the Southwest Delaware County Municipal Authority ("SWDCMA"), Upland Borough, Lower Chichester Township, and Trainer Borough (collectively, "Municipal Protestants").

On September 16, 2020, ALJ Jones presided over a public input hearing.

On September 24, 2020, the Municipal Protestants filed a Motion for Summary Judgment.

On September 25, 2020, ALJ Jones issued a Protective Order.

On September 29, 2020, protestants and intervenors submitted Direct Testimony, including Delaware County Statement No. 1, the Direct Testimony of Stan Faryniarz, and Delaware County Statement No. 2, the Direct Testimony of Brian P. Zidek.

On October 8, 2020, the Commission issued an order denying Aqua's Petition for Reconsideration of the Order of Chief ALJ Charles E. Rainey, Jr., dated August 31, 2020, which granted the Expedited Motion for an Extension of the Statutory Suspension Period by sixty days.

On October 15, 2020, DELCORA and Aqua filed answers in opposition to the Municipal Protestants' Motion for Summary Judgment.

On October 16, 2020, I&E filed a letter to correct Aqua's misuse of I&E's position as a basis to deny the Municipal Protestants' Motion for Summary Judgment.

On October 16, 2020, the County filed an answer in support of the Municipal Protestants' Motion for Summary Judgment.

On October 20, 2020, parties submitted Rebuttal Testimony, including Delaware County Statement No. 1-R, the Rebuttal Testimony of Stan Faryniarz.

On October 30, 2020, ALJ Jones denied the Municipal Protestants' Motion for Summary Judgment.

On November 2, 2020, parties submitted Surrebuttal Testimony, including Delaware County Statement No. 1-SR, the Surrebuttal Testimony of Stan Faryniarz.

On November 6, 2020, Aqua submitted Rejoinder Outlines.

ALJ Jones presided over evidentiary hearings from November 9-10, 2020.

On November 13, 2020, Aqua filed a Motion to Keep the Record Open for the Limited Purpose of Admitting the Decision of the Court of Common Pleas of Delaware County at No. CV-2020-003185.

On November 18, 2020, the Commission's Secretary issued a Notice assigning ALJ Francis Brady to preside over the proceeding alongside ALJ Jones.

On November 30, 2020, the County filed a Motion to Admit Into the Record the Declassified Direct Testimony of County Witness Faryniarz, Delaware County Statement No. 1.

Main Briefs are due on December 1, 2020. Reply Briefs are due December 14, 2020.

B. Overview of the Proposed Transaction

This proceeding concerns a transaction through which Aqua, a well-funded private utility company seeks to acquire a publicly-owned municipal authority at a \$276.5 million purchase price, substantially below its appraised fair market value of approximately \$358.5 million. DELCORA, the seller utility, is not a smaller municipal system with technical, managerial, and/or financial deficiencies that require rescue by a larger public wastewater utility, as is typically the case in such PUC applications. Rather, DELCORA is a large and sophisticated wastewater utility providing retail and wholesale wastewater service in all or part of 49 municipalities in Southeast

Pennsylvania.¹ Through its retail and wholesale operations, DELCORA serves approximately 200,000 Equivalent Dwelling Units ("EDUs") and more than 500,000 people across the Greater Philadelphia region.²

Due to DELCORA's current dependence on the Philadelphia Water Department ("PWD") to treat flows from DELCORA's eastern service region,³ and anticipated rate increases from PWD,⁴ DELCORA faces a major decision on its future - whether to remain tied to PWD or to build its own infrastructure to leave PWD. Each alternative has a downside. To stay with PWD, DELCORA would avoid near term rate increases but face uncertain and unpredictable future costs for future PWD costs. To leave PWD when the current PWD-DELCORA agreement expires in 2028,⁵ DELCORA must act now, beginning major projects to transport wastewater from east to west and construct increased capacity for its western region wastewater treatment plant.

DELCORA believes the overarching solution to its PWD problem is to sell itself, at below market value, to Aqua.⁶ A portion of the sale proceeds would then be allocated towards an irrevocable trust ("Trust") created by DELCORA, albeit through powers it does not possess under the Municipality Authorities Act of 1945, 53 Pa. C.S. §5601 *et seq.* ("Authorities Act"). The Trust would fund rate stabilization through payments to Aqua that would be applied as bill credits for the existing DELCORA customers. Aqua and DELCORA intend for the Trust-funded rate stabilization plan ("Rate Stabilization Plan") to mitigate a portion of the higher rates that will unquestionably result from Aqua ownership.

¹ Application at 3.

² Delaware County Statement No. 1 at 10.

³ Application at ¶¶ 13-16, 56(c).

⁴ *Id.* at ¶ 56(g).

⁵ See Aqua Statement No. 4 (Direct Testimony of Mark Bubel) at 8:1-3.

⁶ Aqua Statement No. 5 at 5.

As detailed below, application of the Trust payments towards rate stabilization would provide a buffer against significant rate increases *for a time*. Ultimately, the proposed transaction would kick the proverbial can down the road, as DELCORA's customers would still experience significant rate increases that would be immediately effective upon expiration of the Trust. Additionally, the proposed transaction would privatize a valuable public asset without the approval, consent, or support of Delaware County, which is the sole incorporating municipality for DELCORA.

II. BURDEN OF PROOF

Section 332(a) of the Public Utility Code states that, unless otherwise provided, "the proponent of a rule or order has the burden of proof."⁷ Section 315 of the Public Utility Code establishes that the burden to show that the proposed course of action "is just and reasonable shall be upon the public utility."⁸ The public utility bears the burden of proving that each element of its request is just and reasonable.⁹ Here, Aqua as the applicant bears the burden of proving that its Application and the proposed acquisition of the DELCORA Assets provides substantial affirmative benefits and is in the public interest. This burden applies to each individual approval sought by Aqua; to the specifically identified Code sections cited in the Application (Sections 507, 1102 and 1329) and to any "other relief" sought by Aqua.¹⁰

The Commonwealth Court has explained that "the evidence adduced by a utility to meet this burden must be substantial."¹¹ The Supreme Court of Pennsylvania has held that the party

⁷ 66 Pa. C.S. § 332(a)

⁸ 66 Pa. C.S. § 315(a)

⁹ *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217, 1226 (Pa. Cmwlth. 1984).

¹⁰ Application at ¶ 74.

¹¹ *Lower Frederick Twp. v. Pa. PUC*, 409 A.2d 505, 507 (Pa. Cmwlth. 1980) (citations omitted); *see also Brockway Glass v. Pa. PUC*, 437 A.2d 1067, 1070 (Pa. Cmwlth. 1981).

with the burden of proof in a PUC proceeding must establish that "the elements of [its case] are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary."¹²

Aqua has not met its burden, per Section 332(a) of the Public Utility Code, to demonstrate that the Application is in the public interest and should be approved under Sections 507, 1102, 1103, and 1329 of the Public Utility Code.¹³ As demonstrated herein, the proposed transaction is unjust, unreasonable,¹⁴ unlawful, and not in the interest of the DELCORA ratepayers, Aqua ratepayers, or the general public.

III. STATEMENT OF QUESTIONS INVOLVED

Suggested Question: Has Aqua met its burden to demonstrate that its Application and proposed acquisition of the DELCORA System Assets provides substantial affirmative public benefits and is in the public interest?

Suggested Answer: No.

Suggested Question: Has Aqua failed to comply with the requisite procedural and substantive requirements of Section 1329 of the Public Utility Code, 66 Pa. C.S. § 1329?

Suggested Answer: Yes.

Suggested Question: Does Aqua possess the requisite technical, managerial, and legal fitness to acquire the DELCORA System Assets?

Suggested Answer: No.

¹² *Burleson v. Pa. PUC*, 461 A.2d 1234, 1236 (Pa. 1983) (citing *Lear v. Shirk's Motor Express Corp.*, 152 A.2d 883 (1959)).

¹³ 66 Pa. C.S. §§ 332(a), 507, 1102, 1103, 1329.

¹⁴ See 66 Pa. C.S. § 1301 (requiring all PUC-jurisdictional rates to be just and reasonable).

IV. SUMMARY OF ARGUMENT

The County is the incorporating municipality of DELCORA and strongly opposes the transaction as proposed by Aqua and DELCORA.

The Commission is charged with determining whether the proposed transaction complies with statutory requirements and approvals set forth in Public Utility Code. These approvals include compliance with the filing and documentary requirements of Section 1329 as well as the public interest determinations in Sections 507, 1102, and 1103.¹⁵

Aqua's Application violates the statutory requirements of Section 1329, thereby rendering the Application deficient and ineligible for the requested relief. The evidentiary record in this proceeding confirms that Aqua and DELCORA developed a Rate Stabilization Plan that is applicable, and in fact central to, the proposed transaction. Because the Rate Stabilization Plan was not filed with the Application as a tariff modification or otherwise, the Application fails to comply with Section 1329. Additionally, Section 1329 also requires that parties availing themselves of the Section 1329 process must show the underlying transaction was negotiated at arm's length. The preponderance of record evidence demonstrates that the proposed transaction was not negotiated at arm's length and thus cannot proceed under the Section 1329 review process.

While failure to comply with the Section 1329 requirements merits dismissal of the Application, review of the Application under Sections 1102, 1103, and 507 of the Public Utility Code also supports a denial of the proposed transaction. In conducting its public interest review pursuant to Sections 1102 and 1103, the Commission must carefully balance the interests of the parties to the transaction, the parties to the Application proceeding, the interests of Aqua and DELCORA's ratepayers, and the interests of the general public. In balancing these various

¹⁵ See 66 Pa. C.S. §§ 507, 1102, 1103, 1329.

interests, the Commission must consider the unique circumstances attendant to the proposed transaction.

Aqua has not provided substantial evidence of affirmative public benefits. DELCORA is not a small municipal system that must be acquired by a regulated public utility in order to maintain safe and reliable service to customers or access sufficient capital to fund necessary improvements. The County submits that the Commission must consider adverse revenue impacts of the proposed transaction, including the higher projected revenue requirement for Aqua operation of the DELCORA system and the limited efficacy of the proposed Rate Stabilization Plan, including the rate shock for existing DELCORA customers upon expiration of the Trust.

The Commission must also weigh Aqua's fitness to acquire DELCORA's assets. The Application is beset with legal challenges and insufficiencies, including the County's ongoing litigation before the Court of Common Pleas, the conflict of interest that implicates the Commission's review of the APA under Section 507 of the Public Utility Code, and Section 1303 violations resulting from Aqua's claim that bill credits applied to customers under its Rate Stabilization Plan are non PUC-jurisdictional rates.¹⁶

As discussed herein, the Commission should reject Aqua's application outright because Aqua has not met its burden to demonstrate the Application complies with Public Utility Code, provides substantial affirmative public benefits, and is in the public interest.

¹⁶ See 66 Pa. C.S. §§ 507, 1303.

V. ARGUMENT

A. Section 1329

1. Introduction

Section 1329 of the Public Utility Code, 66 Pa. C.S. § 1329, prescribes a voluntary process to determine the fair market value of the assets of municipally or authority-owned water and wastewater systems acquired by investor-owned water and wastewater utilities. Introduced by the legislature through Act 12 of 2016, Section 1329 provides market participants with an alternative to traditional statutory requirements establishing original depreciated cost as the valuation method for public utility assets.¹⁷ If the transacting entities agree to use the Section 1329 process, a buyer and the seller of the municipal system must each select a utility valuation expert ("UVE") from the Commission's list of experts. Per Sections 1329(a) and (b), fair market value is determined by the results of two separate, independent appraisals conducted by UVEs. The appraisals are then averaged to determine the fair market value.¹⁸ The fair market value is the valuation the acquiring utility will use as the rate base for the acquired assets in its next base rate case.¹⁹

As discussed below, Aqua's Application fails to comply with at least two requirements of Section 1329 in that Aqua: (1) failed to include the Rate Stabilization Plan in its proposed tariff changes or as an exhibit to the Application; and (2) failed to establish by a preponderance of the evidence that the proposed transaction results from arm's length negotiations.

2. Section 1329 – Legal Principles

In comparison to other statutory review processes at the Commission, Section 1329 stands out as a remarkably specific and prescriptive statute. As noted above, the statute requires the

¹⁷ 66 Pa. C.S. § 1311.

¹⁸ 66 Pa. C.S. § 1329(g).

¹⁹ 66 Pa. C.S. § 1329(c)(2).

Commission to certify a list of qualified UVEs. It additionally provides a template for the valuation analysis by requiring each UVE to employ the cost, market, and income models to develop a valuation.²⁰ Market participants electing to proceed under Section 1329 also have an opportunity to secure approval of the transaction within an expedited period, as Section 1329(d)(2) sets forth a six-month review period, commencing upon acceptance of an application by the Commission.²¹

Although the statute offers a purely voluntary regulatory process, Section 1329 also establishes key protections that limit eligibility for the process. First, Section 1329 carries specific statutory filing requirements, including the submission of any rate stabilization plan applicable to the transaction.²² Second, the statute narrows eligible transactions to arm's length transactions. Section 1329(g) of the Code defines an "acquiring public utility" as a water or wastewater public utility subject to regulation under the Code "that is acquiring a selling utility *as the result of a voluntary arm's-length transaction between the buyer and seller.*"²³ A "selling utility" is defined as "[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.*"²⁴ Both individually and collectively, these definitions reasonably and necessarily limit eligibility for the Section 1329 process to buyers and sellers engaged in an arm's length transaction.

²⁰ 66 Pa. C.S. § 1329(a)(3).

²¹ 66 Pa. C.S. § 1329.

²² 66 Pa. C.S. § 1329(d)(5).

²³ 66 Pa. C.S. § 1329(g) (Emphasis added).

²⁴ *Id.* (Emphasis added).

3. Aqua's Application

As referenced above and discussed herein, Aqua's Application fails to comply with the legal requirements of Section 1329. By not acknowledging the applicability of its Rate Stabilization Plan to the transaction, clearly appending the plan to the Application, or including it in its tariff, Aqua attempts to circumvent the plainly-stated statutory directive for upfront disclosure. This violation frustrated the efforts of parties to this proceeding to expeditiously review the transaction and caused the parties to expend unnecessary additional litigation resources to investigate the Rate Stabilization Plan. Further, the underlying transaction between Aqua and DELCORA fails to demonstrate an arm's length transaction. As such, it cannot proceed under the Section 1329 process. Accordingly, the Commission should dismiss the Application. Alternatively, the Commission, at minimum, must direct Aqua to properly cure these deficiencies and file a revised Application.

a) Aqua Violated Section 1329(d)(5) by Excluding the Rate Stabilization Plan from the Application

The County raised concerns with the omission of the Rate Stabilization Plan from Aqua's Application earlier in this proceeding through the Petition for Reconsideration of Staff Action filed on June 23, 2020 ("Petition for Reconsideration"). The Petition for Reconsideration alleged that Aqua omitted complete documentation of its Rate Stabilization Plan in its Application and requested that the Commission revoke its conditional acceptance of Aqua's Application. Following additional responsive pleadings from both Aqua, DELCORA, and the County, the Petition for Reconsideration was initially denied through a July 11 Secretarial Letter for lack of ripeness and finally denied through a Commission Order entered on August 27, 2020 ("August 27 Order"). Importantly, in denying the Petition for Reconsideration, the Commission concluded that the County raised issues to be addressed through the evidentiary record.

Consistent with the August 27 Order, the County now submits that the evidentiary record conclusively establishes that the proposed transaction includes a Rate Stabilization Plan that was omitted from the Application and Aqua's tariff. Accordingly, the Application should be denied for failure to comply with the statutory filing requirements or at minimum re-filed to cure the deficiencies and preserve the necessary incentives for future compliance.

As discussed in the County's Petition for Reconsideration, Paragraph 36 of Aqua's Application states as follows:

After Closing, Aqua will implement DELCORA's sanitary wastewater rates in effect at closing as reflected on Schedule 7.04(a) of the Agreement. Aqua also may apply Commission permitted or required surcharges or pass-through costs to DELCORA's base rates after closing. A schedule of rates tariff pages implementing rates for DELCORA customers post-closing is attached hereto as Exhibit G. **Aqua is not presenting a rate stabilization plan.** Aqua is proposing to implement DELCORA's existing rates after Closing and to maintain those rates until the next Aqua rate proceeding. A copy of DELCORA's currently effective Rates and Rules is attached hereto as Exhibit H. DELCORA will take a portion of the proceeds of the Proposed Transaction and place them into a trust for the benefit of the DELCORA customers, and **is requesting to apply payments to DELCORA customers from the Trust through Aqua's billing process. A proforma Memorandum of Understanding is attached as Appendix B to Mr. Packer's testimony, to facilitate payments from the trust to be put on DELCORA customer bills.**²⁵

The Memorandum of Understanding ("MOU") filed as an Exhibit to Aqua's Statement No. 2 describes the rate stabilization further as follows:

Aqua Wastewater shall calculate the customer assistance payment amount for each DELCORA customer and the total customer assistance payment amount for each billing period, and shall provide its calculation, along with any and all information necessary to confirm the calculation of both payment amounts to the designated calculation agent.²⁶

²⁵ Petition for Reconsideration of Staff Action at 2 (Emphasis added).

²⁶ Aqua Statement No. 2, Appendix B.

However, the Application contained absolutely no information as to how Aqua "shall calculate the customer assistance payment amount for each DELCORA customer..." Incredibly, Aqua steadfastly argued that "[t]his Application neither includes a request or proposal for a rate stabilization plan nor is one included in the proposed tariff."²⁷ The County challenged these assertions in the Petition for Reconsideration.

While the Commission denied the Petition for Reconsideration, it preserved parties' opportunity to address the question of whether Aqua's Application includes a Rate Stabilization Plan following development of an evidentiary record in this proceeding. Specifically, the Commission determined that the issues raised by the County fall outside the scope of authority delegated to TUS for review of sufficiency of Aqua's Application, but acknowledged that "the County and the Company present a factual dispute of whether a rate stabilization plan exists and whether it is applicable to the Application."²⁸

The County submits that the record in this proceeding conclusively establishes that a rate stabilization plan exists and is applicable to the Application. Section 1329 clearly defines a rate stabilization plan as a "[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case."²⁹ Despite previously arguing the Application does not propose a rate stabilization plan, Aqua eventually provided a revised Memorandum of Understanding in response to discovery that confirmed the intent to phase-in rate increases for the DELCORA customers. Specifically, the revised Memorandum of Understanding affirms the following:

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

²⁷ Aqua Statement No. 3 at p. 6.

²⁸ August 27 Order at 16.

²⁹ 66 Pa. C.S. § 1329(g).

Date and each anniversary of such date during the DELCORA Customer Assistance Trust Payment Period.³⁰

As further explained in the Direct Testimony of County Witness Faryniarz, Aqua projects that the Trust will be sufficient to continue limiting rate increases for the DELCORA customers to the 3% compound annual maximum, which would amount to a 7-year phase-in rate stabilization plan if the Commission approves the proposed transaction in 2021.³¹

Aqua's attempts to avoid characterizing the plan as "rate stabilization" are contrary to the statutory language in Section 1329. In efforts to avoid correct designation of its plan, Aqua seeks to draw a distinction between a Rate Stabilization Plan administered by Aqua and a Rate Stabilization Plan administered by DELCORA.³² This is a distinction without a difference, as the statute requires that any rate stabilization plan applicable to the Application must be included with the filing.³³ Aqua also suggests it is not proposing to reduce the tariff rates assessed upon DELCORA customers, alleging "the proposal is not a rate stabilization plan that impacts future rates charged by Aqua after the Proposed Transaction Closing or at any future point in time."³⁴ This is only true in the sense that the DELCORA customers would be charged the full applicable retail service rates subject to the bill credits. In other words, Aqua's Rate Stabilization Plan does not change the total bill, but it reduces the portion of the bill to be directly paid by DELCORA customers.

Regardless, the Public Utility Code does not accord with Aqua's narrow definition of rates. The statutory definition of "rate" including "every individual, or joint fare, toll, charge, rental, **or**

³⁰ Aqua Statement No. 2-R, WCP-2R Schedule E at 3; *see also* Delaware County Statement No. 1 at 15.

³¹ Delaware County Statement No. 1 at 13.

³² *See* Aqua Answer to County Petition for Reconsideration of Staff Action at ¶¶ 11-14 (July 9, 2020).

³³ 66 Pa. C.S. § 1329(g).

³⁴ Aqua Statement No. 2-R at 20.

other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, **or received** for any service within this part, offered, rendered, or furnished by such public utility... ."35 The Commonwealth Court recently agreed that the Public Utility Code defines "rate" broadly, stating that:

It is clear from the General Assembly's use of the term "base rate" in those Code sections that the General Assembly knew how to differentiate between "base rates" and "rates" and did so in drafting the legislation. In Section 1301.1(a) of the Code, it used the defined term, "rate[s]." 66 Pa.C.S. § 102. That term in the first two sentences of Section 1301.1(a) of the Code is not ambiguous because it is defined to include "[e]very . . . charge . . . **whatsoever of any public utility**"36

Similar to the Commonwealth Court's finding that a reference to "rate" is not limited to "base rates", the reference in Section 1329 to "rate" is not limited to the total bill. Accordingly, the proposal to fix the portion of the rate to be received from a DELCORA customer to increase by no more than 3% annually does in fact constitute rate stabilization under the Public Utility Code.

The County also notes that the facts in this proceeding differ from the those previously addressed by the Commission in the *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 & 1329 of the Pub. Util. Code for Approval of Its Acquisition of the Wastewater Sys. Assets of New Garden Twp. & the New Garden Twp. Sewer Auth.*, No. A-2016-2580061, 2017 WL 4552494 (Oct. 5, 2017) ("*New Garden*"). In *New Garden*, the Commission rejected arguments from I&E and OCA that the acquiring utility (also Aqua) proposed a rate stabilization plan.³⁷ In that proceeding, Aqua proposed to limit compound annual rate increases to 4% over 10 years.³⁸ The Commission approved the proposal with a condition that Aqua and its shareholders would

³⁵ 66 Pa. C.S. § 102 (emphasis added). See also *McCloskey v. Pa. Pub. Util. Comm.*, 219 A.3rd 1216 (Commw. Ct. 2019).

³⁶ *McCloskey v. Pa. PUC*, 219 A.3d 1216, 1225 (Pa. Cmwlth. 2019) (emphasis added).

³⁷ *New Garden* at 17.

³⁸ *Id.* at 17.

absorb any difference between the 4% cap and the actual future rates approved by the Commission.³⁹ The Commission argued that Aqua's proposal did not in any way bind the Commission's rate setting authority, as Aqua's shareholders would absorb any difference between the Commission-made rates and the 4% cap for 10 years. However, in this case, the tariff rates established by the Commission directly impact the available rate stabilization. If the Commission approves rates higher than Aqua's projections, it will accelerate the depletion of the Trust funds and shorten the rate stabilization period.⁴⁰ Lower Commission-made rates would have the opposite effect and extend the rate stabilization period.⁴¹ Aqua's proposal places the Commission in the de facto position of modifying both the bill credit and the phase-in period each time it approves a rate increase. The Rate Stabilization Plan cannot be considered a purely private contractual proposal when the mechanics and efficacy of the proposal are directly contingent on outcomes of future Commission rate proceedings. This makes the case here a clearer example of rate stabilization than the circumstances in *New Garden*.

As a Section 1329 applicant, Aqua had an obligation to include the Rate Stabilization Plan with its filing and as part of its tariff. Section 1303 of the Public Utility Code unequivocally establishes that public utilities cannot "*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."⁴² As the proposed Rate Stabilization Plan would

³⁹ *Id.* at 42.

⁴⁰ Delaware County Statement No. 1 at 15 (explaining the impact of rate increases on the Rate Stabilization Plan bill credit, which is defined in the revised MOU as the "DELCORA Customer Assistance Payment").

⁴¹ *Id.*

⁴² 66 Pa. C.S. § 1303.

indirectly reduce the rate received from the DELCORA customers, the omission of the bill credit from Aqua's tariff conflicts with Section 1303.

As initially set forth in the County's Petition for Reconsideration, the proposed Rate Stabilization Plan was not attached to Aqua's Application or included in its tariff. Only discovery from the County and other parties elicited the revised Memorandum of Understanding detailing the mechanics of the proposed rate stabilization. The County submits that Aqua's purposeful omission of the Rate Stabilization Plan from its filing violates the express filing requirements of Section 1329, and thus effectively precludes Aqua from proceeding under the review process set forth therein. While the Commission has broad discretion to waive regulatory filing requirements, Aqua has violated an unambiguous and vital statutory filing requirement.⁴³

Similarly, this deficiency cannot be cured by disregarding Section 1329 and reviewing the record solely under the Section 1102 and 1103 public interest requirement. The Section 1329 process directly impacted the presentation of evidence and the litigation schedule approved for this proceeding. For example, if Aqua and DELCORA had filed the Application solely under Sections 1102 and 1103, parties would not have been bound to accept the valuation methodologies specifically prescribed by Section 1329. As a result of the applicant's election to proceed under Section 1329 and subsequent failure to comply with the statutory requirements, the Commission must dismiss the Application.

At a minimum, the Commission should require Aqua to cure the deficiencies in the Application by refiling the Application (with applicable notice to customers and other parties) to include the Rate Stabilization Plan documents and tariff provisions outlining the bill credit mechanism.

⁴³ *Re Fitness of Natural Gas Marketers*, 1997 Pa. PUC LEXIS 45, *23 (Pa. P.U.C. May 28, 1997).

b) Aqua and DELCORA Have Not Met the Arm's Length Transaction Requirement in Section 1329(g) of the Public Utility Code

As referenced above, Section 1329 confers numerous advantages upon the selling and purchasing utility, including the 6-month Application review period and a fair market value formula providing regulatory certainty of the authorized public utility rate base for the acquired assets. However, only entities engaged in arm's length transactions would be eligible to avail themselves of the statute's process and benefits.

The proposed transaction raises serious concerns regarding the independence of DELCORA's negotiation team, its overarching objective of benefitting all DELCORA stakeholders, as well as the absence of any competitive process for selecting Aqua as a prospective buyer or evaluating other potential suitors. This situation presents unusual circumstances in that no single factor exists that independently or conclusively establishes that this transaction was or was not conducted at arm's length. Review of the question requires an integrated and comprehensive consideration of the negotiations and the outcome. Accordingly, the Commission must consider all factors, such as the failure to issue a Request for Proposals for competitive bids, less than transparent negotiations, as well as the conflicting, if not compromised interest of DELCORA's negotiating team (as the transaction guarantees a high level executive post with Aqua's parent company for DELCORA's Executive Director). Lastly and importantly, the purchase price itself, falls more than \$70 million below the results of both independent appraisals conducted pursuant to Section 1329(a)(2).

While "arm's length transaction" is not defined in Section 1329, courts tasked with reviewing transactions alleging impropriety have explained that an arm's length transaction "requires that the agreement be negotiated in good faith with no self-dealing, where the parties can

fairly price the relevant goods and services."⁴⁴ Similarly, Black's Law Dictionary defines "arm's length transaction" as a "transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises."⁴⁵ The County submits that such definitions of "arm's length transaction" may be applied to the circumstances in this proceeding and should guide the Commission towards a finding that Aqua and DELCORA failed to fulfill their responsibilities under the statute and furnish substantial evidence of an arm's length transaction.

1. The Record Shows the Selection of Aqua as the Purchaser for DELCORA's System Occurred Without Competition or Transparency

County Witness Brian Zidek has served as a Delaware County Councilman since January 2018 and has served as Chairman of the Delaware County Council since January 6, 2020. In his testimony, Mr. Zidek provides an illuminating account of the sequence of events leading up to execution of the APA. Mr. Zidek first recounts that the initial public discussion of a potential sale of DELCORA's wastewater system occurred on July 23, 2019, during a Council Agenda Meeting.⁴⁶ Mr. Zidek also discussed an August 21, 2019 Council Meeting, where DELCORA representatives provided an update on the sale exploration.⁴⁷ However, Mr. Zidek clarified that "Council was not provided with any documents or written reports summarizing or analyzing the basis for the proposed transaction, notwithstanding requests for more detailed information and

⁴⁴ *Hunger v. Sterling Bank*, 750 F. Supp. 2d 530, 54 (2010).

⁴⁵ *Arm's Length Transaction*, Black's Law Dictionary (11th ed. 2019).

⁴⁶ The Council Agenda Meetings directly precede the County Council Meetings. Delaware County Statement No. 2 at 3.

⁴⁷ *Id.* at 3.

analysis."⁴⁸ Mr. Zidek also confirms that the transaction was not competitively bid and expressly notes that Aqua and DELCORA declined to seek Council approval of the transaction.⁴⁹

Based on these observations, Mr. Zidek issued the following statement in his testimony:

As a public official, I find the lack of competitive bidding to be profoundly concerning and counter to generally-accepted municipal practices. Regardless of whether it is required by the letter of the law, I would encourage the Commission to consider exercising its authority to act in the interest of the public and deny Aqua's Application.⁵⁰

As indicated in Mr. Zidek's statement, a lack of competitive bidding or transparent negotiations is not in and of itself dispositive of whether the proposed transaction constitutes an arm's length transaction. However, it is a significant and concerning indicator to the contrary that should inform the Commission's consideration of this Section 1329 requirement.

DELCORA Witness Robert Willert responds to Mr. Zidek's testimony by claiming DELCORA conducted an open and transparent process. Mr. Willert bases this statement primarily on the fact that "DELCORA held a number of meetings in September and October 2019, including multiple public meetings, to discuss the Proposed Transaction with stakeholders."⁵¹ However, this testimony ignores the fact that at the time DELCORA commenced public meetings on the transaction, including the initial meeting with the Delaware County Council, DELCORA had already entered into a formal letter of intent to transfer the system to Aqua on July 16, 2019 ("Letter of Intent").⁵² The Letter of Intent restricted DELCORA not only from entering into a sale

⁴⁸ *Id.* at 4.

⁴⁹ As the County is DELCORA's incorporating municipality under the Authorities Act, Aqua's failure to seek and obtain the County's approval of the transaction is further evidence of the lack of arm's length transaction and differentiates this proposed acquisition from prior Aqua acquisitions because the Commission has never approved an asset transfer over the objection of the incorporating municipality.

⁵⁰ Delaware County Statement No. 2 at 5.

⁵¹ Aqua Statement No. 5-R at 7.

⁵² Delaware County Hearing Exhibit No. 2. There is no indication that the Letter of the Intent was filed with the Commission pursuant to 66 Pa. C.S. § 507.

agreement with other parties, but additionally from even any effort to "engage in, continue or otherwise participate in any discussions or negotiations regarding, or otherwise participate in any way with, any Authority Competing Offer... ." ⁵³ Therefore, the public discussions – which were already few and time-constrained – contributed nothing to any competitive process or genuine consideration of other alternatives. This timeline conclusively demonstrates that DELCORA and Aqua established an exclusive partnership even prior to the initial July 23 meeting with the County, much less any public meetings held in September or October. This is particularly notable as the record shows that Pennsylvania-American Water Company ("PAWC") expressed interest in making an offer to purchase DELCORA following execution of the Letter of Intent. ⁵⁴

As set forth above, the County acknowledges that the Public Utility Code does not explicitly require a competitive bidding process to meet the arm's length transaction standard under Section 1329. The County nevertheless asks the Commission to examine the relevant facts as a whole to address the arm's length transaction question. As part of that analysis, the County submits that the absence of competitive solicitations or public discussion of the decision to partner with Aqua contributes to the substantial evidence showing that DELCORA and Aqua were not engaged in arm's length negotiations. Critically, Aqua has not demonstrated by a preponderance of evidence that Aqua and DELCORA participated in arm's length negotiations.

2. An Employment Offer for DELCORA's Executive Director Erodes the Independence of DELCORA's Negotiation Team

Yet another factor impacting the relationship between Aqua and DELCORA comes from the role of DELCORA's Executive Director in negotiating and supporting the proposed

⁵³ Delaware County Hearing Exhibit No. 2.

⁵⁴ Delaware County Statement No. 2, Exhibit BPZ-3, at 70.

transaction. As observed by Mr. Zidek, "DELCORA's Executive Director, Robert Willert, who was heavily involved in the negotiations for the transaction and who executed the asset purchase agreement on behalf of DELCORA, now seems poised to join Essential Utilities (the parent of Aqua-PA) at an executive level."⁵⁵ Notably, neither Aqua nor DELCORA disputed this statement from Mr. Zidek's Direct Testimony. A memorandum from Aqua to Mr. Willert further confirms the anticipated transition and explains that Mr. Willert would report to Aqua PA's President (Marc Lucca) and "have oversight of Aqua PA WW in southeast PA including DELCORA and SEPA WW operations as well as wastewater due diligence and some business development with initial focus on Delaware County."⁵⁶ While the memorandum was prepared after execution of the APA, it nevertheless calls into question the independence of DELCORA's negotiation process, as the same Executive Director confirmed that he at no time considered any other potential buyers other than Aqua.⁵⁷

As noted above, Mr. Willert's opportunity to join the ranks of executive leadership at Essential Utilities, Inc. (Aqua's parent company) alone would not support a finding that Aqua and DELCORA failed to conduct an arm's length transaction.⁵⁸ But in the context of the omission of competitive bidding, lack of public discussion of the decision to partner with Aqua, and Mr. Willert's declining to even consider the potential benefits of exploring opportunities with other buyers, the executive opportunity adds another compelling factor undercutting Aqua's argument that the parties engaged in arm's length negotiations.

⁵⁵ Delaware County Statement No. 2 at 5; Exhibit BPZ-3 at 59 (confirming Mr. Willert executed the APA on behalf of DELCORA); *see also* Application, Exhibit B1 (attaching executed APA).

⁵⁶ Delaware County Statement No. 2, Exhibit BPZ-1.

⁵⁷ Delaware County Statement No. 2 at fn 1 *citing* BPZ Exhibit 3, 48:1-15.

⁵⁸ See Sections V.A.3.b.2 and V.D.1.a of this Brief for the discussion of how Mr. Willert's conflict of interest renders the APA legally insufficient under Sections 507 and 1103 of the Public Utility Code.

3. The Below-Market Purchase Price for DELCORA's System Further Reflects the Absence of Arm's Length Negotiations

While the events leading up to the transaction signify that the sale and proposed transaction between Aqua and DELCORA was not an arm's length transaction,⁵⁹ the inadequate purchase price of the DELCORA System Assets provides further evidence that the sale was not an arm's length transaction.⁶⁰ As previously stated, Section 1329 of the Public Utility Code does not define "arm's-length transaction." In addition to the judicial and Black's Law Dictionary definitions referenced above, the Corporate Finance Institute defines an arm's length transaction as one where the negotiation is expected to result in a transaction price that "closely matches the fair market value of the consideration."⁶¹ The sale price of \$276.5 million, falls far below the average of the two independent appraisals of the DELCORA System Assets.⁶² Gannett Fleming appraised the DELCORA System Assets at \$408.9 million and ScottMadden Inc. ("ScottMadden") appraised the system assets at \$308.2 million, resulting in an average fair market value of \$358.5 million.⁶³

Thus, the fair market value of \$358.5 million is approximately 30% higher than the sale price of \$276.5 million, confirming that the sale price undervalues the system assets.

The chasm between the purchase price and the fair market value becomes even more striking upon a more detailed review of the DELCORA valuation conducted by ScottMadden. If the ScottMadden appraisal had utilized an equal weighting of each of the three valuation approaches (the cost, market, and income approaches) as done by Gannet Fleming for the Aqua

⁵⁹ See Delaware County Statement No. 2, at 3:18-6"2

⁶⁰ See Delaware County Statement No. 1 at 29-30.

⁶¹ See *id.* at 29:19-30:2 (citing <https://corporatefinanceinstitute.com/resources/knowledge/deals/arms-length-transaction/>).

⁶² See *id.* at 30.

⁶³ See Aqua Application at ¶ 60.

appraisal, then the ScottMadden appraisal would have resulted in a much higher fair market value of \$400 million.⁶⁴ Accordingly, even the average fair market value of \$358.5 million still significantly undervalues the DELCORA System Assets.

The below market purchase price of the DELCORA Assets serves as one more step away from an arm's length transaction for Aqua and DELCORA. The County acknowledges that a purchase price below fair market value is expressly contemplated by Section 1329 and would not individually confirm the absence of an arm's length transaction. In this case, the purchase price does not stand alone. The County does not believe the sale of DELCORA's wastewater assets without a competitive solicitation and at an undervalued sale price serves the best interests of the County and County residents, which constitute 98% of DELCORA's customers.⁶⁵ The County submits that when assessed under the preponderance of evidence standard, the magnitude of the sale divergence from fair market value combined with additional indicators of close and questionable negotiations supports finding the transaction was not conducted at arm's length.

For the reasons set forth above, the Commission should find that Aqua and DELCORA have not furnished substantial evidence of an arm's length transaction and thus cannot proceed with a Section 1329 Application. Accordingly, the Application should be dismissed. At minimum, the Commission should direct DELCORA to cure this deficiency by conducting a Request for Proposals for sale of its system. As set forth in Delaware County Statement No. 2, DELCORA should be directed to allow at least 180 days between issuance of the Request for Proposals and the deadline for final bids.⁶⁶ This process would serve the public interest by allowing the Commission to make a more informed decision on the Application.

⁶⁴ See Delaware County Statement No. 1 at 30:5-16.

⁶⁵ Delaware County Statement No. 2 at 6:3-5; *see also* Delaware County Statement No. 1 at 10:4.

⁶⁶ Delaware County Statement No. 2 at 7.

4. Challenges to UVE Appraisals

The County is not addressing this section.

5. Conclusion

Aqua's Application fails to comply with two fundamental legal requirements of Section 1329 of the Public Utility Code: 1) Aqua failed to include the Rate Stabilization Plan in its filing and proposed Tariff revisions and 2) record evidence demonstrates that the underlying transaction between Aqua and DELCORA lacks any indication of an arm's length transaction and thus cannot proceed under the Section 1329 process. Accordingly, the Commission should dismiss the Application. Alternatively, at a minimum, the Commission should direct Aqua to cure these deficiencies and file a revised Application.

B. Section 1102/1103 Standards – Public Interest

1. Section 1102/1103 – Legal Principles

Section 1102 of the Public Utility Code, 66 Pa. C.S. § 1102, requires an applicant to apply for and receive a certificate of public convenience prior to furnishing public utility service in its proposed service territory. The Commission will only grant a certificate of public convenience under the standards and procedures established in Section 1103 of the Public Utility Code, 66 Pa. C.S. § 1103, if the Commission finds that doing so is "necessary or proper for the service, accommodation, convenience or safety of the public." Per Section 1103, the applicant must show it is technically, legally, and financially fit.⁶⁷ An applicant seeking to acquire public utility assets must also show the proposed transaction would "affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way."⁶⁸ The PUC

⁶⁷ *Chester Water Auth. v. Pa. PUC*, 868 A.2d 384, 386 (Pa. 2005) (Section 1103 requires the PUC to determine, *inter alia*, "the applicant's fitness to render such service, along technical, financial and legal lines").

⁶⁸ *City of York v. PUC*, 295 A.2d 825, 828 (1972).

indicated that it will review the public interest impact based on its consideration of the impact of the acquisition on all affected parties.⁶⁹

2. Fitness

Prior to examining whether or not the proposed acquisition provides affirmative benefits and serves the public interest, the Commission as a threshold matter must first determine that the applicant possesses the requisite technical, legal, and financial fitness to provide the proposed service.⁷⁰ Pursuant to Section 1103 of the Public Utility Code, 66 Pa. C.S. § 1103, the applicant must demonstrate that it is technically, legally, and financially fit to own and operate the assets it proposes to acquire.⁷¹ In assessing the legal, financial, or technical fitness of a public utility applying to acquire additional utility assets, the Commission grants the applicant a presumption of fitness to acquire the assets, subject to the presentation of evidence to the contrary.⁷² However, this Application presents circumstances sufficient to rebut the presumption, as Aqua does not possess wastewater experience on the same scale as its experience managing and operating water systems. An applicant is not necessarily entitled to a presumption of technical fitness on the basis

⁶⁹ *Joint Application of Pa.-American Water Co. and the Sewer Authority of the City of Scranton et al.*, Docket No. A-2016-2537209, at p. 45 (Order entered Oct. 19, 2016) (citing *Middletown Twp. v. Pa. PUC*, 482 A.2d 674, at 682 (Pa. Cmwlth. 1984)).

⁷⁰ *See Application of Aqua Pa. Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of Wastewater System Assets of New Garden Twp. et al.*, Docket No. A-2016-2580061, 2017 Pa. PUC LEXIS 168 at *20 (Order entered June 29, 2017).

⁷¹ *Id.* at *18 (citing *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); *see also Byerly et al. v. Pa. PUC*, 270 A.2d 186, 188-189 (Pa. Super. Ct. 1970)).

⁷² *Application of Aqua Pa. Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of Wastewater System Assets of New Garden Twp. et al.*, Docket No. A-2016-2580061, 2017 Pa. PUC LEXIS 168 at *20 (Order entered June 29, 2017).

of their affiliation with other utilities.⁷³ Additionally, the record is replete with evidence that Aqua lacks legal fitness to acquire DELCORA's assets.

A showing of technical fitness requires the applicant to demonstrate that it has "sufficient staff, facilities and operating skills to make the proposed service feasible, profitable and a distinct service to the public."⁷⁴ The sophistication and scope of DELCORA's wastewater operations merits consideration of Aqua's technical and managerial fitness to operate DELCORA's system. The DELCORA system is a vast network of wastewater treatment, conveyance, and collection assets across 49 municipalities that serves 197,000 EDUs and 500,000 people in Southeast Pennsylvania.⁷⁵ On the other hand, the combined services of Aqua and its water affiliate (Aqua Pennsylvania, Inc.) shows wastewater accounts for just 4.24% of total customers.⁷⁶ Indeed, DELCORA's Executive Director even explained his failure to consider other potential buyers with more substantial wastewater operations by noting that "we [DELCORA] are the experts in wastewater."⁷⁷ While Aqua and DELCORA anticipate that DELCORA's employees will transition to Aqua, the extension of offers does not guarantee all of these employees will actually accept positions with Aqua. Aqua has not demonstrated that it has the staff and operating skills to operate the DELCORA system – a system that is unique to DELCORA and larger than Aqua's existing

⁷³ *Application of Armstrong Communications et al.*, Docket No. A-310583F0002 et al., 1998 Pa. PUC 175 at *31-32 (Initial Decision issued Sep. 9, 1998) (Order entered Apr. 28, 1999).

⁷⁴ *V.I.P. Travel Service, Inc.*, Docket A. 00101748, 1982 Pa. PUC LEXIS 12, 56 Pa. PUC 625, at *629 (Order entered Dec. 17, 1982); *see Application of Evansburg Water Co.*, Docket No. A-210870F0002 (Order entered Apr. 9, 1993); *see also Application of James Black Water Service Co.*, Docket No. A-2013-2395443 (Order entered Apr. 5, 2018).

⁷⁵ Delaware County Statement No. 1 at 10; Application at 3 (confirming DELCORA's system serves customers in 49 municipalities).

⁷⁶ *Id.* at 11.

⁷⁷ Delaware County Statement No. 2, Exhibit BPZ-3 at 48.

Pennsylvania wastewater operations. The Commission has refused to certificate prior carriers that have not met their burden to demonstrate managerial fitness in light of evidence to the contrary.⁷⁸

Further, Aqua has not demonstrated that it has the legal fitness to acquire all of the DELCORA Assets that are the subject of the proposed transaction. In reviewing legal fitness, the Commission will examine and account for any pending legal proceedings that challenge the applicant's ability to legally operate the proposed assets.⁷⁹ Other sections of this brief detail specific legal challenges and violations relevant to the assessment of Aqua's legal fitness, each of which are identified below.

In Section V.B.4.a of this brief, the County summarizes pending litigation before the Delaware County Court of Common Pleas in which the County has challenged the legality of the proposed Trust intended to fund the Rate Stabilization Plan.⁸⁰ The same court proceeding will also address the County's ability to proceed with termination of DELCORA, as the court is reviewing Aqua's request to enjoin the County from terminating DELCORA prior to closing on the proposed transaction.

In Section V.D.1.a of this brief, the County reviews the conflict of interest issues presented by the role of DELCORA's Executive Director Robert Willert in the transaction. While these

⁷⁸ See, e.g., *Application of Aqua Pa., Inc. for approval to begin to offer, render, furnish and supply water service to the public in portions of Dallas Twp.*, Docket No. A-21010F0074, 2007 Pa. PUC LEXIS, at *17-19 (Order entered July 12, 2007); cf. *Pa. PUC v. Deer Have Sewer Co.*, 2011 Pa. PUC LEXIS 1864 at *65-66 (Order entered May 19, 2011) (directing, in response to allegations of inadequate service and managerial issues, the small utility to be afforded a reasonable opportunity to investigate alternatives to acquisition).

⁷⁹ See *Application of Pa.-American Water Co. under Sections 507, 1102, and 1329 of the Public Utility Code for Approval of its Acquisition of Wastewater System Assets of Exeter Twp.*, Docket No. A-2018-3004933, 2017 Pa. LEXIS 284, at *27-28 (Order entered Oct. 3, 2019) (explaining that there are no legal proceedings that could impact the applicant's legal fitness).

⁸⁰ The Commission has previously identified the absence of "pending legal proceedings challenging Aqua's ability or propensity to operate safely and legally" as an indication of legal fitness in a prior Section 1329 Application proceeding. See *Application of Aqua Pa. Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of Wastewater System Assets of New Garden Twp. et al.*, Docket No. A-2016-2580061, 2017 Pa. PUC LEXIS 168 at *22 (Order entered June 29, 2017).

issues are also addressed in the context of Aqua and DELCORA's failure to comply with the Section 1329 requirement for arm's length transactions, the relationship between Aqua and DELCORA's chief executive presents a conflict of interest under Section 5614(e) of the Authorities Act, which renders the APA inoperable under the terms of the statute.

Finally, in Section V.D.1.b of this brief, the County briefly reviews the contractual arguments raised by the Municipal Protestants, which describe necessary consents Aqua and DELCORA failed to secure or otherwise resolve prior to seeking Commission approval of the APA.

In consideration of the above violations and legal deficiencies, the County requests the Commission find Aqua should not be afforded the presumption of technical, managerial, and particularly legal fitness under these circumstances and that the Application should be denied for lack of fitness to acquire DELCORA's assets.

3. Affirmative Public Benefits

- a) Aqua's Application does not offer substantial affirmative benefits to DELCORA customers and existing Aqua customers

As discussed above, the County believes Aqua's Application should be dismissed for failure to meet the statutory requirements of Section 1329. However, if the Commission proceeds to review the Application under the applicable standards for granting a certificate of public convenience, the Commission should deny the Application for failure to meet the affirmative benefits test set forth in *City of York*.⁸¹

The well-established standard set forth in *City of York* places a burden on an applicant seeking Commission approval of an acquisition of public utility assets to demonstrate not only that

⁸¹ *City of York v. PUC*, 295 A.2d 825,828 (1972).

the proposed transaction will not harm the public, but that the transaction will yield affirmative benefits for the public.⁸² The Commission has detailed the specific contours of the affirmative benefits analysis as follows:

[T]he appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission's finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.⁸³

Critically, the Commission requires an applicant for approval of public utility mergers or acquisitions to establish by a preponderance of the record evidence that the proposed transaction offers affirmative public benefits to the public.⁸⁴

1. Aqua Fails to Demonstrate that Economies of Scale Will Be Realized From the Transaction

Despite the pronouncements to the contrary from Aqua and DELCORA, the record in this proceeding lacks the scope of affirmative public benefits identified by the Commission in support of prior acquisition applications. One of the primary distinguishing features of the proposed transaction compared to other transactions presented to the Commission for approval relates to the scope of DELCORA's existing sewer operations. This is a critical differentiator as the economies of scale generated from privatization of municipal utilities often serves to offset the higher cost of capital required to operate investor-owned utilities ("IOUs"). Seemingly in recognition of its

⁸² *McCloskey v. PUC*, 195 A.3d 1055 (Pa. Cmwlth. Ct. 2018).

⁸³ *Popowsky v. Pa. PUC*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007) (*Popowsky*).

⁸⁴ *Application of PPL Electric Utilities Corporation for Approval of Intercompany Restructuring*, A-2017-2629534, 2019 Pa. PUC LEXIS 134 (2019).

failure to identify any meaningful improvements to DELCORA's economies of scale, Aqua focuses instead on purported rate benefits from its proposal to apply rate stabilization to near term increases to DELCORA's sewer rates. These efforts also fall short as the record reveals any short-term customer benefits from Aqua's rate stabilization proposal are demonstrably outweighed by dramatic long-term rate increases for the former DELCORA customers.⁸⁵

Fundamentally, this proposed transaction differs from other transactions reviewed by the Commission in that DELCORA itself is a large utility system. This impacts the Commission's review of the transaction, as economies of scale that often contribute to the benefits of public utility consolidations are easily discernable when a larger operator absorbs a smaller operator. Here, there is no question that DELCORA is a substantially larger wastewater operation than Aqua and has operated the system with expertise and sophistication. Aqua has not credibly demonstrated specific facts to show the acquisition would generate incremental economies of scale for DELCORA's customers, much less affirmative public benefits.

Aqua's own Direct Testimony addresses the uniqueness of this transaction in terms of the size of DELCORA compared to the size of Aqua's existing wastewater operations. In Direct Testimony, Aqua Witness Packer distinguishes the DELCORA transaction from prior transactions as follows:

In past Section 1329 applications, I have compared the Company's current rate base per customer to the rate base per customer of the acquired system. For this Application, this comparison needs further explanation because DELCORA contains significantly more wholesale transmission and treatment services, compared to the Company's existing collection and treatment systems.⁸⁶

⁸⁵ See 66 Pa. C.S. § 1301 (requiring all PUC-jurisdictional rates to be just and reasonable).

⁸⁶ Aqua Statement No. 2 at 9.

Mr. Packer's statement highlights the discrepancy between DELCORA's total retail customer count and its vastly more extensive wholesale and transmission services. In terms of retail customer count, DELCORA has approximately 16,000 retail customers.⁸⁷ This alone would result in a 45% increase to Aqua's 35,000 current retail wastewater customers.⁸⁸ However, as discussed by both Aqua Witness Packer and County Witness Faryniarz, DELCORA's "retail sales only amount to \$9.34 million of DELCORA's \$70.9 million annual revenue."⁸⁹ When viewed in the context of its total retail and wholesale operations, it becomes clear that DELCORA's wastewater operations are significantly larger than Aqua's current wastewater operations.⁹⁰

The size discrepancy should be considered in evaluating Aqua's assertions of economies of scale. County Witness Faryniarz opines that "[w]hen acquiring a system this large relative to the acquiring entity, claims of economies of scale should be supported with greater specificity, in comparison to smaller sales where either the efficiencies are more obvious or the impacts to existing customers are less severe."⁹¹ Where a large utility operator acquires a smaller system, economies of scale are often found to result from reduced procurement costs, centralized staffing, or other operational benefits attendant to larger institutions.⁹² While the Commission does not require applicants to quantify all alleged benefits generated from a proposed transaction, any general claims of economies of scale under circumstances where a smaller utility seeks to acquire a larger utility should be rejected.

⁸⁷ Aqua Statement No. 2 at 9.

⁸⁸ Delaware County Statement No 1 at 10.

⁸⁹ *Id.* at 3 *citing* Aqua Statement No. 2 at 10.

⁹⁰ Aqua has included in its filing the Master Asset List, an Excel file, that details the various facilities and infrastructure of the DELCORA system. A review of the Master Asset List confirms that DELCORA is a large, extensive wastewater utility operation.

⁹¹ Delaware County Statement No. 2-SR at 3.

⁹² Delaware County Statement No. 1 at 29.

In an attempt to establish economies of scale, Aqua's various witnesses provide highly generalized statements outlining traditional benefits observed by the Commission in prior acquisition proceedings. Aqua Witness Marc Lucca testifies that by combining DELCORA's system with Aqua's "future infrastructure investments across the Commonwealth driven by normal replacement cycles, emergency repairs, emergency response of compliance with new environmental regulations will be shared at a lower incremental cost per customer for all of Aqua's customers over time."⁹³ DELCORA Witness Willert similarly claims that "[b]y merging its existing operations with DELCORA's System, Aqua will be able to create a larger-scale, efficiently operated water and wastewater utility."⁹⁴ While these generalized averments may carry the burden of proof in more traditional transactions, where the greater size of the acquiring utility contributes to the preponderance of evidence, they are insufficient indicators of economies of scale where DELCORA already operates a wastewater system larger than Aqua's existing wastewater operations.

Rather than provide any detail to support its projected economies of scale, Aqua asks the Commission to accept as a *fait accompli*, that economies of scale will result from the proposed transaction. Aqua Witness Packer encapsulates the company's position in stating:

It is just a fact of utility ratemaking in Pennsylvania and around the country that the sharing of costs over a larger customer base benefits customers. Aqua operates many systems throughout the Commonwealth and not all of them require the same level of investment at the same time.⁹⁵

To be clear, the County does not dispute this general statement on the principles of economies of scale. The County challenges Aqua's argument that a bald assertion that such benefits will accrue

⁹³ Aqua Statement No.1 at 13-14.

⁹⁴ Aqua Statement No. 5 at 10.

⁹⁵ Aqua Statement No. 2-SR at 46.

from this transaction is sufficient to satisfy Aqua's burden of proving the existence of substantial public benefits where DELCORA already administers and operates a wastewater system larger than Aqua's wastewater system.

Other intervenors reached similar conclusions. Kimberly Clark Corporation has concluded that Aqua has failed to demonstrate that economies of scale are a benefit of the transaction:

Aqua has not identified any concrete economies of scale and plans to simply step into DELCORA's shoes and maintain the *status quo*. Unless DELCORA was about to become insolvent, I do not see how this could be considered a benefit of the transaction.⁹⁶

For the reasons set forth above with regard to the size and sophistication of DELCORA's operations, the County concurs. Under these circumstances, Aqua has failed to demonstrate economies of scale sufficient to overcome the higher revenue requirements that will result from operation of the DELCORA system by Aqua.

2. The Proposed Transaction Increases the Revenue Requirement for the DELCORA System

Absent the economies of scale realized in other transactions reviewed by the Commission, the rate impacts of the proposed transaction become particularly relevant to the overall analysis of affirmative public benefits. As demonstrated by County Witness Faryniarz, the future cost of operating the DELCORA system, referred to as the Present Value Revenue Requirement ("PVRR"), will be significantly higher under Aqua ownership of the system compared to DELCORA ownership. While Aqua and DELCORA seek to mitigate the ratepayer impacts of higher rates through temporary rate stabilization, this measure of rate relief only postpones the inevitable outcome of the proposed transaction, which remains higher rates for the DELCORA

⁹⁶ Kimberly-Clark Statement No. 1-SR, at 16:18.

customers. A transaction that fails to elicit economies of scale *and* increases rates for the acquired customers fails to offer the affirmative public benefits required for approval.

(a) The County's Revenue Requirement Analysis
Confirms Adverse Revenue Impacts from the
Proposed Transaction

For purposes of assessing the rate impacts of a proposed transaction, the municipal model and IOU model must be analyzed and applied on a case-by-case basis to determine whether customers would benefit from continued municipal ownership or through public utility ratemaking under IOU ownership.⁹⁷

Municipal ratemaking is designed to allow a municipal-owned utility, such as DELCORA, to recover operating expenses, make payments on its debt (*i.e.*, debt service), and ensure additional reserves above operating income available for debt service (*i.e.*, debt service coverage)⁹⁸. IOU ratemaking, which applies to PUC-regulated utilities like Aqua, is designed to recover operating expenses (including taxes and annual depreciation expense) and allows the utility to earn a reasonable return on the public utility's capital investments (*i.e.*, rate base).⁹⁹ Unlike municipal utility rates, IOU rates need to be set to earn a return, pay taxes, and recover depreciation expense.¹⁰⁰ As noted above, IOU ownership can also generate efficiencies above and beyond operations under municipal ownership.

To examine the rate impact of the proposed transaction on the DELCORA customers, County Witness Faryniarz conducts an analysis of the PVRR under continued DELCORA

⁹⁷ See Delaware County Statement No. 1-SR at 5:1-3, 8:19-23; Delaware County Statement No. 1, at 23:17-24:2.

⁹⁸ Delaware County Statement No. 1 at 24:6-9.

⁹⁹ *Id.* at 24:9-11.

¹⁰⁰ *Id.* at 24:11-13.

ownership and Aqua ownership. As part of this analysis, Mr. Faryniarz explains the primary drivers of DELCORA's and Aqua's capital costs as follows:

The difference in capital costs are attributed to the difference in the weighted average cost of capital ("WACC"). Since DELCORA CapEx will be fully funded through debt, the WACC will equal the interest rate on its debt.

However, Aqua PA, an IOU, has presented a capital structure of roughly 47 percent debt and 53 percent equity, assuming a debt rate of 4.43 percent and a ROE of 10 percent, which equates to a WACC of 7.37 percent.¹⁰¹

Notably, Mr. Faryniarz "assumed" cost of debt are assumptions only insofar as they are used to project future cost of debt. As explained in his testimony, Mr. Faryniarz "assumed the interest rate paid by DELCORA to be 4.0 percent based on DELCORA's own rate model for 2020 and the interest rate paid by Aqua PA to be 4.43 percent based on data provided by Aqua."¹⁰² Neither DELCORA nor Aqua challenged Mr. Faryniarz's cost of debt projections. Using his projected cost of debt for DELCORA and Aqua's projected WACC, Mr. Faryniarz proceeds to calculate the impact of Aqua's higher cost of capital over a 21-year period, with the following results:

The difference between the municipal rate of interest on debt, which we have assumed for now is 4.0 percent and Aqua PA's assumed WACC of 7.37 percent, is 3.37 percent. When this higher WACC is evaluated in isolation, assuming all other costs are the same, over a 21-year period, the revenue requirement, not adjusted by Trust contributions, is \$542 million higher under the IOU structure. The present value of revenue requirements ("PVR") is \$266 million higher under the IOU structure. Table 4 illustrates the higher revenue requirement in each year for a 21-year period, driven by a higher WACC.

¹⁰¹ Delaware County Statement No. 1 at 26.

¹⁰² *Id.*

Table 4: Revenue Requirements Comparison for DELCORA vs. Aqua ¹⁰³		
Year	DELCORA no sale	Aqua
2020	\$70,978,127	\$78,361,849
2021	\$67,754,039	\$88,253,121
2022	\$68,973,113	\$93,597,488
2023	\$75,328,305	\$99,650,852
2024	\$83,788,448	\$106,735,892
2025	\$87,837,306	\$112,612,323
2026	\$89,407,570	\$126,716,985
2027	\$101,931,332	\$130,683,688
2028	\$101,939,204	\$141,246,722
2029	\$113,460,959	\$146,208,143
2030	\$115,724,467	\$146,330,696
2031	\$117,897,846	\$147,055,959
2032	\$120,620,368	\$148,975,187
2033	\$124,141,994	\$152,073,517
2034	\$128,374,653	\$155,584,070
2035	\$131,725,551	\$158,960,753
2036	\$135,994,218	\$160,348,040
2037	\$138,364,117	\$161,089,047
2038	\$138,644,590	\$161,581,056
2039	\$141,176,194	\$161,917,331
2040	\$143,705,172	\$162,201,238
Total	\$2,297,767,578	\$2,840,183,954
PVRR	\$1,039,447,534	\$1,305,089,904

Based on Mr. Faryniarz's analysis, the PVRR under Aqua operation will exceed the PVRR under continued DELCORA operation by \$266 million. Even after offsetting the temporary rate reductions from the proposed rate stabilization plan, the PVRR under Aqua operation still exceeds the PVRR under continued DELCORA operation by \$114 million.¹⁰⁴ Without the economies of

¹⁰³ See Delaware County Statement No. 1 at 27:1-3 (citing Responses of DELCORA to COUNTY V-1 Attachment 1 and COUNTY II-11 Attachment 10 – Rate Model 2020 – CONFIDENTIAL).

¹⁰⁴ *Id.* at 29.

scale observed in prior transactions, the increased rates resulting from the proposed transaction result in a significant detriment for DELCORA customers.

(b) Aqua's Critiques of the County's Revenue Analysis
are Unfounded

Aqua criticizes the County's analysis of the rate impacts as both empirically flawed and a collateral attack on legislative and Commission support for water and sewer system regionalization.¹⁰⁵ Neither claim holds muster. While Aqua attempts to invalidate the County's PVRR analysis by shifting to a higher projected revenue requirement for DELCORA, there are numerous reasons to accord little weight to these revised projections. Similarly, Aqua's distortion of the County's analysis as a wholesale denouncement on the potential merits of privatization or utility consolidation is simply incorrect.

Aqua Witness Packer attempts to rebut Mr. Faryniarz's revenue requirement analysis by presenting a contrary PVRR analysis showing a PVRR under continued DELCORA operation higher than the projected PVRR under Aqua ownership.¹⁰⁶ Mr. Packer explains the basis for his higher DELCORA PVRR in the below excerpt:

Notably, I have different numbers than Witness Faryniarz in my DELCORA (No Sale) Column (B). This is because I disagree with his revenue assumptions from 2021 – 2028 as they are not consistent with expected rate increases shown by DELCORA in Mr. Pileggi's rebuttal testimony, JP-6R Schedule A. Specifically, utilizing the correct remaining years 2029 – 2040 by 2% per annum, one arrives at a completely different result for DELCORA's future rates than those presented by Witness Faryniarz.¹⁰⁷

Aqua suggests Mr. Faryniarz inappropriately ignores the updated rate increase projections provided by DELCORA Witness John Pileggi. However, Mr. Faryniarz clarified that these

¹⁰⁵ Aqua Statement No. 2-R at 34.

¹⁰⁶ *Id.* at 33 (presenting Schedule A to Witness Packer's Rebuttal Testimony).

¹⁰⁷ *Id.* at 34.

projections cannot be relied upon because Aqua failed to establish a foundation for its rate increase projections. Mr. Faryniarz outlined his concerns in the below response to Aqua's analysis of DELCORA's revenue requirement:

... Aqua PA provided a spreadsheet in County IX-2 Attachment 1 that includes hardcoded percentage increases from 2019 through 2042 based on a variety of borrowing assumptions made by Mr. Pileggi, which I dispute. In Mr. Packer's WCP-2R Schedule A, he uses Mr. Pileggi's projected increases to project DELCORA revenue requirements for 2021-2025. Next Mr. Packer uses the average annual increase from 2021-2025 to project revenue requirements for 2026-2028. From 2029 onwards, Mr. Packer increases annual revenue requirements by two percent, with no explanation supporting this two percent increase.

Mr. Pileggi then states that he supports Mr. Packer's projections. This entire circular reasoning appears to be based on Mr. Pileggi's assumption that a DELCORA owned system will continue under a mechanism that requires a large amount of upfront cash to fund large capital investments. Part of Mr. Pileggi's revenue requirement increases from 2021 to 2025 include these unrealistic front loaded costs. Additionally, Mr. Pileggi has included hardcoded percent increases in his overall projection. This is seen in County-IX-2. In year 2020, Mr. Pileggi includes a hardcoded seven percent "Base rate increase" with no underlying evidence as to why this is needed. Years 2021-2025 include a three percent base rate increase. Mr. Packer uses those percentage increases to calculate 2026-2028 revenue requirements. In using these percentages Mr. Packer is providing an unrealistic projection of a stand-alone DELCORA system that is based on unrealistic and unclear assumptions.¹⁰⁸

Aqua bases their "refined" revenue projections solely on Mr. Pileggi's assumption that DELCORA will fund its large capital improvement projects with upfront cash. However, Mr. Faryniarz explains that DELCORA is far more likely to fund such significant infrastructural investments with debt:

It simply would not be prudent to increase rates to customers in order to generate the cash necessary to finance these projects. Financing these projects with cash mismatches the life of these investments (which will benefit a generation of customers), and place the onus on existing ratepayers. Instead, classic,

¹⁰⁸ Delaware County Statement No. 1-SR at 13-14.

longstanding ratemaking principles suggest spreading out and recovering the costs of such significant investments over the life of the assets.¹⁰⁹

In addition, Witness Faryniarz states that "in the current low interest rate environment, DELCORA would have a strong incentive to borrow to meets its capital investment objectives."¹¹⁰ These observations call the revised DELCORA revenue projections into question.¹¹¹

Aqua further attempts to discredit the County's analysis as critical of private operation of wastewater utilities in general.¹¹² Aqua Witness Packer claims Mr. Faryniarz takes issue "with the legislature and the Public Utility Code, which allow and encourage regulated public utilities like Aqua to own operate and consolidate with other water and wastewater providers in the Commonwealth."¹¹³ This red-herring argument is untrue and should not distract the Commission from the central question of whether Aqua has met its burden of showing affirmative public benefits in this case. Mr. Faryniarz's testimony recognizes the potential benefits of regionalization as he states "it is generally true that IOU ownership under certain circumstances can provide efficiencies compared to municipal ownership, such as economies of scale and improved customer service, and early adoption of technology advancements."¹¹⁴

The analysis in this proceeding is not a referendum on privatization as a whole, but rather a specific examination of whether Aqua has convincingly demonstrated this specific transaction will produce affirmative public benefits. Without a showing of incremental economies of scale that would benefit a customer base consisting primarily of wholesale customers, the record does

¹⁰⁹ Delaware County Statement No. 1-SR at 10-11.

¹¹⁰ *Id.* at 11.

¹¹¹ See *id.* at 13.

¹¹² Aqua Statement No. 2-R at

¹¹³ *Id.* at 36.

¹¹⁴ Delaware County Statement No. 1-SR.

not contain substantial evidence of other benefits sufficient to warrant imposing higher rates on DELCORA's customers.

3. Other Rate Impacts and Expected Rate Increases

Section 1301 of the Public Utility Code requires all PUC-jurisdictional rates to be just and reasonable, 66 Pa. C.S. § 1301. Aqua has conceded that the proposed transaction will lead to rate increases for existing DELCORA customers and existing Aqua customers.¹¹⁵ Approximately \$15 million of Aqua's projected 2020 revenue requirement is being driven by the equity component earned on a rate base of \$276.5 million (the sale price).¹¹⁶ Section V.B.3.a.2 detailed the projected increase to the DELCORA system revenue requirement under Aqua ownership, including a 12.55% rate increase when Aqua files its next base rate case (prior to application of any rate stabilization from the Trust funds).¹¹⁷ Additionally, Aqua's existing wastewater customers will experience an even higher 14.32% initial rate increase.¹¹⁸ Aqua's water customers, which include the vast majority of the DELCORA sewer customers, will experience a 4.58% increase to their water bills for the portion of DELCORA's revenue requirement to be allocated to water customers.¹¹⁹

At some point in the future, Aqua will charge a Distribution System Improvement Charge ("DSIC") to the acquired DELCORA customers, even if Aqua eventually creates a second operating division for the acquired DELCORA customers.¹²⁰ Additionally, it is conceivable that

¹¹⁵ Aqua Statement No. 2 at 12:11-14.

¹¹⁶ Delaware County Statement No. 1 at 19.

¹¹⁷ *See also* OCA Statement No. 1 at 29.

¹¹⁸ *Id.* at 25.

¹¹⁹ *Id.*

¹²⁰ Delaware County Statement No. 1 at 40:4-6. Aqua indicates it will apply the DSIC to DELCORA customers upon the requisite approval of an amendment to its Long-Term Infrastructural Improvement Plan. OCA Statement No. 1, Exhibit RCS-8 at 48.

Aqua "could reprioritize DELCORA's long-term capital investment plan in a way that would accelerate capital investment and bring costs forward, resulting in a revenue deficiency that must be offset by a rate increase earlier than planned."¹²¹

Importantly, the mechanisms proposed by Aqua to mitigate rate increases do not offer sufficient benefits to DELCORA customers to overcome the higher long-term costs of service under Aqua ownership.¹²² Although Aqua touts its Rate Stabilization Plan as a significant rate mitigation tool, it relies on a legally unsound Trust,¹²³ and a bill credit mechanism at odds with the Public Utility Code.¹²⁴ The Trust also offers no benefits to existing Aqua wastewater customers, which as noted above, will bear even higher rate increases than the DELCORA customers.¹²⁵ Moreover, the expiration of the Trust in or around 2028-2029 will result in rate shock for the DELCORA customers,¹²⁶ as detailed below.

Aqua contends that Act 11 may be used as another rate mitigation mechanism to shift costs of wastewater operations, including those of DELCORA, to Aqua PA's water customer base.¹²⁷

¹²¹ Delaware County Statement No. 1 at 40:6-10.

¹²² *Id.* at 40:11-42:21, 43:1-12.

¹²³ See I&E Letter in Support of the County of Delaware's Petition for Stay, A -2019-3015173 (filed Aug. 13, 2020); Surrebuttal Testimony of Lisa Gumby, I&E Statement No. 1-R at 2:18-3:15; Direct Testimony of Lisa Gumby, I&E Statement No. 1 at 9:9-10:2 (expressing concerns that the pending Common Pleas litigation impacts the authority of DELCORA to sell all of its system assets), 14:17-15:14 (expressing concerns that the Trust violates the Public Utility Code).

¹²⁴ See Aqua Answer to Petition of Delaware County for Reconsideration of Staff Action, Docket No. A-2019-3015173, at ¶¶ 15-25 (filed July 9, 2020) (arguing that DELCORA's use of the sale proceeds in creating a Trust is not a PUC-jurisdictional matter and will have no impact on PUC jurisdictional rates).

¹²⁵ See Aqua Application at ¶ 36 (explaining that the Trust would only benefit existing DELCORA customers and would facilitate payments from the Trust to DELCORA customer bills); see also OCA Statement No. 1 at 38 (showing Aqua projects an initial 14.32% increase for existing wastewater customers resulting from the proposed transaction).

¹²⁶ See Delaware County Statement No. 1 at 43:7-8.

¹²⁷ See Delaware County Exhibit No. SCF-2 (Response of Aqua to COUNTY V-1(d)); Delaware County Statement No. 1 at 41:1-3; see *Aqua Pa. Inc.*, PUC Docket Nos. R-2018-3003558 and R-2018-3003561, 1-A Water and 1-B Wastewater Revenue Requirement Summary, Schedule Act 11 at 1 (showing the amount shifted from wastewater to water customers proposed by the Company). In his direct testimony, Mr. Faryniarz cited to Docket No. R-2018-3003068; however, the docket number for Aqua's 2018 base rate case was reassigned to Docket Nos. R-2018-3003558 and R-2018-3003561.

Aqua's reliance on Act 11 revenue reallocation (shifting Aqua wastewater costs to Aqua water customers) to provide rate benefits for DELCORA customers is speculative.¹²⁸ Any proposed future reallocation of Aqua PA's wastewater revenue requirements cannot be construed as a guaranteed benefit of this transaction because those reallocations do not yet exist as any future reallocation must be approved by the Commission in a separate proceeding.¹²⁹ Aqua also has not previously received Commission approval for Act 11 reallocations "of the magnitude that would be necessary to bridge the gap between the projected Aqua revenue requirements for DELCORA and the revenue requirements projected under continued DELCORA ownership."¹³⁰

Even if the Commission grants Aqua's request to reallocate revenue from DELCORA/wastewater customers to Aqua's water customers under Act 11, Aqua has failed to account for the practical reality that the vast majority of DELCORA customers are also Aqua water customers. County Witness Faryniarz presents a comparison of the DELCORA and Aqua Pennsylvania, Inc. (Aqua's water affiliate) showing that Aqua Pennsylvania, Inc. provides substantially all of DELCORA's customers with potable water service. Accordingly, the DELCORA customers would still pay a portion of the Act 11 reallocation through payments made on their water bill.¹³¹ This double count means Aqua's next base rate filing is projected to increase sewer rates for DELCORA customers by 12.55% *and* water rates for the same customers by 4.58%.¹³²

¹²⁸ Delaware County Statement No. 1 at 41:6-8.

¹²⁹ *Id.* at 41:12-14.

¹³⁰ *Id.* at 41:14-18.

¹³¹ *Id.* at 41:19-42:3.

¹³² OCA Statement No. 1 at 25.

For the above reasons, the purported rate mitigation measures touted by Aqua and DELCORA are speculative and insufficient to overcome the future revenue requirement increases compared under Aqua ownership of the system.

4. Aqua and DELCORA's Claims of Other Benefits Are Unpersuasive and Lack Evidence

Aside from the generalized economies of scale claims, the few specific benefits adduced by Aqua and DELCORA are either not benefits at all or are insufficient to overcome the adverse rate impacts detailed by County Witness Faryniarz. DELCORA Witness Willert's testimony identifies some purported specific benefits associated with the proposed transaction, such as continued employment for DELCORA employees, access to Aqua's expertise in capital projects and systems compliance, environmental benefits from the anticipated disconnection of DELCORA's system from PWD's treatment plant, and improved customer service.¹³³

None of these arguments address how these purported claims would offer incremental benefits. For example, there is no indication that DELCORA also would not continue to employ its staff. Similarly, regarding the environmental benefits of disconnecting from PWD's system, County Witness Mr. Faryniarz projects that the capital costs for this project would occur under either Aqua or DELCORA ownership (which no party disputes).¹³⁴ As for customer service improvements, County Witness Faryniarz explains that "as DELCORA operates conveyance and treatment facilities that mostly serve wholesale municipal and industrial customers, expanded customer service capabilities are not as relevant as they might be for a utility serving primarily

¹³³ Aqua Statement No. 5 at 2-3.

¹³⁴ See Delaware County Statement No. 1 at 20.

end-use customers." ¹³⁵ Accordingly, any improvements to end user customer service should be afforded little weight in assessing the overall benefits of this particular transaction.

5. DELCORA Customers will Experience Rate Shock
Immediately Upon Expiration of the Trust

In an effort to mitigate the rate increases borne by customers upon approval of the proposed transaction, Aqua and DELCORA developed the Rate Stabilization Plan discussed above. Notwithstanding the ongoing litigation concerning the legal validity of the Trust established to fund the proposed Rate Stabilization Plan, the Commission should also consider that the proposed Rate Stabilization Plan offers rate mitigation to customers, but at the cost of exposing customers to extreme rate increases upon expiration of Trust.

As explained above, the proposed Rate Stabilization Plan does not operate to reduce the tariff rates assessed upon customers following a sale of the DELCORA system to Aqua, but would provide a bill credit to customers for as long as the Trust balance remain available. As a result, customers will be subject to the full tariff rates immediately upon expiration of the Trust. County Witness Faryniarz projects that the Trust will be depleted in 2028, resulting in an effective rate increase of approximately 70% between 2027 and 2029.¹³⁶ This stark rate increase derives from the inevitable higher costs of operating the DELCORA system under Aqua ownership. The proposed Rate Stabilization Plan temporarily moderates the impact of the transaction upon customers in the initial years, but actually serves to intensify the long-term impacts by assuring rate shock upon expiration of the Trust.¹³⁷ In assessing the overall public interest of the transaction, the proposed rate stabilization plan should not outweigh the overall long-term rate impacts.

¹³⁵ *Id.* at 29.

¹³⁶ *See id.* at 22.

¹³⁷ *See* 66 Pa. C.S. § 1301 (requiring all PUC-jurisdictional rates to be just and reasonable).

4. Public Interest – Common Pleas Litigation

a) Common Pleas Litigation

As stated above, one of the reasons Aqua does not possess the legal fitness to acquire DELCORA's assets relates to pending legal challenges before the Delaware County Court of Common Pleas. On May 14, 2020, while the Commission's Docket Number A-2019-3015173 was inactive, the County filed a complaint against DELCORA and the Trust in the Court of Common Pleas of Delaware County, docketed at CV-2020-003185 (*i.e.*, the Common Pleas Action), asserting that DELCORA's creation of the Trust violates DELCORA's Articles of Incorporation, was *ultra vires*, and violates the Municipality Authorities Act ("Authorities Act").¹³⁸ On June 3, 2020, the Delaware County Council approved and enacted Ordinance 2020-4 directing the orderly termination of DELCORA.¹³⁹

Aqua subsequently intervened in the Common Pleas Action. While the County's complaint was narrowly drawn to limit the issues in the Common Pleas actions to specific issues arising under the Authorities Act, Aqua and DELCORA filed counterclaims requesting that the Common Pleas Court adjudicate broad issues regarding the Asset Purchase Agreement, including the enforceability of the APA and Aqua's request to enjoin the County from terminating DELCORA prior to any closing on the proposed transaction.¹⁴⁰

¹³⁸ All documents in the Common Pleas Action are available by searching the Delaware County Court's website at <https://delcopublicaccess.co.delaware.pa.us/search/case> under Docket No. CV-2020-003185.

¹³⁹ 53 Pa.C.S. § 5619; *see also Township of Forks v. Forks Twp. Mun. Sewer Auth.*, 759 A.2d 47, 53, 2000 Pa. Commw. LEXIS 494, *10 (Pa. Commw. 2000) ("[T]he creating municipality has the power to dissolve its authority under Section 18A once the impediments of Sections 14 and 18 are removed, particularly the discharge of all indebtedness, regardless of its character. Under the Act, the power to dissolve includes the power to order the Authority, prior to dissolution, to remove legally removable impediments...").

¹⁴⁰ DELCORA Brief in Opposition to Petition to Stay, Exhibit. B, p 11 ("Count I of Aqua's Counterclaim seeks a judgment 'declaring that the Asset Purchase Agreement is a valid, binding and enforceable contract, and that closing on the Asset Purchase Agreement must occur prior to termination of Delcora by the County of Delaware' and an injunction 'preventing the County from terminating Delcora prior to closing on the Asset Purchase Agreement between Aqua and Delcora.' Aqua's Counterclaims, Count I, ad damnum clause.").

On November 19, 2020, the County filed an Emergency Application for a Writ of Prohibition with the Pennsylvania Supreme Court.¹⁴¹ The County's Application seeks to prohibit the Delaware County Court of Common Pleas from adjudicating the Aqua and DELCORA counterclaims regarding the APA as such issues are within the exclusive jurisdiction of the Commission. On November 30, 2020, the Pennsylvania Supreme Court denied the Emergency Application for a Writ of Prohibition, thereby ensuring that the issues addressed before the Delaware County Court of Common Pleas will extend beyond the limited matters raised in the County's Complaint.

The County would have preferred to limit the issues before the Delaware County Court of Common Pleas to the Trust formation challenge raised in its Complaint. However, in light of Aqua's insertion of APA issues into the Common Pleas Action, the County submits that the Commission should not proceed to approve the proposed Application while the arguments directly impacting the APA remain contested before the courts.

If the Application is not rejected as proposed by the County, the Commission should invoke its authority under Section 1103 of the Public Utility Code to condition any approval on an express requirement that closing on the proposed transaction must not occur while the proceedings at Delaware County Court of Common Pleas Docket No. CV-2020-003185 remain pending before the courts.

b) **Rate Stabilization Trust**

Addressed above.

c) **Other**

¹⁴¹ *County of Delaware, Pet v. CCP of Delaware County*, 172 MM 2020. The County also filed an Emergency Application for Stay, which was denied as moot pursuant to the denial of the Emergency Application for a Writ of Prohibition.

The County is not addressing this section.

5. Environmental Aspects of the Proposed Transaction

The County is not addressing this section.

6. Conclusion – Public Interest and Benefits

The Application to transfer DELCORA's sewer operations, including the extensive treatment and conveyance assets serving primarily wholesale customers, represents a departure from the Commission's review of prior acquisitions under Section 1329. The County's opposition to the transfer of DELCORA's assets alone mitigates against approving the proposed transaction as consistent with the public interest. Additionally, the record does not establish substantial affirmative benefits to overcome the diminished economies of scale where the selling municipal authority already operates a larger wastewater system than the buyer. Various rate implications also favor rejection of the proposed transaction, including Aqua's high cost of capital and the untenable 70% rate increase experienced upon expiration of the proposed Rate Stabilization Plan. The plethora of legal challenges and violations also weigh heavily against approval of the Application. For all of the above reasons, the County requests that the Commission deny the Application.

C. Recommended Conditions

The County recommends that the Commission deny Aqua's application in its entirety or require Aqua to re-file the Application to address the deficiencies as detailed in prior sections of this brief.

If the Application is approved at any point, the Commission should invoke its authority under Section 1103 of the Public Utility Code to condition any approval on an express requirement that closing on the proposed transaction must not occur while the proceedings at Delaware County Court of Common Pleas Docket No. CV-2020-003185 remain pending before the courts.

The County reserves its right on reply brief to respond to any proposed conditions by other parties in this proceeding.

D. Section 507 Approvals

1. Legal Principles

To a large extent, the Commission's duty to review and approve the Asset Purchase Agreement Section under Section 507 overlaps with the Applicant's legal fitness under Section 1103. Per Section 507 of the Public Utility Code, contracts or agreements between a public utility and a municipal corporation must be filed with the PUC at least 30 days prior to the effective date of the agreement.¹⁴² The PUC will then consider the reasonableness, legality, or any other matter affecting the validity of the agreement.¹⁴³

The Commission's powers under Section 507 are extremely broad and include not simply "reasonableness" but the "legality" of the Agreement under review as well as "any other matter affecting the validity" of the agreement.¹⁴⁴ In this proceeding before the Commission, the County is challenging the legality of the Asset Purchase Agreement under the Authorities Act and the Public Utility Code.

a) Asset Purchase Agreement

Section 5614(e) of the Authorities Act is subtitled "conflict of interest" and states:

(e) *Conflict of interest.* —No member of the authority or officer or employee of the authority may directly or indirectly be a party to or be interested in any contract or agreement with the authority if the contract or agreement establishes liability against or indebtedness of the authority. Any contract or

¹⁴² 66 Pa. C.S. § 507.

¹⁴³ See *Joint Application of PAWC and City of Scranton et al.*, Docket No. A-2016-2437209, at p. 12 (Order issued Oct. 6, 2016) (hereinafter "Scranton Order"); see also *Aqua Application for approval of Limerick Township assets*, Docket No. A-2017-2605434 (Order entered Nov. 29, 2017).

¹⁴⁴ 66 Pa. C.S. § 507.

agreement made in violation of this subsection is void, and no action may be maintained on the agreement against the authority.¹⁴⁵

As discussed earlier, DELCORA's executive director, was heavily involved in negotiating the sale of DELCORA to Aqua.¹⁴⁶ The APA establishes "liability or indebtedness" of DELCORA, not only to Aqua, but also to the parties to numerous other agreements DELCORA intends to assign (or have assigned) to Aqua.¹⁴⁷ As its Executive Director, Mr. Willert is an "officer or employee" of DELCORA. Therefore, if Mr. Willert is directly or indirectly a party to *or interested* in any contract or agreement, that agreement is null and void.

As previously discussed, Mr. Willert is the signatory to the APA for DELCORA and received an executive employment offer to join Aqua's parent company. Moreover, the Asset Purchase Agreement dictates that approximately \$3,200,000 of the sale proceeds will fund DELCORA's outstanding pension obligations.¹⁴⁸ Mr. Willert personally and uniquely benefits from the full funding of the pension plan as paragraph 2(c) of his 2015 employment contract with DELCORA entitles him and him alone to \$50,000 of annual deferred compensation.¹⁴⁹ Mr. Willert's 5-year 2015 contract has remained in effect since January 1, 2015 and was renewed for an additional 5-year term effective January 1, 2020.¹⁵⁰ Accordingly, Mr. Willert's cumulative deferred compensation interest alone is worth more than \$250,000.¹⁵¹ The County submits that

¹⁴⁵ 53 Pa. C.S. § 5614(e).

¹⁴⁶ Delaware County Statement No. 1 at 5; *see also* Delaware County Statement No. 2, BPZ-3 at 59.

¹⁴⁷ *See generally* Application.

¹⁴⁸ Application, Exhibit A.

¹⁴⁹ Delaware County Hearing Exhibit No. 3 (attaching Mr. Willert's 2015 contract and the renewal effective January 1, 2020); *see also* Delaware County Statement No. 2, BPZ-3 at 14.

¹⁵⁰ Delaware County Hearing Exhibit No. 3; *see also* Delaware County Statement No. 2, BPZ-3 at 14.

¹⁵¹ *Id.*

these circumstances violate the conflict of interest provision in Section 5614(e) of the Authorities Act and warrant denying Section 507 approval of the Application.

The County further submits that Section 5614(e) of the Authorities Act is independent of similar statutory authority set for the Pennsylvania State Ethics Act ("State Ethics Act"). There is very little caselaw interpreting Section 5614(e), but legislative documents suggest the conflicts rule in the Authorities Act is distinct from the rules under the State Ethics Act.¹⁵² Accordingly, exceptions to conflicts of interest provisions considered under the Pennsylvania State Ethics Act, such as the subclass exemption, would not apply.

b) Municipal Protestants' Contracts

As further evidence of Aqua's lack of legal fitness to acquire the DELCORA Assets, the Municipal Protestants have explained that the proposal to transfer DELCORA Assets to Aqua triggers reversionary interests that require consent of the individual Municipal Protestants before certain DELCORA Assets can transfer to Aqua.¹⁵³ Aqua's failure to demonstrate that it has legal access to certain assets it proposes to acquire in its Application, including wastewater facilities and contract rights of the Municipal Protestants, confirms that Aqua cannot meet the necessary requirements of a certificate of public convenience to serve the DELCORA customers.¹⁵⁴ Accordingly, the failure of Aqua and DELCORA to demonstrate clear legal authority to assets that are the subject of the proposed acquisitions militates against the approval of Aqua's application.

¹⁵² See *Sivick v. State Ethics Comm'n*, 238 A.3d 1250 (Pa. 2020); see also 65 Pa. C.S. § 1102 (stating "[t]he term [conflict of interest] does not include an action having a de minimus economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated."); but see 2015 Legis. Bill Hist. PA S.B. 341 (Senate Bill 341 would have extended the State Ethics Act's enforceability to Section 5614(e) of the Authorities Act, but the bill failed).

¹⁵³ See Motion for Summary Judgment of the Municipal Protestants, at ¶¶ 7-9, Docket No. A-2019-3015173 (filed Sep. 25, 2020) (citing Aqua-DELCORA APA § 2.01).

¹⁵⁴ See *id.* at ¶¶ 12, 15, 71, 75.

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

The County is not addressing this section.

VI. CONCLUSION WITH REQUESTED RELIEF

Aqua's Application presents significantly different facts and legal issues than prior Section 1329 applications that the Commission has adjudicated since the enactment of Act 12 of 2016. Unlike prior Section 1329 applications where a significantly larger public utility seeks to acquire a much smaller financially distressed municipal system, Aqua seeks to acquire an extensive, sophisticated wastewater system that is many times larger than Aqua's Pennsylvania existing wastewater operations.

Your Honor and the Commission are presented with more complex legal issues associated with the proposed acquisition. Delaware County, as the incorporating municipality of DELCORA, contests the both the legal rights of Aqua and DELCORA to close on the transaction and the public benefits resulting therefrom. Aqua and DELCORA failed to comply with the requirements in Section 1329 of the Public Utility Code. The Rate Stabilization Plan was not provided with the Application. Additionally, the lack of competitive bidding, the non-transparent negotiations, and the low sale price (that was substantially below two independent valuations of the DELCORA Assets) confirm that Aqua and DELCORA did not engage in an arm's length transaction.

Aqua additionally has not met its burden to show fitness to acquire the DELCORA Assets. DELCORA operates a larger wastewater system than Aqua, which itself is sufficient to overcome the presumption of fitness for a certificated utility seeking to acquire additional public utility assets. Moreover, Aqua also has not demonstrated fitness to acquire the assets in light of the court challenges mounted by the County as well as numerous statutory and contractual challenges to the sufficiency of Aqua's Application.

Notwithstanding the significant legal issues and deficiencies with Aqua's application, Aqua has not met its burden to demonstrate that the acquisition of the DELCORA municipal system will provide substantial affirmative benefits and serve the public interest. As outlined by the County's expert witness, the paucity of evidence showing economies of scale and the detrimental long-term rate impact and the rate shock that will occur for existing DELCORA customers upon expiration of the Trust (if the acquisition is approved) militates against any finding that the Application offers substantial affirmative benefit.

Finally, Aqua's Application is heavily contested by a broad spectrum of stakeholders, the County, KCC, Sunoco, and the Municipal Protestants. OCA and I&E have also raised concerns with the Application and its effects of both the current DELCORA customers and Aqua's existing customers. The broad stakeholder opposition to the Application further demonstrates that Aqua has not met its burden to show substantial affirmative benefits and that approval of the Application is in the public interest.

WHEREFORE, for the reasons set forth above, the County of Delaware, Pennsylvania, respectfully requests that the Pennsylvania Public Utility Commission deny the Application, and grant any other relief deemed necessary and consistent with this Main Brief.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

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Dated: December 1, 2020

Appendix A
List of Delaware County's Sponsored Testimony and Exhibits

Delaware County's Testimony and Exhibits of Witness Stan C. Faryniarz

1. Confidential Delaware County Statement No. 1 (Direct Testimony of Stan C. Faryniarz) and Confidential Exhibits SCF-1 and SCF-2*;
2. Public Delaware County Statement No. 1 (Direct Testimony of Stan C. Faryniarz) and Public Exhibits SCF-1 and SCF-2;
3. Delaware County Statement No. 1-R (Rebuttal Testimony of Stan C. Faryniarz); and
4. Delaware County Statement No. 1-SR (Surrebuttal Testimony of Stan C. Faryniarz) and Exhibit No. SCF-3.

* A Motion to Admit into the Record the Declassified Direct Testimony and Exhibits of County Witness Stan Faryniarz is pending before the Presiding ALJs.

Delaware County's Testimony and Exhibits of Witness Brian P. Zidek

1. Delaware County Statement No. 2 (Direct Testimony of Brian P. Zidek) and Exhibit Nos. BPZ-1, BPZ-2, And BPZ-3.

Stipulated Hearing Exhibits

1. Delaware County Hearing Exhibit No. 1 – Aqua Responses to County Interrogatories Set X, Nos. 1-5;
2. Delaware County Hearing Exhibit No. 2 – A July 16, 2019 Letter of Intent from Aqua President Marc A. Lucca to the DELCORA Board of Directors; and
3. Delaware County Hearing Exhibit No. 3 – The DELCORA Response to County Interrogatory Set IX, No. 9.

Appendix B
PROPOSED FINDINGS OF FACT

1. Aqua PA, a well-funded private utility company seeks to acquire a publicly-owned municipal authority at a \$276.5 million purchase price, substantially below its appraised fair market value of approximately \$358.5 million. Application at ¶¶ 24, 59-60.
2. DELCORA is a large and sophisticated wastewater utility providing retail and wholesale wastewater service in all or part of 49 municipalities in Southeast Pennsylvania. Application at 3; Delaware County Statement No. 1 at 10; *see* Master Asset List (Excel file filed with Aqua's application that details the various facilities and infrastructure of the DELCORA system).
3. Through its retail and wholesale operations, DELCORA serves approximately 200,000 Equivalent Dwelling Units ("EDUs") and more than 500,000 people across the Greater Philadelphia region. Delaware County Statement No. 1 at 10.
4. The combined services of Aqua and its water affiliate (Aqua Pennsylvania, Inc.) shows wastewater accounts for only 4.24% of total customers. Delaware County Statement No. 1 at 11.
5. Due to DELCORA's current dependence on the Philadelphia Water Department ("PWD") to treat flows from DELCORA's eastern service region, and anticipated rate increases from PWD, DELCORA faces a major decision on its future - whether to remain tied to PWD or to build its own infrastructure to leave PWD. Aqua Statement No. 5 at 5-6.
6. DELCORA believes the overarching solution to its PWD problem is to sell itself, at below market value, to Aqua. Aqua Statement No. 5 at 5.
7. DELCORA plans to allocate a portion of the proceeds of the sale of the DELCORA system toward an irrevocable trust ("Trust") created by DELCORA. Application at ¶ 36; Aqua Statement No. 2, Memorandum of Understanding.
8. The Trust would fund rate stabilization through payments to Aqua that would be applied as bill credits for the DELCORA customers. Application at ¶ 36; Aqua Statement No. 2, Memorandum of Understanding.
9. Aqua and DELCORA intend for the Trust-funded rate stabilization plan to mitigate a portion of the higher rates that will result from Aqua ownership of the DELCORA Assets. Application at ¶ 36; Aqua Statement No. 2-R, WCP-2R Schedule E at 3; Delaware County Statement No. 1 at 13-15.
10. Delaware County is the sole incorporating municipality of DELCORA. Delaware County Protest at ¶ 1.

11. DELCORA and Aqua representatives did not seek Delaware County Council's approval of the proposed sale of DELCORA's wastewater assets to Aqua. Delaware County Statement No. 2 at 5:1-3.
12. Delaware County has not consented to Aqua's proposed acquisition of DELCORA. Delaware County Statement No. 2 at 3, 5-6.
13. Delaware County Council was not provided with any documents or written reports summarizing or analyzing the basis for Aqua's proposed transaction of DELCORA, notwithstanding requests for more detailed information and analysis. Delaware County Statement No. 2 at 4.
14. DELCORA's failure to publicly bid its wastewater system assets is inconsistent with generally-accepted municipal practices. Delaware County Statement No. 2 at 5.
15. DELCORA entered into a formal letter of intent to transfer the system to Aqua on July 16, 2019. Delaware County Hearing Exhibit No. 2.
16. The Letter of Intent restricted DELCORA not only from entering into a sale agreement with other parties, but also from any effort to engage in, continue or otherwise participate in any discussions or negotiations regarding, or otherwise participate in any way with, any Authority Competing Offer." Delaware County Hearing Exhibit No. 2.
17. DELCORA commenced public meetings on the transaction, including the initial meeting with the Delaware County Council, DELCORA had already entered into a formal letter of intent to transfer the system to Aqua on July 16, 2019. Delaware County Hearing Exhibit No. 2; Delaware County Statement No. 2 at 3-4.
18. Pennsylvania-American Water Company expressed interest in making an offer to purchase DELCORA following execution of the Letter of Intent. Delaware County Statement No. 2, Exhibit BPZ-3, at 70.
19. The selection of Aqua by DELCORA as the purchase of DELCORA's system occurred without competition or transparency. Delaware County Statement No. 2 at 3-5; Delaware County Statement No. 2, Exhibit BPZ-3, at 70; Delaware County Hearing Exhibit No. 2.
20. DELCORA's Executive Director, Robert Willert, who was heavily involved in the negotiations for the transaction and who executed the asset purchase agreement on behalf of DELCORA, is poised to join Essential Utilities (the parent of Aqua-PA) at an executive level. Delaware County Statement No. 2 at 5; Exhibit BPZ-1; Exhibit BPZ-3 at 59; Application, Exhibit B1.
21. DELCORA Executive Director has confirmed that he, on behalf of DELCORA, did not consider any potential buyers of the DELCORA system other than Aqua. Delaware County Statement No. 2 at fn 1 (citing Exhibit No. BPZ-3, 48:1-15).

22. The inadequate purchase price of the DELCORA System Assets provides direct, quantitative evidence that the sale was not an arm's length transaction. Delaware County Statement No. 2 at 3-4; Delaware County Statement No. 1 at 29-3.
23. If the ScottMadden appraisal had utilized an equal weighting of each of the three valuation approaches (the cost, market, and income approaches) as done by Gannet Fleming for the Aqua appraisal, then the ScottMadden appraisal would have resulted in a much higher fair market value of \$400 million, resulting in an average fair market value well above \$358.5 million. Delaware County Statement No. 1 at 30:5-16.
24. Delaware County finds that the sale of DELCORA's wastewater assets without a competitive solicitation and at an undervalued sale price serves the best interests of the County and County residents, which constitute 98% of DELCORA's customers. Delaware County Statement No. 2 at 6:3-5; Delaware County Statement No. 1 at 10:4.
25. DELCORA has approximately 16,000 retail customers. Aqua Statement No. 2 at 9.
26. The addition of DELCORA's 16,000 retail customers to Aqua's existing 35,000 retail wastewater customers results in a 45% increase in Aqua's wastewater customers. Delaware County Statement No. 1 at 10.
27. DELCORA's retail sales only amount to \$9.34 million of DELCORA's \$70.9 million annual revenue. Delaware County Statement No. 1 at 3; Aqua Statement No. 2 at 10.
28. Aqua has failed to support its claims of economies of scale with specificity in light of the fact that Aqua seeks to acquire a larger, more sophisticated wastewater operation. Delaware County Statement No. 2-SR at 3; Kimberly-Clark Statement No. 1-SR, at 16.
29. Where a large utility operator such as Aqua acquires a smaller system, economies of scale are often found to result from reduced procurement costs, centralized staffing, or other operational benefits attendant to larger institutions. Delaware County Statement No. 1 at 29.
30. General claims of economies of scale under circumstances where a smaller utility seeks to acquire a larger utility do not apply to Aqua's application. Delaware County Statement No. 1 at 39-40; Delaware County Statement No. 2-SR at 2-3, 15.
31. For purposes of assessing the rate impacts of a proposed transaction, the municipal model and investor-owned utility ("IOU") model must be analyzed and applied on a case-by-case basis to determine whether customers would benefit from continued municipal ownership or through public utility ratemaking under IOU ownership. Delaware County Statement No. 1-SR, at 5:1-3, 8:19-23; Delaware County Statement No. 1, at 23:17-24:2.
32. Municipal ratemaking is designed to allow a municipal-owned utility, such as DELCORA, to recover operating expenses, make payments on its debt, and ensure an additional reserves above operating income available for debt service. Delaware County Statement No. 1, at 24:6-9.

33. IOU ratemaking, which applies to PUC-regulated utilities like Aqua, is designed to recover operating expenses (including taxes and annual depreciation expense) and allows the utility to earn a reasonable return on the public utility's capital investments (*i.e.*, rate base). Delaware County Statement No. 1, at 24:9-11.
34. Unlike municipal utility rates, IOU rates need to be set to earn a return, pay taxes, and recover depreciation expense. Delaware County Statement No. 1, at 24:11-13.
35. The primary drivers of DELCORA's and Aqua's capital costs are the differences in capital costs are attributed to the difference in the weighted average cost of capital. Delaware County Statement No. 1 at 26.
36. Aqua, an IOU, has presented a capital structure of roughly 47 percent debt and 53 percent equity. Delaware County Statement No. 1 at 26; Aqua Statement No. 2, Appendix A 1 of 11.
37. Assuming a debt rate of 4.43 percent and a return on equity ("ROE") of 10 percent, Aqua's weighted average cost of capital is approximately 7.37 percent. Delaware County Statement No. 1 at 26.
38. The Present Value Revenue Requirement ("PVRR") of the DELCORA System Assets under Aqua operation will exceed the PVRR under continued DELCORA operation by \$266 million. Delaware County Statement No. 1 at 29, Table 4.
39. Even after offsetting the temporary rate reductions from the proposed rate stabilization plan, the PVRR under Aqua operation still exceeds the PVRR under continued DELCORA operation by \$114 million. Delaware County Statement No. 1 at 29, Table 4.
40. Aqua has failed to establish a foundation for its rate increase projections from 2019-2042 if Aqua were to acquire and operate the DELCORA System Assets. Delaware County Statement No. 1-SR at 13-14.
41. Aqua has conceded that the proposed transaction will lead to rate increases for existing DELCORA customers and existing Aqua customers. Aqua Statement No. 2 at 12:11-14.
42. Approximately \$15 million of Aqua's projected 2020 revenue requirement is being driven by the equity component earned on a rate base of \$276.5 million (the sale price). Delaware County Statement No. 1 at 19.
43. The projected increase to the DELCORA system revenue requirement under Aqua ownership includes a 12.55% rate increase in Aqua's next base rate case (prior to application of any rate stabilization from the Trust funds). OCA Statement No. 1 at 29.
44. Aqua's water customers, which include the vast majority of the DELCORA sewer customers, will experience a 4.58% increase to their water bills for the portion of DELCORA's revenue requirement to be allocated to water customers if the proposed transaction is approved. OCA Statement No. 1 at 25.

45. Aqua's existing wastewater customers will experience a 14.32% initial rate increase if the proposed transaction is approved. OCA Statement No. 1 at 25.
46. Because longstanding ratemaking principles suggest spreading out and recovering the costs of significant investments over the life of the assets, Aqua's approach to financing significant long-term future projects with cash will unduly place the onus of those investments on existing ratepayers. Delaware County Statement No. 1-SR at 10-11.
47. In the current low interest rate environment, DELCORA has a strong incentive to borrow to meets its capital investment objectives. Delaware County Statement No. 1-SR at 11.
48. At some point in the future, Aqua will charge a Distribution System Improvement Charge ("DSIC") to the acquired DELCORA customers, even if Aqua eventually creates a second operating division for the acquired DELCORA customers. Delaware County Statement No. 1 at 40:4-6; OCA Statement No. 1, Exhibit RCS-8 at 48.
49. Aqua could reprioritize DELCORA's long-term capital investment plan in a way that would accelerate capital investment and bring costs forward, resulting in a revenue deficiency that must be offset by a rate increase earlier than planned. Delaware County Statement No. 1 at 40:4-6.
50. The mechanisms proposed by Aqua to mitigate rate increases do not offer sufficient benefits to DELCORA customers to overcome the higher costs of service under Aqua ownership. Delaware County Statement No. 1 at 40:11-42:21, 43:1-12.
51. The Trust offers no benefits to existing Aqua customers and instead increases rates for those customers. Aqua Application at ¶ 36; OCA Statement No. 1 at 38.
52. The expiration of the Trust in or around 2028-2029 will result in rate shock for the existing DELCORA customers. Delaware County Statement No. 1 at 43:7-8.
53. Aqua's reliance on Act 11 revenue reallocation (shifting Aqua wastewater costs to Aqua water customers) to provide rate benefits for DELCORA customers is speculative. Delaware County Statement No. 1 at 41:6-8.
54. Any proposed future reallocation of Aqua PA's wastewater revenue requirements cannot be construed as a guaranteed benefit of this transaction because those reallocations do not yet exist as any future reallocation must be approved by the Commission in a separate proceeding. Delaware County Statement No. 1 at 41:12-14.
55. Aqua has not previously received Commission approval for Act 11 reallocations of the magnitude that would be necessary to bridge the gap between the projected Aqua revenue requirements for DELCORA and the revenue requirements projected under continued DELCORA ownership. Delaware County Statement No. 1 at 41:14-18.
56. Existing DELCORA customers would still pay a portion of any Act 11 reallocation through payments made on their water bill. Delaware County Statement No. 1 at 41:19-42:3.

57. Regarding Aqua's proffered environmental benefits realized from disconnecting from Philadelphia Water Department's system, such benefits would occur under either Aqua or DELCORA ownership of the DELCORA system because the capital costs for this project would also occur under either Aqua or DELCORA ownership. Delaware County Statement No. 1 at 20.
58. The Trust will be depleted in 2028, resulting in an effective rate increase of approximately 70% between 2027 and 2029. Delaware County Statement No. 1 at 22.
59. On May 14, 2020, the County filed a complaint against DELCORA and the Trust in the Court of Common Pleas of Delaware County, docketed at CV-2020-003185, asserting that DELCORA's creation of the Trust violates DELCORA's Articles of Incorporation, was *ultra vires*, and violates the Municipality Authorities Act ("Authorities Act").¹⁵⁵ County Petition to Intervene at ¶ 2, fn. 2.
60. On June 3, 2020, the County Council approved and enacted Ordinance 2020-4 directing the orderly termination of DELCORA. Count Petition for Stay at ¶ 17, Exhibit 4.
61. The pending litigation in the Court of Common Pleas of Delaware County creates an impediment to Aqua's proposed acquisition of DELCORA. Delaware County Statement No. 2 at 6-7.
62. Robert Willert, DELCORA's executive director, was heavily involved in negotiating the sale of DELCORA to Aqua. Delaware County Statement No. 1 at 5; Delaware County Statement No. 2, BPZ-3 at 59.
63. Robert Willert is the signatory to the APA for DELCORA. Application, Exhibit A.
64. Robert Willert received an executive employment offer to join Aqua's parent company. Delaware County Hearing Exhibit No. 3; Delaware County Statement No. 2, BPZ-3 at 14.
65. The Asset Purchase Agreement dictates that approximately \$3,200,000 of the sale proceeds will fund DELCORA's outstanding pension obligations. Application, Exhibit A.
66. Robert Willert personally and uniquely benefits from the full funding of the pension plan as his paragraph 2(c) of his 5-year 2015 employment contract includes \$50,000 per year in deferred compensation. Delaware County Hearing Exhibit No. 3; Delaware County Statement No. 2, BPZ-3 at 14.
67. As Mr. Willert's 2015 employment contract has remained in effect and was renewed effective January 1, 2020 for an additional 5-year term, Mr. Willert's deferred

¹⁵⁵ All documents in the Common Pleas Action are available by searching the Delaware County Court's website at <https://delcopublicaccess.co.delaware.pa.us/search/case> under Docket No. CV-2020-003185.

compensation interest alone is worth more than \$250,000. Delaware County Hearing Exhibit No. 3; Delaware County Statement No. 2, BPZ-3 at 14.

Appendix C

Proposed Conclusions of Law

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa. C.S. §§ 102, 501, 507, 508,
2. Aqua Pennsylvania Wastewater, Inc. ("Aqua"), as the applicant, bears the burden of proving it is entitled to the relief requested in its Application and that its proposed course of action is just and reasonable. 66 Pa. C.S. §§ 315(a), 332(a).
3. The degree of proof required to establish a case before the Public Utility Commission is by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1954); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990); and *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976).
4. The party with the burden of proof in a PUC proceeding must establish that "the elements of [its case] are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary." *Burleson v. Pa. PUC*, 461 A.2d 1234, 1236 (Pa. 1983) (citing *Lear v. Shirk's Motor Express Corp.*, 152 A.2d 883 (1959)).
5. An applicant in a merger/acquisition proceeding must demonstrate that the proposed transaction will "affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." *City of York v. PUC*, 295 A.2d 825,828 (1972).
6. An applicant in a proceeding under Sections 1103 and 1329 of the Public Utility Code, 66 Pa. C.S. §§ 1102, 1329, must show not only that no harm will come from proposed transaction, but also establish that substantial affirmative benefits flow to ratepayers. *McCloskey v. PUC*, 195 A.3d 1055 (Pa. Cmwlth. Ct. 2018); *Popowsky v. Pa. PUC*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007).
7. Aqua has not borne its burden by a preponderance of evidence to demonstrate that its Application should be granted.
8. Aqua has not demonstrated that granting its Application would result in substantial affirmative public benefits. *City of York v. PUC*, 295 A.2d 825,828 (1972); 66 Pa. C.S. §§ 1102-1103.
9. Aqua has not demonstrated that granting its Application is in the public interest. 66 Pa. C.S. §§ 1102-1103.
10. The proposed transaction is unjust, unreasonable, unlawful, and not in the interest of the DELCORA ratepayers, Aqua ratepayers, or the general public. 66 Pa. C.S. §§ 1102-1103, 1301.

11. Aqua failed to comply with the requisite procedural and substantive requirements of Section 1329 of the Public Utility Code, 66 Pa. C.S. § 1329.
12. Aqua and DELCORA have not met the arm's length transaction requirement in Section 1329(g) of the Public Utility Code, 66 Pa. C.S. § 1329(g).
13. Aqua does not possess the requisite technical, managerial, and legal fitness to acquire the DELCORA System Assets.
14. The proposed use of DELCORA Trust violates Section 1303 of the Public Utility Code that requires PUC-jurisdictional rates to be filed with and approved by the Commission. 66 Pa. C.S. § 1303.
15. The Asset Purchase Agreement between Aqua and DELCORA is a contract that is subject to review and approval by the Commission under Section 507 of the Public Utility Code, 66 Pa. C.S. § 507.
16. The Asset Purchase Agreement between Aqua and DELCORA violates the Municipality Authorities Act of 1945, 53 Pa. C.S. §5601 *et seq.*
17. DELCORA's Executive Director, Mr. Robert Willert is an "interested" party in the Asset Purchase Agreement between Aqua and DELCORA, as defined in Section 5614(e) of Municipality Authorities Act, 53 Pa. C.S. § 5614(e).
18. Aqua has failed to demonstrate that it has legal access to certain assets it proposes to acquire, including wastewater facilities and contract rights of the Municipal Protestants. 66 Pa. C.S. § 507.
19. Aqua's failure to demonstrate it has full legal access to all of the assets it proposes to acquire prevents Aqua from obtaining a certificate of public convenience to serve the existing DELCORA customers. 66 Pa. C.S. §§ 1102-1103.

Appendix D
Proposed Ordering Paragraphs

THEREFORE,

IT IS ORDERED:

1. That the Application of Aqua Pennsylvania Wastewater, Inc. is hereby denied.
2. That the Secretary's Bureau shall mark the proceeding at Docket No. A- 2019-3015173 closed.