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January 22, 2021

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

Re: Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for approval of the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority; Docket No. A-2019-3015173; **SUNOCO PARTNERS MARKETING & TERMINALS, L.P./ENERGY TRANSFER'S EXCEPTIONS (PUBLIC VERSION)**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is Sunoco Partners Marketing & Terminals, L.P./Energy Transfer's ("SPMT") Exceptions (Public Version) in the above-captioned matter. Please note that the Highly Confidential version of SPMT's Exceptions will be filed under separate cover.

Should you have any questions or comments, please feel free to contact me directly.

Very truly yours,

/s/ Kevin J. McKeon

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WES/jld

Enclosures

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Office of Special Assistants ([ra-OSA@pa.gov](mailto:ra-OSA@pa.gov))  
Per Certificate of Service

PUBLIC VERSION

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**EXCEPTIONS OF  
SUNOCO PARTNERS MARKETING & TERMINALS, L.P.**

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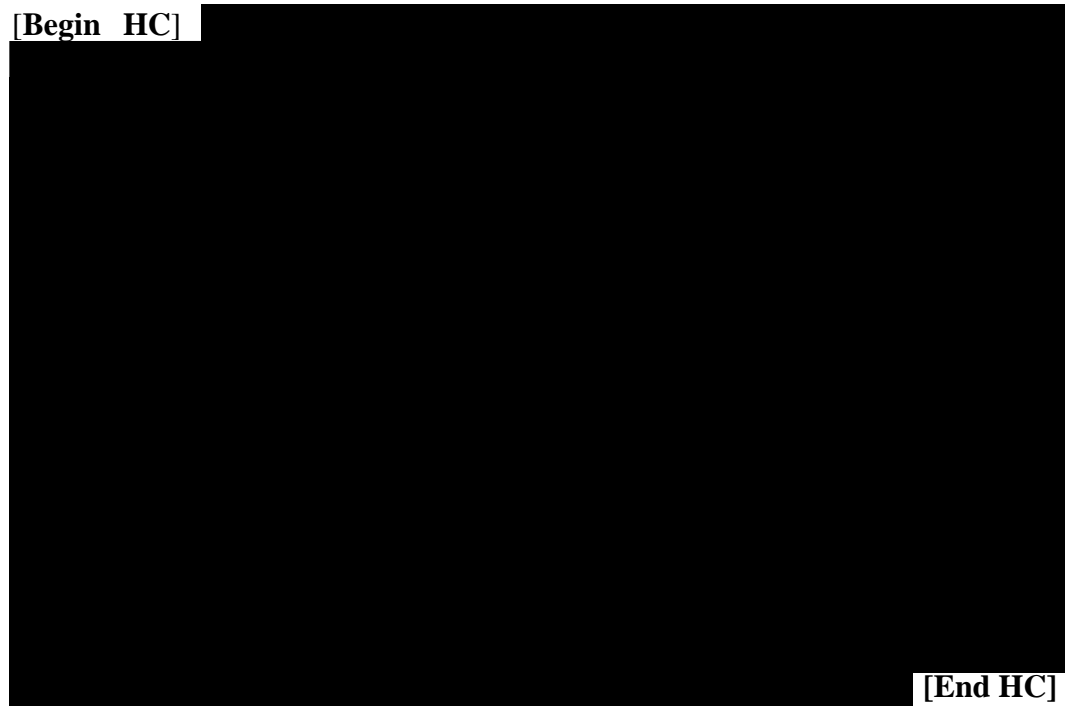
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## I. INTRODUCTION AND SUMMARY

Sunoco Partners Marketing & Terminals, L.P. (SPMT) agrees with and supports the reasoning and conclusion of the Recommended Decision (R.D.) that the application (Application) submitted by Aqua Pennsylvania Wastewater, Inc. (Aqua) for approval to acquire the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA) must be denied because Aqua failed to meet its burden of proof.

SPMT files these exceptions to highlight the following alternative and/or additional reasons for denying the Application, which are fully developed in the evidentiary record, but not adopted in the R.D., as reasons for denying the Application:


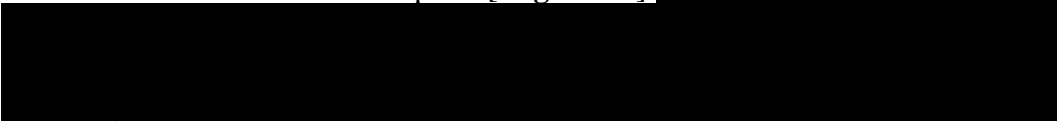
- **[Begin HC]**



**[End HC]**

- **The adverse rate impact will be severe and SPMT's contract will be impaired**  
**[Exception 2]:** In deciding whether Aqua's acquisition of the DELCORA wastewater system results in a "substantial public benefit," the Commission must address its impact on rates. *McCloskey v. Pennsylvania Public Utility Commission*, 195 A.3d 1055, 1066 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*). If the Application were approved, DELCORA customers would be penalized with a revenue requirement that would be at least \$36 to \$44 million per year more than the revenue requirement under continued DELCORA ownership, resulting in a very significant adverse rate impact on DELCORA customers, with

no positive factors from the acquisition to outweigh it. Moreover, SPMT's total bill under Aqua ownership over the period ending 2040, with Aqua implementing DELCORA's capital improvement program, will be ***\$18.6 million more on a net present value basis*** than it would be under DELCORA's continued ownership. The same service with no material betterments would simply cost much more under Aqua ownership.

- **Trust funding is illusory [Exception 3]:** Although Aqua touts the proposed DELCORA Customer Trust as the Application's primary public benefit because it could offset Aqua's planned steep post-acquisition rate increases, the record demonstrates that the Trust would not be funded at anywhere near the \$200 million level Aqua alleges, and likely would never be funded at all. Absent this "primary" public benefit, the acquisition's significant adverse impact on rates would not be "outweighed by ... other positive factors," as the law requires. *McCloskey*, 195 A.3d at 1067.
- **Combined sewer overflow remediation costs would skyrocket under a best available technology mandate [Exception 4]:** As a public entity operating a POTW, DELCORA is subject to policies developed and implemented by the United States Environmental Protection Agency (EPA) regarding controls on combined sewer overflows (CSOs). These policies allow POTWs with combined sanitary and storm sewers, like DELCORA's WRTP, to meet the goals of the Clean Water Act in a flexible, cost-effective manner. DELCORA uses CSO regulators at 26 outflow points. If Aqua owns the DELCORA system, however, EPA and the Pennsylvania Department of Environmental Protection (PA DEP) could require Aqua to employ "best available technology" to combat the CSO problem, resulting in the enormous expense of physically separating the stormwater sewer system from the sanitary sewer system, or enlarging the WRTP to treat both sanitary and stormwater flows. Although Aqua hopes that it will be able to simply assume DELCORA's CSO remediation obligations, the issue is not resolved, and hope is not a strategy. The potential cost to customers of implementing best available technology (a cost not presently included in Aqua's increased acquisition-driven rate and revenue requirement projections) would be staggering.
- **Detriments far outweigh the claimed benefits [Exception 5]:** Aqua must prove "not only that no harm will come from the transaction" but also that "substantial affirmative benefits" will flow from it. *McCloskey*, 195 A.3d at 1064. Aqua has done neither on this record. Aqua's [Begin HC]   
  
[End HC], and the unnecessary and dramatic rate increases Aqua ownership would bring, are all significant harms that would accompany a grant of the Application. Balanced against these harms, the alleged benefits Aqua attributes to the acquisition are actually either detriments or at most no new benefit at all, but instead a continuation of DELCORA's *status quo*. Thus, Aqua's claims that a grant of the Application will bring superior environmental regulation compliance competency,

lower rates, a Trust fund to offset near term rate increases, and a continuation in the private sphere of the benefits DELCORA enjoys as a public entity operating a POTW, all have been demonstrated on this record to be plainly false. Aqua's other claims that its acquisition of DELCORA will bring economies of scale, the benefits of a larger organization, greater experience in the provision wastewater service, and the ability for DELCORA to "control its own destiny" are likewise directly contrary to the facts. DELCORA is a much larger wastewater utility than Aqua; Aqua's plan is not to reorganize or streamline DELCORA, but instead to allow DELCORA to continue on as a separate unit within Aqua run by existing DELCORA management, staffed by existing DELCORA employees, operated from DELCORA's existing location, and implementing DELCORA's existing capital expansion plans – plans that DELCORA had already developed before the acquisition negotiations began. Under this arrangement, the only "value added" from the acquisition will accrue to Aqua shareholders.

**The Application is dogged by other unobtained approvals [Exception 6].** The R.D. appropriately denies the Application for failure of Aqua to either avert or resolve pending lawsuits by three municipalities that make it uncertain whether DELCORA will be permitted to transfer the municipalities' assets to Aqua, R.D. at 20, such that a grant of the Application "may result in Aqua being obligated to serve areas where it would not have sufficient facilities to provide service." *Id.* However, there are numerous other regulatory approvals and/or litigation-related loose ends that Aqua was either unaware of or ignored in its rush to seek approval of a transaction that simply is not ready for Commission review. The Commission should find that the lack of these required approvals also poses a barrier to a grant of the Application.

Fundamentally, although the R.D. points to only three threshold reasons that the Application must be denied, the record supports denial of the Application for a host of other reasons the R.D. did not reach including the specific exceptions SPMT raises. The "regionalization" benefits that Aqua attempts to embrace and exploit in this case is a decidedly bad fit and in fact do not exist; achieving the goal of regionalization may be paramount in the case of smaller wastewater systems that struggle to maintain compliance with environmental regulatory and capital improvement requirements, but this case is different. For the large and robust DELCORA system that is essentially already a region unto itself, Aqua's reliance on regionalization as a primary "benefit" of the transaction rings hollow. DELCORA, whose operations are immensely larger than Aqua's comparatively small sewer or wastewater operations,

already serves a huge region, with a customer base that dwarfs Aqua's. DELCORA has a long track record of providing quality service at a customer cost far lower than Aqua presently offers or will be able to provide in the future. DELCORA is solvent. DELCORA is in no need of "rescue" by Aqua. Even if the circumstances suggested Aqua's acquisition of DELCORA was a good idea (they clearly do not), Aqua's Application presents the Commission with a transaction so indefinite and subject to as-yet unobtained but required approvals from other state and federal agencies and the courts that its contours are barely discernable. More is required. The Commission should grant these exceptions so as to adopt additional record-based reasons for denying Aqua's Application.

Finally, in the event the Commission were to disagree with the R.D. and grant Aqua's Application, SPMT urges the imposition of the conditions described in Part III of these exceptions. In particular, the Commission should require DELCORA to retain ownership on a permanent basis of the WRTP and the 26 CSO regulators [Begin HC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End HC] Alternatively, the Commission should impose the same conditions on a transitional basis until the necessary permits are issued, the appeal period for challenging such permits has passed, and any appeals exhausted.

## II. EXCEPTIONS

1. Aqua's [Begin HC] [REDACTED] [End HC] permitting uncertainties justify denial of the Application; the R.D. erred in failing to consider them (SPMT M.B. at 30-41; SPMT R.B. at 14-19).

[Begin HC] [REDACTED]

[REDACTED]

[REDACTED]



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<sup>1</sup> **[Begin HC]**

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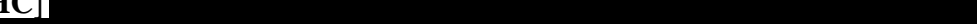
**[End HC]**

<sup>2</sup> [Begin HC]

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<sup>3</sup> **[Begin HC]**  **[End HC]**

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[REDACTED] [End HC]

- 2. Aqua’s rates will be significantly higher than DELCORA’s with no discernable benefit from Aqua ownership; the R.D. erred in failing to consider this issue (SPMT M.B. at 20-23; SPMT R.B. at 6-10).**

In deciding whether Aqua’s acquisition of the DELCORA wastewater system results in a “substantial public benefit,” the Commission must address its impact on rates. *McCloskey*, 195 A.3d at 1066 (“Because *City of York [v. Pa. Pub. Util. Comm’n]*, 295 A.2d 825 (Pa. 1972)] requires the impact on rates to be considered, the Commission must address that impact when deciding whether there is substantial public benefit.”). The R.D. did not reach this issue, concluding instead as a threshold matter that the ongoing Municipal lawsuits<sup>5</sup> make it uncertain whether DELCORA

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<sup>5</sup> The “Municipal lawsuits” are the complaints filed by the Southwest Delaware County Municipal Authority (SWDCMA), Lower Chichester Township, and Upland Borough against against DELCORA and the DELCORA Rate Stabilization Trust between November 3-6, 2020, for breach of contract and to enjoin DELCORA from closing the transaction with Aqua because DELCORA is purporting to transfer assets over which the Municipalities have contractual reversion rights that conflict with DELCORA’s representations in the Asset Purchase Agreement. R.D. at 8.

will be permitted to transfer the Municipalities' assets to Aqua, R.D. at 20, such that a grant of the Application "may result in Aqua being obligated to serve areas where it would not have sufficient facilities to provide service." *Id.* Thus, the R.D. concluded, it is "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." *Id.*

The R.D. is correct to identify the Municipal lawsuits (and the Municipalities' clear contractual rights to property DELCORA presumes it can transfer to Aqua, on which the lawsuits are based) as one of the many troubling uncertainties that compel denial of the Application. However, the record in this case is clear, and the R.D. should have found that Aqua's proposed acquisition of DELCORA would have a decidedly adverse impact on rates. As demonstrated in SPMT's other exceptions, this material adverse impact on rates would not be "outweighed by the other positive factors," as the law requires. *McCloskey*, 195 A.3d at 1067.

SPMT Witness Howard Woods analyzed the impact on DELCORA customer rates under existing DELCORA ownership and under proposed Aqua ownership on a stand-alone basis, and concluded that the transaction will have a substantial adverse rate impact:

- Aqua's revenue requirement associated with purchasing DELCORA's assets, assuming all assets transfer at the full amount of \$276.5 million, ***will be double the cost of existing DELCORA debt service***, increasing the revenue requirement from approximately \$15 million per year to approximately \$30 million. SPMT Statement No. 2 at 6:11-7:2; 18:17-21:2; Schedule HJW-1.
- The increase in Aqua's revenue requirement associated with the purchases of DELCORA's assets will ***increase DELCORA customers' rates by 12.55%, increase existing Aqua wastewater customer rates by 14.32%, and increase existing Aqua water customer rates by 4.58%***. SPMT Statement No. 2 at 6:2-9.
- In addition to the rate increases associated with the purchase price Aqua will pay, there is the revenue requirement associated with proposed capital improvements to the DELCORA system that DELCORA has planned and that Aqua now will implement; if the Commission approves Aqua's Application, the revenue

requirement for these very same improvements will be **\$46 million more per year** than if DELCORA retained the assets and made the investments. If DELCORA were to retain ownership and implement the improvements it has planned itself, the net present value of savings for DELCORA customers would be nearly half a billion dollars – \$462.9 million – over the period ending 2040. SPMT Statement No. 2 at 7:4-14; 23:14-28:15; Schedules HJW-2, HJW-3, and HJW-4.

- SPMT’s total bill under Aqua ownership over the period ending 2040, with Aqua implementing DELCORA’s capital improvement program, will be **\$18.6 million more on a net present value basis** than it would be under DELCORA’s continued ownership. SPMT Statement No. 2 at 35: 5-15; Schedule HJW-6.
- A portion of a DELCORA customer’s total out-of-pocket cost for these significant rate increases would be lowered if the proposed rate stabilization Trust is actually implemented, operated, and funded as proposed, so as to offset rate increases through 2028, but there is no credible basis for assuming that relief from the Trust will actually materialize,<sup>6</sup> whereas it is certain that Aqua’s revenue requirement-driven rate increases are real.

A public utility’s revenue requirement drives its rates, and it is undisputed that Aqua’s acquisition of DELCORA would significantly increase the DELCORA system’s revenue requirement to a level far above the level DELCORA would continue to require on a stand-alone basis. *See* SPMT M.B. at 20-23; Aqua M.B. at 33 (Table). Despite Aqua’s representations to the contrary, sharp increases in the rates Aqua would charge DELCORA system customers would follow. This is so for four reasons.

First, Aqua’s own analysis confirms the inevitable revenue requirement spike. To attempt to refute the revenue requirement projections of protestant experts that contrasted future DELCORA system revenue requirements on a “no sale” basis to a “sale to Aqua” basis, Aqua prepared a table that compares (i) the future revenue requirements for DELCORA on a stand-alone “no sale” basis, assuming planned capital infrastructure investments, as projected by County

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<sup>6</sup> *See* Exception 3, *infra*.

Witness Faryniarz (Column A), SPMT Witness Woods (Column A.1), and Aqua Witness Pileggi<sup>7</sup> (Column B), with (ii) Aqua’s projections of future revenue requirements under a “sale to Aqua” scenario (Columns C and D). Aqua M.B. at 33 (Table). Although the table spans 2020-2040, the year to focus on here is 2029, the year Aqua assumed would be the first full year after rate subsidies from the proposed DELCORA Trust would be exhausted.<sup>8</sup> Without even considering the fact, discussed below, that the protestants demonstrated (without response from Aqua) that the Pileggi projection (Column B) grossly overstates DELCORA’S stand-alone revenue requirement, Aqua’s own table proves that under Aqua ownership the revenue requirement for the DELCORA system will exceed the annual revenue that DELCORA would require absent Aqua ownership by more than \$10.4 million (Column B - C = E). The excerpt from Aqua’s table shown below displays the comparison for the year 2029:

**Aqua Revenue Requirement Comparison for DELCORA System<sup>9</sup>**

	A	A.1	B	C	D	E	F
Year	Faryniarz DELCORA No sale	Woods DELCORA No sale	Pileggi DELCORA No sale	Packer DELCORA Sale w/Trust	Packer DELCORA Sale w/Trust + Assumed 10% cost spread	Difference B-C	Difference B-D
2029	\$113,460,959	\$105,865,754	\$139,125,496	\$149,533,281	\$134,579,952	(\$10,407,785)	\$4,545,543

While acknowledging the \$10.4 million greater revenue requirement under Aqua ownership (displayed in Column E), Aqua is asking DELCORA customers and the Commission

<sup>7</sup> Mr. Pileggi is DELCORA’s chief financial officer who testified as an Aqua witness. Aqua St. Nos. 6 and 6-R.

<sup>8</sup>There is no reason to believe the Trust corpus would last until 2028; SPMT proved it would be exhausted by 2024, assuming it can be funded at all after DELCORA applies the proceeds of the sale first to satisfy federally mandated payout obligations under Presidential Executive Order 12803. *See* Exception 3, *infra*.

<sup>9</sup> Excerpted from Aqua M.B. at 33 (year 2029).



to ignore it, and join Aqua in hoping that beginning in 2029, Aqua's wastewater customers outside of the DELCORA service area would pick up the tab for about 10% (\$15 million each year) of the cost to serve DELCORA system customers (Column D). This will result, Aqua claims, in a \$4.5 million savings for DELCORA customers under Aqua ownership (Column F). *See* Aqua M.B. at 33-34. The problem is that Aqua's "10% cost spread" concept in Column D is wholly unsupported speculation. The cost shifting Aqua promises is at best a two-way street, as shown by SPMT's witness Mr. Woods. SPMT Statement No. 2-SR at 6:13-11:2. The far greater likelihood given Aqua's aggressive growth through acquisition strategy, coupled with its aggressive investment in new and replacement infrastructure in areas it already serves, is that in 2029 or before, significant additional costs will be shifted onto DELCORA system customers from other soon-to-be-acquired Aqua wastewater systems, not the reverse. *Id.* It will be DELCORA system customers who will be picking up the tab for Aqua's expansion. *Id.* Mr. Woods' point thus refutes the core principle of Aqua's "don't worry about rate increases" narrative.<sup>10</sup> ***Tellingly, Aqua offered no rejoinder regarding this point.***

Second, the record demonstrates that the Pileggi projection of the DELCORA "no sale" revenue requirement (Column B of Aqua's table) cannot be trusted. Aqua and DELCORA "stacked the deck" before playing out the comparison of revenue requirement projections. The Pileggi Column B projection assumes (unrealistically and imprudently), that DELCORA will fund out of cash (*i.e.*, current rates), the very large capital investments it needs to make in order to

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<sup>10</sup> Indeed, under strict rate equalization principles, Aqua's acquisition of DELCORA's much larger, well-managed, lower cost wastewater system would require DELCORA system customers to begin subsidizing other Aqua wastewater service area customers immediately, without even taking into consideration the growing revenue requirement associated with Aqua's ongoing expansion plans. OSBA Witness Kalcic correctly notes that **under rate equalization principles, rates charged by DELCORA for typical residential service would need to increase by 89% to match existing Aqua Wastewater Zone 1 rates** (SPMT Statement No. 2-SR at 11:4-12:17).

redirect its Eastern Region flow from the Philadelphia Water Department to DELCORA's expanded WRTP by 2028. Of course, these very substantial investments in long-lived assets should and would be financed through the issuance of low-cost municipal bonds under DELCORA ownership, so as to spread the burden over the generations of ratepayers who will benefit from them. County Witness Faryniarz highlighted Pileggi's unrealistic assumption that is outcome-determinative of Column B's overstated "no sale" revenue requirement projections. Delaware County Statement No. 1-SR at 10:14-11:2 and at 13:1-14:5; *see* County M.B. at 39-40. ***On this critical point as well, Aqua offered no rejoinder.*** The takeaway is that Aqua and DELCORA were outed on the record in their attempt to manipulate the numbers to increase DELCORA's "no sale" revenue requirement in order to make the sale to Aqua (Columns C and D), and the very high rate increases the sale will bring compared to continued DELCORA ownership, appear more reasonable, when in fact they are not. Aqua and DELCORA's bootstrap argument must be rejected.

Third, SPMT's revenue requirement projections for DELCORA (Column A.1), by contrast, are reasonable. Aqua's Vice President – Controller Mr. Packer, for his part, conceded that Mr. Woods' calculations quantifying the respective revenue requirements for DELCORA and Aqua and the resulting rate increases he projected "appear to be accurate." (Aqua Statement No. 2-R at 52:21-53:1). Although Mr. Pileggi criticized Mr. Woods' Column A.1 projections on grounds that he used an inflation rate that was too low (Aqua Statement No. 6-R at 8:1-2), and that he neglected to include expenses DELCORA will incur associated with the Philadelphia Water Department's Long Term Control Plan, *id.* at 3:11-12,<sup>11</sup> Mr. Woods explained in surrebuttal that neither the inflation rate he chose, nor the addition of Philadelphia LTCP expenses, would change his revenue requirement conclusions because both items would require parallel adjustments to

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<sup>11</sup> Mr. Woods did not include this expense in his original calculation because Aqua neglected to include it in its projected capital improvement plan. SPMT Statement No. 2-SR at 13:18–14:6.

DELCORA and Aqua projections, such that the relative difference in "no sale" vs. "sale" revenue requirement projections would remain the same. SPMT Statement No. 2-SR at 15:20–16:14; 13:4-15:18. *Once again, Aqua offered no rejoinder on this point.*

Viewing Aqua's table in light of these record facts, the conclusion to be drawn is that if the Commission allows Aqua to acquire DELCORA, the most likely revenue requirement effect of an Aqua acquisition of the DELCORA system is found by ignoring the DELCORA projection (Column B) and instead comparing the "no sale" projections of Mr. Faryniarz (\$113,460,959) or Mr. Woods (\$105,865,754) for 2029 (Column A or A.1) with Aqua's "sale" projection (\$134,579,952) (Column C).

Fourth, if the Application were approved, the consequence of points one through three above will be that DELCORA customers would be penalized with a revenue requirement *that is at least \$36 to \$44 million per year more than it would be under continued DELCORA ownership*. There is no doubt that the increase in revenue requirement will translate to higher rates for existing DELCORA customers. The money must come from someplace. It is the pockets of DELCORA's customers that will be picked clean. The Commission must address that impact. *McCloskey*, 195 A.3d at 1066. The alleged benefits of the transaction, which are negligible if not negative, do not come close to outweighing its ruinous rate impact on DELCORA customers. *Id.* at 1067.<sup>12</sup>

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<sup>12</sup> In addition to the direct adverse rate impact on DELCORA system customers and on Aqua's other customers, Aqua's acquisition of DELCORA's assets will have two other negative rate-related effects, both related to DELCORA's loss of POTW status for the WRTP. **First**, Section 1383 of the Clean Water Act allows the states to provide financing assistance to POTWs at below market rates for infrastructure projects. DELCORA's WRTP as a POTW has access to the program and could have used it to finance the \$1 billion in improvements it has planned in order to migrate away from use of the Philadelphia treatment plant for DELCORA flows in the Eastern portion of its system. Under Aqua ownership, DELCORA system customers would not get that benefit, resulting in a much higher capital costs and revenue requirement and thus much higher rates.

**3. The DELCORA Rate Stabilization Trust's funding uncertainties justify denial of the Application; the R.D. erred in failing to consider the problem (SPMT M.B. at 23-28; SPMT R.B. at 10-14).**

The R.D. correctly finds as a matter of law that the Application must be denied because the proposed irrevocable DELCORA Customer Trust (Trust), which allegedly will be sufficiently funded so as to offset until 2028 the steep rate increases that DELCORA customers will suffer under Aqua ownership, would in reality be a “*de facto* rate stabilization plan” that should have been (but was not) submitted for approval as part of Aqua’s Application and that, “in effect, functions to bypass the Commission’s ratemaking authority,” R.D. at 22. The Trust’s sketchy legal status, however, is only the beginning of Aqua’s Trust-related problems. Although Aqua touts the Trust’s ability to offset Aqua’s planned steep rate increases as the Application’s primary public benefit, Aqua Statement No. 2 at 13:16-17; Aqua Statement No. 5 at 11:12-14, the record demonstrates that the Trust would not be funded at anywhere near the \$200 million level Aqua alleges, and likely would never be funded at all. The R.D. failed to address this factual issue.

The facts reveal that Aqua’s estimate that the Trust will start out with a \$200 million balance is the product of double counting and wishful thinking. The evidence of double counting is clear. DELCORA revealed in discovery that \$100 million that will be paid into the Trust will be paid out, not to DELCORA customers as Aqua bill offsets, but instead to Aqua to implement DELCORA’s obligations under a federal court consent decree with EPA and PA DEP to remedy CSO issues under DELCORA’s Long Term Control Plan (LTCP). SPMT Statement No. 2SR at 18:1-17; SPMT Exhibit HJW-1SR at 15, 17, 18. Similarly, DELCORA CFO Pileggi revealed in

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**Second**, Pennsylvania’s share of Clean Water Act funds for these loans to all POTWs in Pennsylvania will decrease because the formula used to allocate funds is a simple ratio of the POTW needs in Pennsylvania divided by the POTW improvement needs in the United States. Because the DELCORA system’s needs will not be included in the formula if DELCORA is acquired by Aqua, Pennsylvania’s allocated share will decrease and all other Pennsylvania POTWs will lose out. SPMT M.B. at 28-30.

rebuttal testimony that DELCORA's obligation to pay an additional \$86 million for its share of the Philadelphia Water Department's Long Term Control Plan (PWD LTCP) between 2020 and 2028 was not included in DELCORA's capital expenditure plan; Aqua will need to recover the \$86 million through rates even higher than Aqua projected. SPMT Statement No. 2SR at 13:4-14:6, citing Aqua Statement No. 6R at 3:10-15. In turn, this would result in higher than expected Aqua rate offset payments from the Trust, thereby depleting the Trust even more rapidly than expected. SPMT Statement No. 2SR at 18:22-19:5. With fewer dollars in the Trust available to offset Aqua's rate increases, and with Aqua rate increases higher than initially projected, SPMT's witness Mr. Woods calculated in his surrebuttal testimony that the Trust would run out of funds by 2024 – four years earlier than Aqua's projection that the Trust-funded rate offsets would continue until 2028. *Id. Neither DELCORA nor Aqua disputed this conclusion when they had the opportunity to do so in rejoinder testimony.*

It is equally clear that wishful thinking is all that supports Aqua's claim that Trust will be funded at all. Presidential Executive Order 12803 (E.O. 12803) applies to DELCORA's sale of its assets to Aqua, because DELCORA's assets were funded in part through grants from the Federal Government through EPA-administered programs. SPMT Statement No. 2 at 44:10-50:12.<sup>13</sup> Although Aqua and DELCORA apparently were unaware of E.O. 12803 until SPMT brought it to their attention in testimony,<sup>14</sup> both concede it applies to Aqua's proposed purchase of DELCORA's assets. Aqua Statement No. 4R at 11:16-17; Aqua Statement No. 6R at 12:14-13:2. In addition to requiring federal approvals of the sale (including the fixing of the sale price) by the EPA and the Office of Management and Budget (OMB) – steps that Aqua and DELCORA have

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<sup>13</sup> A copy of Presidential Executive Order 12803, in evidence as SPMT Statement No. 2 Appendix C, is attached to these Exceptions as **Appendix A**.

<sup>14</sup> E.O. 12803 is not mentioned in the Application or any of the testimony that accompanies it.

not taken – **E.O. 12803 imposes a hierarchy of repayment obligations that places the Trust last in line to receive any of the proceeds DELCORA would receive from the sale to Aqua.**

*Id.* The operative E.O. 12803 provision requires that state and local governments that contributed to DELCORA’s assets are first in line to be repaid in full the “unadjusted dollar amounts” of their contributions:

**[T]he transfer price shall be distributed, as paid, in the following manner: (i) State and local governments shall first recoup in full the unadjusted dollar amount of their portion of total project costs (including any transaction and fix-up costs they incur) associated with the infrastructure assets involved; (ii) if proceeds remain, then the Federal Government shall recoup in full the amount of Federal grant awards associated with the infrastructure assets, less the applicable share of accumulated depreciation on such asset (calculating using the Internal Revenue Service accelerated depreciation schedule for the categories of assets in question); and (iii) finally, the State and local governments shall keep any remaining proceeds....**

Appendix A, E.O. 12803, Section 3(c).

As SPMT explained in testimony, we already know for certain that DELCORA will be required to repay \$11.9 million to SDCMA from the asset sale proceeds, SPMT Statement No. 2SR at 23:5-13, but there are 49 other municipalities in the DELCORA system, each of which may need to be repaid at the “unadjusted dollar amount”<sup>15</sup> for its contributions. *Id.* Those payments to the municipalities that contributed their facilities to the DELCORA system will necessarily reduce or eliminate altogether the funds that DELCORA has stated will be available to fund the Trust. *Id.*

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<sup>15</sup> E.O. 12803 makes a clear distinction between the amount to be repaid to local governments, which shall “recoup in full the *unadjusted dollar amount of their portions of total project costs*” and the amount to be repaid to the federal government, which shall “recoup in full the amount of Federal grant awards...less the applicable share of accumulated depreciation.” Thus, the repayment amount to DELCORA’s local government contributors cannot to be reduced to reflect accumulated depreciation – in other words, local governments must be repaid the full undepreciated original cost value.

*Neither Aqua nor DELCORA offered rejoinder testimony to rebut this critical point.*

In briefing, Aqua sought to characterize E.O. 12803's requirements, including this mandated distribution of proceeds requirement, as requirements that the EPA and the OMB will "waive." Aqua M.B. at 54. No evidence supports this assertion. Nor is there anything in the language of E.O.12803 that states (or even implies) that the provision requiring refunding to local governments of the full unadjusted amount of contributions that they made is anything other than mandatory and nonwaivable. E.O.12803 allows EPA and OMB to approve the privatization of DELCORA's assets, but expressly conditions that grant of authority on repayment to municipalities of the funds contributed:

Sec. 3. Privatization Initiative. To the extent permitted by law, the head of each executive department and agency shall undertake the following actions:

....

(c) Approve State and local governments' requests to privatize infrastructure assets... **provided that** the transfer price **shall be distributed**, as paid, in the following manner: (i) State and local governments shall first recoup in full the unadjusted dollar amount of their portion of total project costs (including any transaction and fix-up costs they incur) associated with the infrastructure asset involved;

The "provided that" language in Section 3(c) of E.O. 12803 that immediately precedes the mandatory "shall be distributed" directive that controls the order of distribution admits of no other interpretation. Thus, even if EPA and OMB were amenable to permitting DELCORA's no-bid sale of its assets to Aqua at their agreed price, neither has the power under E.O. 12803 to dispense with the mandatory requirements governing how proceeds from the transaction are to be distributed. Implementation of those distribution requirements almost certainly will make it impossible for DELCORA to fund the Trust at the proposed \$200 million level, and likely will prevent DELCORA from funding the Trust at all. If the Trust cannot be funded because the transaction proceeds are used to pay back DELCORA's contributing municipalities, the transaction's "primary

benefit” will disappear.

Aqua also has suggested in briefing that concerns about the amount of funds available to the Trust after satisfaction of the repayment obligations under E.O. 12803 are “speculative at best.” Aqua M.B. at 53. But given that Aqua concedes that E.O. 12803 applies, the burden is on Aqua, not protestants, to explain how it can be that any funds from the sale proceeds will remain to fund the Trust after the requirements of E.O. 12803 are satisfied. Aqua has not done so.

Accordingly, quite apart from the R.D.’s conclusion that the Trust is an unauthorized *de facto* rate stabilization plan, Aqua has failed to prove that this alleged “primary benefit” is even real. Put differently, given the reimbursement requirements of E.O. 12803, it is Aqua that is “speculating” that the Trust will be funded as claimed. The record evidence weighs heavily on the side of a conclusion that Aqua has not carried its burden to demonstrate that the Trust will provide any benefit whatsoever.

**4. Combined sewer overflow remediation cost uncertainties justify denial of the Application; the R.D. erred in failing to consider them (SPMT M.B. at 30-41; SPMT R.B. at 14-19).**

Another detriment of the transaction fully supported in the record that the R.D. neglects to expressly consider relates to the impact of Aqua’s acquisition of DELCORA on the future cost of the DELCORA system’s ongoing combined sewer overflow (CSO) remediation program.<sup>16</sup> As a

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<sup>16</sup> A combined sewer is a single sewer main that collects and transmits wastewater in addition to stormwater. During dry weather, combined sewers carry wastewater to the treatment plant for proper treatment and disposal. During storm events, combined sewers are designed to overflow at defined CSO points and discharge untreated wastewater and storm water to a receiving stream. SPMT Statement No. 2 at 9:5-12. The environmental impacts associated with combined sewer overflows during wet weather conditions have been a key focal point for enforcement activities by EPA and PA DEP. *Id.* at 41:16-42:16. Mitigating those impacts also poses an enormous challenge for the regulated community because of the complexities and challenges associated with attempting to retrofit infrastructure that can be quite old. *Id.* Combined sewers carry both domestic and industrial wastewater discharged to the DELCORA system or discharged to the municipal systems feeding into the DELCORA system along with storm water collected within the communities that have combined sewers. *Id.* at 9:5-8.



public entity, DELCORA is subject to an EPA-administered CSO control policy that allows POTWs with combined sewers, like DELCORA's WRTP, to meet the goals of the Clean Water Act in a flexible, cost-effective manner. Under this approach, DELCORA as a public entity is able to minimize the impact of overflows through the implementation of regulatory and operational controls, rather than through far more costly measures such as complete separation of all sanitary and storm sewers or enlarging its treatment plant to provide for full treatment for all flows including storm flows. SPMT Statement No. 2 at 42:1-16. If Aqua owns the DELCORA system, however, EPA and PA DEP, perhaps at the behest of third parties, may require that Aqua employ "best available technology" to combat the CSO problem, resulting in, for example, the enormous expense of physically separating the stormwater sewer system and the sanitary sewer systems. As SPMT witness Woods explained:

The regulatory program associated with Combined Sewer Overflows ("CSO") does not apply to private entities. It only applies to POTWs. DELCORA's existing NPDES Permit includes the primary discharge from the wastewater treatment plant, regulated storm water discharges from the treatment plant site, and 26 additional outfalls that are located on combined stormwater and sanitary sewers. This permit expired on April 30, 2018 and a new permit has not yet been issued by Pennsylvania DEP. It is not clear how these discharge points will be regulated once the POTW designation for the DELCORA system is lost if the sale to AQUA closes. The existing USEPA CSO control policy provides guidance on how POTWs with combined sewers, like DELCORA, can meet the goals of the CWA in a flexible, cost-effective manner. While the CSO control program recognizes that some storm-related events will result in overflows and that the impact of these can be minimized through the implementation of regulatory and operational controls, discharges from a private system do not benefit from these guidelines and controls. For example, one of the nine minimum controls in this program relies on the concept of maximizing the volume of storm flows treated in a POTW to provide at least primary treatment prior to discharge and would allow a secondary treatment bypass. This remedy is only available to POTWs. As a result, a private system could be ordered to completely separate all sanitary and storm sewers to eliminate the CSOs or provide full treatment for all flows including storm flows. This could dramatically increase the

capital cost of the DELCORA long-term control plan if the POTW designation is lost. Such a result could have a crippling impact as the capital improvement program would be much more costly than the program proposed by DELCORA.

SPMT Statement No. 2 at 41:14-42:15.

Aqua's complete testimonial response on this issue is that Aqua hopes that it would be "substituted for DELCORA" under the 2015 federal district court Consent Decree with EPA and PA DEP, and thereby be permitted to fulfill DELCORA's CSO obligations, rather than new and much more costly obligations using best available technology that could be imposed on a private entity such as Aqua. Aqua Statement No. 4R at 5:19-7:20. Consistent with Aqua's wholly unsupported narrative that environmental regulators will not care about esoteric legal distinctions between POTWs and private wastewater systems so long as the private owner does not alter the POTW's operations,<sup>17</sup> Aqua witness Bubel stated confidently that "Aqua does not expect that its acquisition of the DELCORA system will lead to the imposition of CSO obligations greater than those that would be imposed on DELCORA." *Id.* at 18-20. In surrebuttal, however, Mr. Woods reiterated his concern that EPA will be required under the Clean Water Act to insist that Aqua as a private owner implement best available technology to remediate CSOs. As he explained:

**Q. DELCORA'S PUBLICLY OWNED TREATMENT WORKS ("POTW") STATUS FOR THE DELCORA WESTERN REGION WASTEWATER TREATMENT PLANT WILL BE LOST UPON THE TRANSFER OF THE ASSETS TO AQUA. HOW WILL THAT LOSS OF POTW STATUS AFFECT THE COMBINED SEWER OVERFLOW PROGRAM?**

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<sup>17</sup> Aqua's cavalier approach to critical regulatory distinctions systemically infects the Application. While Aqua may wish to equate private and public ownership of wastewater treatments systems, this is simply not the framework that is reflected in key environmental regulatory requirements. Whether a wastewater treatment system is owned by a public entity or a private entity matters greatly in terms of the environmental requirements that apply even if Aqua may wish otherwise.

- A. As Mr. Bubel asserts in his Rebuttal Testimony (Aqua Statement No. 4-R, Bubel, Page 7, Lines 14-17), the parties to the Consent Decree (EPA, DEP, DELCORA and Aqua) can jointly petition the United States District Court to substitute Aqua for DELCORA under the Decree and obligate Aqua to implement the Long Term Control Plan. However, it is my understanding that **the Clean Water Act does not permit EPA to implement the Combined Sewer Overflow requirements where private combined point source discharges are concerned but instead must impose Best Available Technology requirements on these discharges. I would anticipate that this is an issue that could take an extended period of time to resolve.**

SPMT Statement No. 2R at 28:1-14 (emphasis added).

Although *Aqua offered no rejoinder on this issue*, and in fact never addressed in any testimony the POTW versus private wastewater provider issue in the context of CSO remediation that Mr. Woods has raised, it has offered legal argument that the CSO remediation cost issue is “speculative” and “meritless.” Aqua M.B. at 49-51. As the record stands, however, the evidence that Aqua as a private owner of DELCORA’s system may be required to implement extraordinarily costly CSO remediation measures is unrebutted. Here again, it is Aqua’s attempt to downplay a significant obstacle that must be deemed “speculative.” It is based on nothing more than the “hope” that EPA and PA DEP will agree to modify the Consent Decree so as to allow Aqua to assume only those CSO remediation obligations that apply to DELCORA, that no third party will protest the modification on the grounds that Aqua should be required to comply with the best available technology requirement, and that the district court will allow the modification. As with so many other key approvals that Aqua must have from entities other than the Commission that it has not yet obtained, the number of “ifs” that remain here is cause of concern. Aqua, in its rush to secure Commission approval, has provided the Commission with many more questions than answers about whether approval of this transaction is in the public interest.

**5. Aqua failed to prove affirmative public benefits; the R.D. erred to the extent it assumed such benefits exist (SPMT M.B. at 14-19; SPMT R.B. at 4-5).**

Aqua must prove “not only that no harm will come from the transaction” but also that “substantial affirmative benefits” will flow from it. *McCloskey*, 195 A.3d at 1064, *citing City of York*, 295 A.2d at 828. Aqua failed to carry this burden, as the record clearly demonstrates. To the extent that the R.D. suggests that the transaction might offer affirmative public benefits, SPMT excepts.<sup>18</sup>

Quite apart from the existential harm that would result from the acquisition because of Aqua’s [Begin HC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End HC], and the unnecessary and dramatic rate increases Aqua ownership would bring, the transaction confers no substantial affirmative benefits on DELCORA’s customers, Aqua’s wastewater customers, or Aqua’s water customers.

The complete listing of Aqua’s alleged benefits is summarized in Aqua Witness Packer’s direct testimony, which he states are drawn from “the Application and from direct testimony submitted in support of the Application.” Aqua Statement No. 2 at 13:10-14:20. A review of these alleged benefits, however, reveals that they net to zero or negative numbers, and that the only likely beneficiaries of the transaction will be Aqua shareholders:

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<sup>18</sup> R.D. at 22 (“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”). Elsewhere in the R.D., however, the ALJs make it clear that they did not substantively assess the affirmative public benefits issue because of the ongoing Municipal lawsuits that make 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.” *Id.* at 20.

ALLEGED BENEFIT <sup>19</sup>	REALITY
<ul style="list-style-type: none"> <li>“The majority of the sale proceeds will be placed in an irrevocable Trust that will benefit DELCORA customers for years to come.” Aqua Statement No. 2 at 13:16-17; Trust is the “primary benefit” of the transaction. Aqua Statement No. 5 at 11:12-14</li> </ul>	<p>The Trust is illusory. Projections that the Trust will be funded sufficiently to offset Aqua rate increases until mid-2028 are clearly wrong. The inputs Aqua and DELCORA provided are the product of double counting and wishful thinking. <i>See supra</i> Exception 3 (discussion of why the Trust is likely to be underfunded or unfunded because of double counting of expendable funds and the payout hierarchy requirements of E.O. 12803).</p>
<ul style="list-style-type: none"> <li>“Aqua is familiar with the DELCORA service areas and serves populations of nearly 500,000 in Delaware County and 200,000 in Chester County” Aqua Statement No. 2 at 13:18-19.</li> </ul>	<p>Familiarity with DELCORA’s service territory cannot be viewed as anything more than a “met expectations” requirement. It certainly is not a benefit, as lack of familiarity would obviously be a detriment. Moreover, the customer counts Aqua cites are its affiliate’s water customers – Aqua’s wastewater footprint is far smaller than DELCORA’s. Finally, Aqua obviously is not more familiar with DELCORA’s customers than DELCORA is, and DELCORA is perfectly capable of continuing to service its customers.</p>
<ul style="list-style-type: none"> <li>“Economies of scale will result from the these nearby and overlapping service areas” Aqua Statement No. 2 at 13:20.</li> </ul>	<p>This claim is unsupported and unlikely. DELCORA’s existing customer base and size dwarfs Aqua wastewater operations, serving 197,000 Equivalent Dwelling Units to Aqua’s approximately 38,000. SPMT Statement No. 2 at 13:3-13; 15:11-19; SPMT Statement No. 2SR 2R at Exhibit HJW-1SR p. 12. Given Aqua’s post-acquisition plans to operate DELCORA in place as a satellite under existing DELCORA management with all existing DELCORA employees, there can be no appreciable cost savings or economies of scale in any of the major cost centers. <i>See</i> Aqua Statement No. 4 at 9:22-10:2 (Aqua will maintain “the office and operations centers currently in place in DELCORA’s service territory”); Delaware County Statement No. 2 at 5 n. 1 (Current DELCORA executive director to have “oversight of Aqua PA in</p>

<sup>19</sup> Alleged benefits as stated in Aqua Statement No. 2 at 13:13-14:20.

	southeast PA including DELCORA and SEPA [wastewater] operations..."); Aqua Statement No. 1 at 8:3-4, (Aqua will "offer employment to all of the DELCORA employees").
<ul style="list-style-type: none"> <li>• "DELCORA customers will benefit from Aqua's experience in large-scale capital planning and replacement programs" Aqua Statement No. 2 at 13:21-22.</li> </ul>	DELCORA, not Aqua, created the capital investment plan that, post-acquisition, Aqua, employing existing DELCORA management, will implement. SPMT Statement No. 2 at 17:19-18:7. In other words, DELCORA, a much larger wastewater utility than Aqua Wastewater, after Aqua absorbs it, will use existing DELCORA personnel to implement existing DELCORA plans under the nominal leadership of Aqua. This is not a benefit.
<ul style="list-style-type: none"> <li>• "DELCORA customers will benefit from customer protections provided by the Commission's regulations and the Company's Helping Hand program" Aqua Statement No. 2 at 14:1-2.</li> </ul>	DELCORA has been serving its customers as a public governmental entity for decades. There is no evidence in this record that DELCORA customers lack customer protections under DELCORA's existing programs.
<ul style="list-style-type: none"> <li>• "Aqua has committed to preserving the jobs of DELCORA employees" Aqua Statement No. 2 at 14:3.</li> </ul>	This is a laudable goal, but certainly not a benefit when there is no evidence that, absent acquisition by Aqua, DELCORA would need to lay off employees or downsize in order to remain viable on a stand-alone basis. The commitment is arguably a detriment, from the perspective of realizing economies of scale as the result of the transaction.
<ul style="list-style-type: none"> <li>• "Aqua has a proven record of environmental stewardship of wastewater systems" Aqua Statement No. 2 at 14:4.</li> </ul>	<p>Whatever its environmental record coming into this transaction, Aqua has demonstrated in this transaction [Begin HC] [REDACTED]</p> <p>[End HC]</p>
<ul style="list-style-type: none"> <li>• "Aqua's expertise in implementing large scale projects and compliance with Pennsylvania Department of Environmental Protection and US Environmental Protection Agency regulations" Aqua Statement No. 2 at 14:5-7.</li> </ul>	<p>As demonstrated in Exception 1, <i>supra</i>, [Begin HC] [REDACTED]</p> <p>[End HC]</p>
<ul style="list-style-type: none"> <li>• "The combining of systems and customers provides inherent stability</li> </ul>	Whatever validity this principle may have as a general rule, under the circumstances

<p>in the day to day utility operations, in that, these systems do not all require major capital investments at the same time and, therefore, spreads the financial impacts over the long term operations of the utility” Aqua Statement No. 2 at 14:8-11.</p>	<p>presented in this transaction where DELCORA has a long track record of providing quality service at rates much lower than Aqua’s, and where Aqua is in the process of spending hundreds of millions of dollars on acquiring and investing in multiple additional wastewater systems, the costs associated with those acquisitions are likely to dramatically raise the rates of DELCORA customers, not subsidize or stabilize them. <i>See supra</i> Exception 2; SPMT Statement No. 2SR at 4:17-12:17; OSBA Statement No. 1 at 6:12 – 7:8 (under rate equalization principles, <b>rates charged by DELCORA for typical residential service would need to increase by 89% to match existing Aqua Wastewater Zone 1 rates</b>) (<i>see</i> SPMT Statement No. 2-SR at 11:4-12:17).</p>
<ul style="list-style-type: none"> <li>• “DELCORA's customers will become part of a larger-scale, efficiently operated, water and wastewater utility” Aqua Statement No. 2 at 14:12-13.</li> </ul>	<p>DELCORA’s existing customer base and size dwarfs Aqua’s existing wastewater operations. SPMT Statement No. 2 at 15:17-19 (“By any objective measure, DELCORA is larger than Aqua Pennsylvania Wastewater, Inc., the AQUA entity that will actually acquire DELCORA if this transaction is approved.”). There is no evidence in the record that Aqua is more efficiently operated than DELCORA. There is ample evidence in the record to demonstrate that existing Aqua rates result in much higher charges for the same service provided by DELCORA. OSBA Statement No. 1 at 2:21-3:6.</p>
<ul style="list-style-type: none"> <li>• “By virtue of the Company's larger combined customer base, future infrastructure investments across the Commonwealth, driven by normal replacement cycles, emergency repairs, emergency response or compliance with new environmental regulations, will be shared at a lower incremental cost per customer for all of Aqua's customers over time” Aqua Statement No. 2 at 14:14-18.</li> </ul>	<p>Whatever validity this principle may have as a general rule, under the circumstances presented in this transaction where DELCORA has a long track record of providing quality service at rates much lower than Aqua’s, and where Aqua is in the process of spending hundreds of millions on acquiring and investing in multiple additional wastewater systems, the costs associated with that activity are likely to dramatically raise the rates of DELCORA customers, not stabilize them. <i>See supra</i> Exception 2; SPMT Statement No. 2SR at 4:17-12:17. Moreover, DELCORA’s cost of capital is less than half</p>

	that of Aqua's. SPMT Statement No. 2 at 7:16-8:9.
<ul style="list-style-type: none"> <li>• “The elimination of the treatment expense to PWD [Philadelphia Water Department] will allow DELCORA to control its own destiny and offset the potential risk of future increases” Aqua Statement No. 2 at 14:19-20.</li> </ul>	<p>This is a strategy DELCORA had already planned to pursue on its own to eliminate the PWD treatment arrangement and associated expense and thereby “control its own destiny” long before it entered into this transaction with Aqua. Aqua ownership will actually make it less of a benefit, because there is no basis in the record to conclude that DELCORA is not able to follow through to “control its own destiny” on its own without the added revenue requirement burden on DELCORA ratepayers of Aqua ownership. SPMT Statement No. 2 at 16:1-13; 17:19-18:7. <b>[BEGIN HC]</b> [REDACTED] <b>[END HC]</b></p>

Aqua also asserts repeatedly that regionalization of wastewater systems must be viewed as a beneficial end in itself. Application at ¶ 56a; Aqua Statement No. 1 at 10:9-12; Aqua Statement No. 2 at 8:6-7; Aqua Statement No. 2R at 3:20-22. As even Aqua concedes, however, the Commission's policy encouraging regionalization focuses on “acquisitions of smaller systems by larger more viable systems.” Application at ¶ 56a, citing *Final Policy Statement on Acquisition of Water and Wastewater Systems*, Docket No. M-00051926, Final Order at 18 (Aug. 17, 2006). That is not the situation with DELCORA. DELCORA is larger than Aqua's entire existing wastewater operation, serving 197,000 Equivalent Dwelling Units to Aqua's approximately 38,000. SPMT Statement No. 2 at 13:3-13; 15:11-19; SPMT Statement No. 2SR 2R at Exhibit HJW-1SR p. 12. There is no evidence in the record that DELCORA is not viable, or even that it is “less viable” than Aqua. Aqua itself admits that even though it believes that most municipally-owned wastewater systems have not “had proper repair and maintenance over the years,” Aqua Statement



No. 2R at 48:22-49:1, that is not DELCORA's situation. *Id.* at 49:10-11 ("I would not categorize [DELCORA] as underinvested."). Nor is the need to manage the challenge of environmental regulation necessarily easier for a private entity such as Aqua as opposed to public entities such as DELCORA – the evidence shows that it actually is easier and less costly for DELCORA as a public entity to comply with the environmental laws than it is for a private entity such as Aqua, *see infra* Exception 4 (discussing the CSO remediation issue), without even taking into consideration [Begin HC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End HC] In short, the "regionalization" benefit that Aqua attempts to co-opt and exploit in this case does not fit the facts – DELCORA itself already is a region of very significant size. Indeed, using the same arguments offered by Aqua in this proceeding, it would be easier to justify the public benefits of a DELCORA acquisition of Aqua than to make the case offered in favor of an Aqua acquisition of DELCORA. DELCORA is financially sound, already serves a huge region, has a long track record of doing it well, and at a customer cost far lower than Aqua will be able to provide. DELCORA is in no need of "rescue."

## **6. As-yet unobtained approvals make the Application unripe.**

In recommending denial of the Application, the R.D. focuses primarily on the fact that the pendency of the Municipal lawsuits makes it uncertain whether DELCORA will be permitted to transfer the Municipalities' assets to Aqua, R.D. at 20, such that a grant of the Application "may result in Aqua being obligated to serve areas where it would not have sufficient facilities to provide service." *Id.* Lack of assent from municipalities that have legal claims to assets Aqua is purporting to acquire from DELCORA is a serious problem, but it is only part of the tangle of loose ends involving critical issues for which Aqua needs approvals by entities other than the Commission.

For some of these, such as E.O. 12803, Aqua was not even aware of its need for approval; for others, as in the case of the Municipalities' contracts, Aqua knew it needed the consents it lacked but decided to file its Application anyway. Although the R.D. was correct to recommend denial based on the uncertainties raised by the Municipal lawsuits, it should have included in its rationale Aqua's dizzying lack of other "must have" approvals, including:

- [Begin HC] [REDACTED] [End HC];
- [Begin HC] [REDACTED] [End HC];
- Consent of EPA and OMB under E.O. 12803 to the sale of DELCORA assets to Aqua;
- Fixing by EPA and OMB of the purchase price under E.O. 12803 for the DELCORA asset sale to Aqua because the sale of the system was not publicly bid;
- Determination under E.O. 12803 of the remaining proceeds available to DELCORA to fund the Trust after repayment of the full unadjusted amount of municipal contributions to DELCORA, under the hierarchy of proceeds distribution required;
- Consent of EPA and PA DEP to allow Aqua to undertake DELCORA's obligations under the 2015 federal district court consent decree (Ex. 3 to the Aqua's Application) that requires DELCORA to initiate remedial measures for combined sewer overflows on its system;
- Consent of the federal district court to modify the 2015 consent decree to allow Aqua to undertake DELCORA's combined sewer overflows and other remedial obligations;
- Approval by PA DEP of revised Act 537 Plans by the municipalities presently served by DELCORA to confirm that Aqua will be the owner and operator of the wastewater assets used to provide conveyance and treatment capacity for the municipality; such approvals take time even when the municipalities support the change in provider, which is not the case here. SPMT Statement No. 2SR at 29:18-30:12.

### **III. RECOMMENDED CONDITIONS (Applicable only if the Application is granted)**

In the event the Commission does not adopt the R.D.'s recommendation to deny the Application outright, SPMT requests that the Commission condition the grant of the Application and the certificates under Sections 1102 and 1103 of the Public Utility Code so as to require DELCORA to retain ownership of the WRTP to preserve its POTW status and to retain ownership of the 26 CSO regulators, **[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[End HC]** These conditions, set forth in SPMT's Main Brief and repeated here for convenience, also will preserve the contractual commitments that DELCORA has made to SPMT:

- I. The Commission should condition approval of the Application on DELCORA retaining ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators; to accomplish this under the terms of the Asset Purchase Agreement, these DELCORA assets could be designated as Non-Assignable Assets in the context of Section 2.06 of the Asset Purchase Agreement, except that the designation would be permanent rather than transitional;
- II. The Commission should condition approval of the Application on removing the value of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from Aqua's post-acquisition rate base, as these assets will be retained by DELCORA; and

- III. The Commission should condition approval of the Application on DELCORA retaining SPMT as a DELCORA customer under the existing contract between the parties, consistent with Section 2.06 of the Asset Purchase Agreement.
- IV. In the alternative regarding the rate issue, and to preclude impairment of existing contracts, the Commission should direct Aqua as a compliance filing in this proceeding to adhere to the terms and conditions of the present contract for service between SPMT and DELCORA for the remainder of such contract's term.

As a minimum alternative to proposed Conditions I-III, the Commission should condition approval of the Application on implementing Conditions I-III on a transitional basis, such that:

- A. DELCORA may not transfer ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators to Aqua until Aqua is able to demonstrate to the Commission's satisfaction that under Aqua ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators, **[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[End HC]**

- B. Aqua may not include the value of DELCORA's Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators in its rate base until the Commission has approved the transfer of those assets from DELCORA to Aqua

consistent with the provisions of Section A of these alternative proposed conditions;  
and

- C. Service to SPMT shall continue under SPMT's contract with DELCORA until the later of (a) the effective date of rates in Aqua's first rate case following the transfer of ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from DELCORA to Aqua consistent with the provisions of Section A of these alternative proposed conditions; or (b) the remainder of the term of SPMT's contract with DELCORA.

#### **IV. CONCLUSION WITH REQUESTED RELIEF**

The Application should be denied, for the reasons specified in the R.D., and for the additional reasons advanced in these exceptions that are fully supported in the evidentiary record. The transaction provides no benefits, let alone substantial affirmative public benefits. Instead, the transaction actively causes harm, by needlessly increasing rates with no corresponding benefit [Begin HC] [REDACTED]

[REDACTED] [End HC] The transaction also is subject to so many contingencies and other required approvals not yet obtained or even applied for that neither the transfer price nor the ultimate contours of what the Commission has been asked to approve are known or knowable.

If the Application is not denied outright, the Commission must impose conditions that address these issues. In particular, the Commission should require DELCORA to retain ownership on a permanent basis of the WRTP and the 26 CSO regulators [Begin HC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End HC] Alternatively, the Commission should

impose the same conditions on a transitional basis until the necessary permits are issued, the appeal period for challenging such permits has passed and any appeals exhausted.

Respectfully submitted,

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Dated: January 22, 2021

# **Appendix A**

5-4-92  
Vol. 57 No. 86  
Pages 19063-19248

# federal register

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**Monday**  
**May 4, 1992**

**Briefing on How To Use the Federal Register**  
For information on a briefing in Washington, DC, see  
announcement on the inside cover of this issue.



# Presidential Documents

Title 3—

Executive Order 12803 of April 30, 1992

The President

## Infrastructure Privatization

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that the United States achieves the most beneficial economic use of its resources, it is hereby ordered as follows:

### Section 1. *Definitions.* For purposes of this order:

(a) "Privatization" means the 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.

(b) "Infrastructure asset" means any asset financed in whole or in part by the Federal Government and needed for the functioning of the economy. Examples of such assets include, but are not limited to: roads, tunnels, bridges, electricity supply facilities, mass transit, rail transportation, airports, ports, waterways, water supply facilities, recycling and wastewater treatment facilities, solid waste disposal facilities, housing, schools, prisons, and hospitals.

(c) "Originally authorized purposes" means the general objectives of the original grant program; however, the term is not intended to include every condition required for a grantee to have obtained the original grant.

(d) "Transfer price" means: (i) the amount paid or to be paid by a private party for an infrastructure asset, if the asset is transferred as a result of competitive bidding; or (ii) the appraised value of an infrastructure asset, as determined by the head of the executive department or agency and the Director of the Office of Management and Budget, if the asset is not transferred as a result of competitive bidding.

(e) "State and local governments" means the government of any State of the United States, the District of Columbia, any commonwealth, territory, or possession of the United States, and any county, municipality, city, town, township, local public authority, school district, special district, intrastate district, regional or interstate governmental entity, council of governments, and any agency or instrumentality of a local government, and any federally recognized Indian Tribe.

**Sec. 2. *Fundamental Principles.*** Executive departments and agencies shall be guided by the following objectives and principles: (a) Adequate and well-maintained infrastructure is critical to economic growth. Consistent with the principles of federalism enumerated in Executive Order No. 12612, and in order to allow the private sector to provide for infrastructure modernization and expansion, State and local governments should have greater freedom to privatize infrastructure assets.

(b) Private enterprise and competitively driven improvements are the foundation of our Nation's economy and economic growth. Federal financing of infrastructure assets should not act as a barrier to the achievement of economic efficiencies through additional private market financing or competitive practices, or both.

(c) State and local governments are in the best position to assess and respond to local needs. State and local governments should, subject to assuring continued compliance with Federal requirements that public use be on reasonable and nondiscriminatory terms, have maximum possible freedom to

make decisions concerning the maintenance and disposition of their federally financed infrastructure assets.

(d) User fees are generally more efficient than general taxes as a means to support infrastructure assets. Privatization transactions should be structured so as not to result in unreasonable increases in charges to users.

**Sec. 3. *Privatization Initiative.*** To the extent permitted by law, the head of each executive department and agency shall undertake the following actions:

(a) Review those procedures affecting the management and disposition of federally financed infrastructure assets owned by State and local governments and modify those procedures to encourage appropriate privatization of such assets consistent with this order;

(b) Assist State and local governments in their efforts to advance the objectives of this order; and

(c) Approve State and local governments' requests to privatize infrastructure assets, consistent with the criteria in section 4 of this order and, where necessary, grant exceptions to the disposition requirements of the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" common rule, or other relevant rules or regulations, for infrastructure assets; provided that the transfer price shall be distributed, as paid, in the following manner: (i) State and local governments shall first recoup in full the unadjusted dollar amount of their portion of total project costs (including any transaction and fix-up costs they incur) associated with the infrastructure asset involved; (ii) if proceeds remain, then the Federal Government shall recoup in full the amount of Federal grant awards associated with the infrastructure asset, less the applicable share of accumulated depreciation on such asset (calculated using the Internal Revenue Service accelerated depreciation schedule for the categories of assets in question); and (iii) finally, the State and local governments shall keep any remaining proceeds.

**Sec. 4. *Criteria.*** To the extent permitted by law, the head of an executive department or agency shall approve a request in accordance with section 3(c) of this order only if the grantee: (a) Agrees to use the proceeds described in section 3(c)(iii) of this order only for investment in additional infrastructure assets (after public notice of the proposed investment), or for debt or tax reduction; and

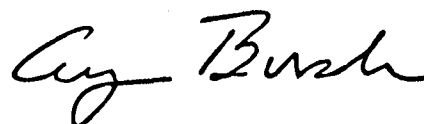
(b) Demonstrates that a market mechanism, legally enforceable agreement, or regulatory mechanism will ensure that: (i) the infrastructure asset or assets will continue to be used for their originally authorized purposes, as long as needed for those purposes, even if the purchaser becomes insolvent or is otherwise hindered from fulfilling the originally authorized purposes; and (ii) user charges will be consistent with any current Federal conditions that protect users and the public by limiting the charges.

**Sec. 5. *Government-wide Coordination and Review.*** In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the executive departments and agencies are consistent with the principles, criteria, and requirements of this order. The Office of Management and Budget shall review the results of implementing this order and report thereon to the President 1 year after the date of this order.

**Sec. 6. *Preservation of Existing Authority.*** Nothing in this order is in any way intended to limit any existing authority of the heads of executive departments and agencies to approve privatization proposals that are otherwise consistent with law.

**Sec. 7. *Judicial Review.*** This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable by a party against the

United States, its agencies or instrumentalities, its officers or employees, or any other person.

A handwritten signature in cursive script, reading "George H. W. Bush".

THE WHITE HOUSE,  
*April 30, 1992.*

[FR Doc. 92-10495

Filed 4-30-92; 4:17 pm]

Billing code 3195-01-M

## **CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving the Surrebuttal Testimony of Sunoco Partners Marketing & Terminals, L.P./Energy Transfer in the manner and upon the persons listed below:

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Dated: January 22, 2020