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December 18, 2020

*Via Electronic Filing*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17105-3265  
rchiavetta.pa.gov

In re: Docket No. A-2019-3015173  
Application of Aqua Pennsylvania Wastewater, Inc. – DELCORA

Dear Secretary Chiavetta:

We are counsel for Aqua Pennsylvania Wastewater, Inc. in the above matter and are submitting with this letter a Replacement Version of its Main Brief (*Public Version*) filed December 1, 2020. The Replacement Version redacts the Highly Confidential language in a different and more secure application than the originally filed Main Brief (*Public Version*). There is no change to the wording of the Main Brief (*Public Version*) or the visual presentation of it. Please “take down” the originally filed Main Brief (*Public Version*) from the docket and replace it with this Replacement Version and contact me with any questions concerning this matter.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Thomas T. Niesen

cc: Certificate of Service (via email, w/encl.)  
The Honorable Angela T. Jones, Administrative Law Judge (via email, w/encl.)  
The Honorable F. Joseph Brady, Administrative Law Judge (via email, e/encl.)  
Alexander R. Stahl, Esquire (via email, w/encl.)

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this 18<sup>th</sup> day of December 2020 served a true and correct copy of the foregoing letter and Replacement Version of the Main Brief (*Public Version*) of Aqua Pennsylvania Wastewater, Inc., upon the persons and in the manner indicated below:

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**The Honorable Angela T. Jones, Presiding  
The Honorable F. Joseph Brady, Presiding**

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**Application of Aqua Pennsylvania : Docket No. A-2019-3015173**  
**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 :**

**MAIN BRIEF OF**  
**AQUA PENNSYLVANIA WASTEWATER, INC.**  
**(Public Version)**

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DATED: December 1, 2020

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

### **A. Procedural History**

This proceeding concerns the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”), filed with the Public Utility Commission (“Commission”) on March 3, 2020, pursuant to Sections 1102, 1329 and 507 of the Public Utility Code (“Code”).

The Application asks the Commission to approve Aqua’s acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”) and allow Aqua to begin to provide wastewater service in portions of Delaware and Chester Counties (“Proposed Transaction”).

The Application also asks the Commission to approve the ratemaking rate base of the wastewater system assets for Aqua pursuant to Section 1329(c)(2) of the Code, for certificates of filing pursuant to Section 507 of the Code and for such other approvals, certificates, registrations and relief, if any, under the Code that may be required with respect to the Proposed Transaction.

Aqua served copies of the Application on the Bureau of Technical Utility Services (“TUS”), the Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”) and the Office of Small Business Advocate (“OSBA”) on March 3, 2020. Thereafter, the Company filed and served supplemental information on May 6, 7, 8, 13, 22, 28 and June 8, 2020, in response to information requests from TUS.

By Secretarial Letter dated June 11, 2020, the Commission, *inter alia*, conditionally accepted the Application for filing and directed Aqua to serve copies of the Application upon designated entities, to provide individualized notice to affected customers and to publish notice of the filing of the Application in a newspaper of general circulation.

Aqua complied with the requirement of the conditional acceptance letter. The Commission, thereafter, by Secretarial Letter dated July 27, 2020, informed Aqua that it accepted the Application

for filing and that the matter would be assigned to the Office Administrative Law Judge for disposition.

Administrative Law Judge Angela T. Jones and Administrative Law Judge F. Joseph Brady were assigned to the proceeding.

The OCA filed a Protest and Public Statement on April 2, 2020. I&E filed a Notice of Appearance on April 2, 2020. The OSBA filed a Notice of Intervention on March 26, 2020. The County of Delaware (“County”) filed a Petition to Intervene on May 18, 2020 and, subsequently, a Protest on August 31, 2020. SPMT Partners Marketing & Terminals, L.P./Energy Transfer (“Sunoco” or “SPMT”) and Kimberly-Clark Corporation/Kimberly-Clark Pennsylvania, LLC (“KCC”) filed Protests on August 28, 2020, and August 31, 2020, respectively.

Edgmont Township (“Edgmont”) filed a Petition to Intervene on June 15, 2020 and, subsequently, a Protest on August 17, 2020. Lower Chichester Township (“Lower Chichester”), Trainer Borough (“Trainer”), Upland Borough (“Upland”) and the Southwest Delaware County Municipal Authority (“SWDCMA”) filed Protests on August 7, 2020, August 17, 2020, August 7, 2020, and July 17, 2020, respectively. (Edgmont, Lower Chichester, Trainer, Upland and SWDCMA are collectively referred to as the “Municipal Protestants”).

Protests were also filed by the Borough of Swarthmore, C&L Rental Properties, Ross F. Schmucki, the Treasure Lake Property Owners Association, Inc., Patricia Kozel, Lawrence and Susan Potts and Peter Ginopolas.

A prehearing conference was held on September 2, 2020, at which a litigation schedule was adopted providing for evidentiary hearings on November 9 and 10, 2020 and memorialized in Prehearing Conference Order #2.

Public Input Hearings were held on the afternoon and evening of September 16, 2020.

The evidentiary hearings were convened on November 9 and 10, 2020, with Judge Jones

presiding. Aqua actively participated in the hearings. I&E, OCA, OSBA, the County, Sunoco, KCC and the Municipal Protestants also actively participated in the evidentiary hearings.

Aqua submits this Main Brief in support of the Application pursuant to Sections 1102, 1329 and 507 of the Code.

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

Like many wastewater systems, DELCORA is facing significant increased infrastructure investment and expenses and more stringent environmental regulations. Two factors were paramount to its decision to sell the system: (1) the prohibitively high expense – presently estimated at \$606 million – that DELCORA will face if it continues to have its Eastern service area treated by the Philadelphia Water Department (“PWD”); and (2) the costs DELCORA will incur to repair its infrastructure in order to comply with current requirements of the Environmental Protection Agency (“EPA”).<sup>1</sup>

Upon exploration of alternative solutions to address its infrastructure challenges and likely rate impacts, DELCORA determined that, in order to leave PWD at the end of the current contract period in 2028, it would need an immediate investment of \$450 million to (a) build a new pipeline to convey wastewater from the Eastern service area to the DELCORA Western Regional Treatment Plant (“WRTP”) and (b) upgrade and upsize the WRTP so that it can accommodate the increased volume of wastewater.<sup>2</sup>

Faced with this reality, DELCORA did what was prudent – it began to look for opportunities to make the necessary changes in the most efficient and cost-beneficial manner for the *long-term* interests of its customers. This process led them to talk with Aqua, an experienced, well-capitalized public utility providing the same types of services as DELCORA and ultimately to the sale of DELCORA’s system in an Asset Purchase Agreement (“APA”) that was negotiated at arms-

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<sup>1</sup> Aqua St. No. 5 at 5.

<sup>2</sup> Aqua St. No. 5 at 9.

length by parties of comparable bargaining strength. The result is the comprehensive Proposed Transaction that is before the Commission.

The Proposed Transaction presents numerous substantial affirmative public benefits that the Commission has found previously to support other acquisitions. These include economies of scale, job retention, maintaining the seller's business, improved customer service and billing to the acquired customers, joining a larger more diverse public utility purchaser that can share costs across a larger customer base, lower long-term customer rates compared to the status quo, combined and enhanced operations, use and development of best practices, among others.

However, the Proposed Transaction has a unique and substantial affirmative public benefit. Unlike the typical transaction, DELCORA has agreed to set aside a substantial portion of the sale proceeds for the benefit of its former customers. Rather than simply taking the sale proceeds and using them for undefined purposes, DELCORA will place approximately \$200 million of the proceeds in a DELCORA Customer Trust ("Trust") that will be used to mitigate future Aqua rate increases to about 3% per year for several years post-closing. This unique and substantial benefit supports Commission approval.

Both Aqua and DELCORA understand that, like many large transaction, there will likely be challenges. Some of DELCORA's customers are being asked to depart from terms and conditions of service under previously negotiated service contracts with DELCORA in favor of service provided under utility tariffs. In recognition of this concern, Aqua and DELCORA have been meeting with impacted customers for months to explain the Proposed Transaction in general and to provide each customer with mutually acceptable terms and conditions (including rates) under which their unique service contract could be assigned to Aqua. While most of these municipal and commercial and industrial customers have agreed to assign their contracts to Aqua, not all have done so to date. A few that have not yet assigned have been active participants in this proceeding.

The alleged concerns and deficiencies of the Proposed Transaction are not insurmountable, as some parties have contended. All of the alleged deficiencies can be addressed as part of final Commission approval. Aqua, in that regard, is willing to accept reasonable conditions relating to 1) obtaining all necessary environmental permits for the operation of DELCORA's facilities, 2) assuring customers that do not elect to assign their contracts that those contracts will be honored and performed by Aqua as DELCORA's agent, 3) confirming that customers who have contractual rights to re-purchase or retake their former assets may do so in accordance with the applicable contract terms, 4) filing a separate cost of service study for the DELCORA system in Aqua's next rate case, and 5) accepting several conditions proposed by the OCA.

Aqua recognizes that the Proposed Transaction is part of a process that requires a *transition* for DELCORA's customers, many of whom have relied upon service from a municipal authority for decades. Aqua is committed to transitioning the former DELCORA customers to Aqua's service and facilities fairly, while providing them the opportunity, along with Aqua's existing customers, to realize over the long-term the substantial affirmative benefits inherent in the Proposed Transaction.

The substantial affirmative public benefits outweigh any negative impact. Accordingly, the Commission should approve the Proposed Transaction.

## **II. BURDEN OF PROOF**

Section 1102 of the Code requires Commission approval through the issuance of a certificate of public convenience ("CPC") for a public utility to expand its service territory and to acquire property used or useful in the public service.

The burden of proving entitlement to a CPC is upon the applicant as it is the applicant that is seeking a proposed rule or order. 66 Pa.C.S. § 332. *Se-Ling Hosiery v. Margulies*, 70 A.3d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990).

In *Se-Ling Hosiery*, the Pennsylvania Supreme Court held that the term "burden of proof"

means a duty to establish a fact by a preponderance of the evidence. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the slightest degree, than the evidence presented by the opposing party.

Additionally, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704.

More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. v. Pa. P.U.C.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Com. Bd. Of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

As will be demonstrated herein, Aqua has met the burden of proof.

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

#### **Question No. 1**

Is Aqua’s acquisition of the wastewater system assets of DELCORA and related expansion of certificated service territory necessary or proper for the service, accommodation, convenience or safety of the public?

#### **Suggested Answer to Question No. 1**

Yes. Aqua’s acquisition of the wastewater system assets of DELCORA and related expansion of certificated service territory are necessary or proper for the service, accommodation, convenience or safety of the public.

#### **Question No. 2**

Pursuant to Section 1329 of the Code, what is the ratemaking rate base of the wastewater system assets of DELCORA?



**Suggested Answer to Question No. 2**

The ratemaking rate base determined pursuant to Section 1329(c)(2) of the Code is \$276,500,000, being the lesser of the purchase price of \$276,500,000 negotiated by Aqua and DELCORA and the average of the fair market value appraisals which is \$358,538,503.

**Question No. 3**

Pursuant to Section 507 of the Code, are the contracts between Aqua and DELCORA, including assignments of contracts, reasonable, legal and valid?

**Suggested Answer to Question No. 3**

The Contracts between Aqua and DELCORA, including Assignments of Contracts, are reasonable, legal and valid pursuant to Section 507 of the Code.

**IV. SUMMARY OF ARGUMENT**

**Sections 1102/1103 and Certificates of Public Convenience**

Section 1102 of the Code requires Commission approval through the issuance of a CPC for a public utility to expand its service territory and to acquire property used or useful in the public service.

Section 1103 of the Code provides that a certificate of public convenience will issue if the Commission finds or determines that the granting of a certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.

Additionally, the party receiving the assets and service obligation must be technically, legally, and financially fit.

An existing provider of public utility service is presumed fit. Aqua, nevertheless, established its technical, legal and financial fitness by a preponderance of the evidence. Aqua is fit to acquire the DELCORA system and to initiate wastewater service in DELCORA's service territory ("Requested Territory"). No party presented testimony in opposition to Aqua's fitness.

Aqua demonstrated through a preponderance of the evidence that the Proposed Transaction and initiation of wastewater service in the Requested Territory will affirmatively promote the

service, accommodation, convenience, or safety of the public in substantial ways. The Proposed Transaction and initiation of wastewater service in the Requested Territory will further the public interest.

### **Section 1329 and Ratemaking Rate Base**

Section 1329 of the Code addresses the valuation of municipal assets. Aqua engaged the services of Gannett Fleming Valuation and Rate Consultants LLC (“Gannett”) to provide a fair market value appraisal in accordance with Uniform Standards of Professional Appraisal Practice (“USPAP”), utilizing the cost, market and income approaches. DELCORA engaged the services of ScottMadden, Inc. (“ScottMadden”) for the same purpose. Both firms were pre-certified as authorized Utility Valuation Experts (“UVEs”).

Gannett’s fair market value appraisal is \$408,883,000. ScottMadden’s fair market value appraisal is \$308,194,006. The average of the two is \$358,538,503. The ratemaking rate base determined pursuant to Section 1329(c)(2) is \$276,500,000, being the lesser of the negotiated purchase price of \$276,500,000 and the average of \$358,538,503.

The OCA proposed adjustments to the UVE appraisals. The dollar value of the OCA’s adjustments does not alter the Company’s proposed rate base of \$276,500,000, even if the Commission were to adopt them. The adjustments, nevertheless, should not be adopted as they are inconsistent with USPAP and prior Commission decisions.

### **Section 507 Contracts between Aqua and DELCORA**

Section 507 of the Code addresses Commission approval of contracts between a public utility and a municipal corporation. Aqua’s Application asks that the Commission, to the extent necessary, issue Section 507 certificates of filing, for 163 contracts, including assignments of contracts, between Aqua and DELCORA, and the MOU. The contracts, including assignment of contracts, should be approved as reasonable, legal and valid in accordance with Section 507.

## V. ARGUMENT

### A. Section 1329

#### 1. Introduction

Section 1329 of the Code addresses the valuation of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities.

For ratemaking purposes, the valuation is the lesser of the fair market value (*i.e.*, the average of the buyer's and seller's independently conducted appraisals) or the negotiated purchase price.

If the parties agree to the Section 1329 process, the acquiring public utility and the selling municipality each select a UVE from a list of experts maintained by the Commission. The UVEs perform independent fair market value appraisals of the system in compliance with USPAP, employing the cost, market and income approaches.

#### 2. Legal Principles

In regard to the ratemaking rate base, Section 1329(c) directs as follows:

(c) **Ratemaking rate base.** – The following apply:

(2) The ratemaking rate base of the selling utility shall be the lesser of the purchase price negotiated by the acquiring public utility or entity and selling utility or the *fair market value* of the selling utility.<sup>3</sup>

Section 1329(g) defines “fair market value” as “[t]he average of the two utility valuation expert appraisals conducted under subsection (a)(2).”

The ratemaking rate base of the DELCORA wastewater system, as determined in accordance with the clear and unambiguous statutory language, is \$276,500,000.

#### 3. Aqua's Application

Aqua and DELCORA negotiated a purchase price of \$276,500,000 for the wastewater

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<sup>3</sup> 66 Pa.C.S. § 1329(c)(2) (emphasis added).

system. The price was the result of voluntary arm's length negotiations. Aqua and DELCORA are not affiliated with each other. They agreed to use the process presented in Section 1329 to determine the fair market value of the wastewater system and the ratemaking rate base.

Aqua engaged the services of Gannett to provide a fair market value appraisal in accordance with USPAP, utilizing the cost, market and income approaches. DELCORA engaged the services of ScottMadden for the same purpose. Both firms are on the list of qualified appraisers maintained by the Commission. Both firms have extensive specific experience with the valuation and appraisal of utility assets.

Gannett's fair market value appraisal is \$408,883,000. ScottMadden's fair market value appraisal is \$308,194,006. The average of the two is \$358,538,503. The ratemaking rate base determined pursuant to Section 1329(c)(2) is \$276,500,000, being the lesser of the negotiated purchase price of \$276,500,000 and the average of \$358,538,503.

The results of the Gannett analyses and calculations are as follows:<sup>4</sup>

<u>Valuation Approach</u>	<u>Indicated Value</u>	<u>Weight</u>	<u>Weighted Value</u>
Cost Approach	\$399,664,113	33.33%	\$131,889,157
Market Approach	\$438,337,696	33.34%	\$149,034,817
Income Approach	\$387,754,301	33.33%	\$127,958,919
		100%	\$408,882,893
<b>Conclusion</b>			<b>\$408,883,000</b>

The results of the ScottMadden analyses and calculations are as follows:<sup>5</sup>

<u>Valuation Approach</u>	<u>Indicated Value</u>	<u>Weight</u>	<u>Weighted Value</u>
Cost Approach	\$292,413,993	45%	\$131,586,297
Market Approach	\$613,520,480	5%	\$30,676,024
Income Approach	\$291,863,370	50%	\$145,931,685
		100%	<b>\$308,194,006</b>

Copies of the Fair Market Value Appraisal Reports of Gannett and ScottMadden were attached as Exhibit Q and Exhibit R, respectively, to the Application. Verified Statements of

<sup>4</sup> Aqua St. No. 8 at 11.

<sup>5</sup> Aqua St. No. 9, Table 4, at 20.

Gannett and of ScottMadden, verifying that their Appraisals determined fair market value in compliance with USPAP, employing the cost, market and income approaches, were attached to the Application as Exhibit T1 and Exhibit T2, respectively.

Section 1329(d)(3)(i) provides that if the Commission issues an order approving an application thereunder, the order “shall include the ratemaking rate base of the selling utility, as determined under subsection (c)(2).” The Commission’s Order approving Aqua’s acquisition of the DELCORA wastewater system should include a determination that the ratemaking rate base is \$276,500,000.

#### **4. Challenges to the UVE Appraisals**

OCA witness Smith proposed adjustments to several of the UVE appraisal approaches. Mr. Smith did not perform an appraisal of the DELCORA wastewater system asset<sup>6</sup> and presented no evidence showing he has the experience or legal competency to critique the appraisals of certified UVEs. Although the dollar value of Mr. Smith’s adjustments are not of sufficient magnitude to alter the ratemaking rate base claim of \$276,500,000, even if the Commission were to adopt them,<sup>7</sup> the adjustments do not meet a standard of value of fair market value and are in direct violation of Section 1329 of the Code.<sup>8</sup> The adjustments, consequently, should not be adopted.

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

Mr. Smith’s adjustments to the Cost Approach analyses of Gannett and Scott Madden are based on the use of shorter service lives for various plant accounts. The use of shorter service lives produces a lower appraised value under the Cost Approach. Mr. Smith’s recommendations were rejected by both Mr. Walker and Mr. D’Ascendis.

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<sup>6</sup> Aqua St. No. 8-R at 1.

<sup>7</sup> See OCA St. No. 1 at 10.

<sup>8</sup> Aqua St. No. 8-R at 2.

**i. The Gannett Cost Approach**

Mr. Smith recommends shorter service lives for nine plant accounts in the Gannett Cost Approach based on the Aqua specific depreciation rates approved in Aqua's last base rate case.<sup>9</sup> The use of Aqua specific depreciation rates as part of the Cost Approach does not meet a standard of value of fair market value and is a direct violation of Section 1329 of the Code.

Under the standard of value of fair market value, the buyer is a hypothetical or generic entity, not Aqua Pennsylvania, not Pennsylvania-American, or any other specific entity. Mr. Smith's recommendation of using Aqua's "depreciation rates" results in an inappropriate standard of value of investment value, *not* fair market value.<sup>10</sup>

More specifically, under Mr. Smith's recommendation, the appraisal value of DELCORA's wastewater system would fluctuate depending upon the identity of the buyer because each such buyer has its own unique existing depreciation rates. Under a standard of value of fair market value, an appraised value does not differ based on who the buyer is.<sup>11</sup>

Mr. Smith's recommendation is also internally inconsistent inasmuch as Mr. Smith did *not* recommend using Aqua specific "depreciation rates" for *all* plant accounts. He recommended doing so *only* where it would *lower* the asset value under the Cost Approach. If Mr. Smith had been consistent and used Aqua-specific depreciation rates for all accounts, his adjustment would have reduced the Gannet Cost Approach result by \$21,581,044 instead of \$100,465,415.<sup>12</sup>

As a final point, Mr. Smith provided no statistical analysis to support the use of Aqua specific depreciation rates for the DELCORA assets. Aqua's assets and the DELCORA assets, in fact, may not be comparable. Aqua's existing wastewater systems are "relatively small in size and

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<sup>9</sup> Aqua St. No. 8-R at 4.

<sup>10</sup> Aqua St. No. 8-R at 5.

<sup>11</sup> Aqua St. No. 8-R at 8-9.

<sup>12</sup> Aqua St. No. 8-R at 3-4. Irrespective of the inconsistency, Mr. Smith's use of Aqua specific depreciation rates results in an investment value and not a fair market value, a direct violation of Section 1329, and should not be adopted as set forth above.

number of customers” and each “operating division” being “self-sustained” and providing wastewater service to a total population of 64,000. The DELCORA facilities, on the other hand, serve more than 500,000 people in 46 municipalities.<sup>13</sup>

## **ii. The ScottMadden Cost Approach**

Within the ScottMadden Cost Approach, Mr. Smith recommends shorter service lives for Account 362.2 Special Collecting Structures (from 75 years to 40 years) and Accounts 380.3 Treatment and Disposal Equipment – Pump Stations and 380.4 Treatment and Disposal Equipment (from 50 years to 40 years). Mr. Smith’s adjustments, once again, are based on the depreciation rates approved in Aqua’s last base rate case.<sup>14</sup>

Similar to Gannett’s response to Mr. Smith, ScottMadden also emphasized that ScottMadden’s valuation study is *not* bound by Aqua’s decisions. ScottMadden used a source of information for useful lives that is both readily available and supported by a state regulatory jurisdiction.<sup>15</sup>

The useful lives in the ScottMadden Cost Approach were based on the *System of Accounts for Water and Wastewater Utilities – with 200 or More Connections* as published by the Public Utility Commission of Texas. ScottMadden also looked to this Commission for guidance. Specifically, in Docket No. A-2019-3008491, the Commission found a useful life of 75 years to be appropriate for mains. ScottMadden considered Account 362.2 Special Collecting Structures to be functionally equivalent to mains, and, therefore, relied on Commission guidance and a useful life of 75 years in that instance.<sup>16</sup>

Regarding Accounts 380.3 and 380.4, as shown on page 5 of *System of Accounts for Water and Wastewater Utilities – with 200 or More Connections*, the useful lives listed for account “380

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<sup>13</sup> Aqua St. No. 8-R at 9.

<sup>14</sup> Aqua St. No. 9-R at 3.

<sup>15</sup> Aqua St. No. 9-R at 4.

<sup>16</sup> Aqua St. No. 9-R at 3.

Outfall sewer lines” is 50 years. While recognizing that Aqua used useful lives of 40 years for account 380 in its rate case depreciation study, Mr. D’Ascendis stated that the ScottMadden valuation study is *not* bound by Aqua’s decisions. Instead, as set forth above, ScottMadden appropriately used a source of information that is both readily available and supported by a state regulatory jurisdiction.<sup>17</sup>

Mr. D’Ascendis explained that the Cost Approach to value is based solely on DELCORA’s assets (*i.e.*, exclusive and irrespective of ownership by Aqua). Mr. Smith presented no evidence questioning the integrity of the reference material for useful lives relied on by ScottMadden. As such, ScottMadden does not find Mr. Smith’s adjustments appropriate and Mr. D’Ascendis found no reason to make any adjustments his Cost Approach in response to Mr. Smith’s testimony.

### **iii. Conclusion – Cost Approach**

Mr. Smith’s selective and inconsistent use of Aqua specific depreciation rates for only those accounts for which doing so would produce a lower value should not be approved. The use of Aqua specific rates in the Cost Approach does not meet a standard of value of fair market value and, thus, is a direct violation of Section 1329. Mr. Smith’s adjustments to the Gannett’s and Scott Madden’s Cost Approach to valuation should be rejected.

## **b. Market Approach**

### **i. The Gannett Market Approach**

The Gannett Fair Market Value Appraisal explains that there are two methods of doing the Market Approach to valuation: the Market Multiples method; and the Selected Transaction method.<sup>18</sup> The results of the Market Multiples method indicate a value of the system of \$518.4 million. The results of the Selected Transactions method indicate a value of \$358.3 million. The Market Approach to valuation indicates a value of \$438.3 million for the system based on the

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<sup>17</sup> Aqua St. No. 9-R at 4.

<sup>18</sup> Aqua Exhibit No. 1, Application Exhibit Q at 40.



results of the market multiples method and the selected transactions method.<sup>19</sup>

OCA witness Smith did not recommend any adjustments to the Gannett Market Multiples analysis. OCA witness Smith did, however, propose adjustments to the Gannett Selected Transactions analysis, which produced an adjusted Selected Transactions result of \$327,125,128. Mr. Smith's adjustment reflects the use of only *ex post*, Commission determined, ratemaking rate base values in the Selected Transaction method. The use of *ex post*, Commission determined ratemaking rate base values in the Selected Transaction method was *rejected* by both Judge Jones and the Commission in the recently concluded Cheltenham proceeding. It should be rejected, again, here.<sup>20</sup>

Mr. Walker emphasized that the Selected Transaction method relies on and reflects information that was known, *ex-ante*, *i.e.*, information that was known at the time the winning purchase bid (price) was given. After all, the winning purchase bid (price) could not have reflected *ex-post* information that was not available when it was made.<sup>21</sup>

For the McKeesport transaction, for example, neither the re-negotiated \$159 million nor the Commission-approved rate base value of \$158 million was known at the time of the bid. Similarly, for the Limerick transaction, the correct purchase price of \$75 million was used in lieu of the Commission's determined ratemaking rate base value of \$64 million because \$75 million was the amount bid and paid by the buyer. A Commission determined ratemaking rate base value for an entity does not change the price bid and paid by a buyer.<sup>22</sup>

Further, the metrics (Gross Property Plant and Equipment, Net Property Plant and Equipment, Customers, etc.) used in the Selected Transaction method are relative to the time period

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<sup>19</sup> Aqua Exhibit No. 1, Application Exhibit Q at 47.

<sup>20</sup> Aqua St. No. 8-R at 17. The Cheltenham proceeding cited by Mr. Walker is the *Application of Aqua Pennsylvania Wastewater, Inc.*, Docket No. A-2019-3008491, Opinion and Order entered November 5, 2019.

<sup>21</sup> Aqua St. No. 8-R at 19-20.

<sup>22</sup> Aqua St. No. 8-R at 18.

the bid (price) was made. That is, the metrics are time period sensitive. For example, a 2016 bid would likely reflect metrics from 2015 since the results of 2016 would not be known at the time. It is unrealistic for Mr. Smith to suggest that only *ex-post* original cost studies are more appropriate than *ex-ante* information in the Market Approach.<sup>23</sup>

It must be emphasized that Gannett verified the results of its Market Approach.<sup>24</sup> In 2018 two IOUs, Connecticut Water Service, Inc. and SJW Group, announced a planned merger with Connecticut Water. Although this acquisition is not directly applicable to the DELCORA system, it does provide a range of indicated value for the system, which Gannett relied on as a check. The results of the Connecticut Water selected transactions show a range of value for the DELCORA system of \$495.5 million when the reported significant selected transactions multiples are considered and a value of \$564.2 million when the reported significant selected transactions multiples have been adjusted for “cost free” capital.

Mr. Smith’s proposed adjustment to the Gannett Market Approach to value should be rejected.

## **ii. The ScottMadden Market Approach**

The ScottMadden Fair Market Value Appraisal explains that the Market Approach considers comparable transactions of similar utilities in the same general timeframe and general operational area and other market-based data to establish a fair market value.<sup>25</sup> In the ScottMadden Appraisal, the Market Approach was addressed using a Market-to-Book Multiple Method and a Comparable Sales Method. The ScottMadden Market Approach to value is \$613,520,480.<sup>26</sup> Notably, ScottMadden applied a relatively low 5% weighting to the Market Approach result.

Mr. Smith excluded the results of the Comparable Sales Method from the ScottMadden

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<sup>23</sup> Aqua St. No. 8-R at 19-20.

<sup>24</sup> Aqua Exhibit 1, Application Exhibit Q at 47.

<sup>25</sup> Aqua Exhibit No. 1, Application Exhibit R at 3.

<sup>26</sup> Aqua Exhibit No. 1, Application Exhibit R at 8-9.

Appraisal result. His proposed adjustment reduces the ScottMadden Market Approach to value by \$197,931,116. Mr. Smith believes that the Comparable Sales Method is unreliable because of a lack of demonstrated reliability and use in actual transactions and produces extremely inflated valuation results.<sup>27</sup>

Mr. Smith's criticism of the Comparable Sales Method is illogical and contrary to established reference materials. The Comparable Sales Method is one of the most intuitive methods of valuation. Any homeowner, for example, would, obviously, want to know the recent sales history of other homes on their block – comparable sales, in other words – before putting their home up for sale. It is no different for utility fair market valuation.<sup>28</sup>

The Comparable Sales Method has also been noted in numerous publications, including The American Society of Appraisers as recognized by Mr. Smith. Additionally, David L. Hayward notes that market-based approaches are “[A] general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.”<sup>29</sup>

Hayward also discusses acceptable multiples for use in the Guideline Merged and Acquired Company (“M&A”) method:

The M&A method uses various benchmarks *e.g.*, number of customers, multiples of book value, purchase price/rate base from “comparable” transactions, capital/EBITDA, sales/EBITDA, and capital/EBIT.

The first two benchmarks mentioned by Hayward – number of customers and multiples of book value – were both used in the ScottMadden Market Approach to value.

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<sup>27</sup> OCA Sta. No. 1 at 63.

<sup>28</sup> Aqua St. No. 9-R at 6.

<sup>29</sup> Aqua St. No. 9-R at 6.

Mr. Smith offered no support for his conclusory statement that using cost per connection is not reliable. Moreover, as emphasized by Mr. D’Ascendis, ScottMadden took into account the results of the Market Approach by applying a 5% weighting. Because Mr. Smith has provided no evidence for his support that the Comparable Sales Method, and specifically the purchase price per customer multiple, is unreliable and lacks application in actual transactions, Mr. D’Ascendis found no reason to make any adjustments to his Market Approach in response to Mr. Smith’s testimony.

**c. Income Approach**

**i. The Gannett Income Approach**

The Gannett Appraisal explains that the Income Approach theorizes that the value of a business is the future economic benefit that ownership will provide. Capitalizing or discounting a future income stream to a present value provides an indication of the value of a business. The capitalization or discount rate reflects future growth, business risk, economic factors, financial risk and industry risk of the assets.<sup>30</sup>

The two most common methods of the Income Approach are the capitalization of earning or cash flow method and the discounted cash flow method (“DCF”). The capitalization of earning method converts a single base economic income number to a value by dividing it by a capitalization rate. The DCF method uses estimates of future free cash flow and discounts them to arrive at a present value or price of the cash flows.<sup>31</sup> Gannett’s Income Approach indicated a value of \$387,754,301 for the DELCORA system.

Mr. Smith’s criticism of the Gannett Appraisal is limited to the manner of determining the “terminal value” used in the Income Approach (DCF model). Mr. Smith expresses concerns regarding the application of a capitalization rate concept to estimate terminal value. In lieu of a capitalization rate concept, Mr. Smith recommends use of net plant value as the terminal value in

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<sup>30</sup> Aqua Exhibit No. 1, Application Exhibit Q at 31.

<sup>31</sup> Aqua Exhibit No. 1, Application Exhibit Q at 31.

the Income Approach. The end-result of Mr. Smith's adjustment to the "terminal value" in the DCF model is a downward, or negative, adjustment of \$82,690,835 to the Gannett Income Approach to value.<sup>32</sup>

Mr. Smith's criticism of the Gannett terminal value should be denied. Gannett has applied a capitalization rate concept to estimate terminal value in *nine* Section 1329 proceedings and the Commission has not adjusted the concept in any one of those prior *nine* proceedings.<sup>33</sup> Judge Jones and the Commission, moreover, *rejected* the use of net plant value as the terminal value in the Cheltenham proceeding.<sup>34</sup> Mr. Smith's proposal here, which is identical to the proposal rejected in Cheltenham, should again be rejected.

Within the DCF model, the "terminal value" is simply a point in time in which the growth in annual Debt Free Net Cash Flows changes from multiple growth rates to a constant growth rate. Within the DCF analysis, the growth rate of annual Debt Free Net Cash Flows during time periods 1 through 24 (year 2021 through 2044) changes multiple times due to the various assumptions listed in the Gannett Appraisal. After time period 24 (year 2044), the growth in annual Debt Free Net Cash Flows is a constant growth rate. The "terminal value" is simply the present value of future Debt Free Net Cash Flows from time period 24 (year 2044) forward. Under the Income Approach, a terminal value can also be thought of as the future market value, or future sale price, of existing assets.<sup>35</sup> The Gannett terminal value at year 24 ranges from \$530.071 million to \$611.997 million from time period 24 (year 2044).<sup>36</sup>

Mr. Smith recommends using the \$340.646 million net plant value from time period 24 (year 2044) as the terminal value. Mr. Smith's recommendation defeats or eliminates the need to

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<sup>32</sup> Aqua St. No. 8-R at 9-10.

<sup>33</sup> Aqua St. No. 8-R at 10.

<sup>34</sup> Aqua St. No. 8-R at 14.

<sup>35</sup> Aqua St. No. 8-R at 11.

<sup>36</sup> Aqua Exhibit No. 1, Application Exhibit Q, Exhibit 15, page 6.

appraise plant assets since the indicated value of net cost of the plant assets is simply the net cost of the plant assets under Mr. Smith's recommendation. If Mr. Smith were correct, then an original cost less depreciation analysis would be the only method needed to value assets. However, the value of the investment in plant and equipment for the DELCORA wastewater system assets is being determined in this proceeding based upon a standard of value of fair market value, not a standard of value of original cost.<sup>37</sup>

Mr. Smith's criticism of, and his proposed adjustments to, the Gannett Income Approach are not in accordance with valuation practice. The use of a "terminal value" in the DCF model is a mathematical shortcut to avoid having to show and/or calculate annual Debt Free Net Cash Flows for hundreds of time periods, or hundreds of years, and is practical and is in accordance with accepted valuation practice. Conversely, Mr. Smith's proposed alternative of using net plant value from time period 24 (year 2044) as the terminal value is not in accordance with accepted valuation practice and is not reasonable.<sup>38</sup>

Mr. Walker provided an evidentiary analysis demonstrating that "net plant value" is not a good measure or proxy for future market value. The Gannet Appraisal lists the current market multiples applicable to the corresponding financial and operating statistics of the DELCORA system.<sup>39</sup> These market multiples and the corresponding financial and operating statistics of the DELCORA wastewater system that were utilized by Mr. Smith are presented in "Table 2" at page 13 of Aqua Statement Number 8-R.<sup>40</sup>

As shown in "Table 2," the indicated market value in period 24 (year 2044) applicable to each metric range from \$1,380.530 million to \$640.414 million, and collectively proves net plant value (i.e., \$340.646 million) is not a good measure or proxy of the future market value, or sales

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<sup>37</sup> Aqua St. No. 8-R at 11-12.

<sup>38</sup> Aqua St. No. 8-R at 12.

<sup>39</sup> Aqua Exhibit 1, Application Exhibit Q. Exhibit 16, page 1 of 3.

<sup>40</sup> Aqua St. No. 8-R at 13.

price, of existing assets since the indicated future market value is about 168% higher than Mr. Smith's recommendation of \$340.646 million (year 2044).<sup>41</sup> Mr. Smith's "terminal value" criticism, accordingly, should be rejected.

Mr. Smith made other assertions that Mr. Walker reviewed and countered:

- First, in the context presented in Mr. Smith's testimony, Mr. Walker disagreed with Mr. Smith's assertion that a "regulated utility's net cash flow is a direct function of its plant in service." The value of the investment in plant and equipment for the DELCORA wastewater system assets is being determined in these proceedings. The appraised value estimated by Gannett Fleming and ScottMadden is \$408.8 million and \$308.1 million, respectively (OCA Exhibit RCS-1). The purchase price negotiated by Aqua and DELCORA is \$276.5 million (OCA Exhibit RCS-1); all of which are considerably higher than the present value of terminal value of net cost of the plant and equipment of \$159.5 million to \$78.6 million used by Mr. Smith (OCA Exhibit RCS-1, pages 2 and 3, respectively).<sup>42</sup>
- Second, Mr. Smith is incorrect when he states that under the UVE assumptions and modeling techniques, the DELCORA wastewater utility is depreciating and using up its existing plant faster, and to a higher degree, than it is making investments to replace that plant. To the contrary, over the course of the 24 year DCF model the depreciation expense totals \$341.8 million and the capital expenditures totals \$392.3 million (OCA Exhibit RCS-3, pages 2 and 3). In the 24th year (2044) the depreciation expense is \$17.3 million and the capital expenditures are \$17.0 million, a difference of less than 2%. With a net plant balance of \$340.6 million (year 2044) and the small \$0.3 million (\$17.3 - \$17.0) difference between depreciation expense and the capital expenditures, it would take 1,135 years to use up existing plant ( $\$340.6 \div \$0.3 = 1,135$ ).<sup>43</sup>
- Third, Mr. Smith did not recalculate terminal value using net plant less Accumulated Deferred Income Taxes ("ADIT"). In response to a discovery request, Mr. Smith stated, "[t]he annual ADIT balance and annual tax depreciation for each year 2021 through 2044 was not used for Exhibit RCS-3." Based on Mr. Smith's discovery response, Mr. Smith did not adjust the terminal value shown on Exhibit RCS-3 and his testimony likely intended to reference Exhibits addressing the ScottMadden appraisal, not Exhibit RCS-3. A copy of Mr. Smith's response is included as Exhibit 4 of Exhibit HW-1R.<sup>44</sup>

Mr. Smith's criticisms of the Gannett Income Approach to value should be rejected.

## **ii. The ScottMadden Income Approach**

The ScottMadden Fair Market Value Appraisal explains that the Income Approach to value

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<sup>41</sup> Aqua St. No. 8-R at 13-14.

<sup>42</sup> Aqua St. No. 8-R at 14.

<sup>43</sup> Aqua St. No. 8-R at 15.

<sup>44</sup> Aqua St. No. 8-R at 15-16.

provides an indication of value by discounting the expected or future cash flows of a company to a present value. The projected cash flows must account for additional investment and working capital additions and reflect the specific growth potential of the system being valued. The discount rate used to calculate the present value of the company must be derived from market data of similar risk companies and take into account how the potential acquirer will finance the transaction (e.g., debt, equity, or a combination of debt and equity).<sup>45</sup> ScottMadden's Income Approach indicated a value of \$291,863,370 for the DELCORA system.<sup>46</sup>

Mr. Smith disagreed with the terminal value used after 2049 within the ScottMadden Income Approach.<sup>47</sup> He proposed a recalculation of the terminal value using the amount of Net Plant less ADIT projected for the year 2049.<sup>48</sup> Mr. D'Ascendis disagreed with Mr. Smith, explaining that Mr. Smith provided no theoretical or academic support for the use of projected net plant less ADIT as the terminal value for a going concern. He provided citations to valuation literature that support the calculation of the terminal value as presented in the ScottMadden Appraisal (capitalizing terminal year cash flow and discounting that to present value).<sup>49</sup>

The National Association of Certified Valuators and Analysts and Institute of Business Appraisers state the following about the calculation of a terminal value:

The terminal value represents the value of a company in the terminal year of an earnings forecast, or what the company will be worth in x number of years. There are several methods of estimating terminal value, including price/earnings and other multiples. The most frequently used method is to capitalize terminal year earnings using an appropriate capitalization rate and then discount the results to a present value.

The American Society of Appraisers also discuss the calculation of a terminal value in the income approach:

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<sup>45</sup> Aqua Exhibit 1, Application Exhibit R at 3.

<sup>46</sup> Aqua Exhibit 1, Application Exhibit R at 12.

<sup>47</sup> OCA St. No. 1 at 61.

<sup>48</sup> Aqua St. No. 9-R at 4.

<sup>49</sup> Aqua St. No. 9-R at 5-6.



The next step, which is sometimes considered the salvage value or residual value, is used to derive the present value of the operations in the last period of the forecast – *estimate the terminal value of the asset* (basic step 7). An analysis concerning the life of the operations must be developed. If the asset has a limited life (the operations end at the last period in the forecast), the terminal value is the present value of the net salvage or scrap value of the operations in the future. If the asset is a business whose life may be very long, the terminal value is the present value of the capitalized future value; the capitalized value, in a future period, reflects the value of the operations into perpetuity. In both cases, the future value for the last forecast period is discounted to present value at the appraisal date.

Finally, specific to water utilities, Hayward in Valuing a Water Utility states:

In situations in which the investment is assumed to have a finite life, the estimated liquidation or salvage value at the end of the finite life is the terminal value. The second method, the generally preferred one, is capitalization of cash flows expected in the year following a specific projection period, usually by the Gordon Growth Model.

In view of the above and given DELCORA's operations are assumed to be a going concern (*i.e.*, operation into perpetuity),<sup>50</sup> it is appropriate to rely on the capitalization of cash flows as done by ScottMadden in its Income Approach to value.

## **5. Conclusion**

### **Section 1329 Fair Market Valuation**

The ratemaking rate base determined pursuant to Section 1329(c)(2) is \$276,500,000, being the lesser of the negotiated purchase price of \$276,500,000 and the average of the UVE appraisals of \$358,538,503. The OCA's criticisms of the appraisals, which do not impact Aqua's ratemaking rate base claim, nevertheless, should be rejected and given no weight.

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

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

Section 1102 of the Code requires Commission approval through the issuance of a CPC for a public utility to expand its service territory and to acquire property used or useful in the public

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<sup>50</sup> See OCA St. No. 1 at 19, where Mr. Smith acknowledges that Aqua will merge its system with the DELCORA system.

service.

Section 1103 of the Code provides that a CPC will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” In *City of York v. Pa. P.U.C.*, 295 A.2d 825 (Pa. 1972) (“*City of York*”), the Pennsylvania Supreme Court explained in the context of a utility merger that the issuance of a certificate of public convenience requires the Commission to find affirmatively that public benefit will result from the merger.

The Pennsylvania Supreme Court addressed *City of York* in *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040 (Pa. 2007) (“*Popowsky*”) and explained that the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome or impossible; rather, the Commission properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

More recently, the Commonwealth Court in *McCloskey v. Pa. P.U.C.*, 195 A.3d 1055 (Pa. Cmwlth. 2018), *petition for allowance of appeal denied* No. 703 MAL 2018 (April 23, 2019) (“*McCloskey*”) held that Commission findings: i) that Aqua, as the owner of numerous water and wastewater systems has sufficient operational expertise and ability to raise capital to support system operations; and ii) that the Commission has a policy of consolidation/regionalization of wastewater system assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities, are substantial evidence, consistent with *Popowsky* to support a conclusion that there is a public benefit to a transaction.

*McCloskey* also explains that the Commission must address rate impact in a “general fashion” when deciding whether there is substantial public benefit for a Section 1329 acquisition. Significantly, however, rate impact is not dispositive in the Commission’s determination of

affirmative benefits and may be outweighed by other positive factors.

Additionally, the party receiving the assets and service obligation must be technically, legally, and financially fit. *Joint Application of Peoples Natural Gas Company LLC, Peoples TWP LLC, and Equitable Gas Company, LLC*, Docket No. A-2013-2353647, 309 P.U.R.4th 213 (2013). An existing provider of public utility service is presumed fit. *See Re Pennsylvania-American Water Company*, 85 PA PUC 548 (1995). The burden of proof to rebut the presumption is on Protestants. *Re Byerly*, 270 A. 2d 186 (Pa. 1970); *Morgan Drive-Away, Inc., v. Pa. P.U.C.*, 293 A.2d 895 (Pa. Cmwlth. 1972).

## **2. Fitness**

As a certificated provider of utility service, Aqua's fitness is presumed. Aqua, nevertheless, presented substantial evidence that it is legally, financially and technically fit. No party presented testimony challenging Aqua's fitness.

The Commission addressed the fitness criteria in *Re Perry Hassman*, 55 PA PUC 661 (1982).

As to legal fitness, Aqua must demonstrate that it has obeyed the Code and Commission regulations. *Hassman, supra*. Aqua is a public utility operating under CPCs granted by the Commission. There are no pending legal proceedings challenging Aqua's ability to provide safe and adequate service. Aqua is legally fit.

Aqua is also financially fit. As to financial fitness, Aqua must demonstrate that it has sufficient financial resources to provide the proposed service. *Hassman, supra*. Aqua is a Class A wastewater utility with total assets of \$282 million and annual revenues of \$21 million. As a direct subsidiary of Aqua PA, Aqua has access to Aqua PA's financing capabilities.

Aqua PA is a Class A water utility and the largest subsidiary of Aqua America. In 2019, Aqua PA had operating income of approximately \$251 million, net income of \$194 million and

cash flow from operations of \$268 million. Aqua PA has a Standard and Poor's Rating of A+.

Aqua PA has a \$100 million short term credit facility and access to equity capital. Aqua will use existing short-term credit lines to fund the acquisition. The short-term credit funding will be converted to a mix of long-term debt and equity capital shortly after closing. The Proposed Transaction is not expected to have any negative effect on Aqua PA's corporate credit rating.

As to technical/managerial fitness, Aqua must have sufficient staff, facilities and operating skills to provide the proposed service. *Hassman, supra*. Aqua has an existing operational presence and wastewater professionals in the area. It provides wastewater service in Delaware and Chester Counties and Aqua and DELCORA have wastewater systems in close proximity to each other. Aqua also will be offering employment to all current DELCORA employees. The Proposed Transaction will easily fold into Aqua's existing wastewater operations. Aqua is technically/managerially fit.

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

Aqua presented substantial evidence in support of the affirmative public benefits of the Proposed Transaction and explaining, further, that any hypothetical rate impact is outweighed by other positive benefits.

#### **a. The Many Public Benefits**

The Proposed Transaction will provide many public benefits to both existing Aqua customers and the acquired DELCORA customers. The benefits below are as presented in the Application and the testimony submitted in support of it:

##### **Customer Assistance Payments from the DELCORA Customer Trust**

- The majority of the sale proceeds, estimated to be approximately \$200,000,000, will be placed in an irrevocable Trust that will benefit DELCORA customers for years to come. Aqua St. No. 2 at 13.

##### **Consolidation/Regionalization**

- The Commission has long supported the consolidation/regionalization of water/wastewater

systems in Pennsylvania. Through consolidation/regionalization, the utility industry has a better chance to realize the benefits of better management practices, economies of scale, and the resulting greater environmental/economic benefits. The benefits of consolidation/regionalization, ultimately, inure to customers both existing and acquired. Although it does not involve a small system, the Proposed Transaction embodies all of the principles noted in the Commission's policy statement. Aqua Exhibit No. 1, Application ¶56.a.

- Aqua provides utility service to approximately 35,000 wastewater customers and has years of experience operating wastewater treatment and collection systems in a safe, reliable and efficient manner. Aqua has acquired 15 wastewater systems over the past 10 years. The inherent combining of systems and customers provides stability in the day to day utility operations, in that, these systems do not all require major capital investments at the same time and, therefore, the financial impacts of various discrete projects and investments can be spread over the long term operations of the acquiring utility as a whole. Aqua Exhibit No. 1, Application ¶56.b and Aqua St. No. 2 at 14.
- In *McCloskey*, the Commonwealth Court held that Commission findings: (i) that Aqua, as the owner of numerous water and wastewater systems has sufficient operational expertise and ability to raise capital to support system operations; and (ii) that the Commission has a policy of consolidation/regionalization of wastewater system assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities, are substantial evidence, consistent with *Popowsky* ... to support a conclusion that there is a public benefit to a transaction. This same analysis supports the public benefit of the Proposed Transaction;

#### **Benefits to DELCORA Customers**

- DELCORA's customers will benefit by becoming part of a larger-scale, efficiently operated, water and wastewater utility. Aqua has existing operations serving populations of nearly 500,000 in Delaware County and 200,000 in Chester County, in nearby and overlapping service area. It will be able to merge and integrate DELCORA's customers by folding them into a larger-scale, efficiently operated water and wastewater utility that over time will likely yield further efficiencies and improve long-term viability as envisioned in the Commission policy statement. Aqua Exhibit No. 1, Application ¶56.c. and Aqua St. No. 2 at 13.
- Aqua is projecting a lower, long-term revenue requirement for DELCORA customers as a result of the Proposed Transaction compared to the revenue requirement that would result with DELCORA continuing as a stand-alone entity. Depending on certain assumptions, the projected benefit to DELCORA customers is between \$111 million and \$313 million through 2040. Aqua St. No. 2-R at 32-35 and WCP-2R Schedule A.
- Aqua also is projecting lower operating and maintenance costs that will likely be realized through reductions in cost for wastewater treatment through the investment in the expansion of the WRTP and force main to divert flows to the WRTP from PWD, as well as efficiencies in administrative and general costs, such as insurance, auditing, legal among others. Aqua Exhibit No. 1, Application ¶56.c. and Aqua St. No. 2 at 13.
- DELCORA's customers will also benefit through customer service enhancements and

protections provided by Aqua. Aqua has procedures in place under Chapter 14 of the Code ... and Chapter 56 of the Commission's regulations ... that provide for billing, payment, collection, termination and reconnection of service, payment arrangements, medical certifications, and formal and informal complaint procedures. By DELCORA becoming part of a regulated public utility, these protections will be available to DELCORA's customers. DELCORA low income customers will be able to enroll in Aqua's Helping Hand program. Aqua Exhibit No. 1, Application ¶56.d and Aqua St. No. 2 at 13.

- DELCORA customers will benefit from Aqua's experience in large-scale capital planning and replacement programs. Aqua St. No. 2 at 13. This is especially significant in regard to the planned expansion of the WRTP.

#### **Benefits to Existing Aqua Customers**

- The Proposed Transaction will benefit Aqua's existing customers and is significant to Aqua's existing wastewater platform. The addition of the DELCORA customers will create a wastewater division the equivalent size of Aqua PA's Main Division for water service. The addition of the DELCORA Wastewater system will increase Aqua's customer base by 45%. Aqua Exhibit No. 1, Application ¶56.e.
- By virtue of Aqua's larger combined customer base, future infrastructure investments across the Commonwealth driven by normal replacement cycles, emergency repairs, emergency response or compliance with new environmental regulations will be shared at a lower incremental cost per customer for all of Aqua's customers over time. Aqua Exhibit No. 1, Application ¶56.e.

#### **No Immediate Impact on Rates**

- The Proposed Transaction will not have any immediate impact on the rates of either DELCORA's customers or Aqua's existing customers. DELCORA sets its budget each year prior to December 1 and has increased rates charged to customers in each year. Through the Proposed Transaction, Aqua will implement DELCORA's existing base customer rates, which will remain in effect until Aqua's next base rate case is filed and concluded. Aqua Exhibit No. 1, Application ¶56.f.

#### **Planned Capital Projects**

- Planned capital projects will provide benefits by removing significant and increasing costs of contributing to PWD's LTCP. The elimination of treatment expense to PWD will result in greater control over treatment costs in the future. By investing capital now to expand the WRTP, Aqua and DELCORA will, in essence, be in control of their own destiny. Aqua Exhibit No. 1, Application ¶56.g.

#### **Environmental Stewardship**

- Aqua has a proven record of environmental stewardship of wastewater systems. Aqua St. No. 2 at 14.

- Aqua’s expertise in implementing large scale projects and compliance with DEP and EPA regulations. Aqua St. No. 2 at 14.

#### **DELCORA Employees**

- Aqua has committed to preserving the jobs of DELCORA employees. Aqua St. No. 2 at 14.

#### **DELCORA Wants to Sell Its Wastewater System**

- DELCORA has agreed to sell its system. The public interest and need will be served by allowing Aqua, in lieu of DELCORA, to provide wastewater service in the Requested Territory and to address the issues of regulatory requirements and capital expenditures. The DELCORA system will benefit from the support of wastewater professionals throughout Aqua’s organization. Aqua Exhibit No. 1, Application ¶56.j.

Significantly, together with the foregoing, Aqua’s acquisition of the DELCORA wastewater system is consistent with the General Assembly’s clear support and encouragement of municipal wastewater acquisitions. The Proposed Transaction is supported by substantial affirmative public benefits consistent with *City of York*, *Popowsky* and *McCloskey*.

#### **b. Potential Rate Impact**

Aqua estimated the potential rate impact of the Proposed Transaction on customers in compliance with Section 1329. The potential impact is 12.55% to DELCORA customers; 14.32% to Aqua wastewater customers; and 4.58% to Aqua water customers. The estimates do not include the effect that the Trust will have to assist DELCORA customers in paying their utility bills.<sup>51</sup>

#### **i. Hypothetical rate impact is outweighed by affirmative public benefit**

In *McCloskey*, the Commonwealth Court concluded that the Commission must address rate impact “in a general fashion” when deciding whether there is substantial public benefit for a Section 1329 proceeding. The rate impact for the Proposed Transaction is summarized as follows. Notably,

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<sup>51</sup> Aqua St. No. 2 at 4.

because DELCORA's rate base and rates are less than Aqua's current rates, the Proposed Transaction produces immediate economies of scale.<sup>52</sup>

### **Rate Impact**

- The current average monthly bill of a residential/commercial retail customer of DELCORA, is approximately \$41.26 per month using 6,660 gallons. Applying 100% of the revenue deficiency to the existing rates would increase the average bill to approximately \$46.44 per month or a 12.55% increase, which is less than the Company's existing average wastewater rates included in its most recent rate case at approximately \$68.27. Aqua St. No. 2 at 10.
- Additionally, Aqua is acquiring the system at a rate base per customer of \$2,250, which is less than the Company's rate base per customer of existing systems of \$7,750. Aqua St. No. 2 at 10.
- The fact that rate base and the rates are less than the Company's current rates demonstrate that there are immediate economies of scale as a result of the Proposed Transaction. Aqua St. No. 2 at 10.
- While the rates of DELCORA system customers are reasonably expected to increase, either on their own, or whether acquired by the Company, there is more flexibility and opportunity to deal with those impacts over a much larger customer base under Aqua ownership. This benefits both existing and acquired customers alike. Aqua St. No. 1 at 12.

*McCloskey* also explains that an expectation of increased rates can be outweighed by the other positive benefits of a transaction. Section 1329 transactions further a recognized legislative objective and are consistent with the Commission's consolidation/regionalization policy. Mr. Packer emphasized the following benefits as outweighing potential rate impact.<sup>53</sup>

- The economies of scale an acquisition of this size can bring are substantial, and the Commission has recognized this fact as demonstrated by the longstanding success of leading public water utility purveyors providing quality and reliable service in the Commonwealth.
- The purchase price of DELCORA is reasonable, supported by appraisals, was negotiated at arms' length, and considers the long-term relationship of infrastructure investment and rates.
- At a 12.55% first year difference in revenue requirement, the Proposed Transaction provides the lowest increase to the acquired DELCORA customers of those Fair Market Value ("FMV") applications submitted to the Commission by Aqua.
- The purchase price per customer is less than the Company's existing rate base per customer.

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<sup>52</sup> Aqua St. No. 2-r at 12.

<sup>53</sup> Aqua St. No. 2-R at 3-5.



- Stand-alone residential rates at DELCORA's full cost of service are lower than the Company's existing rates.
- Aqua is a growing wastewater utility that has the ability to utilize its larger customer base to share costs that more than offset the cost of capital and income tax differences between municipal and private ownership emphasized by the opponents to the Proposed Transaction.
- The Company's analysis of the long-term projections of revenue requirement is conservative, and there are regulatory tools at the Company's disposal to further reduce revenue requirement impacts of federal and state income tax through lower taxes with the election of tax repair.
- The Company's Appendix A has been utilized in numerous Section 1329 proceedings, and the methods used to forecast impacts have been reviewed and approved in at least three Aqua proceedings before the Commission.
- DELCORA customers will also benefit from regulatory rate protections as a result of the Proposed Transaction. Presently, DELCORA customers can only challenge proposed rates by bringing a legal action in the Court of Common Pleas. In contrast, under Commission jurisdiction, there are public input hearings and public advocates that will advocate for customers' interests in rate proceedings. An Administrative Law Judge will recommend a result and the Commission will review and issue a final decision on future rates. An appellate court review option is also available.

In sum, the hypothetical impact on rates is outweighed by the recognized benefits of Aqua's ownership including its expertise and ability to raise capital; the furtherance of consolidation/regionalization of wastewater services; and the spreading of costs over a larger customer base. Perhaps more significantly, the Proposed Transaction furthers the objective of the General Assembly in enacting Section 1329. While *McCloskey* concludes that rate impact should be addressed, it recognizes that it is not dispositive in the Commission's determination of substantial affirmative benefits.

### **iii. Other Parties' Concern with Potential Rate Impact**

At a 12.55% first year difference in revenue requirement, the Proposed Transaction provides the lowest increase to the acquired customers of any of the Fair Market Value applications submitted to the Commission by Aqua. The County and Sunoco, nevertheless, disagree with Aqua's analysis of rate impact and challenge the public benefits of the Proposed Transaction. Their

disagreement is based largely on the fact that the capital costs of a privately owned utility are higher than the capital costs of a public authority.

Mr. Packer provided a projection of revenue requirements to 2040 demonstrating that the rate impact conclusions of County witness Faryniarz and Sunoco witness Woods are incorrect. Utilizing correct assumptions for projected DELCORA rates leads to a completely different result for DELCORA's future revenue requirement than those projected by Mr. Faryniarz and Mr. Woods. A sale to Aqua results in an overall *lower* revenue requirement and a benefit to DELCORA customers.<sup>54</sup>

Mr. Packer summarized his analysis in the Table presented at page 33 of his rebuttal testimony, which is explained in detail at pages 34 and 35 of that testimony and reproduced below. Although Aqua, as a private utility has a higher cost of capital, DELCORA customers benefit, significantly, under the Proposed Transaction both with and without an allocation of costs to other Aqua wastewater customers by approximately \$312.9 million and \$111.4 million in savings, respectively, over 20 years:<sup>55</sup>

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<sup>54</sup> Aqua St. No. 2-R at 34-35.

<sup>55</sup> Aqua St. No. 2-R at 32-35.

	(A.)	(A.1)	(B.)	(C.)	(D.)	(E.)	(F.)
DELCORA vs. Aqua with Trust Payments							
Year	Faryniarz Table 4 - DELCORA No Sale	SPMT - Woods - HJW-4 DELCORA no sale *^	DELCORA no sale *^	Aqua / Trust Payments ^^	Aqua w/ Trust Payments (10% Cost Spread) ^^	Difference Col. (B.) vs (C.)	Difference Col. (B.) vs (D.)
2020	\$70,978,127	\$70,978,127	\$70,978,127	\$70,978,127	\$70,978,127	\$0	\$0
2021	\$67,754,039	\$74,527,033	\$74,997,375	\$73,107,471	\$73,107,471	\$1,889,904	\$1,889,904
2022**	\$68,973,113	\$78,253,385	\$80,495,980	\$75,300,695	\$75,300,695	\$5,195,285	\$5,195,285
2023	\$75,328,305	\$82,166,054	\$87,181,320	\$77,559,716	\$77,559,716	\$9,621,605	\$9,621,605
2024	\$83,788,448	\$86,274,357	\$94,245,102	\$79,886,507	\$79,886,507	\$14,358,594	\$14,358,594
2025**	\$87,837,306	\$90,588,075	\$106,710,726	\$82,283,102	\$82,283,102	\$24,427,623	\$24,427,623
2026	\$89,407,570	\$95,117,479	\$115,808,624	\$84,751,596	\$84,751,596	\$31,057,028	\$31,057,028
2027	\$101,931,332	\$99,873,353	\$125,682,186	\$87,294,143	\$87,294,143	\$38,388,043	\$38,388,043
2028**	\$101,939,204	\$105,865,754	\$136,397,545	\$124,632,143	\$112,168,929	\$11,765,401	\$24,228,616
2029	\$113,460,959	\$105,865,754	\$139,125,496	\$149,533,281	\$134,579,952	(\$10,407,785)	\$4,545,543
2030	\$115,724,467	\$105,865,754	\$141,908,006	\$153,180,434	\$137,862,390	(\$11,272,428)	\$4,045,615
2031**	\$117,897,846	\$105,865,754	\$144,746,166	\$147,016,127	\$132,314,515	(\$2,269,962)	\$12,431,651
2032	\$120,620,368	\$105,865,754	\$147,641,089	\$150,691,531	\$135,622,377	(\$3,050,441)	\$12,018,712
2033	\$124,141,994	\$105,865,754	\$150,593,911	\$154,366,934	\$138,930,240	(\$3,773,023)	\$11,663,671
2034**	\$128,374,653	\$111,159,041	\$153,605,789	\$156,219,127	\$140,597,215	(\$2,613,338)	\$13,008,575
2035	\$131,725,551	\$111,159,041	\$156,677,905	\$160,124,606	\$144,112,145	(\$3,446,701)	\$12,565,760
2036	\$135,994,218	\$111,159,041	\$159,811,463	\$164,030,084	\$147,627,075	(\$4,218,621)	\$12,184,388
2037**	\$138,364,117	\$111,159,041	\$163,007,692	\$160,807,127	\$144,726,415	\$2,200,565	\$18,281,278
2038	\$138,644,590	\$111,159,041	\$166,267,846	\$164,827,306	\$148,344,575	\$1,440,541	\$17,923,271
2039	\$141,176,194	\$111,159,041	\$169,593,203	\$168,847,484	\$151,962,735	\$745,719	\$17,630,468
2040**	\$143,705,172	\$111,159,041	\$172,985,067	\$161,656,127	\$145,490,515	\$11,328,940	\$27,494,552
<b>Total</b>	<b>\$2,297,767,573</b>	<b>\$2,091,085,674</b>	<b>\$2,758,460,617</b>	<b>\$2,647,093,667</b>	<b>\$2,445,500,436</b>	<b>\$111,366,950</b>	<b>\$312,960,181</b>
<b>PVRR^^^</b>	<b>\$1,039,447,532</b>	<b>\$990,743,427</b>	<b>\$1,239,009,481</b>	<b>\$1,166,503,753</b>	<b>\$1,095,787,772</b>	<b>\$72,505,728</b>	<b>\$143,221,709</b>

\* = 2021 - 2025 DELCORA Projected increases in rates utilized from OCA - III - 11; 2026 - 2028 Projected at 8.53% per year

\*\* = Indicates Aqua Base Rate Case Year

^ = 2029 through 2040 Projected increases capped at 2.0%

^^ = DSIC Included between rate cases (Every 3 years 2029 - 2040) up to 5%

^^^ = Net present value of cash flows at 7.37% discount rate

Column D is the key column because it reflects the practical reality of utility ratemaking and demonstrates the benefits that a regulated public utility offers – i.e., a larger and diverse portfolio of systems and customers to share costs, risk, and any possible rate increases. The comparison of Column D against Column B demonstrates that the revenue requirement under Aqua with the Trust

is *lower* in 2040 than if Aqua did not acquire the DELCORA wastewater assets. Mr. Packer noted his revenue requirement differential is conservative inasmuch as his analysis did not include possible benefits from Act 11 shifting of costs from wastewater to water customers, tax repair benefits, or future growth of the DELCORA wastewater system and the Aqua wastewater business as a whole.<sup>56</sup>

County witness Faryniarz listed five areas of disagreement at pages 5 through 7 of his direct testimony. If one were to accept Mr. Faryniarz' analysis, no regulated public utility would ever be approved to take over a municipal system. The Commission, however, understands there are inherent benefits to consolidation, benefits to economies of scale, and that utilities like Aqua have the experience and expertise to achieve those benefits while fulfilling their statutory obligation to provide safe, adequate, and reliable utility service. DELCORA is no exception to the many examples of systems that have been merged into Aqua.

Mr. Packer addressed each of Mr. Faryniarz's five areas of disagreement. Contrary to Mr. Faryniarz's claims 1) that the Proposed Transaction does not offer substantial benefits because Aqua is a regulated public utility that falls under the jurisdiction of the Commission; 2) that the Proposed Transaction would result in "rate shock;" and 3) that DELCORA customers would be better off if DELCORA remained independent and funded with municipal debt, Mr. Packer quantified the benefit of the Proposed Transaction to DELCORA customers as set forth above.<sup>57</sup> That analysis also demonstrates that there will be no "rate shock" and that DELCORA customers would not be better off if DELCORA remained independent.<sup>58</sup>

Mr. Packer also disagreed with Mr. Faryniarz's claim that the purchase price indicates that the Proposed Transaction was not negotiated at arms' length. Aqua and DELCORA are not

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<sup>56</sup> Aqua St. No. 2-R at 35.

<sup>57</sup> Aqua St. No. 2-R at 30-

<sup>58</sup> See Aqua St. No. 2-R at 37-41.

affiliated with each other. The APA was negotiated over a number of months. The parties had separate counsel and separate transactional consultants. In addition, Aqua and DELCORA followed the process as required by Section 1329 and Commission regulations.<sup>59</sup> A bidding process or Request For Proposals (“RFP”) is not a legal requirement for the sale of the DELCORA wastewater system; nor is it a requirement for an arms’ length negotiation.<sup>60</sup> The Commission, in any event, has no jurisdictional authority to order DELCORA to initiate an RFP for the purchase of the DELCORA system.<sup>61</sup>

Both Aqua and DELCORA had equivalent bargaining positions in negotiating the transaction with neither counterparty under duress to buy or sell.<sup>62</sup> The fact that the negotiated purchase price of \$276,500,000 is less than the results of the UVE appraisals does not demonstrate that the transaction was negotiated at other than arms’ length. The negotiated purchase price has been less than the UVE appraisal results in every past Aqua fair market value transaction. Notably, OCA witness Smith proposes a fair market value of \$280,655,000 for the system, which is approximately equal to the negotiated purchase price of \$276,500,000.<sup>63</sup>

Finally, Mr. Packer addressed Mr. Faryniarz’s claim that existing DELCORA customers will be subject to a higher blended rate base per customer prospectively. This claim is no more than recognition of the known result of investing capital at a greater rate than depreciation. While rate base per customer will increase, Aqua will be able to offer benefits to DELCORA customers, over time, post-acquisition that will more than offset the increase in rate base per customer. This

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<sup>59</sup> Mr. Faryniarz’s testimony reflects a misconception of the appraisal process which may have led to his criticism of the negotiation process. At page 8, lines 2 through 5 of his direct testimony, he stated that the purchase price was agreed upon “following negotiations and after review of two independent appraisals.” This is neither the sequence of events nor how the process worked. The purchase price was not negotiated after review of the appraisals. The UVEs conducted their appraisals after the purchase price was determined – not before. Aqua St. No. 2-R at 42.

<sup>60</sup> Aqua St. No. 2-R at 5-6.

<sup>61</sup> Aqua St. No. 2-R at 6.

<sup>62</sup> Aqua St. No. 2-R at 5-6 and 42-44.

<sup>63</sup> Aqua disagrees with Mr. Smith’s adjustments to the UVE appraisals which produce his proposed fair market value and, as presented in Section V.A.4, submits that they should not be adopted.

includes sharing of costs over a larger customer base, taking advantage of the diversification of the systems, varying the time of investments, and leveraging the size of the customer base to spread costs among all customers in utility ratemaking.<sup>64</sup>

Mr. Packer also addressed the testimony of Sunoco witness Woods. To support his belief that the Proposed Transaction is not in the public interest, Mr. Woods states that 1) the Proposed Transaction will unnecessarily increase revenue requirement; 2) the average investment per customer does not demonstrate efficiencies; 3) the Proposed Transaction will result in higher capital costs for DELCORA; 4) DELCORA customers will not benefit by combination with a larger customer group; and 5) there are other regulatory issues impacting the Proposed Transaction.<sup>65</sup>

By and large, the underlying reasons raised by Mr. Woods for opposing the Proposed Transaction are the same as those raised by Mr. Faryniarz. Contrary to Mr. Woods' concern that the Proposed Transaction will unnecessarily increase revenue requirement, the acquisition at fair market value rate base will increase revenue requirement consistent with and as permitted by Section 1329. Rate increases are only one issue that needs to be addressed in the overall public interest analysis. By simply referring to a potential rate increase, Mr. Woods has improperly ignored all of the other substantial affirmative public benefits that overwhelmingly support approval of the Proposed Transaction.<sup>66</sup>

Additionally, and significantly, Mr. Packer's revenue requirement projection, addressed above, effectively rebutted Mr. Woods' concerns with increased revenue requirement, higher capital cost with Aqua ownership and no benefit through combination with a larger customer group. That analysis demonstrates that, when reasonable regulatory assumptions are considered, DELCORA customers benefit, significantly, under the Proposed Transaction both with and without an

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<sup>64</sup> Aqua St. No. 2-R at 45-47.

<sup>65</sup> Aqua St. No. 2-R at 47-48.

<sup>66</sup> Aqua St. No. 2-R at 48.

allocation of costs to other Aqua wastewater customers by approximately \$312.9 million and \$111.4 million, respectively, over 20 years.<sup>67</sup>

Similar to Mr. Faryniarz, Mr. Woods in Exhibit HJW-1 calculates a “Revenue Requirement” for the Proposed Transaction. Again, a conclusion and analysis of this nature is not surprising. Differences in capital costs have never led to an outright denial of any acquisition application. Comparing financing types is comparing an apple to an orange, because each type has different characteristics, benefits, and preferences by different consumers. To flatly say one is better than the other is too simplistic an argument. The facts are that Aqua has the ability to secure both equity and debt capital at excellent rates. The standard of review is not whether a municipal model is better or worse than a regulated public utility model. The test is whether there are substantial public benefits *overall* as part of the transaction.<sup>68</sup>

Mr. Packer’s WCP-2R Schedule A demonstrates the impact of the Company’s ability to share costs with its larger customer base. It does not take into account other ways in which the Company can lower its cost of service, like tax repair, as noted by OCA Witness Smith, and, thus, Mr. Packer’s approach is, actually, a conservative analysis of revenue impacts. In fact, the affirmative benefit of the Proposed Transaction will be even more significant because of the ability of the Company to spread costs, operate efficiently, and reduce its cost of service.<sup>69</sup>

While Mr. Woods’ fundamental calculations appear to be accurate, his analysis does not acknowledge that the cost of service post 2028 would be allocated over a large wastewater customer base, thus, changing the result. Mr. Woods’ DELCORA “No Sale” revenue requirement is understated throughout the timeframe in the same manner as the “no sale” revenue requirement was understated by Mr. Faryniarz. Ultimately, Mr. Woods’ comparison of the Aqua and DELCORA

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<sup>67</sup> Aqua St. No. 2-R at 32-35.

<sup>68</sup> Aqua St. No. 2-R at 49-50.

<sup>69</sup> Aqua St. No. 2-R at 52.

revenue requirements, in his Schedule HJW-4, is inaccurate and misleading. Mr. Packer's WCP-2R Schedule A presents a better and more realistic end result, which is an overall projected lower revenue requirement under Aqua ownership.<sup>70</sup>

Additionally, Mr. Woods incorrectly claims that the conditions of service in DELCORA's service area will not change in a material way post-closing of the Proposed Transaction that would justify a change in revenue requirement. DELCORA has already benefited from the collaborative engagement between Aqua and DELCORA operations, which translates to improved service. One of the clear benefits of this relationship has been the sharing of Aqua's expertise in managing, planning, and executing larger scale capital projects like the expansion of the WRTP and diversion of flows from PWD.<sup>71</sup>

Mr. Packer summarized his disagreement with Mr. Faryniarz and Mr. Woods as follows:<sup>72</sup>

- 1.) Both analyses under-projected the long-term revenue requirement expectations of DELCORA, thereby misstating the differences in revenue requirement when compared to Aqua. Revenue requirements under Aqua ownership should be substantially lower than under DELCORA ownership.
- 2.) Both analyses do not include any recognition of the Company's ability to utilize single tariff pricing and share costs among wastewater customers over time; thus, they misstate the differences in revenue requirement when compared to Aqua's ownership of the DELCORA system.
- 3.) My analysis demonstrates that, with even a small amount of cost allocation ability assumed among wastewater customers (not Act 11 wastewater to water cost shifting), there are benefits long-term under Aqua ownership. My analysis, moreover, is conservative since it does not include any further reductions to Aqua's cost of service for operating efficiencies and income tax expense.

Additionally, it is important to underscore that at a 12.55% first year difference in revenue requirement, the Proposed Transaction provides the lowest increase to the acquired DELCORA customers of any FMV application submitted to the Commission by Aqua. Moreover, the purchase

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<sup>70</sup> Aqua St. No. 2-R at 52-53.

<sup>71</sup> Aqua St. No. 2-R at 50-51.

<sup>72</sup> Aqua St. No. 2-R at 56-57.



price per customer is less than the Company's existing rate base per customer. For all the reasons set forth above, the analyses offered by both Mr. Faryniarz and Mr. Woods should be rejected.

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

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

The litigation in the Court of Common Pleas of Delaware County at No. CV-2020-003185 concerns (a) a legal challenge to the Trust arrangement and (b) the County's desire to dissolve DELCORA. Neither of these concerns affects the continued efficacy of the APA. Delaware County, in fact, has not filed a pleading challenging the APA in County Court.<sup>73</sup> Neither of these concerns is a matter of Commission jurisdiction under the Code.

The Trust arrangement, additionally, is not part of the APA. If 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.

The APA, moreover, was entered into by DELCORA in full compliance with law and the Municipality Authorities Act ("MAA"). Thus, the APA constitutes a binding, enforceable agreement and contractual obligation of DELCORA. DELCORA cannot be dissolved prior to closing of the Proposed Transaction. The APA contains multiple provisions that can only be satisfied by DELCORA prior to closing, and not the County.<sup>74</sup>

The Common Pleas litigation is addressed further in Section V.C.2 below in the discussion of I&E witness Gumby's recommended conditions for approval of the Application.

##### **b. Rate Stabilization Trust / DELCORA Customer Trust**

DELCORA will create an irrevocable DELCORA Customer Trust and fund it with the bulk of the sale proceeds – approximately \$200 million – remaining after the satisfaction of

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<sup>73</sup> Aqua St. No. 2-R at 9.

<sup>74</sup> Aqua St. No. 2-R at 10.

DELCORA's outstanding debt. Payments from the Trust will be made to DELCORA customers the effect of which will provide for an annual increase in rates of 3% for 8-12 years. The impact of the Trust on customer bills is a significant benefit to DELCORA customers and the Proposed Transaction.<sup>75</sup>

To facilitate the Trust payments, Aqua and DELCORA have entered into a Memorandum of Understanding<sup>76</sup> which provides, *inter alia*, for the Trustee to make distributions to Aqua in order to process the customer assistance payment for the benefit of DELCORA customers. DELCORA prefers to have Aqua present the Trust payment as a customer assistance line item on the Aqua bill to the DELCORA customer.<sup>77</sup>

Neither Aqua nor DELCORA is asking the Commission to approve the Trust Agreement or the Trust payments. Aqua submits, moreover, that the Trust is non-jurisdictional to the Commission. Aqua and DELCORA are only asking the Commission to approve as an administrative request, if required and only to the extent necessary, the presentation of the customer assistance payment as a line item on the Aqua bill to DELCORA customers.<sup>78</sup>

If the Commission concludes that the presentation of the payment on the Aqua bill is inappropriate, there are other ways to flow the benefit of the Trust to DELCORA customers, although the customer assistance line item is the preferred method. Aqua could, for example, include a check in each DELCORA customer bill or it could send customer information to the Trust and the Trust could issue checks.<sup>79</sup>

OCA witness Smith acknowledged the benefit of the Trust to DELCORA customers and testified that it (or some acceptable alternative) should be used to limit annual rate increases to

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<sup>75</sup> Aqua St. No. 5 at 10 and 12.

<sup>76</sup> Aqua St. No. 2-R, WCP-2R Schedule E.

<sup>77</sup> Aqua St. No. 2 at 5.

<sup>78</sup> Aqua St. No. 2-R at 8.

<sup>79</sup> Aqua St. No. 2 at 6.

DELCORA customers under Aqua ownership until the funding has been fully applied.<sup>80</sup>

**c. Other – Arms’ Length Negotiation**

County witnesses Faryniarz and Zidek criticize the Proposed Transaction, claiming that negotiations for the APA were not conducted at arms’ length and ask the Commission to direct DELCORA to issue an RFP for the purchase of the system. Their criticisms should be rejected as the facts demonstrate arms’ length negotiation as addressed above in the response to the testimony of Mr. Faryniarz.

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

**a. Introduction**

Aqua’s Direct Testimony addressed its expertise in regulatory compliance and explained how DELCORA’s W RTP and Springhill Farms Wastewater Treatment Facility (“Springhill Farms”) are activated sludge wastewater treatment facilities similar to wastewater treatment facilities currently operated by Aqua.<sup>81</sup> Aqua and the DELCORA staff that will be retained post-acquisition will provide the expertise and knowledge that will allow quality wastewater service to be provided to all customers.<sup>82</sup>

Sunoco and KCC oppose approval of the Application based in part on alleged environmental concerns they claim will arise from Aqua’s status as a private owner of the wastewater collection and treatment facilities.<sup>83</sup> Specifically, Sunoco witness Woods has raised concerns regarding future environmental permitting under the Resource Conservation and Recovery Act (“RCRA”) and the Clean Water Act (“CWA”) (more specifically addressed by Sunoco witness Smith), the future cost of managing combined sewer overflows (“CSOs”), a potential reduction of Federal funds provided

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<sup>80</sup> OCA St. No. 1 at 10-11.

<sup>81</sup> Aqua St. No. 4 at 6.

<sup>82</sup> Aqua St. No. 4 at 10. DELCORA’s Director of Operations and Maintenance, Michael J. DiSantis, addressed the historic environmental compliance issues DELCORA has successfully navigated, including its Long-Term Control Plan (“LTCP”) for the City of Chester’s combined sewer system. Aqua St. No. 7 at 6-9.

<sup>83</sup> As a first alternative to denial of the Application, Sunoco proposes that DELCORA retain ownership of the W RTP and 26 CSOs, and continue to serve Sunoco under its “existing” contract. SPMT St. No. 2-SR at 36.

to Pennsylvania under the CWA and anticipated difficulty for Aqua and DELCORA to satisfy the requirements of the EPA and the Office of Management and Budget under Executive Order 12803 (the “EO”).<sup>84</sup>

As a “minimum alternative”, Sunoco requests that the Commission condition transfer of ownership of the WRTP and the 26 CSOs to Aqua upon a demonstration that under Aqua ownership, Sunoco is able to operate the Marcus Hook Industrial Complex (“MHIC”) in compliance with EPA and DEP environmental permitting requirements.<sup>85</sup>

KCC witness Wentz is also concerned about the potential for new permitting obligations on his company arising from Aqua ownership of the WRTP, including loss of an Industrial Wastewater Discharge Permit through DELCORA’s Industrial Pretreatment Program (“IPP”) and the impact of private ownership on DELCORA’s National Pollutant Discharge Elimination System (“NPDES”) permit.<sup>86</sup> In addition, Mr. Wentz is concerned that KCC’s alleged status as a low-cost, high-volume wastewater customer will not be recognized by the Commission in its post-acquisition ratemaking.<sup>87</sup> Mr. Wentz did not respond to Aqua witness Miller’s Rebuttal Testimony regarding the feasibility of Aqua and industrial customers like Sunoco obtaining all the necessary environmental authorizations to allow continuous and seamless service under Aqua ownership. However, Mr. Wentz did proffer as an alternative to rejecting the Application, the Commission conditioning closing of the Proposed Transaction on resolution of environmental permit issues.<sup>88</sup>

It is not necessary for the ALJs and Commission to step out of their Code expertise, predict the outcome of Aqua and industrial users’ requests for DEP authorizations and reject this Application, as Sunoco and KCC have requested. These intervenors posit that Aqua and

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<sup>84</sup> SPMT St. No. 2 at 40-50.

<sup>85</sup> SPMT St. No. 2-SR 36-37.

<sup>86</sup> Kimberly-Clark St. No. 2 at 11-13.

<sup>87</sup> Kimberly-Clark St. No. 2 at 5-11.

<sup>88</sup> Kimberly-Clark St. No. 2-SR at 6.

DELCORA's industrial customers are doomed to lengthy and expensive environmental review processes with uncertain outcomes. On the contrary, Aqua has established unequivocally that private ownership of what were previously public wastewater facilities do not present difficult or intractable environmental permitting issues.

- b. **There is a clear and timely path for obtaining the necessary DEP authorizations of Aqua's and industrial users' operations and new Part B permits will not be necessary.**

The Sunoco and KCC concerns over environmental permitting generally fall into two categories: 1) NPDES-related concerns and 2) concerns regarding the regulatory treatment of industrial wastewater discharges after the transition from public ownership by DELCORA to private ownership under Aqua. Aqua witness Bubel in his Rebuttal Testimony addressed Mr. Wentz's concerns relating to DELCORA's IPP and obtaining permits for Aqua to operate the WRTP.<sup>89</sup> Mr. Miller addressed Sunoco's concerns on the change in RCRA regulation **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[REDACTED].<sup>90</sup> **[END HIGHLY CONFIDENTIAL]** Both Aqua witnesses assert that the alleged environmental concerns introduced in this proceeding by Sunoco and KCC are not insurmountable. In fact, the alleged concerns in many ways highlight the need to obtain and comply with DEP and EPA permitting requirements. While these alleged concerns should be dealt in the ordinary course of any transaction prior to closing, they do not outweigh the substantial affirmative public benefits of the Proposed Transaction.

There is a wide disparity in the environmental permitting expertise between the Aqua/DELCORA experts and the witnesses offered by Sunoco and KCC. Mr. Bubel, a Registered Professional Engineer in five states, including Pennsylvania, is also a Pennsylvania Licensed Water and Wastewater Operator. Mr. Bubel has worked at Aqua since 2003 in roles relating to wastewater

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<sup>89</sup> Aqua St. No. 4-R.

<sup>90</sup> [REDACTED].

treatment facilities, including planning, design, start-up and operational troubleshooting.<sup>91</sup> Aqua witness Miller, a consultant with Ramboll U.S. Consulting, Inc., is a former consultant to the U.S. Department of Energy, has provided companies with environmental compliance support and advised on hundreds of projects in the last twenty years.<sup>92</sup> Both KCC witness Wentz and Sunoco witness Smith are employees of DELCORA industrial customers. While witnesses Wentz and Smith have expertise in their respective employers' environmental responsibilities, they do not have the breadth of experience and knowledge of environmental compliance issues possessed by Messrs. Bubel and Miller, and their opinions should be evaluated with that more limited experience in mind.

The NPDES permit program was established under the CWA and it regulates entities that discharge wastewaters to waters of the United States. DELCORA is currently regulated under NPDES since it discharges to the Delaware River. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>94</sup> **[END HIGHLY CONFIDENTIAL]**

Mr. Bubel confirmed that primary supervision of the IPP for industrials would move from the EPA to DEP under the Proposed Transaction and that Aqua intends to operate and implement the pretreatment program functionally equivalent to how it is operated under DELCORA

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<sup>91</sup> Aqua St. No. 4 at 1.

<sup>92</sup> Aqua St. No. 10-R at 1-2.

<sup>93</sup> Tr. 298.

<sup>94</sup> [REDACTED].

ownership. The IPP will be implemented through an NPDES permit authorized by DEP, similar to other former Publicly Owned Treatment Works (“POTWs”) such as the DELCORA W RTP.<sup>95</sup> Mr. Bubel explained that witness Wentz’s citations to a 1987 EPA memorandum entitled *Permit Implications of Privatization* merely affirmed the well-understood proposition that privately-owned wastewater treatment plants are subject to different provisions and requirements of the CWA and its regulations than publicly-owned treatment plants.<sup>96</sup> Mr. Bubel made the following additional points responsive to Mr. Wentz’s concerns: (i) since 1987, numerous POTWs have been sold to private owners and the related transitional issues have been worked out, in many cases by incorporating industrial pretreatment obligations into the new private owner’s NPDES permit; (ii) transfer of the DELCORA NPDES permit involves submission of a 5-page DEP Permit Transfer Form completed by DELCORA and the proposed Permittee Aqua, a \$200 transfer fee and other supporting documentation; and (iii) Aqua has successfully transferred nine NPDES permits from municipalities or municipal authorities over the last twenty-two years.<sup>97</sup>

Mr. Miller supported Mr. Bubel’s overall conclusions that [BEGIN HIGHLY  
CONFIDENTIAL] [REDACTED]

[REDACTED]  
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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>95</sup> Aqua St. No. 4-R at 2-3.

<sup>96</sup> Aqua St. No. 4-R at 3.

<sup>97</sup> Aqua St. No. 4-R at 3-5.

<sup>98</sup> [REDACTED].

[illegible]

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[REDACTED].<sup>120</sup> [END HIGHLY CONFIDENTIAL]

The record fully substantiates by a preponderance of the evidence that the Application should not be rejected or given a conditioned approval because environmental permitting will become an extended and expensive process that threatens industrial users’ continued operations. Aqua’s consistent record of obtaining timely DEP authorization of its municipal and municipal authority wastewater acquisitions can be expected to continue with the Proposed Transaction.

**c. Sunoco’s CSO and CWA funding concerns are meritless.**

Sunoco witness Woods raised two additional issues of concern in the environmental issue area. DELCORA operates a CSO control program which is subject to EPA and DEP oversight, and

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115 [REDACTED]  
116 [REDACTED]  
117 [REDACTED]  
118 [REDACTED]  
119 [REDACTED]  
120 [REDACTED]

is governed by a Federal Consent Decree entered in the U.S. District Court for the Eastern District of Pennsylvania in 2015 at Docket No. 2:15-cv-4652.<sup>121</sup> CSOs are facilities that combine wastewater and stormwater collected from systems feeding into the DELCORA system.<sup>122</sup> Mr. Woods speculates that a private owner such as Aqua “could” be forced into a greatly expanded CSO control program that is significantly more costly than DELCORA’s current plan. No basis was provided by Mr. Woods, other than Aqua’s status as a private company, for his view it is likely that EPA and DEP would modify the current DELCORA plan by ordering Aqua to “completely separate all sanitary and storm sewers to eliminate the CSOs or provide full treatment for all flows including storm flows”, a massive undertaking.<sup>123</sup>

Mr. Woods misses the overarching regulatory requirement that all point source discharges under the CWA, including CSO outfalls, must comply with applicable water quality standards. EPA NPDES CSO Control Policy. Those water quality standards apply to all dischargers, whether public or private.<sup>124</sup> Mr. Bubel rebutted Mr. Woods’ testimony by pointing out: (i) DELCORA has already submitted for EPA and DEP review a LTCP revision that will set forth DELCORA’s CSO obligations; (ii) EPA and DEP are expected shortly to approve DELCORA’s LTCP in the near future, at which time it will be incorporated into DELCORA’s obligations under the Consent Decree; (iii) the Consent Decree contains provisions that allow a party acquiring the DELCORA system to become the party fulfilling the LTCP and Consent Decree obligations; and (iv) Aqua and DELCORA have already approached EPA and DEP to discuss transfer of the DELCORA system to Aqua and plan to formally request the substitution of Aqua for DELCORA in the Consent Decree at or near the time the Proposed Transaction is expected to close.<sup>125</sup> Upon Aqua replacing DELCORA

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<sup>121</sup> SPMT St. No. 2 at 9; Aqua St. No. 4-R at 7.

<sup>122</sup> SPMT St. No. 2 at 9.

<sup>123</sup> SPMT St. No. 2 at 42.

<sup>124</sup> 25 Pa. Code § 93.7.

<sup>125</sup> Aqua St. No. 4-R at 7.

in the Consent Decree, it will receive the benefit of DELCORA's LTCP work to date and be required to continue performance of the approved LTCP. There is no evidence that CSO obligations greater than those imposed on DELCORA in order to meet Pennsylvania's Water Quality Standards will be required by EPA or DEP because Aqua is a private company.<sup>126</sup>

Mr. Woods is also concerned that moving DELCORA to private ownership will ultimately lead to a lower proportion of Federal funds for infrastructure improvements under the CWA being allotted to Pennsylvania and the loss of financing assistance to DELCORA in the CWA revolving loan program will be replaced by higher-cost investor-owned utility capital.<sup>127</sup>

In response, Mr. Bubel pointed out that removing DELCORA's infrastructure needs from CWA funding will reduce Pennsylvania's proportional amount of funding, however, any reduction in CWA infrastructure funds will be offset by the reduction in infrastructure needs.<sup>128</sup> Moreover, Aqua will pick up those infrastructure demands and it is unlikely CWA funding would fully meet the DELCORA system's capital requirements.<sup>129</sup> Nor is loss of access to CWA State Revolving Fund financing a negative factor. In addition to DELCORA customers receiving the benefits of economies of scale under Aqua ownership, the system would avoid the higher administrative costs, preliminary engineering costs and other costs that accompany Revolving Fund financing.<sup>130</sup> Finally, it is Mr. Bubel's understanding that most CWA Revolving Fund dollars go to smaller companies that cannot readily access market funding.<sup>131</sup>

Accordingly, Sunoco's concerns regarding future CSO and financing costs are meritless and should be disregarded.

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<sup>126</sup> Id.

<sup>127</sup> SPMT St. No. 2 at 42-44.

<sup>128</sup> Aqua St. No. 4-R at 8.

<sup>129</sup> Id.

<sup>130</sup> Aqua St. No. 4-R at 9.

<sup>131</sup> Id.

**d. Executive Order 12803 requirements will be met**

As described by Aqua witness Bubel, EO 12803, issued in 1992 by then-President George H. W. Bush: (i) allows for disposition or transfer of an infrastructure asset, such as by sale or by long-term lease, from a State or local government to a private party and (ii) was intended to encourage state and local governments to sell publicly-owned assets as a means of raising funds to meet budget deficits and to increase operating efficiency.<sup>132</sup> The EO also “encourages privatization of water supply facilities and wastewater treatment facilities, directing federal agencies to work with state and local officials who might be interested in selling such assets, and adjusting financial incentives to enable local governments to retain the proceeds from the sale of facilities that were constructed using federal assistance.”<sup>133</sup>

According to 1999 Draft Guidance issued (and later withdrawn) by the EPA, “the EO was established for the following five purposes: (i) assist local privatization initiatives; (ii) remove federal barriers to privatization; (iii) increase the financial incentives for state and local governments by relaxing federal repayment requirements; (iv) protect the public interest by ensuring reasonable user charges; and (iv) establish guarantees that the facility will continue to be used for its intended purpose.”<sup>134</sup>

Mr. Woods and Mr. Bubel were the only witnesses in the proceeding who addressed the EO. Mr. Woods’ basic criticism is that EO applies to the Proposed Transaction and that neither Aqua nor DELCORA has addressed the process and requirements of the EO.<sup>135</sup> His specific criticisms are that: (i) neither the Transfer Price nor the amount of the locally funded shares of the relevant assets have been established in this proceeding; (ii) the EPA has not approved the Proposed Transaction;

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<sup>132</sup> Aqua St. No. 4-R at 9.

<sup>133</sup> Aqua St. No. 4-R at 9-10.

<sup>134</sup> *Draft Guidance on the Privatization of Federally Funded Facilities*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF WATER (September, 1999) at 14-15; Aqua St. No. 4-R at 10.

<sup>135</sup> Aqua St. No. 4-R at 10; SPMT St. No. 2 at 45-49.

and (iii) neither the Director of the OMB nor the Administrator of the EPA has determined the appraised value for the assets to be transferred under the Proposed Transaction.<sup>136</sup>

Mr. Woods expanded on his concerns regarding the EO in his surrebuttal testimony, in part noting that there is some potential that, upon final application of the EO, including the requirement that state and local contributions relevant to the DELCORA assets be refunded without adjustment, could diminish the value of the Trust.<sup>137</sup>

Mr. Bubel addressed the EO and many of Mr. Woods' concerns. Aqua agrees that the 28-year old EO is still in effect and further understands that DELCORA did obtain EPA construction grants for certain of its wastewater facilities under the then-effective EPA construction grant program.<sup>138</sup> However, since there are few details on the process to be used by the EPA to administer the EO, many if not all of Mr. Woods' concerns are speculative at best. As noted previously, the 1999 EPA Draft Guidance on the EO has long been withdrawn and the EPA has not even dealt with a wastewater privatization in connection with facilities funded under the EPA construction grant program since the early 2000's.<sup>139</sup>

While Aqua and DELCORA have not officially started the process for addressing the EO in the context of the Proposed Transaction, it is clear that the expected process with the EPA is for DELCORA – as the asset owner and recipient of the grant funds – to apply for a waiver of the EO requirements with the EPA's Region 3 office in Philadelphia. Further, Aqua and DELCORA have committed to taking the necessary steps to obtain a waiver from the EPA of the EO requirements.<sup>140</sup> Most importantly with respect to Mr. Woods' concerns about the EO, Aqua does not expect EPA's sign-off and/or waiver of the EO to have a material impact on closing the Proposed Transaction. As

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<sup>136</sup> SPMT St. No. 2 at 46-27.

<sup>137</sup> SPMT St. No. 2-SR at 20.

<sup>138</sup> Aqua St. No. 4-R at 11.

<sup>139</sup> Aqua St. No. 4-R at 12.

<sup>140</sup> Aqua St. No. 4-R at 12.

Mr. Bubel testified, “Aqua believes the EPA is committed to working with DELCORA and Aqua timely and expeditiously, consistent with the spirit and purpose of the EO, which is to facilitate and promote the privatization of infrastructure.”<sup>141</sup>

Aqua understands Mr. Woods’ concerns about the possible application and impact of the EO (particularly in connection with the amount of funds in the DELCORA Customer Trust). And, because Aqua and DELCORA are far more optimistic than Sunoco about obtaining the necessary waiver of the EO from all parties (including, if necessary, the OMB), Aqua is prepared to accept in this proceeding a condition of Commission approval of the Application that the appropriate waiver or other resolution of the EO is obtained/completed before closing of the Proposed Transaction. In addition, although there is no material risk that Aqua will not be able to readily achieve environmental compliance with DEP’s requirements, Aqua agrees to accept Commission conditions requiring Aqua to obtain an NPDES permit prior to Closing and to request a permit by rule, as detailed in Section V.C.6 of this Brief.

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

Aqua’s acquisition of the DELCORA wastewater system assets and related expansion of certificated service territory are necessary or proper for the service, accommodation, convenience or safety of the public. Aqua submitted a preponderance of evidence and substantial evidence supporting numerous affirmative public benefits as a result of the Proposed Transaction consistent with *City of York*, *Popowsky*, and *McCloskey*. Aqua also submitted preponderance of evidence and substantial evidence that the hypothetical increase in rates to DELCORA customers is outweighed by the many positive benefits of the Proposed Transaction.

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<sup>141</sup> Aqua St. No. 4-R at 13.



## C. Recommended Conditions

### 1. The OCA's Recommended Conditions for Section 1102/1103 Approval

OCA witness Smith testified that, *as proposed*, Aqua has not supported the Proposed Transaction with affirmative public benefits. He recommended several conditions if the Commission approves it.<sup>142</sup> Aqua considered each condition and agreed with some and disagreed with others as follows:<sup>143</sup>

- Aqua agrees with the OCA that the customer assistance payments from the DELCORA Customer Trust should be separately shown on the bills to help make this part of the public benefit transparent to the DELCORA wastewater utility customers who are receiving the bill assistance.
- Aqua agrees with the OCA that the Trust should be used to provide customer bill assistance payments to DELCORA customers, the effect of which will provide for 3% annual increases to DELCORA customers until the approximately \$200 million projected Trust funding has been fully applied.
- Aqua agrees with the OCA that a separate Cost of Service Study (“COSS”) will remain an obligation at least as long as the Trust provides the bill assistance payments. As for OCA’s recommendation of a separate rate zone, it would not be appropriate, to establish a cost allocation methodology for DELCORA rates in this proceeding. The OCA would have the opportunity to address this issue and make any proposal in the context of a future Aqua base rate proceeding.
- Aqua agrees that, in its next rate filing, it will file COSS 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.
- Aqua agrees that, when it modifies its Long-Term Infrastructure Improvement Plan (“LTIIIP”) to include the DELCORA wastewater system, and any DELCORA-related projects reflected in the revised LTIIIP will be in addition to, and not a reprioritization of, any capital improvements that Aqua was already committed to undertake for existing customers.
- The OCA proposed that DELCORA address convincingly whether it has the legal authority to transfer the wastewater utility assets and related contracts to Aqua. DELCORA convincingly addressed its legal authority in the Rebuttal Testimony of Robert Willert and is addressing it further in its brief.

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<sup>142</sup> Aqua St. No. 2-R at 2.

<sup>143</sup> Aqua St. No. 2-R at 21-25.

- The OCA seeks to clarify the Trust. The Trust Agreement is clear both regarding the establishment of the Trust and its exclusive use for the benefit of former DELCORA wastewater customers and new customers in the former DELCORA service territory. The MOU, included with Mr. Packer's rebuttal testimony as WCP-2R Schedule E, provides the mechanism of how the Trust payments will be applied.
- The OCA seeks to revise the MOU to add details regarding how the Trust proceeds will be properly credited to the former DELCORA customers. The updated MOU included with Mr. Packer's rebuttal testimony as WCP-2R Exhibit E provides the administrative mechanics to apply bill assistance payments from the Trust to customer bills.
- Aqua is willing to file annual (not quarterly) reports showing how customer bill assistance payments are being applied to Aqua's bills to DELCORA customers.
- Aqua accepts, for this proceeding, the OCA's recommendation that, in the period from the date when the Proposed Transaction is consummated through the effective date of new rates for the acquired DELCORA wastewater utility customers in Aqua's next base rate case, the impact on income tax expense from repairs deductions claimed by Aqua on DELCORA wastewater utility system assets will be recorded in a regulatory liability account and addressed in Aqua's next base rate case in which rates for the acquired DELCORA wastewater utility customers are addressed.
- The OCA proposed that issues concerning transfer of agreements should be resolved before the transaction can close. Aqua agrees that those issues should and will be resolved as addressed in Section D below.

## **2. I&E's Recommended Conditions for Section 1102/1103 Approval**

I&E witness Gumby testified that, if the Commission determines to approve the Application, it condition approval on the following terms:<sup>144</sup>

- Closing should not occur until Aqua and DELCORA provide the Commission with a guarantee that the pending County Court litigation 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;
- To the extent that it relies upon Aqua issuing acquired customers' bills that are lower than applicable tariff rates, the proposed irrevocable trust should be rejected; and
- Aqua should provide a separate cost of service study for the DELCORA system that segregates stormwater costs, identifies the plan in service costs at the time the DELCORA system was purchased, identifies the cost of any plant retirements, and identifies the cost of any plant investments.

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<sup>144</sup> See I&E St. No. 1 at 5.

**a. Guarantee Related to County Court Litigation**

I&E's request for a "guarantee" related to the County Court litigation is neither necessary nor appropriate. The County Court action concerns (a) a legal challenge to the Trust arrangement and (b) the County's desire to dissolve DELCORA. Neither of these challenges affects the continued efficacy of the APA. The County, in fact, has not filed a pleading challenging the APA in County Court. The Trust arrangement is not part of the APA. Neither of these challenges is a jurisdictional matter to the Commission.<sup>145</sup>

DELCORA, as a municipal authority, has all the rights, powers and duties that are set forth in the MAA, including the right and power to sell its system to a regulated utility, such as Aqua. Even if it is determined by the Delaware County Court that DELCORA may dissolve DELCORA prior to closing, the APA would become a binding obligation of the County.<sup>146</sup>

The APA, moreover, was entered into by DELCORA in full compliance with law and the MAA. Thus, the APA constitutes a binding, enforceable agreement and contractual obligation of DELCORA. DELCORA cannot be dissolved prior to closing. The APA contains multiple provisions that can only be satisfied by DELCORA prior to closing, and not the County.<sup>147</sup>

The APA reflects a presently existing and binding contractual obligation between Aqua as buyer and DELCORA as seller. DELCORA is an authority/entity separate and apart from the County. DELCORA, as an independent authority, had and continues to have the ability to enter into contracts like the APA. Any transaction brought to the Commission for approval 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 approval of a CPC application.<sup>148</sup>

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<sup>145</sup> Aqua St. No. 2-R at 9.

<sup>146</sup> Aqua St. No. 2-R at 9-10.

<sup>147</sup> Aqua St. No. 2-R at 10.

<sup>148</sup> Aqua St. No. 2-R at 10-11.

Finally, and significantly, the County's legal challenge to the Trust and the dissolution of DELCORA are not jurisdictional to the Commission.<sup>149</sup>

**b. Irrevocable Trust Arrangement**

Ms. Gumby recommends that, to the extent it relies upon Aqua issuing acquired customers' bills that are lower than applicable tariff rates, the Trust should be rejected. She emphasizes that she is not addressing DELCORA's use of the Proposed Transaction sale proceeds. It is only the presentation of the Trust payment as a bill assistance payment on the Aqua bill that she is challenging. Ms. Gumby claims that presentation of the Trust payment on the Aqua bill would violate Section 1303 of the Code.<sup>150</sup>

The presentation of the Trust proceeds as a customer bill assistance payment would not violate Section 1303. Aqua's bills to DELCORA's customers will present the charge for wastewater service at the full tariff rate. Only after showing the full tariff rate will the bill assistance payment from the Trust be applied and shown on the bill. Presentation of the full tariff rate minus the bill assistance payment does not violate Section 1303.<sup>151</sup> Contrary to Ms. Gumby's testimony, the presentation of the customer assistance payment is not the same situation that was problematic in the City of Scranton acquisition.<sup>152</sup>

The dicta comments of the ALJs in Pennsylvania American Water Company's acquisition of the Scranton Sewer Authority ("SSA") proceeding at Docket No. A-2016-2537209 (August 17, 2016) do not represent the views of the Commission and are thoroughly distinguishable from the Trust proposal in this proceeding:

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<sup>149</sup> Aqua St. No. 2-R at 9.

<sup>150</sup> Aqua St. No. 2-R at 11.

<sup>151</sup> Aqua St. No. 2-R at 12.

<sup>152</sup> See Aqua St. No. 2-R at 12-16.

- The sums potentially returned to customers by the SSA, the precise mechanism of that return and the ultimate purchase price of the system were undetermined at the time the ALJs considered the issue, unlike this case.<sup>153</sup>
- Unlike the SSA proceeding, the sums credited to customers are from a trust created by a third party, DELCORA, and are not a discount of rates coming from the acquiring utility.<sup>154</sup>
- The ALJs erroneously assumed the Commission could not direct any changes in how the APA established the credit to customers, while in this case, Aqua and DELCORA recognize the Commission could condition approval of the Proposed Transaction on any modifications of the MOU it deemed necessary.<sup>155</sup>

It is not unusual for third parties to provide funds to utilities that act as a payment on bills. Monthly LIHEAP cash benefits and Aqua's Helping Hand Program credits, for example, are shown on customers' bills with no indication from the Commission that such provisions are discriminatory or in violation of Section 1303.<sup>156</sup>

I&E's discovery responses indicated it is not the return of the proceeds to customers that makes the Trust payment to customers unlawful, but the relationship of the payment to billings and tariffed rates.<sup>157</sup> That is not a material legal issue, as OCA recognizes by supporting this creative and substantial benefit to customers.<sup>158</sup> By allowing the payment to be placed on the Aqua bill as a Trust payment it makes it clear to customers the payment is provided by the DELCORA Customer Trust. There will be no customer perception that Aqua is discounting rates.<sup>159</sup> The Trust MOU should be approved.

### **c. Cost of Service Study**

Aqua, in its next base rate case following closing of the Proposed Transaction, will file cost of service study calculations separately for the DELCORA system and for the City of Chester

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<sup>153</sup> Aqua St. No. 2-R at 14.

<sup>154</sup> Aqua St. No. 2-R at 15.

<sup>155</sup> Aqua St. No. 2-R at 16.

<sup>156</sup> Aqua St. No. 2-R at 17. One time credits are also permitted on customers' bills. Aqua St. No. 2-R at 18.

<sup>157</sup> Aqua St. No. 2-R at 19.

<sup>158</sup> *Id.*

<sup>159</sup> Aqua St. No. 2-R at 19-20.

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>160</sup> Aqua understands that this commitment resolves Ms. Gumby's cost of service recommendation.

### **3. OSBA's Recommended Condition for Section 1102/1103 Approval**

OSBA witness Kalcic recommends, as a condition for approval, that the Commission require Aqua to begin to consolidate DELCORA's rates with the Company's system-wide average rates in its next base rate case. Mr. Kalcic opposed the setting of DELCORA's overall rates at full cost of service on a standalone basis as inconsistent with long standing single tariff pricing.<sup>161</sup>

Mr. Kalcic's recommendation is inconsistent with Commission practice. The Commission has not established a cost allocation methodology in any prior Aqua Section 1329 proceeding. It should not do so here. In the first rate proceeding post-closing, Aqua will propose to move DELCORA customers to full cost of service. The OSBA will have the opportunity to present its consolidation proposal at that time. Aqua is not proposing any change in rates in this proceeding.

### **4. KCC's Recommended Conditions for Section 1102/1103 Approval**

KCC witness Brooks testified that, if the Commission approves the Application, it should impose the following conditions:<sup>162</sup>

- Aqua should be required to ensure the Trust will be established at the full projected dollar value and operated under Commission oversight;
- To the extent that its future rates provide for recovery of capital costs, Aqua should acknowledge that, as a general principle, customers such as KCC should only be required to pay for the portion of assets and infrastructure used to serve them;

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<sup>160</sup> Aqua St. No. 2-R at 20-21.

<sup>161</sup> Aqua St. No. 2-R at 2 and 25.

<sup>162</sup> Aqua St. No. 2-R at 57-58.

- Aqua should be required to treat interest payments by industrial customers such as KCC as if they were contributions in aid of construction or the Commission should develop another mechanism that gives KCC credit or recognition for financial contributions made to DELCORA since 1973; and
- In the alternative, KCC wants Aqua to establish contract rates or contract riders.

Mr. Packer disagreed with KCC's proposed conditions.<sup>163</sup> First, in regard to the Trust, which is explained fully in Section V.B.4.b, DELCORA has made it clear that the Proposed Transaction creates an irrevocable trust fund that will contain the majority of the Proposed Transaction sale proceeds. There is no need for Commission oversight. Independent oversight will be provided by the independent, institutional trustee.

Second, Aqua cannot acknowledge or provide assurance that customers such as KCC will only be required to pay for the portion of assets and infrastructure used to serve them. Cost of service and revenue allocation will be decided by the Commission in Aqua rate cases going forward. Aqua has agreed to provide a separate cost of service study in its base rate case for the DELCORA system.<sup>164</sup>

Third, it would be inappropriate and a violation of Section 1329 to treat KCC's past interest payments as contributions in aid of construction. Section 1329 requires a fair market valuation of the DELCORA system irrespective of funding sources.

Fourth, as to KCC's proposed alternative that Aqua establish contract rates or contract riders as part of Aqua's future tariff, it must be noted that KCC, presently, has no contract with DELCORA. The contract between DELCORA and Kimberly-Clark expired in December 2004.<sup>165</sup>

## **5. Sunoco Alternative Conditions for Approval**

Sunoco witness Woods testified in surrebuttal that, if the Commission approves the Application, it should impose the following initial set of conditions:<sup>166</sup>

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<sup>163</sup> Aqua St. No. 2-R at 58.

<sup>164</sup> See Section V.C.2. above.

<sup>165</sup> See Section V.D.3.b, below.

- DELCORA permanently retaining ownership of the WRTP and the 26 CSO Regulators and considering these assets as “Non-Assignable Assets” under Section 2.06 of the APA;<sup>167</sup>
- The Commission permanently removing the value of the WRTP and the 26 CSO Regulators from Aqua rate base post-closing of the Proposed Transaction;<sup>168</sup> and
- SMPT permanently remaining as a DELCORA customer under the existing service contract between the parties.<sup>169</sup>

Mr. Packer rejected these initial set of conditions in his oral rejoinder testimony. Aside from the untimeliness of these recommendations – appearing for the first time in Mr. Woods’ surrebuttal testimony – they “contemplate an entirely different transaction than the one submitted in the application by the company ...”<sup>170</sup> Pulling out of the Proposed Transaction the WRTP and the 26 CSO Regulators and removing them from Aqua’s rate base represents a deal far different than the one contemplated by the Application and reflected in the APA. The Non-Assignable Assets concept reflected in Section 2.06 of the APA anticipated a reasonable disagreement between the owner of an asset or contract counterparty and DELCORA with respect to the assignability or transferability of such asset or contract. It was not intended to be an artificial construct to eliminate assets that are the essence of the Proposed Transaction from the deal to suit the needs of parties that have no ownership or control of the asset. Yet that is precisely (and incorrectly) how Mr. Woods is attempting to misuse Section 2.06 of the APA. DELCORA and Aqua, the parties to the APA, have no dispute or disagreement regarding the assignability/transferability of the WRTP and the 26 CSO Regulators and therefore applying Section 2.06 to further Sunoco’s goals is inappropriate and unacceptable. For the same reason, the corollary recommendation about removing the value of these assets from Aqua’s rate base is unreasonable, unacceptable and fundamentally changes the Proposed Transaction.

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<sup>166</sup> Aqua St. No. 2-R at 57-58.

<sup>167</sup> SPMT St. No. 2-SR at 35.

<sup>168</sup> SPMT St. No. 2-SR at 36.

<sup>169</sup> SPMT St. No. 2-SR at 36.

<sup>170</sup> Tr. 213-214.



Mr. Wood's third preliminary recommendation – Sunoco remaining a DELCORA customer – is completely unnecessary since Aqua has already indicated that, absent agreement with DELCORA and the relevant customer on the terms of a mutually acceptable assignment, such customer will continue to be served under its existing contract by Aqua as agent or subcontractor of DELCORA. Under this situation, DELCORA, as principal, will remain primarily responsible for implementing the terms and conditions of the customer service contract, but will delegate certain duties and responsibilities under the applicable agreement to its agent, Aqua.

In apparent recognition that his “permanent” recommended conditions would be unacceptable to Aqua and DELCORA, Mr. Woods retreated to a set of “transitional” conditions as follows<sup>171</sup>:

- DELCORA may not transfer ownership of the WRTP and the 26 CSO Regulators until Aqua demonstrates to the Commission that Sunoco will be able to operate its Marcus Hook facility with compliance with the EPA and PaDEP requirements;
- Aqua may not include the value of the WRTP and the 26 CSO Regulators in its rate base until Aqua demonstrates to the Commission that Sunoco will be able to operate its Marcus Hook facility with compliance with the EPA and DEP requirements; and
- Service to Sunoco shall continue under Sunoco's existing service contract with DELCORA until the effective date of Aqua's first rate case following the transfer of the WRTPA and the 26 CSO Regulators to Aqua per the above two conditions.

These transitional recommended conditions are unacceptable and unnecessary. As noted in Section V.B.5, the environmental permitting and process necessary to transition the WRTP and related facilities from public to private ownership is known and reasonably achievable with little, if any, incremental risk to Sunoco. Thus, there is no reason to impose needless conditions that undermine the Proposed Transaction, adversely impact the timing of rate base recognition for assets that are included in the Proposed Transaction, and create disincentives for Aqua and Sunoco to agree on mutually acceptable service terms and conditions post-closing.

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<sup>171</sup> SPMT St. No. 2-SR at 36-37.

For the reasons specified above, all of Sunoco witness Woods' recommended conditions should be rejected.

## **6. Conclusion**

Concluding this discussion of conditioned approval, Aqua submits that the Commission should approve the Proposed Transaction and issue CPCs conditioned as follows:

- Customer assistance payments from the DELCORA Customer Trust will be separately shown on Aqua bills to help make this part of the public benefit transparent to the DELCORA wastewater utility customers who are receiving the bill assistance.
- The DELCORA Customer Trust will be used to provide customer bill assistance payments to DELCORA customers, the effect of which will provide for 3% annual increases to DELCORA customers until the approximately \$200 million projected Trust funding has been fully applied.
- A separate COSS will remain an obligation at least as long as the Trust provides the bill assistance payments. The OCA will have the opportunity to address creation of a separate rate zone in the context of a future Aqua base rate proceeding.
- Aqua will file COSS 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.
- When Aqua modifies its LTIIP to include the DELCORA wastewater system, any DELCORA-related projects reflected in the revised LTIIP will be in addition to, and not a reprioritization of, any capital improvements that Aqua was already committed to undertake for existing customers.
- The DELCORA Customer Trust is for the exclusive use and benefit of former DELCORA wastewater customers and new customers in the former DELCORA service territory. The MOU included with Mr. Packer's rebuttal testimony as WCP-2R Schedule E, provides the mechanism of how the Trust payments will be applied to customer bills.
- Aqua will file annual reports showing how customer bill assistance payments are being applied to Aqua's bills to DELCORA customers.
- In the period from the date when the acquisition is consummated through the effective date of new rates for the acquired DELCORA wastewater utility customers in Aqua's next base rate case, the impact on income tax expense from repairs deductions claimed by Aqua on DELCORA wastewater utility system assets will be recorded in a regulatory liability

account and addressed in Aqua's next base rate case in which rates for the acquired DELCORA wastewater utility customers are addressed.

- Aqua will resolve issues concerning transfer of agreements prior to closing.
- Prior to the closing of the Proposed Transaction, Aqua and DELCORA will obtain: (i) a renewal of DELCORA's NPDES permit that includes the pretreatment requirements that will be applicable to Aqua and its industrial users upon closing; or (ii) a transfer of DELCORA's NPDES permit to Aqua, which will continue the substantive pretreatment program as constituted by DELCORA as of the closing date.

- Aqua and DELCORA will [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[END]

HIGHLY CONFIDENTIAL]

- Aqua will obtain an appropriate waiver or other resolution of the Executive Order 12803 before Closing of the Proposed Transaction.

#### **D. Section 507 Approvals**

##### **1. Legal Principles**

Section 507 specifies the requirements associated with contracts between municipalities and public utilities. In order for a contract between a public utility like Aqua and any of the Municipal Protestants<sup>172</sup> to become effective, it must be first filed with the Commission at least 30 days prior to its effective date.

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

Among the assets to be acquired by Aqua in the Proposed Transaction are service contracts between DELCORA and various municipal and other counterparties ("Assigned Contracts"). Those contracts are attached to the Application as Exhibits F1 through F163.<sup>173</sup> As noted above, to the extent some of the Assigned Contracts are/will be between a municipal entity and Aqua, a public

<sup>172</sup> Since the Municipal Protestants are boroughs and townships in the Commonwealth, they satisfy the definition of "municipal corporation" under Sections 102 (Definitions) and 507 of the Code, 66 Pa.C.S. §§102 and 507.

<sup>173</sup> Aqua Exhibit No. 1, Application, ¶28 at 6.

utility, such contracts cannot be valid and enforceable unless filed with the Commission at least thirty (30) days prior to their effective date. Accordingly, Aqua seeks certificates of filing with respect to the Assigned Contracts and their assignments in accordance with Schedule 4.15 of the APA.<sup>174</sup>

The acquisition by Aqua of the Assigned Contracts generally presupposes that, by time of closing of the Proposed Transaction, required consents and agreements necessary to assign the subject contracts from DELCORA to Aqua will have been obtained. As noted further below, as of the present time, not all required consents to assign these various service agreements to Aqua have been obtained.

The Municipal Protestants' service contracts comprise 5 of the 163 Assigned Contracts. The Municipal Protestants each have separate service contracts with DELCORA under which wastewater service is currently provided to either the municipality directly or to its residents. Each Municipal Protestant has generally opposed the Proposed Transaction and not formally refused to consent to the assignment of its existing contract to Aqua thus far. As summarized by Mr. Packer, their concerns are that, under Aqua ownership, i) Aqua would attempt to set rates by combining costs across all of DELCORA or across all of Aqua's Pennsylvania holdings, resulting in higher rates to the Municipal Protestants; ii) the Municipal Protestants could be charged costs related to treating wastewater by PWD or charged costs of bypassing PWD, which they claim they are not paying presently; and iii) the Municipal Protestants are not getting credit for property and assets they previously contributed to DELCORA.<sup>175</sup>

There is no dispute that each existing service contract between DELCORA and the respective Municipal Protestants cannot be assigned to and assumed by Aqua unless each Municipal

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<sup>174</sup> Aqua Exhibit No. 1, Application, ¶73 at 19-20.

<sup>175</sup> Aqua St. No. 2-R at 63.64.

Protestant consents to such assignment.<sup>176</sup>

However, Aqua and DELCORA understood when negotiating the APA that certain contracts might take longer than others to assign and, in the limited circumstances presently pertaining to the Municipal Protestants, certain contract counterparties might not consent to the assignment of their service contract prior to Closing. As described by Mr. Packer, Aqua and DELCORA have been meeting with representatives from DELCORA customers to address the assignment of service agreements and their concerns about the terms, conditions, rates and other issues that each party believes represent their specifically negotiated contract rights. In many instances, agreements have been reached, allowing these service contracts to be assigned to Aqua as anticipated under the APA.<sup>177</sup> And, Aqua remains committed to working with the Municipal Protestants to develop mutually acceptable contract assignments.<sup>178</sup> Indeed, it is not unusual to be negotiating and even obtaining contract assignments after Commission approval of a transaction, and up to and around the time of closing.<sup>179</sup>

Further, the APA has a clear contractual process for addressing any service contracts for which consents to assignment have not occurred as of closing. As Mr. Packer testified:

To the extent assignments cannot be achieved because of the unwillingness of these specific Municipal and Industrial Protestants for any of the reasons asserted, Aqua intends to continue, over the short-term, to provide service to these customers as the agent and/or subcontractor of DELCORA at the rates established in the service agreements. This structure and approach is specified in the APA.<sup>180</sup>

Section 2.06 the APA provides that if, at closing, there is no mutual agreement to assign the service agreements requiring mutual consent (i.e., “Nonassignable Assets”), then after closing DELCORA will continue to be the legal owner of the Nonassignable Assets, but Aqua will become

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<sup>176</sup> Aqua St. No. 2-R at 64.

<sup>177</sup> Aqua St. No. 2-R at 65.

<sup>178</sup> Aqua St. No. 2-R at 64.

<sup>179</sup> Aqua St. No. 2-R at 65.

<sup>180</sup> Aqua St. No. 2-R at 65-66.

the economic/beneficial owner of the Nonassignable Assets and provide service to these customers as the agent/subcontractor of DELCORA.<sup>181</sup> Aqua has not found, and the Municipal Protestants have not shown, that there is any prohibition of this arrangement in any of the service agreements that are considered Nonassignable Assets. Under this proposed arrangement, DELCORA, as legal owner and counterparty under the service agreements, will still be ultimately responsible for providing service and fulfilling its obligations under the applicable service agreement, with Aqua acting as DELCORA's agent/subcontractor.

If it becomes necessary to implement the Aqua–DELCORA agent/subcontractor arrangement, the parties would develop and implement a form of agreement defining their duties and responsibilities as principal and agent.<sup>182</sup>

Some of the Municipal Protestants' contracts contain other provisions that, absent some mutually acceptable resolution regarding assignment, also give them rights under certain circumstances that they believe need to be addressed in the contract assignment process. For example, Edgmont has a right of first refusal to purchase certain DELCORA assets serving it if DELCORA sells the facilities. Trainer and Upland each have a reversionary interest in the system serving them if DELCORA fails to operate the system, unless the boroughs decline to take ownership in which case the systems revert to the County of Delaware or any other agency.<sup>183</sup> While Aqua has and will continue to work with these individual Municipal Protestants to address their concerns and to develop a mutually acceptable basis for them consenting to assignment of their respective service contracts to Aqua, absent such arrangements and assuming their reversionary or first refusal rights are properly exercised, their respective systems will be transferred to them.<sup>184</sup> However, if they elect to proceed outside of the Proposed Transaction, Edgmont, Trainer and

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<sup>181</sup> Aqua St. No. 2-R at 66.

<sup>182</sup> Tr. at 285.

<sup>183</sup> Aqua St. No. 2-R at 67.

<sup>184</sup> Aqua St. No. 2-R at 67.

Upland will not be eligible to receive any Trust funds to mitigate future Aqua rate increases as otherwise proposed in this proceeding.<sup>185</sup>

Edgmont<sup>186</sup>, Lower Chichester<sup>187</sup>, SWDCMA<sup>188</sup>, and Upland<sup>189</sup> claim they have contributed specific property and assets to DELCORA, procured and turned over grants to DELCORA and their contract with DELCORA requires that their rates for DELCORA service be based on that party's specific attributes and costs of service. These contract-specific issues have been part of the negotiation process relating to possible consent to assignment. And, to the extent these issues remain an obstacle to developing a mutually acceptable consent to assignment, these service agreements will be treated as Nonassignable Assets as discussed above and Aqua will continue to provide service to these Municipal Protestants as the agent or subcontractor for DELCORA, which will remain the counterparty and principal on these agreements.<sup>190</sup>

The Municipal Protestants also raise concerns that if they become direct Aqua customers they will be charged the costs of bypassing PWD or system-wide costs, which they claim not to be incurring under contracts/arrangements with DELCORA.<sup>191</sup> Aqua acknowledges these rate concerns. However, the traditional utility rate model provides substantial benefits to customers and risk mitigation, like single tariff pricing and consolidated ratemaking, that will benefit these customers in the long-term even if past contributions of assets and interest payments cannot be considered in a Section 1329 valuation process.<sup>192</sup>

Each of the Municipal Protestants has an existing service agreement with DELCORA as follows:

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<sup>185</sup> Aqua St. No. 2-R at 68.

<sup>186</sup> Edgmont St. No. 1 at 4 and 7.

<sup>187</sup> Lower Chichester St. No. 1 at 3 and 4.

<sup>188</sup> SWDCMA St. No. 1 at 4 and 5.

<sup>189</sup> Upland St. No. 1 at 4

<sup>190</sup> Aqua St. No. 2-R at 66.

<sup>191</sup> Aqua St. No. 2-R at 68.

<sup>192</sup> Aqua St. No. 2-R at 68.

- Edgmont Borough service contract dated as of October 17, 2020.<sup>193</sup>
- Lower Chichester service contract dated April 12, 1977.<sup>194</sup>
- Southwest Delaware County Municipal Authority’s service contract dated December 21, 2009, as amended December 17, 2013.<sup>195</sup>
- Trainer Borough service contract dated August 9, 2005.<sup>196</sup>
- Upland Borough service contract dated July 22, 1975, as amended on January 18, 1983, December 21, 1983 and February 12, 1985.<sup>197</sup>

Although these service agreements expressly require consent to effect a contract assignment to Aqua, none have a provision preventing or prohibiting the delegation by DELCORA, as principal, of its contractual duties to an agent like Aqua. This is precisely the approach addressed in Section 2.06 of the APA, which provides assurances that these customers will continue to receive service under their *existing contracts* post-closing if no satisfactory consent to assignment of the relevant service agreement has been effected before that time.

The Municipal Protestants have questioned DELCORA’s legal ability to delegate its duties under the relevant service contracts to Aqua as DELCORA’s agent.<sup>198</sup> For example, in the Motion for Summary Judgment, the Municipal Protestants argued that their various service contracts “require” DELCORA to own and operate the relevant wastewater facilities. What the Municipal Protestants ignore is that neither Aqua nor DELCORA is proposing any change in the ownership or operation of the facilities serving them under their individual contracts. Therefore, the anticipated delegation of contract duties to Aqua as DELCORA’s agent does not violate any “requirement” that DELCORA continue to own and operate the subject wastewater assets.

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<sup>193</sup> Aqua Exhibit No. 1, Exhibit F81.

<sup>194</sup> Aqua Exhibit No. 1, Exhibit F84.

<sup>195</sup> Aqua Exhibit No. 1, Exhibits F110 and F111, respectively.

<sup>196</sup> Aqua Exhibit No. 1, Exhibit F137.

<sup>197</sup> Aqua Exhibit No. 1, Exhibits F139 though F142, respectively.

<sup>198</sup> See, Municipal Protestants’ Motion for Summary Judgment dated September 25, 2020, ¶71. Further, in at least three of the Municipal Agreements there is an express acknowledgement that the parties might have agents. See, Section 8.06, Service Agreement dated April 12, 1977 between Lower Chichester Township and DELCORA. Aqua Exhibit No. 1, Exhibit F84. See, October 17, 2012 Agreement between Edgmont Township and DELCORA, Section 3(h). Aqua Exhibit No. 1, Exhibit F81. See, December 21, 2009 Agreement between Southwest Delaware County Municipal Authority and DELCORA, Section 9.04. Aqua Exhibit No. 1, Exhibit F110.



The Municipal Protestants have no answer to DELCORA delegating duties to Aqua, a lawful and fully accepted approach to commercial business transactions, and are merely left with mischaracterizing such approach as a “fiction.”<sup>199</sup>

The Municipal Protestants have not acknowledged the difference between the *assignment* of an existing contract and *delegation of duties* under such a contract.

An assignment is a transfer of a right to performance to a third party, and the transfer extinguishes the transferor’s right to receive performance in whole or in part and gives that right to receive performance to the third-party transferee. *Restatement (Second) of Contracts* § 317(1). On the other hand, delegation is the appointment by one person of another to perform either a duty or a condition to the other party’s performance. *Restatement (Second) of Contracts* § 318(1). Importantly, delegation of a duty does not discharge the delegating party’s performance obligation. *Id.* at § 318(3). In general, if the delegate performs the duty, the duty is discharged, both as to the delegate and the obligor who delegated the duty. 1-11 *Murray on Contracts* § 141. The duty may be delegated to another, provided the obligor stands ready to perform in the event the delegate does not perform. *Id.* In general, however, in the absence of contrary agreement, delegation of a duty is precluded “only where substantial reason is shown why delegated performance is not as satisfactory as personal performance.” 9 *Corbin on Contracts* § 49.1 citing *Restatement (Second) of Contracts* § 318, cmt. c.

Delegation of contract duties is firmly entrenched in Pennsylvania law. Pennsylvania’s version of the Uniform Commercial Code, 13 Pa.C.S § 2210(a), specifically provides and allows for delegation of performance to a third party:

- (a) Delegation of performance -- A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract.

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<sup>199</sup> Municipal Protestants’ Motion for Summary Judgment, ¶73.

No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

13 Pa.C.S § 2210(a).

While 13 Pa.C.S § 2210(a) governs the delegation of performance as a normal and permissible incident of a contract for the *sale of goods*, which is not subject of the Municipal Protestants' *service contracts*, that delegation concept applies more broadly to other types of contracts as well. For example, Section 160 of the *Restatement of Contracts* provides that performance may be delegated under a performance contract, unless such performance “would vary materially from performance by the person named in the contract,” or if the delegation “is forbidden by statute or by the policy of the common law, or prohibited by contract.” *See* § 160(1), (2), and (3)(a) of the *Restatement of Contracts*.

Modern contract law in and outside of Pennsylvania recognizes the principle that performance of contractual duties are delegable. 9 *Corbin on Contracts* § 49.1. Generally, contractual duties are delegable, unless they involve the personal qualities or skills of the obligor. *See, Williston on Contracts* § 74:27 (4th ed.) and § 74:28 (4<sup>th</sup> ed.) (“[t]hough a party subject to a duty cannot escape its obligation, it may delegate performance of the duty provided there is no contractual provision to the contrary, and provided the duty does not require personal performance”); *see also* 1-11 *Murray on Contracts* § 141 (“delegation of a duty is considered a normal incident of a contract unless a substantial reason can be shown why the delegated performance would not be as satisfactory as the performance by the delegator”).

Section 318 of the *Restatement (Second) of Contracts*, specifically provides that “[a]n obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.” Pennsylvania has adopted Section 318 and recognizes that a contractual duty can be delegated to another unless delegation is contrary to public policy or the terms of the contract. *Greater Nanticoke Area Education Association v. Greater*

*Nanticoke Area School District*, 938 A.2d 1177, at 1185 (2007), citing *Restatement Second of Contracts* § 318(1); (“Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.” *Id.* at § 318(2)).

While the Municipal Protestants’ service contracts with DELCORA may require consent to effect an assignment, they contain no prohibition on delegating some or all of DELCORA’s duties under those agreements to Aqua as DELCORA’s agent. Those agreements could have specifically placed limitations on or prohibited the delegation of DELCORA’s duties. In fact, they did neither, effectively allowing DELCORA to make such delegation without breaching the agreements.

The right to delegate contractual duties under Pennsylvania law is not absolute, however. As noted above, such delegation cannot violate some established public policy or be done if the obligee has a substantial interest in having its specific contractual counterparty perform or control the acts promised. The Municipal Protestants have not articulated any public policy against DELCORA delegating its duties under the various service agreements to Aqua. In fact, no such public policies exist. Nor have the Municipal Protestants suggested that the wastewater collection and treatment services performed by DELCORA are so unique and special that they have a particular interest in having DELCORA – and only DELCORA – perform those contracts. As important as the collection and treatment of wastewater is, it is not sufficiently unique and special in the eyes of the Municipal Protestants that DELCORA – and only DELCORA—can perform such services. And, as a practical matter, since all of DELCORA’s employees will be retained by and working for Aqua after closing of the Proposed Transaction, it is likely that all or substantially all of the former DELCORA employees will continue to provide service under the various Municipal Protestants’ contracts, albeit as the agent of DELCORA.<sup>200</sup> There should be no concern about who is ultimately providing

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<sup>200</sup> Tr. at 429.

the service called for in these various contracts with the Municipal Protestants if Aqua does so as DELCORA's lawfully appointed agent.

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

#### **a. Sunoco**

Sunoco has concerns about the assignment of its existing DELCORA service contracts, Aqua Application Exhibits F125-131, similar to the issues raised by the Municipal Protestants. Sunoco witness Human summarized those contracts<sup>201</sup> and noted concerns specifically about continuation under Aqua of all of Sunoco's claimed existing contractual rights including discharge rights, Sunoco's characterization as a "Wholesale Industrial User", the use of quarterly estimates with provision for audits and true-up; measurement of wastewater discharges based on Sunoco's meters, charges to Sunoco continuing to be based solely on costs associated with the Western Region and Industrial Wholesale Users costs imposed on the DELCORA system, and Sunoco's ability to seek and obtain damages to its property from third parties.<sup>202</sup>

The environmental, permitting, discharge and damage concerns are addressed elsewhere in this Brief. Sunoco's general concerns about ratemaking, billing and charges for service were addressed by Aqua witness Packer. As was the case with similar concerns raised by the Municipal Protestants regarding their rates, billing, cost of service, etc. Mr. Packer acknowledged these issues from Sunoco and indicated that Aqua and DELCORA have continued to meet with Sunoco representatives to address the assignment of its service agreements and its concerns about the terms, conditions, rates and other issues specifically related to its existing service contracts.<sup>203</sup> As noted above, if Sunoco and Aqua are unable to negotiate mutually acceptable terms of an assignment of

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<sup>201</sup> SPMT St. No. 1 at 10-13.

<sup>202</sup> SPMT St. No. 1 at 11-13.

<sup>203</sup> Aqua St. No. 2-R at 65-66.

the various Sunoco service contracts, Aqua will act as DELCORA's agent in assuring the continuation of all the services currently being provided by DELCORA to Sunoco.

**b. KCC**

The issue relating to KCC is *not* the terms on which an existing service contract may be assigned, but whether there is any such contract at all. The evidence is clear that KCC has no present service contract with DELCORA that can be assigned to Aqua as part of the Proposed Transaction. Further, all of the provisions of that contract, including those addressing: i) that KCC will not be responsible for costs unrelated to its own wastewater, ii) that DELCORA will use all available grants and subsidies, iii) that KCC will not be responsible for applying for permits and iv) that KCC's wastewater would not require a surcharge, are no longer in effect.<sup>204</sup>

Mr. Packer addressed the status of the KCC/DELCORA service agreement.<sup>205</sup> DELCORA executed a Service Agreement with Scott Paper Company (i.e., KCC's predecessor) on December 1, 1973 ("Service Agreement").<sup>206</sup> In a letter dated November 19, 2003<sup>207</sup> from DELCORA Executive Director Joseph L. Salvucci to KCC Plant Manager Paul R. Wittekind, DELCORA provided notice to KCC of its intention to terminate the Service Agreement in accordance with Section 10 of that agreement, effective December 10, 2004. That letter expressly requested the parties to commence discussions about how to address their future relationship.<sup>208</sup> Importantly, given the clear termination of the Service Agreement, Aqua does not intend to assume that contract as part of the Proposed Transaction.<sup>209</sup>

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<sup>204</sup> Aqua St. No. 2-R at 63.

<sup>205</sup> Aqua St. No. 2-R at 59-62. The Service Agreement is Aqua Exhibit No. 1, Exhibit F105.

<sup>206</sup> Kimberly Clark St. No. 1 at 3.

<sup>207</sup> WCP-2R Schedule F.

<sup>208</sup> Aqua St. No. 2-R at 59.

<sup>209</sup> Aqua St. No. 2-R at 60.

KCC and DELCORA established new terms and conditions governing wastewater service *after* the Service Agreement was terminated effective December 10, 2004.<sup>210</sup> This new arrangement was confirmed and addressed by DELCORA witness Pileggi.<sup>211</sup> DELCORA's pretreatment program's Rules and Regulations were intended by DELCORA and KCC to govern their service relationship, thereby obviating the need for a new agreement.<sup>212</sup>

KCC has challenged DELCORA's claim that the Service Agreement is terminated arguing in part that: i) there is uncertainty about what precise pretreatment program's "Rules and Regulations" are intended to replace the terminated Service Agreement; and ii) DELCORA and KCC "have acted" as if the Service Agreement was still in effect.<sup>213</sup> Both claims were addressed by Aqua witness Packer and neither claim is meritorious.

KCC's claim of uncertainty about the applicable pretreatment Rules and Regulations is not supportable. DELCORA's website contains extensive information about its IPP, including its purposes and two primary documents. One document describes the local limitations and substance restrictions for discharge to DELCORA facilities under the IPP. The second, entitled "DELCORA Standards, Rules and Regulations of 2011," details standards, rules and regulations governing the proper disposition of all wastewaters introduced into the DELCORA wastewater management system, including the acceptance and connection to DELCORA facilities; establishing the procedures, enforcement mechanisms and fee system to administer the regulations; and related matters.<sup>214</sup> The scope and breadth of available information about the IPP and the detailed documents referenced on DELCORA's website about the IPP calls into question Mr. Brooks' claims of uncertainty about the Rules and Regulations that apply to KCC subsequent to the

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<sup>210</sup> Aqua St. No. 2-R at 60.

<sup>211</sup> See, response to Kimberly-Clark Interrogatory KCC-I-1, WCP-2R Schedule G.

<sup>212</sup> Aqua St. No. 2-R at 60.

<sup>213</sup> Kimberly-Clark St. No 1 at 4-5.

<sup>214</sup> Aqua St. No. 2-R at 60-61.

termination of the Service Agreement. In fact, quite the opposite conclusion can be drawn as noted by Mr. Packer, i.e., that the broad scope and extent of available information about the IPP and its “Rules and Regulations” thoroughly demonstrate why the parties agreed to use those Rules and Regulation in lieu of entering into a new agreement.<sup>215</sup> Considering that KCC and DELCORA have been operating under the IPP since the Service Contract was terminated in 2004 – 16 years ago - it is hard to discern the source of KCC’s uncertainty about the IPP Rules and Regulations.

KCC relies on two anecdotes to support its claim that the Service Agreement is still in effect because DELCORA and KCC “have acted as if the Service Agreement is still in effect.”<sup>216</sup> Mr. Packer addressed these matters, noting that the words “per agreement dated December 18, 1973” on DELCORA’s quarterly invoices to KCC and a PowerPoint presentation making references to changes to KCC’s “Service Agreement” (Kimberly-Clark St. No., 1, page 4, lines 14-23) are, in his view, nothing more than short-hand descriptions of the existing service arrangement between DELCORA and KCC.<sup>217</sup> The probative impact of these two anecdotes is minor compared to the clear and unequivocal letter officially terminating the Service Agreement.

In surrebuttal testimony, KCC witness Brooks continued to challenge the efficacy of the Service Agreement termination by the unsupported assertion, despite the notice letter of termination, that KCC “has found no evidence in its business records to support DELCORA’s assertion that the Service Agreement expired.”<sup>218</sup> It is not clear what more KCC needs to evidence termination of the Service Agreement other than the notice of termination letter issued in 2004. That fact that KCC cannot find it does not change the existence of the letter and subsequent agreement to proceed under DELCORA’s IPP Rules and Regulations as testified to by Mr. witness Pileggi.

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<sup>215</sup> Aqua St. No. 2-R at 61.

<sup>216</sup> Kimberly-Clark St. No. 1 at 4.

<sup>217</sup> Aqua St. No. 2-R at 62.

<sup>218</sup> Kimberly Clark St. No. 1-SR at 2.

The fact that the rates specified in the Service Agreement may still be used to calculate charges to KCC<sup>219</sup> does not mean that the Service Agreement – and all of its other terms and conditions – was not terminated by the 2004 letter of termination. Use of one portion of the terminated Service Agreement (i.e., rates) provides no support for KCC’s claim that the agreement was not terminated. That is a leap too far and completely unsupported in this proceeding. Further, Mr. Packer noted that rates applicable to KCC are actually set each year by DELCORA via resolution and not via a particular contract.<sup>220</sup>

Nor is the fact that as a ministerial matter the APA lists the expired Service Agreement as one to be assigned controlling on the existence of that agreement as claimed by Mr. Brooks.<sup>221</sup> Given the number and scope of agreements typically involved in mergers and acquisitions, it is not unusual for expired agreements sitting in a company’s files to be included in a merger agreement, often as a conservative act to ensure that all possible agreements (whether or not still in effect) are included in the transaction. To draw a conclusion that the Service Agreement is in effect based on its being included in an APA schedule defies both logic and standard merger and acquisition practice.

Finally, Mr. Brooks attempts to interpret Mr. Packer’s rebuttal statement that KCC “may be eligible for a rate set under a future rider in Aqua’s tariff”<sup>222</sup> as a possible FLEX rate. The nature and type of rate that may be applicable to KCC, given its service conditions, requires more evaluation and discussion between the parties. But clearly Aqua remains open to developing rates for its customers like KCC based on their service conditions and consistent with its tariff and applicable law.

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<sup>219</sup> Kimberly Clark St. No. 1-SR at 2.

<sup>220</sup> Aqua St. No. 2-R at 63.

<sup>221</sup> Kimberly Clark St. No. 1-SR at 2.

<sup>222</sup> Aqua St. No. 2-R at 63; Kimberly-Clark St. 1-SR at 2-3.



For the reasons noted above, there is no basis for finding that the KCC Service Agreement is in full force and effect and subject to assignment to Aqua in this proceeding.

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

Aqua asks that the Commission acknowledge, in its Opinion and Order, the issuance of all other approvals, certificates, registrations and relief, if any, under the Code as may be appropriate.

**VI. CONCLUSION WITH REQUESTED RELIEF**

For the reasons set forth above, Aqua Pennsylvania Wastewater, Inc. requests that the Public Utility Commission approve its Application filed pursuant to Section 1102, 1329 and 507 of the Public Utility Code, and:

- a. Issue Certificates of Public Convenience under Section 1102:
  - (1) Authorizing Aqua to acquire, by purchase, the wastewater system assets of DELCORA; and
  - (2) Authorizing Aqua to begin to offer, render, furnish and supply wastewater service to the public in the Requested Territory.
- b. Authorize Aqua to file tariff revisions, effective upon one day's notice, to:
  - (1) Include within its territory all the Requested Territory;
  - (2) Adopt and apply within the Requested Territory, DELCORA's rates as Aqua's Base Rates; and
  - (3) Apply Aqua's *Rules and Regulations* within the Requested Territory.
- c. As part of its Order approving the Application include a determination that the ratemaking rate base of the DELCORA system is \$276,500,000 pursuant to Section 1329(c)(2); and
- d. As part of its Order approving the Application approve Contracts, including Assignment of Contracts, between Aqua and DELCORA, pursuant to Section 507 of the Public Utility Code; and

- e. Issue such other approvals, certificates, registrations and relief, if any, under the Public Utility Code as may be appropriate.

Respectfully submitted,

**AQUA PENNSYLVANIA WASTEWATER, INC.**

By 

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Date: December 1, 2020

## **APPENDIX A**

### **LIST OF STATEMENTS AND EXHIBITS SPONSORED BY AQUA PENNSYLVANIA WASTEWATER, INC.**

#### **AQUA STATEMENTS OF TESTIMONY**

Aqua Statement No. 1 – The Direct Testimony of Marc A. Lucca

Aqua Statement No. 2, – The Direct Testimony of William C. Packer

Aqua Statement No. 2-R – The Rebuttal Testimony of William C. Packer

Aqua Statement No. 3, – The Direct Testimony of Erin Feeney

Aqua Statement No. 4 – The Direct Testimony of Mark J. Bubel, Sr.

Aqua Statement No. 4-R – The Rebuttal Testimony of Mark J. Bubel, Sr.

Aqua Statement No. 5 – The Direct Testimony of Robert Willert

Aqua Statement No. 5-R – The Rebuttal Testimony of Robert Willert

Aqua Statement No. 6 – The Direct Testimony of John Pileggi

Aqua Statement No. 6-R – The Rebuttal Testimony of John Pileggi

Aqua Statement No. 7 – The Direct Testimony of Michael DiSantis

Aqua Statement No. 7-R – The Rebuttal Testimony of Michael DiSantis

Aqua Statement No. 8 – The Direct Testimony of Harold Walker, III

Aqua Statement No. 8-R – The Rebuttal Testimony of Harold Walker, III

Aqua Statement No. 9 – The Direct Testimony of Dylan D’Ascendis

Aqua Statement No. 9-R – The Rebuttal Testimony of Dylan D’Ascendis

Aqua Statement No. 10-R – The Rebuttal Testimony of Jason B. Miller

#### **AQUA EXHIBITS**

Aqua Exhibit 1 –Application of Aqua Pennsylvania Wastewater submitted on March 3, 2020, including Exhibits A through AA2

**CONFIDENTIAL** Aqua Exhibit 2 – Territory Maps with Facilities submitted on March 3, 2020

**CONFIDENTIAL** Aqua Exhibit 3 – Schedules to the Asset Purchase Agreement submitted on March 3, 2020

**CONFIDENTIAL** Aqua Exhibit 4 – a Computer Disc of Confidential and Proprietary Information submitted on March 3, 2020 that includes Confidential Work Paper Files of Gannett Fleming in Excel Format

**CONFIDENTIAL** Aqua Exhibit 5 – a Computer Disc of Confidential and Proprietary Information submitted on March 3, 2020 that includes Confidential Work Paper Files of ScottMadden in Excel Format

**CONFIDENTIAL** Aqua Exhibit 6 – a Computer Disc in Excel Format of Appendix A to Mr. Packer’s Testimony submitted with the Application on March 3, 2020

**CONFIDENTIAL** Aqua Exhibit 7 – a Computer Disc of Work Paper Files in Excel Format for Application Exhibit D – Engineer’s Assessment submitted with the Application on March 3, 2020

Aqua Exhibit 8 – a Letter to the Secretary of the Public Utility Commission dated May 6, 2020, Providing Additional Information requested by the Bureau of Technical Utility Services

**CONFIDENTIAL** Aqua Exhibit 9 – a Letter to the Secretary of the Public Utility Commission dated May 7, 2020, Providing Additional Information requested by the Bureau of Technical Utility Services

**CONFIDENTIAL** Aqua Exhibit 10 – a Letter to the Secretary of the Public Utility Commission dated May 8, 2020, Providing Additional Information requested by the Bureau of Technical Utility Services

Aqua Exhibit 11 – a Letter to the Secretary of the Public Utility Commission dated May 13, 2020, Providing Additional Information requested by the Bureau of Technical Utility Services

Aqua Exhibit 12 – a Letter to the Secretary of the Public Utility Commission dated May 22 2020, Providing Additional Information requested by the Bureau of Technical Utility Services

Aqua Exhibit 13 – a Letter to the Secretary of the Public Utility Commission dated May 28, 2020, Providing Additional Information requested by the Bureau of Technical Utility Services

Aqua Exhibit 14 – Letter to the Secretary of the Public Utility Commission dated June 8, 2020, Providing Additional Information requested by the Bureau of Technical Utility Services; included with the Exhibit is a **CONFIDENTIAL** Excel file

Aqua Cross Examination Exhibit 1 – Lower Chichester Answer to Aqua Interrogatory Set XII-8

Aqua Cross Examination Exhibit 2 – Lower Chichester Answer to Aqua Interrogatory Set XII-2

Aqua Cross Examination Exhibit 3 – Lower Chichester Answer to Aqua Interrogatory Set XII-6

Aqua Cross Examination Exhibit 4 – Lower Chichester Answer to Aqua Interrogatory Set XII-7

Aqua Cross Examination Exhibit 5 – Edgmont Answer to Aqua Interrogatory Set XI-8

Aqua Cross Examination Exhibit 6 – Edgmont Answer to Aqua Interrogatory Set XI-9

Aqua Cross Examination Exhibit 7 – Edgmont Answer to Aqua Interrogatory Set XI-2

Aqua Cross Examination Exhibit 8 – Edgmont Answer to Aqua Interrogatory Set XI-7

Aqua Cross Examination Exhibit 9 – SWDCMA Answer to Aqua Interrogatory Set XIII-1

Aqua Cross Examination Exhibit 10 – SWDCMA Answer to Aqua Interrogatory Set XIII-4

Aqua Cross Examination Exhibit 11 – SWDCMA Answer to Aqua Interrogatory Set XIII-5

Aqua Cross Examination Exhibit 12 – SWDCMA Answer to Aqua Interrogatory Set XIII-7

Aqua Cross Examination Exhibit 13 – Upland Answer to Aqua Interrogatory Set XIV-2

Aqua Cross Examination Exhibit 14 – Upland Answer to Aqua Interrogatory Set XIV-7

Aqua Cross Examination Exhibit 15 – Upland Answer to Aqua Interrogatory Set XIV-4

## **APPENDIX B**

### **PROPOSED FINDINGS OF FACT**

#### **AQUA AND DELCORA**

1. Aqua is a certificated provider of wastewater service, duly organized and existing under the laws of the Commonwealth of Pennsylvania. Aqua St. No. 3 at 3 and Aqua Exhibit No. 1, Application ¶ 7.

2. Aqua operates 37 wastewater treatment plants throughout the Commonwealth of Pennsylvania providing wastewater service to approximately 35,000 customers. Aqua St. No. 1 at 7. Aqua's existing service territories cover various Counties throughout Pennsylvania including parts of Delaware and Chester Counties. Aqua Exhibit No. 1, Application ¶ 7.

3. Aqua operates 21 wastewater systems in its Southeast Division that are in proximity to DELORA. Aqua St. No. 1 at 7.

4. Aqua is a subsidiary of Aqua Pennsylvania, Inc. ("Aqua PA"). Aqua PA is the second largest investor owned water utility in the Commonwealth of Pennsylvania, providing service to 465,000 water customers. Aqua PA is a subsidiary of Aqua America, Inc. ("Aqua America"). Aqua St. No. 1 at 6-7.

5. DELCORA is a body corporate and politic, organized under the Pennsylvania Municipal Authorities Act. Aqua Exhibit No. 1, Application ¶ 8.

6. DELCORA owns and operates sanitary and combined wastewater collection and treatment systems that provide sanitary and combined wastewater service to retail and wholesale customers in parts of Delaware and Chester Counties, including direct retail service to approximately 16,000 customers. Aqua Exhibit No. 1, Application ¶ 8.

7. DELCORA also provides wholesale conveyance and treatment service to

municipal and municipal authority customers within all or part of 49 municipalities. Aqua Exhibit No. 1, Application ¶ 8.

## **OVERVIEW OF TRANSACTION**

8. Like many wastewater systems, DELCORA is facing significant increased infrastructure investment and expenses and more stringent environmental regulations. Two factors were paramount to its decision to sell the system: (1) the prohibitively high expense – presently estimated at \$606 million – that DELCORA will face if it continues to have its Eastern service area treated by the Philadelphia Water Department (“PWD”); and (2) the costs DELCORA will incur to repair its infrastructure in order to comply with current requirements of the Environmental Protection Agency (“EPA”). Aqua St. No. 5 at 5.

9. Upon exploration of alternative solutions to address its infrastructure challenges and likely rate impacts, DELCORA determined that, in order to leave PWD at the end of the current contract period in 2028, it would need an immediate investment of \$450 million to (a) build a new pipeline to convey wastewater from the Eastern service area to the DELCORA Western Regional Treatment Plant (“WRTP”) and (b) upgrade and upsize the WRTP so that it can accommodate the increased volume of wastewater. Aqua St. No. 5 at 9

10. In the summer of 2019, Aqua and DELCORA entered into discussions for a sale of the assets of DELCORA to Aqua. A transaction with Aqua, a large provider of water/wastewater utility services in Delaware and Chester Counties, would provide Aqua and DELCORA and their customers with benefits through meeting necessary capital and financial obligations, growth in overall customers, and economies of scale from similar geographic areas served. Aqua St. No. 1 and 7 and Aqua St. No. 5 at 9.

11. After arms-length negotiations concluded, Aqua and DELCORA entered into an Asset Purchase Agreement (“APA”) on September 17, 2019, and a First Amendment to APA on February 24, 2020, providing for the sale of the assets, properties and rights of the wastewater system. The purchase price was \$276,500,000. The acquired DELCORA customers will be charged DELCORA’s existing base rates upon closing. Aqua’s tariff rules and regulations will apply following closing. Aqua will offer employment to all of the DELCORA employees, subject to onboarding requirements. Aqua St. No. 5 at 7-8.

12. The Proposed Transaction will allow DELCORA to exit its relationship with PWD and control its own destiny. The Transaction also makes economic and business sense for both Aqua and DELCORA, and their respective customers. Aqua and DELCORA share similar service types and geographical locations. As a result, both organizations will be able to leverage the economies of scale and the combined expertise of both entities. Aqua St. No. 5 at 8-9.

13. The sale proceeds will be used, first, to satisfy DELCORA’s outstanding debt with the remainder – the bulk of the sale proceeds – approximately \$200 million – then placed into an irrevocable Trust. Payments from the Trust will be made to DELCORA customers as a customer assistance line item such that the effect of the payment will provide an annual increase of 3% for 8-12 years. The Commission would not have jurisdiction over the Trust. The impact of the Trust on customer bills, nevertheless, is a significant benefit to DELCORA customers and the Proposed Transaction. Aqua St. No. 5 at 10 and 12.

14. Throughout the negotiation process, DELCORA engaged in a robust communications and outreach effort to advise the public of the ongoing circumstances. Initially, in 2016, DELCORA began having meetings related to its own Long Term Control Plan (“LTCP”). Thereafter, DELCORA held a series of meetings in September and October 2019,



including multiple public meetings, to discuss the Proposed Transaction with stakeholders. This process included conducting over 20 meetings with employees, municipal officials and the Delaware County Council, and two public meetings with customers. Aqua St. No. 5 at 11.

#### **ASSET PURCHASE AGREEMENT**

15. Aqua and DELCORA are parties to an *Asset Purchase Agreement* and a *First Amendment to Asset Purchase Agreement* dated September 17, 2019, and February 24, 2020, respectively. Aqua Exhibit 1, Application ¶ 5 and ¶ 24; *see also* Aqua Exhibit No. 1, Exhibit B1 and Exhibit B2.

16. The purchase price, which is based on arms' length negotiation, is Two Hundred Seventy-Six Million Five Hundred Thousand Dollars (\$276,500,000.00). Aqua and DELCORA are not affiliated with each other. Aqua Exhibit No. 1, Application ¶ 24 and ¶ 25.

17. Aqua will use existing short-term credit lines for the purchase of the assets. The short-term credit funding will be converted to a mix of long-term debt and equity capital shortly after closing. Aqua St. No. 3 at 5; *see also* Aqua Exhibit No. 1, Application ¶ 26.

#### **ASSETS BEING TRANSFERRED**

18. The wastewater system assets to be transferred are the "Acquired Assets" and have the meaning specified in Section 2.01 of the Agreement. The Acquired Assets include the assets, properties and rights of the DELCORA used in the system and all wastewater related treatment, disposal, sludge receiving assets and conveyance facilities. Aqua Exhibit No. 1, Application ¶ 27.

19. Acquired Assets also include the contracts identified on Schedule 4.15 of the APA to which DELCORA is a party (the "Assigned Contracts"). The Assigned Contracts are attached to the Application as Exhibits F1 through Exhibits F163. Aqua Exhibit No. 1,

Application ¶ 28.

20. Acquired Assets also include all Authorizations and Permits of or held by DELCORA (to the extent transferrable to Aqua under applicable Law), including all Authorizations and Permits which are environmental permits, DELCORA National Pollution Discharge Permits, other operating permits and those items listed or described on Schedule 4.14 of the Agreement. Aqua Exhibit No. 1, Application ¶ 29.

21. “Excluded Assets,” which are those assets not being transferred to Aqua, has the meaning specified in Section 2.02 of the Agreement. Excluded Assets include contracts that are not Assigned Contracts, cash and cash equivalents and the assets, properties and rights set forth in Schedule 2.02(g) of the Agreement. Aqua Exhibit No. 1, Application ¶ 30.

22. “Assumed Liabilities” has the meaning specified in Section 2.04(a) of the Agreement and include all liabilities and obligations arising out of or relating to Aqua’s ownership or operation of the wastewater system and the Acquired Assets on or after Closing. Aqua Exhibit No. 1, Application ¶ 31.

## **RATES**

23. Aqua will implement DELCORA’s wastewater rates in effect at closing as reflected on Schedule 7.04(a) of the APA. Aqua also may apply Commission permitted or required surcharges or pass-through costs to DELCORA’s base rates after closing. A schedule of rates tariff page implementing rates for DELCORA customers post-closing is included with Aqua Exhibit 14. Aqua Exhibit No. 1, Application ¶ 36, Aqua Exhibit 14 and Aqua Statement No. 1 at 10.

24. DELCORA will take a portion of the proceeds of the Proposed Transaction and place them into an irrevocable trust for the sole benefit of the DELCORA customers and is

requesting to apply payments to DELCORA customers from the Trust through Aqua's billing process. A Memorandum of Understanding is attached as WCP-2R Schedule E to Mr. Packer's rebuttal testimony, to facilitate payments from the trust to be put on DELCORA customer bills. Aqua Exhibit No. 1, Application ¶ 36 and Aqua St. No. 2-R, WCP-2R Schedule E.

25. Based on DELCORA's current rate schedule, Aqua projects annual revenue of \$70,978,127 from DELCORA customers with annual operating and maintenance expenses of \$41,408,283. Aqua Exhibit No. 1, Application ¶ 42 and ¶ 43.

26. Aqua will implement its Rules and Regulations to govern the provision of wastewater service. Aqua Exhibit No. 1, Application ¶ 37.

#### **INTEGRATION WITH CURRENT OPERATIONS**

27. Aqua will operate the DELCORA wastewater system as a standalone system within Aqua's footprint overseen from its Southeastern Division Office in Bryn Mawr, which is approximately 11 miles from the Division Main Office. Aqua will keep the DELCORA office and operations centers in the City of Chester for a period of 25 years following Closing. Aqua Exhibit No. 1, Application ¶ 44 and ¶ 52 and Aqua St. No. 4 at 2-5.

28. Aqua is not anticipating any physical, operational or managerial changes at its Southeastern Division Office as a result of the acquisition. Aqua, however, will be offering employment to all current DELCORA employees. Aqua Exhibit No. 1, Application ¶ 44, ¶ 52 and ¶ 53.

#### **DEP COMPLIANCE**

29. Aqua is in good standing with the Pennsylvania Department of Environmental Protection ("DEP"). Aqua Exhibit No. 1, Application ¶ 49.

30. DELCORA has recently updated its LTCP for the City of Chester's combined

sewer system, which is currently under review with DEP and EPA for final approval. The City of Chester is served by both separate and combined sewer systems, and DELCORA developed the original LTCP to address the combined system in April 1999. In 2010, the EPA ordered DELCORA to update this LTCP, claiming that it violated the federal Clean Water Act due to overflows and storm water discharges, which occur during heavy rain and wet weather events. Aqua St. No. 7 at 6-7.

31. In 2015, the EPA and DEP filed a complaint against DELCORA in the United States District Court for the Eastern District of Pennsylvania. The complaint sought injunctive relief and civil penalties for alleged violations of the Clean Water Act and the Pennsylvania Clean Streams Law relating to the discharge of sewage. As a result of that action, DELCORA, EPA and DEP entered into a Consent Decree, effective November 13, 2015, which outlined the steps DELCORA would take to achieve full compliance with the Clean Water Act and the Pennsylvania Clean Streams Law and eliminate sanitary sewer overflows, which occur during rain and wet weather events. Aqua St. No. 7 at 7. Aqua will continue to implement the LTCP in compliance with the Consent Decree. Aqua St. No. 4 at 7.

32. Additionally, the EPA and the Delaware River Basin Commission (“DRBC”) have established Stage 1 Total Maximum Daily Loadings (“TMDLs”) for the Delaware River Estuary and corresponding Waste Load Allocation (“WLA”) assigned to DELCORA for the discharge of polychlorinated biphenyls from the WTRP. While a proposed Stage 2 TMDL or WLA has not yet been issued by EPA and DRBC, it is DELCORA’s expectation that this will occur soon. Aqua St. No. 7 at 8.

33. Aqua will work with the DELCORA operations and engineering staff to address environmental compliance issues. Aqua St. No. 2 at 10.

## **ENVIRONMENTAL AND PERMITTING**

34. Aqua has a record of successfully meeting DEP's environmental requirements for the transfer of nine NPDES permits from municipalities or municipal authorities over the last twenty-two years. Aqua St. No. 4-R at 5.

35. No documentary evidence has been presented indicating DEP requires new private owners of publically owned treatment facilities or their industrial users to obtain new Resource Conservation and Recovery Act ("RCRA") Part B permits. Tr. 300.

36. Separate existing approaches within EPA and DEP regulations available to Aqua and industrial users allow for adequate environmental regulatory oversight without Part B permits under RCRA. Tr. 300.

37. The NPDES permit program was established under the CWA and it regulates entities that discharge wastewaters to waters of the United States. Tr. 298.

38. DELCORA is currently regulated under NPDES since it discharges to the Delaware River. Tr. 298.

39. In Pennsylvania, DEP has been delegated authority by EPA for both the NPDES permit program and the RCRA program. Tr. 298.

40. The RCRA can apply to wastewater treatment facilities and require permitting to facilities that manage wastewaters, if the wastewaters meet definitions within those regulations for solid and hazardous wastes. Tr. 298.

41. RCRA and NPDES can both apply to different aspects of a facility's operations, and a number of exclusions, exemptions and other options exist within RCRA to minimize that overlap and give precedence to the CWA and the NPDES permitting program. Tr. 298-299.

42. Aqua intends that the Industrial Pretreatment Program (“IPP”) applicable to the DELCORA WRTWP system will be implemented through an NPDES permit authorized by DEP, similar to other former Publically Owned Treatment Works (“POTWs”). Aqua St. No. 4-R at 2-3.

43. Aqua made the following points (i) since 1987, numerous POTWs have been sold to private owners and the related transitional issues have been worked out, in many cases by incorporating industrial pretreatment obligations into the new private owner's NPDES permit; (ii) transfer of the DELCORA NPDES permit involves submission of a 5-page DEP Permit Transfer Form completed by DELCORA and the proposed Permittee Aqua, a \$200 transfer fee and other supporting documentation; and (iii) Aqua has successfully transferred nine NPDES permits from municipalities or municipal authorities over the last twenty-two years. Aqua St. No. 4-R at 3-5.

[illegible]

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[REDACTED]

55. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL]**

56. Aqua and DELCORA have discussed with EPA and DEP the transfer of DELCORA's Long Term Control Plan Combined Sewer Overflow obligations under an existing Consent Decree to Aqua, and intend to petition for substitution of Aqua for DELCORA in the Consent Decree at or near the time of closing the Proposed Transaction. Aqua St. No. 4-R at 7.

57. Any reduction in CWA infrastructure funds due to the privatization of DELCORA will be offset by the reduction in Pennsylvania infrastructure needs. Aqua St. No. 4-R at 8.

58. Aqua and DELCORA have committed to taking the necessary steps to obtain a waiver from the EPA of the EO 12803 requirements. Aqua St. No. 4-R at 12.

59. The 28-year old EO 12803 is still in effect and Aqua understands that DELCORA did obtain EPA construction grants for certain of its wastewater facilities under the then-effective EPA construction grant program. Aqua St. No. 4-R at 11.



60. The 1999 EPA Draft Guidance on EO 12803 has long been withdrawn and the EPA has not even dealt with a wastewater privatization in connection with facilities funded under the EPA construction grant program since the early 2000's. Aqua St. No. 4-R at 12.

#### **PLANNED CAPITAL PROJECTS**

61. Aqua intends to upgrade DELCORA's W RTP and facilities to divert flow from Eastern Region to the W RTP prior to the expiration of the existing agreement with PWD in 2028. This will require the construction of a new pipeline, upgrading the three existing pump stations to convey flow, construction of equalization storage tanks, and upgrading the W RTP by the construction of an increased capacity activated sludge treatment system as well as a wet weather. The estimated cost of the new pipeline, related facilities and W RTP plant expansion is approximately \$450 million. Aqua St. No. 4 at 8-9.

62. Aqua also will implement DELCORA's planned capital program for routine plant upgrades, collection system work and pump station upgrades. Some of those projects include collection system and pump station upgrades as well as more routine upgrades to the W RTP based on the useful life of various system components. These capital projects for the first ten years are set forth in Appendix A to Aqua Statement No. 4 and total \$751.4 million through 2030. Aqua St. No. 4 at 9 and Appendix A.

63. Replacement and upgrade of facilities will continue beyond Aqua's capital plan based on facility age and expected facility life span. Aqua St. No. 4 at 9-10.

#### **FITNESS**

##### **Legal Fitness**

64. Aqua is a Pennsylvania public utility certificated by the Commission to provide wastewater service in the Commonwealth of Pennsylvania. There are no pending legal

proceedings challenging Aqua's ability to provide safe and adequate service to customers. Aqua St. No. 3 at 3-4.

#### **Financial Fitness**

65. Aqua is a Class A, Pennsylvania wastewater utility with total assets of \$282 million and annual revenues of \$21 million. As a subsidiary of Aqua PA, Aqua has access to Aqua PA's financing capabilities. Aqua St. No. 3 at 4.

66. Aqua PA is a Class A water utility and the largest subsidiary of Aqua America, with total assets of \$4.9 billion and annual revenues of \$472 million in 2019. In 2019, Aqua PA had operating income of approximately \$251 million and net income of \$194 million. Aqua PA's cash flows from operations were \$268 million in 2019. Aqua St. No. 3 at 4.

67. Aqua PA has a Standard and Poor's Rating of A+ and has approximately \$1.703 billion in outstanding long-term debt at a weighted average interest rate of approximately 4.3%. Aqua PA also has a \$100 million short term credit facility and access to equity capital as a subsidiary of Aqua America. Aqua St. No. 3 at 4.

68. Aqua will finance the acquisition of the DELCORA wastewater system using existing short term credit lines. The short term credit funding will be converted to a mix of long-term debt and equity capital shortly after closing. The acquisition is not expected to have any effect on Aqua PA's corporate credit rating. Aqua St. No. 3 at 5.

#### **Technical and Managerial Fitness**

69. Aqua PA and Aqua are Class A, certificated utilities with operations throughout Pennsylvania. Aqua will provide quality and reliable wastewater service to the DELCORA customers via Aqua's operational expertise as well as engineering support. Aqua has expertise in troubleshooting mechanical equipment, as well as wastewater treatment processes, and in

operating wastewater collection, conveyance, and treatment systems. Aqua strives to ensure that its collection, conveyance, treatment, and pumping systems provide continuous, safe and reliable service. Aqua St. No. 2 at 10-11.

70. Aqua will operate the DELCORA wastewater system as a standalone system within Aqua's footprint overseen from Aqua's Southeastern Division Office, which is approximately 14 miles from the DELCORA Main Office. Aqua will keep the DELCORA office and operations centers in the City of Chester for a period of 25 years following Closing. Aqua will be offering employment to all current DELCORA employees. The acquisition will easily fold into Aqua's existing wastewater operations. Aqua St. No. 4 at 2-5; *see also* Aqua Exhibit No. 1, Application ¶ 44 and ¶ 52.

71. Aqua has worked with the Commission and statutory advocates to acquire and improve troubled wastewater systems – the Washington Park Wastewater System, for example, Docket No. A-230550F2000. Aqua was appointed receiver for the North Heidelberg Sewer Company in March 2018 serving 274 customers. Aqua St. No. 2 at 11.

## **PUBLIC INTEREST AND AFFIRMATIVE PUBLIC BENEFITS**

### **Customer Assistance Payments from the DELCORA Customer Trust**

72. The majority of the sale proceeds, estimated to be approximately \$200,000,000, will be placed in an irrevocable Trust that will benefit DELCORA customers for years to come. Aqua St. No. 2 at 13.

### **Consolidation/Regionalization**

73. The Commission has long supported the consolidation/regionalization of water/wastewater systems in Pennsylvania. Through consolidation/regionalization, the utility industry has a better chance to realize the benefits of better management practices, economies of

scale, and the resulting greater environmental/economic benefits. The benefits of consolidation/regionalization, ultimately, inure to customers both existing and acquired. Although it does not involve a small system, the Proposed Transaction embodies all of the principles noted in the Commission's policy statement. Aqua Exhibit No. 1, Application ¶56.a.

74. Aqua provides utility service to approximately 35,000 wastewater customers and has years of experience operating wastewater treatment and collection systems in a safe, reliable and efficient manner. Aqua has acquired 15 wastewater systems over the past 10 years. The inherent combining of systems and customers provides stability in the day to day utility operations, in that, these systems do not all require major capital investments at the same time and, therefore, the financial impacts of various discrete projects and investments can be spread over the long term operations of the acquiring utility as a whole. Aqua Exhibit No. 1, Application ¶56.b and Aqua St. No. 2 at 14.

75. In *McCloskey*, the Commonwealth Court held that Commission findings: (i) that Aqua, as the owner of numerous water and wastewater systems has sufficient operational expertise and ability to raise capital to support system operations; and (ii) that the Commission has a policy of consolidation/regionalization of wastewater system assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities, are substantial evidence, consistent with *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040 (Pa. 2007) to support a conclusion that there is a public benefit to a transaction. This same analysis supports the public benefit of this transaction;

#### **Benefits to DELCORA Customers**

76. DELCORA's customers will benefit by becoming part of a larger-scale, efficiently operated, water and wastewater utility. Aqua has existing operations serving

populations of nearly 500,000 in Delaware County and 200,000 in Chester County, in nearby and overlapping service area. It will be able to merge and integrate DELCORA's customers by folding them into a larger-scale, efficiently operated water and wastewater utility that over time will likely yield further efficiencies and improve long-term viability as envisioned in the Commission policy statement. Aqua Exhibit No. 1, Application ¶56.c. and Aqua St. No. 2 at 13.

77. Aqua is projecting a lower, long-term revenue requirement for DELCORA customers as a result of the acquisition compared to the revenue requirement that would result with DELCORA continuing as a stand-alone entity. Depending on cost spreading assumptions, the projected benefit to DELCORA customers is between \$111 million and \$313 million through 2040. Aqua St. No. 2-R at 32-35 and WCP-2R Schedule A.

78. Aqua also is projecting lower operating and maintenance costs that will likely be realized through reductions in cost for wastewater treatment through the investment in the expansion of the WRTP and force main to divert flows to the WRTP from PWD, as well as efficiencies in administrative and general costs, such as insurance, auditing, legal among others. Aqua Exhibit No. 1, Application ¶56.c. and Aqua St. No. 2 at 13.

79. DELCORA's customers will also benefit through customer service enhancements and protections provided by Aqua. Aqua has procedures in place under Chapter 14 of the Code, 66 Pa. C.S. § 1401 *et seq.* and Chapter 56 of the Commission's regulations, 52 Pa Code Chapter 56.1 *et seq.*, that provide for billing, payment, collection, termination and reconnection of service, payment arrangements, medical certifications, and formal and informal complaint procedures. By DELCORA becoming part of a regulated public utility, these protections will be available to DELCORA's customers. DELCORA low income customers will be able to enroll in Aqua's Helping Hand program. Aqua Exhibit No. 1, Application ¶56.d and Aqua St. No. 2 at 13.

80. DELCORA customers will benefit from Aqua's experience in large-scale capital planning and replacement programs. Aqua St. No. 2 at 13. This is especially significant in regard to the planned expansion of the WRTP.

#### **Benefits to Existing Aqua Customers**

81. The Proposed Transaction will benefit Aqua's existing customers and is significant to Aqua's existing wastewater platform. The addition of the DELCORA customers will create the equivalent size of Aqua PA's Main Division. The addition of the DELCORA Wastewater system will increase Aqua's customer base by 45%. Aqua Exhibit No. 1, Application ¶56.e.

82. By virtue of Aqua's larger combined customer base, future infrastructure investments across the Commonwealth driven by normal replacement cycles, emergency repairs, emergency response or compliance with new environmental regulations will be shared at a lower incremental cost per customer for all of Aqua's customers over time. Aqua Exhibit No. 1, Application ¶56.e.

#### **No Immediate Impact on Rates**

83. The Proposed Transaction will not have any immediate impact on the rates of either DELCORA's customers or Aqua's existing customers. DELCORA sets its budget each year prior to December 1 and has increased rates charged to customers in each year. Through the Proposed Transaction, Aqua will implement DELCORA's existing base customer rates, which will remain in effect until Aqua's next base rate case is filed and concluded. Aqua Exhibit No. 1, Application ¶56.f.

#### **Planned Capital Projects**

84. Planned capital projects will provide benefits by removing significant and

increasing costs of contributing to PWD's LTCP. The elimination of treatment expense to PWD will result in greater control over treatment costs in the future. By investing capital now to expand the WRTP, Aqua and DELCORA will, in essence, be in control of their own destiny. Aqua Exhibit No. 1, Application ¶56.g.

#### **Environmental Stewardship**

85. Aqua has a proven record of environmental stewardship of wastewater systems. Aqua St. No. 2 at 14.

86. Aqua's expertise in implementing large scale projects and compliance with Pennsylvania Department of Environmental Protection and US Environmental Protection Agency regulations. Aqua St. No. 2 at 14.

#### **DELCORA Employees**

87. Aqua has committed to preserving the jobs of DELCORA employees. Aqua St. No. 2 at 14.

#### **DELCORA Wants to Sell Its Wastewater System**

88. DELCORA has agreed to sell its Assets. The public interest and need will be served by allowing Aqua, in lieu of DELCORA, to provide wastewater service in the Requested Territory and to address the issues of regulatory requirements and capital expenditures. The DELCORA system will benefit from the support of wastewater professionals throughout Aqua's organization. Aqua Exhibit No. 1, Application ¶56.j.

#### **The McCloskey Case – Hypothetical Rate Impact Is Outweighed by Affirmative Public Benefit**

89. The current average monthly bill of a residential/commercial retail customer of DELCORA, is approximately \$41.26 per month using 6,660 gallons. Applying 100% of the revenue deficiency to the existing rates would increase the average bill to approximately \$46.44

per month or a 12.55% increase, which is less than the Company's existing average wastewater rates included in its most recent rate case at approximately \$68.27. Aqua St. No. 2 at 10.

90. Additionally, Aqua is acquiring the system at a rate base per customer of \$2,250, which is less than the Company's rate base per customer of existing systems of \$7,750. Aqua St. No. 2 at 10. The fact that both the rate base and the rates are less than the Company's current rates demonstrate that there are immediate economies of scale as a result of the Proposed Transaction. Aqua St. No. 2 at 10.

91. While an increase in rates may result from the transaction, this is not unexpected. The possibility of increased rates is noted by the Commonwealth Court in *McCloskey*. Aqua St. No. 1 at 12-16.

92. The expectation of potential increased rates is outweighed by the other positive benefits of the Proposed Transaction. Section 1329 transactions further a recognized legislative objective and are consistent with the Commission's consolidation/regionalization policy. Aqua witness Packer emphasized the following benefits as outweighing potential rate impact (Aqua St. No. 2-R at 3-5):

- The economies of scale an acquisition of this size can bring are substantial, and the Commission has recognized this fact as demonstrated by the longstanding success of leading public water utility purveyors providing quality and reliable service in the Commonwealth.
- The purchase price of DELCORA is reasonable, supported by appraisals, was negotiated at arms' length, and considers the long-term relationship of infrastructure investment and rates.
- The purchase price per customer is less than the Company's existing rate base per customer.
- Stand-alone residential rates at DELCORA's full cost of service are lower than the Company's existing rates.



- Aqua is a growing wastewater utility that has the ability to utilize its larger customer base to share costs that more than offset the cost of capital and income tax differences between municipal and private ownership emphasized by the opponents to the Proposed Transaction.
- The Company's analysis of the long-term projections of revenue requirement is conservative, and there are regulatory tools at the Company's disposal to further reduce revenue requirement impacts of federal and state income tax through lower taxes with the election of tax repair.
- The Company's Appendix A has been utilized in numerous Public Utility Code Section 1329 Applications, and the methods used to forecast impacts have been reviewed and approved in at least three Aqua proceedings before the Commission.
- At a 12.55% first year difference in revenue requirement, the Proposed Transaction provides the lowest increase to the acquired DELCORA customers of those Fair Market Value ("FMV") applications submitted to the Commission by Aqua.
- DELCORA customers will also benefit from regulatory rate protections as a result of the acquisition. Presently, DELCORA customers can only challenge proposed rates by bringing a legal action in the Court of Common Pleas. In contrast, under Commission jurisdiction, there are public input hearings and public advocates that will advocate for customers' interests in rate proceedings. An Administrative Law Judge will recommend a result and the Commission will review and issue a final decision on future rates. An appellate court review option is also available.

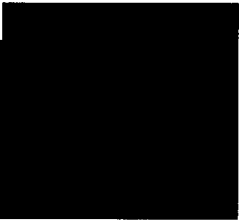
93. The hypothetical impact on rates is outweighed by the recognized benefits of Aqua's ownership including its expertise and ability to raise capital; the furtherance of consolidation/regionalization of wastewater services; and the spreading of costs over a larger customer base as emphasized by Mr. Packer. More significantly, the acquisition furthers the objective of the General Assembly with the enactment of Section 1329. While *McCloskey* concludes that rate impact should be addressed, it recognizes that it is not dispositive in the Commission's determination of substantial affirmative benefits.

#### **CONDITIONS FOR APPROVAL**

94. Aqua accepted and proposed the following conditions for approval:

- Customer assistance payments from the DELCORA Customer Trust will be separately shown on Aqua bills to help make this part of the public benefit transparent to the DELCORA wastewater utility customers who are receiving the bill assistance.
- The DELCORA Customer Trust will be used to provide customer bill assistance payments to DELCORA customers, the effect of which will provide for 3% annual increases to DELCORA customers until the approximately \$200 million projected Trust funding has been fully applied.
- A separate COSS will remain an obligation at least as long as the Trust provides the bill assistance payments. The OCA will have the opportunity to address creation of a separate rate zone in the context of a future Aqua base rate proceeding.
- Aqua will file COSS 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.
- When Aqua modifies its LTIP to include the DELCORA wastewater system, any DELCORA-related projects reflected in the revised LTIP will be in addition to, and not a reprioritization of, any capital improvements that Aqua was already committed to undertake for existing customers.
- The DELCORA Customer Trust is for the exclusive use and benefit of former DELCORA wastewater customers and new customers in the former DELCORA service territory. The MOU included with Mr. Packer's rebuttal testimony as WCP-2R Schedule E, provides the mechanism of how the Trust payments will be applied to customer bills.
- Aqua will file annual reports showing how customer bill assistance payments are being applied to Aqua's bills to DELCORA customers.
- In the period from the date when the acquisition is consummated through the effective date of new rates for the acquired DELCORA wastewater utility customers in Aqua's next base rate case, the impact on income tax expense from repairs deductions claimed by Aqua on DELCORA wastewater utility system assets will be recorded in a regulatory liability account and addressed in Aqua's next base rate case in which rates for the acquired DELCORA wastewater utility customers are addressed.
- Aqua will resolve issues concerning transfer of agreements prior to closing.
- Prior to the closing of the Proposed Transaction, Aqua and DELCORA will obtain: (i) a renewal of DELCORA's NPDES permit that includes the pretreatment requirements that will be applicable to Aqua and its industrial users upon closing; or (ii) a transfer of

DELCORA's NPDES permit to Aqua, which will continue the substantive pretreatment program as constituted by DELCORA as of the closing date.

- Aqua and DELCORA will **[BEGIN HIGHLY CONFIDENTIAL]**   
**[END HIGHLY CONFIDENTIAL]**
- Aqua will obtain an appropriate waiver or other resolution of the Executive Order 12803 before Closing of the Proposed Transaction.

## **SECTION 1329 CONSIDERATIONS**

### **Ratemaking Rate Base**

95. Aqua and DELCORA agreed to use the process presented in Section 1329 of the Code to determine the fair market value of the wastewater system assets and the ratemaking rate base. Aqua Exhibit No. 1, Application ¶ 57.

96. Aqua and DELCORA agreed on a Licensed Engineer to complete the Assessment of Tangible Property and engaged Utility Valuation Experts ("UVE") to perform Fair Market Value analyses of the system in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), utilizing the cost, market, and income approaches. Aqua St. No. 3 at 7; *see also* Aqua Exhibit No. 1, Application ¶ 11 and Exhibit D.

97. Aqua engaged the services of Gannett Fleming Valuation and Rate Consultants, LLC ("Gannett"). DELCORA engaged the services of ScottMadden, Inc. ("ScottMadden"). Both firms were pre-certified as authorized UVEs and are on the list of qualified appraisers maintained by the Commission. Aqua St. No. 3 at 7 and Aqua Exhibit No. 1, Application ¶ 57.

98. As required by Section 1329(d)(1)(i), copies of the Fair Market Value Appraisal Reports of Gannett and ScottMadden were attached as Exhibit Q and Exhibit R, respectively, to

the Application. Aqua Exhibit No. 1, Application ¶ 58, Exhibit Q and Exhibit R.

99. As required by Section 1329(d)(1)(ii), the purchase price agreed to by Aqua and DELCORA was identified as \$276,500,000. Aqua Exhibit No. 1, Application ¶ 59.

100. As required by Section 1329(d)(1)(iii), the ratemaking rate base determined pursuant to Section 1329(c)(2) is \$276,500,000, being the lesser of the negotiated purchase price of \$276,500,000 and the average of the fair market value appraisals which is \$358,538,503 – determined by \$408,883,000 presented in the Gannett appraisal and \$308,194,006 presented in the ScottMadden appraisal. Aqua Exhibit No. 1, Application ¶ 60; *see also* Aqua St. No. 1 at 7-8.

101. As required by Section 1329(d)(1)(iv), transaction and closing costs were identified as approximately \$750,000, which will be included in rate base. Aqua Exhibit No. 1, Application ¶ 61. Exact closing costs will be determined at closing. Aqua St. No. 3 at 9.

102. As required by Section 1329(d)(1)(v), a tariff containing a rate equal to the existing DELCORA rates at the time of acquisition was attached as Exhibit G to the Application. Aqua Exhibit No. 1, Application ¶ 62 and Exhibit G. The final form of the tariff was included with Aqua Exhibit 14.

103. The UVEs were paid \$61,913 for the completed Fair Market Value Appraisal Reports. Documentation of the fees paid to each UVE was included with the Application as Exhibit S1 and Exhibit S2, respectively. Aqua Exhibit No. 1, Application ¶ 64, Exhibit S1 and Exhibit S2 and Aqua St. No. 3 at 8.

104. The fees paid to the UVEs are reasonable based on the scope of work, the methods used as accepted industry practice, and that the UVEs' fees were less than 5% of the fair market value benchmark noted in the Final Implementation Order. Aqua St. No. 3 at 8-9.

105. Statements of Gannett and of ScottMadden verifying that they have no affiliation with Aqua or DELCORA as specified in Section 1329 and that their Appraisals determined fair market value in compliance with the most recent edition of USPAP, employing the cost, market and income approaches and that they complied with applicable jurisdictional exceptions were attached to the Application as Exhibit T1 and Exhibit T2, respectively. Aqua Exhibit No. 1, Application ¶ 65, Exhibit T1 and Exhibit T2.

106. Aqua's contract with Gannett to undertake its Fair Market Value Appraisal was included as Exhibit T1 to the Application. Aqua St. No. 3 at 9. DELCORA's contract with ScottMadden to undertake its Fair Market Value Appraisal was included as Exhibit T2 to the Application. Aqua St. No. 3 at 9.

#### **No Rate Stabilization Plan**

107. A rate stabilization plan is a plan that will hold rates constant or phase rates in over a period of time after the next base rate case. The Application includes neither a request nor proposal for a rate stabilization plan. Aqua has not included a rate stabilization plan in its proposed tariff. Aqua will be charging a stand alone tariff rate. DELCORA's request to apply a customer assistance payment on an Aqua bill does not constitute an Aqua rate stabilization plan. Aqua Statement No. 3 at 6.

#### **SECTION 507**

108. Section 507 of the Code states that, except for contracts between a public utility and a municipal corporation to furnish service at tariff rates, no contract or agreement between a public utility and a municipal corporation shall be valid unless filed with the Commission at least 30 days prior to its effective date.

109. Aqua's Application asks that the Commission, to the extent necessary, issue

certificates for filing, pursuant to Section 507, for the APA dated September 17, 2019 and First Amendment to the APA, dated February 24, 2020 by and among DELCORA and Aqua and for the assignment of 163 contracts identified on Schedule 4.15 of the APA and provided with the Application as Exhibits F1 through F163. Aqua Exhibit No. 1, Application ¶ 73. Aqua also requests approval of the Memorandum of Understanding (MOU) between Aqua and DELCORA for use of the Aqua bill for Customer Trust credits. Aqua St. No. 2-R at 16.

### **Municipal Contracts and Other Industrial Customer Contracts**

110. Among the assets to be acquired by Aqua in the Proposed Transaction are various service contracts between DELCORA and various municipal and other counterparties (“Assigned Contracts”). Aqua Exhibit No. 1, Exhibits F1 through F163.

111. Each existing service contract between DELCORA and the respective Municipal Protestants cannot be assigned to and assumed by Aqua as part of the Proposed Transaction unless each Municipal Protestant consents to such assignment. Aqua St. No. 2-R at 64.

112. Aqua and DELCORA have been meeting with representatives from DELCORA customers to address the assignment of service agreements and their concerns about the terms, conditions, rates and other issues that each party believes represent their specifically negotiated contract rights. Aqua St. No. 2-R at 64-65.

113. Aqua remains committed to working with the Municipal Protestants to develop mutually acceptable contract assignments. Aqua St. No. 2-R at 64.

114. It is not unusual to be negotiating and obtaining contract assignments after PUC approval of a transaction, and up to and around the time of closing. Aqua St. No. 2-R at 65.

115. The APA has a clear contractual process for addressing any service contracts for which consents to assignment to Aqua have not occurred as of closing of the Proposed Transaction. Aqua St. No. 2-R at 65-66.

116. Section 2.06 the APA provides that if, at closing of the Proposed Transaction, there is no mutual agreement to assign the service agreements requiring mutual consent (i.e., “Nonassignable Assets”), then after closing DELCORA will continue to be the legal owner of the Nonassignable Assets, but Aqua will become the economic/beneficial owner of the Nonassignable Assets and provide service to these customers as the agent/subcontractor of DELCORA. Aqua St. No. 2-R at 66.

117. If it becomes necessary to implement the Aqua–DELCORA agent/subcontractor arrangement, the parties would develop and implement a form of agreement defining their duties and responsibilities as principal and agent. Aqua St. No. 2-R at 66.

118. Edgmont Township has a right of first refusal to purchase certain DELCORA assets serving it if DELCORA sells the facilities. Aqua St. No. 2-R at 66-67.

119. Trainer and Upland Borough each have a reversionary interest in the system serving them if DELCORA fails to operate the system, unless the boroughs decline to take ownership in which case the systems revert to the County of Delaware or any other agency. Aqua St. No. 2-R at 66-67.

120. If Edgmont Township and Trainer and Upland Boroughs proceed outside of the Proposed Transaction, they will not be eligible to receive any Trust funds to mitigate future Aqua rate increases as otherwise proposed in this proceeding. Aqua St. No. 2-R at 68.

121. Edgmont Township<sup>1</sup>, Lower Chichester Township<sup>2</sup>, Southwest Delaware County Municipal Authority<sup>3</sup>, and Upland Borough<sup>4</sup> claim they have contributed specific property and assets to DELCORA, procured and turned over grants to DELCORA and their contract with DELCORA requires that their rates for DELCORA service be based on that party's specific attributes and costs of service.

122. If consents to assignment cannot be mutually negotiated between each of Edgmont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority, Upland Borough and Aqua, their respective service agreements with DELCORA Nonassignable Assets under Section 2.06 of the APA and Aqua will continue to provide service to these Municipal Protestants as the agent or subcontractor for DELCORA, which will remain the counterparty and principal on these agreements. Aqua St. No. 2-R at 68.

123. The Municipal Protestants are concerned that if they become direct Aqua customers they will be charged costs associated with bypassing PWD or system-wide costs, both of which they claim not to be incurring under their current contracts/arrangements with DELCORA. Aqua St. No. 2-R at 68.

124. Traditional utility rate model provides substantial benefits to customers and risk mitigation, like single tariff pricing and consolidated ratemaking, that will benefit these Municipal Protestants in the long-term even if past contributions of assets and interest payments cannot be considered in a Public Utility Code Section 1329 valuation process like this proceeding. Aqua St. No. 2-R at 68.

125. Each of the Municipal Protestants has an existing service agreement with

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<sup>1</sup> Edgmont St. No. 1 at 4 and 7.

<sup>2</sup> Lower Chichester St. No. 1 at 3 and 4.

<sup>3</sup> SWDCMA St. No. 1 at 4 and 5.

<sup>4</sup> Upland St. No. 1 at 4



DELCORA as follows:

- Edgmont Borough service contract dated as of October 17, 2020.<sup>5</sup>
- Lower Chichester service contract dated April 12, 1977.<sup>6</sup>
- Southwest Delaware County Municipal Authority's service contract dated December 21, 2009, as amended December 17, 2013.<sup>7</sup>
- Trainer Borough service contract dated August 9, 2005.<sup>8</sup>
- Upland Borough service contract dated July 22, 1975, as amended on January 18, 1983, December 21, 1983 and February 12, 1985.<sup>9</sup>

126. The Municipal Protestants have not shown that their contracts prohibit Aqua acting as DELCORA's agent to implement DELCORA's responsibilities under these service contracts. Aqua St. No. 2-R at 66-67.

127. Since all of DELCORA's employees will be retained by and working for Aqua after closing of the Proposed Transaction, it is likely that all or substantially all of the former DELCORA employees will continue to provide service under the various Municipal Protestants' contracts, albeit as the agent of DELCORA. Tr. at 429.

128. Sunoco's existing service agreements with DELCORA and contained in Aqua Application Exhibits F125-131. Aqua Exhibit No. 1, Exhibits F125-131.

129. Sunoco witness Human noted concerns specifically about continuation under Aqua of all of Sunoco's claimed existing contractual rights including discharge rights, Sunoco's characterization as a "Wholesale Industrial User", the use of quarterly estimates with provision for audits and true-up; measurement of wastewater discharges based on Sunoco's meters, charges to Sunoco continuing to be based solely on costs associated with the Western Region and Industrial Wholesale Users costs imposed on the DELCORA system, and Sunoco's ability to seek and obtain damages to its property from third parties. SPMT St. No. 1 at 11-13.

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<sup>5</sup> Aqua Exhibit No. 1, Exhibit F81.

<sup>6</sup> Aqua Exhibit No. 1, Exhibit F84.

<sup>7</sup> Aqua Exhibit No. 1, Exhibits F110 and F111, respectively.

<sup>8</sup> Aqua Exhibit No. 1, Exhibit F137.

<sup>9</sup> Aqua Exhibit No. 1, Exhibits F139 though F142, respectively.

130. Aqua witness Packer acknowledged these issues from Sunoco and indicated that Aqua and DELCORA have continued to meet with Sunoco representatives to address the assignment of its service agreements and its concerns about the terms, conditions, rates and other issues specifically related to its existing service contracts. Aqua St. No. 2-R at 65-66.

131. If Sunoco and Aqua are unable to negotiate mutually acceptable terms of an assignment of the various Sunoco service contracts, Aqua will act as DELCORA's agent in assuring the continuation of all the services currently being provided by DELCORA to Sunoco. Aqua St. No. 2-R at 68.

132. DELCORA executed a Service Agreement with Scott Paper Company (i.e., Kimberly Clark's predecessor) on December 1, 1973 ("Service Agreement"). Aqua St. No. 2-R at 63.

133. In a letter dated November 19, 2003<sup>10</sup> from DELCORA Executive Director Joseph L. Salvucci to Kimberly-Clark Plant Manager Paul R. Wittekind, DELCORA provided notice to Kimberly-Clark of its intention to terminate the Service Agreement in accordance with Section 10 of that agreement, effective December 10, 2004. That letter expressly requested the parties to commence discussions about how to address their future relationship. Aqua St. No. 2-R at 59.

134. Aqua does not intend to assume the Kimberly-Clark Service Agreement as part of the Proposed Transaction. Aqua St. No. 2-R at 60.

135. Kimberly-Clark and DELCORA established new terms and conditions governing wastewater service *after* the Service Agreement was terminated effective December 10, 2004. Aqua St. No. 2-R at 60; WCP-2R Schedule G.

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<sup>10</sup> WCP-2R Schedule F.

136. DELCORA's pretreatment program's Rules and Regulations were intended by DELCORA and Kimberly-Clark to govern their service relationship after the Service Agreement was terminated, thereby obviating the need for a new agreement. Aqua St. No. 2-R at 60.

137. DELCORA's website contains extensive information about its Industrial Pretreatment Program ("IPP"), including its purposes and two primary documents. One document describes the local limitations and substance restrictions for discharge to DELCORA facilities under the IPP. The second, entitled "DELCORA Standards, Rules and Regulations of 2011," details standards, rules and regulations governing the proper disposition of all wastewaters introduced into the DELCORA wastewater management system, including the acceptance and connection to DELCORA facilities; establishing the procedures, enforcement mechanisms and fee system to administer the regulations; and related matters. Aqua St. No. 2-R at 60-61.

138. Rates applicable to Kimberly-Clark are actually set each year by DELCORA via resolution and not via a particular contract. Aqua St. No. 2-R at 63.

## APPENDIX C

### PROPOSED CONCLUSIONS OF LAW

#### **Background and Burden of Proof**

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa. C.S. §§ 1102 and 1329.

2. The Public Utility Code requires Commission approval in the form of a certificate of public convenience for a public utility to expand its service territory and to acquire property used or useful in the public service. 66 Pa.C.S. §§ 1102(a)(1) and 1102(a)(3).

3. The burden of proving entitlement to a certificate is upon the applicant as it is the applicant that is seeking a proposed rule or order. 66 Pa.C.S. § 332. *Se-Ling Hosiery v. Margulies*, 70 A.3d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990). The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery, supra*. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the slightest degree, than the evidence presented by the opposing party. *Id.*

4. Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. v. Pa. P.U.C.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Com. Bd. Of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth.

1984).

5. A certificate of public convenience will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa.C.S. § 1103(a).

6. In *City of York v. Pa. P.U.C.*, 295 A.2d 825 (Pa. 1972), the Pennsylvania Supreme Court explained in the context of a utility merger that the issuance of a certificate of public convenience requires the Commission to find affirmatively that public benefit will result from the merger.

7. In *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040 (Pa. 2007), the Pennsylvania Supreme Court addressed *City of York* and explained that the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome or impossible; rather, the Commission properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

8. In *McCloskey v. Pa. P.U.C.*, 195 A.3d 1055 (Pa. Cmwlth. 2018), *petition for allowance of appeal denied* No. 703 MAL 2018 (April 23, 2019), the Commonwealth Court held that Commission findings: (i) that Aqua, as the owner of numerous water and wastewater systems has sufficient operational expertise and ability to raise capital to support system operations; and (ii) that the Commission has a policy of consolidation/regionalization of wastewater system assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities, are substantial evidence, consistent with *Popowsky*, to support a conclusion that there is a public benefit to a transaction. The Court held, further, that the Commission must address rate impact in a “general fashion” when deciding whether there is

substantial public benefit for a Section 1329 acquisition.

9. Additionally, the party receiving the assets and service obligation must be technically, legally, and financially fit. *Joint Application of Peoples Natural Gas Company LLC, Peoples TWP LLC, and Equitable Gas Company, LLC*, Docket No. A- 2013-2353647, 309 P.U.R.4th 213 (2013).

10. An existing provider of public utility service is presumed fit. *See Re Pennsylvania-American Water Company*, 85 PA PUC 548 (1995). The burden of proof to rebut the presumption is on Protestants. *Re Byerly*, 270 A. 2d 186 (Pa. 1970); *Morgan Drive-Away, Inc., v. Pa. P.U.C.*, 293 A.2d 895 (Pa. Cmwlth. 1972).

**Aqua Is Fit to Acquire the DELCORA Wastewater System and Initiate Wastewater Service in Delaware and Chester Counties**

11. No party rebutted the presumption of fitness and Aqua established its technical, legal and financial fitness by a preponderance of the evidence and substantial evidence.

12. Aqua is fit to acquire the DELCORA wastewater system assets and to initiate wastewater service in Delaware and Chester Counties.

**Public Interest and Affirmative Public Benefit**

13. Aqua demonstrated through a preponderance of the evidence and substantial evidence that its acquisition of the DELCORA wastewater system will affirmatively promote the service, accommodation, convenience, or safety of the public in substantial ways. Hypothetical rate impact is offset by other positive benefits of the transaction.

14. Aqua's acquisition of the DELCORA wastewater system and initiation of wastewater service in Delaware and Chester Counties will further the public interest.

**Section 1329 and Ratemaking Rate Base**

15. Section 1329 of the Public Utility Code, 66 Pa.C.S. § 1329, addresses the

valuation of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities.

16. If the parties agree to the Section 1329 process, the acquiring public utility and the selling municipality each select a UVE from a list of experts established and maintained by the Commission. The selected UVEs perform independent fair market value appraisals of the system in compliance with USPAP, employing the cost, market and income approaches. 66 Pa.C.S. § 1329(a).

17. Aqua engaged the services of Gannett to provide a fair market value appraisal in accordance with USPAP, utilizing the cost, market and income approaches. DELCORA engaged the services of ScottMadden for the same purpose. Both firms were pre-certified as authorized UVEs by the Commission and are on the list of qualified appraisers maintained by the Commission.

18. In regard to the ratemaking rate base, the General Assembly directed as follows for acquisitions proceeding under Section 1329:

**(c) Ratemaking rate base.** – The following apply:

(2) The ratemaking rate base of the selling utility shall be the lesser of the purchase price negotiated by the acquiring public utility or entity and selling utility or the fair market value of the selling utility.

19. Section 1329(g) defines “fair market value” as “[t]he average of the two utility valuation expert appraisals conducted under subsection (a)(2).”

20. Gannett’s fair market value appraisal is \$408,883,000. ScottMadden’s fair market value appraisal is \$308,194,006. The average of the two is \$358,538,503. The ratemaking rate base determined pursuant to Section 1329(c)(2) is \$276,500,000, being the lesser of the negotiated purchase price of \$276,500,000 and the average of \$358,538,503.

**Section 507**

21. Section 507 of the Code states that, except for contracts between a public utility and a municipal corporation to furnish service at tariff rates, no contract or agreement between a public utility and a municipal corporation shall be valid unless filed with the Commission at least 30 days prior to its effective date.

22. The contracts, including assignment of contracts, identified on Schedule 4.15 of the APA and included with the Application as Exhibits F1 through F163, and the Aqua-DELCORA MOU are accepted as valid pursuant to Section 507.



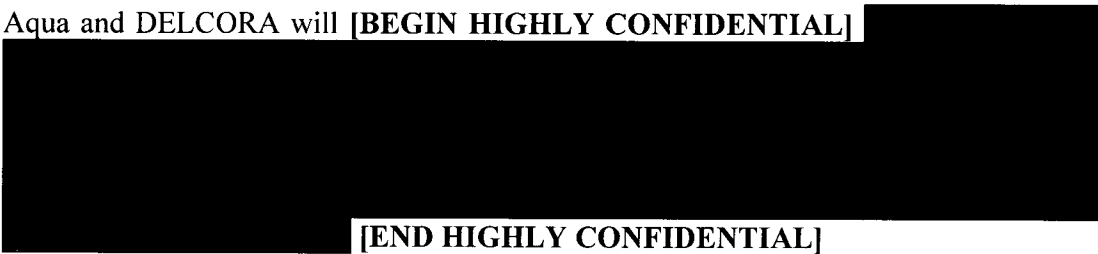
## **APPENDIX D**

### **PROPOSED ORDERING PARAGRAPHS**

#### **IT IS ORDERED:**

1. That the Application filed by Aqua Pennsylvania Wastewater, Inc. is approved.
2. That the Office of the Secretary issue Certificates of Public Convenience evidencing the right of Aqua Pennsylvania Wastewater, Inc., under Sections 1102(a)(1) and 1102(a)(3) of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 1102(a)(1) and 1102(a)(3), (a) to acquire, by purchase, the wastewater system assets of the Delaware County Regional Water Quality Control Authority situated within Delaware and Chester Counties, Pennsylvania; and (b) to begin to offer, render, furnish or supply wastewater service to the public in portions of Delaware and Chester Counties, Pennsylvania, subject to the following conditions:

- Customer assistance payments from the DELCORA Customer Trust will be separately shown on Aqua bills to help make this part of the public benefit transparent to the DELCORA wastewater utility customers who are receiving the bill assistance.
- The DELCORA Customer Trust will be used to provide customer bill assistance payments to DELCORA customers, the effect of which will provide for 3% annual increases to DELCORA customers until the approximately \$200 million projected Trust funding has been fully applied.
- A separate COSS will remain an obligation at least as long as the Trust provides the bill assistance payments. The OCA will have the opportunity to address creation of a separate rate zone in the context of a future Aqua base rate proceeding.
- Aqua will file COSS 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.
- When Aqua modifies its LTIP to include the DELCORA wastewater system, any DELCORA-related projects reflected in the revised LTIP will be in addition to, and not a reprioritization of, any capital improvements that Aqua was already committed to undertake for existing customers.

- The DELCORA Customer Trust is for the exclusive use and benefit of former DELCORA wastewater customers and new customers in the former DELCORA service territory. The MOU included with Mr. Packer's rebuttal testimony as WCP-2R Schedule E, provides the mechanism of how the Trust payments will be applied to customer bills.
- Aqua will file annual reports showing how customer bill assistance payments are being applied to Aqua's bills to DELCORA customers.
- In the period from the date when the acquisition is consummated through the effective date of new rates for the acquired DELCORA wastewater utility customers in Aqua's next base rate case, the impact on income tax expense from repairs deductions claimed by Aqua on DELCORA wastewater utility system assets will be recorded in a regulatory liability account and addressed in Aqua's next base rate case in which rates for the acquired DELCORA wastewater utility customers are addressed.
- Aqua will resolve issues concerning transfer of agreements prior to closing.
- Prior to the closing of the Proposed Transaction, Aqua and DELCORA will obtain: (i) a renewal of DELCORA's NPDES permit that includes the pretreatment requirements that will be applicable to Aqua and its industrial users upon closing; or (ii) a transfer of DELCORA's NPDES permit to Aqua, which will continue the substantive pretreatment program as constituted by DELCORA as of the closing date.
- Aqua and DELCORA will **[BEGIN HIGHLY CONFIDENTIAL]**  **[END HIGHLY CONFIDENTIAL]**
- Aqua will obtain an appropriate waiver or other resolution of the Executive Order 12803 before Closing of the Proposed Transaction.

3. That, pursuant to Section 1329 of the Public Utility Code, 66 Pa. C.S. § 1329, the ratemaking rate base of the DELCORA wastewater system assets is \$276,500,000.

4. That the Commission's Secretary issue a Certificates of Filing under Section 507 of the Public Utility Code, 66 Pa. C.S. § 507, for the Asset Purchase Agreement between DELCORA (as Seller) and Aqua Pennsylvania Wastewater, Inc. (as Buyer) and the contracts, including assignment of contracts, identified on Schedule 4.15 of the APA and included with the

Application as Exhibits F1 through F163, as well as the Aqua-DELCORA MOU.

5. That all such other approvals, certificates, registrations and relief as may be required under the Public Utility Code for Aqua to acquire the DELCORA wastewater system assets are hereby issued.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**The Honorable Angela T. Jones, Presiding  
The Honorable F. Joseph Brady, Presiding**

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**Application of Aqua Pennsylvania : Docket No. A-2019-3015173**  
**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 :**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 1<sup>st</sup> day of December, 2020, served a true and correct copy of the foregoing Main Brief of Aqua Pennsylvania Wastewater, Inc. upon the persons and in the manner set forth below:

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