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December 1, 2020

***VIA ELECTRONIC FILING***

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

Re: Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for approval of the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority; Docket No. A-2019-3015173; **SUNOCO PARTNERS MARKETING & TERMINALS, L.P./ENERGY TRANSFER'S MAIN BRIEF (PUBLIC VERSION)**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is Sunoco Partners Marketing & Terminals, L.P./Energy Transfer's ("SPMT") Main Brief (Public Version) in the above-captioned matter. Please note that the Highly Confidential version of SPMT's Main Brief will be filed under separate cover.

Should you have any questions or comments, please feel free to contact me directly.

Very truly yours,

*/s/ Whitney E. Snyder*

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Kevin J. McKeon  
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KJM/das  
Enclosures

cc: Honorable Angela T. Jones (via email [angeljones@pa.gov](mailto:angeljones@pa.gov))  
Honorable Charles E. Rainey, Jr. (via email [crainey@pa.gov](mailto:crainey@pa.gov))  
Per Certificate of Service (letter and certificate of service only)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MAIN BRIEF OF  
SUNOCO PARTNERS MARKETING & TERMINALS, L.P.**

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

### **A. Procedural History**

By Application filed March 3, 2020, Aqua Pennsylvania Wastewater, Inc. (Aqua) requested Commission approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA), and approval of the ratemaking rate base of these assets, as Sections 1102 and 1329 of the Public Utility Code require. Aqua also requested approval of contracts, including assignments of contracts from DELCORA to Aqua, pursuant to Section 507 of the Public Utility Code. The Application included direct testimony, exhibits, and other supporting materials.

Numerous parties intervened by notice or permission and/or protested the Application, including the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), the Commission's Bureau of Investigation and Enforcement (I&E), Delaware County (County), Edgmont Township of Delaware County (Edgmont), Southwest Delaware County Municipal Authority (SWDCMA), Upland Borough, Lower Chichester Township, Trainer Borough, Sunoco Partners Marketing and Terminals L.P./Energy Transfer (SPMT), Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark, Corporation (Kimberly Clark), Treasure Lake Property Owners Association, Ross Schmucki, and C&L Rental Properties. DELCORA, not a party to the Application, separately intervened. Parties that filed protests include the OCA, the County, SWDCMA, Upland Borough, Lower Chichester Township, Trainer Borough, Edgmont, SPMT, Kimberly Clark, Ross Schmucki, and C&L Rental Properties.

On July 27, 2020, the Commission by Secretarial Letter accepted the Application as complete for review. The matter was assigned to the Office of Administrative Law Judge for a hearing.

By Order dated August 31, 2020, Chief ALJ Charles Rainey granted the OCA's Motion to extend the statutory deadline for Commission decision to March 26, 2021. The procedural schedule

was revised to accommodate the extension and a Protective Order was entered to address proprietary materials.

Pursuant to the procedural schedule, intervenors/protestants OCA, OSBA, I&E, the County, Edgmont, Lower Chichester, SWDCMA, Upland, SPMT, and Kimberly Clark filed direct testimony on September 29, 2020. Aqua filed rebuttal testimony on October 20, 2020. Intervenors/protestants filed surrebuttal testimony on November 2, 2020. A hearing was conducted remotely on November 9 and 10, 2020, via Zoom and telephone link. Portions of the transcript from November 9, 2020 are designated as Highly Confidential.<sup>1</sup> Aqua presented oral rejoinder testimony at the hearing on November 9, 2020.

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

Aqua, a wastewater public utility that serves 38,000 customer accounts scattered throughout Pennsylvania, seeks to acquire the assets of DELCORA, a municipal authority that owns and operates one of the largest wastewater systems in Pennsylvania. DELCORA serves all of Delaware County and parts of Chester County; by “any objective measure, DELCORA is larger than Aqua.” SPMT Statement No. 2 at 15:12-19. As SPMT Witness Woods summarized:

DELCORA is a large regional wastewater system operating in southeastern Pennsylvania. DELCORA was created on October 20, 1971 by a resolution of the Council of Delaware County under the Pennsylvania Municipality Authorities Act of 1945. The governing body of DELCORA is a nine-member board whose members are appointed to staggered terms by the Delaware County Council.<sup>2</sup> DELCORA's facilities serve residential, commercial, institutional, and industrial customers in Delaware and Chester Counties. DELCORA owns and operates a system consisting of 24 pump stations and associated force mains, and 180 miles of gravity collection system mains and interceptor sewers for the conveyance of wastewater to DELCORA's Western Regional Treatment Plant

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<sup>1</sup> SPMT will note this in any references to the **Highly Confidential** transcript with the designation “Tr. \_\_ (HC) at \_:\_.”

<sup>2</sup> Delaware County Regional Water Quality Control Authority, Audited Financial Statements, December 31, 2019; Page 3.

(WRTP) located in the City of Chester in Delaware County and to the Philadelphia Water Department's Southwest Water Pollution Control Plant.<sup>3</sup> The DELCORA Western Service Area includes eighteen (18) pumping stations which are owned and operated by DELCORA including the Central Delaware Pump Station which can direct flow to either the WRTP, a permitted 44 MGD activated sludge wastewater treatment plant, or the City of Philadelphia's Southwest Water Pollution Treatment Plant. The DELCORA Eastern Service Area includes (6) six pumping stations which are owned and operated by DELCORA. The Eastern Service Area discharges to the Philadelphia Southwest Water Pollution Control Plant (SWWPCP) and the WRTP.<sup>4</sup> In addition to the WRTP, DELCORA owns and operates three (3) remote Treatment Plants: Corinne Village (Pocopson Preserve) located in Pocopson Township; Sheeder Tract (Riverside) located in Pocopson Township; and Springhill Farms located in Chadds Ford Township. The average annual flow for Corinne Village is 0.013 MGD; for Sheeder Tract is 0.021 MGD and for Springhill Farms is 0.042 MGD.<sup>5</sup>

DELCORA owns all or part of the collection systems in the following areas: City of Chester, Chester Township, Borough of Marcus Hook, Borough of Rose Valley, Upland Borough, Parkside Borough, Trainer Borough, Edgmont Township, and Pocopson Township.<sup>6</sup> DELCORA serves approximately 16,000 customer connections;<sup>7</sup> however, a number of these connections are points at which flow is delivered to DELCORA from municipally-owned wastewater collection networks in the DELCORA service area. DELCORA provides wholesale conveyance and treatment service to municipal and municipal authority customers within all or part of 49 municipalities<sup>8</sup> that comprise Delaware County. DELCORA is a very large regional wastewater system that serves 197,000 Equivalent Dwelling Units ("EDU").<sup>9</sup> At 3 persons per EDU, the equivalent population served directly and indirectly by DELCORA exceeds 550,000.

SPMT Statement No. 2 at 11:18-13:13.

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<sup>3</sup> Company Exhibit D; DELCORA Sewerage Facilities Engineering Assessment and Original Cost; Pennoni Associates, Inc.; Philadelphia, PA; December 13, 2019; Page 4 and Company Exhibit W1, Direct Testimony of Robert Willert; Page 4, Line 12.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Company Exhibit W3, Direct Testimony of Michael DiSantis; Page 3, Lines 5-8.

<sup>7</sup> Company Exhibit U2, Direct Testimony of William C. Packer; Page 9, Line 21.

<sup>8</sup> Application; Page 3, Paragraph 8.

<sup>9</sup> Op.Cit.; Packer; Page 9, Line 21.



### **1. Financial condition of DELCORA.**

DELCORA is in good financial condition. It had positive net income of \$12.9 million in 2019 on operating revenue of \$66 million. SPMT Statement No. 2 at 13:16 -14:4. DELCORA has outstanding bonds and has easily met its debt service on them. The associated indentures obligate it to produce net revenues of at least 1.1 times the annual debt service requirements. SPMT Statement No. 2 at 14:8-9. DELCORA satisfied this obligation in 2019, with net cash from operations of \$18.8 million and debt service of \$6.1 million. DELCORA should also easily meet its debt service in 2020. *Id.* at 14:12-15.

### **2. Nearly all of DELCORA's capital assets have been contributions in aid of construction which under the proposed transaction would give Aqua a huge windfall of rate base supplied by customers or grants and result in significant increases to present Aqua customers and to DELCORA's customers now and in the future.**

DELCORA's capital assets have been financed primarily through proceeds from various bond issues, grants from the United States Environmental Protection Agency (EPA) and funds generated from ongoing operations. SPMT Statement No. 2 at 15:1-9. The amount of the federal grants is estimated at \$100,000,000. *Id.* This contribution in aid of construction<sup>10</sup> reduces the value of the DELCORA net investment to \$160,506,518. *Id.* In addition, various municipal participants in the DELCORA system have made contributions in aid of construction, so the actual value of the DELCORA net investment may be much lower. *Id.*

### **3. Contracts to be assigned and unassignable contracts.**

In addition to assets, DELCORA plans to assign its customer contracts to Aqua. Many of these contracts with municipalities involve the transfer to DELCORA of collection systems and

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<sup>10</sup> Under utility ratemaking a contribution in aid of construction, whether by a grant, developer, customer or other source, is not included in rate base or depreciated as the utility and its stockholders did not fund or invest in the assets contributed.

other assets, with provisions requiring the reversion of those assets to the municipal customer if DELCORA ceases to operate the system. A number of the municipalities have yet to agree to DELCORA's sale of the assets to Aqua, but Aqua's purchase price includes the sale of the assets. SPMT Statement No. 2 at 35:17-38:18.

Among the contracts to be assigned to Aqua is SPMT's contract. SPMT is one of the major industries served in the Western Region of the DELCORA system. In 2019, DELCORA derived approximately \$7 million of its \$66 million in revenue from these Western Region industrial customers; DELCORA billed and received \$2.8 million from SPMT. SPMT Statement No. 2 at 13:16-19. SPMT's contract runs through at least 2025. Application, Exhibit F129. It limits the amount of wastewater that SPMT can discharge to the DELCORA system for treatment and sets out the parameters used to define the costs that can be recovered from SPMT for service rendered. The costs recovered from SPMT are limited to costs associated with the DELCORA Western Region system. The contract provides that DELCORA issues quarterly estimated bills to SPMT based on current DELCORA rates for service and the estimated flow emanating from the Marcus Hook Industrial Complex (MHIC or Marcus Hook facility) that SPMT operates. At the close of each year, the charges to SPMT are subject to audit and a true-up adjustment is made based on the results of the audit and actual performance.

The transaction between Aqua and DELCORA is memorialized in an Asset Purchase Agreement (APA). Application, Exhibit B1. Section 2.06 of the APA addresses the circumstance in which DELCORA's transfer of an asset to Aqua would "result in a violation of Law, or would require the consent, authorization, approval or waiver of any Person (other than the Parties), including any Governmental Authority, and such consent, authorization, approval or waiver shall not have been obtained prior to the Closing." [Begin HC] [REDACTED]

[REDACTED]

[REDACTED] [End HC] Section 2.06 provides that if the needed consent or approval is not obtained prior to closing, the asset affected will not be transferred until the consent or approval is obtained and will be designated a “Nonassignable Asset.” *Id.* Where a Nonassignable Asset is designated, Section 2.06 (b) provides that the parties will cooperate to provide to each other “the economic and, to the extent permitted under Law, operational equivalent of the transfer of such Nonassignable Asset to Buyer.” Tr. (HC) 227:14-228:21.

Although not part of the transaction, and not an obligation Aqua undertook, DELCORA has decided to establish a rate stabilization Trust using proceeds from the sale to Aqua, in order to offset the rate increases that will be imposed on DELCORA’s customers under Aqua’s ownership. The County has challenged DELCORA’s establishment of the Trust as *ultra vires* and that lawsuit is pending in the Delaware County Court of Common Pleas. The County also in that same litigation is challenging the DELCORA asset sale to Aqua. Delaware County Statement No. 2 at 6:14-20. As discussed later in this Brief, the Trust Fund will likely be less than stated by DELCORA and will function essentially as a band-aid for the severe increase to present and future rates that will occur if Aqua’s planned acquisition of DELCORA is consummated.

In addition to the uncertainty that the pendency of the County’s litigation creates, the evidence shows that with respect to the assets to be transferred, Aqua and/or DELCORA have to date failed to obtain a number of required consents and approvals. These include:

- Consent of EPA and the federal Office of Management and Budget (OMB) under Presidential Executive Order 12803 (E.O.12803) because DELCORA’s assets have been funded in part with federal grants and loans, SPMT Statement No. 2 Appendix C;
- Consent of various municipalities whose asset transfers to DELCORA revert to the municipalities upon DELOCRA’s sale of its system unless otherwise agreed;
- Consent of EPA and the Pennsylvania Department of Environmental Protection (DEP), and approval of the federal district court for the Eastern District of Pennsylvania to allow Aqua to undertake DELCORA’s obligations under a 2015

consent decree that requires DELCORA to initiate remedial measures for combined sewer overflows (CSOs) on its system; and

- [Begin HC]

[End HC]

## II. BURDEN OF PROOF

Pursuant to Section 332(a) of the Public Utility Code, “the proponent of a rule or order has the burden of proof.” 66 Pa. C.S. § 332(a). To obtain a certificate of public convenience, “the acquiring public utility has the burden, by preponderance of the evidence, to establish that it is technically, legally and financially fit to provide the proposed service.” *McCloskey v. Pennsylvania Public Utility Commission*, 195 A.3d 1055, 1058 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*), *citing Seaboard Tank Lines, Inc. v. Pennsylvania Public Utility Commission*, 502 A.2d 762 (Pa. Cmwlth. 1985) (*Seaboard*). The burden of proof is the preponderance of the evidence standard. *See Suber v. Pennsylvania Com’n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992) (*Lansberry*). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *See Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 855-56 (Pa. 1950).

An existing certificate holder is entitled to a continuing presumption regarding its fitness. *McCloskey* 195 A.3d at 1058. Parties challenging the application bear the burden of rebutting this presumption. *Lehigh Valley Transp. Services, Inc. v. Pennsylvania Public Utility Commission*, 56 A.3d 49, 58 (Pa. Cmwlth. 2012) (*Lehigh Valley*).

The Commission’s adjudications must be supported by substantial evidence in the record.

2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037 (Pa. 1980) (*Norfolk*); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

### III. STATEMENT OF QUESTIONS INVOLVED

- A. Whether the Application should be denied because it confers no “substantial affirmative public benefits”?
- B. Assuming the Application is granted, whether it should be conditioned to require that Aqua not acquire DELCORA’s WRTP, its 26 CSO regulators, or its contract with SPMT, such that DELCORA continues to own the WRTP, the 26 CSO regulators, and the obligation to serve SPMT on a permanent basis?
- C. In the alternative, and assuming the Application is granted, whether it should be conditioned to require that Aqua not acquire DELCORA’s WRTP, its 26 CSO regulators, or its contract with SPMT, such that DELCORA continues to own the WRTP, the 26 CSO regulators, and the obligation to serve SPMT under its existing contract, on a transitional basis until Aqua is able to demonstrate to the Commission’s satisfaction that under Aqua ownership of the WRTP and the 26 CSO regulators, Aqua is able to operate the WRTP and the 26 CSO regulators in compliance with all applicable environmental requirements (including obtaining the necessary permits for the WRTP) and [Begin HC]

[End HC]

### IV. SUMMARY OF ARGUMENT

The Application should be denied. The transaction provides no benefits, let alone substantial affirmative public benefits. Instead, the transaction actively causes harm, by needlessly increasing rates with no corresponding benefit and by [Begin HC]

[REDACTED]

[REDACTED]

[REDACTED] **[End HC]** The unripe and incomplete proposed transaction also is subject to so many contingencies and other required approvals not yet obtained or even applied for that neither the transfer price nor the ultimate contours of what the Commission has been asked to approve are known or knowable.

The transaction's adverse impact on rates is sufficient reason alone to deny the Application. Aqua ownership will increase the DELCORA system's revenue requirements and will therefore increase DELCORA customers' rates, as well as the rates of existing Aqua customers, with no discernable benefit to anyone other than Aqua shareholders. DELCORA presently is a well-managed publicly owned treatment works that is far larger than Aqua's current wastewater operations, that is in no need of "rescue," and that will continue to be run by DELCORA's existing management team even if Aqua takes ownership of DELCORA. DELCORA already has in place capital improvement plans that Aqua has simply adopted rather than replaced or improved. The rate stabilization Trust that DELCORA plans to fund with transaction proceeds to offset planned Aqua rate increases is illusory. All of these plans will effectuate a breach of SPMT's existing contract with DELCORA, which extends years beyond the intended closing date of the transaction. Even if there were affirmative public benefits from the transaction (there are not), the harm that increased rates will cause far outweighs the alleged public benefits.

**[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[Redacted] **[End HC]**

If the Application is not denied outright, the Commission must impose conditions that address these issues. In particular, the Commission should require DELCORA to retain ownership on a permanent basis of the WRTP and the 26 CSO regulators **[Begin HC]** [Redacted]

[Redacted] **[End**

**HC]** Alternatively, the Commission should impose the same conditions on a transitional basis,

**[Begin HC]** [Redacted]

**[End HC]**



## **V. ARGUMENT**

### **A. Section 1329**

#### **1. Introduction**

SPMT did not contest the Section 1329 valuation issues in this proceeding, except to the extent that if the Commission grants the Application, it condition the grant on requiring that ownership of the W RTP and the 26 CSO regulators remain with DELCORA; if the Commission so conditions the grant of the Application, the value of the plant not transferred should be excluded from Aqua's rate base. SPMT Statement No. 2SR at 32:10-18. Moreover, if the W RTP, a significant asset, is removed from the transaction, the respective valuation experts should be required to amend their valuation estimates to reflect such a change. *Id.* at 33:1-10. The same treatment should apply for any municipal assets that are not transferred.

#### **2. Section 1329 - Legal Principles [not addressed]**

#### **3. Aqua's Application [not addressed]**

#### **4. Challenges to UVE Appraisals [not addressed]**

##### **a. Cost Approach**

##### **b. Market Approach**

##### **c. Income Approach**

#### **5. Conclusion**

SPMT and other intervenors have raised material questions concerning the extent to which the DELCORA-owned assets can or should be transferred to Aqua. If the fundamental inventory of transferable assets is not known, the Commission is not in a position where it can reasonably pass judgement on the requested rate base determination. Similarly, the appropriate sale price cannot be known if material portions of the assets will not be sold or will revert to municipal ownership. If the final sale price is not known, the net proceeds used to fund the proposed rate stabilization trust also cannot be known at this time. For these reasons, the Petition should be denied.

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

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

In addition to approval under Section 1329 of the Public Utility Code, Aqua’s Application requires a certificate of public convenience under two subsections of Section 1102 of the Public Utility Code. To commence wastewater service to DELCORA’s customers, Aqua requires a certificate under Section 1102(a)(1)(i), which provides that a certificate is required before a public utility may commence service in a different territory than one for which it already possesses a certificate of public convenience to provide that service. To acquire DELCORA’s assets, Aqua also requires a certificate under 66 Pa. C.S. § 1102(a)(3), which provides that a certificate is required before a public utility may acquire title to, or the possession or use of, utility property<sup>11</sup> from another entity, including a municipal corporation such as DELCORA.

Section 1103(a) of the Public Utility Code sets forth the standard Aqua must meet: “A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a). To meet this standard, Aqua must prove that it is technically, legally, and financially fit to provide the proposed service. *McCloskey*, 195 A.3d at 1058, *citing Seaboard*, 502 A.2d 762. Because the transaction will result in what amounts to a merger between Aqua and DELCORA, Aqua also must adduce sufficient evidence to allow the Commission “to find affirmatively that public benefit will result from the merger.” *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825, 828 (Pa. 1972) (*City of York*). *See Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d

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<sup>11</sup> A certificate is not required where the undepreciated book value of the property falls below specified thresholds, 66 Pa. C.S. § 1102(a)(3)(i)-(iv). The undepreciated book value of DELCORA’s assets exceeds those thresholds.

1040 (Pa. 2007) (Verizon’s application for a certificate of public convenience permitting Verizon’s acquisition of MCI as a wholly-owned subsidiary measured against the “substantial affirmative public benefits” standard).

## 2. Fitness

Aqua is presumed fit, *McCloskey*, 195 A.3d at 1058. SPMT has therefore not addressed this issue.

## 3. Affirmative Public Benefits

Aqua must prove “not only that no harm will come from the transaction” but also that “substantial affirmative benefits” will flow from it. *McCloskey*, 195 A.3d at 1064, *citing City of York*, 295 A.2d at 828. Quite apart from the existential threat [Begin HC] [REDACTED] [End HC] and the unnecessary and dramatic rate increases it will bring, the transaction confers no substantial affirmative benefits on DELCORA’s customers, Aqua’s wastewater customers, or Aqua’s water customers.

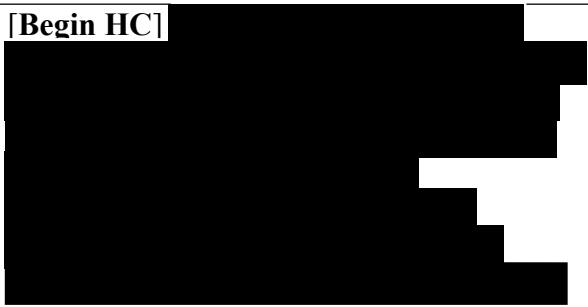
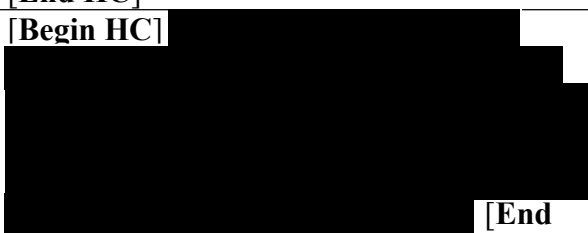
To be sure, Aqua has claimed alleged benefits, summarized in Aqua Witness Packer’s direct testimony, which he states are drawn from “the Application and from direct testimony submitted in support of the Application.” Aqua Statement No. 2 at 13:10-14:20. A review of the alleged benefits, however, reveals that the only likely beneficiaries of the transaction will be Aqua and its shareholders:

ALLEGED BENEFIT <sup>12</sup>	REALITY
<ul style="list-style-type: none"> <li>“The majority of the sale proceeds will be placed in an irrevocable Trust that will benefit DELCORA customers for years to come.”</li> </ul>	<p>Projections that the Trust will be funded sufficiently to offset Aqua rate increases until mid-2028 are clearly wrong. The inputs Aqua and DELCORA provided are the product of double counting and wishful thinking. <i>See infra</i> at Section V.B.4.b.(ii)(detailed discussion of why, assuming the courts do not</p>

<sup>12</sup> Alleged benefits as stated in Aqua Statement No. 2 at 13:13-14:20.

	invalidate the Trust, it is likely to be underfunded or unfunded because of double counting of expendable funds and the payout hierarchy requirements of Executive Order 12803). <sup>13</sup> Moreover, even if the Trust is funded at some much smaller than projected level, its administration will be entirely beyond the control of Aqua or the Commission.
<ul style="list-style-type: none"> <li>• “Aqua is familiar with the DELCORA service areas and serves populations of nearly 500,000 in Delaware County and 200,000 in Chester County”</li> </ul>	Familiarity with DELCORA’s service territory cannot be viewed as anything more than a “met expectations” requirement. It certainly is not a benefit, as lack of familiarity would obviously be a detriment. Moreover, Aqua obviously is not more familiar with DELCORA’s customers than DELCORA is, and DELCORA is perfectly capable of continuing to service its customers.
<ul style="list-style-type: none"> <li>• “Economies of scale will result from the these [sic] nearby and overlapping service areas”</li> </ul>	This claim is unsupported and unlikely. DELCORA’s existing customer base and size dwarfs Aqua wastewater operations. SPMT Statement No. 2 at 15:17-19 (“By any objective measure, DELCORA is larger than Aqua Pennsylvania Wastewater, Inc., the AQUA entity that will actually acquire DELCORA if this transaction is approved.”). Given Aqua’s post-acquisition plans to operate DELCORA in place as a satellite under existing DELCORA management with all existing DELCORA employees, there can be no appreciable cost savings or economies of scale in any of the major cost centers. <i>See</i> Aqua Statement No. 4 at 9:22-10:2 (Aqua will maintain “the office and operations centers currently in place in DELCORA’s service territory”); Delaware County Statement No. 2 at 5 n. 1 (Current DELCORA executive director to have “oversight of Aqua PA in southeast PA including DELCORA and SEPA [wastewater] operations...”); Aqua

<sup>13</sup> The E.O. 12803 requirements, which also place calculation of the transfer price in the hands of the Federal government because DELCORA did not seek and obtain competitive bids in the proposed transaction, were brought to Aqua’s attention by SPMT, and Aqua and DELCORA have acknowledged that E.O.12803 applies to the transaction. Neither Aqua nor DELCORA have explained in testimony how or when they expect to work with OMB to establish the actual transfer price of the transaction. *See infra* at Section V.B.4.b.(ii).

	Statement No. 1 at 8:3-4, (Aqua will “offer employment to all of the DELCORA employees”).
<ul style="list-style-type: none"> <li>“DELCORA customers will benefit from Aqua's experience in large-scale capital planning and replacement programs”</li> </ul>	DELCORA, not Aqua, created the capital investment plan that, post-acquisition, Aqua, employing existing DELCORA management, will implement. SPMT Statement No. 2 at 17:19-18:7. In other words, DELCORA, a much larger wastewater utility than Aqua wastewater, after Aqua absorbs it, will use existing DELCORA personnel to implement existing DELCORA plans under the nominal leadership of Aqua. This is not a benefit.
<ul style="list-style-type: none"> <li>“DELCORA customers will benefit from customer protections provided by the Commission's regulations and the Company's Helping Hand program”</li> </ul>	DELCORA has been serving its customers as a public governmental entity for decades. There is no evidence in this record that DELCORA customers lack customer protections under DELCORA’s existing programs.
<ul style="list-style-type: none"> <li>“Aqua has committed to preserving the jobs of DELCORA employees”</li> </ul>	This is a laudable goal, but not a benefit per se and arguably a detriment, from the perspective of realizing economies of scale as the result of the transaction.
<ul style="list-style-type: none"> <li>“Aqua has a proven record of environmental stewardship of wastewater systems”</li> </ul>	<p>[Begin HC]</p>  <p>[End HC]</p>
<ul style="list-style-type: none"> <li>“Aqua's expertise in implementing large scale projects and compliance with Pennsylvania Department of Environmental Protection and US Environmental Protection Agency regulations”</li> </ul>	<p>[Begin HC]</p>  <p>[End HC]</p>
<ul style="list-style-type: none"> <li>“The combining of systems and customers provides inherent stability in the day to day utility operations, in that, these systems do not all require major capital investments at the same time and, therefore, spreads the financial impacts over the long term</li> </ul>	Whatever validity this principle may have as a general rule, under the circumstances presented in this transaction where DELCORA has a long track record of providing quality service at rates much lower than Aqua’s, and where Aqua is in the process of spending hundreds of millions of dollars on

operations of the utility”	acquiring and investing in multiple additional wastewater systems, the costs associated with those acquisitions are likely to dramatically raise the rates of DELCORA customers, not subsidize or stabilize them. <i>See infra</i> at Section V.B.4.b(i); SPMT Statement No. 2SR at 4:17-12:17; OSBA Statement No. 1 at 6:12 – 7:8.
<ul style="list-style-type: none"> <li>“DELCORA's customers will become part of a larger-scale, efficiently operated, water and wastewater utility”</li> </ul>	DELCORA’s existing customer base and size dwarfs Aqua existing wastewater operations. SPMT Statement No. 2 at 15:17-19 (“By any objective measure, DELCORA is larger than Aqua Pennsylvania Wastewater, Inc., the AQUA entity that will actually acquire DELCORA if this transaction is approved.”). There is no evidence in the record that Aqua is more efficiently operated than DELCORA. There is ample evidence on the record to demonstrate that existing Aqua rates result in much higher charges for the same service provided by DELCORA. OSBA Statement No. 1 at 2:21-3:6.
<ul style="list-style-type: none"> <li>“By virtue of the Company's larger combined customer base, future infrastructure investments across the Commonwealth, driven by normal replacement cycles, emergency repairs, emergency response or compliance with new environmental regulations, will be shared at a lower incremental cost per customer for all of Aqua's customers over time”</li> </ul>	Whatever validity this principle may have as a general rule, under the circumstances presented in this transaction where DELCORA has a long track record of providing quality service at rates much lower than Aqua’s, and where Aqua is in the process of spending hundreds of millions on acquiring and investing in multiple additional wastewater systems, the costs associated with that activity are likely to dramatically raise the rates of DELCORA customers, not stabilize them. <i>See infra</i> at Section V.B.4.b(i); SPMT Statement No. 2SR at 4:17-12:17. Moreover, DELCORA’s cost of capital is less than half that of Aqua’s. SPMT Statement No. 2 at 7:16-8:9.
<ul style="list-style-type: none"> <li>“The elimination of the treatment expense to PWD [Philadelphia Water Department] will allow DELCORA to control its own destiny and offset the potential risk of future increases”</li> </ul>	DELCORA had planned to eliminate the PWD treatment arrangement and associated expense on its own and thereby “control its own destiny” by expanding the W RTP before it entered into this transaction with Aqua, and there is every reason to believe that DELCORA would be able to follow through to “control its own destiny” on its own without the added burden on DELCORA

	ratepayers of Aqua ownership. SPMT Statement No. 2 at 16:1-13; 17:19-18:7. In doing so, DELCORA would also maintain the W RTP’s status as a POTW, thus preserving the environmental regulatory regime that DELCORA and its industrial customers currently rely on to maintain compliance with environmental laws.
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Aqua also asserts repeatedly that regionalization of wastewater systems must be viewed as a beneficial end in itself. Application at ¶ 56a; Aqua Statement No. 1 at 10:9-12; Aqua Statement No. 2 at 8:6-7; Aqua Statement No. 2R at 3:20-22. As even Aqua concedes, however, the Commission’s policy encouraging regionalization focuses on “acquisitions of smaller systems by larger more viable systems.” Application at ¶ 56a, citing *Final Policy Statement on Acquisition of Water and Wastewater Systems*, Docket No. M-00051926, Final Order at 18 (Aug. 17, 2006). That is not the situation with DELCORA. DELCORA is larger than Aqua’s entire existing wastewater operation, serving 197,000 Equivalent Dwelling Units to Aqua’s approximately 38,000. SPMT Statement No. 2 at 13:3-13; 15:11-19; SPMT Statement No. 2SR 2R at Exhibit HJW-1SR p. 12. There is no evidence in the record that DELCORA is not viable, or that it is “less viable” than Aqua. Aqua itself admits that even though it believes that most municipally-owned wastewater systems have not “had proper repair and maintenance over the years,” Aqua Statement No. 2R at 48:22-49:1, that is not DELCORA’s situation. *Id.* at 49:10-11 (“I would not categorize [DELCORA] as underinvested.”). [Begin HC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End HC] In short, the “regionalization” benefit that Aqua attempts to co-opt and exploit in this case is nonexistent under the present facts. Indeed, using the same arguments offered by Aqua in this proceeding, it would be easier to justify the public benefits of a DELCORA acquisition of Aqua than to make the case offered in favor of an Aqua acquisition of DELCORA. DELCORA is financially sound, it already serves a huge region, has a long track record of doing it well at a customer cost far lower than Aqua will be able to provide, and is in no need of “rescue.”

#### **4. Public Interest**

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

SPMT is aware of the pending litigation the County initiated in the Court of Common Pleas of Delaware County alleging that DELCORA’s entry into the APA and creation of the rate stabilization Trust are *ultra vires* acts. The pendency of this litigation injects yet more uncertainty into what is already a transaction that is contingent on so many other as-yet unattained approvals or un-negotiated transactions. Moreover, in the event the trial court voids the creation of the Trust, any possibility of some relief, however insignificant, to Aqua’s planned rate increases due to the transaction and its aftermath will be extinguished.

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

In deciding whether the transaction results in a “substantial public benefit,” the Commission must address its impact on rates. *McCloskey*, 195 A.3d at 1066 (“Because *City of York* requires the impact on rates to be considered, the Commission must address that impact when deciding whether there is substantial public benefit.”). The evidence establishes that rates for DELCORA customers and rates for existing Aqua customers will be significantly higher as a result of the transaction. SPMT Statement No. 2 at 18-28. The Commission must decide whether this



negative rate impact “is outweighed by the other positive factors.” *McCloskey*, 195 A.3d at 1067. Aqua has presented as its primary alleged benefit of the transaction that “the majority of the sale proceeds will be placed in an irrevocable Trust that will benefit DELCORA customers for years to come.” Aqua Statement No. 2 at 13:16-17; *see* Aqua Statement No. 5 at 11:12-14 (Trust is the “primary benefit” of the transaction). The reality, however, is that under Aqua ownership, DELCORA customers will face very substantial rate increases of a magnitude they would never experience under continued DELCORA ownership, both as a direct result of the transaction and as an indirect result of Aqua’s other existing and planned acquisitions, and that the Trust is likely to provide little or no offsetting benefit.

- (i) *Aqua rates will be significantly higher than DELCORA’s, with no discernable benefit from Aqua ownership.*

SPMT Witness Woods analyzed the impact on DELCORA customer rates under existing DELCORA ownership and under proposed Aqua ownership on a stand-alone basis, and concluded that the transaction will have a substantial adverse rate impact:

- Aqua’s revenue requirement associated with purchasing DELCORA’s assets, assuming all assets transfer at the full amount of \$276.5 million, will be double the cost of existing DELCORA debt service, increasing the revenue requirement from approximately \$15 million per year to approximately \$30 million. SPMT Statement No. 2 at 6:11-7:2; 18:17-21:2; Schedule HJW-1.
- The increase in Aqua’s revenue requirement associated with the purchases of DELCORA’s assets will ***increase DELCORA customers’ rates by 12.55%, increase existing Aqua wastewater customer rates by 14.32%, and increase existing Aqua water customer rates by 4.58%***. SPMT Statement No. 2 at 6:2-9.
- These rate increases associated with the purchase price Aqua will pay do not reflect the revenue requirement associated with proposed capital improvements to the DELCORA system that DELCORA has planned and that Aqua now will implement; under Aqua ownership, the revenue requirement for these very same improvements will be ***\$46 million more per year*** than if DELCORA retained the assets and made the investments. If DELCORA were to retain ownership and implement the improvements it has planned itself, the net present value of savings for DELCORA customers would be nearly half a billion dollars -- \$462.9 million – over the period ending 2040. SPMT Statement No. 2 at 7:4-14; 23:14-28:15;

Schedules HJW-2, HJW-3, and HJW-4.

- SPMT’s total bill under Aqua ownership over the period ending 2040, with Aqua implementing DELCORA’s capital improvement program, will be ***\$18.6 million more on a net present value basis*** than it would be under DELCORA’s continued ownership. SPMT Statement No. 2 at 35: 5-15; Schedule HJW-6.
- A portion of a DELCORA customer’s total out-of-pocket cost for these significant rate increases would be lowered if the proposed rate stabilization Trust is actually implemented, operated, and funded as proposed, so as to offset rate increases through 2028, but there is no credible basis for assuming that relief from the Trust will actually materialize, whereas it is certain that Aqua’s revenue requirement-driven rate increases are real.

Aqua’s response to this detailed quantification of the significant rate increases that will be imposed on DELCORA customers because of Aqua ownership is the testimonial equivalent of a shoulder shrug. Aqua Witness Packer acknowledges that rates will go up because of Aqua’s much higher capital costs, Aqua Statement No. 2R at 49:16-50:12, and concedes that Mr. Woods’ calculations quantifying the respective revenue requirements and resulting rate increases on Schedules HJW-2, 3 and 4 “appear to be accurate,” *id.* at 52:21-53:1. His justification for Aqua rate increase projections that are lower than those that Mr. Woods calculated is that Aqua’s cost of service post-2028 will be “allocated over a large wastewater customer base,” thereby subsidizing DELCORA customers’ rates by spreading the cost of the DELCORA system beyond DELCORA system customers. *Id.* at 52:23-53:3.

As Mr. Woods pointed out in surrebuttal, however, although there is no doubt that Aqua has a growing customer base as the result of its aggressive and very expensive acquisition of wastewater systems into which it is pouring hundreds of millions of dollars, SPMT Statement No. 2SR at 8:12-11:2, allocating those costs over a growing Aqua customer base is a two-way street: Aqua’s equalization of rates is just as likely (if not more likely) to increase rates for former DELCORA customers as it is to lower them. SPMT Statement No. 2SR at 2:17-12:17. In contrast to Mr. Packer’s attempt to paint a rosy rate picture for post-acquisition DELCORA customers,

OSBA Witness Kalcic described the true workings of uniform tariff rates where, as here, differentials in rates between the DELCORA service area and other Aqua service areas will exist; his analysis shows that moving DELCORA rates upwards toward Aqua's average rate for each class of service would increase the bill of a non-industrial DELCORA customer using 6,000 gallons per month by almost 90%. SPMT Statement No. 2SR at 11:10-12:2, citing OSBA Statement No. 1 at 6:17-22. Given this reality, Mr. Woods' stand-alone data-driven approach to analyzing the rate impact of Aqua's acquisition is conservative in that it actually understates the rate impact:

In refusing to show the impact of the acquisition on a stand-alone basis, Mr. Packer's projection purports to demonstrate that rate equalization among service areas will shift the cost to serve DELCORA customers to Aqua customers in other Aqua service areas, thereby diluting the impact of the acquisition on DELCORA customers' rates. Obviously, however, rate equalization is a two-way street, and Mr. Packer is only pointing out the potential for costs being transferred out of the DELCORA footprint, but not back in.

SPMT Statement No. 2SR at 6:16-21.

Aqua offered no rejoinder testimony on this critical point.

At bottom, Aqua's answer to the indisputable evidence that its acquisition of DELCORA's assets will foist significant rate increases on DELCORA customers is the vague assurance that ill-defined alleged "benefits" of the transaction outweigh this significant detriment. Chief among these alleged benefits as presented by Aqua is the proposed rate stabilization Trust. Aqua Statement No. 2 at 13:16-17 (Trust placed first on list of alleged benefits); Aqua Statement No. 5 at 11:12-14 (Trust described as the "primary benefit" of the transaction). As explained below, however, the evidence reveals that the Trust is likely to be an empty promise. Moreover, as already demonstrated, the record belies other alleged benefits: DELCORA presently operates a much larger wastewater system than Aqua does, has done so efficiently and competently for decades,

and is not, as Aqua itself concedes, “underinvested” in the way that Aqua believes the majority of other “municipal authority owned systems” are. Aqua Statement No. 2R at 48:18-49:12. In short, there is no evidence that DELCORA is not capable of continuing to provide high quality service into the future at a lower cost to its customers than Aqua for the same service. *See supra* Section V.B.3.

(ii) *DELCORA customers will not get a benefit from the Trust*

Aqua is not proposing a rate stabilization plan as part of its Application. (Application ¶ 36).<sup>14</sup> Instead, DELCORA has said it will take the “majority of the sale proceeds,” Aqua Statement No. 5 at 11:14-15, after satisfying existing DELCORA debt, *id.* at 10:20, and place them in “an irrevocable trust for the benefit of DELCORA's customers.” *Id.* at 11:14-15. In reality, the Trust is unlikely to provide any benefit, however.

In the absence of Aqua or DELCORA satisfying their burden of proof by quantifying the starting balance of the Trust and the length of time that the Trust could provide payments to DELCORA customers to offset Aqua rate increases before it is exhausted, Mr. Woods in his direct testimony made that calculation based on known data points. He took DELCORA’s assumed sale proceeds (\$276,500,000), added DELCORA cash and investments on hand (\$100,051,839), subtracted existing DELCORA debt that would need to be paid off (\$143,011,834), subtracted DELCORA’s note payable to Edgmont Township (\$1,751,785), and derived a starting balance for the Trust of \$231,787,770. SPMT Statement No. 2 at 30:17-31:3. Based on assumptions set forth in his testimony and schedules, he projected that the Trust would be exhausted by mid-2028. *Id.* at 31:9-15. Aqua in rebuttal testimony has similarly projected that the Trust balance will offset a

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<sup>14</sup> A rate stabilization plan is defined as “a plan that will hold rates constant or phase rates in over a period of time after the next base rate case.” 66 Pa.C.S. § 1329(g). Section 1329(d)(4) provides that the tariff submitted shall remain in effect until such time as new rates are approved in new base rate cases.

portion of DELCORA customer bills from Aqua until 2028. Aqua Statement No. 2R at 34:12-21.

As it turns out, however, these Buyer and Seller projections are clearly wrong because the inputs Aqua and DELCORA provided are the product of double counting and wishful thinking. The evidence of double counting is clear. In responses to discovery that DELCORA provided after Mr. Woods submitted his direct testimony, DELCORA revealed that \$100 million that will be paid into the Trust will be paid out to Aqua to implement DELCORA's obligations under the federal court consent decree with EPA and DEP to remedy CSO issues under DELCORA's Long Term Control Plan (LTCP). SPMT Statement No. 2SR at 18:1-17; SPMT Exhibit HJW-1SR at 15, 17, 18. In addition, DELCORA Witness Pileggi revealed in rebuttal testimony that DELCORA's obligation to pay \$86 million for its share of the Philadelphia Water Department's Long Term Control Plan (PWD LTCP) between 2020 and 2028 was not included in DELCORA's capital expenditure plan, SPMT Statement No. 2SR at 13:4-14:6, citing Aqua Statement No. 6R at 3:10-15, and will cause Aqua to recover the \$86 million through higher rates. This will result in higher than expected offset payments from the Trust, thus depleting the Trust more rapidly than expected. SPMT Statement No. 2SR at 18:22-19:5. With fewer dollars in the Trust available to offset Aqua's rate increases, and with Aqua rate increases higher than initially projected, Mr. Woods calculated in his surrebuttal testimony that the Trust would run out of funds by 2024 rather than 2028. *Id.* Neither DELCORA nor Aqua disputed this conclusion when they had the opportunity to do so in rejoinder testimony.

It is equally clear that wishful thinking is all that supports the notion that a significant portion of the transaction proceeds will be available to fund the Trust. E.O.12803 applies to DELCORA's sale of its assets to Aqua because DELCORA's assets were funded in part through grants from the Federal Government through EPA-administered programs. SPMT Statement No. 2 at 44:10-50:12; SPMT Statement No. 2 Appendix C (Text of E.O. 12803). E.O. 12803 imposes

various requirements and restrictions on the sale of DELCORA's assets, including the need for approvals from EPA and OMB, the fixing of the transfer price for the assets by OMB, and a hierarchy of payments from DELCORA's proceeds from the sale that places the Trust last in line to receive any of the money. *Id.* Although Aqua and DELCORA apparently were unaware of E.O. 12803 until SPMT brought it to their attention,<sup>15</sup> both conceded in rebuttal that it applies. Aqua Statement No. 4R at 11:16-17; Aqua Statement No. 6R at 12:14-13:2.

Three provisions of E.O. 12803 are pertinent to the issue of the availability of funds for the Trust. The first is that where, as here, the transaction is not based on competitive bidding, the transfer price must be "determined by the head of the executive department or agency and the Director of the Office of Management and Budget." E.O.12803, Section 1(d). SPMT Statement No. 2 Appendix C. Accordingly, although Aqua and DELCORA have negotiated a sale price, it is EPA and OMB that must determine the price because it was not determined by competitive bidding; the price to be determined by EPA and OMB, and thus the starting point for determining the amount of the proceeds available for the Trust, is presently unknown.

Second, E.O. 12803 prescribes the distribution of the proceeds, and expressly requires that DELCORA must first pay back to the local governments that contributed property to DELCORA "the unadjusted dollar amount" of those contributions, and then repay the federal government the full amount of grants less accumulated depreciation; only then can any of the proceeds of the sale go to DELCORA. The operative E.O.12803 provision states:

[T]he transfer price shall be distributed, as paid, in the following manner: (i) State and local governments shall first recoup in full the unadjusted dollar amount of their portion of total project costs (including any transaction and fix-up costs they incur) associated with the infrastructure assets involved; (ii) if proceeds remain, then the Federal Government shall recoup in full the amount of Federal grant awards associated with the infrastructure assets, less the

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<sup>15</sup> E.O.12803 is not mentioned in the Application or any of the testimony that accompanies it.

applicable share of accumulated depreciation on such asset (calculating using the Internal Revenue Service accelerated depreciation schedule for the categories of assets in question); and (iii) finally, the State and local governments shall keep any remaining proceeds....

E.O. 12803, Section 3(c). SPMT Statement No. 2 Appendix C.

Third, Section 4(a) of E.O. 12803 requires that DELCORA use any funds that remain to pay off debt or invest in additional infrastructure. E.O. 12803, Section 3(c). SPMT Statement No. 2 Appendix C.

As Mr. Woods explained in his direct testimony, none of these conditions have been met:

I do not believe all of these criteria can be met though the proposed transaction. First, while the proceeds of the sale are intended to extinguish DELCORA debt, it is not apparent that the prior repayment of the local funding shares or federal shares have been accommodated. Second, the net amount of the purchase price less outstanding DELCORA debt plus the DELCORA cash investments and cash on hand is being transferred to the proposed DELCORA trust and these monies will be used to artificially depress customer wastewater bills for a limited period of time. These funds, especially including the cash investments and cash on hand could have been used by DELCORA to fund the construction of part of its capital improvement plan. Instead, these funds amounting to approximately \$100 million will be moved to the trust and ultimately be paid to AQUA as the trust funded portion of the customer bills. There does not appear to be any other aspect of the proposed transaction where sale proceeds are being invested in new infrastructure.

SPMT Statement No. 2 at 48:14-49:5.

In rebuttal testimony, Aqua and DELCORA witnesses asserted confidently, but without any factual support, that any E.O. 12803 approvals that are needed can and will be negotiated with and obtained from EPA. Aqua Statement No. 4R at 9:17-13:13; Aqua Statement No. 6R at 12:14-13:11. Neither addressed the need to have OMB determine the transfer price or the amount of any necessary repayment of federal loans, however. More critical to the availability of any funds for the Trust, neither addressed the hierarchy of payments provisions of E.O.12803 that require “first

dollar” repayment in full of contributions from local governments. As Mr. Woods pointed out in surrebuttal, we know for certain of one “first dollar” payment to a local government that will need to be made from the DELCORA asset sale proceeds, but there are 49 other municipalities in the DELCORA system, any or all of which may need to be repaid at the “unadjusted dollar amount” of their contributions, and those payments will necessarily reduce or eliminate altogether the funds that DELCORA has stated will be available for the Trust:

I do not see any evidence in this proceeding that quantifies the total amount due to be repaid to all State and local government units. The Municipal Protestants have noted that they contributed to the construction of specific assets. For example, Ms. Nelson, testifying on behalf of the Southwest Delaware County Municipal Authority (“SDCMA”), indicated that SDCMA’s share of the cost of the Chester Ridley Creek Pump Station was \$10.3 million and that SDCMA incurred an additional expense of \$1.6 million in decommissioning costs (SDCMA Statement 1, Nelson, Page 4, Lines 5-9). This is just one of 49 municipalities in the DELCORA system. In the EPA/OMB review and approval process, these and other similar contributions will need to be accounted for and refunded.

SPMT Statement No. 2SR at 23:5-13.

Neither Aqua nor DELCORA offered rejoinder testimony to rebut or provide any assurance on this critical point.

The upshot is that the record is now clear that, at best, the transaction’s alleged “primary benefit” – DELCORA’s rate stabilization Trust – will not be sufficiently funded to last beyond 2024 (that is, half the time period originally projected) because of double counting problems that Aqua and DELCORA have chosen to ignore. Worse, there is no reason to believe that the Trust will be funded at all, because of E.O. 12803 repayment obligations that Aqua has just learned about during this proceeding and apparently chosen to ignore. Moreover, the Trust may not come to fruition at all if the County’s lawsuit to declare it illegal is successful, and even if it is permitted to exist with whatever underfunded balance it is able to muster, it will exist beyond the



Commission's jurisdiction, not as a rate stabilization fund under Aqua's (and thus the Commission's) control. It thus is difficult to conclude that the Trust provides any positive counterbalance to the significant detriment that Aqua's large rate increases will bring.

**c. Other**

Additional aspects of the Aqua DELCORA transaction are detrimental to the public interest as well. These include: (i) a diminution in federal funding available for all POTWs in Pennsylvania; (ii) the loss of low-interest or no-interest funding for the planned capital improvements to the DELCORA system under Aqua's ownership; and (iii) the fallout from DELCORA's choice to remove the proposed sale from competitive bidding.

*(i) Diminution of favorable federal funding  
for Pennsylvania POTWs*

Under the Clean Water Act, federal funds are appropriated to the States to help fund wastewater infrastructure improvements through low and no interest loans. SPMT Statement No. 2 at 42:20-21. As Mr. Woods explained, each year, annual allotment tables are developed that allocate the annual appropriation of funds to the states. *Id.* at 42:21-22. In 2020, the funding allotment under the Clean Water Act earmarked \$63,583,000 for Pennsylvania out of a national total of \$1,638,826,000. *Id.* at 42:22-43:2. Thus, Pennsylvania's share was 3.9% of the total annual federal appropriation. *Id.* As Mr. Woods explained, removal of DELCORA's planned investments from the Pennsylvania project amounts will adversely impact future allocations for Pennsylvania:

This percentage is derived from a formula that estimates the CWA needs for all POTWs. Private system needs are not included in the formula. The formula is a simple ratio of the POTW needs in the Commonwealth of Pennsylvania divided by the POTW improvement needs in the United States. At present under DELCORA's ownership, the planned capital improvements in excess of \$1 billion are included in the formula but will drop out once the system is sold to an investor-owned entity such as AQUA, because the system will no longer be a POTW. Removing over \$1 billion in improvements from the Pennsylvania calculation will

lower the ratio assigned to Pennsylvania in a future assessment of the allocation formula. While the ratio is currently set in the CWA, future reassessments of Pennsylvania's needs will exclude private system needs and this will ultimately lead to a lower portion of the annual allotment of federal funds for Pennsylvania.

*Id.* at 43:2-13. Aqua took issue with this criticism of the detrimental side effect of privatizing the DELCORA system in rebuttal, arguing that "any reduction in available infrastructure funds will be offset by the reduction in the infrastructure demand from Pennsylvania as a result of excluding the DELCORA system." Aqua Statement No. 4-R at 8:18-20. As Mr. Woods explained in surrebuttal, however, Aqua misses the point that eliminating DELCORA's capital needs from the formula will reduce Pennsylvania's allocated percentage of federal funds going forward:

Mr. Bubel does not address the impact this will have on the future calculation of Federal appropriations to Pennsylvania. Pennsylvania's current allotment of the annual Federal Clean Water Act appropriation for wastewater system improvements is 3.9%, as I noted in my Direct Testimony. Let me illustrate the impact of the sale of DELCORA by focusing on the potential impact of removing a single year's capital needs from the calculation of the appropriation. Let's assume that the total annual need for Pennsylvania is \$400,000,000. The comparable US need with Pennsylvania's ratio at 3.9% would be roughly \$10,256,410,000. Now, let's remove a one-year \$30,000,000 need for DELCORA from both the numerator (\$400,000,000 - \$30,000,000) and denominator (\$10,256,410,000 - \$30,000,000) and recalculate the ratio. In doing so, we will find that the Pennsylvania ratio is reduced from 3.9% to 3.6%. Pennsylvania will receive a smaller share of the Federal Clean Water Act construction fund appropriation as a result of this sale.

SPMT Statement No. 2SR at 26:3-15.

Aqua offered no rejoinder on this point.

*(ii) Loss of favorable funding for DELCORA customers*

In addition to the adverse impact on future federal funding for Pennsylvania POTW capital projects, Aqua's privatization of DELCORA will deprive DELCORA and thus existing DELCORA customers of low-cost funding for DELCORA's planned \$1 billion in capital

improvements. Private wastewater systems cannot use low-cost federal funds made available to public entities such as DELCORA under the Clean Water Act. The upshot is the adverse consequence for both DELCORA's customers and Aqua's existing customers: "Aqua's cost of capital is higher than DELCORA's cost of capital, so this is also a detriment to DELCORA's customers, and any external Aqua customer, all of whom will be asked to pay this higher cost." SPMT Statement No. 2SR at 26:22-27:3.

*(iii) No competitive bidding*

DELCORA has agreed to sell its assets to Aqua without attempting to seek out the highest bidder through competitive bidding. Although SPMT opposes the privatization of DELCORA through any means, no-bid contracting for assets worth hundreds of millions of dollars is simply bad public policy. The immediate consequence for the transaction is that under E.O. 12803, because the transaction is not based on competitive bidding, the transfer price must be "determined by the head of the executive department or agency and the Director of the Office of Management and Budget." E.O.12803, Section 1(d). SPMT Statement No. 2 Appendix C. Accordingly, although Aqua and DELCORA have negotiated a sale price, EPA and OMB must independently determine the actual fair market price for the DELCORA system. Aqua and DELCORA have not yet approached EPA or OMB, and, accordingly, the price has yet to be determined, a void that ripples through the entire Application, adding yet another unknown.

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

[Begin HC]

16 **[Begin HC]**

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<sup>17</sup> [Begin HC]

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[REDACTED] [End HC]

Aqua has taken the same unfocused approach to its plan to assume DELCORA's obligations under the federal consent decree designed to remediate DELCORA's combined sewer overflows (CSOs). On this issue, the concern is primarily one of potential dramatic increases in future environmental compliance costs that Aqua as a private entity may be required to incur that

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[REDACTED]

[REDACTED] [END HC]

DELCORA as a public entity would not.<sup>18</sup> The increased cost issue is significant, and presents one more reason why the transaction is not in the public interest.

(i) [Begin HC]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- 1. **Identify the problem.** The first step is to clearly define the problem or issue that needs to be addressed. This involves gathering information, understanding the context, and identifying the stakeholders involved.
- 2. **Analyze the problem.** Once the problem is identified, the next step is to analyze it. This involves breaking down the problem into smaller, more manageable components and identifying the root causes.
- 3. **Generate solutions.** The third step is to generate potential solutions. This involves brainstorming ideas, evaluating the feasibility of each solution, and selecting the most promising one.
- 4. **Implement the solution.** The fourth step is to implement the chosen solution. This involves developing a plan, allocating resources, and executing the plan.
- 5. **Evaluate the results.** The final step is to evaluate the results of the implementation. This involves monitoring progress, measuring outcomes, and assessing the overall impact of the solution.

[illegible]

<sup>18</sup> The CSO issue also implicates potential environmental liability, because indirect dischargers like SPMT and other industrial and commercial customers of DELCORA could be held liable should any pollutants generated on their respective sites be discharged through a CSO point that is not permitted to a POTW. SPMT Statement No. 2 at 9:12-15.

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1. **Introduction**

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[REDACTED] [End HC]

*(ii) Aqua may face far higher costs to remediate CSOs than DELCORA would, which would be passed on to customers*

A separate environmental issue and detriment that will be needlessly triggered by the transfer of DELCORA's wastewater system assets to a private entity such as Aqua is the

remediation program that addresses CSOs.<sup>19</sup> As SPMT Witness Woods explained, once Aqua owns the DELCORA system, EPA and DEP, perhaps at the behest of third parties, may require that Aqua employ “best available technology” to combat the CSO problem, resulting in, for example, the enormous expense of physically separating the stormwater sewer system and the sanitary sewer systems:

The regulatory program associated with Combined Sewer Overflows (“CSO”) does not apply to private entities. It only applies to POTWs. DELCORA’s existing NPDES Permit includes the primary discharge from the wastewater treatment plant, regulated storm water discharges from the treatment plant site, and 26 additional outfalls that are located on combined stormwater and sanitary sewers. This permit expired on April 30, 2018 and a new permit has not yet been issued by Pennsylvania DEP. It is not clear how these discharge points will be regulated once the POTW designation for the DELCORA system is lost if the sale to AQUA closes. The existing USEPA CSO control policy provides guidance on how POTWs with combined sewers, like DELCORA, can meet the goals of the CWA in a flexible, cost-effective manner. While the CSO control program recognizes that some storm-related events will result in overflows and that the impact of these can be minimized through the implementation of regulatory and operational controls, discharges from a private system do not benefit from these guidelines and controls. For example, one of the nine minimum controls in this program relies on the concept of maximizing the volume of storm flows treated in a POTW to provide at least primary treatment prior to discharge and would allow a secondary treatment bypass. This remedy is only available to POTWs. As a result, a private system could be ordered to completely separate all sanitary and storm sewers to eliminate the CSOs or provide full treatment for

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<sup>19</sup> Combined sewers carry both domestic and industrial wastewater discharged to the DELCORA system or discharged to the municipal systems feeding into the DELCORA system along with storm water collected within the communities that have combined sewers. A combined sewer is a single sewer main that collects and transmits wastewater in addition to stormwater. During dry weather, combined sewers carry wastewater to the treatment plant for proper treatment and disposal. During storm events, combined sewers are designed to overflow at defined CSO points and discharge untreated wastewater and storm water to a receiving stream. SPMT Statement No. 2 at 9:5-12. The environmental impacts associated with combined sewer overflows during wet weather conditions have been a key focal point for enforcement activities by EPA and DEP. Mitigating those impacts also poses an enormous challenge for the regulated community because of the complexities and challenges associated with attempting to retrofit infrastructure that can be quite old.

all flows including storm flows. This could dramatically increase the capital cost of the DELCORA long-term control plan if the POTW designation is lost. Such a result could have a crippling impact as the capital improvement program would be much more costly than the program proposed by DELCORA.

SPMT Statement No. 2 at 41:14-42:15.

The fix, as Mr. Woods explained, assuming the Application is approved, is for the Commission to condition approval on DELCORA's retention of its 26 CSO regulator points. SPMT Statement No. 2SR at 32:3-8. That way, ownership of the facilities involved would remain with DELCORA, a POTW, and there would be no imposition on Aqua of the "potentially enormous expenditure of funds to implement best available technology to address the CSO issue." *Id.*

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

The Application should be denied because it is not in the public interest. The "regionalization" benefit that Aqua attempts to embrace and exploit in this case may be evident for smaller systems that struggle to maintain compliance with environmental regulatory and capital improvement requirements, but for the large and robust DELCORA system, it is nonexistent. DELCORA already serves a huge region, has a long track record of doing it well at a customer cost far lower than Aqua will be able to provide, and is in no need of "rescue" by Aqua. There are no tangible benefits to Aqua's acquisition of DELCORA; those that Aqua alleges are benefits DELCORA already enjoys. A grant of the Application will only disadvantage DELCORA's customers and Aqua's other customers.

[Begin HC]



[REDACTED]

[REDACTED] **[End HC]** Transfer to Aqua of the 26 CSO outfall regulators likewise may result in a dramatic increase in Aqua's revenue requirements and thus a dramatic increase in DELCORA customer system rates and the rates of all other Aqua customers. Even absent the potential substantial rate increases associated with environmental obligations that could be placed on Aqua but not DELCORA, the revenue requirements associated with the DELCORA wastewater system, and thus the rates charged to DELCORA's customers, will increase unnecessarily and dramatically under Aqua's private ownership of DELCORA's system. The proposed rate stabilization Trust, if it survives at all, is likely to be only minimally funded, and will be beyond the control of both Aqua and the Commission.

The Application is inherently and fundamentally flawed. It is a bad idea that fails to recognize and to cure the many detriments it creates such as the need to obtain numerous as-yet unapplied for approvals. It does not even have a valid transfer price for the Commission to consider, and will not until Aqua and DELCORA seek approval of the sale from EPA and OMB, which they did not even know was required and have yet to do. The Application should be denied.

### **C. Recommended Conditions**

In the event the Commission does not deny the Application outright, SPMT requests that the Commission condition the grant of the Application and the certificates under Sections 1102 and 1103 of the Public Utility Code so as to require DELCORA to retain ownership of the WRTP to preserve its POTW status and to retain ownership of the 26 CSO regulators, **[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[End**

**HC]** These conditions also will preserve the contractual commitments that DELCORA has made to SPMT:

- I. The Commission should condition approval of the Application on DELCORA retaining ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators; to accomplish this under the terms of the Asset Purchase Agreement, these DELCORA assets could be designated as Non-Assignable Assets in the context of Section 2.06 of the Asset Purchase Agreement, except that the designation would be permanent rather than transitional;
- II. The Commission should condition approval of the Application on removing the value of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from Aqua's post-acquisition rate base, as these assets will be retained by DELCORA; and
- III. The Commission should condition approval of the Application on DELCORA retaining SPMT as a DELCORA customer under the existing contract between the parties, consistent with Section 2.06 of the Asset Purchase Agreement.

As a minimum alternative to proposed Conditions I-III, the Commission should condition approval of the Application on implementing Conditions I-III on a transitional basis, such that:

- A. DELCORA may not transfer ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators to Aqua until Aqua is able to demonstrate to the Commission's satisfaction that under Aqua ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators, **[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; [End HC]

- B. Aqua may not include the value of DELCORA's Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators in its rate base until the Commission has approved the transfer of those assets from DELCORA to Aqua consistent with the provisions of Section A of these alternative proposed conditions; and
- C. Service to SPMT shall continue under SPMT's contract with DELCORA until the effective date of rates in Aqua's first rate case following the transfer of ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from DELCORA to Aqua consistent with the provisions of Section A of these alternative proposed conditions.

**D. Section 507 Approvals**

**[SPMT is not addressing this section.]**

- 1. Legal Principles
- 2. Municipal Protestants' Contracts
  - a. Introduction
  - b. Edgmont Township's Contract
  - c. Lower Chichester Township's Contract
  - d. Southwest Delaware County Municipal Authority's Contract
  - e. Trainer Borough's Contract

f. Upland Borough's Contract

3. Contracts Other Than Municipal Protestants' Contract

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

SPMT has a contract with DELCORA that extends through 2025. Application Exhibit F129. DELCORA may have the right to assign it to Aqua, but Aqua has no right to breach the contract once assigned. Subjecting SPMT to a new rate regime would be a breach of the contract.

**VI. CONCLUSION WITH REQUESTED RELIEF**

The Application should be denied. The transaction provides no benefits, let alone substantial affirmative public benefits. Instead, the transaction actively causes harm, by needlessly increasing rates with no corresponding benefit [Begin HC] [REDACTED]

[REDACTED] [End HC] The transaction also is subject to so many contingencies and other required approvals not yet obtained or even applied for that neither the transfer price nor the ultimate contours of what the Commission has been asked to approve are known or knowable.

If the Application is not denied outright, the Commission must impose conditions that address these issues. In particular, the Commission should require DELCORA to retain ownership on a permanent basis of the WRTP and the 26 CSO regulators [Begin HC] [REDACTED]

[REDACTED] [End HC] Alternatively, the Commission should impose the same conditions on a transitional basis until the necessary permits are issued, the appeal period for challenging such permits has passed and any appeals exhausted.

Respectfully submitted,

/s/ Kevin J. McKeon

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*Attorneys for Respondent Sunoco Partners Marketing and Terminals L.P.*

Dated: December 1, 2020

**SPMT'S SPONSORED  
TESTIMONY AND EXHIBITS**

<b>SPMT Statement No. 1</b>	Direct Testimony of Edward Human
<b>SPMT Statement No. 2</b>	Direct Testimony of Howard J. Woods, Jr. P.E.
App. A	Qualifications of Mr. Woods
App. B	Supporting Schedules <b>Schedule HJW-1:</b> Purchase Price Revenue Requirement <b>Schedule HJW-2:</b> Calculation of AQUA Revenues <b>Schedule HJW-3:</b> Calculation of DELCORA Revenue <b>Schedule HJW-4:</b> Comparison of Annual Revenue Requirements <b>Schedule HJW-5:</b> Analysis of Rate Stabilization Trust <b>Schedule HJW-6:</b> Projected SPMT Billings
App. C	Presidential Executive Order 12803
<b>SPMT Statement No. 2SR</b>	Surrebuttal Testimony of Howard J. Woods, Jr. P.E
SPMT Exhibit HJW-1SR	Interrogatory Responses
<b>SPMT Statement No. 3</b>	Direct Testimony of Kevin Smith (Highly Confidential)
<b>SPMT Statement No. 3SR</b>	Surrebuttal Testimony of Kevin Smith (Highly Confidential)
SPMT Exhibit KS-1SR	SPMT-DELCORA-IV-6 (Highly Confidential)
SPMT Exhibit KS-2SR	SPMT'S September 2020 Self-Monitoring Report (Highly Confidential)
SPMT Exhibit KS-3SR	SPMT-DELCORA-IV-10 (Highly Confidential)

## **PROPOSED FINDINGS OF FACT**

### **I.A. Procedural**

1. By Application filed March 3, 2020, Aqua Pennsylvania Wastewater, Inc. (Aqua) requested Commission approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA), and approval of the ratemaking rate base of these assets, as Sections 1102 and 1329 of the Public Utility Code require. Aqua also requested approval of contracts, including assignments of contracts from DELCORA to Aqua, pursuant to Section 507 of the Public Utility Code.

2. Numerous parties, including Sunoco Partners Marketing and Terminals L.P./Energy Transfer (SPMT), a large industrial customer of DELCORA in DELCORA's Western Region, protested the Application.

3. On July 27, 2020, the Commission by Secretarial Letter accepted the Application as complete for review.

4. The matter was assigned to the Office of Administrative Law Judge for a hearing.

5. By Order dated August 31, 2020, Chief ALJ Charles Rainey granted the OCA's Motion to extend the statutory deadline for Commission decision to March 26, 2021.

6. A Protective Order was entered to address proprietary materials.

7. Pursuant to the procedural schedule, intervenors/protestants OCA, OSBA, I&E, the County, Edgmont, Lower Chichester, SWDCMA, Upland, SPMT, and Kimberly Clark filed direct testimony on September 29, 2020. Aqua filed rebuttal testimony on October 20, 2020. Intervenors/protestants filed surrebuttal testimony on November 2, 2020. A hearing was conducted remotely on November 9 and 10, 2020, via Zoom and telephone link. Portions of the transcript from

## **APPENDIX B**

November 9, 2020 are designated as Highly Confidential. Aqua presented oral rejoinder testimony at the hearing on November 9, 2020.

**I.B. The Proposed Transaction**

8. Aqua is a wastewater public utility that serves 38,000 customer accounts scattered throughout Pennsylvania.

9. DELCORA is a municipal authority that owns and operates one of the largest wastewater systems in Pennsylvania.

10. DELCORA serves all of Delaware County and parts of Chester County; by “any objective measure, DELCORA is larger than Aqua.” SPMT Statement No. 2 at 15:12-19.

11. DELCORA was created on October 20, 1971 by a resolution of the Council of Delaware County under the Pennsylvania Municipality Authorities Act of 1945. The governing body of DELCORA is a nine-member board whose members are appointed to staggered terms by the Delaware County Council. Delaware County Regional Water Quality Control Authority, Audited Financial Statements, December 31, 2019; Page 3. SPMT Statement No. 2 at 11:18-13:13.

12. DELCORA's facilities serve residential, commercial, institutional, and industrial customers in Delaware and Chester Counties. DELCORA owns and operates a system consisting of 24 pump stations and associated force mains, and 180 miles of gravity collection system mains and interceptor sewers for the conveyance of wastewater to DELCORA's Western Regional Treatment Plant (WRTP) located in the City of Chester in Delaware County and to the Philadelphia Water Department's Southwest Water Pollution Control Plant. Aqua Application Exhibit D; DELCORA Sewerage Facilities Engineering Assessment and Original Cost; Pennoni



Associates, Inc.; Philadelphia, PA; December 13, 2019; Page 4 and Aqua Statement No. 5, Direct Testimony of Robert Willert; Page 4, Line 12. SPMT Statement No. 2 at 11:18-13:13.

13. The DELCORA Western Service Area includes eighteen (18) pumping stations which are owned and operated by DELCORA including the Central Delaware Pump Station which can direct flow to either the WRTP, a permitted 44 MGD activated sludge wastewater treatment plant, or the City of Philadelphia's Southwest Water Pollution Treatment Plant. The DELCORA Eastern Service Area includes (6) six pumping stations which are owned and operated by DELCORA. The Eastern Service Area discharges to the Philadelphia Southwest Water Pollution Control Plant (SWWPCP) and the WRTP. *Id.*

14. In addition to the WRTP, DELCORA owns and operates three (3) remote Treatment Plants: Corinne Village (Pocopson Preserve) located in Pocopson Township; Sheeder Tract (Riverside) located in Pocopson Township; and Springhill Farms located in Chadds Ford Township. The average annual flow for Corinne Village is 0.013 MGD; for Sheeder Tract is 0.021 MGD and for Springhill Farms is 0.042 MGD. *Id.* DELCORA owns all or part of the collection systems in the following areas: City of Chester, Chester Township, Borough of Marcus Hook, Borough of Rose Valley, Upland Borough, Parkside Borough, Trainer Borough, Edgmont Township, and Pocopson Township. Aqua Statement No. 7 at 3:5-8.

15. DELCORA serves approximately 16,000 customer connections. Aqua Statement No. 2 at 9:21.

16. However, a number of DELCORA's customer connections are points at which flow is delivered to DELCORA from municipally-owned wastewater collection networks in the DELCORA service area. DELCORA provides wholesale conveyance and treatment service to municipal and municipal authority customers within all or part of 49 municipalities that comprise

Delaware County. DELCORA is a very large regional wastewater system that serves 197,000 Equivalent Dwelling Units (“EDU”). Application; Page 3, Paragraph 8; Aqua Statement No. 2 at 9:21. At 3 persons per EDU, the equivalent population served directly and indirectly by DELCORA exceeds 550,000. SPMT Statement No. 2 at 11:18-13:13.

17. DELCORA is in good financial condition. It had positive net income of \$12.9 million in 2019 on operating revenue of \$66 million. SPMT Statement No. 2 at 13:16 -14:4. DELCORA has outstanding bonds and has easily met its debt service on them. The associated indentures obligate it to produce net revenues of at least 1.1 times the annual debt service requirements. SPMT Statement No. 2 at 14:8-9. DELCORA satisfied this obligation in 2019, with net cash from operations of \$18.8 million and debt service of \$6.1 million. DELCORA should also easily meet its debt service in 2020. *Id.* at 14:12-15.

18. DELCORA’s capital assets have been financed primarily through proceeds from various bond issues, grants from the United States Environmental Protection Agency (EPA) and funds generated from ongoing operations. SPMT Statement No. 2 at 15:1-9. The amount of the federal grants is estimated at \$100,000,000. *Id.* This contribution in aid of construction<sup>1</sup> reduces the value of the DELCORA net investment to \$160,506,518. *Id.* In addition, various municipal participants in the DELCORA system have made contributions in aid of construction, so the actual value of the DELCORA net investment may be much lower. *Id.*

19. In addition to assets, DELCORA plans to assign its customer contracts to Aqua. Many of these contracts with municipalities involve the transfer to DELCORA of collection

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<sup>1</sup> Under utility ratemaking a contribution in aid of construction, whether by a grant, developer, customer or other source, is not included in rate base or depreciated as the utility and its stockholders did not fund or invest in the assets contributed.

systems and other assets, with provisions requiring the reversion of those assets to the municipal customer if DELCORA ceases to operate the system.

20. A number of the municipalities have yet to agree to DELCORA's sale of the assets to Aqua, but Aqua's purchase price includes the sale of the assets. SPMT Statement No. 2 at 35:17-38:18.

21. Among the contracts DELCORA proposes to assign to Aqua is SPMT's contract. SPMT's contract runs through at least 2025. It limits the amount of wastewater that SPMT can discharge to the DELCORA system for treatment and sets out the parameters used to define the costs that can be recovered from SPMT for service rendered. The costs recovered from SPMT are limited to costs associated with the DELCORA Western Region system. The contract provides that DELCORA issues quarterly estimated bills to SPMT based on current DELCORA rates for service and the estimated flow emanating from the Marcus Hook Industrial Complex (MHIC or Marcus Hook facility) that SPMT operates. At the close of each year, the charges to SPMT are subject to audit and a true-up adjustment is made based on the results of the audit and actual performance. Application, Exhibit F129.

22. SPMT is one of the major industries served in the Western Region of the DELCORA system. In 2019, DELCORA derived approximately \$7 million of its \$66 million in revenue from these Western Region industrial customers; DELCORA billed and received \$2.8 million from SPMT. SPMT Statement No. 2 at 13:16-19.

23. The proposed transaction between Aqua and DELCORA is memorialized in an Asset Purchase Agreement (APA). Application, Exhibit B1.

24. Section 2.06 of the APA addresses the circumstance in which DELCORA's transfer of an asset to Aqua would "result in a violation of Law, or would require the consent,

authorization, approval or waiver of any Person (other than the Parties), including any Governmental Authority, and such consent, authorization, approval or waiver shall not have been obtained prior to the Closing.”

25. [BEGIN HC]

[END HC]

26. Section 2.06 provides that if the needed consent or approval is not obtained prior to closing, the asset affected will not be transferred until the consent or approval is obtained and will be designated a “Nonassignable Asset.” *Id.* Where a Nonassignable Asset is designated, Section 2.06 (b) provides that the parties will cooperate to provide to each other “the economic and, to the extent permitted under Law, operational equivalent of the transfer of such Nonassignable Asset to Buyer.” Tr. (HC) 227:14-228:21.

27. Although not part of the transaction, and not an obligation Aqua undertook, DELCORA has decided to establish a rate stabilization Trust using proceeds from the sale to Aqua, in order to offset the rate increases that will be imposed on DELCORA’s customers under Aqua’s ownership.

28. The County has challenged DELCORA’s establishment of the Trust as *ultra vires* and that lawsuit is pending in the Delaware County Court of Common Pleas.

29. The County also in that same litigation is challenging the DELCORA asset sale to Aqua. Delaware County Statement No. 2 at 6:14-20.

30. Aqua and/or DELCORA have to date failed to obtain a number of required consents and approvals. These include:

- a. Consent of EPA and the federal Office of Management and Budget (OMB) under Presidential Executive Order 12803 (E.O.1283) because DELCORA’s

assets have been funded in part with federal grants and loans, SPMT Statement No. 2 Appendix C;

b. Consent of various municipalities whose asset transfers to DELCORA revert to the municipalities upon DELOCRA's sale of its system unless otherwise agreed;

c. Consent of EPA and the Pennsylvania Department of Environmental Protection (DEP), and approval of the federal district court for the Eastern District of Pennsylvania to allow Aqua to undertake DELCORA's obligations under a 2015 consent decree that requires DELCORA to initiate remedial measures for combined sewer overflows (CSOs) on its system;

d. [BEGIN HC]

[END HC]

### **V.3. Alleged Affirmative Public Benefits**

31. Aqua has presented as its primary alleged benefit of the transaction that "the majority of the sale proceeds will be placed in an irrevocable Trust that will benefit DELCORA customers for years to come." Aqua Statement No. 2 at 13:16-17; *see* Aqua Statement No. 5 at 11:14 (Trust is the "primary benefit" of the transaction).

32. However, Projections that the Trust will be funded sufficiently to offset Aqua rate increases until mid-2028 are clearly wrong. The inputs Aqua and DELCORA provided are the product of double counting and wishful thinking. SPMT Main Brief at Section V.B.4.b.(ii)(detailed discussion of why, assuming the courts do not invalidate the Trust, it is

likely to be underfunded or unfunded because of double counting of expendable funds and the payout hierarchy requirements of Executive Order 12803).

33. Even if the Trust is funded at some much smaller than projected level, its administration will be entirely beyond the control of Aqua or the Commission.

34. Aqua states as a benefit of the transaction that it is “familiar with the DELCORA service areas and serves populations of nearly 500,000 in Delaware County and 200,000 in Chester County.” Aqua Statement No. 2 at 13.

35. However, familiarity with DELCORA’s service territory cannot be viewed as anything more than a “met expectations” requirement. It certainly is not a benefit, as lack of familiarity would obviously be a detriment. Moreover, Aqua obviously is not more familiar with DELCORA’s customers than DELCORA is, and DELCORA is perfectly capable of continuing to service its customers.

36. Aqua states that “Economies of scale will result from the these [sic] nearby and overlapping service areas.” Aqua Statement No. 2 at 13.

37. However, Aqua has provided no evidence of economies of scale. This claim is unsupported and unlikely. DELCORA’s existing customer base and size dwarfs Aqua wastewater operations. SPMT Statement No. 2 at 15:17-19 (“By any objective measure, DELCORA is larger than Aqua Pennsylvania Wastewater, Inc., the AQUA entity that will actually acquire DELCORA if this transaction is approved.”). Given Aqua’s post-acquisition plans to operate DELCORA in place as a satellite under existing DELCORA management with all existing DELCORA employees, there can be no appreciable cost savings or economies of scale in any of the major cost centers. *See* Aqua Statement No. 4 at 9:22-10:2 (Aqua will maintain “the office and operations centers currently in place in DELCORA’s service territory”);

Delaware County Statement No. 2 at 5 n. 1 (Current DELCORA executive director to have “oversight of Aqua PA in southeast PA including DELCORA and SEPA [wastewater] operations...”); Aqua Statement No. 1 at 8:3-4, (Aqua will “offer employment to all of the DELCORA employees”).

38. Aqua states that “DELCORA customers will benefit from Aqua's experience in large-scale capital planning and replacement programs.” Aqua Statement No. 2 at 13.

39. However, DELCORA, not Aqua, created the capital investment plan that, post-acquisition, Aqua, employing existing DELCORA management, will implement. SPMT Statement No. 2 at 17:19-18:7. In other words, DELCORA, a much larger wastewater utility than Aqua wastewater, after Aqua absorbs it, will use existing DELCORA personnel to implement existing DELCORA plans under the nominal leadership of Aqua..

40. Aqua states that “DELCORA customers will benefit from customer protections provided by the Commission's regulations and the Company's Helping Hand program.” Aqua Statement No. 2 at 14.

41. However, DELCORA has been serving its customers as a public governmental entity for decades. There is no evidence in this record that DELCORA customers lack customer protections under DELCORA’s existing programs.

42. Aqua states that it is “committed to preserving the jobs of DELCORA employees.” Aqua Statement No. 2 at 14.

43. However, retaining all DELCORA employees, from the perspective of realizing economies of scale, is a detriment, not a benefit of the transaction.

44. Aqua states that it “has a proven record of environmental stewardship of wastewater systems.” Aqua Statement No. 2 at 14.

45. [BEGIN HC]

[END

HC]

46. Aqua states that DELCORA will benefit from “Aqua's expertise in implementing large scale projects and compliance with Pennsylvania Department of Environmental Protection and US Environmental Protection Agency regulations.” Aqua Statement No. 2 at 14.

47. [BEGIN HC]

[END

HC]

48. Aqua states that “The combining of systems and customers provides inherent stability in the day to day utility operations, in that, these systems do not all require major capital investments at the same time and, therefore, spreads the financial impacts over the long term operations of the utility.” Aqua Statement No. 2 at 14.

49. However, under the circumstances presented in this transaction where DELCORA has a long track record of providing quality service at rates much lower than Aqua’s, and where Aqua is in the process of spending hundreds of millions of dollars on acquiring and investing in multiple additional wastewater systems, the costs associated with those acquisitions are likely to dramatically raise the rates of DELCORA customers, not subsidize or stabilize them. SPMT Main Brief at Section V.B.4.b(i); SPMT Statement No. 2SR at 4:17-12:17; OSBA Statement No. 1 at 6:12-7:8.

50. Aqua states that “DELCORA's customers will become part of a larger-scale,

## APPENDIX B



efficiently operated, water and wastewater utility.” Aqua Statement No. 2 at 14.

51. However, DELCORA’s existing customer base and size dwarfs Aqua existing wastewater operations. SPMT Statement No. 2 at 15:17-19 (“By any objective measure, DELCORA is larger than Aqua Pennsylvania Wastewater, Inc., the AQUA entity that will actually acquire DELCORA if this transaction is approved.”). There is no evidence in the record that Aqua is more efficiently operated than DELCORA. There is ample evidence on the record to demonstrate that existing Aqua rates result in much higher charges for the same service provided by DELCORA. OSBA Statement No. 1 at 2:21-3:6.

52. Aqua states that because of its “larger combined customer base, future infrastructure investments across the Commonwealth, driven by normal replacement cycles, emergency repairs, emergency response or compliance with new environmental regulations, will be shared at a lower incremental cost per customer for all of Aqua’s customers over time.” Aqua Statement No. 2 at 14.

53. However, under the circumstances presented in this transaction where DELCORA has a long track record of providing quality service at rates much lower than Aqua’s, and where Aqua is in the process of spending hundreds of millions on acquiring and investing in multiple additional wastewater systems, the costs associated with that activity are likely to dramatically raise the rates of DELCORA customers, not stabilize them. SPMT Main Brief at Section V.B.4.b(i); SPMT Statement No. 2SR at 4:17-12:17. Moreover, DELCORA’s cost of capital is less than half that of Aqua’s. SPMT Statement No. 2 at 7:16-8:9.

54. Aqua states that “The elimination of the treatment expense to PWD [Philadelphia Water Department] will allow DELCORA to control its own destiny and offset the potential risk of future increases.” Aqua Statement No. 2 at 14.

55. However, DELCORA had planned to eliminate the PWD treatment arrangement and associated expense on its own and thereby “control its own destiny” by expanding the WRTP before it entered into this transaction with Aqua, and there is every reason to believe that DELCORA would be able to follow through to “control its own destiny” on its own without the added burden on DELCORA ratepayers of Aqua ownership. SPMT Statement No. 2 at 16:1-13; 17:19-18:7. In doing so, DELCORA would also maintain the WRTP’s status as a POTW, thus preserving the environmental regulatory regime that DELCORA and its industrial customers currently rely on to maintain compliance with environmental laws.

56. Aqua asserts that regionalization of wastewater systems must be viewed as a beneficial end in itself. Application at ¶ 56a; Aqua Statement No. 1 at 10:9-12; Aqua Statement No. 2 at 8:6-7; Aqua Statement No. 2R at 3:20-22.

57. However, Aqua concedes that the Commission’s policy encouraging regionalization focuses on “acquisitions of smaller systems by larger more viable systems.” Application at ¶ 56a, citing *Final Policy Statement on Acquisition of Water and Wastewater Systems*, Docket No. M-00051926, Final Order at 18 (Aug. 17, 2006). That is not the situation with DELCORA. DELCORA is larger than Aqua’s entire existing wastewater operation, serving 197,000 Equivalent Dwelling Units to Aqua’s approximately 38,000. SPMT Statement No. 2 at 13:3-13; 15:11-19; SPMT Statement No. 2SR 2R at Exhibit HJW-1SR p. 12. There is no evidence in the record that DELCORA is not viable, or that it is “less viable” than Aqua. Aqua itself admits that even though it believes that most municipally-owned wastewater systems have not “had proper repair and maintenance over the years,” Aqua Statement No. 2R at 48:22-49:1, that is not DELCORA’s situation. *Id.* at 49:10-11 (“I would not categorize [DELCORA] as underinvested.”).

#### **V.4. Public Interest**

##### **V.4.a. Common Pleas Litigation**

58. Delaware County has initiated pending litigation alleging that DELCORA's entry into the APA and creation of the rate stabilization Trust are *ultra vires* acts.

59. The pendency of this litigation injects yet more uncertainty into what is already a transaction that is contingent on so many other as-yet unattained approvals or un-negotiated transactions.

60. If the trial court voids the creation of the Trust there will be no offset to Aqua's planned rate increases.

##### **V.4.b. Rate Stabilization Trust**

61. Aqua's revenue requirement associated with purchasing DELCORA's assets, assuming all assets transfer at the full amount of \$276.5 million, will be double the cost of existing DELCORA debt service, increasing the revenue requirement from approximately \$15 million per year to approximately \$30 million. SPMT Statement No. 2 at 6:11-7:2; 18:17-21:2; Schedule HJW-1.

62. The increase in Aqua's revenue requirement associated with the purchases of DELCORA's assets will *increase DELCORA customers' rates by 12.55%, increase existing Aqua wastewater customer rates by 14.32%, and increase existing Aqua water customer rates by 4.58%*. SPMT Statement No. 2 at 6:2-9.

63. These rate increases associated with the purchase price Aqua will pay do not reflect the revenue requirement associated with proposed capital improvements to the DELCORA system that DELCORA has planned and that Aqua now will implement; under Aqua ownership, the revenue requirement for these very same improvements will be **\$46 million**

*more per year* than if DELCORA retained the assets and made the investments. If DELCORA were to retain ownership and implement the improvements it has planned itself, the net present value of savings for DELCORA customers would be nearly half a billion dollars -- \$462.9 million – over the period ending 2040. SPMT Statement No. 2 at 7:4-14; 23:14-28:15; Schedules HJW-2, HJW-3, and HJW-4.

64. SPMT’s total bill under Aqua ownership over the period ending 2040, with Aqua implementing DELCORA’s capital improvement program, will be *\$18.6 million more on a net present value basis* than it would be under DELCORA’s continued ownership. SPMT Statement No. 2 at 35: 5-15; Schedule HJW-6.

65. A portion of a DELCORA customer’s total out-of-pocket cost for these significant rate increases would be lowered if the proposed rate stabilization Trust is actually implemented, operated, and funded as proposed, so as to offset rate increases through 2028, but there is no credible basis for assuming that relief from the Trust will actually materialize, whereas it is certain that Aqua’s revenue requirement-driven rate increases are real.

66. Aqua acknowledges that rates will go up because of Aqua’s much higher capital costs, Aqua Statement No. 2R at 49:16-50:12.

67. Aqua states that Mr. Woods’ calculations quantifying the respective revenue requirements and resulting rate increases on Schedules HJW-2, 3 and 4 “appear to be accurate,” Aqua Statement No. 2R at 52:21-53:1.

68. Aqua’s justification for Aqua rate increase projections that are lower than those that Mr. Woods calculated is that Aqua’s cost of service post-2028 will be “allocated over a large wastewater customer base,” thereby subsidizing DELCORA customers’ rates by spreading the cost of the DELCORA system beyond DELCORA system customers. Aqua Statement No. 2R at

52:2-53:3.

69. However, Aqua's equalization of rates is just as likely (if not more likely) to increase rates for former DELCORA customers as it is to lower them. SPMT Statement No. 2SR at 2:17-12:17.

70. Moving DELCORA rates upwards toward Aqua's average rate for each class of service would increase the bill of a non-industrial DELCORA customer using 6,000 gallons per month by almost 90%. SPMT Statement No. 2SR at 11:10-12:2, citing OSBA Statement No. 1 at 6:17-22.

71. Aqua is not proposing a rate stabilization plan as part of its Application. (Application ¶ 36).

72. Instead, DELCORA has said it will take the "majority of the sale proceeds," Aqua Statement No. 5 at 11:14-15, after satisfying existing DELCORA debt, *id.* at 10:20, and place them in "an irrevocable trust for the benefit of DELCORA's customers." *Id.* at 11:14-15.

73. The presumptive starting balance of the Trust based on DELCORA's original production of data is \$231,787,770. (Assumed sale proceeds (\$276,500,000), plus DELCORA cash and investments on hand (\$100,051,839), minus existing DELCORA debt that would need to be paid off (\$143,011,834), minus DELCORA's note payable to Edgmont Township (\$1,751,785) = \$231,787,770. SPMT Statement No. 2 at 30:17-31:3.

74. However, DELCORA subsequently revealed that \$100 million that will be paid into the Trust will be paid out to Aqua to implement DELCORA's obligations under the federal court consent decree with EPA and DEP to remedy CSO issues under DELCORA's Long Term Control Plan (LTCP). SPMT Statement No. 2SR at 18:1-17; SPMT Exhibit HJW-1SR at 15, 17, 18.

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75. In addition, DELCORA revealed in rebuttal testimony that DELCORA's obligation to pay \$86 million for its share of the Philadelphia Water Department's Long Term Control Plan (PWD LTCP) between 2020 and 2028 was not included in DELCORA's capital expenditure plan, see SPMT Statement No. 2SR at 13:4-14:6, citing Aqua Statement No. 6R at 3:10-15, and will cause Aqua to recover the \$86 million through higher rates.

76. These additional payouts from the Trust will deplete the Trust more rapidly than expected. SPMT Statement No. 2SR at 18:22-19:5, leading the Trust to run of funds by 2024 rather than 2028. *Id.*

77. In addition, Executive Order 12803 (E.O. 12803) applies to DELCORA's sale of its assets to Aqua because DELCORA's assets were funded in part through grants from the Federal Government through EPA-administered programs. SPMT Statement No. 2 at 44:10-50:12; SPMT Statement No. 2 Appendix C (Text of E.O. 12803).

78. E.O. 12803 imposes various requirements and restrictions on the sale of DELCORA's assets, including the need for approvals from EPA and OMB, the fixing of the transfer price for the assets by OMB, and a hierarchy of payments from DELCORA's proceeds from the sale that places the Trust last in line to receive any of the money. SPMT Statement No. 2 Appendix C.

79. Under E.O. 12803, if the transaction is not based on competitive bidding, the transfer price must be "determined by the head of the executive department or agency and the Director of the Office of Management and Budget." E.O.12803, Section 1(d). SPMT Statement No. 2 Appendix C.

80. Because Aqua and DELCORA have not yet sought OMB or EPA's approval under E.O.12803, the starting point for determining the amount of the proceeds available for the Trust,

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is presently unknown.

81. E.O. 12803 also prescribes the distribution of the proceeds, and expressly requires that DELCORA must first pay back to the local governments that contributed property to DELCORA “the unadjusted dollar amount” of those contributions, and then repay the federal government the full amount of grants less accumulated depreciation; only then can any of the proceeds of the sale go to DELCORA. E.O. 12803, Section 3(c). SPMT Statement No. 2 Appendix C.

82. Section 4(a) of E.O. 12803 requires that DELCORA use any funds that remain to pay off debt or invest in additional infrastructure. E.O. 12803, Section 3(c). SPMT Statement No. 2 Appendix C.

83. DELOCORA has not met any of these three conditions Imposed by E.O.12803. SPMT Statement No. 2 at 48:14-49:5.

84. Although Aqua and DELCORA each addressed the E.O.12803 issue in rebuttal testimony, neither addressed the need to have OMB determine the transfer price or the amount of any necessary repayment of federal loans, and neither addressed the hierarchy of payments provisions of E.O.12803 that require “first dollar” repayment in full of contributions from local governments.

85. There are 50 municipalities in the DELCORA system, any or all of which may need to be repaid at the “unadjusted dollar amount” of their contributions, and those payments will necessarily reduce or eliminate altogether the funds that DELCORA has stated will be available for the Trust: SPMT Statement No. 2SR at 23:5-13.

#### **V.4.c. Other**

86. Under the Clean Water Act, federal funds are appropriated to the States to help fund

wastewater infrastructure improvements through low and no interest loans. SPMT Statement No. 2 at 42:20-21.

87. In 2020, the funding allotment under the Clean Water Act earmarked \$63,583,000 for Pennsylvania out of a national total of \$1,638,826,000. Thus, Pennsylvania's share was 3.9% of the total annual federal appropriation. SPMT Statement No. 2 at 42:22-43:2.

88. Removal of DELCORA's planned investments from the Pennsylvania project amounts will adversely impact future allocations for Pennsylvania. SPMT Statement No. 2 at 43:2-13; SPMT Statement No. 2SR at 26:3-15.

89. In addition to the adverse impact on future federal funding for Pennsylvania POTW capital projects, Aqua's privatization of DELCORA will deprive DELCORA and thus existing DELCORA customers of low-cost funding for DELCORA's planned \$1 billion in capital improvements. Private wastewater systems cannot use low-cost federal funds made available to public entities such as DELCORA under the Clean Water Act. SPMT Statement No. 2SR at 26:22-27:3.

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

90. [BEGIN HC]

91.



[REDACTED]

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92. [REDACTED]

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161. [REDACTED]

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162. [REDACTED]

[REDACTED]

[REDACTED] [END HC]

163. A separate environmental issue and detriment that will be needlessly triggered by the transfer of DELCORA's wastewater system assets to a private entity such as Aqua is the remediation program that addresses CSOs.

164. Combined sewers carry both domestic and industrial wastewater discharged to the DELCORA system or discharged to the municipal systems feeding into the DELCORA system along with storm water collected within the communities that have combined sewers. A combined sewer is a single sewer main that collects and transmits wastewater in addition to stormwater. During dry weather, combined sewers carry wastewater to the treatment plant for proper treatment and disposal. During storm events, combined sewers are designed to overflow at defined CSO points and discharge untreated wastewater and storm water to a receiving stream. SPMT Statement No. 2 at 9:5-12. The environmental impacts associated with combined sewer overflows during wet weather conditions have been a key focal point for enforcement activities by EPA and DEP. Mitigating those impacts also poses an enormous challenge for the regulated community because of the complexities and challenges associated with attempting to retrofit infrastructure that can be quite old.

165. Once Aqua owns the DELCORA system, EPA and DEP, perhaps at the behest of third parties, could require that Aqua employ “best available technology” to combat the CSO problem, potentially resulting in the enormous expense of physically separating the stormwater sewer system and the sanitary sewer systems. SPMT Statement No. 2 at 41:14-42:15.

## PROPOSED CONCLUSIONS OF LAW

1. Pursuant to Section 332(a) of the Public Utility Code, “the proponent of a rule or order has the burden of proof.” 66 Pa. C.S. § 332(a).

2. To obtain a certificate of public convenience, “the acquiring public utility has the burden, by preponderance of the evidence, to establish that it is technically, legally and financially fit to provide the proposed service.” *McCloskey v. Pennsylvania Public Utility Commission*, 195 A.3d 1055, 1058 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*), *citing Seaboard Tank Lines, Inc. v. Pennsylvania Public Utility Commission*, 502 A.2d 762 (Pa. Cmwlth. 1985) (*Seaboard*).

3. The burden of proof is the preponderance of the evidence standard. *See Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (1992) (*Lansberry*).

4. To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *See Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 855-56 (Pa. 1950).

5. An existing certificate holder is entitled to a continuing presumption regarding its fitness. *McCloskey* 195 A.3d at 1058. Parties challenging the application bear the burden of rebutting this presumption. *Lehigh Valley Transp. Services, Inc. v. Pennsylvania Public Utility Commission*, 56 A.3d 49, 58 (Pa. Cmwlth. 2012) (*Lehigh Valley*).

6. The Commission’s adjudications must be supported by substantial evidence in the record. 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602.

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7. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938).

8. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (1980) (*Norfolk*); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

9. To commence wastewater service to DELCORA's customers, Aqua requires a certificate under Section 1102(a)(1)(i), which provides that a certificate is required before a public utility may commence service in a different territory than one for which it already possesses a certificate of public convenience to provide that service.

10. To acquire DELCORA's assets, Aqua also requires a certificate under 66 Pa. C.S. § 1102(a)(3), which provides that a certificate is required before a public utility may acquire title to, or the possession or use of, utility property from another entity, including a municipal corporation such as DELCORA. (A certificate is not required where the undepreciated book value of the property falls below specified thresholds, 66 Pa. C.S. § 1102(a)(3)(i)-(iv). The undepreciated book value of DELCORA's assets exceeds those thresholds.)

11. Section 1103(a) of the Public Utility Code sets forth the standard Aqua must meet: "A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. § 1103(a). To

meet this standard, Aqua must prove that it is technically, legally, and financially fit to provide the proposed service. *McCloskey*, 195 A.3d at 1058, *citing Seaboard*, 502 A.2d 762.

12. Because the transaction will result in what amounts to a merger between Aqua and DELCORA, Aqua also must adduce sufficient evidence to allow the Commission “to find affirmatively that public benefit will result from the merger.” *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825, 828 (Pa. 1972) (*City of York*). *See Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d 1040 (Pa. 2007) (Verizon’s application for a certificate of public convenience permitting Verizon’s acquisition of MCI as a wholly-owned subsidiary measured against the “substantial affirmative public benefits” standard).

13. Aqua must prove “not only that no harm will come from the transaction” but also that “substantial affirmative benefits” will flow from it. *McCloskey*, 195 A.3d at 1064, *citing City of York*, 295 A.2d at 828.

14. The Commission’s policy encouraging regionalization focuses on “acquisitions of smaller systems by larger more viable systems.” *Final Policy Statement on Acquisition of Water and Wastewater Systems*, Docket No. M-00051926, Final Order at 18 (Aug. 17, 2006).

15. In deciding whether the transaction results in a “substantial public benefit,” the Commission must address its impact on rates. *McCloskey*, 195 A.3d at 1066 (“Because *City of York* requires the impact on rates to be considered, the Commission must address that impact when deciding whether there is substantial public benefit.”).

16. The Commission must decide whether any negative rate impact “is outweighed by the other positive factors.” *McCloskey*, 195 A.3d at 1067.

17. Presidential Executive Order 12803 imposes various requirements and restrictions on the sale of DELCORA’s assets, including the need for approvals from EPA and OMB, the

fixing of the transfer price for the assets by OMB, and a hierarchy of payments from DELCORA's proceeds from the sale that places the Trust last in line to receive any of the money. SPMT Statement No. 2 Appendix C (Text of E.O. 12803).

18. Aqua has not carried its burden to prove that no harm will come from the transaction.

19. Aqua has not carried its burden to adduce sufficient evidence to allow the Commission "to find affirmatively that public benefit will result from the merger." *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825, 828 (Pa. 1972) (*City of York*). See *Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d 1040 (Pa. 2007) (Verizon's application for a certificate of public convenience permitting Verizon's acquisition of MCI as a wholly-owned subsidiary measured against the "substantial affirmative public benefits" standard).

20. Aqua has not carried its burden to adduce sufficient evidence to allow the Commission find that the negative rate impact that will result from the transaction "is outweighed by the other positive factors." *McCloskey*, 195 A.3d at 1067.

## PROPOSED ORDERING PARAGRAPHS

Sunoco Partners Marketing and Terminals L.P. proposes three alternative ordering paragraphs:

1. Aqua Pennsylvania Wastewater, Inc.'s (Aqua) Application for approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA), approval of the ratemaking rate base of these assets, as Sections 1102 and 1329 of the Public Utility Code require, and approval of contracts, including assignments of contracts from DELCORA to Aqua, pursuant to Section 507 of the Public Utility Code (Application), is hereby **DENIED**.

**2. [ALTERNATIVE 1]**

Aqua Pennsylvania Wastewater, Inc.'s (Aqua) Application for approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA), approval of the ratemaking rate base of these assets, as Sections 1102 and 1329 of the Public Utility Code require, and approval of contracts, including assignments of contracts from DELCORA to Aqua, pursuant to Section 507 of the Public Utility Code (Application), **is hereby GRANTED, subject to the following conditions:**

A. DELCORA shall not transfer, and Aqua shall not acquire, ownership of the Western Region Wastewater Treatment Plant (WRTP) and the 26 Combined Sewer Overflow Regulators; these DELCORA assets may, at the discretion of Aqua and DELCORA, be designated as Non-Assignable Assets under Section 2.06 of the Asset Purchase Agreement, except that the designation would be permanent rather than transitional;

B. The value of the WRTP and the 26 Combined Sewer Overflow Regulators shall be removed from Aqua's post-acquisition rate base; and

## APPENDIX D

C. Sunoco Partners Marketing & Terminals, L.P. (SPMT) shall remain a customer of DELCORA under the existing contract between the parties, consistent with Section 2.06 of the Asset Purchase Agreement.

**3. [ALTERNATIVE 2]**

Aqua Pennsylvania Wastewater, Inc.'s (Aqua) Application for approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA), approval of the ratemaking rate base of these assets, as Sections 1102 and 1329 of the Public Utility Code require, and approval of contracts, including assignments of contracts from DELCORA to Aqua, pursuant to Section 507 of the Public Utility Code (Application), **is hereby GRANTED, subject to the following conditions:**

A. DELCORA may not transfer ownership of the Western Region Wastewater Treatment Plant (WRTP) and the 26 Combined Sewer Overflow Regulators to Aqua until Aqua is able to demonstrate to the Commission's satisfaction that under Aqua ownership of the WRTP and the 26 Combined Sewer Overflow Regulators, **[Begin HC]** [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] **[END HC];**

B. Aqua may not include the value of DELCORA's WRTP and the 26 Combined Sewer Overflow Regulators in its rate base until the Commission has approved the transfer of those assets from DELCORA to Aqua consistent with the provisions of Section A of these conditions; and

**APPENDIX D**



C. Service to SPMT shall continue under SPMT's contract with DELCORA until the effective date of rates in Aqua's first rate case following the transfer of ownership of the WRTP and the 26 Combined Sewer Overflow Regulators from DELCORA to Aqua consistent with the provisions of Section A of these conditions.

## **CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving the Surrebuttal Testimony of Sunoco Partners Marketing & Terminals, L.P./Energy Transfer in the manner and upon the persons listed below:

### **VIA ELECTRONIC MAIL ONLY**

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