



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

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

December 14, 2020

**Via Electronic Filing**

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

Re: Application of Aqua Pennsylvania Wastewater Inc. pursuant to Sections 507, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority  
Docket No. A-2019-3015173  
**I&E Reply Brief**

Dear Secretary Chiavetta:

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

Copies are being served on parties of record per the attached Certificate of Service. *Due to the temporary closing of the PUC's offices, I&E is only providing electronic Service.* Should you have any questions, please do not hesitate to contact me.

Respectfully,

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

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

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

GLM/ac  
Enclosures

cc: Hon. Angela T. Jones, Office of Administrative Law Judge *(via email only)*  
Hon. F. Joseph Brady, Office of Administrative Law Judge *(via email only)*  
Pamela McNeal, Legal Assistant, Office of Administrative Law Judge *(via email only)*  
Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

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Gina L. Miller  
Prosecutor  
PA Attorney ID No. 313863

Erika L. McLain  
Prosecutor  
PA Attorney ID No. 320526

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

Dated: December 14, 2020

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

The Bureau of Investigation & Enforcement (“I&E”) incorporates, by reference, the *Statement of the Case* section, including the Procedural History and the Overview of the Transaction, as contained in its timely-filed Main Brief of December 1, 2020.<sup>1</sup> In addition to I&E, the following parties also timely filed Main Briefs with the Pennsylvania Public Utility Commission (“Commission”): Aqua Pennsylvania Wastewater, Inc. (“Aqua”), Delaware County Regional Water Quality Control Authority (“DELCORA”), the Office of Small Business Advocate (“OSBA”), the Office of Consumer Advocate (“OCA”), the County of Delaware, Pennsylvania (“Delaware County”), the Municipal Protestants,<sup>2</sup> Sunoco Partners Marketing and Terminals L.P./Energy Transfer (“Sunoco”) and Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark, Corporation (“Kimberly-Clark”). Pursuant to the procedural schedule and in accordance with Sections 5.501-5.502 of the Public Utility Code (“Code”), I&E submits this Reply Brief.

## **II. BURDEN OF PROOF**

In its Main Brief, I&E explained that Aqua, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application.<sup>3</sup> To be sure, Aqua recognizes its formidable burden, which includes the obligation to establish a preponderance of evidence which is substantial and legally credible.”<sup>4</sup> In order to meet its burden of proof, Aqua must “present evidence

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<sup>1</sup> I&E Main Brief, pp. 1-8.

<sup>2</sup> The “Municipal Protestants” include Southwest Delaware County Municipal Authority (“SWDCMA”), Upland Borough, Lower Chichester Township, Edgmont Township, and Trainer Borough.

<sup>3</sup> I&E Main Brief, pp. 8-9; 66 Pa. C.S. § 332(a).

<sup>4</sup> Aqua Main Brief, Public Version, pp. 5-6; *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

more convincing, by even the smallest amount, than that presented by any opposing party.<sup>5</sup> To satisfy its burden, Aqua must demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.<sup>6</sup> Specifically to this case, Aqua has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, and 1329 of the Code. Absent imposition of the conditions I&E recommends, Aqua cannot meet its burden because its Application will not comply with any of the applicable sections of the Code.

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

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

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

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

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

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

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<sup>5</sup> Aqua Main Brief, Public Version, pp. 5-6; *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

<sup>6</sup> Aqua Main Brief, Public Version, pp. 5-6; *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).



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

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

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

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

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

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

In its Main Brief, Aqua purports to acknowledge that the threshold question that the Commission must answer in this case is whether granting its Application<sup>7</sup> would affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way and be in the public interest.<sup>8</sup> Despite Aqua's acknowledgment, by asking the Commission to approve its Application, as filed, it is also asking that the Commission stray far beyond the inquiry of whether the proposed transaction is in the public interest. Instead, Aqua's Application, for all practical purposes, asks the Commission to depart from the public interest inquiry in favor of the contrived and inappropriate inquiries into whether Aqua should be permitted to contract around the Code and whether jurisdictional ratepayers should be required to assume the

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<sup>7</sup> "Aqua's Application" is how I&E will refer to the Aqua's Application pursuant to Sections 507, 1102 and 1329 of the Code for Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority, pending at this docket.

<sup>8</sup> Aqua Main Brief, Public Version, pp. 7-8.

unprecedented risk of the legal actions against DELCORA that Aqua all too willingly seeks to assume.

I&E submits that while it is irresponsible of Aqua to seek approval of this transaction, case law and recent Commission guidance clearly establish that Aqua is prohibited from contracting around the Code and circumventing the Commission's ratemaking authority by agreeing to charge acquired customers less than tariffed rates. Additionally, all of the risk that Aqua voluntarily seeks to assume should not be passed on to ratepayers. Here, the record demonstrates that the risks Aqua assumes in its Application now include the following: (1) the risk that DELCORA may not exist as a viable seller, as implicated in Delaware County's lawsuit;<sup>9</sup> and (2) the risk of Aqua paying for assets and contracts that the record proves DELCORA cannot sell, as set forth in the Municipal lawsuits.<sup>10</sup>

Adoption of the conditions that I&E recommends, as more fully set forth below in Section 2(C), *Recommended Conditions*, would provide the Commission with a mechanism to ensure that Aqua's Application may be granted in a manner that is consistent with the Code and that ratepayers are protected against the unwarranted and irresponsible risk of the transaction. Although Aqua and DELCORA attempt to argue against I&E's conditions, their combined arguments do not refute the need for the

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<sup>9</sup> As explained on p. 2 of I&E Main Brief, May 14, 2020, Delaware County filed a complaint against DELCORA and the DELCORA Rate Stabilization Trust in the Delaware County Court of Common Pleas, docketed at CV-2020-003185 ("Delaware County's lawsuit").

<sup>10</sup> As explained on p. 6 of I&E's Main Brief, the "Municipal lawsuits" are comprised of the following individual actions filed on November 3-November 6, 2020: (1) SWDCMA v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-0074691; (2) Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007552; and Upland Borough v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007596.

conditions; however, in some case, they do support the need for I&E's conditions. I&E will explain and respond to Aqua and DELCORA's arguments below in Section 2(C), *Recommended Conditions*.

## **V. ARGUMENT**

### **A. Section 1329**

#### **1. Introduction**

I&E herein incorporates this section of its Main Brief.<sup>11</sup>

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

I&E herein incorporates this section of its Main Brief.<sup>12</sup>

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

I&E herein incorporates this section of its Main Brief.<sup>13</sup>

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

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

I&E herein incorporates this section of its Main Brief.<sup>14</sup>

#### **2. Fitness**

I&E herein incorporates this section of its Main Brief.<sup>15</sup>

#### **3. Affirmative Public Benefits**

I&E herein incorporates this section of its Main Brief.<sup>16</sup>

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<sup>11</sup> I&E Main Brief, p. 12.

<sup>12</sup> I&E Main Brief, p. 13.

<sup>13</sup> Id. at pp. 13-14.

<sup>14</sup> Id. at pp. 14-15.

<sup>15</sup> Id. at 16.

<sup>16</sup> Id.

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

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

I&E herein incorporates this section of its Main Brief.<sup>17</sup>

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

I&E herein incorporates this section of its Main Brief.<sup>18</sup>

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

I&E has not addressed this issue.

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

I&E herein incorporates this section of its Main Brief.<sup>19</sup>

### **C. Recommended Conditions**

I&E has already established that it is well-settled that in order to ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.<sup>20</sup> I&E submits that this case exemplifies the need for the great latitude that the Commission is granted when determining conditions imposed on an award of certificate of public convenience.<sup>21</sup> As set forth in its Main Brief, in order to ensure that the transaction is in the public

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<sup>17</sup> Id. at 16-17.

<sup>18</sup> Id. at 17.

<sup>19</sup> Id. at 17-18.

<sup>20</sup> I&E Main Brief, p. 18, citing to 66 Pa. C.S. § 1103(a).

<sup>21</sup> *Rheems Water Co. v. Pa. PUC*, 620 A.2d 609, 153 Pa. Cmwlth. 49 (Cmwlth.1993).

interest, and consistent with the Code, I&E recommends that it only be approved subject to the following three conditions:<sup>22</sup>

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

Below, I&E will address Aqua and DELCORA's argument against the second and third conditions listed above and explain why their arguments are without merit and warrant rejection. The first condition, regarding cost of service, is not contested as more fully set forth in I&E's Main Brief<sup>23</sup> and below.

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<sup>22</sup> I&E Main Brief, pp. 53-54.

<sup>23</sup> I&E Main Brief, pp. 19-21.

## **I. Cost of Service**

As thoroughly explained in I&E's Main Brief,<sup>24</sup> I&E and Aqua reached an agreement regarding the need for Aqua to perform a specific cost of service study of the DELCORA system for inclusion in Aqua's next base rate case.<sup>25</sup> I&E identified the agreed-upon cost of service term as follows:

In its next base rate case, Aqua must file cost of service calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.<sup>26</sup>

In turn, Aqua's Main Brief recognized its assent to the above cost of service obligation.<sup>27</sup>

For the reasons identified in I&E's Main Brief,<sup>28</sup> I&E avers that the agreed-upon cost of service condition is in the public interest. I&E also notes that the Commission has approved similar cost of service conditions in Aqua's acquisitions of both the Cheltenham<sup>29</sup> and East Norriton<sup>30</sup> wastewater system assets, with the only material difference here being the separation of the City of Chester system as is necessary to account for its status as a combined sewer system. Accordingly, I&E submits that the

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<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id at 20.

<sup>27</sup> Aqua's Main Brief, Public Version, pp. 59-60.

<sup>28</sup> I&E Main Brief, pp. 19-21.

<sup>29</sup> Application of Aqua under Sections 507, 1102, and 1329 of the Public Utility Code for Approval of its Acquisition of wastewater system assets of the Township of Cheltenham at Docket No. A-2019-3008491, p. 91 (Order entered November 5, 2019).

<sup>30</sup> Application of Aqua under Sections 507, 1102, and 1329 of the Public Utility Code for Approval of its Acquisition of wastewater system assets of East Norriton Township at Docket No. A-2019-3009052, pp. 38-39 (Order entered May 21, 2020).

above-referenced cost of service condition is in the public interest and that it is consistent with recent Commission-approved cost of service conditions. Therefore, I&E respectfully requests that the ALJs recommend, and the Commission approve it, without modification, as a condition of granting Aqua's Application.

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

### **A. Introduction**

As fully explained in I&E's Main Brief,<sup>31</sup> by way of an "Information Sharing" Memorandum of Understanding ("MOU"), Aqua has committed to use proceeds from the DELCORA Rate Stabilization Trust ("Trust") to reflect a billing discount ("Aqua Bill Discount") on DELCORA customer bills after the effective date of new rates resulting from Aqua's next base rate case.<sup>32</sup> Aqua proposes to reflect the Bill Discount by applying a line item to directly discount the DELCORA customer bills from tariffed rates.<sup>33</sup> Despite the Commission's clear and unambiguous ratemaking authority for jurisdictional utilities, Aqua and DELCORA are in lockstep that they are only asking the Commission to approve the MOU-based Bill Discount arrangement "as an administrative request," and only "if required" and "to the extent necessary."<sup>34</sup> I&E submits that the Commission has clear authority over the Bill Discount because it violates Section 1303 of the Code and unlawfully seeks to impede on the Commission's ratemaking authority.

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<sup>31</sup> I&E Main Brief, pp. 21-24.

<sup>32</sup> I&E Main Brief, p. 8; Aqua St. No. 2-R, Ex. E.

<sup>33</sup> I&E Ex. No. 1, Sch. 4.

<sup>34</sup> Aqua Main Brief, Public Version, p. 40; DELCORA Main Brief, pp. 18-19.

In its Main Brief, I&E demonstrated the many reasons why Aqua’s Bill Discount proposal must be rejected. Relying upon the application of the plain language of Section 1303, principles of statutory interpretation, and the illustrative example presented in the PAWC/Scranton acquisition case, I&E’s Main Brief established that Aqua’s Bill Discount proposal violates Section 1303 of the Code.<sup>35</sup> I&E’s Main Brief also demonstrated that Aqua’s faulty comparisons of the Bill Discount to bill credits resulting from valid low-income customer programs and to Commission-approved rate credits related to recompensing customers in the Aqua/ Peoples acquisition case were without merit and warranted rejection.<sup>36</sup> Finally, I&E noted that in lieu of Aqua’s illegal Bill Discount proposal, as a Section 1329 Applicant, Aqua could have proposed to stabilize acquired customers’ rates through the only statutorily permissible method vis a vis a rate stabilization plan; however, it rejected that option.<sup>37</sup>

#### **B. DELCORA Does Not Attempt to Refute I&E’s Position**

Importantly, DELCORA, a zealous proponent of the Bill Discount, and a party to the MOU asking the Commission to approve it,<sup>38</sup> does not deny that the Bill Discount violates Section 1303 of the Code. Instead, DELCORA ignores the issue entirely. In its

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<sup>35</sup> I&E Main Brief, pp. 23-29.

<sup>36</sup> Id. at pp. 29-35.

<sup>37</sup> I&E Main Brief, pp. 35-40. Importantly, while I&E acknowledges that Delaware County now argues that Aqua is proposing a de facto rate stabilization plan, Aqua’s continued denial of such proposal, coupled with its failure to support any rate stabilization plan weigh against Delaware County’s argument. But I&E avers that the determinative fact here is that the Aqua Bill Discount cannot operate as a rate stabilization plan because it depends on an uncertain funding stream, the unquantified and speculative Trust funding. As pointed out on p. 17 of I&E’s Main Brief, the amount of Trust funds available may be de minimis or even non-existent depending on the outcome of litigation and payment of Aqua’s unaccounted for liabilities; therefore it cannot underlie or support any guaranteed amount of rate stabilization for a fixed period of time beyond Aqua’s next base rate case as would be required under 66 Pa. C.S. § 1329(g).

<sup>38</sup> Aqua Ex. 2-R, Sch. E.



Main Brief, DELCORA simply indicates that if the Bill Discount is invalidated, it will simply “choose another vehicle” to use to accomplish its goal of using the transaction proceeds to benefit DELCORA customers.<sup>39</sup> I&E recognizes, as a general matter, that the Commission may not have authority to direct how DELCORA, a non-jurisdictional municipal authority, spends its sale proceeds using any of the “other vehicles” that DELCORA may contemplate to distribute the proceeds, with certain caveats. Pertinent to this discussion, an important caveat is that any of DELCORA’s “other vehicles” must not, either directly or indirectly, result in jurisdictional customers paying less than tariffed rates. I&E will address this topic more thoroughly below, as it addresses Aqua’s similar position.

### **C. Aqua’s Attempts to Refute I&E Are Without Merit**

Aqua’s Main Brief barely addresses the legality of its Bill Discount proposal and it presents no legal argument or analysis to combat I&E’s position. Instead, Aqua merely claims that “[p]resentation of the full tariff rate minus the bill assistance payment does not violate Section 1303.”<sup>40</sup> In an attempt to distinguish the Bill Discount from the Variance Adjustment that the ALJs determined to be violative of Section 1303 in the PAWC/Scranton acquisition case,<sup>41</sup> Aqua mischaracterizes the ALJs’ Recommended

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<sup>39</sup> DELCORA Main Brief, p. 17.

<sup>40</sup> Aqua Main Brief, Public Version, p. 58.

<sup>41</sup> Joint Application of Pennsylvania-American Water Company and the Sewer Authority of the City of Scranton for Approval of (1) the transfer, by sale, of substantially all of the Sewer Authority of the City of Scranton’s Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania (“Scranton Acquisition Case”), Docket No. A-2016-2537209, p. 39 (Recommended Decision Entered August 17, 2016).

Decision. Specifically, Aqua claims that the ALJs' determination relied, in part, upon a factor of the PAWC/SSA Variance Adjustment that does not apply to the Bill Discount. The alleged factor is that the Variance Adjustment could have been impacted by an uncertain purchase price, while purchase price is clearly established in this case.<sup>42</sup> Aqua also attempts to distinguish the Bill Discount from the Variance Adjustment by arguing that unlike the facts of the PAWC/SSA acquisition case, the sums credited to customers through the Bill Discount are from a trust created by a third party, DELCORA, not a discount of rates coming from Aqua. In a final attempt to defend its Bill Discount, Aqua claims that "it is not unusual for third parties to provide funds to utilities that act as a payment on bills" and it points to low-income program payments as an example.<sup>43</sup>

I&E avers that all of Aqua's attempts to defend its Bill Discount are without merit and they must be rejected. First, Aqua's claim that "[p]resentation of the full tariff rate minus the bill assistance payment does not violate Section 1303" is completely erroneous, as I&E thoroughly explained in its Main Brief.<sup>44</sup> On the contrary, the Bill Discount proposal would directly result in impacted customers paying less than their tariffed rates, not by virtue of approved low-income funding or a Commission-approved reimbursement, but by Aqua's agreement with DECLORA. This result is directly at odds with Section 1303's clear prohibition against a public utility charging its customers less than tariffed rates,<sup>45</sup> and Aqua's denial of that fact does not make it any less true.

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<sup>42</sup> Aqua Main Brief, Public Version, p. 59.

<sup>43</sup> Id. at pp. 58-59.

<sup>44</sup> I&E Main Brief, pp. 24-25.

<sup>45</sup> 66 Pa. C.S. § 1303.

Additionally, Aqua's attempt to distinguish its Bill Discount from the PAWC/SSA Variance Adjustment are to no avail. Aqua makes much of the fact that PAWC's purchase price for the SSA assets was uncertain because it depended on an undetermined payment of a Variance Adjustment. However, in making this argument, Aqua appears to overlook the fact that its own Bill Discount proposal depends on application of uncertain and unquantified sale proceeds that may comprise the Trust. Regardless, Aqua's purchase price argument is a red-herring because despite Aqua's representation to the contrary, a review of the Recommended Decision reveals that the uncertainty of the purchase price was not a determining factor in the ALJs' determination that Section 1303 was violated. Instead, the ALJs determined that the Variance Adjustment's operation as a "price break" from tariffed rates was a violation of Section 1303.<sup>46</sup> Additionally, Aqua's argument that the fact that a third party, the Trust, is providing the discount money is determinative here also fails.

As I&E explained in its Main Brief, it does not matter whether Aqua or another party provides the funding because Section 1303 expressly prohibits deviation from tariffed rates "directly or indirectly, by any device whatsoever...."<sup>47</sup> The ALJs in the PAWC/SSA Scranton acquisition case recognized this important principal too. The ALJs' recognition is clear in that it is reflected in their determination that any Variance Adjustment refund paid to acquired customers, *either paid directly or through a third party administrator mechanism*, would result in the same outcome: an impermissible

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<sup>46</sup> Scranton Acquisition Case, Docket No. A-2016-2537209, p. 39 (Recommended Decision Entered August 17, 2016).

<sup>47</sup> I&E Main Brief, pp. 24, 27.

violation of Section 1303.<sup>48</sup> Finally, I&E recognizes that in the PAWC/SSA acquisition case, where PAWC attempted to use the Variance Adjustment as a vehicle to stabilize acquired customers' rates, PAWC did not have the rate stabilization option available. Instead, as a non-Section 1329 Applicant, PAWC did not have an opportunity to propose a rate stabilization plan in order to avoid offending Section 1303. Here, as a Section 1329 Applicant, the General Assembly has provided Aqua with an express opportunity to do what PAWC could not do, propose a rate stabilization plan, but Aqua declined it in favor of needlessly contracting around the Code. Therefore, the PAWC/SSA acquisition case does not support Aqua's Bill Discount, but it does support I&E's position.

Finally, in its Main Brief,<sup>49</sup> I&E demonstrated why Aqua's Bill Discount is completely distinguishable from the low-income program payments upon which Aqua now seeks to rely. Specifically, there are fundamental differences between Aqua's MOU-based promise to discount the rates of acquired DELCORA customers and applying regulatorily-approved and needs-based funding awards to low-income utility customers. One fundamental difference is that low-income program credits are "based on financial need and are not applied unilaterally to newly-acquired customers based on billed usage, which is clearly a discount or rate subsidy."<sup>50</sup> Additionally, low-income program payments are subject to defined parameters of affordability, and subject to Commission approval and oversight.<sup>51</sup> In direct contrast to low-income program

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<sup>48</sup> Scranton Acquisition Case, Docket No. A-2016-2537209, p. 39 (Recommended Decision Entered August 17, 2016).

<sup>49</sup> I&E Main Brief, pp. 29-32.

<sup>50</sup> I&E Main Brief, p. 30; I&E St. No. 1-SR, p. 11.

<sup>51</sup> I&E Main Brief, pp. 31-32; I&E St. No. 1-SR, p. 11.

payments, Aqua's Bill Discount simply operates as an arbitrary discount from tariffed rates for acquired customers, not based on need, but based on a commitment made to DELCORA in the MOU. Accordingly, Aqua's reliance upon low-income programming credits as a basis to support its billing discount proposal is without merit and it should be rejected.

**D. Aqua Cannot Contract Around the Commission's Authority to Regulate Rates**

Having established that Aqua's Bill Discount must be rejected, I&E notes that both Aqua and DELCORA raise the specter of using other means to distribute any available Trust proceeds to acquired customers. Aqua goes as far as to suggest that if its Bill Discount is not approved, it could include a check in each DELCORA customer bill or it could send customer information to the Trust and the Trust could issue checks.<sup>52</sup> I&E avers that while Aqua apparently suggests these methods as alternatives, none of them were developed in the record or specifically proposed in this case. Additionally, none of the alleged alternatives are memorialized in the MOU that underlies the Bill Discount proposal. Nonetheless, I&E remains concerned that Aqua's apparent determination to appease DELCORA at the expense of the Code must be expressly rejected regardless of what vehicle it may seek to employ.

By way of the case of *PPL Electric Utilities Corporation v. City of Lancaster*,<sup>53</sup> recent case law affirms that the Commission's jurisdiction over tariffed rates may not be disturbed. *PPL Electric* held, in part, that the City of Lancaster's attempt to impose a

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<sup>52</sup> Aqua Main Brief, Public Version, p. 40.

<sup>53</sup> *PPL Electric Utilities Corporation v. City of Lancaster*, 214 A.3d 639 (Pa., 2019).

maintenance fee via Ordinance 16-2013 at issue in the case was preempted by the Code's clear authority over tariffed rates. As demonstrated in the passage below, preemption was established, in part, because the fee that the City of Lancaster proposed to charge encroached on PPL's tariffed rates approved by the Commission (the passage below refers to the Commission-approved tariffed rates as "the state tariff"):

Like the state-level tariff, the City proposes to impose a fee that, at least in part, reflects the regulatory expense of overseeing utilities' conduct within its jurisdiction. This would be doubly the case were we to uphold the Ordinance's proposed inspection and enforcement provisions—and it is only right to view the City's intent relative to the entirety of the Ordinance it enacted. However, these costs are materially congruent to the state-level costs embedded in the state tariff that utilities already bear. **Thus, if the tariff is a utility regulation, and plainly it is, one cannot tenably maintain that a municipal maintenance fee can be understood as anything but the same. Consequently, the maintenance fee, too, is preempted by the Code in favor of the PUC's authority to regulate public utilities.**<sup>54</sup>

I&E submits that although *PPL Electric* addresses a municipality's attempt to impede upon tariffed rates via adoption of an Ordinance, in this case, Aqua and DELCORA seek to encroach upon the Commission's authority by circumventing tariffed rates via a private agreement with a non-jurisdictional municipal authority.

In this case, Aqua, a regulated public utility, fails to respect the Commission's authority to regulate its rates because it argues that the Commission has little, if any, authority to do anything other than approve, "if necessary" its contractual arrangement to charge acquired customers less than tariffed rates. I&E submits, and clear statutory

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<sup>54</sup> Id. at 659 (Pa., 2019) (emphasis added).

guidance establishes,<sup>55</sup> that the Commission, not Aqua, nor DELCORA must retain authority over acquired customers rates. Significantly, Kimberly-Clark, an entity that may become an acquired customer through the transaction, has already expressed a concern that perfectly exemplifies the importance of Commission's authority over jurisdictional rates. Specifically, Kimberly-Clark indicates a concern as follows:

. . .as structured by Aqua, there will be no direct oversight of the Trust Fund by the Commission. If there are issues in the future involving the Trust Fund, it is unclear whether, or to what extent, the Commission would have jurisdiction to adjudicate and resolve them.<sup>56</sup>

I&E submits that Kimberly-Clark's concern perfectly illustrates the practical result of Aqua's Bill Discount proposal, which is to impermissibly empower a third party to hold authority over jurisdictional customers' rates. Such a result offends the Code, because it is directly at odds with the Commission's authority over jurisdictional utilities,<sup>57</sup> and it would leave jurisdictional ratepayers without a remedy for rate disputes. Additionally, I&E notes that recent Commission precedent also expressly prohibits exactly what Aqua has done here, which is to attempt to circumvent the Code by making separate arrangements through an agreement with a municipal authority.<sup>58</sup> Accordingly, I&E respectfully requests that the Commission reject Aqua's Bill Discount arrangement.

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<sup>55</sup> 66 Pa. C.S. § 501.

<sup>56</sup> Kimberly -Clark Main Brief, p. 12.

<sup>57</sup> 66 Pa. C.S. § 501.

<sup>58</sup> *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority – Stage 1*, M-2018-2640802 et al, p. 59 (Opinion and Order, March 26, 2020).

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

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

##### **1. Introduction**

As set forth in its Main Brief, I&E recommended that closing of the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change DELCORA's status as a bona fide seller.<sup>59</sup> In making its recommendation, I&E acknowledged that this case appears to be the first acquisition case before the Commission whereby the seller, DELCORA, is currently a defendant in active litigation that may conclude with the determination that it cannot consummate the transaction at issue in this case. As summarized thoroughly in I&E's Main Brief, the Delaware County lawsuit is currently pending in the Court of Common Pleas of Delaware County which, *inter alia*, may result in the termination of DELCORA.<sup>60</sup> I&E recognized that under the facts alleged in Delaware County's Petition,<sup>61</sup> DELCORA's status as a qualifying "selling utility"<sup>62</sup> is in dispute because DELCORA's very existence as a municipal authority is at issue while dissolution remains possible. Aside from qualification as a seller on a statutory basis, I&E demonstrated that DELCORA and Aqua's APA relies upon DELCORA's representation and warranty that it is "duly

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<sup>59</sup> I&E St. No. 1, pp. 9-10.

<sup>60</sup> Delaware County's Petition, ¶38.

<sup>61</sup> Delaware County's Petition, ¶¶ 15, 21, 30, 38.

<sup>62</sup> Section 1329 defines a "Selling utility" as "a water or wastewater company located in this Commonwealth, owned by a municipal corporation or authority that is being purchased by an acquiring public utility or entity as the result of a voluntary arm's-length transaction between the buyer and seller."



organized and existing under the Municipal Authorities Act and incorporated by appropriate legal action by the Seller.”<sup>63</sup> In summary, both the law and DELCORA and Aqua’s APA require that DELCORA exist as a municipal wastewater company, and its existence as such is under direct attack in the Delaware County lawsuit. Accordingly, imposition of I&E’s condition is warranted and necessary to protect the public interest.

## **2. Aqua and DELCORA’s Conflicting and Inconclusive Legal Conclusions**

In an attempt to move full-steam ahead with this transaction, DELCORA asks the Commission to reach a legal conclusion regarding the pending Delaware County lawsuit. Specifically, DELCORA asks the Commission to conclude that even if Delaware County wins its lawsuit and dissolves DELCORA, that Delaware County would be compelled to step in to DELCORA’s shoes as the Seller in this transaction.<sup>64</sup> However, Aqua’s conflicting position directly rejects any notion that a simple substitution of Delaware County for DELCORA would keep the transaction intact. Instead, Aqua asks that the Commission conclude that DELCORA simply cannot be dissolved prior to closing the transaction, because the APA contains multiple provisions that “can only be satisfied by DELCORA prior to closing, and not the County.”<sup>65</sup>

Thus, while Aqua and DELCORA demonstrably disagree about whether Delaware County could be forced to assume the APA if DELCORA is dissolved, they nonetheless agree that the Commission is empowered to do nothing more than to disregard the

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<sup>63</sup> Aqua’s Application, Exhibit B-1, Section 4.01.

<sup>64</sup> DELCORA Main Brief, p. 17.

<sup>65</sup> Aqua Main Brief, Public Version, pp. 57-58.

Delaware County lawsuit and let the chips fall where they may.<sup>66</sup> To be sure, Aqua claims that the potential dissolution of DELCORA through the Delaware County lawsuit is non-jurisdictional to the Commission.<sup>67</sup> Still, in an apparent attempt to assuage any of the Commission’s “non-jurisdictional” concerns, DELCORA alleges the outcome of the case could be available at any time after the conclusion of the trial on December 2, 2020.<sup>68</sup>

### **3. I&E’s Recommended Condition is Warranted and in the Public Interest**

I&E submits that the Commission must fundamentally reject both DELCORA’s and Aqua’s arguments against I&E’s recommended condition. First, the record demonstrates that Aqua and DELCORA cannot even, between themselves, form a meeting of the minds as to whether the transaction can move forward if DELCORA is dissolved. Accordingly, the Commission should reject DELCORA’s legal conclusion that dissolution will not impact the transaction and negate the need for I&E’s condition. Next, Aqua’s argument that the Commission has no jurisdiction over the potential dissolution of DELCORA is correct only in the technical sense that the Delaware County lawsuit is pending in the Delaware County Court of Common Pleas instead of at the Commission. Otherwise, Aqua’s argument relies upon the proposition that the Commission must approve Aqua’s Application without ever truly knowing the identity of the Seller, an absurd outcome that cannot credibly be considered.

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<sup>66</sup> Id.; DELCORA Main Brief, p. 16.

<sup>67</sup> Aqua Main Brief, Public Version, p. 58.

<sup>68</sup> DELCORA Main Brief, p. 16.

I&E submits that the public interest requires that the Commission protect jurisdictional ratepayers from the uncertain outcome of expensive, protracted litigation that may impact DELCORA's very existence and implicate all of the commitments it purports to make in the APA. No requisite public interest or public benefit analysis is possible while the Delaware County and Municipal lawsuits against DELCORA remain unresolved, because the guarantees DELCORA makes in the APA may be directly and materially impacted by any of those lawsuits. I&E also submits that it is inconsequential whether DELCORA anticipates that the Delaware County lawsuit will soon conclude because not only is there no certainty of any timetable for the conclusion, but parties to that case may seek to appeal the decision whenever it finally becomes available.

Even assuming, *arguendo*, that the Delaware County lawsuit is finally resolved in DELCORA's favor, as explained in more detail below, the Municipal lawsuits also may negate DELCORA's ability to sell certain property in a way that would materially alter the transaction. Therefore, legal challenges to DELCORA's authority to sell, as represented in the APA, will continue to persist. The risk of those legal challenges will all be to the detriment of ratepayers who will have no remedy if DELCORA cannot deliver what it promised. This is not a result that the Commission should permit because it is completely adverse to the public interest. In order to protect the public interest, I&E respectfully requests that the Commission condition any approval of Aqua's Application upon closing of the transaction not being permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change DELCORA's status as a bona fide seller.

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

**1. Introduction**

Although the Code establishes that the Commission has discretionary power to determine the reasonableness, legality and validity of Aqua's APA;<sup>69</sup> existing and numerous legal disputes challenging DELCORA's ability to convey all of the property and to assign all of the contracts identified in the APA will make such a determination impossible. In its Main Brief, I&E summarized that the record in this case reveals that multiple municipalities within the DELCORA "system" have asserted property and contractual rights that DELCORA now impermissibly attempts to convey to Aqua.<sup>70</sup>

These rights include the following:

- Edgmont Township has an existing contract with DELCORA that identified specific terms of the finance, design, construction, installation, ownership, operation, maintenance and repair duties and responsibilities for the Crum Creek Sewer District System, which DELCORA purports to convey. The Edgmont contract included a buyback provision that a buy-back provision in case DELCORA ever did decide to sell or stop operating the system, plus a requirement that Edgmont would have to consent to any assignment of the contract. Edgmont has not consented to any assignment.<sup>71</sup>
- Lower Chichester Township has an existing contract with DELCORA that defines parameters for DELCORA will 'bill the township for service, what costs can be billed to the township, operation of the treatment plant, industrial

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<sup>69</sup> 66 Pa. C.S. § 507.

<sup>70</sup> I&E Main Brief, pp. 47-52.

<sup>71</sup> Edgmont St. No. 1, pp. 3-5.

pretreatment, obtaining grant funding, and so on.” Lower Chichester Township has not consented to any assignment of its contract.<sup>72</sup>

- Upland Borough has an existing contract for DELCORA to service and maintain the Upland Borough wastewater/sewer system, and the agreement provides, among other things, that in the event that DELCORA does not continue to operate the wastewater system, the system in Upland will be turned back over to Upland. Upland Borough has not consented to any assignment of its contract.<sup>73</sup>
- Trainer Borough has an existing contract with DELCORA, which, inter alia, provides for DELCORA’s operation of the Trainer Borough system and which provides that the customers of DELCORA located in Trainer Borough shall bear none of the costs of the collection of sewage outside the service area of Trainer Borough. Also, the contract provides that if DELCORA fails to operate the wastewater system, then certain assets will revert to Trainer’s ownership, unless Trainer declines to take ownership in which case the Trainer system reverts to the County of Delaware or any other agency, as may be dictated by law. Trainer Borough has not consented to any assignment of its contract.<sup>74</sup>
- Southwest Delaware County Municipal Authority (“SWDCMA”) has an existing contract with DELCORA that memorializes the rates SWDCMA agreed to pay DELCORA. The rate agreement was reached recognition of SWDCMA’s contribution of 60%, or approximately \$12 million of the costs of the Chester Ridley Creek Pump Station which was necessary to were built to connect SWDCMA, a neighboring authority, and another township to the DELCORA system. SWDCMA has not consented to any assignment of its contract.<sup>75</sup>

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<sup>72</sup> Lower Chichester St. No. 1, pp. 3-5.

<sup>73</sup> Upland St. No. 1, pp. 1-3.

<sup>74</sup> Municipal Protestant Exhibits, Exhibit 2, pp. 12-13.

<sup>75</sup> SWDCMA St. No. 1, pp. 1-5.

I&E noted that the APA materially misrepresents property interests retained by Edgmont Township, Upland Borough and Trainer Borough. Instead, the APA ignores those property interests by failing to identify them as excluded assets in Schedule 2.02(g) when, in fact, they cannot be conveyed without the permission of Upland Borough and Trainer Borough. Additionally, by way of Section 4.15 of the APA, “Assigned Contracts,” DELCORA purports to transfer the above-mentioned contracts of Edgmont Township, Lower Chichester Township, Upland Borough, Trainer Borough, and SWDCMA without their requisite permission for such assignment. In order to enforce their respective property and contract rights against DELCORA, through the Municipal lawsuits, SWDCMA, Lower Chichester Township, and Upland Borough have each initiated actions against DELCORA in Delaware County Court seeking to enforce their contract rights and to enjoin DELCORA from closing the transaction.<sup>76</sup>

Importantly, the undisputed record reveals that the Municipal lawsuits are now pending, and the outcome of any of those actions could impact the legality of the APA and directly impede Aqua’s ability to acquire all of the property that DELCORA purports to sell. The uncertainty of the APA is further compounded by the incorrect assumptions made in the UVEs valuations, each of which established a cost approach value on the potentially false assumption that all of the above-referenced assets at issue in the Municipal lawsuits would be conveyed to Aqua.<sup>77</sup> Additionally, I&E explained that the outcome of the Municipal lawsuits may directly and materially alter the property and contractual rights that DECLORA has promised to assign to Aqua. In recognition of

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<sup>76</sup> Municipal Protestants Exhibits 11-13, respectively.

<sup>77</sup> I&E Main Brief, p. 51, citing to Aqua Application, Exhibit R, pp. 4-6 and Aqua Exhibit Q, p. 27.

these facts, I&E submitted that if the Commission approves Aqua's Application, including the APA, prior to the resolution of the Municipal lawsuits, the transaction that the Commission approves may be materially different than the transaction, if any, that DELCORA is empowered to enter.<sup>78</sup> I&E recommended that the Commission act to ensure that the APA is legally sound and that ratepayers are not deprived of the benefit of Aqua's bargain by paying for assets and contracts that cannot be transferred. Therefore, in order to protect the public interest, I&E recommended that the Commission condition any approval of Aqua's Application on the closing of the transaction not being permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not result in any change to the terms of Aqua's APA.<sup>79</sup>

## **2. Aqua and DELCORA Ask the Commission to Assume the Risk of their Materially Inaccurate APA**

Despite I&E's well-founded concerns regarding the viability and legality of the APA, all which have clear support in the record, Aqua and DELCORA ask the Commission to summarily dismiss them in favor of their conclusion that DELCORA has full authority to fulfill all of the commitments in the APA.<sup>80</sup> Aqua also attempts to minimize the direct, immediate, and material attack now pending upon the APA by claiming that any transaction "could potentially be subject to current or future litigation, but that potential is not and never has been a bar to Commission's consideration and

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<sup>78</sup> I&E Main Brief, pp. 47-52.

<sup>79</sup> Id. at 51-52.

<sup>80</sup> Aqua Main Brief, Public Version, p. 57; DELCORA Main Brief, p. 21.

approval of a CPC application.”<sup>81</sup> Finally both Aqua and DELCORA point to Section 2.06 of the APA as a way to escape DELCORA’s apparent inability to transfer all of the assets it promised to sell to Aqua.<sup>82</sup>

The APA term that Aqua and DELCORA rely upon, Section 2.06, *Certain Transfers; Assignment of Contracts*, appears in pertinent part below:<sup>83</sup>

(a) Notwithstanding anything to the contrary in this Agreement, and subject to the provisions of this Section 2.06(a), Section 2.06(b) and Section 12.01(c), to the extent that the sale, transfer, assignment, conveyance and delivery, or attempted sale, transfer, assignment, conveyance and delivery, to Buyer of any Assigned Contract or other Acquired Asset 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, this Agreement shall not constitute a sale, transfer, assignment, conveyance and delivery, or an attempted sale, transfer, assignment, conveyance, and delivery, thereof (any such Acquired Asset, a “Nonassignable Asset”). . . .

(b) Until such time as a Nonassignable Asset is transferred to Buyer pursuant to this Article II, Buyer and the Seller shall cooperate in any commercially reasonable and economically Feasible arrangements (such as leasing/subleasing, licensing/sublicensing or contracting/subcontracting) to provide to the Parties the economic and, to the extent permitted under Law, operational equivalent of the transfer of such Nonassignable Asset to Buyer at the Closing and the performance by Buyer of its obligations with respect thereto, and so long as the Seller transfers and turns over all economic and beneficial rights with respect to each such Nonassignable

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<sup>81</sup> Aqua’s Main Brief, Public Version, pp. 67-68; DELCORA Main Brief, p. 22.

<sup>82</sup> Id.

<sup>83</sup> Aqua’s Application, Exhibit B-1, Section 2.06 (a)-(b). I&E notes that portions of these terms were not included because they were too voluminous and were not necessary to summarize Aqua and DELCORA’s positions.



Asset, Buyer shall, to the extent permitted under Law and the terms of any applicable contract that constitutes a Nonassignable Asset, as agent or subcontractor for the Seller, pay, perform and discharge the liabilities and obligations of the Seller thereunder from and after the Closing Date, but only to the extent that such liabilities and obligations would constitute Assumed Liabilities if the applicable consent or approval had been obtained on or prior to the Closing Date and such Nonassignable Asset had been assigned to Buyer at Closing. . . .

According to DELCORA, by applying Section 2.06, if the consent it needs to assign any service agreement is required but cannot be obtained, then DELCORA will continue to be the legal owner of those assets after closing. In that case, Aqua would become the economic/beneficial owner of the “Nonassignable Assets” and Aqua would provide service to these customers as an agent/subcontractor of DELCORA.<sup>84</sup> Aqua too relies upon Section 2.06 as a purported remedy for situations where DELCORA is without authority to actually assign the contracts to Aqua that it purports to assign in the APA.<sup>85</sup>

Despite their claims of shelter via Section 2.06, both Aqua and DELCORA admit that aside from contracts, there are also property rights held by the Municipal Protestants that DELCORA does not have the present authority to transfer. Specifically, Aqua admits both that “Edgmont has a right of first refusal to purchase certain DELCORA assets serving it if DELCORA sells the facilities” and that “Trainer and Upland each have a reversionary interest in the system serving them if DELCORA fails to operate the system.”<sup>86</sup> Aqua indicates that it is continuing to work with the Municipal Protestants to

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<sup>84</sup> DELCORA Main Brief, p. 22.

<sup>85</sup> Aqua Main Brief, Public Version, pp. 67-68.

<sup>86</sup> Id. at. 68.

resolve their concerns and to facilitate assignment of the contracts and assets; however, it concedes that if a resolution cannot be reached, the property interests cannot be transferred. Similarly, DELCORA recognizes that “some of the contracts at issue have reversionary rights and/or rights of first refusal.” However, DELCORA attempts to dismiss the impact of such contracts by alleging that their impact upon the transaction “would be negligible.”<sup>87</sup>

Despite the clear and unresolved defects and inaccuracies in the APA, and by relying upon Section 2.06, Aqua and DELCORA ask the Commission to overlook those material defects by permitting Aqua to acquire less than DELCORA promised to sell. Both Aqua and DELCORA admit that the Municipal Protestants hold valid property interests that DELCORA cannot convey without consent, and the record is clear that no consent has been granted, but they attempt to characterize these issues as negligible. As demonstrated below through the Municipal Protestants arguments and I&E’s analysis, the Commission should reject Aqua and DELCORA’s arguments because they are without merit and they are antithetical to the public interest.

### **3. The Municipal Protestants Quantify the Material Impact of the APA’s Material Misrepresentations**

In their Main Brief, the Municipal Protestants effectively articulate why Aqua and DELCORA’s reliance upon Section 2.06 of the APA will not cure the defects of DELCORA’s inability to transfer all of the contracts and property as promised in the APA. Significantly, the Municipal Protestants credibly refute Aqua and DELCORA’s

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<sup>87</sup> DELCORA Main Brief, p. 22.

argument that Section 2.06 of the APA can be used to force the Municipal Protestants to accept Aqua's role as either an owner or service provider as contemplated in Section 2.06. Here, the Municipal Protestants have proven that their contracts with DELCORA expressly require DELCORA to own and operate the wastewater treatment system as a condition of each contract,<sup>88</sup> negating the alleged effectiveness of Section 2.06.

Additionally, the Municipal Protestants have disproven DELCORA's claim that the value of the non-transferrable assets and contracts they hold are negligible because the revenues and customer bases tied to these assets are significant and impactful. More specifically, in 2019, DELCORA's total revenues from providing wastewater service were approximately \$59,818,000, and the Municipal Protestants collectively provided \$5,453,000, or approximately 9.1%, of DELCORA's total service revenues.<sup>89</sup>

Additionally, the Municipal Protestants have demonstrated that DELCORA lacks the ability to transfer the contract rights necessary to serve 2,600 retail customers in Edgmont Township, Upland Borough, and Trainer Borough, which represents approximately one-sixth (1/6) of DELCORA's retail customer base.<sup>90</sup> Therefore, I&E submits that DELCORA's attempt to characterize the impact of its inability to transfer the Municipal Protestants' contracts and assets to Aqua as "negligible" is disingenuous and contrary to record evidence in this case.

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<sup>88</sup> Municipal Protestants' Main Brief, pp. 17-19.

<sup>89</sup> Id. at p. 6.

<sup>90</sup> Id. at 21.

#### **4. I&E's Recommended Condition is Warranted and in the Public Interest**

As established earlier in I&E's Main Brief, as well as through the Municipal Protestants' compelling and informational analysis of the impact of its property rights upon this transaction, it is clear that DELCORA has promised more in the APA than it can deliver. It is also clear that DELCORA's inability to deliver what it has promised Aqua cannot be cured by application of Section 2.06 of the APA, and that its inability will significantly reduce the revenues and customer base that Aqua paid to receive. But perhaps the easiest way to understand the significant and material impact of the inaccurate APA and the impact of its failure to recognize the Municipal Protestants' property rights is to review the testimony of Aqua's UVE, Harold Walker.

During the evidentiary hearings in this case, Mr. Walker testified that "the APA essentially determines the rules or the basis of which and how you go about a fair market value determination."<sup>91</sup> Mr. Walker then testified that his appraisal adopted the APA's representation that all of the contracts, customers, and assets of the DELCORA system would be transferred to Aqua at closing.<sup>92</sup> Significantly, when asked whether his valuation of the DELCORA system would be different if the APA was inaccurate and that there are, in fact, non-assignable assets, Mr. Walker indicated that he would likely reach a different conclusion if that were the case.<sup>93</sup> I&E submits that the record now establishes that the Municipal Protestants own substantial non-assignable assets and that

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<sup>91</sup> Hearing Tr. (Public Version) at 388, ln. 7-9.

<sup>92</sup> Id. at 388, ln 10 through 389, ln. 1.

<sup>93</sup> Id. at 390, ln 20 through 391, ln. 15.

DECLORA's failure to accurately reflect them in the APA as excluded assets is a material misrepresentation.

While Aqua and DELCORA argue that I&E's recommended condition is unprecedented, so too is their conduct in submitting a misleading and materially inaccurate APA to this Commission. Although I&E is dismayed that Aqua is vying for the Commission to approve the materially defective APA that may result in it getting less than it is paying for, I&E submits that Aqua should not be empowered to subject its ratepayers to the same uneven and inequitable arrangement. I&E avers that the Commission is empowered, and the public interest requires it, to protect ratepayers from assuming the risk and the impact of DELCORA's missing assets by ensuring that Aqua and DELCORA are only able to consummate the transaction if the representations contained in the APA are true and accurate. The Municipal lawsuits will have a direct and immediate impact upon whether DELCORA can transfer the municipal contracts and property as now represented in the APA. Therefore, I&E respectfully requests that the Commission condition any approval of Aqua's Application upon the transaction not being able to close until Aqua and DELCORA provide the Commission guarantee that the pending litigation in Delaware County Court, or in any other venue, will not result in any change to the terms of the APA for which Aqua seeks approval in this case.

## **D. Section 507 Approvals**

### **1. Legal Principles**

I&E herein incorporates this section of its Main Brief.<sup>94</sup>

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

I&E herein incorporates this section of its Main Brief.<sup>95</sup>

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

I&E herein incorporates this section of its Main Brief.<sup>96</sup>

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

The proposed transaction, as filed, will not affirmatively promote the public interest in a substantial way and violates the Code. Conditions must be imposed prior to granting the requested certificates of public convenience to protect the interests of Aqua, Aqua's existing customers, and the regulated community. Accordingly, if the transaction is approved, I&E respectfully requests that the Administrative Law Judges recommend that the Commission condition its approval of Aqua's Application on the following terms:

- (1) In its next base rate case, Aqua must file cost of service calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods;
- (2) To the extent that it relies upon Aqua issuing acquired customers bills that are lower than the applicable tariffed rates, Aqua and DELCORA's proposal for an irrevocable trust should be rejected; and

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<sup>94</sup> I&E Main Brief, p. 52-53.

<sup>95</sup> Id. at 53.

<sup>96</sup> Id.

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

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'G. L. Miller', written in a cursive style.

Gina L. Miller  
Prosecutor  
PA Attorney ID No. 313863

Erika L. McLain  
Prosecutor  
PA Attorney ID No. 320526

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

Dated: December 14, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

I hereby certify that I am serving the foregoing **Reply Brief** dated December 14, 2020, in the manner and upon the persons listed below:

**Served via Electronic Mail Only**

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

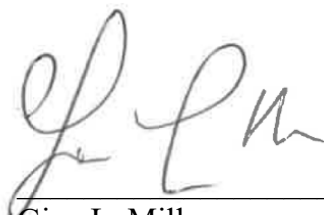
Cynthia Pantages  
C&L Rental Properties, LLC  
30 S. Lake Drive  
P.O. Box 516  
Lake Harmony, PA 1862456t  
[cyndipantages@gmail.com](mailto:cyndipantages@gmail.com)

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

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

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

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



---

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