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Via Electronic Filing

Rosemary Chiavetta, Secretary
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Commonwealth Keystone Building
400 North Street
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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 Reply Brief (*Public Version*) filed December 14, 2020. The Replacement Version redacts the Highly Confidential language in a different and more secure application than the originally filed Reply Brief (*Public Version*). There is no change to the wording of the Reply Brief (*Public Version*) or the visual presentation of it. Please “take down” the originally filed Reply 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 18th day of December 2020 served a true and correct copy of the foregoing letter and Replacement Version of the Reply Brief (*Public Version*) of Aqua Pennsylvania Wastewater, Inc., upon the persons and in the manner indicated below:

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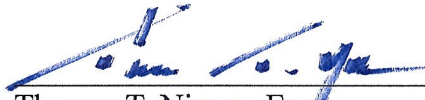
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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 :

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

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DATED: December 14, 2020

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I. INTRODUCTION

This proceeding concerns the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”), filed with the Public Utility Commission (“Commission”) on March 3, 2020, for approval of its acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”) pursuant to Sections 1102, 1329 and 507 of the Public Utility Code (“Code”). Aqua and DELCORA filed Main Briefs in support of the Application on December 1, 2020.

Aqua submits this Reply Brief in accordance with the litigation schedule in Prehearing Conference Order #2, dated September 4, 2020. Aqua’s Reply Brief supplements its Main Brief and is limited to those matters requiring additional discussion as a result of the Main Briefs filed by the Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the County of Delaware (“County”), Sunoco Partners Marketing & Terminals, L.P./Energy Transfer (“Sunoco” or “SPMT”), Kimberly-Clark Corporation/Kimberly-Clark Pennsylvania, LLC (“KCC”) and the Municipal Protestants.¹

¹“Municipal Protestants” is the collective designation for Edgmont Township (“Edgmont”), Lower Chichester Township (“Lower Chichester”), Trainer Borough (“Trainer”), Upland Borough (“Upland”) and the Southwest Delaware County Municipal Authority (“SWDCMA”).

II. SUMMARY OF ARGUMENT

The opposition of I&E, OCA, OSBA, the County, Sunoco, KCC and the Municipal Protestants to the Company's Application as presented in their respective Main Briefs should be denied and rejected.

Valuations Pursuant to Section 1329

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.

Sections 1102/1103 and Certificates of Public Convenience

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").

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 and therefore will further the public interest.

Section 507 Contracts between Aqua and DELCORA

The contracts, including assignments of contracts, between Aqua and DELCORA, the Asset Purchase Agreement ("APA") and the Memorandum of Understanding ("MOU") should be approved as reasonable, legal and valid in accordance with Section 507.

III. ARGUMENT

A. Section 1329

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. Aqua replies, below, to the Main Briefs of the OCA, I&E, the County, Sunoco and Municipal Protestants that addressed Section 1329.

1. Reply to OCA Main Brief

As to valuation, the OCA presents the following question for consideration:

Q. Whether the valuations provided pursuant to Section 1329 are reasonable under Chapter 13 of the Public Utility Code and accepted financial and ratemaking principles?

a. Challenges to UVE Appraisals

Aqua does not oppose the opportunity of OCA to review the Utility Valuation Experts (“UVE”) appraisals and recommend adjustments. We disagree, however, that the standard is “reasonable” and “accepted financial and ratemaking principles” as presented above in OCA’s question for consideration.²

The statutory standard for UVE appraisals is “fair market value in compliance with the Uniform Standards of Professional Appraisal Practice (“USPAP”) employing the cost, market and income approaches.”³ This was affirmed in *New Garden*⁴ where the Commission stated that “when construing Section 1329 in conjunction with both Section 505 and Section 1103(b) of the Code, it is clear that the Commission retains the authority to review and analyze the UVE valuations to

² In its Summary of Argument, the OCA posits a still further afield standard contending that its appraisal adjustments are necessary to account for “accepted ratemaking and regulatory principles.” OCA Main Brief at 6.

³ 66 Pa. C.S. § 1329(a)(3).

⁴ *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township and the New Garden Township Sewer Authority*, Docket No. A-2016-2580061, Opinion and Order entered June 29, 2017 (“*New Garden*”).

determine compliance with the USPAP standards and whether the three methods were accurately applied to the UVEs' analyses.”⁵

The application of standards other than fair market value in compliance with USPAP would be a violation of Section 1329 and inconsistent with the Commission's prior decisions. The review standards of “reasonable” and “accepted financial and ratemaking principles,” as proposed by the OCA, should be rejected.⁶

Aqua also disagrees with OCA's assumption that the testimony and proposed adjustments of OCA witnesses are entitled to equal weight with the Fair Market Value Appraisals. The Appraisals are prepared and sponsored by certified UVEs that are qualified by statute and registered with the Commission. The UVEs are independent and unbiased. The same cannot be said of OCA witness Smith.

Mr. Smith is neither a UVE, nor is he unbiased. He was engaged by the OCA to review and critique the Application and certain supporting documentation. There is no evidence that he was tasked with analyzing the Appraisals from a USPAP perspective. Ultimately, Mr. Smith's testimony is not entitled to the same weight as the independent analyses and appraisal results of the UVEs.

Both appraisal firms have extensive, specific experience with the valuation and appraisal of utility assets. Mr. Smith presented no evidence showing he has any experience with the valuation and appraisal of utility assets. Mr. Smith cited no authoritative sources supporting the appropriateness of his proposed adjustments to the appraisals.

⁵ *New Garden*, slip op. at 14.

⁶ See OCA Main Brief at 11 where OCA contends that Mr. Smith's adjustments are needed “in order to properly reflect financial and ratemaking principles.”

OCA contends that there are “flaws” in the UVE appraisal results⁷, but that contention should be carefully considered inasmuch as it is based on the testimony of a witness who is not qualified or legally competent to conduct and present a Fair Market Value Appraisal in the first instance. In the end, the Commission should reject the criticisms just as it would reject, for example, the testimony of a non-financial expert criticizing the testimony of a rate of return expert.

b. Cost Approach

i. Gannett Depreciation Rates

OCA recommends that the Aqua depreciation rates approved in the Company’s last base rate case be utilized in Gannett’s Cost Approach. This attempt to synchronize appraisal depreciation rates with rate case depreciation rates is a clear and direct violation of appraisal standards. As explained in Aqua’s Main Brief, under a standard of value of fair market value, the buyer is a hypothetical or generic entity, not a specific entity such as Aqua. Mr. Smith’s proposed use of Aqua rate case depreciation rates in the Cost Approach results in an irrelevant standard of value of investment value, *not* fair market value. Mr. Smith, who is not an appraiser, apparently, neither understands nor appreciates the difference. Additionally, in a clear showing of impermissible bias, Mr. Smith recommended using Aqua specific depreciation rates *only* where it would *lower* the appraised asset value.⁸

The issue here is not the same as the service life issue in *Cheltenham*⁹ as contended by OCA.¹⁰ In *Cheltenham*, OCA challenged the AUS Cost Approach because the service lives used by AUS in the Approach differed from the service lives used by AUS in previous fair market value appraisals. That is not the issue here where the OCA is proposing that *buyer* specific service lives

⁷ See OCA Main Brief at 11.

⁸ See Aqua Main Brief, Section V.A.4.a.i.

⁹ *Application of Aqua Pennsylvania Wastewater, Inc.*, Docket No. A-2019-3008491 (Opinion and Order entered November 5, 2019) (“*Cheltenham*”).

¹⁰ See OCA Main Brief at 12-13.

are appropriate within the Cost Approach. If the Commission were to adopt Mr. Smith's methodology, 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 the identity of the buyer.

OCA's proposed adjustment to the Gannett Cost Approach should be rejected. The Gannett Cost Approach result is \$399,664,113.

ii. ScottMadden Depreciation Rates

OCA recommends adjustments to three accounts in the ScottMadden Cost Approach to reflect, again, the depreciation rates used by Aqua and approved by the Commission in Aqua's most recent base rate case. The adjustments are inappropriate and should be rejected for the reasons set forth above in the discussion of OCA's proposed adjustments to the depreciation rates in the Gannett Cost Approach and for the further reasons presented in the Aqua Main Brief.¹¹ The ScottMadden Cost Approach result is \$292,413,993.

c. Market Approach

i. The Gannett Market Approach

The Gannett Market Approach involves two methods: (i) the Market Multiples method; and (ii) the Selected Transaction method. OCA does not recommend any adjustment to the Market Multiples method, but proposes adjustments to the Selected Transactions method. OCA's adjustment would reduce the Market Approach result from \$438,337,696 to \$422,745,927.¹²

OCA's attempt to rely on *ex post*, Commission determined ratemaking rate base values in the Selected Transaction method is wholly inappropriate.¹³ Mr. Walker's Selected Transaction

¹¹ See Aqua Main Brief at V.A.4.a.ii.

¹² OCA Main Brief, Table 1.

¹³ See Aqua Main Brief at V.A.4.b.i.

method was previously approved by the Commission in *Limerick*.¹⁴ The use of *ex post*, Commission approved ratemaking rate base values in the Selected Transaction method was also rejected by both Judge Jones and the Commission in *Cheltenham*.¹⁵ As explained there, "... introducing the Commission's determination of ratemaking rate base as the proper input in the market approach is not a reflection of what willing buyers will ultimately pay in a market."¹⁶

The Selected Transaction method relies on and reflects information that was known, *ex-ante*, 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 the bid (price) was made. 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 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 of the bid. It is unrealistic for Mr. Smith to suggest that *ex post* original cost studies are more appropriate than *ex-ante* information in the Market Approach.¹⁷

OCA's proposed adjustment to the Gannett Market Approach should be rejected. The Gannett Market Approach result is \$438,337,696.

ii. The ScottMadden Market Approach

The ScottMadden Market Approach involves two methods: the Market-to-Book Multiple method and the Comparable Sales method. OCA did not recommend any adjustment to the Market-to-Book Multiple method, but eliminated the Comparable Sales method from the Market Approach

¹⁴ *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Limerick Township*, Docket No. A-2017-2605434, Opinion and Order entered November 29, 2017 ("*Limerick*"), slip op. at 40.

¹⁵ *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Cheltenham Township and Contracts between Aqua Pennsylvania Wastewater, Inc. and Cheltenham Township*, Docket No. A-2019-3008491, Opinion and Order entered November 5, 2019 ("*Cheltenham*"), slip op. at 60-61.

¹⁶ *Cheltenham*, slip op. at 61.

¹⁷ Aqua St. No. 8-R at 19.

claiming that the method is unreliable because of the significant dollar result produced by the method. OCA's adjustment would reduce the Market Approach result from \$613,520,480 to \$415,589,365.¹⁸

Mr. D'Ascendis considered OCA's concern with the results of the Comparable Sales method but concluded that it was unfounded and unsupported.¹⁹ He emphasized that he had accounted for any concern with the method's results by assigning a low weight of 5% to the overall Market Approach. Mr. D'Ascendis' recognition of the issue and his handling of it by assigning a lower weight to the Market Approach is entirely appropriate and reflective of proper appraisal standards. OCA's proposal, on the other hand, which not only eliminated the Comparable Sales method from the Market Approach, but then arbitrarily applied equal weighting to each Approach, does not.

OCA's proposed adjustment to the ScottMadden Market Approach should be rejected. The ScottMadden Market Approach result is \$613,520,480.

d. Income Approach

i. Introduction

OCA has challenged unsuccessfully UVEs' determination of terminal value in past Aqua Section 1329 proceedings. Most recently, in *Cheltenham*, the Commission accepted the terminal value presented by the UVEs as part of the Income Approach, while noting that its rejection of OCA's arguments concerning terminal value is consistent with *Limerick*:

Finally, regarding the OCA's proposed adjustments relating to the UVEs' use of a terminal value, the ALJ rejected the OCA's arguments challenging Gannett's use of a 13-year terminal value and AUS' use of a 20-year terminal. We adopt the ALJ's recommendation and note the ALJ's recommendation is consistent with our decision in *Limerick*. See *Limerick Order* at 22.²⁰

Mr. Walker explained that Gannett has applied a capitalization rate concept to estimate

¹⁸ OCA Main Brief, OCA Table I.

¹⁹ See Aqua Main Brief, Section V.A.4.b.ii.

²⁰ *Cheltenham*, slip op. at 57.

terminal value in *nine* Section 1329 proceedings and the Commission has not adjusted the concept in any one of those prior *nine* proceedings.²¹ He emphasized that OCA's proposal here to use Net Plant Value as the terminal value is *identical* to the proposal rejected by the Commission in Cheltenham.²² Because OCA has presented no new justification for its adjustment of terminal value, it should be rejected, again, here.²³

ii. The Gannett Income Approach

Gannett's Income Approach indicated a value of \$387,754,301 for the DELCORA system based on the capitalization of earnings or cash flow method and the discounted cash flow method. OCA's adjustment, based on a recalculation of the terminal value using Net Plant,²⁴ would reduce the Income Approach result from \$387,754,301 to \$305,063,465.²⁵ OCA's recalculation of the terminal value should be rejected for the reasons set forth above and in Aqua's Main Brief.²⁶ The Gannett Income Approach result is \$387,754,301.

iii. The ScottMadden Income Approach

ScottMadden's Income Approach indicated a value of \$291,863,370 for the DELCORA system based on the discounting of expected or future cash flows to present value. OCA's adjustment, based on a recalculation of the terminal value using Net Plant less Accumulated Deferred Income Taxes from the Gannett appraisal, would reduce the ScottMadden Income Approach result from \$291,863,370 to \$163,125,306.²⁷ OCA's recalculation of the terminal value should be rejected as set forth above and in Aqua's Main Brief.²⁸ The ScottMadden Income Approach result is \$291,863,370.

²¹ Aqua St. No. 8-R at 10.

²² Aqua St. No. 8-R at 14.

²³ See Aqua Main Brief, Section V.A.4.c.

²⁴ OCA Main Brief, at 22, incorrectly states Accumulated Deferred Income Taxes ("ADIT") was subtracted from net plant. Mr. Smith admitted this in response to discovery as explained at pages 15-16 of Aqua St. No. 8-R.

²⁵ OCA Main Brief, OCA Table I.

²⁶ See Aqua Main Brief, Section V.A.4.c.i.

²⁷ OCA Main Brief, Table 1.

²⁸ See Aqua Main Brief, Section V.A.4.c.ii.

iv. **Income Approach - Conclusion**

The OCA challenge to the determination of terminal value is contrary to the evidence of record and prior Commission decisions. It should be rejected here as it has been rejected in the past. The Income Approach results of Gannett and ScottMadden should be accepted without adjustment or modification.

2. **Reply to I&E Main Brief**

I&E does not challenge the UVE appraisals but contends that the appraisals may be flawed because they were predicated on collection system assets of Upland, Trainer and Edgmont that DELCORA does not own or cannot transfer.²⁹ Aqua addressed its continuing efforts to obtain consents to assignment of the Municipal Protestants' contracts in its Main Brief. It also addressed Aqua and DELCORA's intent for Aqua to act as the agent or subcontractor of DELCORA in the absence of consents to contract assignment.³⁰

I&E's claim that in the absence of contract assignments the appraisals are flawed and that "ratepayers, stand to get a lot less than they will pay for"³¹ is inaccurate and contrary to the testimony of the UVEs. Both Mr. Walker and Mr. D'Ascendis addressed the issue in response to questions from Municipal Protestants' counsel Rubin, explaining that what I&E characterizes as a "flaw" would not impact the appraisals in any meaningful or significant way.

Mr. D'Ascendis described the removal of municipal assets as "not really relevant to [his] analysis" and, ultimately, having no more than a "rounding" effect on his appraisal results.³² Mr. Walker focused on Exhibit 9 of the Gannett Appraisal Report and testified that, bringing forward Replacement Cost New Less Depreciation ("RCNLD") to 10/31/20 and subtracting the retail collection system assets of Upland, Trainer and Edgmont, would *increase* RCNLD to

²⁹ See I&E Main Brief at 14 and

³⁰ See Aqua Main Brief, Section V.D.

³¹ See Aqua Main Brief at 51.

³² Tr. 484-489

\$414,252,987.³³ Mr. Walker explained that this conclusion should not be surprising since the Gannett appraisal (Application Exhibit Q) at page 29 cautioned that the majority of DELCORA's 2018 \$57.5 million construction work in progress ("CWIP") was not included in the Engineer's Assessment and therefore not included in the appraisal, stating "[a]ccordingly, we believe a substantial amount of CWIP related plant assets are likely to be included in the currently proposed transaction which have not been accounted for under our Cost Approach."

Ultimately, to have an impact on the proposed ratemaking rate base of \$276,500,000, the removal of municipal assets from the appraisal analysis would have to reduce the average appraisal value of \$358,538,503 by approximately \$80,000,000. Neither UVE testified that this would occur as set forth above and, contrary to the assumption that fair market value would decrease, Mr. Walker explained that bringing RCNLD forward would actually increase fair market value.

3. Reply to County Main Brief

The County does not challenge the UVE Appraisals but contends (1) that the DELCORA Customer Assistance Trust payments fall within the definition of a rate stabilization plan under Section 1329(g) of the Code³⁴ and (2) that the Proposed Transaction was not negotiated at arms' length as it contends is required by the definitions in Section 1329(g).³⁵ We address these contentions below.

a. Aqua Has Not Proposed a Rate Stabilization Plan

The County mischaracterizes the DELCORA Customer Assistance Trust payment as a Section 1329 "rate stabilization plan." The DELCORA Trust and resulting DELCORA Customer Assistance Trust payment is a voluntary DELCORA proposal whereby DELCORA will take the non-jurisdictional net proceeds from the sale of its wastewater system and, through a customer

³³ Tr. 398-400.

³⁴ See County Main Brief, Sections V.A.2 and 3.a.

³⁵ See County Main Brief, Sections V.A.2 and 3.b.

assistance payment to appear on Aqua's bill, provide a benefit to customers. The Commission's *only* involvement in DELCORA's intended use of its non-jurisdictional Proposed Transaction sale proceeds is to determine whether the presentation of the customer assistance payment is permissible as a line item on the Aqua bill.³⁶ If the Commission concludes that the customer assistance payment is not acceptable, DELCORA will provide the same financial benefit to customers in another way that does not utilize the Aqua bill.

Critical and dispositive of the question of whether the DELCORA Customer Assistance Trust payment is a "rate stabilization plan" under Section 1329 is the undeniable fact that the DELCORA Customer Assistance Trust payment will have no impact or effect on Aqua's tariff rates. In respect to tariff rates, Aqua will implement DELCORA's wastewater rates in effect at closing of the Proposed Transaction as reflected on Schedule 7.04(a) of the APA. The payment is not an Aqua discount to its rates because Aqua calculates, but does not determine the amount of, the Customer Assistance Trust payment – that is DELCORA's determination.

Contrary to I&E's assertions, Aqua has not established, in the form of the MOU, a contracted arrangement to provide a discount to its rates.³⁷ The MOU merely facilitates the placement of a customer assistance payment decided by DELCORA, on the Aqua bill.

Section 1329(g) of the Code defines a "rate stabilization plan" as "[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case." Aqua is not proposing to hold its rate constant or phase in rates. Thus, Aqua is not proposing a "rate stabilization plan." Aqua had no statutory or other obligation to present testimony or data in support of such a plan because there was no plan to support. The DELCORA Customer Assistance Trust payment need not, and should not be, part of Aqua's tariff.

³⁶ Aqua has presented, for Commission approval under Section 507, a MOU detailing the application of the DELCORA Customer Assistance Trust payments through Aqua's billing process.

³⁷ I&E Main Brief at 34.

The County's attempt to expand the definition of "rate" to include the use of non-jurisdictional Proposed Transaction sale proceeds as a bill credit should not be allowed. DELCORA's use of the sale proceeds is, in fact, a purely private, and non-jurisdictional matter, with the only issue relevant to the Commission being, again, whether to allow the DELCORA Customer Assistance Trust payment as a line item on the Aqua bill. Aqua did not violate Section 1329 by failing to file a "rate stabilization plan." To the contrary, Aqua had no "rate stabilization plan" to file. The County's request that the Commission dismiss the Application or, in the alternative, require Aqua to refile it with a "rate stabilization plan" should be rejected.

Although I&E contends that Aqua deprived the Commission of "critical information,"³⁸ it should be noted that Aqua provided more data and transparency in this proceeding regarding potential rate impacts than in any other 1329 proceeding, including, ten years of rate impact information in an expanded version of Appendix A and twenty years of data in response to forecasts provided by intervening parties. There is ample evidence in the record regarding future rate impacts for the Commission to consider.

b. The Proposed Transaction Was Negotiated at Arms' Length

The County contends that a lack of competitive bidding, Mr. Willert's executive opportunity with Aqua, and the UVE appraisal results support a conclusion that the Proposed Transaction was not negotiated at arms' length. The contentions are inaccurate in law and fact as addressed below.

i. The County's Concern with Lack of Competitive Bidding

The County complains that Aqua was "selected" as the purchaser without competition or transparency and that the Proposed Transaction, thus, was not negotiated at "arms' length." The County acknowledges, however, (1) that the traditional definition of arms' length does not require a competitive bidding process and (2) that the Code does not require a competitive bidding process

³⁸ See I&E Main Brief at 39.

for utility acquisitions. Yet, the County asks the Commission to, in effect, go beyond its jurisdictional limits and consider the lack of competitive bidding in its consideration of the Proposed Transaction, and then determine that the Proposed Transaction was not negotiated at arms' length. The Commission should decline to do so.

DELCORA is an independent authority with a board of directors that has decision making powers. It was not looking for the highest possible purchase price for its system. In what must be considered as a reasonable and prudent analysis and decision, DELCORA was looking for an optimal price, ultimately translated into a rate base, which would insure that its customers not pay rates any higher than necessary.³⁹ DELCORA worked with a financial advisor to develop the purchase price and to understand potential rate impacts. Financial projections supported the negotiated purchase price as being the best for DELCORA customers, both now and over time.⁴⁰ It would be inappropriate and beyond the Commission's jurisdiction for the Commission to substitute its own judgment and second guess DELCORA's decision making process and conclusion.

DELCORA, moreover, has clear and explicit authority under the Municipality Authorities Act ("MAA") to sell its assets and enter into contracts by which it will do so. It was not required to seek Delaware County Council approval prior to entering into the APA. DELCORA, nevertheless, was completely transparent with Council about the Proposed Transaction, making several public presentations to it prior to entering into the APA.⁴¹

ii. Mr. Willert's Potential Executive Opportunity

The County complains that Mr. Willert's potential executive opportunity with Aqua indicates a lack of arms' length negotiation. The County acknowledges, however, that the

³⁹ Mr. Willert explained that a bidding process could have driven up the purchase price. If the sale, for example, were for \$400 million, customers would have to pay back the \$400 million through higher rates. Delaware County St. No. 2, Exhibit BPZ-3 at 66.

⁴⁰ Aqua St. No. 5-R at 8; *See also* Delaware County St. No. 2, Exhibit BPZ-3 at 53.

⁴¹ Aqua St. No. 5-R at 8-9.

conceptual memorandum concerning Mr. Willert's potential executive opportunity occurred *after* the execution of the APA and the opportunity, in and of itself, would *not* support a finding that the Proposed Transaction was negotiated at other than arms' length.⁴²

More notable, however, in respect to the County's claim of lack of arms' length negotiation, is Mr. Willert's deposition testimony. Mr. Willert was *not* "heavily involved in the negotiations for the transaction," as erroneously claimed by County witness Zidek in testimony and the County in its Main Brief.⁴³ To the contrary, Mr. Willert clearly testified at his deposition that he was *not* "directly involved" in negotiating the APA – "the lawyers handled that."⁴⁴ Additionally, while Mr. Willert hoped to be in charge of the new Aqua wastewater division, there was "no guarantee" and "there was no talk about it."⁴⁵ Finally, Mr. Willert had a five year contract with DELCORA, which was renewed in December 2019, and that contract is a binding obligation of DELCORA.⁴⁶

Ultimately, irrespective of whether Mr. Willert was involved in the sale negotiations or not, the Proposed Transaction was approved by the DELCORA Board of Directors. There is, in short, no basis for the County to suggest that the Proposed Transaction was negotiated at other than arms' length and its claim should be rejected.

iii. Purchase Price

The County contends further that the purchase price of \$276,500,000 for the DELCORA system is below market as evidenced by the higher dollar value of the appraisal results and further indicative of the absence of arms' length negotiations. The contention is in contrast to the usual Section 1329 criticism that the negotiated sale price is too high. The County acknowledges that a

⁴² County Main Brief at 21-22.

⁴³ County Main Brief at 22.

⁴⁴ Delaware County St. No. 2, Exhibit BPZ-3 at 58.

⁴⁵ Delaware County St. No. 2, Exhibit BPZ-3 at 57.

⁴⁶ Delaware County Hearing Exhibit No. 3.

purchase price below UVE appraisal results is expressly contemplated by Section 1329 and would not, in and of itself, confirm the absence of arms' length negotiations.⁴⁷

DELCORA, as explained above, was not looking for the highest possible purchase price. Knowing that customers would ultimately be obligated to pay back the purchase price, it looked for an optimal price, which would ensure that its customers not pay rates any higher than necessary. Although the Gannett and ScottMadden appraisal results are higher than the negotiated purchase price, they are not markedly higher. Additionally, and significantly, the adjusted appraisal result of \$280,655,000 submitted by OCA (with which Aqua disagrees) is approximately equal to the negotiated purchase price of \$276,500,000.

iv. Conclusion

Arms' length negotiating is not defined by competitive bidding. Competitive bidding is not a requirement of the Code. Mr. Willert was not "heavily involved" in the negotiation of the APA as alleged by the County. The UVE appraisals (with or without OCA's proposed adjustments) do not call into question the arm's length nature of the APA negotiations. The APA was negotiated by Aqua and DELCORA at arms' length. The County's criticisms of the negotiation process are inaccurate in fact and law and should be rejected.

4. Reply to Sunoco Main Brief

Sunoco states that it did not contest Section 1329 valuation issues except to the extent that, if the Commission approves the Application, it should condition its approval on requiring that ownership of the Western Regional Treatment Plant ("WRTP") and 26 Combined Sewer Overflow ("CSO") regulators remain with DELCORA. Sunoco's proposed condition should be denied for the reasons presented in Aqua's Main Brief⁴⁸ and in this Reply Brief.⁴⁹

⁴⁷ County Main Brief at 23-24.

⁴⁸ See Aqua Main Brief, Section V.C.5.

⁴⁹ See Section V.C.5, *infra*.

5. Reply to Municipal Protestants Main Brief

Municipal Protestants contend, under a heading of “Section 1329 - Legal Principles,” that the Proposed Transaction raises two important legal issues: (1) whether the Commission may approve a transaction that involves the sale of property to a public utility when the seller does not have the right to sell the property; and (2) whether it is constitutional to permit Aqua to include in rate base the full purchase price of certain DELCORA assets without regard to how DELCORA obtained those assets. Aqua replies to these issues below in Section D – Section 507 Approvals.

B. Section 1102/1103 Standards – Public Interest

1. Fitness

a. Reply to County Main Brief

The County contends that Aqua is not entitled to a presumption of technical, managerial and, particularly, legal fitness.⁵⁰ Aqua addressed the presumption of fitness in its Main Brief. Aqua did not solely rely on the presumption. It also presented evidence in support of its fitness.⁵¹

As to legal fitness, the County cites no pending legal proceedings challenging Aqua’s ability to provide safe and adequate service, because there are none. Instead, it refers to the Delaware County Court proceeding where the County is challenging the legality of the DELCORA Trust and attempting to terminate DELCORA. That proceeding is, in no way, a challenge to Aqua’s ability to provide reasonable and adequate service. The County offers no explanation as to how it might.

The County also refers, again, to alleged lack of arms’ length negotiation and to alleged conflict of interest concerns with Mr. Willert’s role in the Proposed Transaction as a legal deficiency. The County has mischaracterized Mr. Willert’s involvement in the negotiation of the APA, as addressed above. Mr. Willert was not conflicted.⁵² In any event, this allegation in no way

⁵⁰ See County Main Brief, Section V.B.2.

⁵¹ See Aqua Main Brief, Section V.B.2.

⁵² See Section III.A.3,b.ii, *supra*

casts doubt on Aqua's ability to provide reasonable and adequate service. The County offers no explanation as to how it does.

Finally, as to legal fitness, the County refers to the contractual arguments of the Municipal Protestants and the issue of contract consents to assignment. These contractual arguments are, in no way, a basis for questioning Aqua's ability to provide reasonable and adequate service. The County offers no explanation as to how they are.

Aqua witness Bubel addressed the Company's technical/managerial fitness at length in Aqua Statement No. 4. Demonstrating Aqua's technical/managerial fitness, he explained that (i) Aqua has wastewater systems in close proximity to the DELCORA system; (ii) Aqua operates treatment facilities similar to the DELCORA facilities, including the WRTP; (iii) Aqua will continue to implement the DELCORA Long Term Control Plan ("LTCP"); (iv) Aqua has emergency preparedness measures and safety programs in place; and (v) Aqua will be implementing capital projects to expand capacity at the WRTP and will continue to make improvements to the system to ensure any future customer demands are met.

2. Affirmative Public Benefits

a. Reply to County Main Brief

i. Introduction

The County contends that the Proposed Transaction is presented "without [its] ... approval, consent, or support;"⁵³ that the Proposed Transaction does not offer substantial affirmative benefits; and will not benefit the public.⁵⁴ The County's contention that the Proposed Transaction lacks public benefit is contrary to the testimony of public witnesses at the public input hearing who, by and large, recognized the public benefit of the Proposed Transaction:

⁵³ County Main Brief at 5.

⁵⁴ County Main Brief, Section V.B.3.

... I do ask that the merger between Aqua and DELCORA be allowed to proceed unobstructed in what I believe is the best interest of the ratepayers in Delaware County.” Testimony of Joe Ward, Tr. 91.

...I am the former mayor of Upper Darby Township, which is the sixth largest municipality with a population of 82,000 residents ... The Aqua deal gets DELCORA residents out of the City of Philadelphia, which will ultimately be a good thing for the Delaware County residents as a whole ... [I] fully support the rate stabilization plan which will cap ratepayer increases at three percent for a long, foreseeable future while also allowing DELCORA and Aqua to build the necessary infrastructure which has been aging ... Even without the rate stabilization plan, I still believe that the deal should be approved because Aqua has the wherewithal to complete the necessary improvements to allow eastern Delaware County to divert from Philadelphia in an economical, responsible and environmentally safe manner. Testimony of Thomas Micozzi, Tr. 93-94.

It appears that Aqua has guaranteed the jobs of the DELCORA employees should this transaction be approved. For me, it is vital for these employees in this COVID-19 environment, when jobs are so difficult to find, to secure employment and stay with DELCORA as employees. I believe that benefits our county and eases any pain that would come with job losses, especially when it can be avoided. I don't see how that cannot be a good thing, aside from probably many other issues that go along with this transaction. Due to the long relationship that DELCORA has had with Aqua, I think these are the reasons why I feel that I should support this proposal. Testimony of Geraldine Rochon, Tr. 97.

I am in full support of this merger. Testimony of Darius Hill, Tr. 103.

I hope that you will approve this transaction to protect our environment in Delaware County at a time when so many environmental threats are around us. Testimony of Beth Gowie, Tr. 106.

... I fully support this merger. In a time of economic uncertainty with many Delaware County residents also facing financial hardship, a yearly rate increase of only three percent is feasible, and I believe in the best interest of not just me, but my family, my friends and my neighborhood, who would be negatively affected otherwise. Testimony of Tyra Cochran, Tr. 108.

... It seems to me that the two reputable Delaware County utilities with good reputations and attentive to their customers can be combined to be a bigger and better company for the Delaware County community.

I fully support the acquisition. Testimony of Lisa Piotrowski, Tr. 138

... I don't understand why the two companies just can't finalize the deal. It sounds like a no-brainer to me. I fully support the acquisition. Testimony of Danielle Stevenson, Tr. 142.

... [T]he county needs to let this go because Aqua can do it. ... [W]e need a private group such as Aqua, a major utility who understands the business inside and out, and has a buying power that's above all of the other parties involved. And that purchasing power is what's going to make this successful ... I have a lot of respect for Aqua. I think they're a great company, and I think a couple other people touched on it and I'll just say I agree, the fact that they're willing to keep the people employed, and they've got a great reputation. So, Your Honor, that's really all I have to say. I just know what it's going to cost, and I just feel that it's in better hands with Aqua than it is in its current situation. Testimony of James Santora, Tr. 144-145.

I'm hoping that you'll agree that the transaction is a win for ratepayers like myself and a win for the environment. So I am all for this transaction taking over. Testimony of Maureen Ganley, Tr. 152.

I'm a supporter of the sale of DELCORA to Aqua. Testimony of Jay Lovelass, Tr. 155.

We address the County's public interest contentions further below.

ii. Reply to the County's Public Interest Contentions

The County contends that the Proposed Transaction does not offer substantial affirmative public benefit to DELCORA customers and Aqua existing customers.⁵⁵

(a) Economies of Scale

The County contends that DELCORA is a large utility system and that Aqua failed to demonstrate that economies of scale will be realized as a result of the Proposed Transaction sufficient to overcome the higher revenue requirement that will result from operation of the DELCORA system by Aqua.⁵⁶

The evidence of record as highlighted by Mr. Packer in testimony⁵⁷ and by Aqua in its Main Brief⁵⁸ demonstrates that the Proposed Transaction will generate immediate economies of scale.⁵⁹ This is readily apparent, first, because Aqua is acquiring the DELCORA 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

⁵⁵ See County Main Brief, Section V.B.3.a).

⁵⁶ See County Main Brief at 30-34.

⁵⁷ Aqua St. No. 2 at 10.

⁵⁸ See Aqua Main Brief at 30.

⁵⁹ Additionally, as set forth in Aqua's Main Brief, pages 31-39, and in the following section of this Reply Brief, a higher revenue requirement will *not* result from the Proposed Transaction.

\$7,750. Stated differently, post-closing, economies of scale will occur because Aqua's rate base per customer will decrease from \$7,750 as a result of the Proposed Transaction at a significantly lower rate base per customer of \$2,250.

The evidence of record further demonstrates economies of scale as a result of the lowering of average Aqua rates post-closing. The estimated rate increase of 12.55% to DELCORA retail customers would increase their monthly rate to approximately \$46.44 per month. This is significantly less than Aqua's existing average wastewater rate of approximately \$68.27. Stated differently, post-closing, economies of scale will occur as system average rates will decrease.

While the foregoing demonstrates a benefit to the combined system through a potential sharing of costs at modified rate levels, there is also a direct benefit to DELCORA customers through reduced operating expenses as a result of the Proposed Transaction. Mr. Packer projected reductions total \$3.7 million in Property, General Liability Insurance, Information Technology, Outside Services for Legal and Engineering, Office Supplies & Advertising, Education and Training and Contingency Expense.⁶⁰

Additionally, and significantly, the Commission has a policy of consolidation/regionalization of wastewater system assets. The policy, which was recognized by the Commonwealth Court in *McCloskey*, supports consolidation/regionalization irrespective of the relative size of the buying and selling systems. The County's contention, which is inconsistent with the Commission's recognized policy favoring consolidation/regionalization, should be rejected.

(b) The Proposed Transaction Reduces Revenue Requirement

The County's contention that the Proposed Transaction will result in a higher revenue requirement, upon which its opposition to the Proposed Transaction is mostly based, is incorrect.⁶¹ Mr. Packer's revenue requirement analysis demonstrates that DELCORA customers will benefit by

⁶⁰ See County Hearing Exhibit No.1.

⁶¹ See County Main Brief at 34-41.

approximately \$312.9 million and \$111.4 million in savings, both with and without allocation of costs to Aqua wastewater customers, respectively, over 20 years regardless of whether costs are allocated to other Aqua water customers.⁶²

The County disputes the DELCORA revenue projections used in Mr. Packer's projection of revenue requirement arguing that they are based on Mr. Pileggi's "assumptions."⁶³ Mr. Pileggi is the Chief Financial Officer of DELCORA. The projections he provided to Mr. Packer are based on his familiarity with and knowledge of the DELCORA system. Those projections, which included increases related to infrastructure investment and operations and maintenance expense, are credible, and were properly used by Mr. Packer in his revenue requirement analysis. The County's effort to dismiss Mr. Pileggi's projections as mere "assumptions" should be rejected.⁶⁴

Mr. Pileggi, on the other hand, reasonably criticized Mr. Faryniarz's analysis for failing to take into account the significant increase in costs from Philadelphia Water Department's ("PWD") LTCP that are projected to be approximately \$86 million between 2020 and 2028. The PWD LTCP costs are *in addition to* the approximately \$450 million in capital costs being incurred to build infrastructure to divert flow from Philadelphia to Chester between 2020 and 2028.⁶⁵ Mr. Faryniarz has materially understated significant costs, a fatal flaw in his revenue requirement analysis.

Mr. Pileggi explained further that in its calculations of future rates, DELCORA allows for a debt service reserve fund ("DSRF") in each of its projected debt issues in compliance with its Trust Indenture. Each issue can add a substantial amount to the borrowing. For instance, a \$200 million borrowing may require close to a \$10 million DSRF deposit. DELCORA planned to borrow \$1

⁶² Aqua St. No. 2-R at 32-35.

⁶³ See County Main Brief at 39.

⁶⁴ Aqua St. No. 6-R at 3.

⁶⁵ Aqua St. No. 6-R at 3.

billion. This would calculate to be about \$50 million in additional costs – materially significant costs that Mr. Faryniarz failed to consider in his analysis.⁶⁶

Mr. Faryniarz also failed to consider and, in fact, ignored information from DELCORA's response to OCA Interrogatory Set III, No. 11, which shows DELCORA rate increases calculated from 2021 to 2025 as follows:⁶⁷

2021 - 5.66%`
2022 - 7.33%
2023 - 8.31%
2024 - 8.10%
2025 - 13.23%.

Rather than use the rate information provided by DELCORA, Mr. Faryniarz used his own unsupported annual rate increase assumptions for the years of 2021 to 2025 that bear no semblance to what DELCORA calculated its rate increases to be as presented in the discovery responses. In fact, contrary to reality, for 2021, Mr. Faryniarz shows DELCORA's revenue needs *decreasing* in spite of the need to fund a \$1 billion capital plan and increasing costs.⁶⁸

A further failing of the County's analysis is that it is at odds with how DELCORA funds capital improvement projects. Worksheets from Mr. Faryniarz's analysis show an unrealistic *decrease* in cash funded capital projects from \$8,000,000 in 2020 to \$1,000,000 in each of the years 2021 through 2023 based on his arbitrary assumption that DELCORA will finance these projects with debt financing instead of internally generated funds.

Mr. Pileggi explained that, for many years DELCORA has funded its ongoing small capital project needs through rates generated from its annual operating budget. The strategy was based on the fact that DELCORA's cost of borrowing would be greater than its rate of return on investments. Aside from a Penn Vest loan in 2009 at a subsidized borrowing rate for a specific project,

⁶⁶ Aqua St. No. 6-R at 3.

⁶⁷ Aqua St. No. 6-R at 3-4.

⁶⁸ Aqua St. No. 6-R at 3-5.

DELCORA minimized borrowing cost by not borrowing from 2004 to 2013.⁶⁹ The \$8,000,000 revenue requirement for minor capital projects in 2020 is evidence of this continuing strategy.⁷⁰

Mr. Faryniarz, however, removed the funding of small capital projects from his revenue requirement analysis and the County now contends, in its Main Brief, that this was appropriate because it is more likely that DELCORA will fund these projects with debt. This assumption is inconsistent with DELCORA's current and historic practices. It was specifically called out and rejected by Mr. Pileggi.⁷¹ Its only purpose is to skew the results to support the County's revenue requirement calculation and it is another reason why the County's revenue requirement analysis should be rejected.

Both Mr. Faryniarz and, as discussed below, Mr. Woods attempted to calculate DELCORA's expected revenue requirement. They arrived at different numbers: Faryniarz = \$143.7 million (2040); Woods = \$111 million (2040). Although markedly different, both numbers are incorrect as neither is based on the accurate and complete projections provided by Mr. Pileggi based on his knowledge and experience of the DELCORA system as Chief Financial Officer. The County's and Sunoco's concerns with an increased revenue requirement as a result of the Proposed Transaction are baseless and should be rejected.

(c) Other Rate Impacts and Expected Rate Increases

Citing Mr. Packer's testimony, the County further contends that Aqua has conceded that the Proposed Transaction *will* lead to rate increases.⁷² This is a mischaracterization of Mr. Packer's testimony. Mr. Packer testified that the Proposed Transaction is *likely* to have an impact on rates.⁷³ He also testified that, "while the rates of the DELCORA customers are reasonably expected to

⁶⁹ Aqua St. No. 6-R at 5.

⁷⁰ Aqua St. No. 6-R at 5.

⁷¹ Aqua St. No. 6-R at 6.

⁷² County Main Brief at 41, citing Aqua St. No. 2 at 12.

⁷³ Aqua St. No. 2 at 12.

increase, either on their own, or whether acquired by the Company, when part of Aqua, there is more flexibility and opportunity to deal with those impacts over a much larger customer base.”⁷⁴

Acknowledging the likelihood of increased rates is no more than acceptance of a simple fact. The DELCORA system is facing substantial rate increases going forward in order to cover the investment costs and expenses of leaving PWD at the end of the current contract and to upgrade and upsize the WRTP. The dispositive consideration, however, is not the likelihood of increased rates but rather the long-term revenue requirement *savings* of between \$111.4 million and \$312.9 million as a result of the Proposed Transaction, a clear, substantial affirmative benefit of the Proposed Transaction. These savings are conservative as they do not include possible benefits from Act 11 shifting of costs from wastewater to water customers, tax repair benefits, or future growth of the DELCORA system and the Aqua business as a whole.⁷⁵

(d) Other Benefits

The County contends that other benefits claimed by Aqua and DELCORA are unpersuasive and lack evidence. The substantial affirmative benefits of the Proposed Transaction are supported by the Application, and the testimony of witnesses Lucca, Packer, Bubel, Willert and DiSantis. They should be accepted as the required support for the Proposed Transaction, and the challenges of the County rejected.

(e) Rate Shock Upon Expiration of DELCORA Trust

The County complains further of potential “rate shock” after expiration of the DELCORA Trust. The complaint is based on the County’s claim of “inevitable higher costs of operating the DELCORA system under Aqua ownership.”⁷⁶ The long-term revenue requirement, however, is less under Aqua ownership than it would be under continued DELCORA ownership as discussed

⁷⁴ Aqua St. No. 2 at 12.

⁷⁵ Aqua St. No. 2-R at 35.

⁷⁶ See County Main Brief at 45.

above.⁷⁷ The County's claim of potential "rate shock" is not credible and should be given no weight.

b. Reply to Sunoco Main Brief

Sunoco presents many of the same public benefit arguments as the County. Its contention that the Proposed Transaction will produce higher rates is incorrect. The Proposed Transaction produces long term revenue requirement *savings* of between \$111.4 million and \$312.9 million, which are conservative as they do not include possible benefits from Act 11 shifting of costs from wastewater to water customers, tax repair benefits, or future growth of the DELCORA system and the Aqua business as a whole.⁷⁸

Mr. Woods made the same error in his revenue requirement analysis as Mr. Faryniarz. He ignored the revenue projections provided by DELCORA in discovery. The DELCORA projections, which were based on Mr. Pileggi's experience and knowledge of the DELCORA system, included increases related to infrastructure investment and operations and maintenance expense. Mr. Woods' projections of revenue requirement are too low as he omitted significant costs from his analysis. His analysis is further flawed as he included little inflationary increase from 2029 to 2040.⁷⁹

Sunoco contends further that economies of scale will not occur as a result of the Proposed Transaction. The evidence of record as discussed above demonstrates that the Proposed Transaction will generate immediate economies of scale and benefits to the combined system and for DELCORA customers. The Commission's policy supporting consolidation/regionalization of wastewater system assets, which was recognized in *McCloskey*, applies irrespective of relative size of the buying and selling systems. Sunoco's claim that the Proposed Transaction lacks affirmative public benefits should be rejected.

⁷⁷ See also Aqua Main Brief at 31-34.

⁷⁸ Aqua St. No. 2-R at 35.

⁷⁹ Aqua St. No. 6-R at 7-8.

c. Reply to KCC Main Brief

KCC contends that Aqua has not demonstrated that the increased cost of private-sector ownership will be offset by other benefits and that Aqua is simply planning to step into DELCORA's shoes and maintain the status quo. KCC adopts and incorporates by reference parts of the Sunoco Main Brief.

Similar to the County and Sunoco, KCC claims, incorrectly, that the Proposed Transaction will produce a higher revenue requirement for DELCORA customers. Aqua, again, as addressed above in reply to the County Main Brief, provided a revenue requirement projection demonstrating that DELCORA customers will benefit both with and without an allocation of costs to other Aqua customers by approximately \$312.9 million and \$111.4 million over the next 20 years.

KCC's further criticism of an alleged lack of economies scale is also addressed above in reply to the County Main Brief. As for environmental benefits, there is a very clear and substantial monetary benefit to moving away from PWD. Relative to DELCORA, Aqua has expertise in implementing large-scale projects and substantial experience in both continuing facility operations and maintaining regulatory compliance when performing and completing substantial plant upgrades as it is presently doing with the expansion of its Media wastewater treatment plant.⁸⁰

Under separate subheading, KCC also addresses the common pleas litigation by incorporating that section of the Sunoco Main Brief, the DELCORA Rate Stabilization Trust and, under the heading "Other," its terminated Service Agreement. The common pleas litigation is addressed below with references to Aqua's Main Brief and a later section of this Reply Brief. The DELCORA Trust, which is a significant benefit of the Proposed Transaction, is addressed below in Section III.C.1.b, in reply to the I&E Main Brief and in Section V.B.4.b of Aqua's Main Brief. KCC's terminated Service Agreement is addressed in Section V.D.3.b of Aqua's Main Brief.

⁸⁰ See Aqua St. No. 1 at 8-9.

3. Public Interest

a. Common Pleas Litigation

Aqua addressed the Common Pleas litigation in its Main Brief, Section V.B.4.a and is addressing it further below, in Section III.C.1.c. Aqua incorporates the referenced Sections of its Main and Reply Briefs here in reply to the Main Briefs of the County⁸¹ and Sunoco⁸² addressing “Common Pleas Litigation.” The condition proposed by the County that closing of the Proposed Transaction should not occur while the County litigation remains pending before the courts should be rejected.

b. Rate Stabilization Trust / DELCORA Trust

Aqua addressed the Rate Stabilization Trust / DELCORA Trust in its Main Brief and incorporates that discussion here in reply to the Main Briefs of I&E, Sunoco and KCC.⁸³ Sunoco’s additional contention, under this heading , that Aqua rates will be significantly higher than DELCORA’s and that DELCORA customers will not get a benefit from the DELCORA Trust is contrary to the evidence of record. The Proposed Transaction produces long-term revenue requirement *savings* of between \$111.4 million and \$312.9 million. These savings are conservative as they do not include possible benefits from Act 11 shifting of costs from wastewater to water customers, tax repair benefits, or future growth of the DELCORA system and the Aqua business as a whole.⁸⁴ Trust funding of \$200 million is reasonably based on a present estimate of net sale proceeds to DELCORA at closing. The concern over possible depletion of the estimated balance as a result Executive Order 12803 is addressed below.⁸⁵

⁸¹ See County Main Brief, Section V.B.4.a.

⁸² See Sunoco Main Brief, Section V.B.4.a.

⁸³ See Aqua Main Brief, Section V.B.4.b.

⁸⁴ Aqua St. No. 2-R at 35.

⁸⁵ See Section III.B.4.b, *infra*.

4. Environmental Aspects of the Proposed Transaction

a. Introduction

[BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[REDACTED]

86 [REDACTED]
87 [REDACTED]
88 [REDACTED]
89 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY
CONFIDENTIAL]

- 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.

[REDACTED] Aqua and DELCORA will [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

101 [REDACTED]
102 [REDACTED]
103 [REDACTED]

c. Concerns Regarding CSOs and CWA Funding Should Not Impact Approval of The Application.¹⁰⁴

Sunoco claims 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.”¹⁰⁵ As indicated in Aqua’s Main Brief, no basis was provided by Mr. Woods, other than Aqua’s status as a private company, for his view that 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.¹⁰⁶ Mr. Woods’ concern regarding CSOs is nothing more than unsupported speculation.

As noted in its Main Brief, Mr. Woods missed 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, both DELCORA and Aqua.¹⁰⁷ Specifically, Mr. Bubel rebutted Mr. Woods’ concerns regarding CSOs 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 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

¹⁰⁴ Aqua notes that Sunoco addressed these issues in Main Brief subsection V.B.4. (CWA Funding) and V.B.5. (CSOs), while it addressed both issues in subsection V.B.5. Environmental Aspects of the Proposed Transaction.

¹⁰⁵ CSOs are facilities that combine wastewater and stormwater collected from systems feeding into the DELCORA system. SPMT St. No. 2 at 9.

¹⁰⁶ Sunoco Main Brief at 41-43. SPMT St. No. 2 at 42.

¹⁰⁷ 25 Pa. Code § 93.7.

Transaction is expected to close.¹⁰⁸ Upon Aqua replacing DELCORA 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. Sunoco failed to adduce any evidence that CSO obligations greater than those imposed on DELCORA in order to meet Pennsylvania's Water Quality Standards, such as the cost of separating DELCORA's combined wastewater/stormwater facilities, will be required by EPA or DEP because Aqua is a private company.¹⁰⁹

Sunoco also advanced Mr. Woods' concern that moving the DELCORA system to private ownership will ultimately lead to (i) a lower proportion of Federal funds for infrastructure improvements under the CWA being allotted to Pennsylvania and (ii) the loss of financing assistance to DELCORA in the CWA revolving loan program, which will be replaced by higher-cost investor-owned utility capital.¹¹⁰ This argument could be made against any transaction in which public wastewater facilities are proposed to be transferred to private ownership and is tantamount to asking the Commission to reject all such transactions.

In its Main Brief, Aqua 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.¹¹¹ In addition, Aqua will pick up those infrastructure demands and it is unlikely CWA funding would fully meet the DELCORA system's capital requirements.¹¹² Nor is loss of access to CWA State Revolving Fund financing a negative factor. Mr. Woods' speculative estimates of a reduction in Pennsylvania funding under the CWA are not based on any federal formula and therefore are meaningless. It is also Aqua's understanding that most CWA Revolving Fund dollars go, in any event, to smaller

¹⁰⁸ Aqua St. No. 4-R at 7.

¹⁰⁹ *Id.*

¹¹⁰ SPMT St. No. 2 at 42-44.

¹¹¹ Aqua St. No. 4-R at 8.

¹¹² *Id.*

companies that cannot readily access market funding.¹¹³ In addition, Mr. Woods has not accounted for the increase in capital funding of infrastructure that will be available under Aqua ownership of DELCORA's system.

Accordingly, Sunoco's concerns regarding future CSO and loss of CWA funding are meritless and should be disregarded.

d. Executive Order 12803 Requirements Will Be Met

Executive Order 12803 ("EO") was issued in 1992 by then-President George H. W. Bush. Sunoco characterizes the EO as a requirement that will likely drain DELCORA's proceeds from the Proposed Transaction to the point where the funding of the Customer Trust will be so depleted that it will no longer exist as a substantial benefit of the Proposed Transaction.¹¹⁴ Sunoco has not provided any examples of how the nearly thirty year old EO has been applied in recent times. It essentially acknowledges that, since there are so few details on current day application of the EO, Mr. Woods' opinion that the EO will deplete the Customer Trust is speculative at best. 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.¹¹⁵

It remains to be determined to what extent there are any state, local or federal funds that EPA and the Office of Management and Budget ("OMB") will require to be returned to a government entity. What we do know is that the EO was intended to encourage the privatization of municipal infrastructure through sales to private entities such as Aqua in that it: (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

¹¹³ Aqua St. No. 4-R at 9.

¹¹⁴ Sunoco MB at 24-28.

¹¹⁵ Aqua St. No. 4-R at 12.

increase operating efficiency.¹¹⁶ According to a 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.”¹¹⁷ In short, we know the policy inherent in the EO is to enhance the viability of the Proposed Transaction, rather than act as an impediment to completing such transactions.

Aqua and DELCORA are sufficiently confident that complying with the EO will still allow the funding of the Customer Trust to remain robust that Aqua has proposed in its Main Brief accepting the following condition as part of the approval of the Application:

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

Aqua and DELCORA’s acceptance of this condition, combined with their commitment to resolve the EO requirements with the EPA’s Region 3 office in Philadelphia more than satisfy Sunoco’s concerns with the impact of the EO on the Proposed Transaction, and specifically the DELCORA Customer Assistance Trust. The existence and implementation of the EO in no way diminishes the affirmative benefits of the Proposed Transaction.

C. Recommended Conditions

1. Introduction

Aqua has carefully considered the conditions recommended by the intervening parties and adopted many of them. Aqua always takes approval conditions very seriously and has made commitments through settlements in many dockets and has fulfilled those commitments. However,

¹¹⁶ Aqua St. No. 4-R at 9.

¹¹⁷ *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.

some of the intervening parties suggest conditions that Aqua is concerned about agreeing to and seem, quite frankly, to ask the Company to undertake commitments that are beyond its control – thus, making it an unachievable request for any utility.

Particular to this proceeding is (1) the concept and recommendation of I&E for a “guarantee”, a commitment that potential worst case scenarios, “what ifs” and potential future litigation will not happen, or (2) in respect to Sunoco, a desire for Aqua and DELCORA to predict environmental agency decisions in order to ensure a specific outcome. These recommendations are both concerning and problematic.

Uncertainties are present in every transaction and the Commission has never sought to remove them by conditioning its approval with guarantees or commitments. This is well settled as a matter of law. In *Popowsky*,¹¹⁸ the Supreme Court explained that “*City of York* does not support the requirement ... that the Commission must secure legally binding commitments to assure public benefit from a merger.”

Aqua is very sensitive to the issues raised by the intervening parties and ready and willing to accept certain conditions, but the conditions themselves need to be actually achievable. The recommended conditions of other parties are addressed hereinafter.

2. Reply to I&E Main Brief

I&E recommends that the Proposed Transaction only be approved subject to three conditions:

- (1) Aqua should provide a separate cost of service study
- (2) The proposed DELCORA Trust should be rejected to the extent that it relies upon Aqua issuing customer bills that are lower than applicable tariff rates; and
- (3) Closing of the Proposed Transaction should not be permitted to occur until Aqua and DELCORA provide a guarantee that the 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

¹¹⁸ *Popowsky v. Pa. P.U.C.*, 937 A. 2d 1040 (Pa. 2007) at 1055.

terms of the APA

Each of I&E's conditions is discussed below.

a. Cost of Service Study

Aqua agrees and accepts, for the purpose of the Proposed Transaction, the condition as presented in the I&E Main Brief¹¹⁹ and the Aqua Main Brief:¹²⁰

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 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.¹²¹

The above condition addressing cost of service should be made part of the Commission's Opinion and Order approving the Proposed Transaction.

b. Irrevocable Trust Arrangement

I&E contends that the presentation of the DELCORA Customer Assistance Trust payment on the Aqua bill would be an impermissible discounting of Aqua's tariff rates and a violation of Section 1303 of the Code.¹²² I&E's contention mischaracterizes the DELCORA Customer Assistance Trust payment. Aqua will not be discounting its tariff rates through the application of the payment.

Section 1303 of the Code states as follows:

No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariff is of such public utility applicable thereto. ...¹²³

In compliance with Section 1303, Aqua will at all times while the DELCORA Customer

¹¹⁹ I&E Main Brief at 30.

¹²⁰ Aqua Main Brief at 59-60.

¹²¹ Aqua St. No. 2-R at 20-21.

¹²² See I&E Main Brief, Section V.C.II.

¹²³ 66 Pa. C.S. § 1303.

Assistance Trust payment is being applied, demand and receive its approved tariff rate for service. The full tariff rate will be shown on the Aqua bill. Stated differently, but with the same effect, at no time while the DELCORA Customer Assistance Trust payment is being applied, will Aqua demand or receive a greater or less rate than its tariff rate for service. *Only* after showing the full tariff rate will the DELCORA Customer Assistance Trust payment be applied and shown on the bill. Aqua will not be discounting its tariff rates.

Aqua provided a sample bill demonstrating the application of the DELCORA Customer Assistance Trust payment.¹²⁴ The sample bill shows how Total Current Sewer Charges will be presented, first, and, then, *only* after presentation of the Total Charges, will the DELCORA Customer Assistance Trust payment be presented as a line item payment. The proposed presentation is *identical* to the way other payments or credits are presented on the Aqua PA water bill¹²⁵ and no concern has ever been raised that that format is a violation of Section 1303. In fact and law, a line item credit or payment on the Aqua PA water bill is not a violation of Section 1303 and, similarly, the presentation of the DELCORA Customer Assistance Trust payment as a payment line item on the Aqua bill will not be a violation of Section 1303.

I&E cites the Recommended Decision in the Scranton Sewer Authority (“SSA”) proceeding at Docket No. A-2016-2537209 (August 17, 2016) in support of its position. The dicta comments of the ALJs in that proceeding do not represent the views of the Commission and are thoroughly distinguishable from the Trust proposal in this proceeding as explained in Aqua’s Main Brief.¹²⁶

I&E’s attempt to distinguish other bill payments or credits, such as LIHEAP and Helping Hand, as regulatory-approved need-based credits to eligible customers that are thereby permissible

¹²⁴ See I&E Exhibit No. 1, Schedule 4.

¹²⁵ See Aqua St. No. 2-R, WCP-2R Schedule B.

¹²⁶ See Aqua Main Brief, Section V.C.2.b. at 58-59.

under Section 1303¹²⁷ is unsupportable. While the distinguishing characteristics offered by I&E may be true, I&E fails to offer any explanation as to how these characteristics create an exception to Section 1303. In fact, they do not. If the proposed DELCORA customer assistance payment on the bill rises to the level of an illegal tariff discount in violation of Section 1303, then the LIHEAP and Helping Hand bill credits also rise to the level of illegal tariff discounts. I&E is making a plain language statutory argument under Section 1303 and there is no exception provided in Section 1303 for regulatory approved, need-based credits.

The presentation of a line item payment on the bill is not an illegal discounting of the tariff rate and not a violation of Section 1303. Compliance with Section 1303 is effected by the presentation of the full tariff charge for service on the bill followed by a line item payments. The proposed DELCORA Customer Assistance Trust payment, which will be presented as a payment on the Aqua bill, is not a violation of Section 1303. If regulatory approval is needed to authorize the payment and avoid Section 1303 prohibition then, as noted by I&E, Aqua has asked the Commission to approve the MOU in this proceeding.

I&E contends further that what Aqua should have done was file a rate stabilization plan.¹²⁸ The DELCORA customer assistance payment is not a rate stabilization as addressed above in Section III.A.3.a in reply to the County Main Brief.

c. Guarantee Related to County Court Litigation

I&E contends that closing of the Proposed Transaction should not be permitted to occur until Aqua and DELCORA provide a guarantee that the 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. It is notable, that while it recommended a guarantee, I&E did not propose a form of the guarantee for consideration. This lack of detail is sufficient, by itself, to warrant its rejection.

¹²⁷ See I&E Main Brief, Section V.C.II.c.

¹²⁸ See I&E Main Brief, Section V.C.II.d.

I&E's desire for a guarantee is contrary to transactional reality and, as set forth in the Introduction above, not a requirement of established precedent – legally binding commitments are not required to assure public benefit. Aqua addressed I&E's guarantee in its Main Brief¹²⁹ and addresses it further below.

i. DELCORA's Authority to Act as Seller

I&E recommends a guarantee because it is concerned that, pending the result in the County Court litigation, DELCORA may be dissolved and the APA may be determined invalid and unenforceable. I&E's concern is unrealistic and reflects a lack of understanding of the issues before the County Court.

The County's claims in the County Court action concern (a) a legal challenge to the Trust arrangement and (b) the County's desire to dissolve DELCORA. Neither of these challenges affects the validity and enforceability of the APA. The County, in fact, has not filed a pleading challenging the APA in County Court. The Trust arrangement is distinct from and not part of the APA.

Every transaction that comes before the Commission has elements that include a risk of uncertainty but that has not stopped the Commission from moving forward to address jurisdictional matters and approve proposed transactions. A guarantee relating to litigation in another venue has never been required and should not be required here.

As far as the merits of the County Court action are concerned, the APA was properly authorized and properly entered into by DELCORA in full compliance with the MAA. It contains multiple provisions which in effect mandate that DELCORA proceed to closing on the sale to Aqua prior to any dissolution of DELCORA by the County.

Finally, and significantly, in pursuit of a guarantee, I&E fails to understand that the dissolution of DELCORA would *not* terminate the sale obligations. Established law provides that

¹²⁹ See Aqua Main Brief, Section V.C.2.a.

should DELCORA be terminated prior to the Proposed Transaction closing, DELCORA's obligations then must be borne by the County. The I&E guarantee, in short, is unprecedented and unnecessary and should be rejected.

ii. The APA Is Viable

Related to the foregoing, I&E also recommends that closing of the Proposed Transaction not occur until Aqua and DELCORA provide the Commission with a guarantee that the County Court litigation will not result in any change to the terms of the APA. This further condition also should be rejected and for the same reasons as presented above in respect to I&E's concern with DELCORA's ability to act as seller.

I&E's contention in support of this condition that Aqua is actively seeking a determination that the APA is a valid and enforceable agreement is a mischaracterization. In the County Court litigation, Aqua is seeking a determination that the APA is binding and enforceable in the sense that it is a transaction that is authorized by the MAA, including *inter alia* MAA Section 5607(d) (providing DELCORA with the power to sell its assets). Aqua's reference to the APA as a valid and enforceable agreement in County pleadings is a factual averment in answer to the County's attempt to dissolve DELCORA without recognition of the APA sale obligations. DELCORA, moreover, as addressed below, did not misrepresent its ability to convey assets.

iii. Municipal Protestants' Property and Contracts

In further support of its recommended guarantee, I&E refers to disputes regarding DELCORA's ability to convey certain property and contracts.¹³⁰ Aqua addressed the possibility of non-assigned contracts in its Main Brief¹³¹ and is addressing it further below.¹³² The possibility that

¹³⁰ In the course of its discussion, I&E cites Municipal Protestants Exhibits 11 through 13. These Exhibits, however, were not marked or moved into the record (Tr. 516) and, consequently, should not be considered in respect to I&E's recommendation.

¹³¹ See Aqua Main Brief, Section V.D.

¹³² See Section III.D.

non-assigned contracts will need to be addressed is recognized in the APA. A guarantee is not needed and I&E's recommended condition should be rejected.

iv. Impact on Valuation

I&E attempts to justify its recommended guarantee by claiming that ownership uncertainty related to Upland, Trainer and Edgmont raises valuation issues. Aqua addressed I&E's valuation concerns above.¹³³ The appraisals are not flawed and ratepayers do not stand to get a lot less than they paid for. I&E's recommended condition should be rejected.

3. Reply to OCA Main Brief

OCA recommends that the Commission deny the Application, as filed, on the basis that it would not provide substantial affirmative public benefits and contends that the Application should only be approved subject to conditions it proposes. Aqua has accepted most of OCA's conditions as addressed in its Main Brief¹³⁴ and addressed further below.

Preliminary to that further discussion, Aqua disagrees with OCA's assertion that Aqua only offered generalizations in support of the Application.¹³⁵ Aqua, to the contrary, quantified the revenue requirement savings to DELCORA customers from the Proposed Transaction.¹³⁶ It also emphasized that, as a benefit to existing Aqua customers, it is acquiring the DELCORA system at a rate base of \$2,250, which is less than the Company's rate base per customer of existing systems of \$7,750. This quantified rate base differential demonstrates that there are immediate economies of scale as a result of the Proposed Transaction.¹³⁷ These are just two examples – both quantified – of the many benefits supporting the Proposed Transaction.

OCA presents a list of 12 recommended conditions for Commission approval of the

¹³³ See Section III.A.2, *supra*.

¹³⁴ See Aqua Main Brief, Section V.C.1 and 6.

¹³⁵ OCA Main Brief at 26.

¹³⁶ See Aqua St. No. 2-R at 32-35, Aqua Main Brief at 31-34 and Section III.B.2.a.ii.(b), *supra*.

¹³⁷ See Aqua Main Brief, Section V.B.3.b.i.

Proposed Transaction. Aqua discussed OCA's conditions in its Main Brief explaining that it agreed with some and disagreed with other of OCA's recommended conditions. Aqua's limited continuing disagreement with OCA is summarized as follows:

As to recommended conditions 2) and 4), the disagreement is only as to the establishment of a separate rate zone for DELCORA customers. Aqua submits that 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 it desires in the context of a future Aqua base rate proceeding.

As to recommended condition 6), 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 in its Main Brief. This condition is, thus, satisfied.

As to recommended conditions 7) and 8), the OCA seeks to clarify the Trust and to revise the MOU to add details regarding how the Trust proceeds will be properly credited to the former DELCORA customers. Aqua submits that the Trust Agreement¹³⁸ 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 administrative mechanics to apply bill assistance payments from the Trust to customer bills. These conditions are, thus, satisfied.

As to recommended condition 10), Aqua is willing to file reports showing how customer bill assistance payments are being applied to Aqua's bills to DELCORA customers. Aqua submits that annual reports, rather than quarterly reports as proposed by the OCA, are sufficient.

The conditions recommended by OCA, as modified above by Aqua and presented in its Main Brief,¹³⁹ should be made part of the Commission's Opinion and Order approving the Proposed Transaction.

4. Reply to OSBA Main Brief

The OSBA asks the Commission to approve a revenue allocation determination in this proceeding and proposes, 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 for wastewater

¹³⁸ See Aqua St. No. 5.

¹³⁹ See Aqua Main Brief, Section V.C.1 and 6.

service in Aqua's next rate proceeding. A determination regarding revenue allocation in this proceeding would be inconsistent with Commission practice. In its 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.¹⁴⁰

5. Reply to County Main Brief

The County recommends, as a condition for approval, if the Commission approves the Proposed Transaction, that closing not occur while the County litigation remains pending before the courts. The County litigation involves issues that are not jurisdictional to the Commission under the Code. The County's recommended condition, which is similar to I&E's proposed "guarantee" addressed above in Section III.C.1.c, should be denied for the same reasons.

6. Reply to Sunoco Main Brief

As an alternative to outright denial of the Application, Sunoco asks the Commission to require DELCORA to retain ownership on a permanent basis of the WRTP and the 26 CSO regulators [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]. [END HIGHLY CONFIDENTIAL] In the alternative, Sunoco requests that the Commission impose the same conditions on a transitional basis until necessary environmental permits are issued, the appeal period for challenging such permits has passed and any appeals are exhausted.¹⁴¹

Aqua thoroughly addressed Sunoco's proposed conditions in its Main Brief.¹⁴² Specifically, Aqua pointed out that Sunoco's surrebuttal testimony proposal to remove the WRTP and the CSOs from the Proposed Transaction based on Section 2.06 of the APA was untimely, and represented a deal far different from the one proposed in the Application and APA. Section 2.06 was intended to

¹⁴⁰ See Aqua Main Brief, Section V.C.3.

¹⁴¹ Sunoco Main Brief at 47.

¹⁴² See Aqua Main Brief at 41-54, 61-64.

address limited issues of asset assignability. There is simply no dispute regarding the assignability or transferability of the WRTP and the CSOs. Accepting Sunoco's condition to remove those assets from the Proposed Transaction would also remove the assets from Aqua's rate base, an event not addressed by the Parties to this proceeding. Nor should these conditions relating to the WRTP and CSOs be adopted by the Commission as transitional conditions, because the environmental permitting and process necessary to transition the WRTP and CSOs to private ownership is known and reasonably achievable.

Aqua explains in this Reply Brief why Sunoco's environmental permitting conditions are unnecessary, particularly given that it is willing to accept the condition to obtain DEP required permitting before closing on the Proposed Transaction.¹⁴³ Sunoco's proposed condition to delay closing of this Proposed Transaction until any appeal of an issued environmental permit is resolved should be rejected. Sunoco has made no case for appeals to be likely and moreover, the Commission should not be issuing the equivalent of a stay of closing based on a speculative environmental appellate issue.

7. Reply to KCC Main Brief

KCC recommended three conditions in testimony and an alternative fourth condition – a proposed contract rate or contract rider. In its Main Brief, KCC now recommends five conditions – including a recommended cost of service study presentation at least 60 days prior to the next Aqua rate case, which separates out the DELCORA Eastern and Western Regions. This new, fifth condition, which is presented for the first time in brief, should be rejected as untimely and without evidentiary support. The Commission should only consider the conditions as recommended by KCC in testimony and those conditions should be rejected as addressed by Aqua in its Main Brief.¹⁴⁴

¹⁴³ See Aqua Reply Brief Section III.B.4.

¹⁴⁴ See Aqua Main Brief, Section V.C.4.

8. Reply to Municipal Protestants Main Brief

The Municipal Protestants propose two conditions if their primary requested relief, denial of the Application, is not granted.¹⁴⁵ Neither condition is necessary or appropriate.

First, the Municipal Protestants ask the Commission to condition any approval of the Application on Aqua and DELCORA continuing to abide by all terms and conditions of their unassigned contracts.¹⁴⁶ As noted elsewhere in this Reply Brief, Aqua has already indicated that if it is unable to obtain mutually acceptable contract assignments with the Municipal Protestants, their contracts will be honored in their entirety with Aqua acting as agent/subcontractor for its principal, DELCORA.¹⁴⁷ Thus, there is no need to impose this as a condition since it is already part of Aqua's commitment for receiving the relief proposed in this proceeding.

Second, the Municipal Protestants request that certain previously paid amounts contributed by Edgmont (\$7.3 million) and SWDCMA (\$2.5 million) be used to reduce Aqua's Section 1329 initial rate base associated with the Proposed Transaction "to avoid an unconstitutional impairment of Municipal Protestants' contracts ..."¹⁴⁸ As noted further below, there is no impairment of the Municipal Protestants' service contracts with DELCORA, in any sense, constitutional or otherwise. If the Municipal Protestants do not assign their contracts to Aqua, they will be implemented by Aqua as DELCORA's agent in accordance with their terms. In that situation, to the extent previously contributed property was used in whole or in part to set the rates in the applicable contract, those rates will continue post closing of the Proposed Transaction and Edgmont or SWDCMA, as applicable, will continue to get the benefit of their contracted-for bargain. Because these contracts will continue to operate in accordance with their terms, there is no need for any condition to change Aqua's Section 1329 initial rate base associated with the Proposed Transaction.

¹⁴⁵ Municipal Protestants MB at 38.

¹⁴⁶ Municipal Protestants MB at 38.

¹⁴⁷ See, *infra*. at 49-50.

¹⁴⁸ Municipal Protestants MB at 38.

Further, any such proposed adjustment of Aqua's initial rate base for contributed property is inconsistent with the application of Section 1329, which requires the rate base associated with acquired assets to be set without regard to the original source of funding (i.e., contribution) for such asset. For these reasons, the Municipal Protestants' second condition must also be rejected.

D. Section 507 Approvals

1. Municipal Protestants' Contracts

a. Claims Relating to Sale of Property DELCORA Does Not Own

The Municipal Protestants claim that the Commission cannot issue a certificate of public convenience and approve a transaction involving a sale of assets that the seller (i.e., DELCORA) does not have the right to sell.¹⁴⁹ However, that broad assertion fails to account for the actual facts pertinent to this proceeding and the difference between the Proposed Transaction and subsequent ratemaking.

As noted in Aqua's Main Brief, three of the five Municipal Protestants have certain provisions in their existing service contracts with DELCORA which, if exercised, could prohibit DELCORA from selling certain wastewater assets and facilities and Aqua from purchasing them.¹⁵⁰ Edgmont has a right of first refusal to purchase certain DELCORA assets, while Trainer and Upland each have a reversionary interest in the collection system serving them.¹⁵¹ Importantly, none of these three municipalities has yet formally advised DELCORA or Aqua of their intention to actually exercise their contractual rights so the assets in question have not been removed from the Proposed Transaction.

What the Municipal Protestants have either failed to acknowledge or simply ignore is that Aqua unequivocally noted that, absent successfully negotiating mutually acceptable terms and

¹⁴⁹ Municipal Protestants Main Brief at 8.

¹⁵⁰ Aqua Main Brief at 68-69.

¹⁵¹ Aqua Main Brief at 68.

conditions of assignment of the contracts with Edgmont, Trainer and Upland, and assuming the right of first refusal or reversionary interests are properly exercised, the relevant assets will be transferred to those parties and will *not* be sold by DELCORA or purchased by Aqua.¹⁵² Accordingly, and contrary to the Municipal Protestants' claim, there will be no sale of any assets that are not owned by DELCORA in the Proposed Transaction.

In a further effort to support their claim that the Proposed Transaction cannot be approved because DELCORA cannot sell certain of its assets, the Municipal Protestants resurrect their reliance on *Bobtown Sewage Co. v. Pa. P.U.C.*, 195 Pa. Super. 330, 171 A. 2d 625 (1961) ("*Bobtown*")¹⁵³, much as they did in their earlier effort to dispose of this proceeding via Summary Judgment. *Bobtown* no more supports the Municipal Protestants' position now than it did earlier in this proceeding.

In *Bobtown*, the Superior Court explained, that the Bobtown buyer was not in a position to render service because of the pendency of an eminent domain proceeding to acquire the *entire wastewater system*. The circumstances here are markedly different. The five Municipal Protestants do not (and cannot) speak for the *entire* DELCORA retail and wholesale customer base. DELCORA has wholesale contracts with six large municipal authorities comprising the vast majority of Equivalent Dwelling Units ("EDUs") served.¹⁵⁴ Five of the six authorities have already consented to the assignment of their contracts in connection with the Proposed Transaction.¹⁵⁵ Only the sixth authority, SWDCMA, has declined to consent and, instead, protested Aqua's Application. This is hardly the *Bobtown* situation where the ownership of the entire system was expected to transfer to a non-Commission jurisdictional entity.

Bobtown, in sum, does not support the efforts of the five Municipal Protestants to reject the

¹⁵² Aqua Main Brief at 68.

¹⁵³ Municipal Protestants Main Brief at 8.

¹⁵⁴ The DELCORA system serves 197,000 EDUs. See Application Exhibit W2, Aqua Statement No. 6 at 4.

¹⁵⁵ See Application Exhibits F158-162.

relief requested in this proceeding. Unlike *Bobtown*, where the utility seller was prohibited by the eminent domain proceeding from selling its entire system, no such similar restriction impacts the entirety of DELCORA's system.

b. Claims Relating to Alleged Contract Impairment

The Municipal Protestants claim their service contracts with DELCORA will be impaired under the Proposed Transaction in alleged violation of Pa. Const. Article I, § 17, which prohibits “any law impairing the obligation of contracts.”¹⁵⁶ Once again, the facts do not support this sweeping assertion.

The Municipal Protestants do not define contract impairment, but it is essential in order to evaluate whether any state conduct has that impact. “The obligations of a contract,” said Chief Justice Hughes for the United States Supreme Court in *Home Building & Loan Ass'n v. Blaisdell*¹⁵⁷, “are impaired by a law which renders them invalid, or releases or extinguishes them . . . , and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights.”¹⁵⁸

There is no factual basis supporting any impairment to any of the Municipal Protestants contracts by operation of state law if they do not agree to consent to the assignment of their agreements to Aqua. As noted in Aqua's Main Brief, efforts have been underway and will continue to address possible mutually acceptable terms and conditions of the assignment of the Municipal Protestants' contracts to Aqua as envisioned in the Proposed Transaction and reflected in the APA.¹⁵⁹ Failing such assignment, or the exercise of reversionary or right of first refusal options, the service contracts will be honored and implemented in accordance with their terms, with Aqua acting

¹⁵⁶ Municipal Protestants Main Brief at 10 and generally at 10-23.

¹⁵⁷ 290 U.S. 398 (1934).

¹⁵⁸ 290 U.S. at 431.

¹⁵⁹ Aqua Main Brief at 67.

as the agent/subcontractor for its principal, DELCORA, as reflected in Section 2.06 of the APA.¹⁶⁰ Under the agent/subcontractor scenario, the Municipal Protestants' contracts are not and will not be impaired because they will be implemented fully in accordance with their terms, albeit with Aqua as the agent or subcontractor for DELCORA.

While the Municipal Protestants continue to insist that Section 2.06 of the APA cannot be implemented¹⁶¹, neither the facts nor the law support this position. The Municipal Protestants defend their view of APA Section 2.06 by claiming that each of their service contracts “require DELCORA to own and operate the wastewater treatment system.”¹⁶² What they fail to comprehend or acknowledge is that, under the agent and subcontractor paradigm envisioned by APA Section 2.06, DELCORA will continue to own and operate the systems under the respective agreements. But, since none of these contracts (i) are personal service contracts requiring literal performance by a specific party or (ii) contain contractual language prohibiting DELCORA from delegating its duties and obligations (as opposed to assigning the contract) to a third party while still remaining fully responsible for performance, and (iii) Pennsylvania law expressly acknowledges the right of a contract party to delegate its duties and responsibilities, the Municipal Protestants are both powerless to object to such arrangement and cannot legally or factually claim contract impairment.¹⁶³

The same analysis applies to Edgmont, Trainer and Upland, each of which has either a purchase right or a reversionary interest in assets presently serving them. If these entities elect to and properly exercise their contractual rights to reclaim the wastewater assets serving them, their contracts will have been fully implemented by their own terms and, by definition, cannot have been impaired at least by Aqua or DELCORA.

¹⁶⁰ Aqua Main Brief at 67-68; Application Exh. B1.

¹⁶¹ Municipal Protestants Main Brief at 17.

¹⁶² Municipal Protestants MB at 17.

¹⁶³ Aqua Main Brief at 70-71.

The Municipal Protestants real impairment concern emerges in the context of allegedly not being able to have their rates for wastewater set prospectively based on the value of property they contributed to DELCORA. As stated by the Municipal Protestants, they “... have contracts that delineate how the contributed property will affect the rates paid by customers.”¹⁶⁴ This situation affects both Edgmont and SWDCMA. However, if neither of these entities consent to the assignment of their agreement, rates will continue to be charged under the terms of those agreements to all impacted customers. In that case, customers will continue to receive the benefit of their contributed property in their rates and no impairment will result.

The Municipal Protestants have never explained how they are adversely impacted and/or contractually impaired if the value of their contributed property is not used to reduce Aqua’s Section 1329 rate base and their service rates continue to be as specified in their respective agreements which are based in part on the value of their previously contributed property. The answer is that they are not.

c. Issues Regarding Section 507 Approval of the Municipal Protestants’ Contracts

The Municipal Protestants request that their existing contracts, all of which require their consent before any assignment from DELCORA to Aqua, be removed from the list of contracts for which Aqua is filing under Section 507 because, as they presently exist without a valid assignment, they are not contracts between a municipality and a public utility.¹⁶⁵ Aqua agrees with this request and, consistent with its position, unassigned contracts will be honored with Aqua acting as agent/subcontractor for DELCORA.

¹⁶⁴ Municipal Protestants Main Brief at 25.

¹⁶⁵ Municipal Protestants Main Brief at 31.

2. Contracts Other Than Municipal Protestants' Contracts

a. Sunoco Service Contract Issues

Although Sunoco's testimony addressed concerns about the assignment of its various Service Contracts like the Municipal Protestants¹⁶⁶ and Aqua responded in its Main Brief¹⁶⁷ by noting its continuing willingness to develop a mutually acceptable contract assignment (or providing service under the existing contracts as DELCORA's agent/subcontractor), it does not appear that Sunoco has addressed this issue in its Main Brief. Accordingly, Aqua reiterates its position on this issue as reflected in Mr. Packer's testimony and Main Brief.

b. KCC Issues Regarding the 1973 Service Agreement

KCC raises two specific issues with respect to its now-expired 1973 Service Agreement: (i) that such agreement is still in effect and all of its provisions must still be honored by Aqua as part of the Proposed Transaction¹⁶⁸ and (ii) that Aqua treat KCC's past payments and interest as contributions in aid of construction and provide it a "refund" now that DELCORA is selling the WRTP and the conveyance system used to transport wastewater to that plant.¹⁶⁹

Aqua thoroughly addressed all issues regarding the termination of the 1973 Service Agreement in its Main Brief¹⁷⁰ and KCC provides no new arguments in support of its claim – contrary to the record evidence – that the 1973 Service Agreement remains in effect.

Mr. Packer addressed the status of the KCC/DELCORA Service Agreement.¹⁷¹ DELCORA executed a Service Agreement with Scott Paper Company (i.e., KCC's predecessor) on December 1, 1973.¹⁷² In a letter dated November 19, 2003¹⁷³ from DELCORA Executive Director Joseph L.

¹⁶⁶ SPMT St. No 1 at 10-13.

¹⁶⁷ Aqua Main Brief at 74.

¹⁶⁸ KCC Main Brief at 14-15.

¹⁶⁹ KCC Main Brief at 16.

¹⁷⁰ Aqua Main Brief at 75-78.

¹⁷¹ Aqua St. No. 2-R at 59-62. The Service Agreement is Aqua Exhibit No. 1, Exhibit F105.

¹⁷² KCC St. No. 1 at 3.

¹⁷³ WCP-2R Schedule F.

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.¹⁷⁴

Given the clear termination of the Service Agreement, 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*.¹⁷⁵ Importantly, given the clear termination of the Service Agreement, Aqua does not intend to assume that contract as part of the Proposed Transaction.¹⁷⁶

Although KCC is *not* asking the Commission to resolve the dispute regarding the continuing existence of the 1973 Service Agreement¹⁷⁷, it appears to be using the contract dispute as an issue of equity for the Commission to direct that KCC be given a refund because, under the now-expired 1973 Service Agreement, KCC paid 26 percent of the annual debt service charges for the WRTP and 55 percent of the annual debt service charges for the conveyance system used to transport wastewater to that plant.¹⁷⁸ Mr. Packer from Aqua addressed this refund issue in his testimony and concluded it would be inappropriate and a likely violation of Section 1329 to treat KCC's past interest payments as contributions in aid of construction.¹⁷⁹ Section 1329 requires a fair market valuation of the DELCORA system irrespective of funding sources.

¹⁷⁴ Aqua St. No. 2-R at 59.

¹⁷⁵ Aqua St. No. 2-R at 63.

¹⁷⁶ Aqua St. No. 2-R at 60.

¹⁷⁷ KCC Main Brief at 15.

¹⁷⁸ KCC Main Brief at 16.

¹⁷⁹ Aqua St. No. 2-R at 58.

While the refund KCC seeks is not justified or supportable, Aqua has repeatedly indicated in this proceeding that going forward it remains open to developing rates for its customers like KCC based on their service conditions and consistent with its tariff and applicable law.¹⁸⁰

¹⁸⁰ Aqua Main Brief at 78.

IV. CONCLUSION WITH REQUESTED RELIEF


For the reasons set forth above and in its Main Brief, 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,

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By


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Date: December 14, 2020

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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 14th day of December, 2020, served a true and correct copy of the foregoing Reply Brief of Aqua Pennsylvania Wastewater, Inc. upon the persons and in the manner set forth below:

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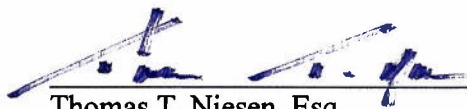
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