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December 14, 2020

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

VIA ELECTRONIC FILING

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

Dear Secretary Chiavetta:

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

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

Sincerely,

McNEES WALLACE & NURICK LLC

By 

Adeolu A. Bakare

Counsel to the County of Delaware, Pennsylvania

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

CERTIFICATE OF SERVICE

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

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Dated this 14th day of December, 2020, in Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

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I. STATEMENT OF THE CASE

A. Procedural History

The procedural history stated in the Main Brief of Delaware County (“the County”) is hereby incorporated by reference as if stated in full.¹

Consistent with the litigation schedule established by presiding Administrative Law Judge (“ALJ”) Angela Jones, the County filed a Main Brief on December 1, 2020 and received Main Briefs from Aqua Pennsylvania Wastewater, Inc. (“Aqua”), Delaware County Regional Water Quality Control Authority (“DELCORA”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the Bureau of Investigation and Enforcement (“I&E”), Kimberly Clark Corporation (“Kimberly Clark”), Sunoco Products Marketing & Terminals LLC (“Sunoco”), Edgmont Township, the Southwest Delaware County Municipal Authority (“SWDCMA”), Upland Borough, Lower Chichester Township, and Trainer Borough (collectively, “Municipal Protestants”).

The County hereby submits this Reply Brief responding to various issues raised in the Main Briefs filed by Aqua and DELCORA.²

B. Overview of Transaction

In the Overview of Transaction subsection of its Main Brief, Aqua presents various assertions about the events leading up to the proposed acquisition of DELCORA that are unsupported in the record. The County concurs with Aqua that DELCORA faces challenges due to DELCORA’s dependence on the Philadelphia Water Department (“PWD”) to treat flows from

¹ Delaware County Main Brief at 1-3.

² The County notes that the issues raised by DELCORA were duplicated and more thoroughly addressed in Aqua’s Main Brief. Accordingly, the County responds directly to Aqua’s Main Brief, but the arguments herein apply with equal force to DELCORA’s Main Brief.

DELCORA's eastern service region and anticipated rate increases from PWD upon expiration of the 2028 contract.³ However, Aqua then claims "DELCORA did what was prudent" and "began to look for opportunities" that "led [DELCORA] to talk with Aqua."⁴ This assertion conflicts with the record of events preceding execution of the Asset Purchase Agreement ("APA") between Aqua and DELCORA. The record does not support a finding that DELCORA explored various opportunities before initiating discussions with Aqua.

In fact, the record demonstrates that DELCORA and Aqua formed an exclusive partnership when they executed a formal letter of intent on July 16, 2019 ("Letter of Intent")⁵ to transfer the DELCORA assets. The Letter of Intent restricted DELCORA not only from entering into a sale agreement with other parties, but also prohibited any effort to "engage in, continue or otherwise participate in any discussions or negotiations regarding, or otherwise participate in any way with, any Authority Competing Offer...".⁶ Therefore, DELCORA was constrained from exploring other opportunities, engaging in a competitive process, or allowing for any genuine consideration of other alternatives.⁷

The County further disputes the account of events from both Aqua and DELCORA that characterize the negotiations as an arms-length transaction.⁸ Aqua argues that the parties had

³ See Aqua Main Brief at 3.

⁴ Aqua Main Brief at 3.

⁵ Delaware County Hearing Exhibit No. 2. There is no indication that the Letter of Intent was filed with the Commission pursuant to 66 Pa. C.S. § 507.

⁶ Delaware County Hearing Exhibit No. 2.

⁷ See Delaware County Main Brief at 20-21.

⁸ See Aqua Main Brief at 3-4, Appendix B, Proposed Finding of Fact #11; DELCORA Main Brief at 3.

“comparable bargaining strength”⁹ but does not cite to the record to support that assertion or explain how the parties had comparable bargaining strength. Moreover, “comparable bargaining” is more relevant in the labor and employment context as it relates to the question of whether there existed properly balanced bargaining power between the parties.¹⁰ The County’s challenge is directed towards the interested relationship between the two parties and the lack of competition throughout the negotiation process. As discussed further herein, the record contains numerous indicators that collectively compel a finding that Aqua and DELCORA have not met their burden to show an arm’s length transaction.

The preponderance of record evidence demonstrates that the proposed transaction was not negotiated at arm’s length and thus cannot proceed under the Section 1329 review process.¹¹ The record demonstrates that DELCORA accepted Aqua as the purchaser of its assets without competition, transparency, or sufficient public input.¹² County Witness Brian Zidek, who has served on the Delaware County Council since January 2018, provided his firsthand testimony of the events leading up the transaction:

Council was not provided with any documents or written reports summarizing or analyzing the basis for the proposed transaction, notwithstanding requests for more detailed information and analysis.¹³

⁹ See Aqua Main Brief 3-4.

¹⁰ See, e.g., *Int’l Ass’n of Machinists & Aero Workers v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 149-150 (1976).

¹¹ Delaware County Main Brief at 7 (citing 66 Pa. C.S. § 1329), 7, 18-21.

¹² Delaware County Main Brief at 19-21 (citing Delaware County Statement No. 2 at 3-5 and Delaware County Hearing Exhibit No. 2).

¹³ Delaware County Main Brief at 19-20, Delaware County Statement No. 2 at 4.

Similar to the lack of meaningful engagement with Council, outreach to the general public was also limited. The County's Main Brief shows the public engagement occurred only after Aqua and DELCORA entered into the Letter of Intent.¹⁴ Additionally, the substantially below-market purchase price for DELCORA's system presents another indication that the proposed transaction was not an conducted at arm's length.¹⁵ The Pennsylvania-American Water Company ("PAWC") expressed interest in making an offer to purchase DELCORA, but PAWC could not negotiate or engage in discussions with DELCORA due to the Letter of Intent.¹⁶ Furthermore, an employment offer for DELCORA's Executive Director, who was directly involved in the negotiations and receives unique contractual benefits, erodes the independence of DELCORA's negotiation team and undercuts Aqua's assertion that the parties engaged in arm's length negotiations.¹⁷ As noted in the County's Main Brief, an "arm's length transaction" is a "transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises."¹⁸ Aqua and DELCORA have not met their burden for furnishing evidence of an arm's length transaction and thus have not met the statutory requirements for review and approval of a Section 1329 Application.

¹⁴ See Aqua Main Brief at 41.

¹⁵ See Delaware County Main Brief at 23-24 (citing Delaware County Statement No. 1 at 29-30, Delaware County Statement No. 2 at 5-7)

¹⁶ See Delaware County Statement No. 2, Exhibit BPZ-3, at 70.

¹⁷ See Delaware County Main Brief at 21-22 (citing Delaware County Statement No. 2 at fn 1 *citing* BPZ Exhibit 3, 48:1-15, 59).

¹⁸ Delaware County Main Brief at 19 (citing *Arm's Length Transaction*, Black's Law Dictionary (11th ed. 2019)).

For the reasons set forth above, the Overview of the Transaction offered by Aqua misrepresents the record. Accordingly, the County asks the Presiding Administrative Law Judges to reject the identified claims from Aqua's Overview of the Transaction.

II. BURDEN OF PROOF

The burden of proof discussion from the County's Main Brief is hereby incorporated by reference as if stated in full.¹⁹ As detailed in the County's Main Brief, Aqua bears the burden of proof and must demonstrate by a preponderance of evidence that the Application is in the public interest and should be approved under Sections 507, 1102, 1103, and 1329 of the Public Utility Code.²⁰ As demonstrated herein and in the County's Main Brief, the proposed transaction would not provide affirmative public benefits and is not in the interest of the DELCORA ratepayers, Aqua ratepayers, or the general public.

III. STATEMENT OF QUESTIONS INVOLVED

The Statement of Questions from the County's Main Brief is hereby incorporated by reference as if stated in full.²¹

IV. SUMMARY OF ARGUMENT

In this Reply Brief, the County responds to certain arguments in Aqua's Main Brief. Aqua fails to establish compliance with the procedural and substantive requirements Section 1329 of the Public Utility Code regarding the existence of an arms-length transaction and the inclusion of an applicable rate stabilization plan in its Application.²² Aqua's public interest analysis fails to

¹⁹ Delaware County Main Brief at 5.

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

²¹ Delaware County Main Brief at 6.

²² 66 Pa. C.S. § 1329.

acknowledge the significant difference between the instant transaction where Aqua is attempting to acquire a wastewater system substantially larger and more sophisticated than its own and prior transactions where Aqua's acquisition of smaller systems could lead to efficiencies.

Aqua and DELCORA understate the substantial adverse rate impacts on DELCORA's customers as well as Aqua's existing water and wastewater customers that would result in the future if Aqua's application is approved. Additionally, the claimed affirmative public benefits purported to outweigh the adverse rate impacts from the proposed transaction are non-specific, generalized, speculative, and unsupported.

Aqua mischaracterizes the issues in the County's Common Pleas Litigation and how those issues impact the Commission's review of this transaction. In particular, Aqua casually dismisses the possibility that the Common Pleas Litigation could vitiate the DELCORA Customer Trust ("Trust") *in toto*. Aqua fails to acknowledge how such an action would undermine Aqua's own argument that the Trust is "a unique and substantial affirmative public benefit" to the transaction. Yet, Aqua persists to argue that the Trust, as a short-term rate reduction mechanism, is not PUC-jurisdictional.

Lastly, this Reply Brief responds to various proposed conditions for the Commission to impose if the Commission does not deny the application or require it to be refiled consistent with Section 1329's requirements. If the Commission does not deny the Application outright, the Commission should adopt the County's recommendation to preclude Closing on the transaction until the related proceedings currently before the Court of Common Pleas of Delaware County ("Common Pleas Court") have concluded.

V. ARGUMENT

A. Section 1329

In its Main Brief, Aqua narrowly focuses on Section 1329 issues related to the valuation of the assets of a municipal authority and the application of Section 1329(c) to determine the ratemaking rate base in a Section 1329 application.²³ Aqua fails to address the other substantive and procedural requirements of Section 1329, including the requirement in Section 1329(g) that Aqua as the “acquiring public utility” and DELCORA as the “selling utility” engage in “a voluntary, arm’s length transaction between the buyer and seller.”²⁴ Aqua also fails to address the County’s longstanding argument in this proceeding that Aqua violated Section 1329(d)(5) by excluding the rate stabilization plan from its Application²⁵ and in doing so also violated Section 102 of the Public Utility Code and Commonwealth Court precedent²⁶ subjecting a public utility rate or “other compensation whatsoever of a public utility”²⁷ to the jurisdiction of the Commission.

Aqua responds to the County’s allegations by arguing that a Request for Proposals (“RFP”) is not a legal requirement for the sale of the DELCORA system and not a requirement for an “arms-length” transaction.²⁸ The County does not dispute that the failure to issue an RFP alone does not contravene the statute. However, in assessing compliance with key provisions limiting eligibility for the Section 1329 process, the Commission must consider the totality of the record. The failure

²³ See Aqua Main Brief at 9-23.

²⁴ See 66 Pa. C.S. § 1329(g) (definitions of “acquiring public utility” and “selling utility”); see Delaware County Main Brief at 18-24.

²⁵ See Delaware County Main Brief at 11-17.

²⁶ *McCloskey v. Pa. PUC*, 219 A.3d 1216, 1225 (Pa. Cmwlth. 2019).

²⁷ 66 Pa. C.S. § 102.

²⁸ Aqua Main Brief at p. 35.

of DELCORA to issue an RFP, coupled with DELCORA's failure to consider other alternatives to Aqua, the unbalanced negotiations due to a conflict of interest, and the lack of transparency leading up to the transaction are all factors that collectively show the transaction was not conducted at arm's length. As more thoroughly addressed in the County's Main Brief,²⁹ Aqua has failed to carry the burden that its Application complies with Section 1329's procedural and substantive requirements.

B. Section 1102/1103 Standards – Public Interest

In describing the legal principles under Sections 1102 and 1103 of the Public Utility Code, Aqua contends that the Commonwealth Court's findings in *McCloskey v. Pa PUC*, 195 A.3d 1055 (Pa. Cmwlth. 2018) support the approval of Aqua's application *in this proceeding*. Specifically, Aqua contends that the Court in *McCloskey* held that: 1) Aqua, as an owner of numerous water/wastewater systems has sufficient expertise and means to raise capital and 2) and the PUC's policies encouraging consolidation/regionalization of wastewater system assets can result in a finding of substantial evidence and a public benefit to a transaction.³⁰ Here, Aqua attempts to use *McCloskey* to argue that a general policy is a public benefit. In its brief, Aqua fails to explain or support its claim that the PUC policy of regionalization/consolidation and Aqua's experience as a public utility on its own – without regard to any of the specific facts in the underlying application at issue³¹ – can constitute substantial evidence of a public benefit. When an appellate court issues a holding, the court applies the law to the specific facts of the case and renders a determination.

²⁹ See Delaware County Main Brief at 9-24.

³⁰ See Aqua Main Brief at 24.

³¹ Importantly, the Court in *McCloskey* relied on the Commission's findings regarding Aqua's ability to operate the specific New Garden water and wastewater systems at issue in that proceeding. 195 A.3d at 1065.

Aqua mistakes policy for law and has overlooks the reality that the facts before the Commission here do not conform to the specific facts in *McCloskey*.

Importantly, Aqua still carries the burden to show evidence that the policy objectives of regionalization – economies of scale, improved service, etc. – will be achieved. The County has already explained that the Commission’s policy of regionalization/consolidation does not apply here because Aqua is not seeking to acquire a small municipal system in need of more efficient and experienced management, but seeks to acquire a sophisticated wastewater operation that is larger than Aqua’s existing wastewater operations in Pennsylvania.³² Kimberly Clark’s Witness succinctly summarized Aqua’s failure to demonstrate economies of scale from regionalization:

Aqua has not identified any concrete economies of scale and plans to simply step into DELCORA’s shoes and maintain the *status quo*. Unless DELCORA was about to become insolvent, I do not see how this could be considered a benefit of the transaction.³³

Accordingly, and as further detailed in the following public benefits discussion, Aqua has not met the *City of York’s* requirement to demonstrate substantial affirmative public benefits by simply pointing to Aqua’s existing experience and the PUC policy on regionalization/consolidation.³⁴

1. Per Section 1103, the applicant must show it is technically, legally, and financially fit.

Aqua argues that no party has presented substantial evidence or testimony challenging Aqua’s fitness.³⁵ While parties did not present testimony on technical and financial fitness, several parties in pleadings and in testimony raised issues related to Aqua’s legal fitness to acquire

³² See Delaware County Main Brief at 3-4 (citing Aqua Application at 3, Delaware County Statement No. 1 at 10), 27, 52.

³³ Kimberly-Clark Statement No. 1-SR, at 16:18.

³⁴ 295 A.2d 825,828 (1972).

³⁵ Aqua Main Brief at 25.

DECLORA's assets.³⁶ Pursuant to Section 1103 of the Public Utility Code, 66 Pa. C.S. § 1103, the applicant must demonstrate that it is technically, legally, and financially fit to own and operate the assets it proposes to acquire.³⁷

The County's Main Brief reviewed the absence of evidence showing Aqua possesses the managerial and technical resources to absorb DELCORA's system as well as the legal challenges and compliance matters implicating its legal fitness to acquire the DELCORA assets.³⁸ The Commission should accept these arguments and find the County rebutted the presumption of fitness afforded to Aqua as an existing certificated public utility.³⁹

2. Affirmative Public Benefits

Aqua's Main Brief alleges that the proposed transaction would provide numerous public benefits to both existing Aqua customers and the current DELCORA customers.⁴⁰ Notably, Aqua misconstrues the applicable standard. The affirmative public benefits standard considers the impact to the public at large and is not limited to the customers of the transacting utilities. Additionally, while Aqua compiles what appears to be a lengthy list of proffered benefits, close

³⁶ See I&E Main Brief at 18-51, 52-54; see also I&E Letter in Support of the County of Delaware's Petition for Stay, A-2019-3015173 (filed Aug. 13, 2020); Surrebuttal Testimony of Lisa Gumby, I&E Statement No. 1-R at 2:18-3:15; Direct Testimony of Lisa Gumby, I&E Statement No. 1 at 9:9-10:2 (expressing concerns that the pending Common Pleas litigation impacts the authority of DELCORA to sell all of its system assets), 14:17-15:14 (expressing concerns that the Trust violates the Public Utility Code); see Municipal Protestants Main Brief at 30-39; see also Motion for Summary Judgment of the Municipal Protestants, at ¶¶ 7-9, Docket No. A-2019-3015173 (filed Sep. 25, 2020) (citing Aqua-DELCORA APA § 2.01).

³⁷ Application of Aqua Pa. Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of Wastewater System Assets of New Garden Twp. et al., Docket No. A-2016-2580061, at 18, 2017 Pa. PUC LEXIS 168 at *20 (Order entered June 29, 2017) (citing *Seaboard Tank Lines v. Pa. PUC*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985),

³⁸ See *Warminster Twp. Mun. Auth. v. Pa. PUC*, 138 A.2d 240, 243 (Pa. Super. 1958); see also *Byerly et al. v. Pa. PUC*, 270 A.2d 186, 188-189 (Pa. Super. Ct. 1970).

³⁹ See Delaware County Main Brief at 26-29.

⁴⁰ Aqua Main Brief at 26.

examination reveals the assertions consist largely of unsubstantiated platitudes and circular reasoning. As discussed at length in the County's Main Brief, Aqua has failed to establish how the proposed transaction would generate incremental public benefits when DELCORA's wastewater operations already exceed the size and scale of Aqua's existing wastewater operations. As demonstrated in the County's Main Brief and repeated in the below responses to Aqua's claims, DELCORA's size is a fundamentally unique characteristic of this proposed transaction that separates it from the public benefits analyses supporting prior transactions.

a) Aqua's Alleged Public Benefits

(1) Customer Assistance Payments from the DELCORA Customer Trust

Aqua alleges that customers will benefit from the proposal to deposit \$200,000,000 of the sale proceeds into the Trust.⁴¹ While the County acknowledges that the Trust would mitigate rate increases for a period, the public benefits associated with the Trust must consider the long-term rate impacts upon customers. Because the Trust only reduces the charges to DELCORA customers, but not the tariff rates, those customers will experience rate shock upon expiration of Trust.⁴²

(2) Consolidation/Regionalization

Aqua's Main Brief references the Commission's Policy Statement supporting consolidation and regionalization of water and sewer utilities.⁴³ This begins the recurring theme of Aqua's failure to acknowledge the disparate nature of this proposed transaction. DELCORA is already a consolidated and regionalized utility. As stated in the County's Main Brief, DELCORA

⁴¹ Aqua Main Brief at 26.

⁴² See Delaware County Main Brief at 45.

⁴³ Aqua Main Brief at 26.

serves 197,000 Equivalent Dwelling Units (“EDU”) and 500,000 people across 49 municipalities in Southeast Pennsylvania.⁴⁴ DELCORA is considerably larger than of the prior Section 1329 transaction cited by Aqua to support its effort to claim regionalization as a public benefit.⁴⁵ While the Commission generally supports regionalization and consolidation as matter of policy, it should require a more exacting showing of discrete public benefits when the record confirms the selling utility already enjoys the benefits of scaled and sophisticated operations.

(3) Benefits to DELCORA customers

In defining the purported benefits for DELCORA customers, Aqua again reiterates its position that customers benefit from economies of scale and efficiencies. As noted above, Aqua has not addressed how its operations would produce efficiencies beyond the capabilities of DELCORA’s extensive operations and experienced staff. Aqua also cites to rate projections showing projected savings to DELCORA customers of \$111 million to \$313 million through 2040.⁴⁶ The County’s Main Brief documented the empirical flaws and assumptions underlying the revised DELCORA budget used to run Aqua’s revenue requirement projections, including an imprudent assumption that major capital improvements would be funded with cash instead of debt.⁴⁷ These numbers should be dismissed as unsupported and the Commission should rely on Mr. Faryniarz’s revenue requirement analysis showing costs of Aqua ownership exceed continued DELCORA operation of the system by \$114 million - \$266 million through 2040.

⁴⁴ Delaware County Main Brief at 27.

⁴⁵ See Aqua Main Brief at 24-25.

⁴⁶ Aqua Main Brief at 27.

⁴⁷ Delaware County Main Brief at 38-40.

Aqua's further references to benefits of lower operating and maintenance costs and large-scale capital planning continue ignoring the question of how these generalized statements establish incremental public benefits over and above continued DELCORA ownership. For example, Aqua's Main Brief references "efficiencies in administrative and general costs, such as insurance, auditing, legal among others."⁴⁸ The County propounded discovery upon Aqua seeking qualifications of these operations and maintenance savings and supporting workpapers.⁴⁹ In response, Aqua provided a list of select operations and maintenance line items showing DELCORA costs of \$3,718,872 million and Aqua costs of \$638,875 (or savings of \$3,079,997).⁵⁰ However, Aqua declined to respond to the County's request for supporting workpapers. While the Commission does not require a public utility to quantify all public benefits, the Commission's evidentiary standards require that any offered quantifications be supported by substantial evidence.⁵¹ As a result, Aqua's unsubstantiated benefit quantifications should be disregarded.

Aqua's claimed customer service enhancements are similarly unpersuasive and cannot support approval of the proposed transaction. Once again, the unique circumstances of DELCORA's operations impact the benefits that would be realized. For most transactions, Aqua's billing and collection procedures and low-income program would likely provide substantial benefits for customers of the acquired system. However, where wholesale wastewater service accounts for 87% of DELCORA's annual revenues, customer service issues impacting just 13%

⁴⁸ Aqua Main Brief at 27.

⁴⁹ Delaware County Hearing Exhibit No. at 8-9 (attaching Aqua Response to County Set X-4).

⁵⁰ Delaware County Hearing Exhibit No. at 8-9 (attaching Aqua Response to County Set X-4).

⁵¹ See *Popowsky v. Pa. PUC*, 683 A.2d 958, 962-963 (Pa. Cmwlth. 1996).

of the business should not carry significant weight in comparison to issues impacting all customers, such as rates.⁵²

(4) Benefit to Existing Customers

In arguing that the proposed transaction benefits the current Aqua customers, the Company contradicts its claims of public benefits to DELCORA customers. In the same Main Brief, Aqua repeatedly argues that DELCORA customers benefit from Aqua's purportedly larger resources. However, in attempting to address benefits to existing customers, Aqua now acknowledges "the addition of DELCORA customers will create a wastewater division the equivalent size of Aqua PA's Main Division."⁵³ While this comparison severely understates the vastness of DELCORA's system by assessing size based on total number of customer accounts (which fails to capture the wholesale business), it still underscores the reality that economies of scale have not been demonstrated on the record because DELCORA is already much larger than Aqua's prior acquisition targets.

Aqua continues to offer highly generalized benefit claims lifted directly from its Application and lacking record support. Aqua argues that existing customers benefit because costs will be shared at a lower incremental cost per customer for all of Aqua's customers over time, but offers no record evidence to support this statement.⁵⁴ By way of contrast, the record does show that existing water customers will experience a 4.58% rate increase solely as a result of the DELCORA acquisition while existing wastewater customers will experience a 14.32% increase as a result of the proposed transaction.

⁵² Delaware County Main Brief at 32, 44-45.

⁵³ Aqua Main Brief at 28.

⁵⁴ Aqua Main Brief at 28.

(5) Immediate Rate Impacts

The County recognizes that Aqua's proposes to adopt DELCORA's existing rates. While appropriate, Aqua's preservation of DELCORA's current rates simply maintains the status quo, which hardly conveys an affirmative public benefit. Consistent with *New Garden*, the Commission should consider the long-term impact of sale that would increase long term revenue requirements without conferring the economies of scale observed in prior Section 1329 transactions.⁵⁵

(6) Planned Capital Projects

Aqua continues to claim the anticipated separation from PWD's Long Term Control Plan ("LTCP") as an affirmative public benefit without acknowledging this capital project will come to fruition regardless of who operates the system. Whether DELCORA or Aqua, the owner of the system will need to invest capital resources to mitigate the prohibitive costs of continuing to purchase capacity from PWD.⁵⁶ This is consistent with testimony from DELCORA's Executive Director affirming that DELCORA reached the decision to terminate its contract with PWD independently of the subsequent decision to enter into an APA with Aqua.⁵⁷ Accordingly, the benefits associated with this project would be realized with or without the proposed transaction.

(7) Environmental Stewardship

Aqua alleges a proven record of environmental stewardship, but fails to provide substantial evidence to support the claim beyond the conclusory statement in its Application.

⁵⁵ See *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 & 1329 of the Pub. Util. Code for Approval of Its Acquisition of the Wastewater Sys. Assets of New Garden Twp. & the New Garden Twp. Sewer Auth.*, No. A-2016-2580061, 2017 WL 4552494 (Oct. 5, 2017) ("*New Garden*").

⁵⁶ Delaware County Main Brief at 44.

⁵⁷ Aqua Statement No. 5 at 6.

(8) DELCORA Employees

Similar to the proposal for Aqua to adopt DELCORA's current rates immediately upon acquiring the system, the County submits that Aqua's proposal to preserve employment for all DELCORA employees is not an affirmative public benefit within the context of this proceeding. With the exception of the conflict of interest matters the County raised with regard to DELCORA's Executive Director, Aqua's offer of employment to DELCORA employees is appropriate. However, where the proposed transaction is otherwise flawed, offers to employees that operate to preserve the status quo rather than confer benefits over and above current DELCORA operations cannot support a finding of affirmative public benefits.

(9) DELCORA Wants to Sell Its Wastewater System

DELCORA's desire to sell its system is irrelevant to the Commission's review of the Application and certainly not an affirmative public benefit. Rather, the Commission should weigh the public policy implications of approving a sale of the DECLORA wastewater system over the objections of the incorporating municipality.⁵⁸

(10) Parties' Concerns with Potential Rate Impact

Aqua's Main Brief acknowledges the projected rate increases for DELCORA customers, current Aqua wastewater customers, and even Aqua water customers, but attempts to rehabilitate the adverse rate impacts by alleging that rate impacts are not dispositive and are outweighed by the economies of scale and public benefits achieved from the proposed transaction.⁵⁹ As part of this effort Aqua attacks the County's rate impact analysis showing higher costs under Aqua ownership of DELCORA's system.

⁵⁸ County brief at 20.

⁵⁹ Aqua Main Brief at 29-30.

Aqua first challenges the revenue projections relied upon by Mr. Faryniarz to model DELCORA's revenue requirement through 2040. Aqua then mischaracterizes Mr. Faryniarz's testimony as contradictory to the Commission's support for regionalization and consolidation in the water and wastewater industries. The County thoroughly addressed these arguments in its Main Brief and offers supplemental responses in this Reply Brief.

Aqua dismisses Mr. Faryniarz's revenue projections for the DELCORA system as "incorrect," but omits any analysis of the reasons underlying Mr. Faryniarz's rejection of the modified revenue projections introduced in Rebuttal Testimony by Aqua and DELCORA.⁶⁰ As detailed in the County's Main Brief, Mr. Faryniarz reviewed the modified revenue projections provided by DELCORA Witness Pileggi and adopted by Aqua Witness Packer, but deemed the revisions unreliable after DELCORA failed to substantiate its revised projections through discovery. Specifically, Mr. Faryniarz requested workpapers showing the formulae underlying Mr. Pileggi's, but received only hardcoded data.⁶¹ Upon further examination, Mr. Faryniarz concluded that the modified revenue projections relate primarily to a shift towards reliance on cash to fund capital projects instead of debt. As observed by Mr. Faryniarz, it would be imprudent for DELCORA to rely on cash to pay for large scale infrastructural upgrades instead of using leverage to synchronize the cost with the useful life of the assets.⁶² For these reasons, the Commission should reject the revenue requirement projections introduced in Rebuttal Testimony and accept Mr. Faryniarz's revenue projections based on discovery issued to DELCORA.

⁶⁰ Aqua Main Brief at 32.

⁶¹ Delaware County Main Brief at 38-40.

⁶² *See id.*

Aqua also takes issue with Mr. Faryniarz's finding that the proposed transaction fails to show public benefits sufficient to overcome the adverse rate impacts. The prior section of this Reply Brief addresses public benefits in general. As emphasized in the County's Main Brief, there is no silver bullet evidentiary factor that definitively rises beyond the threshold of an arm's length transaction.⁶³ Accordingly, Aqua's attempt to focus on black and white requirements to establish the presence or absence of an arm's length transaction oversimplifies the analysis. As detailed in the County's Main Brief⁶⁴, the overriding pattern of behavior from Aqua and DELORA supports a finding of no arm's length transaction.

Aqua additionally attempts to discredit Mr. Faryniarz as an opponent of the Commission's regionalization and consolidation policies. Hyperbolically, Aqua alleges that "[i]f one were to accept Mr. Faryniarz' analysis, no regulated public utility would ever be approved to take over a municipal system."⁶⁵ Aqua also falsely claims Mr. Faryniarz concluded that the proposed transaction does not offer substantial benefits because Aqua is a regulated public utility that falls under the jurisdiction of the Commission.⁶⁶ These unfounded allegations flatly conflict with Mr. Faryniarz's testimony, where he explicitly recognized investor-owned utilities can offer public benefits to justify privatization of municipally-owned systems despite inevitable future rate increases for the acquired customers.⁶⁷ Aqua Witness Mr. Packer also recognizes that Aqua has a higher cost of capital than DELCORA, which drives much of the revenue requirement differential

⁶³ Delaware County Main Brief at 10, 18-24.

⁶⁴ Delaware County Main Brief at 10, 18-24.

⁶⁵ Aqua Main Brief at 34.

⁶⁶ Aqua Main Brief at 34.

⁶⁷ Delaware County Main Brief at 40.

under Mr. Faryniarz’s revenue requirement analysis. The differences between Mr. Faryniarz’s analysis and Mr. Packer’s analysis derive not from an academic debate on the merits of municipal versus investor-owned utility operation, but rather from their positions on the revenue requirement modifications provided by DELCORA in Rebuttal Testimony and analysis of the record (or lack thereof) of affirmative public benefits in this proceeding.

In conclusion, Aqua’s Application does not offer substantial affirmative benefits to DELCORA customers, existing Aqua customers, or the general public.

3. Public Interest

a) Common Pleas Litigation

Aqua’s discussion of the Common Pleas litigation in its Main Brief is somewhat accurate in describing two of the County’s positions in the Common Pleas Litigation.⁶⁸ However, Aqua paints an incomplete picture of the relationship between the Common Pleas Litigation and this proceeding. Specifically, Aqua misleadingly links the fact that the County “has not filed a pleading challenging the APA in County Court” to Aqua’s subsequent implication that nothing in the Common Pleas Litigation “is a matter of Commission jurisdiction under the Code.”⁶⁹

Aqua and DELCORA - not the County - directly brought the APA into the Common Pleas Litigation through their counterclaims.⁷⁰ The County’s consistent position, before both this Commission and the Court of Common Pleas, has long been that all issues regarding the APA

⁶⁸ Aqua fails to mention the County’s *mandamus* count which seeks enforcement of the County’s ordinance directing the orderly termination of DELCORA pursuant to the Authorities Act. Moreover, while the County’s Complaint and Amended Complaint did not challenge the APA, the County’s Answers and New Matters to Aqua and DELCORA’S Counterclaims filed on October 6 and 7, 2020 asserted the APA was invalid under the Authorities Act and void against public policy.

⁶⁹ Aqua Main Brief at p. 39. The complete next sentence is “[n]either of these concerns is a matter of Commission jurisdiction under the Code.”

⁷⁰ Delaware County Petition for Stay, ¶¶ 21-24.

belong before the Commission.⁷¹ Aqua’s petition to intervene in the Common Pleas action asserted “[a]lthough the Amended Complaint and the Ordinance do not expressly purport to challenge or attack the enforceability of the APA, the practical effect of the relief requested in the Amended Complaint and the Ordinance constitutes a direct attack on the APA if in fact the County is permitted to terminate Delcora prior to closing on the APA.”⁷² The Commission should not allow Aqua to make one argument before the Court and then make the opposite argument to the Commission.⁷³

On page 39 of Aqua’s Main Brief Aqua misleadingly states “[i]f the County Court were to conclude that the Trust arrangement is beyond the legal authority of DELCORA, DELCORA could consider other means of implementing its intent to convey the benefit of the proceeds to the DELCORA customers.”⁷⁴ This conflicts with Aqua’s claim that mitigating the future Aqua rate increases through the Trust is “a unique and substantial affirmative public benefit” to the transaction.⁷⁵ The Trust cannot be both a pillar of Aqua’s public benefit claims, yet so inconsequential that litigation concerning its existence should not impact the Commission’s review of the Application.

Accordingly, the Common Pleas Litigation directly impacts and implicates the Commission’s determination in this proceeding and highlights why the Commission should have

⁷¹ Delaware County Petition for Stay, ¶ 45.

⁷² Delaware County Petition for Stay, ¶ 21 (quoting Aqua Court of Common Pleas Petition to Intervene at ¶ 22).

⁷³ The doctrine of judicial estoppel prevents a party from taking inconsistent litigation positions in separate proceedings. *See Marazas v. Workers’ Comp. Appeal Bd.*, 97 A.3d 854, 859 (Pa. Cmwlth. 2014). The Commonwealth Court explained that the purpose of judicial estoppel is to prevent parties from playing “fast and loose” with the facts in order to suit their interests before different tribunals. *Id.* (*Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001); *Trowbridge v. Scranton Artificial Limb Co.*, 747 A.2d 862, 865 (Pa. 2000)).

⁷⁴ Aqua Main Brief at 39.

⁷⁵ *See* Aqua Main Brief at 4.

grave reservations about approving this transaction, even after attaching several conditions. If the Commission does not deny the Application outright, the Commission should adopt I&E's recommended condition that closing on the proposed transaction should not occur until Aqua and DELCORA can provide the Commission with a guarantee that the pending Common Pleas Litigation will not change DELCORA's status as a bona fide seller and will not result in any material changes to the terms of the APA.⁷⁶

b) Rate Stabilization/DELCORA Trust

Aqua and DELCORA contend that the Trust and trust payments to former DELCORA customers are not jurisdictional to the Commission.⁷⁷ They are simply incorrect. The Trust is integral to the transaction and claimed as "a unique and substantial affirmative public benefit". The concept of a "rate stabilization plan" is an element of Section 1329 of the Code.⁷⁸ As discussed in the County's Main Brief, Section 1329 does not distinguish between a buyer funded rate stabilization plan and a seller funded rate stabilization plan.⁷⁹ In addition, the simple fact that Aqua is seeking Section 507 approval of the Memorandum of Understanding places the Trust payments themselves within the Commission's jurisdiction.

4. Environmental Issues

The County will not address environmental issues.

⁷⁶ I&E Main Brief at 54.

⁷⁷ Aqua Main Brief at 40.

⁷⁸ 66 Pa.C.S. § 1329(d)(1)(v).

⁷⁹ Delaware County Main Brief, at 14.

5. Conclusion – Public Interest and Benefit

For the reasons initially set forth in the County’s Main Brief and further discussed in this Reply Brief, Aqua has not met its burden to showing the Application meets the public interest standard.

C. Recommended Conditions

A diverse array of stakeholders with different perspectives and interests have raised substantial issues with Aqua’s Application. I&E asserts that “the proposed transaction, as filed, will not affirmatively promote the public interest in a substantial way and violates the [Public Utility] Code.”⁸⁰ Like the County, Kimberly Clark also requests that the Commission deny the Application because “the transaction has no proven benefits to the public or to DELCORA’s current customers.”⁸¹ While some of the stakeholders challenging the Application suggest the Commission could approve Aqua’s Application if certain conditions are met, the County submits the sheer volume of requested conditions,⁸² collectively, demonstrates that the Application is deeply flawed, legally deficient, and should be outright rejected. While conditions can improve the outcome, no amount of conditions can cure the myriad of deficiencies in the Application.

If Aqua’s Application is approved, future applicants may assume future deficient applications will be similarly approved, either as-filed or with conditions reflecting intervenor concerns with the application. Such a process fails to incentivize applicants to proactively

⁸⁰ I&E Main Brief at 53.

⁸¹ Kimberly Clark Main Brief at 22; *see also* Sunoco Main Brief at 8 (arguing that the transaction provides no benefits and actively causes harm by increasing rates).

⁸² *See* OCA Main Brief at 40-42 (recommending 12 detailed conditions prior to approval to limit ratepayer exposure to the risks of the acquisition), I&E Main Brief at 53-54 (seeking rejection of the Trust and for closing not to occur until pending Common Pleas litigation is known not to materially impact the APA), Municipal Protestants Main Brief at 30-31, Sunoco Main Brief at 44-46 (requesting that DECLORA retain ownership of the Western Regional Treatment Plant), OSBA Main Brief at 8-9, and Kimberly Clark Main Brief at 22-23.

minimize legal deficiencies and customer concerns in advance of filing an application. Nonetheless, if the Commission proceeds with approving Aqua's Application and attaching conditions to that approval, the County recommends the following condition:

- Closing on the transaction cannot occur until the civil litigation dockets, including the Court of Common Pleas of Delaware County at No. CV-2020-003185 and any appeals thereto, are concluded.

Approval of this condition will preserve due process for all parties by ensuring parties have an opportunity to address a court ruling that invalidates the Trust or otherwise impacts the record offered by Aqua in support of the Application.

D. Section 507 Approvals

In its Main Brief, Aqua spends several pages responding to Municipal Protestants, KCC, and Sunoco regarding their contractual issues with DELCORA.⁸³ While the County did not testify in depth regarding the contractual issues between DELCORA and those other protestants, the County submits that the various contractual challenges and issues from a broad spectrum of protestants militates against a finding that the Application is in the public interest. Importantly, Aqua has failed to demonstrate that it has legal access to certain assets it proposes to acquire, including wastewater facilities and contract rights of the Municipal Protestants.⁸⁴ Per Section 507 of the Public Utility Code, contracts or agreements between a public utility and a municipal corporation must be filed with the PUC at least 30 days prior to the effective date of the agreement.⁸⁵ The PUC will then consider the reasonableness, legality, or any other matter

⁸³ See Aqua Main Brief at 65-79.

⁸⁴ See Municipal Protestants Main Brief at 4-7, 31-39; see Delaware County Main Brief at 51-52, Proposed Conclusion of Law #18.

⁸⁵ 66 Pa. C.S. § 507.

affecting the validity of the agreement.⁸⁶ Aqua has failed to demonstrate it has legal fitness and a legal right to certain facilities to which the Municipal Protestants possess a reversionary interest.

E. Other Approvals

The Findings of Fact accompanying Aqua's Main Brief contain various misstatements of the record. The County addresses certain Findings of Fact below. However, the absence of direct response to individual Finding of Fact from Aqua or any other party should not be construed as acceptance or concurrence with said Finding of Fact.⁸⁷

Aqua's Proposed Findings of Fact #12-14 should be rejected as they contain generalizations and opinions that are not supported in the record.

- In Proposed Finding #12, Aqua argues that the Transaction "makes economic and business sense for both Aqua and DELCORA, and their respective customers." The record contains significant contrary evidence through protests and substantiated concerns from a broad spectrum of stakeholders, including the County, OCA, OSBA, the Municipal Protestants, Kimberly Clark, and Sunoco, that dispute Aqua's vague assertions that the transaction makes economic and business sense

⁸⁶ See *Joint Application of PAWC and City of Scranton et al.*, Docket No. A-2016-2437209, at p. 12 (Order issued Oct. 6, 2016) (hereinafter "Scranton Order"); see also *Aqua Application for approval of Limerick Township assets*, Docket No. A-2017-2605434 (Order entered Nov. 29, 2017).

⁸⁷ In this section, the County addresses select proposed findings of fact by Aqua that are not supported in the record. Any omission by the County to not explicitly address or dispute a proposed finding of fact by Aqua or any other party should not be construed as the County's acceptance to that proposed finding of fact. Instead, the County asks the Presiding Administrative Law Judges to accept the findings of fact proposed by the County in its Main Brief.

for all customers.⁸⁸ Moreover, Aqua only cites to a few sentences from the testimony of its own witness⁸⁹ for its proposed finding.

- In Proposed Finding of Fact #12, Aqua also argues that both Aqua and DELCORA will be in position to leverage economies of scale upon consummating the proposed transaction. Again, Aqua only cites to a few sentences of testimony from its own witness to support its general assertion of economies of scale. Asserting something does not make it so. As the County has demonstrated, through an underlying financial and technical analysis from County Witness Stan Faryniarz, the proposed transaction is different than other transactions where an existing large public utility seeks to acquire a smaller municipal system.⁹⁰ DELCORA already administers and operates a wastewater system larger than Aqua's wastewater system. A detailed review of the facts and the financial implications flowing from Aqua ownership of the DELCORA system demonstrates that economies of scale will not be realized from Aqua's acquisition of DELCORA.⁹¹
- In Proposed Finding of Fact #13, Aqua states that the Commission "would not have jurisdiction over the Trust." A disputed statement concerning the Commission's

⁸⁸ See, e.g., Kimberly-Clark Main Brief at 4 (explaining that Aqua ownership translates "into substantially higher revenue requirements and substantially higher rates for the same service"); Municipal Protestants Main Brief at 23-29 (explaining how Aqua's proposed acquisition would increase costs beyond the costs under existing contracts); Sunoco Main Brief at 8-9 (arguing the transaction actively causes harm by increasing rates with no corresponding benefit).

⁸⁹ Aqua St. No. 5 at 8-9.

⁹⁰ See Delaware County Main Brief at 30-34.

⁹¹ Delaware County Main Brief at 3-4, 27, 31, 33-34, Appendix B (Proposed Findings of Fact #2 and #28) (citing Application at 3; Delaware County Statement No. 1 at 10; Delaware County Statement No. 1-SR at 3; Kimberly-Clark Statement No. 1-SR at 16); Aqua Application, Exhibit D, Engineering Assessment – Asset Inventory, Master Asset List (Excel file filed with Aqua's application that details the various facilities and infrastructure of the DELCORA system).

jurisdiction is not a finding of fact and should be rejected. Moreover, I&E and the County have already pointed out that the proposed use of the Trust violates Section 1303 of the Public Utility Code, 66 Pa. C.S. § 1303, that requires PUC-jurisdictional rates to be filed with and approved by the Commission.⁹²

- In the Overview of the Transaction section in its brief and Proposed Finding of Fact #14, Aqua argues it has been meeting with customers “for months”⁹³ and has “engaged in a robust communications and outreach effort to advise the public of the ongoing circumstances.”⁹⁴ Critically, Aqua fails to cite to any support in the record that supports such public outreach. Instead, Aqua asserts that it held a series of meetings in September and October 2019 well after Aqua and DELCORA entered into exclusive negotiations on July 16, 2019.⁹⁵ The number and degree of protests and challenges to Aqua’s Application supports the County’s claim that Aqua and DELCORA did not effectively engage the public and were not upfront about the proposed transaction. Aqua and DELCORA did not obtain the consent of DELCORA’s incorporating municipality, the County.⁹⁶ Further, Aqua and DELCORA have not received several consents from the Municipal Protestants, and such consents are necessary for Aqua to gain legal access to certain assets it

⁹² Direct Testimony of Lisa Gumby, I&E Statement No. 1 at 14:17-15:14 (expressing concerns that the Trust violates the Public Utility Code); Delaware County Main Brief at 8, 16-17, Proposed Conclusion of Law # 14; I&E Main Brief at 9, 11, 21-35.

⁹³ Aqua Main Brief at 4.

⁹⁴ Aqua Main Brief at Proposed Finding of Fact #14.

⁹⁵ See Aqua Main Brief at Proposed Finding of Fact #14.

⁹⁶ Delaware County Main Brief at 7, 52; Delaware County Protest at ¶ 1.

proposed to acquire in its Application.⁹⁷ Aqua concedes that several municipal, commercial, and industrial customers have not agreed to assign their contracts to Aqua but vaguely contends that those obstacles are “not insurmountable.”⁹⁸ Accordingly, Aqua’s representations of effective outreach to customers and speculation about the attainment of assigned contracts in the future are not supported in the record.

VI. CONCLUSION WITH REQUESTED RELIEF

For the foregoing reasons, the County respectfully requests that the Commission reject Aqua’s proposed findings of fact, proposed conclusions of law, and proposed ordering paragraphs, and deny Aqua’s application. Aqua’s Application is not in the public interest. Denying the Application will not harm Aqua, its ratepayers, DELCORA’s customers or the general public. Failure to outright reject the application will result in irreparable harm to the public and cannot be later cured in a future Aqua base rate case.

In the alternative, the Commission could deny the Application without prejudice and require DELCORA to conduct an RFP to ensure that the transaction is sufficiently arms-length to satisfy the requirements of Section 1329 and ensure that a public asset is not sold through a noncompetitive process resulting in a purchase price substantially below fair market value.. In addition, any subsequent application should cure the deficiencies in the present application with regard to the Section 1329 requirement for all elements and workpapers of a rate stabilization plan to be included in the original application.

⁹⁷ See Municipal Protestants Main Brief at 4-7, 31-39; See Motion for Summary Judgment of the Municipal Protestants, at ¶¶ 7-9, Docket No. A-2019-3015173 (filed Sep. 25, 2020) (citing Aqua-DELCORA APA § 2.01).

⁹⁸ See Aqua Main Brief at 4-5.

If the Commission approves the Application, the County requests that the Commission restrict Aqua and DELCORA from closing on the proposed transaction until the Court of Common Pleas of Delaware County proceeding at No. CV-2020-003185 and any appeals thereto, are concluded.

Respectfully submitted,

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