

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania Wastewater, Inc. :
for Approval of its Acquisition of the Delaware :
County Regional Water Quality Control Authority's : A-2019-3015173
Wastewater Assets, *inter alia*, Pursuant to Sections :
1102, 1329, and 507 of the Public Utility Code :

RECOMMENDED DECISION

Before
Angela T. Jones
and
F. Joseph Brady
Administrative Law Judges

INTRODUCTION

This matter concerns the Application of Aqua Pennsylvania Wastewater, Inc. (Aqua or Applicant) filed on March 3, 2020, pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (Code), 66 Pa. C.S. §§ 507, 1102, and 1329. In its Application, Aqua requests the issuance of an Order and Certificates of Public Convenience approving the Company's acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA) and the resulting ratemaking rate base pursuant to Section 1329(c)(2) of the Code. A final order by the Commission is required to be issued by March 26, 2021.¹

¹ A Commission final order is to be entered 181 days from the date the application is accepted by the Commission as complete. See, *Implementation of Section 1329 of the Public Utility Code, Tentative Implementation Order*, M-2016-2543193 at 15 (entered July 21, 2016). In the present case, the Application was accepted as complete on July 27, 2020, and 181 days from that date is January 24, 2021. However, on October 8, 2020, the Commission affirmed the August 31, 2020 Order by Chief Administrative Law Judge Charles E. Rainey Jr., extending the statutory deadline by sixty (60) days due to the COVID-19 pandemic.

This Recommended Decision recommends that the Commission deny Aqua's Application for approval of the acquisition of the wastewater system assets of DELCORA because it failed to meet its burden of proof for the following three reasons: (1) Aqua failed to establish a record upon which the Commission can make a determination that the proposed acquisition promotes the service, accommodation, convenience and safety of the public in some substantial way; (2) the outstanding issues surrounding DELCORA's legal ability to transfer assets subject to the Asset Purchase Agreement (APA) significantly prevent a reliable determination of the appropriate ratemaking rate base, integral to the 1329 proceeding; and (3) Aqua failed to include its rate stabilization plan as an attachment to the Application.

HISTORY OF THE PROCEEDING

By Secretarial letter dated December 30, 2019, the Pennsylvania Public Utility Commission (Commission) acknowledged receipt of Aqua's Letter/Notice of Licensed Engineer and Utility Valuation Expert (UVE) Engagement Concerning Acquisition of DELCORA, Delaware and Chester Counties Sanitary Wastewater Collection and Treatment System, filed on December 26, 2019, at this docket. Aqua requested the Commission approve of the following requests: (1) approval of the acquisition by Aqua of the wastewater system assets of DELCORA situated within all or part of 49 municipalities within portions of Chester and Delaware Counties, Pennsylvania; (2) approval of the right of Aqua to begin to offer, render, furnish and supply wastewater service to the public in portions of Delaware County and Chester County, Pennsylvania; (3) an order approving the acquisition that includes the ratemaking rate base of the DELCORA wastewater system assets pursuant to Sections 1102 and 1329 of the Public Utility Code; and (4) assignments of 163 municipal contracts, between Aqua and DELCORA, pursuant to Section 507 of the Code, approval of the APA, and approval of the terms of a Memorandum of Understanding (MOU) it has entered with DELCORA. Aqua sent several requests for extension of time to file the requisite data for the Application, which were granted and ultimately resulted in the Application being filed on March 3, 2020.

On March 26, 2020, the Office of Small Business Advocate (OSBA) filed a Notice of Appearance and Intervention.

On April 2, 2020, the Office of Consumer Advocate (OCA) filed a Protest and Notice of Appearance.

Also, on April 2, 2020, the Commission's Bureau of Investigation and Enforcement (I&E) filed a Notice of Appearance.

On May 14, 2020, Delaware County filed a complaint against DELCORA and the DELCORA Rate Stabilization Trust in the Delaware County Court of Common Pleas, docketed at CV-2020-003185 ("Delaware County's lawsuit").² Shortly after, Delaware County amended its lawsuit to enforce an ordinance that would dissolve DELCORA,³ and Aqua intervened in the Delaware County lawsuit seeking to protect its interests in its APA with DELCORA.⁴

On May 18, 2020, Delaware County filed a Petition to Intervene in this proceeding.

On June 11, 2020, a Secretarial letter was sent to the Applicant stating conditional acceptance of the Application pending filing of requisite documents.

On June 15, 2020, Edgemont Township of Delaware County (Edgemont Twp.) filed a Petition to Intervene.

On June 23, 2020, Delaware County filed a Petition for Reconsideration of the Commission staff determination of conditional acceptance of the Application.

On June 25, 2020, DELCORA filed a Petition to Intervene.

² *County of Delaware, Pennsylvania's Petition for a Stay of the above-referenced Section 1329 Application for Aqua's Acquisition of the Delaware County Regional Water Quality Authority's Wastewater System Assets* ("Delaware County's Petition"), A-2019-3015173, ¶16.

³ *Id.* at 18.

⁴ *Id.* at 19-25.

On July 9, 2020, Aqua filed an Answer to Delaware County's Petition for Reconsideration.

On July 14, 2020, a Secretarial Letter was issued stating that the docket was inactive and that the Delaware County Petition for Reconsideration would be accepted when the docket became active.

On July 15, 2020, Delaware County filed a response to Aqua's Answer to the Petition for Reconsideration and amended its Petition incorporating its previous Petition and adding new and additional information it believed pertinent for consideration of the Application.

On July 17, 2020, Southwest Delaware County Municipal Authority (SWDCMA) filed a Protest to the Application.

On July 27, 2020, by Secretarial Letter, the Commission accepted the Application as complete for review. This matter was referred to the Office of Administrative Law Judge for adjudication and assigned to Administrative Law Judge (ALJ) Angela T. Jones as presiding officer.

A Prehearing Conference Notice dated July 27, 2020, directed a prehearing conference to convene telephonically on September 2, 2020.

On July 30, 2020, Edward Clark, Jr. filed a Protest on behalf of Treasure Lake Property Owners Association.

On July 31, 2020, Ross Schmucki filed a Protest to the Application.

An order was issued on August 3, 2020, which provided, *inter alia*, procedural rules for this proceeding, amendments to discovery, and a proposed procedural schedule with firm dates for the filing of any Reply Briefs and the Public Meeting date for which this matter will be

presented on the agenda before the Commissioners⁵. The parties were further directed to submit prehearing memoranda regarding the presentation of this case by no later than noon, Monday, August 31, 2020.

On August 4, 2020, Aqua filed an Answer to the Amended Petition for Reconsideration of Delaware County.

On August 7, 2020, Upland Borough and Lower Chichester Township (Lower Chichester Twp.) filed Protests to the Application.

On August 7, 2020, Delaware County filed a Petition to Stay this proceeding until January 31, 2021 and a request for Commission review of the material question regarding the stay requested.

On August 11, 2020, Cynthia Pantages filed a Protest for C&L Rental Properties.

On August 13, 2020, I&E filed a letter in support of the Delaware County Petition to Stay the proceeding and interlocutory review of the material question.

On August 14, 2020, the OCA filed a Motion to Extend the Statutory deadline 60 days or to March 26, 2021. By Order dated August 18, 2020, the parties were directed to respond to the OCA Motion by close of business (4:30 p.m.) on August 24, 2020.

Also, on August 14, 2020, the OCA filed a brief in support of the Delaware County Petition to Stay the proceeding.

⁵ This Prehearing Order was corrected on August 6, 2020 to change the public meeting date to January 21, 2021 instead of January 21, 2020. This Prehearing Order was further corrected on August 17, 2020, to change the public meeting date to January 14, 2021 as there was no scheduled public meeting on January 21, 2021.

Notice of the Application was published in the *Pennsylvania Bulletin* on August 15, 2020, 50 Pa.B. 4220. A deadline of August 31, 2020 was established for the filing of protests or petitions to intervene.

On August 17, 2020, Aqua and DELCORA filed briefs in opposition of the Delaware County Petition to Stay the proceeding.

Also, on August 17, 2020, Trainer Borough filed a Protest to the Application.

On August 21, 2020, Edgemont withdrew its Petition to Intervene and filed a Protest to the Application.

On August 24, 2020, Aqua, DELCORA, the Municipal Protestants (collectively, Edgemont Twp.; Trainer Borough; SWDCMA; Lower Chichester Twp.; and Upland Borough), Delaware County, and OSBA filed Answers to the OCA Motion for a 60-day extension of the statutory deadline.

Also, on August 24, 2020, Delaware County filed a Reply Brief to the Applicant and DELCORA briefs on the Petition to Stay.

By Opinion and Order entered August 27, 2020, the Commission denied the Amended Petition of Reconsideration by Delaware County finding that its Petition presented issues of fact that need to be developed by record evidence for the protection of all parties' due process rights.

On August 27, 2020, Aqua and DELCORA filed Answers in opposition to the Delaware County Petition to Stay.

On August 28, 2020, Sunoco Partners Marketing and Terminals L.P./Energy Transfer (Sunoco Partners) filed a Protest to the Application.

On August 31, 2020, Delaware County's Petition to Stay this proceeding was denied by Commission Opinion and Order.

By Order dated August 31, 2020, Chief ALJ Charles E. Rainey, Jr. granted the OCA Motion extending the statutory deadline to March 26, 2021.⁶ It is noted that the firm dates have been adjusted because of the grant of the 60-day extension granted by the Chief ALJ's Order. The parties were informed by email dated August 31, 2020 of the adjusted firm dates.

Also, on August 31, 2020, the Applicant filed a Petition for Protective Order.

On August 31, 2020, Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark, Corporation (Kimberly Clark) filed a Protest to the Application.

On August 31, 2020, the Commission denied the Delaware County Petition to Stay and interlocutory review of material question.

A telephonic Prehearing Conference was held on September 2, 2020. During the hearing, the parties addressed the evidentiary hearings schedule, modifications to procedural rules, and other administrative matters for these proceedings. On September 4, 2020, an interim Order was issued, which, *inter alia*, set forth the following schedule for this case:

Public Input Hearings	September 16, 2020
Protestant Direct Testimony	September 29, 2020
Rebuttal Testimony	October 20, 2020
Surrebuttal Testimony	November 2, 2020
Evidentiary Hearings	November 9 & 10, 2020
Main Briefs	December 1, 2020
Reply Briefs	December 14, 2020

⁶ The Chief ALJ's August 31, 2020 Order was affirmed by the Commission by Order issued October 8, 2020.

In accordance with the foregoing schedule, Public Input Hearings were held on the afternoon and evening of September 16, 2020, wherein fifteen (15) witnesses appeared and testified.

On September 25, 2020, the Municipal Protestants filed a Motion for Summary Judgment. On October 15, 2020 Aqua and DELCORA filed Answers in Opposition to the Motion for Summary Judgment. On the same day, Delaware County filed an Answer in Support of the Motion. On October 16, 2020, I&E filed a Letter addressing Aqua's Answer to the Motion. On October 30, 2020, an order was issued which denied the Municipal Protestant's Motion for Summary Judgment.

Between November 3-6, 2020, several of the Municipal Protestants filed lawsuits against DELCORA and the DELCORA Rate Stabilization Trust in Delaware County Court of Common Pleas for breach of contract and to assert certain property interests that conflict with DELCORA's representations in the APA. These lawsuits, (collectively the "Municipal lawsuits") are comprised of the following individual actions: (1) SWDCMA v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-0074691;⁷ (2) Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007552;⁸ and Upland Borough v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007596.⁹

The evidentiary hearings were held as scheduled on November 9 and 10, 2020. At the hearing, testimony and exhibits were entered into the record and cross-examination was conducted. The following statements and exhibits were admitted into the record:

⁷ Municipal Protestants Ex. 11.

⁸ Municipal Protestants Ex. 12.

⁹ Municipal Protestants Ex. 13.

Aqua

Statement 1	(Direct Testimony of Mark A. Lucca)
Statement 2	(Direct Testimony of William C. Packer)
Statement 2-R	(Rebuttal Testimony of William C. Packer)
Statement 3	(Direct Testimony of Erin M. Feeney)
Statement 4	(Direct Testimony of Mark J. Bubel, Sr.)
Statement 4-R	(Rebuttal Testimony of Mark J. Bubel, Sr.)
Statement 5	(Direct Testimony of Robert J. Willert)
Statement 5-R	(Rebuttal Testimony of Robert J. Willert)
Statement 6	(Direct Testimony of John J. Pileggi)
Statement 6-R	(Rebuttal Testimony of John J. Pileggi)
Statement 7	(Direct Testimony of Michael DiSantis)
Statement 7-R	(Rebuttal Testimony of Michael DiSantis)
Statement 8	(Direct Testimony of Harold Walker III) 361 366
Statement 8-R	(Rebuttal Testimony of Harold Walker III)
Statement 9	(Direct Testimony of Dylan W. D'Ascendis)
Statement 9-R	(Rebuttal Testimony of Dylan W. D'Ascendis)
Statement 10-R	(Rebuttal Testimony of Jason B. Miller with exhibits)
Aqua Exhibit 1	(application)
Aqua Exhibit 2	(territory maps with facilities - Confidential)
Aqua Exhibit 3	(schedules to asset purchase agreement - Confidential)
Aqua Exhibit 4	(computer disc of files from Gannett Fleming - Confidential)
Aqua Exhibit 5	(computer disc of files from Scott Madden - Confidential)
Aqua Exhibit 6	(computer disc of Appendix A to Mr. Packer's testimony - Confidential)
Aqua Exhibit 7	(computer disc of workpaper files for Application Exhibit D - Confidential)
Aqua Exhibit 8	(5/6/20 letter to Commission Secretary)
Aqua Exhibit 9	(5/7/20 letter to Commission Secretary - Confidential)
Aqua Exhibit 10	(5/8/20 letter to Commission Secretary - Confidential)
Aqua Exhibit 11	(5/13/20 letter to Commission Secretary)
Aqua Exhibit 12	(5/22/80 letter to Commission Secretary)
Aqua Exhibit 13	(5/28/20 letter to Commission Secretary)

Aqua Exhibit 14 (6/8/20 letter to Commission Secretary)

Cross-Exam. Exh. 1 (Lower Chichester Answer to Aqua Interrogatory Set XII-8)

Cross-Exam. Exh. 2 (Lower Chichester Answer to Aqua Interrogatory Set XII-2)

Cross-Exam. Exh. 3 (Lower Chichester Answer to Aqua Interrogatory Set XII-6)

Cross-Exam. Exh. 4 (Lower Chichester Answer to Aqua Interrogatory Set XII-7)

Cross-Exam. Exh. 5 (Edgemont Answer to Aqua Interrogatory Set XI-8)

Cross-Exam. Exh. 6 (Edgemont Answer to Aqua Interrogatory Set XI-9)

Cross-Exam. Exh. 7 (Edgemont Answer to Aqua Interrogatory Set XI-2)

Cross-Exam. Exh. 8 (Edgemont Answer to Aqua Interrogatory Set XI-7)

Cross-Exam. Exh. 9 (SWDCMA Answer to Aqua Interrogatory Set XIII-1)

Cross-Exam. Exh. 10 (SWDCMA Answer to Aqua Interrogatory Set XIII-4)

Cross-Exam. Exh. 11 (SWDCMA Answer to Aqua Interrogatory Set XIII-5)

Cross-Exam. Exh. 12 (SWDCMA Answer to Aqua Interrogatory Set XIII-7)

Cross-Exam. Exh. 13 (Upland Answer to Aqua Interrogatory Set XIV-2)

Cross-Exam. Exh. 14 (Upland Answer to Aqua Interrogatory Set XIV-7)

Cross-Exam. Exh. 15 (Upland Answer to Aqua Interrogatory Set XIV-4)

Investigation and Enforcement

Statement 1 (Direct Testimony of Lisa A. Gumby with Exhibit 1)

Statement 1-R (Rebuttal Testimony of Lisa A. Gumby)

Statement 1-SR (Surrebuttal Testimony of Lisa A. Gumby)

Office of Consumer Advocate

Statement 1 (Direct Testimony of Ralph Smith with Attach. A and Exh. RCS-1 - RCS-8)

Statement 1-SR (Surrebuttal Testimony of Ralph Smith with Exhibit RCS-9)

Office of Small Business Advocate

Statement 1 (Direct Testimony of Brian Kalcic with Exhibit BK-1)

Statement 1-S (Surrebuttal Testimony of Brian Kalcic)

Delaware County

Statement 1 (Direct Testimony of Stan C. Faryniarz with Exhibits SCF-1 and SCF-2)
Statement 1-R (Rebuttal Testimony of Stan C. Faryniarz)
Statement 1-SR (Surrebuttal Testimony of Stan C. Faryniarz)
Statement 2 (Direct Testimony of Brian P. Zidek with Exhibits BPZ-1 through BPZ-3)
Hearing Exhibits 1 (Aqua Responses to Delaware County Interrogatories Set X-1 through 5)
Hearing Exhibits 2 (7/16/19 Letter of Intent from Lucca to DELCORA Board of Directors)
Hearing Exhibits 3 (DELCORA Response to Delaware County Interrogatory Set IX-9)

Sunoco Partners Marketing & Terminals

Statement 1 (Direct Testimony of Edward Human)
Statement 2 (Direct Testimony of Howard Woods with Appendices A through C)
Statement 3 (Direct Testimony of Kevin Smith) (Public and Highly Confidential)
Statement 2-SR (Surrebuttal Testimony of Howard Woods with Exhibit HJW-1-SR)
Statement 3-SR (Surrebuttal Testimony of Kevin Smith)

Kimberly Clark

Statement 1 (Direct Testimony of Thomas Brooks with Exhibits TB-1 through TB-3)
Statement 2 (Direct Testimony of Eric Wentz with Exhibits EW-1 and EW-2)
Statement 1-SR (Surrebuttal Testimony of Thomas Brooks)
Statement 2-SR (Surrebuttal Testimony of Eric Wentz)

Edgemont

Statement 1 (Direct Testimony of Samantha Reiner)

Lower Chichester

Statement 1 (Direct Testimony of Joseph Possenti, Jr., with Schedule JP-1)

SWDCMA

Statement 1 (Direct Testimony of Cecilia Nelson with Schedule CN-1)

Upland

Statement 1 (Direct Testimony of Michael Ciach)

Municipal Protestants

Exhibit 1 (DELCORA Response to OCA Interrogatory Set III-12)

Exhibit 2 (DELCORA Admissions)

Exhibit 3 (Aqua Admissions)

Exhibit 4 (DELCORA Response to Kimberly Clark Interrogatory Set I-32)

Exhibit 5 (Aqua Response to Kimberly Clark Interrogatory Set II-12)

Exhibit 6 (Aqua and DELCORA Response to SWDCMA Interrogatory Set I-2)

Exhibit 7 (Aqua and DELCORA Response to Upland Interrogatory Set I-7)

Exhibit 8 (Aqua Response to SWDCMA Interrogatory Set I-8 by Pileggi)

Exhibit 9 (Aqua Response to Sunoco Data Request)

Exhibit 10 (Aqua Response to Upland Interrogatory Set II-1 by Pileggi - Corrected)

By noticed dated November 18, 2020, an additional Administrative Law Judge, F. Joseph Brady, was assigned to this proceeding.

Main Briefs were filed by the Parties on December 1, 2020, and Reply Briefs were filed on December 14, 2020.

On December 7, 2020, an Order was issued denying Aqua's November 13, 2020, Motion to Keep the Record Open for the Limited Purpose of Admitting the Decision of the Court of Common Pleas of Delaware County at No. CV-2020-003185.

The record closed on December 14, 2020, upon receipt of the Parties' Reply Briefs.¹⁰

On December 28, 2020, the Court of Common Pleas of Delaware County issued an Order at No. CV-2020-003185. There was no objection to our taking notice of this Order.

¹⁰ On December 21, 2020, an Order was issued formally closing the record on December 14, 2020.

The matter is now ready for decision.

FINDINGS OF FACT

1. Aqua Pennsylvania Wastewater, Inc. is a certificated public utility that provides wastewater service to the public in portions of Pennsylvania. Aqua St. No. 3 at 3 and Aqua Exhibit No. 1, Application ¶ 7.

2. Aqua operates 37 wastewater treatment plants in Pennsylvania, serving approximately 35,000 customers in various Counties throughout Pennsylvania including parts of Delaware and Chester Counties. Aqua Exhibit No. 1, Application ¶ 7.

3. Delaware County Regional Water Quality Control Authority (DELCORA) is a wastewater utility providing retail and wholesale wastewater service to municipal, retail/wholesale, industrial, and commercial users in all or part of 49 municipalities in Southeast Pennsylvania. Application at 3; Aqua St. No. 6, pp. 3-4; Delaware County Statement No. 1 at 10.

4. On September 17, 2019, Aqua and DELCORA entered into the APA incorporated in Aqua's Application as "Exhibit B-1," providing for the sale of the assets, properties, and rights of the DELCORA wastewater system to Aqua. Aqua St. No. 5 at 7-8.

5. On February 20, 2020, Aqua and DELCORA entered into an amendment to the APA which addressed limited matters related to DELCORA's implied warranties of merchantability and fitness of a particular purpose that was incorporated in Aqua's Application as "Exhibit B-2." Aqua St. No. 5 at 7-8.

6. The purchase price is Two Hundred Seventy-Six Million Five Hundred Thousand Dollars (\$276,500,000.00). Aqua Exhibit No. 1, Application ¶ 24 and ¶ 25.

7. According to the Application, the sale proceeds will be used to satisfy DELCORA's outstanding debt first and then the remainder – approximately \$200 million – will be placed in an irrevocable Trust. Aqua St. No. 5 at 10 and 12; Aqua Exhibit No. 1, Application ¶ 36.

8. Delaware County alleges that it is the sole incorporating municipality of DELCORA. Delaware County Protest at ¶ 1.

9. On May 14, 2020, Delaware County filed a complaint against DELCORA and the Trust in the Court of Common Pleas of Delaware County, docketed at CV-2020-003185, asserting that DELCORA's creation of the Trust violates DELCORA's Articles of Incorporation, was *ultra vires*, and violates the Municipality Authorities Act (MAA). Delaware County Petition to Intervene at ¶ 2, fn. 2.

10. Aqua has intervened in the Delaware County lawsuit seeking to ensure that its transaction with DELCORA would close before DELCORA is terminated and to seek a declaration that the APA is a valid and enforceable agreement. Aqua's Answer in Opposition to the Petition of the County of Delaware for Stay, A-2019-3015173, p. 5, at 26 (August 27, 2020).

11. On December 28, 2020, the Court of Common Pleas of Delaware County issued an Order finding, *inter alia*, both the APA and the Trust are legal and enforceable. *County of Delaware, Pennsylvania v. Delaware County Regional Water Quality Control Authority et al.*, Court of Common Pleas of Delaware County, CV-2020-003185 (Order issued Dec. 28, 2020).

12. Aqua is requesting to establish a ratemaking rate base level of \$276.5 million for the DELCORA system. Aqua's Application, p. 18.

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

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

15. Aqua has not entered into any contracts with Edgemont Township and Edgemont has not agreed to an assignment of its contract with DELCORA. Edgemont St. 1, p. 13; Municipal Protestants Exh. 2, p. 2, no. 9.

16. Aqua has not entered into any contracts with Lower Chichester and Lower Chichester has not agreed to an assignment of its contract with DELCORA. Lower Chichester St. 1, p. 9; Municipal Protestants Exh. 2, p. 7, no. 9.

17. Aqua has not entered into any contracts with SWDCMA and SWDCMA has not agreed to an assignment of its contract with DELCORA. Tr. 465; Municipal Protestants Exh. 2, p. 9 no. 10.

18. Aqua has not entered into any contracts with Trainer and Trainer's contract with DELCORA does not permit either party to assign it. Trainer has not agreed to amend its contract with DELCORA to permit an assignment. Municipal Protestants Exh. 2, p. 13 nos. 10-11.

19. Aqua has not entered into any contracts with Upland and Upland has not agreed to an assignment of its contract with DELCORA. Municipal Protestants Exh. 2, p. 16 nos. 11-12.

20. Collectively, the Municipal Protestants accounted for approximately \$5,453,000 of DELCORA's revenues in 2019, representing approximately 9.1% of DELCORA's annual service revenues.

21. Both utility valuation experts (UVEs) relied upon the Pennoni Engineering Assessment to calculate the original cost of the DELCORA system. Aqua's Application, Exhibit R, pp. 4-6; Aqua Application, Ex. Q, p. 27.

22. Assumptions regarding DELCORA's ownership of property made in the Pennoni Engineering Assessment carried forward into each of the UVEs' cost approach calculations. Aqua Application, Exhibit D, Pennoni & Associates, Engineering Assessment and Original Cost of DELCORA Sewerage Facilities, Section 4.06; Aqua's Application, Exhibit R, pp. 4-6; Aqua Application, Ex. Q, p. 27.

23. The Pennoni Engineering Assessment expressly identified Upland Borough, Trainer Borough, and Edgemont Township's assets as DELCORA inventory. Aqua's Application, Exhibit D, Pennoni & Associates, Engineering Assessment and Original Cost of DELCORA Sewerage Facilities, Section 4.06.

24. Upland Borough, Trainer Borough, and Edgemont Township have asserted ownership rights to assets DELCORA purports to convey to Aqua and which are enshrined in the Pennoni Engineering Assessment's inventory listing. Edgemont St. No. 1, pp. 3-5; Municipal Protestant Exhibits, Exhibit 2, pp. 12-13; and Upland St. No. 1, pp. 1-3.

25. Between November 3-6, 2020, several of the Municipal Protestants filed lawsuits against DELCORA and the DELCORA Rate Stabilization Trust in Delaware County Court of Common Pleas for breach of contract and to assert certain property interests that conflict with DELCORA's representations in the APA. These lawsuits, (collectively the "Municipal lawsuits") are comprised of the following individual actions: (1) SWDCMA v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-0074691; (2) Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007552; and Upland Borough v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007596. Municipal Protestants Ex. 11-13.

26. Through the Municipal lawsuits, SWDCMA, Lower Chichester Township, and Upland Borough have each initiated a breach of contract action against DELCORA in Delaware County Court seeking to enforce their contract rights and to enjoin DELCORA from closing the transaction. Municipal Protestants Exhibits 11-13, respectively.

27. As of the close of the record, the Municipal lawsuits remained pending. Municipal Protestants Exhibits 11-13, respectively.

DISCUSSION

A. Overview of Proposed Transaction

Aqua's Application proposes to pay \$276.5 million for DELCORA's assets. DELCORA provides direct retail service to approximately 16,000 customers and provides collection, conveyance, and treatment service to approximately 200,000 Equivalent Dwelling Units in Delaware and Chester Counties, Pennsylvania, transmitting, and treating approximately 65 million gallons per day. Moreover, DELCORA provides wholesale conveyance and treatment service to municipal and municipal authority customers within all or part of 49 municipalities. Aqua filed its Application under Sections 1102, 1329, and 507 of the Public Utility Code. 66 Pa. C.S. §§ 1102, 1329, 507.

Pursuant to Section 1102, Aqua requests permission for it to acquire DELCORA's wastewater assets and to obtain the Certificates of Public Convenience necessary for it to begin to offer wastewater service to the public in the DELCORA territory.¹¹

Pursuant to Section 1329, Aqua seeks to utilize the fair market value process to establish the ratemaking rate base of DELCORA's assets at \$276.5 million.¹² In accordance with Section 1329, the \$276.5 million amount represents the lower of Aqua and DELCORA's

¹¹ Aqua Application, p. 20.

¹² Aqua Application, p. 18.

negotiated purchase price, and the average of two fair market value appraisals completed by each of these parties' UVEs.¹³

Pursuant to Section 507, Aqua seeks approval to enter into an APA with DELCORA to assume the 163 municipal contracts identified in APA Section 4.15 that DELCORA has pledged to assign.¹⁴ Also, Aqua proposes that DELCORA will create an irrevocable DELCORA Customer Trust (Trust) and fund it with the bulk of the sale proceeds – approximately \$200 million – remaining after the satisfaction of DELCORA's outstanding debt.¹⁵ Assuming the Trust is created, Aqua requests the Commission approve its MOU with DELCORA that payments from the Trust will be made to DELCORA customers, the effect of which, will provide a billing discount for DELCORA customers after the effective date of new rates resulting from Aqua's next base rate case.¹⁶

B. Burden of Proof and Legal Standards

Aqua, as the Applicant, has the burden of proof in this proceeding to establish that it is entitled to the relief sought. 66 Pa. C.S. § 332(a). Aqua must establish its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). To meet its burden of proof, Aqua must present evidence more convincing, by even the slightest amount, than that presented by any opposing party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

In this case, Aqua has the burden of proving that the proposed transaction is in compliance with Sections 1102, 1329, and 507 of the Public Utility Code. For the reasons set forth within, we find Aqua has failed to satisfy this burden and recommend its Application be denied.

¹³ Aqua Main Brief, p. 8.

¹⁴ Aqua Application, pp. 19-20.

¹⁵ Aqua Main Brief, p. 40.

¹⁶ Aqua St. No. 2-R, Ex. E.

C. Ongoing Litigation

Currently, there are several lawsuits pending in the Court of Common Pleas of Delaware County between DELCORA, Delaware County, and several of the Municipal Protestants.

Delaware County has filed a Petition against DELCORA alleging that “[p]ursuant to Section 5619 of the Municipality Authorities Act (MAA), the County has the exclusive right, power and authority to terminate DELCORA.”¹⁷ Delaware County is also challenging the Trust arrangement. Aqua has intervened in the lawsuit and is seeking determinations regarding DELCORA’s status as a *bona fide* seller or the validity of the APA.¹⁸ At the close of the record, the Delaware County lawsuit was still pending, but an Order was issued on December 28, 2020, finding, *inter alia*, both the APA and the Trust are legal and enforceable.

In the Municipal lawsuits, SWDCMA, Lower Chichester Township, and Upland Borough have each initiated a breach of contract action against DELCORA in Delaware County Court seeking to enforce their contract rights and to enjoin DELCORA from closing the transaction.¹⁹ The Municipal lawsuits are now pending.

D. Sections 1102/1103 Standards – Public Interest

The Code requires that the Commission issue a Certificate of Public Convenience as a prerequisite to offering service, abandoning service, and certain property transfers by public utilities or their affiliated interests. 66 Pa. C.S. § 1102(a). The standards for the issuance of a Certificate of Public Convenience are set forth in Sections 1102 and 1103 of the Code. A

¹⁷ Delaware County’s Petition, ¶ 15.

¹⁸ *Brief of the Delaware County Regional Water Quality Control Authority in Opposition to the Petition of the County of Delaware for A Stay, Request for Commission Review and Answer to A Material Question*, A-2019-3015173, p. 7.

¹⁹ Municipal Protestants Exhibits 11-13, respectively.

Certificate of Public Convenience shall be granted “only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.” 66 Pa. C.S. § 1103(a). These provisions have been interpreted by the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way. *City of York v. Pa. Pub. Util. Comm’n*, 295 A.2d 825, 828 (Pa. 1972).

In this case, the ongoing litigation in the Delaware County Court of Common Pleas between DELCORA and the Municipal Protestants makes it impossible for us, or any other stakeholder, to determine whether this Application would affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way and be in the public interest.

For example, the ongoing Municipal lawsuits mean it is still uncertain what facilities/assets Aqua will be acquiring in this transaction. Without certainty of the facilities Aqua will acquire at closing, awarding a service territory may result in Aqua being obligated to serve areas where it would not have sufficient facilities to provide service and the creation of a competitive condition between Aqua and the entity that may own and/or operate the facilities Aqua is unable to obtain. As a result, the Municipal lawsuits prevent us from being able to issue any recommendation regarding whether this proposed Application is in the public interest.

E. Section 1329 Fair Market Value and Rate Base

Section 1329 of the Code prescribes the process used to determine the fair market value of a municipal utility that is the subject of an acquisition. Section 1329 provides a framework for valuing, for ratemaking purposes, water and wastewater systems that are owned by a municipal corporation or authority that are to be acquired by an investor-owned water or wastewater utility under the Commission’s jurisdiction. 66 Pa. C.S. § 1329. It allows the rate base of the municipal system being purchased to be incorporated into the rate base of the

purchasing investor-owned utility at the lesser of either the purchase price or the fair market value as established by the two independent appraisals conducted by two UVEs. 66 Pa.C.S. § 1329(a)-(c). The Applicant must provide to the Commission copies of the appraisals, the purchase price, the ratemaking rate base, the closing costs, and, if applicable, a tariff and rate stabilization plan. 66 Pa. C.S. § 1329(d)(1), (e).

In this Application, Aqua seeks to utilize the fair market value process to establish the ratemaking rate base of DELCORA's assets at \$276.5 million, which represents the lower of Aqua and DELCORA's negotiated purchase price, and the average of two fair market value appraisals completed by each of these parties' UVEs. However, the ongoing litigation prohibits us and the stakeholders from being able to complete a meaningful determination of the fair market value of DELCORA at this time. Consequently, we cannot determine whether this Application would affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way and be in the public interest.

More specifically, both UVEs relied upon the Pennoni Engineering Assessment to calculate the original cost of the DELCORA system pursuant to 66 Pa. C.S. § 1329(a)(4). Thus, any assumptions regarding DELCORA's ownership of property made in the Pennoni Engineering Assessment carried forward into each of the UVEs' cost approach calculations. Here, the Pennoni Engineering Assessment expressly identified the collection system assets of Upland Borough, Trainer Borough, and Edgemont Township as DELCORA inventory. Therefore, if it is determined that DELCORA does not own or cannot transfer those assets, the UVEs' appraisals would require adjustments and the ratemaking rate base of the transaction may be unreasonable or against the public interest. The Pennoni Engineering Assessment and UVEs' appraisals were constructed and submitted utilizing the totality of the DELCORA system making any interpretational process, based upon segmentation of that system, not possible by the Commission at this time. Additionally, the Market Approach of the UVE appraisals are in part derived from the number of connections to the system. If the Municipal Protestants obtain facilities from DELCORA which are used to provide service to customers, it is unclear if the number of customer connections served by DELCORA would change and thereby change the ratemaking rate base of the transaction once again.

F. Section 507 Approvals

Pursuant to Section 507, essentially all the affirmative public benefits offered by Aqua in this transaction are dependent on the Commission's approvals of the APA and assignment of contracts between various municipalities. As stated before, DELCORA's authority to enter the APA and/or convey the system property it purports to convey and/or assign all the contracts it purports to assign is being litigated on multiple fronts. The ultimate results of that litigation may be that the alleged benefits of Aqua's Application never materialize or change substantially, which in turn would alter our recommendation. The simple fact of the matter is we cannot recommend that a contract between two parties is in the public interest if the terms of the contract remain unsettled.

G. Rate Stabilization Trust

Lastly, regardless of the ongoing litigation, we find the proposed Trust in combination with the MOU, is acting as a *de facto* rate stabilization plan that, in effect, functions to bypass the Commission's ratemaking authority.

The Code defines "Rate" as:

Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, *and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.*

66 Pa.C.S. § 102 (emphasis added). A rate stabilization plan is a plan that will hold rates constant or phase rates in over a period of time after the next base rate case. 66 Pa. C.S. § 1329(g). If an application contains a rate stabilization plan that is applicable to the application,

it must be included as an attachment to the application for a certificate of public convenience filed pursuant to Section 1102. 66 Pa. C.S. § 1329(e).

In this case, Aqua avers that its Application does not propose a rate stabilization plan, nor include one in its proposed tariff.²⁰ Instead, Aqua points to a revised MOU, which purpose is to:

[s]et forth the process by which the Customer Assistance Amount is calculated and distributed so that the effect of the rate to be paid by DELCORA Customers for Wastewater Utility Services will increase by no more than three percent (3%), compounded annually, on the Rate Case Effective Date and each anniversary of such date during the DELCORA Customer Assistance Trust Payment Period.^[21]

Aqua contends that DELCORA's use of sale proceeds pursuant to the MOU is a purely private and non-jurisdictional matter, with the only issue relevant to the Commission being whether to allow the DELCORA Customer Assistance Trust payment as a line item on the Aqua bill via the proposed MOU.²² In support of its position that the discount applied through the DELCORA trust does not constitute a rate stabilization plan, Aqua cites to *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 & 1329 of the Pub. Util. Code for Approval of Its Acquisition of the Wastewater Sys. Assets of New Garden Twp. & the New Garden Twp. Sewer Auth.*, No. A-2016-2580061, 2017 WL 4552494 (Oct. 5, 2017) (*New Garden*).

Contrarily, Delaware County alleges that the proposed transaction does include a rate stabilization plan that was omitted from the Application and Aqua's tariff. Based on the MOU, Delaware County witness Farynairz explained that the Trust will be sufficient to continue limiting rate increases for the DELCORA customers to the 3% compound annual maximum, which would amount to a 7-year phase-in rate stabilization plan if the Commission approves the

²⁰ Aqua St. No. 3 at 6.

²¹ Aqua Statement No. 2-R, WCP-2R Schedule E at 3; *see also* Delaware County Statement No. 1 at 15.

²² *See* Aqua Answer to County Petition for Reconsideration of Staff Action at ¶¶ 11-14 (July 9, 2020).

proposed transaction in 2021.²³ Delaware County also notes that witness Farynairz approximates that the Trust would be depleted in 2028, resulting in an effective rate increase of approximately 70% between 2027 and 2029.²⁴

Further, Delaware County contrasts the Application with the Commission's determination regarding an alleged rate stabilization plan in *New Garden*.²⁵ Delaware County points out that in *New Garden*, the acquiring utility (also Aqua) proposed to limit compound annual rate increases to 4% over 10 years.²⁶ The Commission approved the proposal with a condition that Aqua and its shareholders would absorb any difference between the 4% cap and the actual future rates approved by the Commission.²⁷ Delaware County argues this is distinguishable from this case because, here, the tariff rates established by the Commission directly impact the available rate stabilization plan.²⁸

Explained further, Delaware County describes a situation where the Commission approves rates higher than Aqua's projections. This would accelerate the depletion of the Trust funds and shorten the rate stabilization period.²⁹ Conversely, lower Commission-made rates would extend the rate stabilization period.³⁰ Therefore, Delaware County concludes that Aqua's proposal places the Commission in the *de facto* position of modifying both the bill credit and the phase-in period each time it approves a rate increase/decrease, which means the rate stabilization plan cannot be considered a purely private contractual proposal when the mechanics and efficacy of the proposal are directly contingent on outcomes of future Commission rate proceedings.³¹

²³ Delaware County MB at 14.

²⁴ *Id.* at 45.

²⁵ *Id.* at 17.

²⁶ *Id.*

²⁷ *Id.* at 42.

²⁸ *Id.* at 15-16.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Finally, Delaware County alleges that the omission of the Trust payment from Aqua's tariff conflicts with Section 1303.³² Accordingly, Delaware County contends the Application should be denied for failure to comply with the statutory filing requirements or, at minimum, be re-filed to cure this deficiency and preserve the necessary incentives for future compliance.

I&E contends that the Commission must reject Aqua's bill discount proposal because it would directly result in Aqua illegally issuing acquired customers' bills that are lower than the applicable tariffed rates.³³ According to I&E, Section 1329 of the Code provides Aqua with a permissible method for stabilizing customer rates, but that Aqua rejected it in favor of its proposed bill discount arrangement.³⁴ However, unlike Delaware County, I&E argues that Section 1329(g) of the Code provides for deviation from tariffed rates otherwise prohibited by Section 1303 only in the limited context of Section 1329 rate stabilization plans.³⁵

We find Delaware County's arguments persuasive. The proposed bill discount arrangement constitutes a plan to phase rates in over a period of time after future Aqua base rate cases. The fact that this arrangement is funded/administered by the Trust is an argument that places form over substance. Section 1303 of the Code unequivocally establishes that public utilities cannot "*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 tariffs of such public utility applicable thereto." 66 Pa. C.S. § 1303 (emphasis added). As the proposed Rate Stabilization Plan would indirectly reduce the rate received from the DELCORA customers, the omission of the bill credit from Aqua's tariff conflicts with Section 1303. Unlike in *New Garden*, the proposed arrangement does indirectly what Aqua cannot do directly – deviate from tariff rates. As such, this rate stabilization plan must be included as an attachment to an application filed with the Commission and included as a component of Aqua's tariff.

³² *Id.*

³³ I&E MB at 20-27.

³⁴ *Id.* at 33-34.

³⁵ *Id.*

Finally, we agree with I&E to the extent the proposed bill discount arrangement would result in Aqua illegally issuing acquired customers' bills that are lower than applicable tariff rates. However, we disagree with I&E's contention that Section 1329(g) provides for deviation from tariffed rates only in the limited context of Section 1329 rate stabilization plans. As noted by I&E, Pennsylvania Courts have strictly interpreted Section 1303 as "mean[ing] that public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility."³⁶ Sections 1303 and 1329(g) are meant to function harmoniously and, as such, a rate stabilization plan must be included as a component of a utility's approved tariff, thereby preventing any secret departure from tariff rates.

Accordingly, we find in order to cure the deficiencies in this Application, a new Application would need to be filed that includes the rate stabilization plan documents and tariff provisions outlining the bill credit mechanism discussed above.

H. Conclusion

In this case, Aqua would have the Commission issue what is tantamount to a hypothetical recommendation, which we will not recommend. Between the ongoing litigation and lack of a rate stabilization plan attachment, there are simply too many outstanding issues that need to be resolved in order for the Commission to be able to analyze this Application and make an informed recommendation as to whether it is in the public interest. Accordingly, we recommend the Application be denied.³⁷

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of, and the parties to, this application proceeding. 66 Pa. C.S. §§ 1102, 1103 and 1329.

³⁶ I&E MB at 25.

³⁷ Upon resolution of the outstanding litigation, Aqua may file a new application along with a rate stabilization plan. A new application would be the only process whereby the due process rights of all stakeholders would remain protected by affording them the opportunity to fully review a complete and proper application.

2. Aqua has the burden of proof in this proceeding to establish that it is entitled to the relief it is seeking. 66 Pa. C.S. § 332(a).

3. Aqua must prove its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992).

4. To meet its burden of proof, Aqua must present evidence more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosier v. Margulies*, 70 A.2d 854 (Pa. 1950).

5. As the party to whom the assets and service obligations would be transferred, Aqua must demonstrate by a preponderance of the evidence that it is technically, legally and financially fit. 66 Pa. C.S. §§ 1102 and 1103; *Seaboard Tank Lines, Inc. v. Pa. Pub. Util. Comm'n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985).

6. Aqua must demonstrate, by a preponderance of the evidence, that the proposed transaction will also promote the service, accommodation, convenience and safety of the public in some substantial way. *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825 (Pa. 1972).

7. The rate base of a municipal system being purchased to be incorporated into the rate base of a purchasing investor-owned utility shall be the lesser of either the purchase price or the fair market value as established by the two independent appraisals conducted by two utility valuation experts. 66 Pa. C.S. § 1329.

8. The acquiring public utility or entity and selling utility shall engage the services of the same licensed engineer to conduct an assessment of the tangible assets of the selling utility. The assessment shall be incorporated into the appraisals of the UVEs under the cost approach 66 Pa. C.S. § 1329(a)(4).

9. The APA and Aqua's request to assume enumerated municipal contracts alleged to be currently held by DELCORA are subject to review by the Commission to determine whether there are any issues with their reasonableness, legality, or any other matter affecting their validity. 66 Pa. C.S. § 507.

10. Aqua has failed to establish a record upon which the Commission can make a determination that the proposed acquisition promotes the service, accommodation, convenience and safety of the public in some substantial way. 66 Pa. C.S. §§ 1102 and 1103; *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825 (Pa. 1972).

11. Aqua has failed to establish a record upon which the Commission can make a determination of the fair market value of DELCORA or the rate base. 66 Pa. C.S. § 1329.

12. Aqua has failed to establish a record upon which the Commission can make a determination of the reasonableness, legality, or validity of neither the APA nor Aqua's request to assume enumerated municipal contracts alleged to be currently held by DELCORA. 66 Pa. C.S. § 507.

13. A "Rate" is: "Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental." 66 Pa.C.S. § 102.

14. A rate stabilization plan is a plan that will hold rates constant or phase rates in over a period of time after the next base rate case. 66 Pa. C.S. § 1329(g).

15. Aqua's Application contains terms that constitute a *de facto* rate stabilization plan that is applicable to this Application. 66 Pa. C.S. § 1329(d).

16. Aqua failed to include its rate stabilization plan as an attachment to the Application for a certificate of public convenience filed pursuant to Section 1102. 66 Pa. C.S. § 1329(e).

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Application of Aqua Pennsylvania Wastewater, Inc. for approval of its acquisition of the Delaware County Regional Water Quality Control Authority's wastewater assets pursuant to Sections 1102, 1329, and 507 of the Pennsylvania Public Utility Code, at Docket No. A-2019-3015173, be denied; and

2. That the Application at Docket No. A-2019-3015173 be marked closed.

Date: January 11, 2021

/s/
Angela T. Jones
Administrative Law Judge

/s/
F. Joseph Brady
Administrative Law Judge