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January 22, 2021

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

**RE: Docket No. A-2019-3015173; Application of Aqua Pennsylvania
Wastewater, Inc. – Delaware County Regional Water Quality Control
Authority**

Dear Secretary Chiavetta:

We serve as counsel to the Delaware County Regional Water Quality Control Authority (“DELCORA”) in the above matter and are submitting, with this letter, the Exceptions of DELCORA to the Recommended Decision of Administrative Law Judges Angela T. Jones And F. Joseph Brady.

This document is being served via electronic mail on the Administrative Law Judges presiding over this matter and all parties of record. The document was also filed electronically with the Public Utility Commission on this date.

Very truly yours,

Matthew S. Olesh

cc: The Honorable Angela Jones, Administrative Law Judge
The Honorable F. Joseph Brady, Administrative Law Judge
All parties of record

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Honorable Angela T. Jones and the Honorable F. Joseph Brady, Presiding

Application of Aqua Pennsylvania Wastewater
pursuant to Sections 507, 1102, and 1329 of the
Pennsylvania Public Utility Code for Approval of
the Acquisition of the Delaware County Regional
Water Quality Control Authority

A-2019-3015173

**EXCEPTIONS OF THE DELAWARE COUNTY REGIONAL
WATER QUALITY CONTROL AUTHORITY TO THE
RECOMMENDED DECISION OF ADMINISTRATIVE
LAW JUDGES ANGELA T. JONES AND F. JOSEPH
BRADY**

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Dated: January 22, 2021

I. Introduction

Pursuant to the procedural schedule established and in accordance with the regulations of the Public Utility Commission (the “Commission”) at 52 Pa. Code Section 5.533, the Delaware County Regional Water Quality Control Authority (“DELCORA”) hereby submits these Exceptions to the Recommended Decision of Administrative Law Judges Angela T. Jones and F. Joseph Brady (the “Judges”) in connection with the Application (the “Application”) of Aqua Pennsylvania Wastewater, Inc. (“Aqua”), filed with the Commission on March 3, 2020, pursuant to Section 1102, 1329, and 507 of the Public Utility Code (“Code”).

The Application asks the Commission for an order approving the proposed transaction between Aqua and DELCORA (the “Proposed Transaction”) and permitting Aqua to begin to offer, render, furnish, and supply wastewater service to DELCORA Customers. The Application was assigned Docket No. A-2019-3015173 with Administrative Law Judge Angela T. Jones presiding. Evidentiary hearings were convened on November 9, 2020 and November 10, 2020. On November 18, 2020, Administrative Law Judge F. Joseph Brady was also assigned to preside over the matter.

By Recommended Decision dated January 11, 2021 (“Recommended Decision”), Judge Jones and Judge Brady recommended that Aqua’s Application be denied due to their belief that Aqua failed to meet its burden of proof that it is entitled to the relief it is seeking under 66 Pa.C.S. § 332(a).

More specifically, the Judges recommend the denial of Aqua’s Application based on two issues: (1) outstanding issues surrounding DELCORA’s legal ability to transfer assets subject to the Asset Purchase Agreement, which the Judges contend prevent them

from making a recommendation as to the public interest of the application and prevent a reliable determination of the appropriate ratemaking rate base; and (2) Aqua's failure to include the "rate stabilization plan" being implemented *by DELCORA* with the sale proceeds as an attachment to its Application for a certificate of public convenience.¹

DELCORA respectfully submits exceptions to the Recommended Decision because the Judges are incorrect that either of these reasons presents a valid ground to deny the Application. As DELCORA and Aqua have been asserting for some time, they have been diligently working to resolve all outstanding claims of the Municipal Protestants, which are the only things that the Judges contend could conceivably give rise to any issue with DELCORA's legal ability to transfer assets. If resolved, the issue identified by the Judges will be moot, and the Application may proceed as filed. Even if not resolved, the record evidence provides for approval of the Application – conditional or otherwise – while accounting for any issues bearing on the Municipal Protestants, as those issues have no bearing on (a) valuation of DELCORA's assets to be sold or (b) the benefits of the Proposed Transaction.

Moreover, the fact that Aqua did not include any "rate stabilization plan" as part of the Application is not a reason to deny it. The purported "rate stabilization plan" at issue is nothing more than a choice made by DELCORA to apply the sale proceeds to offset ratepayers' future costs. It does not change the rates and amounts that will be charged to DELCORA customers by Aqua. If the Commission agrees with the Judges and upholds the unprecedented proposition that Application approval must be conditioned on approval for how DELCORA disposes of the sale proceeds, it may provide that approval based on

¹ Recommended Decision, slip op. at 2, 28, 29.

the record in the case. Even then, if the Commission believes that the record is insufficient or that anything having to do with the alleged “rate stabilization plan” is problematic, it can and should condition Application approval on the removal of any such problem, which DELCORA and Aqua have already done by withdrawing their request to have non-Commission jurisdictional Trust payments reflected on Aqua customer bills.

Beyond these two issues, the Commission is left with a record that fully demonstrates that the Application should be approved based on numerous substantial affirmative public benefits. Aqua and DELCORA demonstrated that the Proposed Transaction was negotiated at arms-length and is in the public interest, presenting substantial benefits to both ratepayers and the public. Although not addressed in the Recommended Decision, the Commission should not ignore these clear points as reflected in the record.

For these reasons, as well as all of the other reasons set forth herein, DELCORA respectfully submits the following Exceptions to the Recommended Decision and urges the Commission to reverse that decision and approve the relief requested in the Application on a conditional basis (including the various conditions proposed by the parties and accepted by Aqua and DELCORA to facilitate the Commission’s review and approval of the Application, which were not considered by the Judges).²

² Pursuant to 52 Pa. Code § 5.533, DELCORA incorporates into its Exceptions, by reference and citation, relevant pages of its previously filed Main and Reply Briefs.

II. Exceptions

A. Exception No. 1 – Municipal Protestants

1. Summary of Exception/Identification of Findings of Fact and Conclusions of Law

DELCORA excepts to the Recommended Decision's conclusion that the Application should be denied due to "the ongoing litigation in the Delaware County Court of Common Pleas between DELCORA and the Municipal Protestants." *See* Recommended Decision, p. 20. The specific findings of fact and conclusions of law to which DELCORA takes exception are:

- Findings of Fact Nos. 14-27; and
- Conclusions of Law Nos. 10-13.

DELCORA takes exception to these findings of fact and conclusions of law for two reasons. First, the record clearly reflects that the valuation of the assets to be transferred will not change if the Municipal Protestants' assets are excluded from the Proposed Transaction. Second, the record also reflects that DELCORA and Aqua are in active settlement discussions with the Municipal Protestants in order to attempt to resolve their individual Protests. As stated in Aqua's Main Brief, a condition to closing was already made to resolve these and any other transfer issues. If and when all issues with the Municipal Protestants are resolved, the Commission may move forward with and approve the instant Application or make the order conditioned on such resolution.

To that end, DELCORA takes further exception to the Judges' recommendation that "[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.” *See* Recommended Decision, p. 26, fn. 37. This is simply not the case. The Application as submitted can and should be approved.

2. The Recommended Decision Incorrectly Fails to Give the Application a Full Review Simply Because Issues May Exist With the Municipal Protestants.

a. Background Regarding the Municipal Protestants.

The Municipal Protestants are five municipal entities that contract with DELCORA for the provision of wastewater service: Edgemont Township, Lower Chichester Township, Southwest Delaware County Municipal Authority (“SWDCMA”), Upland Borough, and Trainer Borough. Each of the Municipal Protestants has filed Protests objecting to the relief sought in the Application, essentially claiming that their consent is needed to assign their contracts with DELCORA to Aqua as part of the Proposed Transaction. Moreover, three of the Municipal Protestants – SWDCMA, Lower Chichester, and Upland – have filed lawsuits against DELCORA related to their contracts with it in the Delaware County Court of Common Pleas. As of the date of the filing of these exceptions, these lawsuits remain pending.

In the Recommended Decision, the Judges claim that outstanding issues with the Municipal Protestants prevent the Commission from “analyz[ing] this Application and mak[ing] an informed recommendation as to whether it is in the public interest.” *See* Recommended Decision, p. 26. Respectfully, this is incorrect. The Application, and the benefits of the Proposed Transaction, can and should be analyzed regardless of whether or not the Municipal Protestants’ issues remain outstanding.

b. The Transaction Should Be Given a Full Review On the Merits Notwithstanding Any Issues Raised By the Municipal Protestants.

In the Recommended Decision, the Judges argue that “ongoing litigation [with the Municipal Protestants] prohibits us and the stakeholders from being able to complete a meaningful determination of the fair market value of DELCORA at this time.” *See* Recommended Decision, p. 21. Because of this, the Judges conclude that they “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.” *See id.* This conclusion is wrong and unsupported in the record. In fact, the record supports the exact opposite – that the ongoing litigation with the Municipal Protestants does not materially impact the valuation of DELCORA’s assets, and thus does not stand in the way of Application approval.

As part of the Application, Aqua and DELCORA submitted the testimony of Dylan D'Ascendis, DELCORA’s Utility Valuation Expert (“UVE”). Mr. D'Ascendis’ testimony concluded that DELCORA’s assets have a value of \$308,194,006. *See* Testimony of Dylan D'Ascendis, submitted as Exhibit Y to the Application, pp. 11, 20:2-9.

At the hearing for this matter, DELCORA presented Mr. D'Ascendis for cross-examination. Under questioning by counsel for the Municipal Protestants, Mr. D'Ascendis made clear that any outstanding issues with the Municipal Protestants do not materially impact his valuation. Regarding the provisions of the contracts between DELCORA and the Municipal Protestants that might affect the assets to be transferred, Mr. D'Ascendis testified that:

[I]t's not really relevant to my analysis because, when I make a valuation, it's as a going concern. So my valuation is based on the premise that

DELCORA continues operations as is. So any type of, you know, contract or anything like that wouldn't be in effect because my value is as is current operations at the time of valuation.

Transcript of November 10, 2020 hearing, p. 485:1-7.

Mr. D'Ascendis further explained why his ultimate conclusion regarding the valuation of DELCORA's assets would not change due to any issues involving the Municipal Protestants:

[I]f you take my \$308 million and you subtract that 276,500,000 purchase price, you get about \$31 million, \$31,694,000, okay? So that is the difference between my valuation and what is requested in this case. So, if you take that, if you take that value of \$31 million and you divide that by 45 percent which is my weighting of the cost approach in my analyses, right, you would get to approximately \$70,400,000.

So, for me to change or for me or for Aqua to change their request in the case, it would take a deduct of over \$70 million for them to, you know, for the result or the conclusion to change. Now, that's only my valuation. Now, my valuation is averaged with Mr. Walker's cost approach and his conclusions; and, if we take that and we take an average of the two, it would take a deduction of over \$200 million in the cost approach to get us to a value lower than that \$276,500,000 purchase price.

So in essence it would change probably, but it would not change to the point where it would do anything to change the recommendations of OCA or -- well, I can't speak for OCA but I would say it wouldn't change my recommendation in the case.

See id. at 486:14 – 487:10. Mr. D'Ascendis further equated the exclusion of the Municipal Protestants' assets with a "rounding error." *See id.* at 489:3.

Mr. D'Ascendis' testimony thus established that a review of the Proposed Transaction, including valuation issues and its benefits, can and should proceed regardless of the pending litigation filed by the Municipal Protestants or any contractual issues impacting the transfer of their specific assets to Aqua as part of the Proposed Transaction. The valuation submitted by DELCORA remains the same regardless of any of those issues,

allowing for a full review of the \$276,500,000 purchase price as rate base, which should have been undertaken by the Judges in the Recommended Decision. Moreover, as discussed below, the public benefits of the Proposed Transaction exist regardless of the disposition of the issues raised by the Municipal Protestants. *See infra* pp. 22-26.

3. A New Application Is Not Required if the Issues with the Municipal Protestants Are Resolved.

The Recommended Decision makes the erroneous contention that a new application would be required if the outstanding litigation with the Municipal Protestant is resolved. *See* Recommended Decision, p. 26, fn. 37. This is simply incorrect. The Application was submitted as if no such issues existed, primarily because Aqua and DELCORA have been (and remain) confident that any issues will be resolved by the time of final consideration by the Commission. All parties have had the opportunity to make a record as if this were the case. As a result, no due process considerations prevent the Application from being considered and approved by the Commission as it was submitted.

It is undisputed that at the time of its submission, the Application included the Municipal Protestants' contracts. *See* Application, List of Exhibits; *see also* Application, Exhibits F81, F84, F109, F110, F111, F112, F113, F114, F137, F138, F139, F140, F141, F142. While the Municipal Protestants have used this fact to argue against Application approval, as demonstrated above, the Proposed Transaction can still be properly vetted even if these contracts and the Municipal Protestants' assets are removed from the Proposed Transaction. However, if all issues are resolved with the Municipal Protestants, as anticipated, the Commission will be presented with the Application that was submitted, and upon which the record was made.

The parties to this proceeding were fully aware of the issues raised by the Municipal Protestants. *See* Objections and testimony submitted by the Municipal Protestants in this proceeding. The parties were also fully aware that the Application, as submitted, assumed a resolution of those issues. In fact, the Municipal Protestants specifically submitted testimony and exhibits regarding these issues. *See* Municipal Protestants Common Exhibits 2–3, 6–7, 9–10. It thus cannot be reasonably asserted that any due process violation would exist if the Application was considered as submitted.

Moreover, DELCORA and Aqua have been transparent throughout this proceeding that they were engaged in ongoing negotiations with the Municipal Protestants in an effort to resolve their outstanding issues and objections. *See* Transcript of November 10, 2020 hearing, pp. 435:4–436:7, 441:21–443:21. They have been clear at every juncture that they anticipated that all such issues would be sufficiently addressed by the time of closing, as is typical for these types of transactions. *See id.* As in other transactions, the remedy is to make the Commission order conditioned on such resolution, not outright rejection.³

This remains the case as of the time of the submission of these exceptions. One Municipal Protestant – Trainer Borough – has already withdrawn its objection to the Application. *See* Joint Stipulation of Aqua, Trainer Borough, and DELCORA. Aqua and DELCORA are in active settlement discussions with the other Municipal Protestants – SWDCMA, Lower Chichester, Upland and Edgmont – in attempts to resolve their

³ Not only were DELCORA and Aqua fully transparent about the ongoing negotiations to resolve the Municipal Protestants’ Objections, but the APA provides for a mechanism to address any service contracts for which consents to assignment have not occurred as of closing. Section 2.06 of the APA, provides for an arrangement where DELCORA will continue to be the legal owner of any Nonassignable Assets, but Aqua will become the economic/beneficial owner of the Nonassignable Assets and provide service to these customers as the agent/subcontractor of DELCORA.

individual Protests. The settlement discussions are ongoing and Aqua and DELCORA are hopeful they will result in the resolution of the Municipal Protestant protests. It is important to emphasize that the municipal bodies must have a formal vote at a public meeting prior to approval of any potential resolution of the Protest. Due to the timing of municipal meetings, if a resolution is reached, it may occur after the Exceptions or Reply Exceptions are filed.

Nonetheless, DELCORA and Aqua remain confident that all issues with the Municipal Protestants will be resolved, consistent with the submitted Application. Since all parties had a full and fair opportunity to litigate the Application as filed, there are no due process issues and no need for a new application to be submitted. It may proceed to Commission review as if the issues with the Municipal Protestants never existed since that is the state of affairs contemplated by the Application as initially filed.

Finally, DELCORA notes that *even if* the issues with the Municipal Protestants are not resolved by the time the Application is given final consideration by the Commission, a simple remedy exists: the Commission may give the Application conditional approval pending the resolution of those issues. This conditional approval would preserve the status of the Application as submitted and ensure that the Proposed Transaction only goes forward under the circumstances submitted by the Application – i.e., that there are no outstanding issues with the Municipal Protestants.⁴ As detailed above, this approach would avoid any due process issues.

⁴ Indeed, as noted in Aqua's own Exceptions to the Recommended Decision, Aqua will not close on the Proposed Transaction until it resolved issues relating to the Municipal Protestants' contracts.

B. Exception No. 2 – Rate Stabilization/Disposition of Sale Proceeds

1. Summary of Exception/Identification of Conclusions of Law

DELCORA excepts to the Recommended Decision's findings regarding the Rate Stabilization Plan and, specifically, its conclusion that the trust established by DELCORA to return the sale proceeds to its ratepayers "is acting as a *de facto* rate stabilization plan that, in effect, functions to bypass the Commission's ratemaking authority." See Recommended Decision, p. 22. The specific conclusions of law to which DELCORA takes exception are:

- Conclusions of Law Nos. 14-16.

DELCORA takes exception to these conclusions of law for multiple reasons. First, it is important to emphasize that DELCORA's decision on how to utilize the proceeds of the sale is not a topic included in the Asset Purchase Agreement that is before the Commission for approval, and the Trust itself does not fall under the jurisdiction of the Commission. Nor does the Commission insert itself in the seller's uses of proceeds generally, be it a township constructing a new building or any other use. Here, the mere fact that DELCORA has decided to use the proceeds to the benefit of its ratepayers does not change this fact. Indeed, had DELCORA decided to utilize the proceeds for any other purpose, it seems this transaction would have been thoroughly reviewed by the Judges.

Second, the non-Commission jurisdictional trust established by DELCORA, and its plan to use the sale proceeds/trust funds to essentially pay portions of its ratepayers' bills, is not a rate stabilization plan. ***The rates that will be charged to ratepayers will not be altered, nor will they be stabilized by Aqua.*** Instead, a portion of customer bills will be paid by DELCORA using the Proposed Transaction sale proceeds. The Commission does

not have jurisdiction over DELCORA's use of these sale proceeds, which does not constitute a rate stabilization plan.

Third, even if DELCORA's disposition of the sale proceeds did somehow constitute a rate stabilization plan, every aspect about of DELCORA's allocation of the Trust payments is in the record in this proceeding, and there is nothing stopping the Commission from approving it.

Finally, in an effort to remove this issue before the Commission, DELCORA will provide a direct mail payment to its customers on a quarterly basis, thereby eliminating the need to use Aqua's bill as a mechanism. Throughout the proceeding, DELCORA emphasized that its preferred approach was to use the Aqua bill as an efficient and cost effective way to return sale proceeds to DELCORA customers. However, in an effort to limit the issues before the Commission, DELCORA withdraws that request and will instead return proceeds via direct mail from the Trust to a customer's residence.

2. DELCORA's Choice in Returning the Sale Proceeds to its Ratepayers Does Not Constitute a Rate Stabilization Plan.

As recognized by the Judges, after the proceeds from the Proposed Transaction are used to satisfy DELCORA's outstanding debt, the remainder will be placed into an irrevocable trust. *See* Recommended Decision, p. 14, Finding of Fact No. 7. That trust (the "Trust") was established *by DELCORA* as a vehicle by which the sale proceeds will be used to pay a portion of the future bills received by DELCORA's ratepayers after the closing of the Proposed Transaction. *See* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 2, 12. Mr. Willert, DELCORA's Executive Director, testified that "[t]he Trust's sole purpose is to make monetary distributions to be applied to DELCORA customer bills as a customer assistance payment for the benefit of the

DELCORA customers.” *See id.*, p. 12:5-7. The purpose of its existence is to ensure that the sale proceeds “will only ever be used for the benefit of DELCORA’s customers.” *See id.*, p. 12:9.

Significantly, Mr. Willert’s testimony noted his understanding that “the Commission does not have jurisdiction over the Trust.” *See id.*, p. 12:3-4. Of course, this was not intended to be a dispositive legal opinion, but rather reflects DELCORA’s understanding that the vehicle by which it chose to dispose of the sale proceeds is not jurisdictional to the Commission. Additionally, Ms. Gumby, whose testimony was presented by the Bureau of Investigation and Enforcement, also acknowledged that the Commission generally does not have the authority to direct how a municipal authority like DELCORA spends sale proceeds. *See* I&E Statement No. 1, Direct Testimony of Lisa A. Gumby, p. 17:12–15.

DELCORA does not dispute the Commission’s jurisdiction over rate stabilization plans. However, the plain meaning of “rate stabilization plan” under applicable law reinforces that the Trust simply is not one. As observed in the Recommended Decision, “[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). A non-Commission jurisdictional Trust does not do this. The Trust will not have any impact on the rates that will be charged to DELCORA’s ratepayers after closing of the Proposed Transaction. *See* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 11–12; *see also* Testimony of William C. Packer, attached as Exhibit U2 of the Application, pp. 6–7.

To this end, the Trust will function to return sale proceeds to DELCORA customers to assist with their wastewater bill. Notably, the intention of returning sale proceeds to

customers is was one of the driving forces behind the Proposed Transaction and is one of its numerous benefits. DELCORA recognized that the status quo would result in higher rates for its customers in both the short and long terms, and sought a solution that would instead benefit its customers directly. *See* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 11–12; *see also* Testimony of William C. Packer, attached as Exhibit U2 of the Application, pp. 6–7.

Critically, however, this existence of the Trust does not mean that mean the Trust will modify rates. ***The rates that will be charged to ratepayers who are eligible for Trust distributions will not be capped, limited or impacted in any way by the Trust.*** They will be subject to Commission regulation just as any rates submitted by Aqua will be. ***Simply put, the only thing the Trust does is return sale proceeds to DELCORA customers.*** Since DELCORA and Aqua have withdrawn their request to put a credit on an Aqua bill, DELCORA customers will now have the discretion to utilize payments from the Trust to pay their wastewater bill or something else. As mentioned previously, DELCORA sending checks to its customers is not its preferred approach, but due to the objections raised and its alleged relationship to a rate stabilization plan, that is what it will do.

The Judges’ conclusion that “[t]he proposed bill discount arrangement constitutes a plan to phase rates in over a period of time after future Aqua base rate cases” is thus incorrect. *See* Recommended Decision, p. 25. 66 Pa. C.S. § 1303 – the section on which the Judges and all of the parties opposing the Application based on the Trust rely – proscribes a “***public utility***” from demanding or receiving “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. ***The Trust does not do this.***

With DELCORA mailing a quarterly check to customer residences, there is no scenario under which 66 Pa. C.S. § 1303 applies. The rates that will be charged by Aqua will be identical to those ultimately approved by the Commission, and *Aqua will receive payment for exactly those rates* – no more and no less.

There is thus no scenario under which the Trust could possibly be jurisdictional to the Commission. The Trust is not a “rate stabilization *plan*” as that term is defined by law. To hold otherwise would place form over substance – exactly what the Judges caution against in the Recommended Decision. DELCORA’s choice for the use of the Proposed Transaction sale proceeds does not create any “secret departure from tariffed rates” – it merely creates a fund that assists the ratepayers in paying the tariffed rates, and nothing more.

Finally, DELCORA respectfully notes that the Application submitted by Aqua was accepted by the Bureau of Technical Utility Services (“TUS”) at the time of its submission. If the Application contained a rate stabilization plan, TUS would have identified it at the time of submission and would not have accepted the Application until it was properly supplemented. No rate stabilization plan was required because no such plan was part of the Application. This remains as true today as it was at the time the Application was submitted.

3. The Record Contains Everything Needed For Commission Approval If Such Approval is Required.

Even if Commission approval is needed because the Trust is “deemed” to be a rate stabilization plan, the Commission is able to provide that approval based on the contents of the Application and the vast record that has been made in this proceeding. Notwithstanding that the Trust is not a rate stabilization plan, the parties to this proceeding

have created a complete and thorough record regarding, among other things, how long the Trust will last and what will happen after its funds are depleted. *See, e.g.*, Recommended Decision, pp. 23-24; *see also* I&E Statement No. 1, Direct Testimony of Lisa A. Gumby, pp. 14–15; OCA Statement No. 1, Direct Testimony of Ralph C. Smith, pp. 32–46.

Much like the issues regarding the Municipal Protestants, no party can claim in good faith that they did not have an opportunity to fully vet the terms of the Trust, which was the subject of numerous discovery requests and considerable briefing. *See, e.g.*, OCA Statement No. 1, Direct Testimony of Ralph C. Smith, pp. 32–46 (reviewing the DELCORA Customer Trust at length and summarizing various discovery responses submitted by Aqua and DELCORA in response to OCA and the Municipal Protestants). In the event that the Commission believes the Trust is a “rate stabilization plan” that should have been attached to the Application pursuant to 66 Pa.C.S. § 1329(e), there is nothing stopping the Commission from approving the Application as if it had been attached.

Moreover, DELCORA again emphasizes that the Application was submitted in reliance on TUS’s acceptance of it without requiring that the Trust be submitted therewith. It would be inequitable, and *inherently unjust*, to make Aqua re-submit the Application in light of this reliance, particularly where any resubmission would truly be a matter of form over substance given the record in this proceeding.

4. DELCORA and Aqua Agree to Withdraw Their Request To Reflect Customer Assistance Payments on Ratepayer Bills.

The Recommended Decision suggests that the real issue with the Trust is not that it is providing for partial payment of the payment of rates, but the fact that those payments are reflected on ratepayer bills. Indeed, the Judges assert that “the proposed bill discount

arrangement would result in Aqua illegally issuing acquired customers' bills that are lower than applicable tariff rates." *See* Recommended Decision, p. 26.

As DELCORA has explained throughout this proceeding, the reason that DELCORA and Aqua requested permission to reflect Trust distributions on Aqua bills is because DELCORA made the determination that this was the optimal, most efficient way to distribute the sale proceeds to its ratepayers. Aqua would not be issuing customer bills that are lower than applicable tariff rates. Rather, it would still issue those bills, which would simply reflect the Trust distributions. DELCORA – not Aqua – proposed this arrangement *for the purpose of convenience, accuracy and efficiency only*, and as a preferable alternative to, for example, having to send one or more checks to each of its ratepayers. *See* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 11–12; *see also* Testimony of William C. Packer, attached to the Application as Exhibit U2, p. 6:12–18.

Notwithstanding this fact, due to the concerns raised with this arrangement, Aqua and DELCORA agree to withdraw their request to reflect Trust distributions on customer bills. DELCORA agrees and remains committed to the former DELCORA customers receiving customer assistance payments through direct payments from the Trust consistent with the same commitments made in DELCORA's testimony. While not the preferred method, the Trustee will make such distributions to the former DELCORA customers in a manner that remains separate from Aqua billing. Aqua will share information with DELCORA, the Trust, and the entity that will calculate the customer assistance payment applicable to the former DELCORA customers. Aqua will coordinate to provide the Commission and the parties information concerning the customer assistance payments, if

necessary. Customers will have the option of using the check to pay their wastewater bill over the life of the Trust or for some other purpose.

DELCORA recognizes that some parties believe there is a benefit in allowing the customer assistance payment to be reflected on customer bills. To ensure that the process remains transparent, reviewable and fair, Aqua and DELCORA will: 1) develop a process to ensure confidentiality of the customer information needed to direct mail checks including the limited nature of the data being provided (name, address and amount billed) and including restrictions for who has access to the data, what purpose such data can be collected and to whom that data can be transferred; 2) file quarterly reports containing sufficient documentation that the total returned to DELCORA customers equates to DELCORA's commitment in this proceeding; 3) develop a process for updating customers who have access to the Trust and when they may no longer; 4) develop a process for returned checks, and 5) other consumer protections. Prior to finalization of these documents, Aqua and DELCORA will provide drafts to the Statutory Advocates for review and will work cooperatively on a final work product. Aqua and DELCORA further commit to holding semi-annual briefings for the Trust's duration to address any unanticipated concerns or issues that may arise.

Aqua and DELCORA contemplated that modifications to the chosen mechanism for Trust distributions may be a condition to Application approval. Toward this end, the Commission should note that although the Bureau of Investigation and Enforcement and the Office of Consumer Advocate critique the proposed irrevocable trust arrangement, both agencies do not outright oppose application approval in this case. Instead, the agencies request that Application approval should be conditioned on certain terms set forth in their

respective testimony. *See, e.g.*, I&E Statement No. 1, Direct Testimony of Lisa A. Gumby, pp. 4-5 (explaining the conditions I&E believes the Commission should apply to the Proposed Transaction); OCA Statement No. 1, Direct Testimony of Ralph C. Smith, pp. 10-12, 66-68 (same). Significantly, the Bureau of Investigation and Enforcement acknowledged the willingness of DELCORA and Aqua to find an alternative solution if needed. *See* I&E Statement No. 1-R, Rebuttal Testimony of Lisa A. Gumby, p. 5.

Thus, there is no basis to deny the Application due to any concerns with the Trust. DELCORA maintains that the omission of the Trust from the Application was entirely proper and consistent with the Public Utility Code, but respectfully submits that the Application can and should be approved even if that were not the case.

C. Exception No. 3 – Record Supporting Application Approval

1. Summary of Exception/Identification of Conclusions of Law

DELCORA excepts to the Recommended Decision’s failure to identify, examine or even acknowledge the considerable benefits of the Proposed Transaction. The Recommended Decision characterizes the Application as seeking a “hypothetical recommendation,” and argues that “outstanding issues” prevent the Commission from being able to “analyze this Application and make an informed recommendation as to whether it is in the public interest.” *See* Recommended Decision, p. 26.

These recommendations were made in error. As detailed above, the Application can and should be approved notwithstanding the issues identified by the Judges in the Recommended Decision. Rather than using those issues to mischaracterize the Application as seeking a “hypothetical recommendation,” the Judges should have given the Application a full review.

The specific conclusions of law to which DELCORA takes exception are:

- Conclusions of Law Nos. 10-12.

DELCORA takes exception to these conclusions of law because the Recommended Decision fails to even attempt to give the Application a full and complete review. Had they done so, the Judges would have seen the overwhelming, indisputable evidence that the Application should be approved.

2. Aqua and DELCORA Have Demonstrated By A Preponderance of the Evidence that the Application Should Be Approved.

a. Aqua and DELCORA Clearly Established the Fair Market Value of DELCORA's Assets and Rate Base in the Record.

There can be no real dispute that Aqua established the fair market value of DELCORA's assets and rate base in the record. Pursuant to 66 Pa. C.S. § 1329(a), fair market value is determined by taking the average of appraisals conducted by two utility valuation experts. For ratemaking purposes, the valuation is the lesser of the fair market value or the purchase price.

DELCORA and Aqua complied with this section of the Code to establish the valuation of DELCORA's assets. DELCORA submitted the appraisal of Dylan D'Ascendis at ScottMadden, Inc., who valued the assets at \$308,194,006. *See* Report of Dylan D'Ascendis, submitted as Exhibit R to the Application; Testimony of Dylan D'Ascendis, submitted as Exhibit Y to the Application. Aqua submitted the appraisal of Harold Walker at Gannett Fleming Valuation and Rate Consultants LLC, who valued the assets at \$408,883,000. *See* Report of Harold Walker, submitted as Exhibit Q to the Application; Testimony of Harold Walker, submitted as Exhibit X to the Application.

The average of the two appraisals is \$358,538,503. Consequently, the ratemaking rate base determined pursuant to Section 1329(c)(2) of the Code is \$276,500,000, the lesser

of the negotiated purchase price of \$276,500,000 and the average of \$358,538,503. Contrary to the conclusion reached in the Recommended Decision, a clear record exists upon which the Commission can make a determination of the fair market value of DELCORA's assets and the rate base. Moreover, as discussed above, the issues with the Municipal Protestants do not stand in the way of the determination of fair market value or rate base whatsoever.

b. Aqua and DELCORA Clearly Established in the Record That the Proposed Transaction Substantially Promotes the Service, Accommodation, Convenience and Safety of the Public.

Similarly, the record contains significantly more than a preponderance of evidence demonstrating that the Proposed Transaction substantially promotes the service, accommodation, convenience and safety of the public. Through the Application, Aqua and DELCORA presented ample evidence of the Proposed Transaction's benefits. These benefits include:

- There will be no immediate impact on either the DELCORA customers' or current Aqua customers' rates. *See, e.g.*, Testimony of Marc. A. Lucca, attached to the Application as Exhibit U1, p. 12:8–9 (“The Proposed Transaction will not have any immediate impact on the rates of either the acquired DELCORA customers or Aqua’s existing customers.”); Testimony of William C. Packer, attached to the Application as Exhibit U2, pp. 4:19–20, 11:18–20 (same); Testimony of Mark J. Bubel, Sr., attached to the Application as Exhibit V, p. 12:8–15 (“Through the Proposed Transaction, Aqua will implement DELCORA’s existing base customer rates, which will remain in effect until Aqua’s next base rate case is filed and concluded”).

- When the rates – as reasonably expected – increase, merging the DELCORA customers and existing Aqua customers into one system will provide “more flexibility and opportunity to deal with those impacts over a much larger customer base.” *See* Testimony of Marc A. Lucca, attached to the Application as Exhibit U1, p. 11 (providing a summary of Aqua’s track record of acquiring and improving wastewater systems in the Commonwealth, and specifically noting that “the financial impacts of various discrete projects and investments can be spread over the long term operations of acquiring utility as a whole.”); *see also* Testimony of William C. Packer, attached to the Application as Exhibit U2, pp. 12:11–14, 14:8–11; *see id.* p. 14:14–18 (“By virtue of [Aqua’s] larger combined customer base, future infrastructure investments across the Commonwealth, driven by normal replacement cycles, emergency repairs, emergency response or compliance of compliance with new environmental regulating, will be shared at a lower incremental cost per customer for all of Aqua’s customers over time[.]”);
- The Proposed Transaction – through the irrevocable trust for the benefit of the DELCORA customers – will mitigate bill impacts for DELCORA customers by providing customer assistance payments (i.e., monetary distributions) to DELCORA customers with the majority of the sale proceeds. *See* Testimony of William C. Packer, attached to the Application as Exhibit U2, pp. 5:8–23, 13:16–17; *see also* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 2:15–21, 11–12.
- Aqua’s already existing operational presence in the areas currently served by DELCORA will offer larger-scale operational efficiencies such as capital

replacement planning and execution through strong existing community relationships. *See* Testimony of William C. Packer, attached to the Application as Exhibit U2, pp. 11:14–18, 12:1–5, 13:18–22, 14; *see also* Testimony of Mark J. Bubel, Sr., attached to the Application as Exhibit V, p. 9:5–7 (“The Proposed Transaction will allow Aqua to bring its extensive experience with large scale replacement projects to the table and will be able to leverage Aqua PA and Aqua’s purchasing power for the benefit of the DELCORA customers.”); *see also* Testimony of Marc A. Lucca, attached to the Application as Exhibit U1, pp. 12:4–8 (“Aqua has operations in nearby and overlapping service areas and will be able to merge and integrate DELCORA’s customers by folding them into a larger-scale, efficiently operated water and wastewater utility that over time will likely yield further efficiencies and improve long-term viability as envisioned in the Commission policy statement.”); *see also* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 2:22–23, 3:1–8; *see id.* at p. 13:11–12 (“Aqua has significant experience in large scale, complex projects, such as the one that is needed to be in a position to leave [Philadelphia Water Department].”).

- Aqua can provide additional customer service enhancements and protections. *See* Testimony of Marc A. Lucca, attached to the Application as Exhibit U1, pp. 13:1–5 (“Aqua has procedures in place under Chapter 14, 66 Pa.C.S. 1401 *et. seq.*, that provide for billing, payment, collection, termination and reconnection of service, payment arrangements, medical certifications, and formal and informal complaint procedures.”); *see also* Testimony of Mark J. Bubel, Sr., attached to the Application as Exhibit V, p. 6:1–7 (“Aqua Services will provide support to the operation of the

[DELCORA] System in accounting and financial, administrative, communications, corporate secretarial, customer service and billing, engineering, fleet services, human services, information systems, operations, regulatory compliance, rates and regulatory, risk management, water quality, legal, and purchasing, contracts and sales of real estate.”).

- The excellent customer service that customers currently receive from DELCORA will be enhanced by Aqua’s long-standing capital improvement programs and experience in remedying compliance issues with systems. *See* Testimony of Marc A. Lucca, attached to the Application as Exhibit U1, p. 12:16–20 (“Aqua is projecting lower operating and maintenance costs that will likely be realized through reductions in cost for wastewater treatment through the investment in the expansion of the [Western Regional Treatment Plant] and force main to divert flows to the WRTP from [Philadelphia Water Department], as well as efficiencies in administrative and general costs, such as insurance, auditing, legal among others.”); *see* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 3:4–7, 13:9–15.
- Customers will benefit from Aqua’s Helping Hand program and operational functions that Aqua’s team of experienced water and wastewater professionals can offer. *See* Testimony of Marc A. Lucca, attached to the Application as Exhibit U1, pp. 13:9–13 (“Aqua’s Helping Hand program is designed to assist [Aqua’s] residential low-income payment troubled customers with a payment arrangement, conservation education and assistance, and arrearage forgiveness.”); *see* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 3:8–10, 13:16–19.

- Aqua committed to preserving the jobs of current DELCORA employees, which will ensure a smooth transition of operations to Aqua without causing disruption for existing Aqua customers and the newly acquired DELCORA customers. *See* Testimony of William C. Packer, attached to the Application as Exhibit U2, p. 11:2–11, 14:3; *see also* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 3:11, 13:20–22, 14:1–2.
- Aqua’s reputation for environmental stewardship for the operation of wastewater systems will provide for water discharge at a location that is less environmentally sensitive than current operations in the Delaware River and address the System’s current environmental compliance issues. *See* Testimony of Mark J. Bubel, Sr., attached to the Application as Exhibit V, p. 10:10–14; *see* Testimony of Robert Willert, attached to the Application as Exhibit W1, pp. 3:12–13, 14:3–6.

Again, outstanding issues involving the Municipal Protestants and the Trust do not diminish the clear benefits of the Proposed Transaction established in the record.

c. The Proposed Transaction Is Consistent With Long-Established Commission Policy.

Finally, DELCORA notes that the Commission has long held that “[t]he regionalization of water and wastewater systems through mergers and acquisitions will allow the water industry to institute better management practices and achieve greater economies of scale.” 52 Pa. Code § 69.721(a). Transactions such as the Proposed Transaction are precisely what the Commission had in mind when setting this policy and meet every requirement set by the Commission. Rejection of the Application simply because it has complex issues – which have been sufficiently addressed on the record and can easily be further addressed through conditions on approval, as detailed above – would

very likely have a negative impact on the Commission's goals to this effect through a chilling of the market.

III. Incorporation of Aqua's Exceptions

DELCORA adopts and incorporates by reference the Exceptions filed by Aqua to the Recommended Decision.

IV. Conclusion

Respectfully, the Recommended Decision is wrong in concluding that the Application should be denied. The record is clear that approval is warranted, either outright or with the imposition of conditions that obviate any concerns raised by the Judges.

The Commission should grant the Exceptions submitted by DELCORA and Aqua regarding the Recommended Decision as discussed herein and in the Exceptions submitted by Aqua, and approve the Application submitted by Aqua pursuant to sections 1102, 1319, and 507 of the Code with a ratemaking rate base of \$276,500,000 pursuant to section 1329(c)(2).

Respectfully submitted,

/s/ Thomas Wyatt

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Dated: January 22, 2021

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 Approval of its Acquisition of
the Wastewater System Assets of the
Delaware County Regional Water
Quality Control Authority**

A-2019-3015173

CERTIFICATE OF SERVICE

I, Matthew Olesh, Esq., hereby certify that I have served a true and correct copy of the foregoing letter upon the following parties by electronic mail.

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