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December 14, 2020

Rosemary Chiavetta, Secretary  
Pa. Public Utility Commission  
P.O. Box 3265  
Harrisburg PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing please find the Reply Brief of Edgmont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority, Trainer Borough, and Upland Borough (collectively "Municipal Protestants") in the above-referenced proceeding.

This document is being served on the Administrative Law Judges and all parties of record. The document was filed electronically with the Commission on this date.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott J. Rubin". The signature is fluid and cursive, with the first name "Scott" and last name "Rubin" clearly distinguishable.

Enclosure

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

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CERTIFICATE OF SERVICE

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I hereby certify that I have this day served a true copy of the Reply Brief of Edgmont Township, et al. upon the following parties by electronic mail. Service by first-class mail will be provided to any party that requests such service.

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December 14, 2020  
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A handwritten signature in black ink, reading "Scott J. Rubin". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Scott J. Rubin, Counsel for  
Edgmont Township, et al.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**REPLY BRIEF  
OF  
EDGMONT TOWNSHIP  
LOWER CHICHESTER TOWNSHIP  
SOUTHWEST DELAWARE COUNTY MUNICIPAL AUTHORITY  
TRAINER BOROUGH  
UPLAND BOROUGH  
(COLLECTIVELY “MUNICIPAL PROTESTANTS”)**

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Dated: December 14, 2020

## Table of Contents

I.	Introduction.....	1
V.	Argument .....	2
D.	Section 507 Approvals .....	2
2.	Municipal Protestants’ Contracts.....	2
a.	DELCORA does not have the right to delegate its obligations under Municipal Protestants’ contracts .....	2
b.	The record does not support Aqua’s assertion that Edgmont, Trainer, and Upland would lose access to the Trust if those municipalities exercise their contract rights ...	5
VI.	Conclusion with Requested Relief.....	7

## **I. Introduction**

Edgmont Township (“Edgmont”), Lower Chichester Township (“Lower Chichester”), Southwest Delaware County Municipal Authority (“SWDCMA”), Trainer Borough (“Trainer”), and Upland Borough (“Upland”), collectively Municipal Protestants, fully addressed the evidence and law in their Main Brief. Aqua Pennsylvania Wastewater, Inc. (“Aqua”), however, makes a legal argument and a factual assertion that Municipal Protestants did not address in their Main Brief.

First, in Section V.D.2 of its Main Brief, Aqua argues that DELCORA is permitted to delegate DELCORA’s obligations under Municipal Protestants’ contracts to Aqua. This argument ignores special legal requirements that govern municipal contracts in Pennsylvania. It also is based on an incorrect factual premise that ignores the plain language of Municipal Protestants’ contracts, as explained in Section V.D.2.a, below.

Second, in that same section of its Main Brief, Aqua makes a statement concerning the eligibility for trust payments if Edgmont, Trainer, or Upland exercise their contract rights. Municipal Protestants correct Aqua’s misperception in Section V.D.2.b, below.

## V. Argument

### D. Section 507 Approvals

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

##### a. DELCORA does not have the right to delegate its obligations under Municipal Protestants' contracts

On pages 70-74 of its Main Brief, Aqua argues that Pennsylvania law permits the delegation of contractual duties unless the contract specifically provides to the contrary. Municipal Protestants agrees that this is a general legal principle. That principle, however, does not apply to contracts entered into by Pennsylvania municipal corporations like DELCORA.

Specifically, Article III, Section 31 of the Pennsylvania Constitution prohibits the legislature (and by extension, municipal corporations) from delegating certain responsibilities. That Section provides, in relevant part: “The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.” Pa. Const. art. III, § 31 (emphasis added).

The Pennsylvania Supreme Court has interpreted this provision in the Constitution to prohibit a municipality from delegating to a private company the right to own or operate a sewer plant. Specifically, in *Lighton v. Abington Twp.*, 336 Pa. 345, 9 A.2d 609 (1939), the Court considered whether it was unconstitutional for a municipality to enter into a financing agreement that would transfer the ownership and operation of a sewer system to a private company in the event of default. The Court held that a municipality, as a creation of the legislature, is prohibited from delegating the operation or ownership of government property to a private company. In the



Court’s words: this provision of the Constitution does not permit a “municipality to make a contract with a private corporation to take over and operate public property.” *Id.*, 336 Pa. at 354, 9 A.2d at 613.<sup>1</sup>

The Court then explained its holding as follows:

The section prohibits delegating to any private corporation “any power to make, supervise or interfere with any municipal improvement, money, property or effects whether held in trust or otherwise or to levy taxes or perform any municipal function whatever.” There are no words, on the one hand, restricting the prohibition to property etc., used for purely governmental purposes and, on the other, allowing the delegation for property etc., employed in proprietary capacities. Both classes of municipal activity were familiar when the constitution was adopted. The sewerage system is a municipal improvement; it is property belonging to the municipality; in whatever capacity used, whether governmental or proprietary, the words of section 20 expressly include it; we must give them effect.

*Id.*, 336 Pa. at 355, 9 A.2d at 613 (emphasis added).

Thus, while Pennsylvania law may generally permit contracting parties to delegate their contractual responsibilities, that general rule does not apply to DELCORA as a municipal authority. Article III, Section 31 of the Constitution, as interpreted by our Supreme Court, prohibits the delegation of contractual responsibilities regarding government-owned property.

Moreover, even if the general principle did apply to DELCORA, the principle does not apply to the facts of this case. Specifically, Aqua’s entire argument is based on an incorrect factual premise. On page 70, Aqua states: “What the Municipal Protestants ignore is that neither

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<sup>1</sup> At the time of the *Lighton* case, the same Constitutional prohibition on delegation was found in Article III, Section 20. That provision was renumbered as Article III, Section 31 as part of the 1967 comprehensive changes in the Constitution, as explained in the notes to Article III, Section 31 (“Joint Resolution 1967-3 (P.L. 1037) repealed former section 31 and renumbered former section 20 to present section 31 on May 16, 1967.”).

Aqua nor DELCORA is proposing any change in the ownership or operation of the facilities serving them under their individual contracts. Therefore, the anticipated delegation of contract duties to Aqua as DELCORA's agent does not violate any 'requirement' that DELCORA continue to own and operate the subject wastewater assets." (Emphasis added.) The underlined statement is not accompanied by any citation to the record.

Indeed, this statement is directly contrary to the testimony of Aqua's and DELCORA's witnesses. Witnesses from both Aqua and DELCORA stated that the ownership of all DELCORA physical facilities will be transferred to Aqua at closing. For example, Aqua witness Bubel stated: "The Western Regional Treatment Plant asset will be transferred at closing." Municipal Protestants Exh. 9. Further, DELCORA witness Willert testified at length concerning DELCORA's understanding of the transaction, as shown in the following colloquies:

Q. ... Is that an absolute statement as far as you're concerned? No matter what happens with any of these contract issues the [Western Regional Treatment] plant will be transferred to Aqua at closing?

A. Yes. (Tr. 430)

\* \* \*

Q. So, as you understand it, regardless of any contract issues DELCORA intends to transfer ownership of all transmission mains, force mains, and pump stations at closing; is that what I heard you say?

A. That's correct. (Tr. 431)

\* \* \*

Q. So, if a municipality in which DELCORA owns the collection system does not consent or agree to amend its agreement with DELCORA, will DELCORA continue to own, operate, and maintain the collection system in that municipality?

A. If we currently own the pipes in the street or pump stations, they'll be transferred to Aqua ... (Tr. 431-32)

Similarly, Mr. Willert testified that after closing DELCORA will no longer have a permit to own or operate the treatment plant; rather, "Aqua will be the permittee at that point." Tr. 430.

Simply stated, the testimony of Aqua's and DELCORA's own witnesses demonstrates that the fundamental premise behind Aqua's legal argument is false. DELCORA will not continue to own and operate any of the facilities used to serve Municipal Protestants after closing. This is true from the collection systems all the way through the system to the treatment plants.

As Municipal Protestants explained on pages 17-19 of their Main Brief, the contracts between DELCORA and each of the Municipal Protestants require DELCORA to own and operate the wastewater treatment system (or some portions of it). While some of the contracts permit DELCORA to delegate the maintenance or repair of the facilities, none of them permit DELCORA to delegate the ownership or operation. Indeed, it appears that such a delegation of ownership or operation is expressly prohibited by Art. III § 31 of the Constitution as interpreted by the Court in the *Lighton* case.

b. The record does not support Aqua's assertion that Edgmont, Trainer, and Upland would lose access to the Trust if those municipalities exercise their contract rights

On pages 68-69, Aqua's Main Brief contains a statement that is not accurate. Aqua states: "However, if they elect to proceed outside of the Proposed Transaction, Edgmont, Trainer, and Upland will not be eligible to receive any Trust funds to mitigate future Aqua rate increases as otherwise proposed in this proceeding." (Emphasis added.) Aqua cites to the rebuttal testimony of Aqua witness Packer to support this statement.

In fact, though, neither Mr. Packer nor anyone at Aqua will have any control over the Trust funds, including whether the Trust is even funded by DELCORA and in what amount. At the hearing, Mr. Packer testified as follows:

Q. Is this whole notion of a trust to offset future rates solely DELCORA's

decision?

A. Yeah, that is my understanding. Yes. (Aqua witness Packer; Tr. 270)

\* \* \*

Q. ... I asked you, who would make the decision about customers who were eligible? Would it be Aqua or DELCORA, or both?

A. I would say it would be DELCORA. (Aqua witness Packer, Tr. 278)

Further, both Mr. Packer (from Aqua) and Mr. Pileggi (from DELCORA) testified that no decision had been made about the eligibility of customers in Edgmont, Trainer, or Upland for payments from the Trust, as shown in the following statements:

If a municipality does not agree to assign and amend their contract such that charges for service will be in accordance with Aqua's tariff, Aqua will continue to provide service to that entity. However, that entity may not be eligible to receive the benefit of the customer assistance payments from the DELCORA customer trust. (Aqua witness Packer, Municipal Protestants Exh. 8, p. 1; emphasis added)

\* \* \*

[In Municipal Protestants Exh. 8, p. 1] I carefully used the word "may," "may not be," you know, not a certainty that -- that would have to be determined later on. (Aqua witness Packer, Tr. 278)

\* \* \*

Q. ... Now let's take the other situation where the municipality does not consent. Would the retail customers within those municipalities receive a benefit from the trust, again as you understand it?

A. My answer indicates they may not. I don't know for certain, but my answer certainly indicates that is a possibility, just because of the subsequent negotiations that would have to go on to resolve that contract. I don't know what they would look like, and so I think everything would be back on the table. (Aqua witness Packer, Tr. 281)

\* \* \*

Q. ... Let's talk about Trainer Borough. That's one of the municipalities in which DELCORA provides retail service to individual customers, correct?

A. Yes.

Q. Does DELCORA have a contract with individual customers in Trainer Borough or does it have a contract with the Borough itself?

A. It has a contract with the Borough itself.

Q. Okay. So are you saying that those retail customers may not receive benefits from the trust if the Borough does not agree to some kind of amendment or assignment of its contract?

A. I don't have an answer. I don't know. (DELCORA witness Pileggi, Tr. 463-64)

Thus, contrary to the definitive statement made in Aqua's Main Brief, both Aqua and DELCORA agree that no decision has been made about the eligibility of customers in Edgmont, Trainer, and Upland for Trust payments.

## **VI. Conclusion with Requested Relief**

For the reasons set forth above and in their Main Brief, Edgmont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority, Trainer Borough, and Upland Borough respectfully request the Commission to deny the Application for a certificate of public convenience and necessity filed by Aqua, or to grant the alternative relief set forth in Municipal Protestants' Main Brief.

Respectfully submitted,



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