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January 22, 2021

*Via Electronic Mail (Confidential Version)*  
*Via Electronic Filing (Public Version)*

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

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

Dear Secretary Chiavetta:

We are counsel for Aqua Pennsylvania Wastewater, Inc. in the above matter and are submitting, with this letter, the Company's Exceptions to the Recommended Decision of Administrative Law Judges Angela T. Jones and F. Joseph Brady (*Confidential Version* and *Public Version*). The *Confidential Version* is being filed via electronic mail. The *Public Version* is being filed via electronic filing. Copies of the Exceptions are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Thomas T. Niesen

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

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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<b>Application of Aqua Pennsylvania</b>	<b>:</b>	<b>Docket No. A-2019-3015173</b>
<b>Wastewater, Inc. Pursuant to Sections</b>	<b>:</b>	
<b>1102, 1329 and 507 of the Public Utility</b>	<b>:</b>	
<b>Code for Approval of its Acquisition of the</b>	<b>:</b>	
<b>Wastewater System Assets of the</b>	<b>:</b>	
<b>Delaware County Regional Water Quality</b>	<b>:</b>	
<b>Control Authority</b>	<b>:</b>	

**EXCEPTIONS OF  
AQUA PENNSYLVANIA WASTEWATER, INC.  
TO THE RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGES ANGELA T. JONES AND F. JOSEPH BRADY  
(Public Version)**

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DATED: January 22, 2021

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## **I. INTRODUCTION**

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

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

The Application also asks the Commission to approve ratemaking rate base of \$276,500,000 for the wastewater system pursuant to Section 1329(c)(2) of the Code, for certificates of filing pursuant to Section 507 of the Code and for such other approvals, certificates, registrations and relief, if any, under the Code.

By Secretarial Letter dated July 27, 2020, the Commission informed Aqua that it accepted the Application for filing and that the matter would be assigned to the Office Administrative Law Judge for disposition.

Protests were filed by the Office of Consumer Advocate (“OCA”), the County of Delaware (“County”) Sunoco Partners Marketing & Terminals, L.P./Energy Transfer (“Sunoco” or “SPMT”) and Kimberly-Clark Corporation/Kimberly-Clark Pennsylvania, LLC (“KCC”). The Bureau of Investigation and Enforcement (“I&E”) filed a Notice of Appearance and the Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention.

Protests were also filed by Edgmont Township (“Edgmont”), Lower Chichester Township (“Lower Chichester”), Trainer Borough (“Trainer”),<sup>1</sup> Upland Borough (“Upland”) and the Southwest Delaware County Municipal Authority (“SWDCMA”). (Edgmont, Lower Chichester,

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<sup>1</sup>Trainer, subsequently, withdrew its Protest on January 8, 2021.

Upland and SWDCMA are collectively referred to as the “Municipal Protestants”).<sup>2</sup>

Administrative Law Judge Angela T. Jones was assigned to preside over the matter. Evidentiary hearings were held on November 9 and 10, 2020, with Judge Jones presiding. Administrative Law Judge F. Joseph Brady was later assigned as an additional administrative law judge.

By Recommended Decision dated January 12, 2021, (“RD”), Judge Jones and Judge Brady (“ALJs”) concluded that Aqua failed to meet its burden of proof for three reasons:

- (1) Aqua failed to establish a record upon which the Commission can make a determination that the proposed acquisition promotes the service, accommodation, convenience and safety of the public in some substantial way;
- (2) the outstanding issues surrounding DELCORA’s legal ability to transfer assets subject to the Asset Purchase Agreement (APA) significantly prevent a reliable determination of the appropriate ratemaking rate base, integral to the 1329 proceeding; and
- (3) Aqua failed to include its rate stabilization plan as an attachment to the Application.

Having decided the proceeding on these bases, the ALJs did not review all of the issues extensively litigated by the parties and addressed in briefs. Rather, the RD summarily dismisses Aqua’s Application on a threshold issue, akin to the Applicant missing filing requirements that more properly should have been brought to the attention of the Commission *before* the parties devoted themselves to extensively deploying time and resources on an Application that was not perfected for filing in the ALJs’ minds from the start. This is not an acceptable process or outcome, and it denies the Commission the benefit of the ALJs’ analysis and disposition of numerous issues. It therefore requires immediate redress by this Commission.

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<sup>2</sup> As explained herein, Aqua and DELCORA are in active settlement discussions with SWDCMA, Lower Chichester, Upland and Edgmont in order to attempt to resolve their individual Protests.

First, the rulings on issues the RD did consider in its abbreviated RD are flawed and erroneous. The RD finds that the non-Commission jurisdictional Trust, in combination with the Memorandum of Understanding (“MOU”), are a *de facto* rate stabilization plan that would indirectly reduce the rate received by DELCORA’s customers, and that the Application is therefore fatally defective by not including a rate stabilization plan, both in the Application and Aqua’s tariff.<sup>3</sup> Since Section 1329(g) of the Code requires a “rate stabilization plan” to be included as an attachment to an application for a certificate of public convenience, the RD concludes that the Application, as filed, is defective and cannot be analyzed to determine if the relief sought is in the public interest.<sup>4</sup>

As described in briefing and further below, Aqua did not propose a rate stabilization plan as defined in the Code, and, based on clear Commission precedent, there was no need to include one in the Application.<sup>5</sup> This issue was extant early in this proceeding, i.e., from the time protests were filed in response to the Application. As a matter of fundamental fairness and judicial economy, if the ALJs believed the failure to have included a rate stabilization plan as an attachment to the Application was fatal to reviewing the Application and considering the relief sought, and knowing that Aqua and DELCORA disagreed with any such requirement as a matter of law, they should have utilized the tools available to them under the Commission’s regulations to seek immediate review by the Commission on this important gatekeeping issue.<sup>6</sup> They did not do that, preferring to have the parties litigate fully an Application that is required, by the Commission’s Implementation orders, to include significant support at the time of filing, while knowing that they were prepared to

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<sup>3</sup> RD pp. 22-25.

<sup>4</sup> RD p. 26.

<sup>5</sup> However, if the Commission ultimately believes that on the applicable facts here a rate stabilization plan under Section 1329(g) of the Code is required, all of the elements of such a plan have been addressed and are already reflected in the record in this proceeding.

<sup>6</sup> 52 Pa. Code Section 5.305 specifically allows a presiding officer to seek interlocutory review of a “material” question. There is little doubt that whether a rate stabilization plan was required to be filed as part of the Application is a material question.

summarily reject the Application for not including a rate stabilization plan. This is an ill-advised process, which here led to an unsupportable result that be must be reversed.

Second, the RD mischaracterizes the proposal to show payments from the Trust as a payment on customer bills as a “bill discount” that “would result in Aqua illegally issuing customers’ bills that are lower than applicable tariff rates.”<sup>7</sup> As further discussed below, the RD improperly ignores substantial and probative evidence that the application of non-Commission jurisdictional Trust fund proceeds on the Aqua bill will *not* change (i) the full tariffed rates being charged to customers or (ii) customers’ *obligations* to pay the full tariff rate for service rendered.

Third, the RD concludes that the Application must be dismissed because both on-going litigation filed by the Municipal Protestants in Delaware County Court and uncertainty about the assets to be conveyed by DELCORA to Aqua under the Municipal Protestants’ existing non-assignable contracts create substantial uncertainty and too many unresolved issues to adjudicate the Application.<sup>8</sup> The ALJs are concerned that there is uncertainty about which of the Municipal Protestants’ assets will be actually acquired by Aqua in the Proposed Transaction and whether the correct set of assets was valued and evaluated by the Utility Valuation Experts (“UVEs”).

As noted below, the Municipal Protestants’ contract and asset concerns were thoroughly addressed and have no material impact on the substantial affirmative public benefits of the Proposed Transaction. The Section 1329 process is designed to encourage acquisitions. In addition, Aqua and DELCORA are in active settlement discussions with the Municipal Protestants. A stipulation with the Borough of Trainer resolving all of its issues has been filed and Aqua and DELCORA are hopeful that more resolutions will be filed. Second, the assets represented by all of the Municipal Protestants are a relatively small part of the overall Proposed Transaction, and whether such assets

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<sup>7</sup> RD p. 26.

<sup>8</sup> RD pp. 19-21 and 26.

are actually conveyed or retained by the Municipal Protestants will not have a material impact on Aqua's ratemaking rate base or the purchase price. Thus, rejecting the Application because of contract and litigation issues with the Municipal Protestants is unsupportable.

Finally, the RD is flawed for the numerous issues in the proceeding that it fails to introduce, evaluate and resolve. It is beneficial to the Commission for presiding officers in a proceeding to identify an issue, review all of the parties' positions on that issue and then rule on that issue. This approach was not used here, denying the Commission the benefit of the ALJs' expertise and making it difficult to discern the ALJs' view on some of the key issues in this case.

For example, the RD fails to address (i) the substantial affirmative benefits of the Proposed Transaction under Sections 1102 and 1103 of the Code; (ii) the establishment of Aqua's ratemaking rate base under Section 1329 of the Code; (iii) challenges to the environmental aspects of the Proposed Transaction, including permitting, necessary Pennsylvania Department of Environmental Protection ("DEP") authorization, the requirements of Executive Order 12803, etc.; and (iv) the various conditions proposed by the parties and accepted by Aqua and DELCORA to facilitate the Commission's review and approval of the Application. The failure to analyze these issues is problematic, especially for a proceeding that is time limited by statute.

The RD sees perceived uncertainty in certain limited areas as a basis for rejecting the Application outright. However, the RD fails to appreciate and acknowledge that some uncertainty is expected and part of the transaction process associated with utility sales and acquisitions like the one at issue here. That is why the Code specifically recognizes and allows the Commission to impose "conditions" on its approval under Section 1103. The RD inexplicably and improperly fails to use conditions to address open and uncertain issues that must be resolved before the Proposed Transaction participants will be allowed to proceed to closing. This unrealistic view of how such transactions work is the ultimate flaw of the RD that must be redressed by the Commission.



As addressed in these Exceptions, Aqua has removed, or is removing, each of the three impediments, cited by the RD, to Commission approval of the Proposed Transaction. Trainer, for example, withdrew its Protest and Aqua and DELCORA are continuing to work to assign all of the remaining contracts as required and already agreed to do so as a condition in its Main Brief.

Moreover, as addressed herein, the Delaware County Court, on December 28, 2020, wholly rejected the County's challenges to the Aqua/DELCORA Asset Purchase Agreement ("APA") and the DELCORA Trust, concluding that both the APA and the Trust are legal and enforceable. Significantly, the Court specifically enjoined the County from terminating DELCORA prior to closing. A copy of the County Court Order is attached as Appendix A.

As also addressed herein, Aqua and DELCORA are withdrawing the proposed customer assistance bill payment which the RD concludes is a "rate stabilization" plan and, absent presentation in the tariff, a violation of the Code. DELCORA customers will continue to benefit from the net proceeds of the Proposed Transaction – estimated to total approximately \$200 million<sup>9</sup> – but, rather than using the Aqua bill as a mechanism, DELCORA will return non-Commission jurisdictional Trust funds from the Proposed Transaction through a direct mail, quarterly payment negating any need to put an assistance payment on the utility's bill to wastewater customers.

Considering the above, Aqua submits that the Commission should address the significant public interest and rate base issues that the RD did not address. For the reasons set forth herein and in its Main and Reply Briefs,<sup>10</sup> Aqua requests that the Commission grant these Exceptions, approve Aqua's Application and the Stipulations that have been filed and will be filed and, as part of its Order approving the Application, find that Aqua's ratemaking rate base for the DELCORA system is \$276,500,000.

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<sup>9</sup> See RD, Finding of Fact No. 7.

<sup>10</sup> Pursuant to 52 Pa. Code Section 5.533, Aqua will incorporate into its Exceptions, by reference and citation, relevant pages of its previously filed Main and Reply Briefs.

Before presenting its Exceptions, Aqua provides an overview of the Proposed Transaction explaining, beyond the short overview presented in Discussion – Section A of the RD, the significance of the acquisition to the public, especially Southeastern Pennsylvania.

## **II. OVERVIEW OF THE PROPOSED TRANSACTION**

Like many wastewater systems, DELCORA is facing significant increased infrastructure investment and expenses and more stringent environmental regulations. Two factors were paramount to its decision to sell the system: (1) the prohibitively high expense – presently estimated at \$606 million – that DELCORA will face if it continues to have its Eastern service area treated by the Philadelphia Water Department (“PWD”); and (2) the costs DELCORA will incur to repair its infrastructure in order to comply with current requirements of the Environmental Protection Agency (“EPA”).<sup>11</sup>

Upon exploration of alternative solutions to address its infrastructure challenges and likely rate impacts, DELCORA determined that, in order to leave PWD at the end of the current contract period in 2028, it would need an immediate investment of \$450 million to (a) build a new pipeline to convey wastewater from the Eastern service area to the DELCORA Western Regional Treatment Plant (“WRTP”) and (b) upgrade and upsize the WRTP so that it can accommodate the increased volume of wastewater.<sup>12</sup>

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

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<sup>11</sup> Aqua St. No. 5 at 5.

<sup>12</sup> Aqua St. No. 5 at 9.

bargaining strength. The result is the comprehensive Proposed Transaction that is before the Commission.

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

However, the Proposed Transaction has a unique and substantial affirmative public benefit. Unlike the typical transaction, DELCORA has agreed to set aside a substantial portion of the Proposed Transaction sale proceeds for the benefit of its former customers. Rather than simply taking the sale proceeds and using them for undefined purposes, DELCORA will place approximately \$200 million of the proceeds in a Trust that will be paid to former customers by directly mailing checks to customers on a quarterly basis. This unique and substantial benefit supports Commission approval.

Both Aqua and DELCORA understand that, like many large transactions, there will likely be challenges. Some of DELCORA's customers are being asked to depart from terms and conditions of service under previously negotiated service contracts with DELCORA in favor of service provided under utility tariffs. In recognition of this concern, Aqua and DELCORA have been meeting with impacted customers for months to explain the Proposed Transaction in general and to provide each customer with mutually acceptable terms and conditions (including rates) under which their unique service contract could be assigned to Aqua.

The alleged concerns and deficiencies of the Proposed Transaction are not insurmountable, as some parties have contended. All of the alleged deficiencies can be addressed as part of final

Commission approval, similar to many water and wastewater transactions that have been approved by the Commission.<sup>13</sup> Aqua, in that regard, is willing to accept reasonable conditions relating to 1) obtaining all necessary environmental permits for the operation of DELCORA's facilities, 2) assuring customers that do not elect to assign their contracts that those contracts will be honored, 3) confirming that customers who have contractual rights to re-purchase or retake their former assets may do so in accordance with the applicable contract terms, 4) filing a separate cost of service study for the DELCORA system in Aqua's next rate case, and 5) accepting several conditions proposed by the OCA. This is similar to the Commission's conditions that were imposed in the *Joint Scranton Application* with respect to various Assignment and Assumption Agreements with municipalities that were required to be filed *after* the Commission order was entered in that proceeding and before closing.

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

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

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<sup>13</sup> See *Joint Application of Pennsylvania-American Water Company and the Sewer Authority of the City of Scranton for Approval of (1) the transfer, by sale, of substantially all of the Sewer Authority of the City of Scranton's Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania*, Docket No. A-2016-2537209, Opinion and Order entered October 19, 2016 ("Joint Scranton Application").

### **III. EXCEPTIONS**

#### **EXCEPTION NO. 1 - LEGAL PRINCIPLES AND BURDEN OF PROOF**

*Aqua excepts to the conclusion that Aqua failed to satisfy its burden of proof and the recommendation that the Application be denied. RD, page 2, Discussion – Section B and Recommended Ordering Paragraph No. 1. As set forth in these Exceptions and in its Main and Reply Briefs, Aqua has met its burden of proof in all respects and the Commission should approve the Proposed Transaction.*

Section 1102 of the Code requires Commission approval through the issuance of a Certificate of Public Convenience (“CPC”) for a public utility to expand its service territory and to acquire property used or useful in the public service. Section 1103 of the Code provides that a CPC will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.”

In *City of York v. Pa. P.U.C.*, 295 A.2d 825 (Pa. 1972) (“*City of York*”), the Pennsylvania Supreme Court explained in the context of a utility merger that the issuance of a certificate of public convenience requires the Commission to find affirmatively that public benefit will result from the merger. The Supreme Court addressed *City of York* in *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040 (Pa. 2007) (“*Popowsky*”) and explained that the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome or impossible; rather, the Commission properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

More recently, the Commonwealth Court in *McCloskey v. Pa. P.U.C.*, 195 A.3d 1055 (Pa. Cmwlth. 2018), *petition for allowance of appeal denied* No. 703 MAL 2018 (April 23, 2019) (“*McCloskey*”) held that Commission findings: i) that Aqua, as the owner of numerous water and wastewater systems has sufficient operational expertise and ability to raise capital to support system operations; and ii) that the Commission has a policy supporting the consolidation/regionalization of

wastewater system assets that allows for increased maintenance, upgrade and expansion of public sewer and water facilities, constitute substantial evidence, consistent with *Popowsky*, to support a conclusion that there is a public benefit to a transaction.

*McCloskey* also requires the Commission to address rate impact in a “general fashion” when deciding whether there is substantial public benefit for a Section 1329 acquisition. Significantly, however, rate impact is not dispositive in the Commission’s determination of affirmative benefits and may be outweighed by other positive factors.

As set forth in the following Exceptions Nos. 2 through 10 and in Aqua’s Main and Reply Briefs, Aqua has met its burden of proof in all respects and the Commission should reverse the RD and approve the Proposed Transaction.

Aqua’s Exception No. 1 should be granted.

**EXCEPTION NO. 2 -           ONGOING LITIGATION – MUNICIPAL LAWSUITS**

*Aqua excepts to the conclusion that ongoing litigation in the Delaware County Court of Common Pleas between DELCORA and the Municipal Protestants makes it impossible for the Commission to determine whether the Application would affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way and be in the public interest. RD, page 2, Discussion – Section C.*

Three of the original five Municipal Protestants: SWDCMA, Lower Chichester and Upland, filed Complaints with the Delaware County Court against DELCORA claiming breach of contract and asking the Court to enjoin DELCORA from closing the Proposed Transaction.<sup>14</sup> The RD concludes that this litigation makes it impossible for the Commission to determine whether the Application would affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way and be in the public interest.<sup>15</sup>

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<sup>14</sup> RD, Findings of Fact Nos. 25, 26 and 27.

<sup>15</sup> Although the individual County Court Complaints are referenced in the RD in Findings of Fact Nos. 25, 26 and 27 and in footnote 19, as Municipal Protestants Exhibits 11, 12 and 13, Municipal Protestants Exhibits 11, 12, and 13 were not offered into the evidentiary record and are not part of the evidentiary record. Tr. 516.

Aqua and DELCORA are in active settlement discussions with SWDCMA, Lower Chichester, Upland and Edgmont in order to attempt to resolve their individual Protests.<sup>16</sup> 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.

Irrespective of whether the settlement discussions with the remaining Municipal Protestants are successful, the Municipal Lawsuits are not impediments to Commission review of the Proposed Transaction. The substantial affirmative public benefits presented in Exception No. 6 will occur irrespective of the Municipal Lawsuits. There is no evidence to the contrary. Significantly, as addressed in the following Exception No. 3, the APA addresses how DELCORA and Aqua may handle municipalities in the event that they may not, ultimately, consent to the assignment of their contracts.

The RD's view of the Municipal Protestants' litigation is the primary basis on which the RD recommends dismissal of Aqua's Application and Aqua excepts to the conclusion that the Municipal Protestants' litigation in another jurisdiction precludes the Commission from addressing the public benefits of the Proposed Transaction and granting the relief requested in the Application. The Commission should reverse the RD and approve the Proposed Transaction.

Aqua's Exception No. 2 should be granted.

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<sup>16</sup> See Tr. 441-443

**EXCEPTION NO. 3 - DELCORA MUNICIPAL CONTRACTS**

*The RD failed to consider and address the proposed treatment of certain pre-existing service contracts between DELCORA and the Municipal Protestants which, at the time of briefing, had not been assigned to Aqua, which moots this issue as a concern.*

The RD concluded that several lawsuits filed by the Municipal Protestants in the Delaware County Court of Common Pleas regarding breach of contract created too much uncertainty regarding Aqua's proposed service territory and assets to serve that territory to recommend whether the Proposed Transaction is in the public interest.<sup>17</sup> Further, the RD expressed concern about the accuracy of the value of the DELCORA assets to be acquired in the Proposed Transaction (and Aqua's post Proposed Transaction rate base) if and to the extent certain facilities used to serve the Municipal Protestants and/or their residents were not actually transferred to Aqua due to contractual restrictions or the results of the pending litigation.<sup>18</sup>

While unfortunately focusing on the potential impacts of Municipal Protestants' litigation in another venue and Aqua's related rate base, the RD failed to consider and evaluate Aqua's actual proposal to address the Municipal Protestants' contractual issues. This was erroneous since such failure deprives the Commission the benefit of the ALJs' analysis of these issues in the event the Commission disagrees with the bases on which the RD denied the relief requested in the Application. And, events subsequent to the filing of briefs and the issuance of the RD continue to confirm that the RD's concerns about the Municipal Protestants' contracts and the implications for Aqua's post-Closing rate base are unfounded.

Among the assets to be acquired by Aqua in the Proposed Transaction are service contracts between DELCORA and various municipal and other counterparties ("Assigned Contracts"). Those

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<sup>17</sup> RD at 20.

<sup>18</sup> RD at 21.



contracts are attached to the Application as Exhibits F1 through F163.<sup>19</sup> These are similar to many larger water and wastewater transactions that have come before this Commission.

The acquisition by Aqua of the Assigned Contracts generally presupposes that, by time of closing of the Proposed Transaction, required consents and agreements necessary to assign the subject contracts from DELCORA to Aqua will have been obtained. As acknowledged further below, as of the present time, not all required consents to assign these various service agreements to Aqua have been obtained. Again, this is not unlike any large water or wastewater transaction that has been filed and approved by this Commission.

The Municipal Protestants' service contracts comprise 4 of the 163 Assigned Contracts. The Municipal Protestants each have separate service contracts with DELCORA under which wastewater service is currently provided to either the municipality directly or to its residents. While each Municipal Protestant has generally opposed the Proposed Transaction, they have not formally refused to consent to the assignment of its existing contract to Aqua thus far.<sup>20</sup> As summarized by Aqua witness Packer, their concerns are that, under Aqua ownership, i) Aqua would attempt to set rates by combining costs across all of DELCORA or across all of Aqua's Pennsylvania holdings, resulting in higher rates to the Municipal Protestants; ii) the Municipal Protestants could be charged costs related to treating wastewater by PWD or charged costs of bypassing PWD, which they claim they are not paying presently; and iii) the Municipal Protestants are not getting credit for property and assets they previously contributed to DELCORA.<sup>21</sup>

Aqua and DELCORA understood when negotiating the APA that certain contracts might take longer than others to assign and, in the limited circumstances presently pertaining to the

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<sup>19</sup> Aqua Exhibit No. 1, Application, ¶28 at 6.

<sup>20</sup> There is no dispute that each existing service contract between DELCORA and the respective Municipal Protestants cannot be assigned to and assumed by Aqua unless each Municipal Protestant consents to such assignment. Aqua St. No. 2-R at 64.

<sup>21</sup> Aqua St. No. 2-R at 63,64.

Municipal Protestants, certain contract counterparties might not consent to the assignment of their service contract prior to Closing. As described by Mr. Packer, Aqua and DELCORA have been meeting with representatives from DELCORA customers to address the assignment of service agreements and their concerns about the terms, conditions, rates and other issues that each party believes represent their specifically negotiated contract rights. In many instances, agreements have been reached, allowing these service contracts to be assigned to Aqua as anticipated under the APA.<sup>22</sup> And, Aqua remains committed to working with the Municipal Protestants to develop mutually acceptable contract assignments.<sup>23</sup> Indeed, it is not unusual to be negotiating and even obtaining contract assignments after Commission approval of a transaction, and up to and around the time of closing.<sup>24</sup>

Further, the APA has a clear contractual process for addressing any service contracts for which consents to assignment have not occurred as of closing. Section 2.06 the APA provides that if, at closing, there is no mutual agreement to assign the service agreements requiring mutual consent (i.e., “Nonassignable Assets”), then after closing DELCORA will continue to be the legal owner of the Nonassignable Assets, but Aqua will become the economic/beneficial owner of the Nonassignable Assets and provide service to these customers as the agent/subcontractor of DELCORA.<sup>25</sup> Under this proposed arrangement, DELCORA, as legal owner and counterparty under the service agreements, will still be ultimately responsible for providing service and fulfilling its obligations under the applicable service agreement, with Aqua acting as DELCORA’s agent/subcontractor.

If it becomes necessary to implement the Aqua–DELCORA agent/subcontractor

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<sup>22</sup> Aqua St. No. 2-R at 65.

<sup>23</sup> Aqua St. No. 2-R at 64.

<sup>24</sup> Aqua St. No. 2-R at 65.

<sup>25</sup> Aqua St. No. 2-R at 66.

arrangement, the parties would develop and implement a form of agreement defining their duties and responsibilities as principal and agent.<sup>26</sup> But it is not yet clear that such an arrangement will be necessary to implement.

Some of the Municipal Protestants' contracts contain other provisions that, absent some mutually acceptable resolution regarding assignment, also give them rights under certain circumstances that they believe need to be addressed in the contract assignment process. For example, Edgmont has a right of first refusal to purchase certain DELCORA assets serving it if DELCORA sells the facilities. Upland has a reversionary interest in the system serving it if DELCORA fails to operate the system, unless the borough declines to take ownership in which case the system reverts to the County of Delaware or any other agency.<sup>27</sup> While Aqua has and will continue to work with these individual Municipal Protestants to address their concerns and to develop a mutually acceptable basis for them consenting to assignment of their respective service contracts to Aqua, absent such arrangements and assuming their reversionary or first refusal rights are properly exercised, their respective systems will be transferred to them.<sup>28</sup>

Edgmont<sup>29</sup>, Lower Chichester<sup>30</sup>, SWDCMA<sup>31</sup>, and Upland<sup>32</sup> claim they have contributed specific property and assets to DELCORA, procured and turned over grants to DELCORA, and their contract with DELCORA requires that their rates for DELCORA service be based on that party's specific attributes and costs of service. These contract-specific issues have been part of the negotiation process relating to possible consent to assignment. And, to the extent these issues remain an obstacle to developing a mutually acceptable consent to assignment, these service

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<sup>26</sup> Tr. at 285.

<sup>27</sup> Aqua St. No. 2-R at 67.

<sup>28</sup> Aqua St. No. 2-R at 67.

<sup>29</sup> Edgmont St. No. 1 at 4 and 7.

<sup>30</sup> Lower Chichester St. No. 1 at 3 and 4.

<sup>31</sup> SWDCMA St. No. 1 at 4 and 5.

<sup>32</sup> Upland St. No. 1 at 4

agreements will be treated as Nonassignable Assets as discussed above and Aqua will provide service to these Municipal Protestants as the agent or subcontractor for DELCORA, which will remain the counterparty and principal on these agreements.<sup>33</sup>

As noted in testimony<sup>34</sup> and above, Aqua's discussions with the Municipal Protestants have continued and are making progress, including during the period when the RD was being drafted and issued. Indeed, on January 8, 2021, counsel for Trainer Borough (one of the original Municipal Protestants) filed a Stipulation and a Notice of Withdrawal of Protest because of the settlement of all issues with Aqua. Importantly, the Stipulation included a provision under which Trainer was required to terminate with prejudice its outstanding litigation related to the Proposed Transaction. This action effectively eliminates some of the concern addressed in the RD about granting the relief requested in the Application.

In its haste to find uncertainty and deny the Application, the RD lost sight of the Commission's ability to impose conditions on its approval to ensure that any perceived uncertainty would be alleviated before closing of the Proposed Transaction. Indeed, Aqua addressed this issue directly in its Main Brief where it expressly indicated its willingness to accept reasonable conditions on a number of issues, including the Municipal Protestants' contract issues.<sup>35</sup>

Further, Aqua expressly noted in its Main Brief it would accept various CPC-related conditions including that it "... will resolve issues concerning transfer of agreements prior to closing."<sup>36</sup> Aqua could not have been clearer that it would not close on the Proposed Transaction until it resolved issues relating to the Municipal Protestants' contracts. It has done just that with Trainer and Aqua believes more contract resolutions are anticipated. The Commission should take

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<sup>33</sup> Aqua St. No. 2-R at 66.

<sup>34</sup> Aqua remains committed to working with the Municipal Protestants to develop mutually acceptable contract assignments for all unassigned contracts. Aqua St. No. 2-R at 64.

<sup>35</sup> Aqua Main Brief at 4 and Section II, *supra*.

<sup>36</sup> Aqua Main Brief at 64.

Aqua at its word and condition closing of the Proposed Transaction on resolving the Municipal Protestants' contract issues, thereby mooting the RD's claims of uncertainty, both respect to the contracts themselves and the related assets and ratemaking rate base. To not recognize that acquisitions will create assignment and transfer issues is unrealistic and parties must be given the opportunity to address them through conditional approval. Not recognizing this would discourage future consolidation, not encourage it.

Aqua's Exception No. 3 should be granted.

**EXCEPTION NO. 4 - Ongoing Litigation – Delaware County**

*Aqua excepts to the failure of the RD to clearly state that the Order of the Delaware County Court of Common Pleas at No. CV-2020-003185, issued December 28, 2020, removes that litigation as an impediment to the Proposed Transaction. RD, page 2, Discussion – Section C.*

The County has contended throughout this proceeding that Commission action on the Application would be premature pending resolution of the Delaware County Court of Common Pleas at No. CV-2020-003185.<sup>37</sup> The County Court litigation concerns (a) a legal challenge to the Trust arrangement and (b) the County's desire to dissolve DELCORA. Neither of these concerns affects the continued efficacy of the APA and neither of these concerns is a matter of Commission jurisdiction under the Code.<sup>38</sup>

Irrespective of the jurisdictional question, as noted above and acknowledged in Finding of Fact 11 of the RD, the County Court, on December 28, 2020, wholly rejected the County's challenges to the APA and to the Trust.<sup>39</sup> The Court concluded, in material part, that:

... [T]he Asset Purchase Agreement between DELCORA and AQUA is a legal and enforceable contract, not in violation of the Municipalities Authority Act, public policy, or any other applicable law. This Court further finds that the Asset Purchase

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<sup>37</sup> See Protest of Delaware County, Pennsylvania, filed August 31, 2020, Paragraph 31, and RD at 3 and footnote 2.

<sup>38</sup> See Aqua Main Brief, Section V.B.4.a and Section V.C.2

<sup>39</sup> Judge Jones and Judge Brady took notice of the County Court Order without objection by any party. RD at 12.

Agreement is authorized by Sections 5607, 5619, and 5622 of the Municipalities Act, subject to the approval of the Pennsylvania Public Utility Commission.

\* \* \*

The COUNTY of Delaware is hereby permanently enjoined and restrained from terminating or contractually interfering with the Asset Purchase Agreement, any amendment thereto, and the COUNTY is further enjoined and restrained from terminating the Delaware County Regional Water Control Authority prior to closing on the Asset Purchase Agreement between DELCORA and AQUA Pennsylvania Wastewater, Inc.

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It is hereby DECLARED that upon the completion of the transaction between DELCORA and AQUA Pennsylvania Wastewater, Inc., (AQUA), sale proceeds shall be deposited into the Trust pursuant to the terms of that transaction as set forth in the Asset Purchase Agreement between DELCORA and AQUA and all related agreements, including the Rate Stabilization Fund Trust, and any enabling Trust agreements, and the COUNTY is hereby ENJOINED from preventing same in any way.

The County Court decision should assuage any Commission concern with moving forward to review and, ultimately, approve the Proposed Transaction and the Commission should acknowledge as much in its final Opinion and Order. The APA is a legal and enforceable contract, not in violation of the Municipalities Authority Act, public policy, or any other applicable law. The County is enjoined from terminating DELCORA prior to closing of the Proposed Transaction and further enjoined from preventing, *in any way*, the depositing of sale proceeds in the Trust for the benefit of former DELCORA customers.

Aqua's Exception No. 4 should be granted.

**EXCEPTION NO. 5 - RATE STABILIZATION PLAN**

*Aqua excepts to the RD's erroneous conclusion that the Application proposed a rate stabilization plan under 66 Pa.C.S. § 1329(d) that Aqua failed to include in its Application pursuant to 66 Pa.C.S. §§ 1102, 1329(e) and that, to cure this deficiency, a new Application would need to be filed, and submits that if the Trust is a Rate Stabilization Plan, sufficient information was submitted to satisfy applicable statutory requirements. Conclusions of Law Nos. 15, 16; RD at 22-26 and 29.*

**A. DELCORA's Customer Trust is Not an Aqua Rate Stabilization Plan.**

It appears that the non-Commission jurisdictional Trust has created unnecessary controversy and distraction. Had DELCORA simply decided to use the funds from the Proposed Transaction to build a new community center or fire house, many of the issues here would disappear. The simple decision to return the non-Commission jurisdictional Trust funds to customers is not grounds for a conclusion that the Proposed Transaction is not in the public interest. The RD concludes that the non-Commission jurisdictional Trust is somehow an Aqua Rate Stabilization Plan. To be clear, the non-Commission jurisdictional Trust is not included in the APA before this Commission for approval. As stated previously, the non-Commission jurisdictional Trust was not proposed by Aqua, created by Aqua, and will not be funded by Aqua. Rather, *DELCORA* proposed, created and will fund the Trust if the Proposed Transaction is approved.<sup>40</sup> And, if the Proposed Transaction is approved, Aqua's rates charged to former DELCORA customers will be no different regardless of the creation of the Trust, its funding and its dispersal of funds. The RD erred in concluding DELCORA's Customer Trust was an Aqua Rate Stabilization Plan that the Company failed to file with its Application and address in its proposed tariff.<sup>41</sup>

The seeds of this legal error in the RD were planted in the RD's description of the Trust. The RD incorrectly states that "*Aqua proposes that DELCORA will create an irrevocable DELCORA*

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<sup>40</sup> Aqua Main Brief, pp. 39-40.

<sup>41</sup> RD at 29.

Customer Trust (Trust) and fund it with the bulk of the sales proceeds...”.<sup>42</sup> Aqua has not proposed that DELCORA create and fund the Trust. What Aqua has done is explain throughout this proceeding and elsewhere in these Exceptions why the Trust was one of the many benefits to customers included in its Application.<sup>43</sup> In addition, DELCORA’s Customer Trust was never “a plan that will hold rates constant or phase rates in over a period of time after the next base rate case” – the definition of a Rate Stabilization Plan in Section 1329(g) – because it has nothing whatsoever to do with the rates Aqua intends to charge. Clearly, this Code definition is referring to a plan that proposes to hold the *utility’s* rates constant or will phase-in the *utility’s* rates for the acquired customers over a period of time until the *utility’s* next base rate case. An example of a Rate Stabilization Plan could be found in Aqua’s Limerick application<sup>44</sup> where Aqua proposed to place a portion of the purchase price in a regulatory asset account and phase that portion of the purchase price into rate base over a number of years, thereby gradually increasing the overall cost of service rates to those customers over time. Here, Aqua is not proposing to increase cost of service rates at a set pace over time, but instead will be charging full cost of service rates to customers. The Trust does nothing to hold constant or phase-in rates charged by Aqua – Aqua will be charging full cost of service rates.

Further evidence that the DELCORA Customer Trust is not a Rate Stabilization Plan is that no tariff provision was needed to reflect the customer assistance payment from the Trust on the Company’s bill to customers. Every bill to customers post-closing of the Proposed Transaction will reflect Aqua’s full tariffed rates to customers. That is the only extent to which a tariff was needed to issue bills. If for some reason the customer assistance payment offered by the Trust was not

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<sup>42</sup> RD at 18 (emphasis added).

<sup>43</sup> See Aqua Exception No. 6.

<sup>44</sup> *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Limerick Township*, Docket No. A-2017-2605434, Opinion and Order entered November 29, 2017, Opinion and Order entered July 12, 2018 (“*Limerick*”).



actually provided to Aqua, the customer assistance payment would not appear on the customer's bill. The customer assistance payment is not an indirect modification of a tariffed Aqua rate by Aqua, as suggested by the RD<sup>45</sup>, because Aqua will not determine the amount or funding of the customer assistance payment. In short, there was no need for Aqua to address the Trust payment in its tariff because the assistance payment will not be an Aqua credit to its rates. Rather, Aqua was merely providing an accurate and convenient conduit for the delivery of DELCORA's Proposed Transaction proceeds to customers.<sup>46</sup>

The only request to the Commission related to the non-Commission jurisdictional Trust-related authorization Aqua has been seeking in this case is Commission approval of placing the Trust's disbursements on the Company bill. The mechanism used to share information related to this disbursement were described in the MOU between DELCORA and Aqua. Aqua has been seeking Commission approval to participate in the information exchange and delivery mechanism that DELCORA chose to facilitate the sharing of its Proposed Transaction proceeds with its customers.

To minimize the issues remaining to be resolved, Aqua and DELCORA are withdrawing in their respective Exceptions the request to include the customer assistance payment from the Trust on the Company bill. Aqua and DELCORA stated throughout the proceeding that their preferred approach was to allow DELCORA to include a customer assistance payment on Aqua's bill. However, that is not the only means for the non-Commission jurisdiction Trust to honor its

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<sup>45</sup> RD at 22-26.

<sup>46</sup> The RD rejected I&E's position that the Customer Trust payment violates Section 1303 of the Code because, if tariffed, the payment would be a tariffed rate. It is Aqua's position that the customer assistance payment does not violate Section 1303. As explained in Aqua's Main Brief and Reply Brief, it is not unusual for third parties to provide funds to utilities that act as a payment on bills. Monthly LIHEAP cash benefits and Aqua's Helping Hand Program credits, for example, are shown on customers' bills with no indication from the Commission that such provisions are discriminatory or in violation of Section 1303 of the Code. If credits or payments to tariffed rates, not specified in tariffs, violated Section 1303 of the Code, such a finding would be inconsistent with the Commission's historic and repeated approval of LIHEAP and other similar credits and payments in various orders. Aqua Main Brief at 58-59; Aqua Reply Brief at 41-42.

commitment to give its proceeds back to DELCORA customers and the Trust can simply mail a check to customers directly. As a result, there is no Commission authorization needed related to the Trust disbursement on the Company bill, other than approval of the provision of information to the Trust. Aqua and DELCORA will still need to provide the customer name, address, bill calculation, and amount billed to DELCORA so that it knows who to mail the checks to and maintain DELCORA's commitment to limit increases in their Aqua rates to no more than 3% per year for so long as proceeds remain in the Trust. Aqua recognizes that some parties did believe there was a benefit in allowing the customer assistance payment on the bill. To ensure that the process remains transparent, reviewable and fair, both Aqua and DELOCRA would add its commitment and additional conditions to: 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 related to the 3%; 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 hold semi-annual briefings for the length of the Trust to address any unanticipated concerns or issues that may arise.

During the proceeding, I&E contended that the presentation of the non-Commission jurisdictional Trust payment on the Aqua bill would be an impermissible discounting of Aqua's

tariffed rates and a violation of Section 1303 of the Code.<sup>47</sup> I&E's contention mischaracterized the Trust payment. Aqua will not be discounting its tariffed rates through the application of the payment.

In compliance with Section 1303, Aqua proposed that at all times while the Trust payment is being applied, Aqua will continue to demand and receive its approved tariff rate for service. The full tariff rate will be shown on the Aqua bill. Stated differently, but with the same effect, at no time while the Trust payment is being applied would Aqua demand or receive a greater or less rate than its tariff rate for service. *Only* after showing the full tariff rate would the Trust payment be applied and shown on the bill as a line item payment funded by the DELCORA Trust. Aqua would not be discounting its tariff rates.

Aqua provided a sample bill demonstrating the application of the Trust payment.<sup>48</sup> The sample bill shows how Total Current Sewer Charges will be presented first, and then, *only* after presentation of the Total Charges, will the Trust payment be presented as a line item payment. The proposed presentation is *identical* to the way other payments or credits are presented on the Aqua PA water bill<sup>49</sup> and no concern has ever been raised that such format violates Section 1303 of the Code. In fact and law, neither a line item credit or payment on the Aqua PA water bill, nor the presentation of the Trust payment as a payment line item on the Aqua bill, violates Section 1303.

I&E attempted to distinguish other bill payments or credits, such as LIHEAP and Helping Hand, as regulatory-approved need-based credits to eligible customers that are thereby permissible under Section 1303.<sup>50</sup> While the distinguishing characteristics offered by I&E may be true, I&E did not offer any explanation as to how or why these characteristics create an exception to Section

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<sup>47</sup> See I&E Main Brief, Section V.C.II.

<sup>48</sup> See I&E Exhibit No. 1, Schedule 4.

<sup>49</sup> See Aqua St. No. 2-R, WCP-2R Schedule B.

<sup>50</sup> See I&E Main Brief, Section V.C.II.c.

1303. In fact, they do not. If the proposed Trust payment on the bill is an illegal tariff discount in violation of Section 1303, then the LIHEAP and Helping Hand bill credits are also unlawful tariff discounts. I&E made a plain language statutory argument under Section 1303 and there is no exception provided in Section 1303 for Commission approved, need-based credits. Aqua and DELCORA are withdrawing the proposed line item payment on the Aqua bill, and, instead, payments from the Trust will go directly to customers by direct mail. However, the RD's erroneous characterization of the Trust customer assistance bill payment as a rate stabilization plan should be corrected by the Commission.

Section 1303 does not state "No other entity" and does not constrain others (non-profits, other customers, assistance agencies, churches, community groups) from giving money to customers to help pay their bills, apply credits, bill discounts or provide grants, which is clearly happening today. With DELCORA now providing a direct mail check directly to customers, and not using the Aqua bill as a vehicle, there should be very little for the Commission to approve other than the exchange of basic information which happens now in instances where the water provider is not the wastewater provider. And the argument that this concept constitutes an Aqua Rate Stabilization Plan is not warranted.

**B. The Record Contains Sufficient Information if the Customer Trust was Deemed a Rate Stabilization Plan.**

Even if the Trust is considered to be an Aqua Rate Stabilization Plan, sufficient information was supplied by Aqua and DELCORA in the record of this case to satisfy the Rate Stabilization Plan filing requirement. The key issues addressed by a Rate Stabilization Plan are the impacts of the plan on existing and acquired customers.<sup>51</sup> As stated in Aqua's Reply Brief, Aqua provided more data and transparency in this proceeding regarding potential rate impacts than in any other

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<sup>51</sup> *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 at 27 (Oct. 27, 2016)

Section 1329 proceeding, including ten years of rate impact information in an expanded version of Appendix A and twenty years of data in response to forecasts provided by intervening parties.<sup>52</sup> Listing a Trust payment on the Aqua bill to former DELCORA customers has no impact on existing Aqua customers. The customer assistance payment does not impact Aqua's cost of service or cost allocation among its existing customers. Therefore, no data was needed to demonstrate the impact of the "Rate Stabilization Plan" on *existing* Aqua customers.

The impact of the Trust on the acquired DELCORA customers was provided in Aqua witness Packer's Rebuttal Testimony, which, among other things, contained a chart showing the projected impact of payments from the Trust on those customers' estimated total Aqua revenue requirement.<sup>53</sup>

The Trust is not an Aqua Rate Stabilization Plan, and if it is construed as such, the record in this case adequately addresses the impact on customers as required by and in compliance with Section 1329 of the Code. If the Commission does not consider the DELCORA Trust customer assistance payment to be a rate stabilization plan, it need not resolve whether sufficient information was presented

Aqua's Exception No. 5 should be granted.

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<sup>52</sup> See *Limerick*, where Aqua proposed a rate stabilization plan and provided a projection of nine years in the Direct Testimony of William C. Packer (Aqua Statement No. 1) in that application.

<sup>53</sup> Aqua St. No. 2-R at 32-35. The chart showing that impact for the estimated period over which Customer Trust proceeds were estimated to be available and disbursed has been reproduced in Aqua Exception No. 6.

**EXCEPTION NO. 6 - AFFIRMATIVE PUBLIC BENEFITS**

*Aqua excepts to the conclusion that it failed to establish a record upon which the Commission can make a determination that the Proposed Transaction promotes the service, accommodation, convenience and safety of the public in some substantial way. RD, page 2, Discussion – Section B and Section D, Conclusion of Law 10 and Ordering Paragraph No. 1. Aqua’s acquisition of the DELCORA wastewater system is supported by substantial affirmative public benefit and is necessary or proper for the service, accommodation, convenience, or safety of the public. Aqua Main Brief, Section V.B, and Reply Brief, Section III.B*

**A. Introduction**

The ALJs’ conclusion that Aqua failed to establish a record upon which the Commission can make a determination that the Proposed Transaction promotes the service, accommodation, convenience and safety of the public in some substantial way is based on the County Court litigation between DELCORA and the Municipal Protestants. In deciding the issue on this limited basis, the ALJs did not present or discuss the evidence presented by Aqua demonstrating the substantial affirmative public benefits that will result from the Proposed Transaction.

The litigation between DELCORA and the Municipal Protestants has no impact on the public benefits of the Proposed Transaction or the determination of ratemaking rate base. Aqua excepts to the failure of the RD to discuss the benefits of the Proposed Transaction as they are truly substantial. Accordingly, the RD should be reversed and the Proposed Transaction should be approved.

**B. Aqua Demonstrated Through a Preponderance of Substantial Evidence That its Acquisition of the DELCORA Wastewater System Will Result in Substantial Affirmative Public Benefits**

Aqua presented substantial evidence in support of affirmative public benefits and explained, further, that any hypothetical rate impact is outweighed by other positive benefits consistent with *City of York, Popowsky* and *McCloskey*.

## **1. The Many Public Benefits**

The Proposed Transaction will provide many public benefits to both existing Aqua customers and the acquired DELCORA customers as summarized below:

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

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

### **Consolidation/Regionalization**

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

### **Benefits to DELCORA Customers**

- DELCORA's customers will benefit by becoming part of a larger-scale, efficiently operated, water and wastewater utility. Aqua has existing operations serving populations of nearly 500,000 in Delaware County and 200,000 in Chester County, in nearby and overlapping service area. It will be able to merge and integrate DELCORA's customers by folding them into a larger-scale, efficiently operated water and wastewater utility that over time will likely yield further efficiencies and improve long-term viability as envisioned in the Commission policy

statement. Aqua Exhibit No. 1, Application ¶56.c. and Aqua St. No. 2 at 13.

- Aqua is projecting a lower, long-term revenue requirement for DELCORA customers as a result of the Proposed Transaction compared to the revenue requirement that would result with DELCORA continuing as a stand-alone entity. Depending on certain assumptions, the projected benefit to DELCORA customers is between \$111 million and \$313 million through 2040. Aqua St. No. 2-R at 32-35 and WCP-2R Schedule A.
- Aqua also is projecting lower operating and maintenance costs that will likely be realized through reductions in cost for wastewater treatment through the investment in the expansion of the WRTP and force main to divert flows to the WRTP from PWD, as well as efficiencies in administrative and general costs, such as insurance, auditing, legal among others. Aqua Exhibit No. 1, Application ¶56.c. and Aqua St. No. 2 at 13.
- DELCORA's customers will also benefit through customer service enhancements and protections provided by Aqua. Aqua has procedures in place under Chapter 14 of the Code ... and Chapter 56 of the Commission's regulations ... that provide for billing, payment, collection, termination and reconnection of service, payment arrangements, medical certifications, and formal and informal complaint procedures. By DELCORA becoming part of a regulated public utility, these protections will be available to DELCORA's customers. DELCORA low income customers will be able to enroll in Aqua's Helping Hand program. Aqua Exhibit No. 1, Application ¶56.d and Aqua St. No. 2 at 13.
- DELCORA customers will benefit from Aqua's experience in large-scale capital planning and replacement programs. Aqua St. No. 2 at 13. This is especially significant in regard to the planned expansion of the WRTP.

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

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

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

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



1, Application ¶56.f.

### **Planned Capital Projects**

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

### **Environmental Stewardship**

- Aqua has a proven record of environmental stewardship of wastewater systems. Aqua St. No. 2 at 14.
- Aqua's expertise in implementing large scale projects and compliance with DEP and EPA regulations. Aqua St. No. 2 at 14.

### **DELCORA Employees**

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

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

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

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

## **2. Potential Rate Impact**

Aqua estimated the potential rate impact of the Proposed Transaction on customers in compliance with Section 1329. The potential impact is 12.55% to DELCORA customers; 14.32% to Aqua wastewater customers; and 4.58% to Aqua water customers. The estimates do not include

the effect that the Trust will have to assist DELCORA customers in paying their utility bills.<sup>54</sup> Of note, at a 12.55% first year difference in revenue requirement, the Proposed Transaction provides the lowest increase to the acquired DELCORA customers of those Fair Market Value (“FMV”) applications submitted to the Commission by Aqua.

**a. Hypothetical rate impact is outweighed by affirmative public benefit**

In *McCloskey*, the Commonwealth Court concluded that the Commission must address rate impact “in a general fashion” when deciding whether there is substantial public benefit for a Section 1329 proceeding. The rate impact for the Proposed Transaction is summarized as follows. Notably, because DELCORA’s rate base and rates are less than Aqua’s current rates, the Proposed Transaction produces immediate economies of scale:<sup>55</sup>

**Rate Impact**

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

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<sup>54</sup> Aqua St. No. 2 at 4. Although Aqua and DELCORA are withdrawing the customer assistance payment from the Trust placed on the customer bill, customers will now receive a direct mail quarterly payment from the Trust. The direct mail payment is not reflected in the rate impact estimates.

<sup>55</sup> Aqua St. No. 2-R at 12.

*McCloskey* also explains that an expectation of increased rates can be outweighed by the other positive benefits of a transaction. Section 1329 transactions further a recognized legislative objective and are consistent with the Commission's consolidation/regionalization policy. Mr. Packer emphasized the following benefits as outweighing potential rate impact:<sup>56</sup>

- The economies of scale an acquisition of this size can bring are substantial, and the Commission has recognized this fact as demonstrated by the longstanding success of leading public water utility purveyors providing quality and reliable service in the Commonwealth.
- The purchase price of DELCORA is reasonable, supported by appraisals, was negotiated at arms' length, and considers the long-term relationship of infrastructure investment and rates.
- At a 12.55% first year difference in revenue requirement, the Proposed Transaction provides the lowest increase to the acquired DELCORA customers of those FMV applications submitted to the Commission by Aqua.
- The purchase price per customer is less than the Company's existing rate base per customer.
- Stand-alone residential rates at DELCORA's full cost of service are lower than the Company's existing rates.
- Aqua is a growing wastewater utility that has the ability to utilize its larger customer base to share costs that more than offset the cost of capital and income tax differences between municipal and private ownership emphasized by the opponents to the Proposed Transaction.
- The Company's analysis of the long-term projections of revenue requirement is conservative, and there are regulatory tools at the Company's disposal to further reduce revenue requirement impacts of federal and state income tax through lower taxes with the election of tax repair.
- The Company's Appendix A has been utilized in numerous Section 1329 proceedings, and the methods used to forecast impacts have been reviewed and approved in at least three Aqua proceedings before the Commission.
- DELCORA customers will also benefit from regulatory rate protections as a result of the Proposed Transaction. Presently, DELCORA customers can only challenge proposed rates by bringing a legal action in the Court of Common Pleas. In contrast, under Commission jurisdiction, there are public input hearings and public advocates that will advocate for customers' interests in rate proceedings. An Administrative Law Judge will recommend a result and the Commission will review and issue a final decision on future rates. An appellate court review option is also available.

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<sup>56</sup> Aqua St. No. 2-R at 3-5.

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

**b. Other Parties' Concern with Potential Rate Impact**

At a 12.55% first year difference in revenue requirement, the Proposed Transaction provides the lowest increase to the acquired customers of any of the Aqua Fair Market Value applications. The County and Sunoco, nevertheless, disagreed with Aqua's analysis of rate impact and challenged the public benefits of the Proposed Transaction. Their disagreement was based largely on the fact that the capital costs of a privately owned utility are higher than the capital costs of a public authority.

Mr. Packer provided a projection of revenue requirements to 2040 demonstrating that the rate impact conclusions of County witness Faryniarz and Sunoco witness Woods are incorrect. It is noteworthy that the support utilized for a 1329 defined Rate Stabilization Plan is similar to data not only provided by Mr. Packer below, but also by the two other expert witnesses who disagreed with Mr. Packer. If the Commission does find that a Rate Stabilization Plan is required, the discussion below supports such requirement.

Utilizing correct assumptions for projected DELCORA rates leads to a completely different result for DELCORA's future revenue requirement than those projected by Mr. Faryniarz and Mr. Woods. A sale to Aqua results in an overall *lower* revenue requirement and a benefit to DELCORA

customers.<sup>57</sup>

Mr. Packer summarized his analysis in the Table below, which is explained in detail at pages 34 and 35 of his rebuttal testimony. Although Aqua, as a private utility has a higher cost of capital, DELCORA customers benefit, significantly, under the Proposed Transaction both with and without an allocation of costs to other Aqua wastewater customers by approximately \$312.9 million and \$111.4 million in savings, respectively, over 20 years:<sup>58</sup>

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<sup>57</sup> Aqua St. No. 2-R at 34-35.

<sup>58</sup> Aqua St. No. 2-R at 32-35.

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

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

\*\* = Indicates Aqua Base Rate Case Year

^ = 2029 through 2040 Projected increases capped at 2.0%

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

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

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

is *lower* in 2040 than if Aqua did not acquire the DELCORA wastewater assets. Mr. Packer's revenue requirement differential is conservative inasmuch as his analysis did not include possible benefits from Act 11 shifting of costs from wastewater to water customers, tax repair benefits, or future growth of the DELCORA wastewater system and the Aqua wastewater business as a whole.<sup>59</sup>

**c. The DELCORA Revenue Projections**

The County and Sunoco disputed the DELCORA revenue projections used in Mr. Packer's projection of revenue requirement arguing that they are based on Mr. Pileggi's "assumptions."<sup>60</sup> Mr. Pileggi is the Chief Financial Officer of DELCORA. The projections he provided to Mr. Packer are based on his familiarity with and knowledge of the DELCORA system. Those projections, which included increases related to infrastructure investment and operations and maintenance expense, are credible, and were properly used by Mr. Packer in his revenue requirement analysis. The Commission should reject any contention that Mr. Pileggi's revenue projections are mere "assumptions" or otherwise unreliable.

Mr. Pileggi, on the other hand, reasonably criticized County witness Faryniarz's analysis for failing to take into account the significant increase in costs from PWD's LTCP that are projected to be approximately \$86 million between 2020 and 2028. The PWD LTCP costs are *in addition to* the approximately \$450 million in capital costs being incurred to build infrastructure to divert flow from Philadelphia to Chester between 2020 and 2028.<sup>61</sup> Mr. Faryniarz has materially understated significant costs, a fatal flaw in his revenue requirement analysis.

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

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<sup>59</sup> Aqua St. No. 2-R at 35.

<sup>60</sup> See County Main Brief at 39.

<sup>61</sup> Aqua St. No. 6-R at 3.

borrowing may require close to a \$10 million DSRF deposit. DELCORA planned to borrow \$1 billion. This would calculate to be about \$50 million in additional costs – materially significant costs that Mr. Faryniarz failed to consider in his analysis.<sup>62</sup>

Mr. Faryniarz also failed to consider and, in fact, ignored information from DELCORA's response to OCA Interrogatory Set III, No. 11, which shows DELCORA rate increases calculated from 2021 to 2025.<sup>63</sup> Rather than use the rate information provided by DELCORA, Mr. Faryniarz used his own unsupported annual rate increase assumptions for the years of 2021 to 2025 that bear no semblance to what DELCORA calculated its rate increases to be as presented in the discovery responses. In fact, contrary to reality, for 2021, Mr. Faryniarz shows DELCORA's revenue needs *decreasing* in spite of the need to fund a \$1 billion capital plan and increasing costs.<sup>64</sup>

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

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

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<sup>62</sup> Aqua St. No. 6-R at 3.

<sup>63</sup> Aqua St. No. 6-R at 3-4. The DELCORA calculated rate increases are 2021 – 5.66%; 2022 – 7.33%; 2023 – 8.31%; 2024 – 8.10%; and 2025 – 13.23%.

<sup>64</sup> Aqua St. No. 6-R at 3-5.



DELCORA minimized borrowing cost by not borrowing from 2004 to 2013.<sup>65</sup> The \$8,000,000 revenue requirement for minor capital projects in 2020 is evidence of this continuing strategy.<sup>66</sup>

Mr. Faryniarz, however, removed the funding of small capital projects from his revenue requirement analysis and contending that this was appropriate because it is more likely that DELCORA will fund these projects with debt. This assumption is inconsistent with DELCORA's current and historic practices. It was specifically called out and rejected by Mr. Pileggi.<sup>67</sup> Its only purpose is to skew the results to support the County's revenue requirement calculation and it is another reason why the Commission should reject the County's revenue requirement analysis.

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

**C. Public Witnesses Recognized the Benefit of the Proposed Transaction**

Testimony of public witnesses from the public input hearing, summarized as follows, provides still further substantial support for the Proposed Transaction:

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

...I am the former mayor of Upper Darby Township, which is the sixth largest municipality with a population of 82,000 residents ... The Aqua deal gets DELCORA residents out of the City of Philadelphia, which will ultimately be a good thing for the Delaware County

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<sup>65</sup> Aqua St. No. 6-R at 5.

<sup>66</sup> Aqua St. No. 6-R at 5.

<sup>67</sup> Aqua St. No. 6-R at 6.

residents as a whole ... [I] fully support the rate stabilization plan which will cap ratepayer increases at three percent for a long, foreseeable future while also allowing DELCORA and Aqua to build the necessary infrastructure which has been aging ... Even without the rate stabilization plan, I still believe that the deal should be approved because Aqua has the wherewithal to complete the necessary improvements to allow eastern Delaware County to divert from Philadelphia in an economical, responsible and environmentally safe manner. Testimony of Thomas Micozzi, Tr. 93-94.

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

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

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

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

... It seems to me that the two reputable Delaware County utilities with good reputations and attentive to their customers can be combined to be a bigger and better company for the Delaware County community. I fully support the acquisition. Testimony of Lisa Piotrowski, Tr. 138

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

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

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

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

Aqua submits, again, that the Proposed Transaction should be approved.

**D. Conclusion**

Aqua submits, for all the reasons set forth above, that it has demonstrated by a preponderance of substantial evidence that its acquisition of the DELCORA wastewater system is necessary or proper for the service, accommodation, convenience, or safety of the public and that substantial affirmative public benefits will occur as a result of the acquisition. The RD should be reversed and the Commission should approve the Proposed Transaction.

Aqua's Exception No. 6 should be granted.

**EXCEPTION NO. 7 - CONDITIONS FOR APPROVAL OF ACQUISITION**

*Section 1103 of the Code provides that, in granting a CPC, the Commission may impose such conditions as it may deem to be just and reasonable. Aqua agreed to many conditions proposed by other Parties, notably, several of the conditions proposed by OCA, and proposed still further conditions for the Commission to consider in approving the Proposed Transaction. Aqua excepts to the failure of the RD to recommend approval of the Application with conditions. Aqua Main Brief, Section V.C, and Reply Brief, Section III.C.*

**A. Introduction**

Section 1103 of the Code provides that, in granting a CPC, the Commission may impose such conditions as it may deem to be just and reasonable. In prior Section 1329 proceedings, the Commission has consistently and, as a matter of course, exercised its authority under Section 1103 and approved applications with conditions.

As in many acquisitions and transactions that come before the Commission, issues do arise within the context of the Commission proceeding and in areas outside of the Commission's purview. This is not uncommon and, in fact, different approvals from various agencies must be

received, different reports must be filed, and a myriad of other transactional issues come together as the parties move towards closing. In an effort to eliminate issues, Aqua agreed to many conditions proposed by other parties, notably, several conditions proposed by OCA, and proposed still further conditions for the Commission to consider and impose in approving the Proposed Transaction. The RD does not identify or discuss any conditions and Aqua excepts to the failure of the RD to approve the Application with conditions.

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

OCA witness Smith recommended several conditions if the Commission approves the Application.<sup>68</sup> Aqua considered each condition and agreed with several and disagreed with others as follows:<sup>69</sup>

- Aqua agrees with the OCA that the customer assistance payments from the DELCORA Customer Trust should be separately shown on the bills to help make this part of the public benefit transparent to the DELCORA wastewater utility customers who are receiving the bill assistance.
- Aqua agrees with the OCA that the Trust should be used to provide customer bill assistance payments to DELCORA customers, the effect of which will provide for 3% annual increases to DELCORA customers until the approximately \$200 million projected Trust funding has been fully applied.
- Aqua agrees with the OCA that a separate Cost of Service Study ("COSS") will remain an obligation at least as long as the Trust provides the bill assistance payments. As for OCA's recommendation of a separate rate zone, it would not be appropriate, to establish a cost allocation methodology for DELCORA rates in this proceeding. The OCA would have the opportunity to address this issue and make any proposal in the context of a future Aqua base rate proceeding.
- Aqua agrees that, in its next rate filing, it will file COSS calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to, the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.

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

<sup>69</sup> Aqua St. No. 2-R at 21-25. As presented here, these conditions are as originally presented in Aqua's Main Brief. See Section A.5, of this Exception, *infra*, for conditions as modified based on Aqua's withdrawal of the request to place the customer assistance payment from the Trust on the Aqua bill.

- Aqua agrees that, when it modifies its Long-Term Infrastructure Improvement Plan (“LTIIP”) to include the DELCORA wastewater system, and any DELCORA-related projects reflected in the revised LTIIP will be in addition to, and not a reprioritization of, any capital improvements that Aqua was already committed to undertake for existing customers.
- The OCA proposed that DELCORA address convincingly whether it has the legal authority to transfer the wastewater utility assets and related contracts to Aqua. DELCORA convincingly addressed its legal authority in the Rebuttal Testimony of Robert Willert and is addressing it further in its brief.
- The OCA seeks to clarify the Trust. The Trust Agreement is clear both regarding the establishment of the Trust and its exclusive use for the benefit of former DELCORA wastewater customers and new customers in the former DELCORA service territory. The MOU, included with Mr. Packer’s rebuttal testimony as WCP-2R Schedule E, provides the mechanism of how the Trust payments will be applied.
- The OCA seeks to revise the MOU to add details regarding how the Trust proceeds will be properly credited to the former DELCORA customers. The updated MOU included with Mr. Packer’s rebuttal testimony as WCP-2R Exhibit E provides the administrative mechanics to apply bill assistance payments from the Trust to customer bills.
- Aqua is willing to file annual (not quarterly) reports showing how customer bill assistance payments are being applied to Aqua’s bills to DELCORA customers.
- Aqua accepts, for this proceeding, the OCA’s recommendation that, in the period from the date when the Proposed Transaction is consummated through the effective date of new rates for the acquired DELCORA wastewater utility customers in Aqua’s next base rate case, the impact on income tax expense from repairs deductions claimed by Aqua on DELCORA wastewater utility system assets will be recorded in a regulatory liability account and addressed in Aqua’s next base rate case in which rates for the acquired DELCORA wastewater utility customers are addressed.
- The OCA proposed that issues concerning transfer of agreements should be resolved before the transaction can close. Aqua agrees that those issues should and will be resolved as addressed in Section D below.

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

I&E witness Gumby testified that, if the Commission determines to approve the Application, it should condition approval on the following terms:<sup>70</sup>

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<sup>70</sup> See I&E St. No. 1 at 5.

- Closing should not occur until Aqua and DELCORA provide the Commission with a guarantee that the pending County Court litigation will not change (1) DELCORA's status as a bona fide seller and (2) will not result in any change to the terms of the APA;
- To the extent that it relies upon Aqua issuing acquired customers' bills that are lower than applicable tariff rates, the proposed irrevocable trust should be rejected; and
- Aqua should provide a separate cost of service study for the DELCORA system that segregates stormwater costs, identifies the plan in service costs at the time the DELCORA system was purchased, identifies the cost of any plant retirements, and identifies the cost of any plant investments.

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

I&E's request for a "guarantee" related to the County Court litigation is neither necessary nor appropriate and, in fact, has been rendered moot by the recent Court action. As presented in Exception No. 4, the County Court has wholly rejected the County's challenges to the APA and to the Trust, concluding that the APA is a legal and enforceable contract and that the County is enjoined from terminating DELCORA prior to closing and further enjoined from preventing, *in any way*, the depositing of sale proceeds in the Trust for the benefit of former DELCORA customers.

Aqua opposed I&E's "guarantee" in testimony and brief.<sup>71</sup> Aqua argued that neither of the County's Court challenges affects the continued efficacy of the APA. Aqua pointed out that the Trust arrangement is not part of the APA. Aqua also emphasized that neither of the County's Court challenges is a jurisdictional matter to the Commission.

Aqua continues to oppose the "guarantee" as neither necessary nor appropriate but, in light of the decision of the County Court, submits further that I&E's proposed "guarantee" has been rendered moot. The County Court decision confirms DELCORA's status as a bona fide seller and that there will be no changes to the terms of the APA.

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<sup>71</sup> See Aqua Main Brief, Section V.C.2,a and Reply Brief, Section III.C.2c.

### **b. Irrevocable Trust Arrangement**

I&E recommended that, to the extent it relies upon Aqua issuing acquired customers' bills that are lower than applicable tariff rates, the non-Commission jurisdictional Trust should be rejected. Aqua opposed I&E's recommendation in testimony and brief.<sup>72</sup> Aqua continues to disagree with I&E's position concerning the Trust. However, as presented in Exception No. 5, Aqua and DELCORA are withdrawing the request to place the customer assistance payment on the Aqua bill. DELCORA, instead, will direct mail quarterly payments to former DELCORA customers.

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

Aqua, in its next base rate case following closing of the Proposed Transaction, will file cost of service study calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits<sup>73</sup> and understands that this commitment resolves I&E's cost of service recommendation.<sup>74</sup>

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

OSBA recommended, as a condition for approval, that the Commission require Aqua to begin to consolidate DELCORA's rates with the Company's system-wide average rates in its next base rate case.<sup>75</sup> Mr. Kalcic's recommendation is inconsistent with Commission practice. The Commission has not established a cost allocation methodology in any prior Aqua Section 1329 proceeding. It should not do so here. In the first rate proceeding post-closing of the Proposed Transaction, Aqua will propose to move DELCORA customers to full cost of service. The OSBA

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<sup>72</sup> See Aqua Main Brief, Section V.C.2,b and Reply Brief, Section III.C.2.b.

<sup>73</sup> Aqua St. No. 2-R at 20-21.

<sup>74</sup> See Aqua Main Brief, Section V,C.2.c.

<sup>75</sup> Aqua St. No. 2-R at 2 and 25.

will have the opportunity to present its consolidation proposal at that time. Aqua is not proposing any change in rates in this proceeding.

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

Sunoco witness Woods testified in surrebuttal that, if the Commission approves the Application, it should impose the following initial set of conditions:<sup>76</sup>

- DELCORA permanently retaining ownership of the WRTP and the 26 Combined Sewer Overflow (“CSO”) Regulators and considering these assets as “Non-Assignable Assets” under Section 2.06 of the APA;<sup>77</sup>
- The Commission permanently removing the value of the WRTP and the 26 CSO Regulators from Aqua rate base post-closing of the Proposed Transaction;<sup>78</sup> and
- SMPT permanently remaining as a DELCORA customer under the existing service contract between the parties.<sup>79</sup>

Mr. Packer rejected this initial set of conditions in his oral rejoinder testimony. Aside from the untimeliness of these recommendations – appearing for the first time in Mr. Woods’ surrebuttal testimony – they “contemplate an entirely different transaction than the one submitted in the application by the company ...”<sup>80</sup> Pulling out of the Proposed Transaction the WRTP and the 26 CSO Regulators and removing them from Aqua’s rate base represents a deal far different than the one contemplated by the Application and reflected in the APA. The Non-Assignable Assets concept reflected in Section 2.06 of the APA anticipated a reasonable disagreement between the owner of an asset or contract counterparty and DELCORA with respect to the assignability or transferability of such asset or contract. It was not intended to be an artificial construct to eliminate assets that are the essence of the Proposed Transaction from the deal to suit the needs of parties that have no ownership or control of the asset. Yet, that is precisely (and incorrectly) how Mr. Woods is

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<sup>76</sup> Aqua St. No. 2-R at 57-58.

<sup>77</sup> SPMT St. No. 2-SR at 35.

<sup>78</sup> SPMT St. No. 2-SR at 36.

<sup>79</sup> SPMT St. No. 2-SR at 36.

<sup>80</sup> Tr. 213-214.



attempting to misuse Section 2.06 of the APA. DELCORA and Aqua, the parties to the APA, have no dispute or disagreement regarding the assignability/transferability of the WRTP and the 26 CSO Regulators and therefore applying Section 2.06 to further Sunoco's goals is inappropriate and unacceptable. For the same reason, the corollary recommendation about removing the value of these assets from Aqua's rate base is unreasonable, unacceptable and fundamentally changes the Proposed Transaction.

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

In apparent recognition that his "permanent" recommended conditions would be unacceptable to Aqua and DELCORA, Mr. Woods retreated to a set of "transitional" conditions as follows<sup>81</sup>:

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

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<sup>81</sup> SPMT St. No. 2-SR at 36-37.


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

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

## **5. Conclusion**

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

- The DELCORA Customer Trust will provide customer assistance payments to the former DELCORA customers via the issuance of a quarterly check directly from the Trust.
- 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 related to the 3%; 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 hold semi-annual briefings for the length of the Trust to address any unanticipated concerns or issues that may arise.
- The DELCORA Customer Trust will be used to provide customer bill assistance payments to DELCORA customers, the effect of which will provide for 3% annual increases to DELCORA customers until the approximately \$200 million projected Trust funding has been fully applied.

- A separate COSS will remain an obligation at least as long as the Trust provides the bill assistance payments. The OCA will have the opportunity to address creation of a separate rate zone in the context of a future Aqua base rate proceeding.
- Aqua will file COSS calculations separately for the DELCORA system and for the City of Chester consistent with typically filed ratemaking exhibits including, but not limited to, the following: Rate Base (Measures of Value), Statement of Operating Income, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.
- When Aqua modifies its LTIP to include the DELCORA wastewater system, any DELCORA-related projects reflected in the revised LTIP will be in addition to, and not a reprioritization of, any capital improvements that Aqua was already committed to undertake for existing customers.
- The DELCORA Customer Trust is for the exclusive use and benefit of former DELCORA wastewater customers and new customers in the former DELCORA service territory. The MOU will be updated to provide an information sharing agreement to allow the Trust to distribute the payments to the former DELCORA customers directly.
- Aqua will file quarterly reports confirming the quarterly payments to former DELCORA customers. The report will include a list of who has been added as a customer during the prior quarter. A process would also be developed to deal with returned checks. Confidentiality of customer information would be ensured.
- In the period from the date when the acquisition is consummated through the effective date of new rates for the acquired DELCORA wastewater utility customers in Aqua's next base rate case, the impact on income tax expense from repairs deductions claimed by Aqua on DELCORA wastewater utility system assets will be recorded in a regulatory liability account and addressed in Aqua's next base rate case in which rates for the acquired DELCORA wastewater utility customers are addressed.
- Aqua will resolve issues concerning transfer of agreements prior to closing.
- DELCORA's NPDES permit will be re-issued to Aqua, subject to DEP's process.
- Aqua and DELCORA's goal is to work collaboratively with Sunoco and DEP to create a path for regulatory equivalency for Sunoco as the permits are transferred from DELCORA to Aqua. Aqua and DELCORA have and will [BEGIN HIGHLY CONFIDENTIAL]  
  
[END HIGHLY CONFIDENTIAL]

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

Aqua's Exception No. 7 should be granted.

## **EXCEPTION NO. 8 - RATEMAKING RATE BASE**

*Aqua excepts to the conclusion that (1) outstanding issues surrounding DELCORA's legal ability to transfer assets prevent a reliable determination of the appropriate ratemaking rate base (RD, page 2, and Discussion – Section E) and (2) that Aqua failed to establish a record upon which the Commission can make a determination of the fair market value of DELCORA (Conclusion of Law 11) and further excepts to the failure of the RD to address the fair market value appraisals of Gannett Fleming Valuation and Rate Consultants, LLC ("Gannett") and ScottMadden, Inc. ("ScottMadden") and ratemaking rate base. The ratemaking rate base of the DELCORA system assets is \$276,500,000. Aqua Main Brief, Section V.A and Reply Brief, Section III.A.*

### **A. Introduction**

Aqua's Application asks the Commission to approve ratemaking rate base of \$276,500,000 for the DELCORA wastewater system pursuant to Section 1329(c)(2). For ratemaking purposes, the valuation is the lesser of the fair market value or the negotiated purchase price.

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

The RD wrongly concludes that outstanding issues surrounding DELCORA's legal ability to transfer assets prevent a reliable determination of the appropriate ratemaking rate base and fair market value, citing the "ongoing" municipal litigation between DELCORA and Upland/Trainer/Edgmont and the possible impact of DELCORA owning the Upland/Trainer/Edgmont collection systems, or not being able to transfer them, on the fair market

value appraisals.<sup>82</sup>

There is no evidence to support the RD. Trainer has withdrawn its Protest and, as set forth in Exceptions Nos. 2 and 3, Aqua and DELCORA are continuing to try to resolve the remaining Municipal Protestants' protests. Aqua also addressed in Exception No. 3 Aqua's and DELCORA's intent for Aqua to act as agent or subcontractor of DELCORA in the absence of obtaining remaining consents to contract assignment.

Equally significant to the prior discussion, however, is the testimony of both Gannett and ScottMadden which the RD completely ignored. Both Mr. Walker of Gannett and Mr. D'Ascendis of ScottMadden addressed the issue explaining that the ownership concerns of the Upland/Trainer/Edgmont collection system assets, which are the bases for the conclusions presented in the RD, would not impact the fair market value appraisals in any meaningful or significant way.

Mr. D'Ascendis described the removal of the Upland/Trainer/Edgmont assets as "not really relevant to [his] analysis" and, ultimately, having no more than a "rounding" effect on his appraisal results.<sup>83</sup> Mr. Walker focused on Exhibit 9 of the Gannett Appraisal Report and testified that, bringing forward Replacement Cost New Less Depreciation ("RCNLD") to 10/31/20 and subtracting the retail collection system assets of Upland, Trainer and Edgmont, would *increase* RCNLD to \$414,252,987.<sup>84</sup> Mr. Walker explained that this conclusion should not be surprising since the Gannett appraisal (Application Exhibit Q) at page 29 cautioned that the majority of DELCORA's 2018 \$57.5 million construction work in progress ("CWIP") was not included in the Engineer's Assessment and therefore not included in the appraisal, stating "[a]ccordingly, we believe a substantial amount of CWIP related plant assets are likely to be included in the currently proposed transaction which have not been accounted for under our Cost Approach."

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<sup>82</sup> RD at 2 and 21.

<sup>83</sup> Tr. 484-489

<sup>84</sup> Tr. 398-400.

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

It is also concerning in that the engineering list that is put together and the subsequent valuation is done in a point in time. If this type of precision is required in a rate application like this one, it is hard to see a path forward for any approval. As Mr. Walker testified, there was \$57.5 million in additional CWIP that did not get included in the engineering report. At the end of the day, there is certainly ample evidence to support a purchase of \$276 million.

The RD does not cite any evidence of record in support of its conclusion that uncertainty with ownership of the Upland/Trainer/Edgmont collection system assets has an impact on the fair market value appraisals and ratemaking rate base and Aqua submits that there is no record evidence supporting the conclusion. Accordingly, the RD should be reversed and the Commission should address fair market value of DELCORA and ratemaking rate base.

As set forth in the remainder of this Exception No. 8, the ratemaking rate base of the DELCORA wastewater system assets is \$276,500,000 pursuant to Section 1329(c)(2).

## **B. Legal Principles**

Section 1329(c)(2) of the Code provides that the ratemaking rate base shall be the lesser of the negotiated purchase price or the fair market value of the selling utility. Section 1329(g) defines “fair market value” as “[t]he average of the two utility valuation expert appraisals conducted under subsection (a)(2).”

**C. Aqua's Application**

Aqua and DELCORA negotiated a purchase price of \$276,500,000 for the wastewater system. The price was the result of voluntary arm's length negotiations. Aqua and DELCORA are not affiliated with each other.

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

Gannett's fair market value appraisal is \$408,883,000. ScottMadden's fair market value appraisal is \$308,194,006. The average of the two is \$358,538,503. The ratemaking rate base determined pursuant to Section 1329(c)(2) is \$276,500,000, being the lesser of the negotiated purchase price of \$276,500,000 and the average of \$358,538,503.<sup>85</sup>

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

**D. Challenges to the UVE Appraisals**

OCA witness Smith proposed adjustments to several of the UVE appraisal approaches. Mr. Smith did not perform an appraisal of the DELCORA wastewater system asset<sup>86</sup> and presented no evidence showing he has the experience or legal competency to critique the appraisals of certified UVEs. The dollar value of Mr. Smith's adjustments is not of sufficient magnitude to alter the

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<sup>85</sup> The results and weightings of the Gannett and ScottMadden analyses are presented in two tables in Aqua's Main Brief, page 10.

<sup>86</sup> Aqua St. No. 8-R at 1.

ratemaking rate base claim of \$276,500,000, even if the Commission were to adopt them.<sup>87</sup> The adjustments, however, do not meet a standard of value of fair market value and are in direct violation of Section 1329 of the Code.<sup>88</sup>

While Aqua does not oppose the opportunity of OCA to review the UVE appraisals and recommend adjustments, it disagrees with OCA's assumption that the testimony and proposed adjustments of the OCA witness are entitled to equal weight with the Fair Market Value Appraisals. The Appraisals are prepared and sponsored by certified UVEs that are qualified by statute and registered with the Commission. The UVEs are independent and unbiased. The same cannot be said of OCA witness Smith. Ultimately, Mr. Smith's testimony is not entitled to the same weight as the independent analyses and appraisal results of the UVEs.<sup>89</sup>

Aqua disagrees with OCA's attempt to depart from the statutory standard for UVE appraisals. The statutory standard is "fair market value in compliance with the USPAP employing the cost, market and income approaches,"<sup>90</sup> not "reasonableness" or "accepted financial and ratemaking standards" as OCA proposed in briefing.<sup>91</sup> The statutory standard was affirmed in *New Garden*<sup>92</sup> where the Commission stated that "when construing Section 1329 in conjunction with both Section 505 and Section 1103(b) of the Code, it is clear that the Commission retains the authority to review and analyze the UVE valuations to determine compliance with the USPAP standards and whether the three methods were accurately applied to the UVEs' analyses."<sup>93</sup>

In sum, the OCA adjustments should not be adopted.

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<sup>87</sup> See OCA St. No. 1 at 10.

<sup>88</sup> Aqua St. No. 8-R at 2.

<sup>89</sup> See Aqua Main Brief at 12.

<sup>90</sup> 66 Pa. C.S. § 1329(a)(3).

<sup>91</sup> See OCA Main Brief at 11 where OCA contends that Mr. Smith's adjustments are needed "in order to properly reflect financial and ratemaking principles."

<sup>92</sup> *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township and the New Garden Township Sewer Authority*, Docket No. A-2016-2580061, Opinion and Order entered June 29, 2017 ("*New Garden*").

<sup>93</sup> *New Garden*, slip op. at 14.



## 1. Cost Approach

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

### a. The Gannett Cost Approach

Mr. Smith recommends shorter service lives for nine plant accounts in the Gannett Cost Approach based on the Aqua *specific* depreciation rates approved in Aqua's last base rate case.<sup>94</sup> The use of Aqua specific depreciation rates as part of the Cost Approach does not meet a standard of value of fair market value and, thus, is a direct violation of Section 1329 of the Code.

Under the standard of value of fair market value, the buyer is *not* a *specific* entity but is, rather, a hypothetical or generic entity. Mr. Smith's recommendation of using Aqua's "depreciation rates" results in an inappropriate standard of value of investment value, *not* fair market value.<sup>95</sup> Under Mr. Smith's recommendation, the appraisal value would fluctuate depending upon the identity of the buyer because each such buyer has its own unique existing depreciation rates. Under a standard of value of fair market value, an appraised value does not differ based on who the buyer is.<sup>96</sup>

Mr. Smith's recommendation is also internally inconsistent inasmuch as Mr. Smith did *not* recommend using Aqua specific "depreciation rates" for *all* plant accounts. He recommended doing so *only* where it would *lower* the asset value under the Cost Approach. If Mr. Smith had been consistent and used Aqua-specific depreciation rates for all accounts, his adjustment would have

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<sup>94</sup> Aqua St. No. 8-R at 4.

<sup>95</sup> Aqua St. No. 8-R at 5.

<sup>96</sup> Aqua St. No. 8-R at 8-9.

reduced the Gannett Cost Approach result by \$21,581,044 instead of \$100,465,415.<sup>97</sup>

The issue here is not the same as the service life issue in *Cheltenham*<sup>98</sup> as OCA contended in briefing.<sup>99</sup> In *Cheltenham*, OCA challenged the AUS Cost Approach because the service lives used by AUS differed from the service lives used by AUS in previous fair market value appraisals. That is not the issue here where the OCA is proposing that *buyer* specific service lives are appropriate within the Cost Approach.

As a final point, Mr. Smith provided no statistical analysis to support the use of Aqua specific depreciation rates for the DELCORA assets. Aqua's assets and the DELCORA assets, in fact, may not be comparable. Aqua's existing wastewater systems are "relatively small in size and number of customers" and each "operating division" being "self-sustained" and providing wastewater service to a total population of 64,000. The DELCORA facilities, on the other hand, serve more than 500,000 people in 46 municipalities.<sup>100</sup>

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

**b. The ScottMadden Cost Approach**

Within the ScottMadden Cost Approach, Mr. Smith recommends shorter service lives for Account 362.2 Special Collecting Structures (from 75 years to 40 years) and Accounts 380.3 Treatment and Disposal Equipment – Pump Stations and 380.4 Treatment and Disposal Equipment

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<sup>97</sup> Aqua St. No. 8-R at 3-4. Irrespective of the inconsistency, Mr. Smith's use of Aqua specific depreciation rates results in an investment value and not a fair market value, a direct violation of Section 1329, and should not be adopted as set forth above.

<sup>98</sup> *Application of Aqua Pennsylvania Wastewater, Inc.*, Docket No. A-2019-3008491 (Opinion and Order entered November 5, 2019) ("*Cheltenham*").

<sup>99</sup> See OCA Main Brief at 12-13.

<sup>100</sup> Aqua St. No. 8-R at 9.

(from 50 years to 40 years). Mr. Smith's adjustments, once again, are based on the depreciation rates approved in Aqua's last base rate case.<sup>101</sup>

Similar to Gannett's response to Mr. Smith, ScottMadden also emphasized that ScottMadden's valuation study is *not* bound by Aqua's decisions. ScottMadden used a source of information for useful lives that is both readily available and supported by a state regulatory jurisdiction.<sup>102</sup>

The useful lives in the ScottMadden Cost Approach were based on the *System of Accounts for Water and Wastewater Utilities – with 200 or More Connections* as published by the Public Utility Commission of Texas. ScottMadden also looked to this Commission for guidance. Specifically, in Docket No. A-2019-3008491, the Commission found a useful life of 75 years to be appropriate for mains. ScottMadden considered Account 362.2 Special Collecting Structures to be functionally equivalent to mains, and, therefore, relied on Commission guidance and a useful life of 75 years in that instance.<sup>103</sup>

Regarding Accounts 380.3 and 380.4, as shown on page 5 of *System of Accounts for Water and Wastewater Utilities – with 200 or More Connections*, the useful lives listed for account "380 Outfall sewer lines" is 50 years. While recognizing that Aqua used useful lives of 40 years for account 380 in its rate case depreciation study, Mr. D'Ascendis stated that the ScottMadden valuation study is *not* bound by Aqua's decisions. Instead, as set forth above, ScottMadden appropriately used a source of information that is both readily available and supported by a state regulatory jurisdiction.<sup>104</sup>

Mr. D'Ascendis explained that the Cost Approach to value is based solely on DELCORA's

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<sup>101</sup> Aqua St. No. 9-R at 3.

<sup>102</sup> Aqua St. No. 9-R at 4.

<sup>103</sup> Aqua St. No. 9-R at 3.

<sup>104</sup> Aqua St. No. 9-R at 4.

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

OCA's proposed adjustment to the ScottMadden Approach should be rejected. The ScottMadden Cost Approach result is \$292,413,993.

## **2. Market Approach**

### **a. The Gannett Market Approach**

The Gannett Fair Market Value Appraisal explains that there are two methods of doing the Market Approach to valuation: the Market Multiples method; and the Selected Transaction method.<sup>105</sup> The results of the Market Multiples method indicate a value of the system of \$518.4 million. The results of the Selected Transactions method indicate a value of \$358.3 million. The Market Approach to valuation indicates a value of \$438.3 million for the system.<sup>106</sup>

OCA did not recommend any adjustments to the Gannett Market Multiples analysis. Mr. Smith did, however, propose adjustments to the Gannett Selected Transactions analysis, which produced an adjusted Selected Transactions result of \$327,125,128. Mr. Smith's adjustment reflects the use of only *ex post*, Commission determined, ratemaking rate base values in the Selected Transaction method. The use of *ex post*, Commission determined ratemaking rate base values in the Selected Transaction method was *rejected* by both Judge Jones and the Commission in the recently concluded Cheltenham proceeding. It should be rejected, again, here.<sup>107</sup>

Mr. Walker emphasized that the Selected Transaction method relies on and reflects

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<sup>105</sup> Aqua Exhibit No. 1, Application Exhibit Q at 40.

<sup>106</sup> Aqua Exhibit No. 1, Application Exhibit Q at 47.

<sup>107</sup> Aqua St. No. 8-R at 17. The Cheltenham proceeding cited by Mr. Walker is the *Application of Aqua Pennsylvania Wastewater, Inc.*, Docket No. A-2019-3008491, Opinion and Order entered November 5, 2019.

information that was known, *ex-ante*, *i.e.*, information that was known at the time the winning purchase bid (price) was given. After all, the winning purchase bid (price) could not have reflected *ex-post* information that was not available when it was made.<sup>108</sup>

For the McKeesport transaction, for example, neither the re-negotiated \$159 million nor the Commission-approved rate base value of \$158 million was known at the time of the bid. Similarly, for the Limerick transaction, the correct purchase price of \$75 million was used in lieu of the Commission's determined ratemaking rate base value of \$64 million because \$75 million was the amount bid and paid by the buyer. A Commission determined ratemaking rate base value for an entity does not change the price bid and paid by a buyer.<sup>109</sup>

Further, the metrics (Gross Property Plant and Equipment, Net Property Plant and Equipment, Customers, etc.) used in the Selected Transaction method are relative to the time period the bid (price) was made. That is, the metrics are time period sensitive. For example, a 2016 bid would likely reflect metrics from 2015 since the results of 2016 would not be known at the time. It is unrealistic for Mr. Smith to suggest that only *ex-post* original cost studies are more appropriate than *ex-ante* information in the Market Approach.<sup>110</sup>

OCA's proposed adjustment to the Gannett Market Approach to value should be rejected. The Gannett Market Approach result is \$438,337,696.<sup>111</sup>

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<sup>108</sup> Aqua St. No. 8-R at 19-20.

<sup>109</sup> Aqua St. No. 8-R at 18.

<sup>110</sup> Aqua St. No. 8-R at 19-20.

<sup>111</sup> Gannett verified the results of its Market Approach. In 2018, two IOUs, Connecticut Water Service, Inc. and SJW Group, announced a planned merger with Connecticut Water. Although this acquisition is not directly applicable to the DELCORA system, it does provide a range of indicated value for the system, which Gannett relied on as a check. The results of the Connecticut Water selected transactions show a range of value for the DELCORA system of \$495.5 million when the reported significant selected transactions multiples are considered and a value of \$564.2 million when the reported significant selected transactions multiples have been adjusted for "cost free" capital. Aqua Exhibit 1, Application Exhibit Q at 47.

**b. The ScottMadden Market Approach**

The ScottMadden Fair Market Value Appraisal explains that the Market Approach considers comparable transactions of similar utilities in the same general timeframe and general operational area and other market-based data to establish a fair market value.<sup>112</sup> In the ScottMadden Appraisal, the Market Approach was addressed using a Market-to-Book Multiple Method and a Comparable Sales Method. The ScottMadden Market Approach to value is \$613,520,480.<sup>113</sup> Notably, ScottMadden applied a relatively low 5% weighting to the Market Approach result.

Mr. Smith excluded the results of the Comparable Sales Method from the ScottMadden Appraisal result. His proposed adjustment reduces the ScottMadden Market Approach to value by \$197,931,116. Mr. Smith believes that the Comparable Sales Method is unreliable because of a lack of demonstrated reliability and use in actual transactions and produces extremely inflated valuation results.<sup>114</sup>

Mr. Smith's criticism of the Comparable Sales Method is illogical and contrary to established reference materials. The Comparable Sales Method is one of the most intuitive methods of valuation. Any homeowner, for example, would, obviously, want to know the recent sales history of other homes on their block – comparable sales, in other words – before putting their home up for sale. It is no different for utility fair market valuation.<sup>115</sup>

The Comparable Sales Method has also been noted in numerous publications, including The American Society of Appraisers as recognized by Mr. Smith. Additionally, David L. Hayward notes that market-based approaches are “[A] general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods

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<sup>112</sup> Aqua Exhibit No. 1, Application Exhibit R at 3.

<sup>113</sup> Aqua Exhibit No. 1, Application Exhibit R at 8-9.

<sup>114</sup> OCA Sta. No. 1 at 63.

<sup>115</sup> Aqua St. No. 9-R at 6.

that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.”<sup>116</sup>

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

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

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

Mr. Smith offered no support for his conclusory statement that using cost per connection is not reliable. Moreover, as emphasized by Mr. D’Ascendis, ScottMadden took into account the results of the Market Approach by applying a 5% weighting. Assigning the result a lower weight to the Market Approach is entirely appropriate and reflective of proper appraisal standards. Mr. D’Ascendis found no reason to make any adjustments to his Market Approach in response to Mr. Smith’s testimony.<sup>117</sup>

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

### **3. Income Approach**

#### **a. The Gannett Income Approach**

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

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<sup>116</sup> Aqua St. No. 9-R at 6.

<sup>117</sup> See Aqua Main Brief at 17-18.

and industry risk of the assets.<sup>118</sup>

The two most common methods of the Income Approach are the capitalization of earning or cash flow method and the discounted cash flow method (“DCF”).<sup>119</sup> Gannett’s Income Approach indicated a value of \$387,754,301 for the DELCORA system.

OCA’s criticism of the Gannett Appraisal is limited to the manner of determining the “terminal value” used in the Income Approach (DCF model). OCA witness Smith expressed concerns regarding the application of a capitalization rate concept to estimate terminal value. In lieu of a capitalization rate concept, Mr. Smith recommends use of net plant value as the terminal value in the Income Approach. The end-result of Mr. Smith’s adjustment to the “terminal value” in the DCF model is a downward, or negative, adjustment of \$82,690,835 to the Gannett Income Approach to value.<sup>120</sup>

OCA’s criticism of the Gannett terminal value should be denied. OCA has *unsuccessfully* challenged UVEs’ determination of terminal value in past Aqua Section 1329 proceedings. Most recently, in *Cheltenham*, the Commission accepted the terminal value presented by the UVEs as part of the Income Approach, while noting that its rejection of OCA’s arguments concerning terminal value is consistent with *Limerick*.<sup>121</sup>

Gannett has applied a capitalization rate concept to estimate terminal value in *nine* Section 1329 proceedings and the Commission has not adjusted the concept in any one of those prior *nine* proceedings.<sup>122</sup> OCA’s proposal here to use Net Plant Value as the terminal value is *identical* to the

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<sup>118</sup> Aqua Exhibit No. 1, Application Exhibit Q at 31.

<sup>119</sup> The capitalization of earning method converts a single base economic income number to a value by dividing it by a capitalization rate. The DCF method uses estimates of future free cash flow and discounts them to arrive at a present value or price of the cash flows. Aqua Exhibit No. 1, Application Exhibit Q at 31.

<sup>120</sup> Aqua St. No. 8-R at 9-10.

<sup>121</sup> *Cheltenham*, slip op. at 57.

<sup>122</sup> Aqua St. No. 8-R at 10.



proposal rejected by the Commission in Cheltenham.<sup>123</sup> It should be rejected, again, here as OCA has presented no new justification for its adjustment of terminal value.<sup>124</sup>

Within the DCF model, the “terminal value” is simply a point in time in which the growth in annual Debt Free Net Cash Flows changes from multiple growth rates to a constant growth rate. Within the DCF analysis, the growth rate of annual Debt Free Net Cash Flows during time periods 1 through 24 (year 2021 through 2044) changes multiple times due to the various assumptions listed in the Gannett Appraisal. After time period 24 (year 2044), the growth in annual Debt Free Net Cash Flows is a constant growth rate. The “terminal value” is simply the present value of future Debt Free Net Cash Flows from time period 24 (year 2044) forward. Under the Income Approach, a terminal value can also be thought of as the future market value, or future sale price, of existing assets.<sup>125</sup> The Gannett terminal value at year 24 ranges from \$530.071 million to \$611.997 million from time period 24 (year 2044).<sup>126</sup>

Mr. Smith recommends using the \$340.646 million net plant value from time period 24 (year 2044) as the terminal value. Mr. Smith’s recommendation defeats or eliminates the need to appraise plant assets since the indicated value of net cost of the plant assets is simply the net cost of the plant assets under Mr. Smith’s recommendation. If Mr. Smith were correct, then an original cost less depreciation analysis would be the only method needed to value assets. However, the value of the investment in plant and equipment for the DELCORA wastewater system assets is being determined in this proceeding based upon a standard of value of fair market value, not a standard of value of original cost.<sup>127</sup>

Mr. Smith’s criticism of, and his proposed adjustments to, the Gannett Income Approach are

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<sup>123</sup> Aqua St. No. 8-R at 14.

<sup>124</sup> See Aqua Main Brief, Section V.A.4.c.

<sup>125</sup> Aqua St. No. 8-R at 11.

<sup>126</sup> Aqua Exhibit No. 1, Application Exhibit Q, Exhibit 15, page 6.

<sup>127</sup> Aqua St. No. 8-R at 11-12.

not in accordance with valuation practice. The use of a “terminal value” in the DCF model is a mathematical shortcut to avoid having to show and/or calculate annual Debt Free Net Cash Flows for hundreds of time periods, or hundreds of years, and is practical and is in accordance with accepted valuation practice. Conversely, Mr. Smith’s proposed alternative of using net plant value from time period 24 (year 2044) as the terminal value is not in accordance with accepted valuation practice and is not reasonable.<sup>128</sup>

Mr. Walker provided an evidentiary analysis demonstrating that “net plant value” is not a good measure or proxy for future market value. The Gannett Appraisal lists the current market multiples applicable to the corresponding financial and operating statistics of the DELCORA system.<sup>129</sup> These market multiples and the corresponding financial and operating statistics of the DELCORA wastewater system that were utilized by Mr. Smith are presented in “Table 2” at page 13 of Aqua Statement Number 8-R.<sup>130</sup>

As shown in “Table 2,” the indicated market value in period 24 (year 2044) applicable to each metric range from \$1,380.530 million to \$640.414 million, and collectively proves net plant value (i.e., \$340.646 million) is not a good measure or proxy of the future market value, or sales price, of existing assets since the indicated future market value is about 168% higher than Mr. Smith’s recommendation of \$340.646 million (year 2044).<sup>131</sup> OCA’s “terminal value” criticism, accordingly, should be rejected.<sup>132</sup>

OCA’s proposed adjustment to the Gannett Income Approach to value should be rejected. The Gannett Income Approach result is \$387,754,301.

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<sup>128</sup> Aqua St. No. 8-R at 12.

<sup>129</sup> Aqua Exhibit 1, Application Exhibit Q. Exhibit 16, page 1 of 3.

<sup>130</sup> Aqua St. No. 8-R at 13.

<sup>131</sup> Aqua St. No. 8-R at 13-14.

<sup>132</sup> Additional criticisms of Mr. Smith to the terminal value in the Gannett Income Approach were reviewed and countered by Mr. Walker as presented in Aqua’s Main Brief at 21.

## **b. The ScottMadden Income Approach**

The ScottMadden Fair Market Value Appraisal explains that the Income Approach to value provides an indication of value by discounting the expected or future cash flows of a company to a present value. The projected cash flows must account for additional investment and working capital additions and reflect the specific growth potential of the system being valued. The discount rate used to calculate the present value of the company must be derived from market data of similar risk companies and take into account how the potential acquirer will finance the transaction (e.g., debt, equity, or a combination of debt and equity).<sup>133</sup> ScottMadden's Income Approach indicated a value of \$291,863,370 for the DELCORA system.<sup>134</sup>

Mr. Smith disagreed with the terminal value used after 2049 within the ScottMadden Income Approach.<sup>135</sup> He proposed a recalculation of the terminal value using the amount of Net Plant less ADIT projected for the year 2049.<sup>136</sup> Mr. D'Ascendis disagreed with Mr. Smith, explaining that Mr. Smith provided no theoretical or academic support for the use of projected net plant less ADIT as the terminal value for a going concern. He provided citations to valuation literature that support the calculation of the terminal value as presented in the ScottMadden Appraisal (capitalizing terminal year cash flow and discounting that to present value).<sup>137</sup>

Mr. D'Ascendis testified that, in view of the valuation literature and given DELCORA's operations are assumed to be a going concern (*i.e.*, operation into perpetuity),<sup>138</sup> it is appropriate to rely on the capitalization of cash flows as done by ScottMadden in its Income Approach to value.

OCA's proposed adjustment to the ScottMadden Income Approach to value should be

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<sup>133</sup> Aqua Exhibit 1, Application Exhibit R at 3.

<sup>134</sup> Aqua Exhibit 1, Application Exhibit R at 12.

<sup>135</sup> OCA St. No. 1 at 61.

<sup>136</sup> Aqua St. No. 9-R at 4.

<sup>137</sup> Aqua St. No. 9-R at 5-6; *see also* Aqua Main Brief 22-23.

<sup>138</sup> *See* OCA St. No. 1 at 19, where Mr. Smith acknowledges that Aqua will merge its system with the DELCORA system.

rejected. The ScottMadden Income Approach result is \$291,863,370.

**E. Conclusion**

The Commission in its Final Opinion and Order should reverse the RD. Pursuant to Section 1329(c)(2), the ratemaking rate base for the DELCORA wastewater system is \$276,500,000, being the lesser of the negotiated purchase price of \$276,500,000 and the average of the UVE appraisals of \$358,538,503. The OCA's criticisms of the appraisals, which do not impact Aqua's ratemaking rate base claim, nevertheless, should be rejected and given no weight.

Aqua's Exception No. 8 should be granted.

**EXCEPTION NO. 9 - ENVIRONMENTAL ISSUES**

*Aqua excepts to the RD's failure to address and reject the environmental concerns of Sunoco and Kimberly Clark and accept Aqua's proposed conditions on these issues. Aqua Main Brief at 41-54; Aqua Reply Brief at 29-38.*

**A. Introduction**

The RD did not discuss or resolve the environmental issues raised by Sunoco and KCC in this proceeding, which include [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

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[REDACTED]

[REDACTED]

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[END HIGHLY CONFIDENTIAL]

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[REDACTED]

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[REDACTED]

**B. Environmental Permits**

Aqua witness Mr. Bubel made the following points responsive to Sunoco's and KCC's environmental concerns: (i) since 1987, numerous Privately Owned treatment Works ("POTWs") have been sold to private owners and the related transitional issues have been worked out, in many cases by incorporating industrial pretreatment obligations into the new private owner's National Pollutant Discharge Elimination System ("NPDES") permit; (ii) transfer of the DELCORA NPDES permit to Aqua as the proposed "Permittee", is a known process, and (iii) Aqua has successfully transferred nine NPDES permits from municipalities or municipal authorities over the last twenty-two years.<sup>141</sup>

As explained by Aqua witness Mr. Miller, **[BEGIN HIGHLY CONFIDENTIAL]**

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<sup>141</sup> Aqua St. No. 4-R at 3-5.

<sup>142</sup> Aqua St. No. 10-R at 12.

[REDACTED]<sup>143</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>144</sup> [END HIGHLY CONFIDENTIAL]

Aqua witness Mr. Bubel confirmed that primary supervision of the industrial pretreatment program (“IPP”) for industrials would move from the EPA to DEP under the Proposed Transaction and that Aqua intends to operate and implement the pretreatment program functionally equivalent to how it is operated under DELCORA ownership. The IPP will be implemented through an NPDES permit authorized by DEP, similar to other former POTWs such as the DELCORA WRTP.<sup>145</sup>

Sunoco argues that [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

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[REDACTED]<sup>146</sup> [REDACTED]

[REDACTED]

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<sup>143</sup> [REDACTED]  
<sup>144</sup> [REDACTED]  
<sup>145</sup> Aqua St. No. 4-R at 2-3.  
<sup>146</sup> [REDACTED]

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**[END HIGHLY CONFIDENTIAL]** Aqua's proffered conditions below to meet Sunoco's concerns, with the exception of delaying the satisfaction of the conditions until any appeal period has run or appeals are resolved on authorizations issued by DEP. All relevant parties should be permitted to assess the risks of proceeding with the Proposed Transaction in the face of a possible appeal and related stay if and when that situation occurs and after evaluating the actual decision issued by DEP. It should be kept in mind that Aqua will be operating the same facilities previously operated by DELCORA and treating the same wastewater discharges in the same fashion, **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[REDACTED]

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

While Sunoco would prefer the DEP permitting process to be further advanced, this proceeding is not scheduled to be completed until March 2021.<sup>166</sup> If the Commission approves the

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<sup>165</sup> [REDACTED]

Proposed Transaction, actual Closing on the Proposed Transaction will be even later in 2021, leaving more than sufficient time to complete the anticipated DEP permitting required for Aqua to assume private ownership and operation of DELCORA's treatment facilities. Aqua, DELCORA and Sunoco can collaboratively work toward making the transition from a public system to a private system smooth, and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

The record fully substantiates by a preponderance of the evidence that the Application should not be rejected because environmental permitting could become an extended and expensive process [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL] Aqua's consistent record of obtaining timely DEP authorization of its municipal and municipal authority wastewater acquisitions can be expected to continue with the Proposed Transaction.

**C. CSOs and the Long Term Control Plan**

Sunoco witness Woods raised two additional issues of concern in the environmental area. DELCORA operates a CSO control program that is subject to EPA and DEP oversight, and governed by a Federal Consent Decree entered in the U.S. District Court for the Eastern District of Pennsylvania in 2015 at Docket No. 2:15-cv-4652.<sup>167</sup> CSOs are facilities that combine wastewater and stormwater collected from systems feeding into the DELCORA system.<sup>168</sup> Mr. Woods speculates that a private owner such as Aqua "could" be forced into a greatly expanded CSO control program that is significantly more costly than DELCORA's current plan. No basis was provided by Mr. Woods, other than Aqua's status as a private company, for his view it is likely that EPA and DEP would modify the current DELCORA plan by ordering Aqua to "completely separate all

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<sup>166</sup> Sunoco Main Brief at 34.

<sup>167</sup> SPMT St. No. 2 at 9; Aqua St. No. 4-R at 7.

<sup>168</sup> SPMT St. No. 2 at 9.

sanitary and storm sewers to eliminate the CSOs or provide full treatment for all flows including storm flows”, a massive undertaking.<sup>169</sup>

Mr. Woods misses the overarching regulatory requirement that all point source discharges under the CWA, including CSO outfalls, must comply with applicable water quality standards. EPA NPDES CSO Control Policy. Those water quality standards apply to all dischargers, whether public or private.<sup>170</sup> Mr. Bubel rebutted Mr. Woods’ testimony by pointing out: (i) DELCORA has already submitted for EPA and DEP review a LTCP revision that will set forth DELCORA’s CSO obligations; (ii) EPA and DEP are expected shortly to approve DELCORA’s LTCP in the near future, at which time it will be incorporated into DELCORA’s obligations under the Consent Decree; (iii) the Consent Decree contains provisions that allow a party acquiring the DELCORA system to become the party fulfilling the LTCP and Consent Decree obligations; and (iv) Aqua and DELCORA have already approached EPA and DEP to discuss transfer of the DELCORA system to Aqua and plan to formally request the substitution of Aqua for DELCORA in the Consent Decree at or near the time the Proposed Transaction is expected to close.<sup>171</sup> Upon Aqua replacing DELCORA in the Consent Decree, it will receive the benefit of DELCORA’s LTCP work to date and be required to continue performance of the approved LTCP. There is no evidence that CSO obligations greater than those imposed on DELCORA in order to meet Pennsylvania’s Water Quality Standards will be required by EPA or DEP because Aqua is a private company.<sup>172</sup>

#### **D. Impact on Federal Funding**

Mr. Woods is also concerned that moving DELCORA to private ownership will ultimately lead to a lower proportion of Federal funds for infrastructure improvements under the CWA being

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<sup>169</sup> SPMT St. No. 2 at 42.

<sup>170</sup> 25 Pa. Code § 93.7.

<sup>171</sup> Aqua St. No. 4-R at 7.

<sup>172</sup> Id.

allotted to Pennsylvania and the loss of financing assistance to DELCORA in the CWA revolving loan program will be replaced by higher-cost investor-owned utility capital.<sup>173</sup>

In response, Mr. Bubel pointed out that removing DELCORA's infrastructure needs from CWA funding will reduce Pennsylvania's proportional amount of funding, however, any reduction in CWA infrastructure funds will be offset by the reduction in infrastructure needs.<sup>174</sup> Moreover, Aqua will pick up those infrastructure demands and it is unlikely CWA funding would fully meet the DELCORA system's capital requirements.<sup>175</sup> Nor is loss of access to CWA State Revolving Fund financing a negative factor. In addition to DELCORA customers receiving the benefits of economies of scale under Aqua ownership, the system would avoid the higher administrative costs, preliminary engineering costs and other costs that accompany Revolving Fund financing.<sup>176</sup> Finally, it is Mr. Bubel's understanding that most CWA Revolving Fund dollars go to smaller companies that cannot readily access market funding.<sup>177</sup>

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

**E. Executive Order ("EO") 12803**

As described by Aqua witness Bubel, EO 12803, issued in 1992 by then-President George H. W. Bush: (i) allows for disposition or transfer of an infrastructure asset, such as by sale or by long-term lease, from a State or local government to a private party and (ii) was intended to encourage state and local governments to sell publicly-owned assets as a means of raising funds to meet budget deficits and to increase operating efficiency.<sup>178</sup> The EO also "encourages privatization of water supply facilities and wastewater treatment facilities, directing federal agencies to work

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<sup>173</sup> SPMT St. No. 2 at 42-44.

<sup>174</sup> Aqua St. No. 4-R at 8.

<sup>175</sup> Id.

<sup>176</sup> Aqua St. No. 4-R at 9.

<sup>177</sup> Id.

<sup>178</sup> Aqua St. No. 4-R at 9.

with state and local officials who might be interested in selling such assets, and adjusting financial incentives to enable local governments to retain the proceeds from the sale of facilities that were constructed using federal assistance.”<sup>179</sup>

According to 1999 Draft Guidance issued (and later withdrawn) by the EPA, “the EO was established for the following five purposes: (i) assist local privatization initiatives; (ii) remove federal barriers to privatization; (iii) increase the financial incentives for state and local governments by relaxing federal repayment requirements; (iv) protect the public interest by ensuring reasonable user charges; and (v) establish guarantees that the facility will continue to be used for its intended purpose.”<sup>180</sup>

Mr. Woods and Mr. Bubel were the only witnesses in the proceeding who addressed the EO. Mr. Woods’ basic criticism is that EO applies to the Proposed Transaction and that neither Aqua nor DELCORA has addressed the process and requirements of the EO.<sup>181</sup> His specific criticisms are that: (i) neither the Transfer Price nor the amount of the locally funded shares of the relevant assets have been established in this proceeding; (ii) the EPA has not approved the Proposed Transaction; and (iii) neither the Director of the Office of Management and Budget (“OMB”) nor the Administrator of the EPA has determined the appraised value for the assets to be transferred under the Proposed Transaction.<sup>182</sup>

Mr. Woods expanded on his concerns regarding the EO in his surrebuttal testimony, in part noting that there is some potential that, upon final application of the EO, including the requirement

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<sup>179</sup> Aqua St. No. 4-R at 9-10.

<sup>180</sup> *Draft Guidance on the Privatization of Federally Funded Facilities*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF WATER (September, 1999) at 14-15; Aqua St. No. 4-R at 10.

<sup>181</sup> Aqua St. No. 4-R at 10; SPMT St. No. 2 at 45-49.

<sup>182</sup> SPMT St. No. 2 at 46-27.

that state and local contributions relevant to the DELCORA assets be refunded without adjustment, could diminish the value of the Trust.<sup>183</sup>

Mr. Bubel addressed the EO and many of Mr. Woods' concerns. Aqua agrees that the 28-year old EO is still in effect and further understands that DELCORA did obtain EPA construction grants for certain of its wastewater facilities under the then-effective EPA construction grant program.<sup>184</sup> However, since there are few details on the process to be used by the EPA to administer the EO, many if not all of Mr. Woods' concerns are speculative at best. As noted previously, the 1999 EPA Draft Guidance on the EO has long been withdrawn and the EPA has not even dealt with a wastewater privatization in connection with facilities funded under the EPA construction grant program since the early 2000's.<sup>185</sup> It remains to be determined to what extent there are any state, local or federal funds that EPA and the OMB will require to be returned to a government entity under the EO.

While Aqua and DELCORA have not officially started the process for addressing the EO in the context of the Proposed Transaction, it is clear that the expected process with the EPA is for DELCORA – as the asset owner and recipient of the grant funds – to review its records regarding any federal funding (that has not already been fully depreciated) and submit its findings to the EPA's Region 3 office in Philadelphia. Further, Aqua and DELCORA have committed to taking the necessary steps to resolve the EO requirements.<sup>186</sup> Most importantly with respect to Mr. Woods' concerns about the EO, Aqua does not expect the EO to have a material impact on closing the Proposed Transaction. As Mr. Bubel testified, "Aqua believes the EPA is committed to working

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<sup>183</sup> SPMT St. No. 2-SR at 20.

<sup>184</sup> Aqua St. No. 4-R at 11.

<sup>185</sup> Aqua St. No. 4-R at 12.

<sup>186</sup> Aqua St. No. 4-R at 12.




with DELCORA and Aqua timely and expeditiously, consistent with the spirit and purpose of the EO, which is to facilitate and promote the privatization of infrastructure.”<sup>187</sup>

Aqua understands Mr. Woods’ concerns about the possible application and impact of the EO (particularly in connection with the amount of funds in the DELCORA Customer Trust). And, because Aqua and DELCORA are far more optimistic than Sunoco about obtaining the necessary resolution of the EO from all parties (including, if necessary, the OMB), Aqua is prepared to accept in this proceeding a condition of Commission approval of the Application that the appropriate waiver or other resolution of the EO is obtained/completed before closing of the Proposed Transaction. Importantly, the existence and implementation of the EO in no way diminishes the affirmative benefits of the Proposed Transaction.

**F. Conclusion and Conditions**

Although there is no material risk that Aqua will not be able to achieve environmental compliance with DEP’s requirements, Aqua agrees to accept the following revised and updated Commission conditions from its Main Brief:

- DELCORA’s NPDES permit will be re-issued to Aqua, subject to DEP’s process.
- Aqua and DELCORA’s goal is to work collaboratively with Sunoco and DEP to create a path for regulatory equivalency for Sunoco as the permits are transferred from DELCORA to Aqua. Aqua and DELCORA have and will [BEGIN HIGHLY CONFIDENTIAL]  
 [END HIGHLY CONFIDENTIAL]
- Aqua will obtain an appropriate waiver or other resolution of the Executive Order 12803 before Closing of the Proposed Transaction.

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<sup>187</sup> Aqua St. No. 4-R at 13.

Aqua's Exception No. 9 should be granted.

**EXCEPTION NO. 10 - SECTION 507 APPROVALS**

*Aqua excepts to the conclusion that it failed to establish a record upon which the Commission can make a determination of reasonableness, legality, or validity of neither the APA nor Aqua's request to assume enumerated municipal contracts alleged to be currently held by DELCORA RD Discussion – Section F and Conclusion of Law 12.*

Aqua's Application included a request for Certificates of Filing pursuant to Section 507 of the Code for the APA and the assignment of various contracts between DELCORA and various municipal and other counterparties. Citing, once again, the civil litigation, challenging DELCORA's authority to enter into the APA and/or convey the system property and/or assign all the contracts, the RD concludes that contract terms are unsettled and it cannot recommend that the Commission approve the Proposed Transaction. Aqua excepts to this conclusion.

As presented in Exceptions No. 4, the County Court has wholly rejected the County's challenges to the APA. There is, in short, no civil litigation impeding the Commission from approving the APA.

Additionally, of the 163 contracts to be assigned by DELCORA to Aqua only four are at issue. Aqua and DELCORA are in active settlement discussions with the four remaining Municipal Protestants to resolve their individual Protests and are hopeful they will result in the resolution of the Municipal Protestant Protests. Aqua and DELCORA, however, have a clear contractual process for addressing any contracts for which assignment has not occurred as of closing as presented in Exception No. 3. Accordingly, there is no basis for the Commission to not address the request for Section 507 approvals and issues Certificates of Filing as requested.

Aqua's Exception No. 10 should be granted.

**III. CONCLUSION**

For all the reasons set forth herein, the Public Utility Commission should grant Aqua's Exceptions, reverse and modify the Recommended Decision, approve Aqua's Application filed

pursuant to Section 1102, 1329 and 507 of the Public Utility Code, with Aqua's proposed conditions, and the Stipulations that have been filed and will be filed and:

a. Issue Certificates of Public Convenience under Section 1102:

(1) Authorizing Aqua to acquire, by purchase, the wastewater system assets of DELCORA; and

(2) Authorizing Aqua to begin to offer, render, furnish and supply wastewater service to the public in the Requested Territory.

b. Authorize Aqua to file tariff revisions, effective upon one day's notice, to:

(1) Include within its territory all the Requested Territory;

(2) Adopt and apply within the Requested Territory, DELCORA's rates as Aqua's Base Rates; and

(3) Apply Aqua's *Rules and Regulations* within the Requested Territory.

c. As part of its Order approving the Application include a determination that the ratemaking rate base of the DELCORA system is \$276,500,000 pursuant to Section 1329(c)(2); and

d. As part of its Order approving the Application approve Contracts, including Assignment of Contracts, between Aqua and DELCORA, pursuant to Section 507 of the Public Utility Code; and

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

Respectfully submitted,

**AQUA PENNSYLVANIA WASTEWATER, INC.**

By 

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Date: January 22, 2021

*Counsel for Aqua Pennsylvania Wastewater, Inc.*

**APPENDIX A**  
**Order of the Court of Common Pleas of Delaware**  
**County, dated December 28, 2020,**  
**at CV-2020-003185**

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

County of Delaware, Pennsylvania	:	
Plaintiff	:	
v.	:	NO: CV- 2020-003185
	:	
Delaware County Regional Water Quality	:	
Control Authority, and Delcora Rate	:	
Stabilization Fund Trust Agreement b/t	:	
The Delaware County Regional Water	:	
Quality Control Authority as Settlor and	:	
Univest Bank and Trust Co. as Trustee	:	
Defendants	:	
	:	
Darby Creek Joint Authority, Southern	:	
Delaware County Authority, and Aqua	:	
Pennsylvania Wastewater, Inc.	:	
Intervenors	:	

---

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for the Plaintiff

Nicholas Poduslenko, Esquire, Matthew S. Olesh, Esquire, Thomas S. Wyatt, Esquire,  
for Defendant, DELCORA

William Hinchman, Esquire and Monica Platt, Esquire for Univest Bank and Trust

Joel Frank, Esquire, Michael Puppio, Esquire,  
for Petitioning Intervenor/Defendant, Aqua Pennsylvania Wastewater

Andrew Reilly, Esquire, Jacquelyn Goffney, Esquire,  
for Intervenor/Defendant, Southern Delaware County Authority

William Malone, Esquire,  
for Intervenor/Defendant, Darby Creek Joint Authority

**ORDER**

AND NOW, this <sup>th</sup>28 day of ~~December~~, 2020, upon consideration of the Amended Complaint, all replies thereto, all Counterclaims, and Motions for Summary Judgment, as well as all Exhibits, including Statements of Admission of Parties and hearings on October 21, 27, and December 1 and 2, 2020, NOW, THEREFORE, it is hereby ORDERED as follows;

1. The fundamental issues of this case are the legality, enforceability and integrity of a contract, that being the Asset Purchase Agreement between Delaware County Regional Water Control Authority (“DELCORA”) and Aqua Pennsylvania Wastewater Inc. (“AQUA”), the enforcement of Delaware County’s (COUNTY) Ordinance 2020-04 and the COUNTY’s actions in opposing and allegedly interfering with DELCORA’s performance of the same contract, and the legality and funding of the Rate Stabilization Fund Trust between DELCORA and AQUA.
2. The enforcement of legally binding contracts is the foundation of our law. A COUNTY’s change of governmental administration, management, or political persuasion, being a party to a legally binding contract, may endeavor to renegotiate or not renew nor extend a contract, but the alleged intentional interference, termination, and obstruction requires critical judicial examination. All the parties professionally, skillfully and civilly presented their juxtapose case.
3. Despite the obvious impasse of the legality and enforceability of the Asset Purchase Agreement, and DELCORA’s understandable reluctance to deliver to the COUNTY a Certificate of Termination, this Court heard credible testimony and viewed Exhibits that confirm that DELCORA has significantly cooperated in providing information and documents at the request of the COUNTY.

#### **Asset Purchase Agreement**

4. This Court finds that the Asset Purchase Agreement between DELCORA and AQUA is a legal and enforceable contract, not in violation of the Municipality Authorities Act, public policy, or any other applicable law. This Court further finds that the Asset Purchase Agreement is authorized by Sections 5607, 5619, and 5622 of the Municipalities Authorities Act, subject to the approval of the Pennsylvania Public Utility Commission.
5. This Order is not intended to provide commentary on the pros and cons, advantages or disadvantages of the DELCORA and AQUA Asset Purchase Agreement, but only to confirm the enforceability of a legally adopted Contract. The whims of politics or changing COUNTY administrations do not waive away legally enforceable binding contracts. The reliance and predictability of valid legal contracts is paramountly important and serves public policy.
6. The COUNTY requests that the COUNTY Ordinance 2020-04 be declared valid and enforceable and requests a Writ of Mandamus to DELCORA to comply with the Ordinance and cooperate with termination. But clearly, by way of enforcing Ordinance 2020-04, the COUNTY directs the termination or as the COUNTY refers to the “winding down” of DELCORA. This Court finds that the COUNTY Ordinance 2020-04 does more than “wind down” DELCORA rather interferes and implodes DELCORA’s ability and contractual obligations to perform contractual obligations to effectuate the sale and further interferes with AQUA’s contractual rights.

7. This Court heard testimony that the COUNTY, despite this litigation beginning May 14, 2020, and the significant merits of DELCORA's and AQUA's defense and counterclaims, are presently investigating, planning, and assuming costs and resources in creating a wastewater utility to replace the function and services of DELCORA. The costs and expenses, and efficiency of creating a COUNTY utility, and the retainment of employees, customer Rate Stabilization, the use and application of DELCORA's assets and funds, and the effect on partnering municipal sewer authorities, as well as any public notice, dialogue or actions to create a new COUNTY authority, are all unknown to this Court and not the subject of these proceedings. (See the testimony of Plaintiff witness Steven A. Goldfield and County Executive Director, Howard Lazarus)
8. The directives, terms, and provisions of the COUNTY's June 3, 2020 Ordinance 2020-04, Exhibit P-1, as demonstrated by the County Solicitor Letter, Exhibit P-2, dated June 4, 2020, and public rhetoric with strong political overtones, evidences the COUNTY's intent and design to thwart, reverse, interfere and extinguish the contractual agreements, and contract previously publicly debated, considered and legally adopted by DELCORA, AQUA and DELAWARE COUNTY. See Exhibits P-1, P-2, D-10, D-11, D-12, D-13 and admitted excerpts of Depositions.
9. The COUNTY's Ordinance of dissolution and termination, evidenced by Ordinance 2020-04 requirements, and the COUNTY Solicitors June 4, 2020 directive, as referred above, that DELCORA immediately provide COUNTY with a Certificate of Termination, and restrictions on expenses, and constraints on the actions and performance required of the Asset Purchase Agreement is a functional equivalent to termination and interference of contractual obligations, as well as essential services and imposes and creates immediate and irreparable harm. Various terms and conditions of Ordinance 2020-04 are a substantial obstacle to DELCORA and AQUA's performance of contract.
10. Contracts, binding agreements, and various legally public actions are not to be extinguished or interfered with merely because of a reorganization of County Council or partisan differences. The integrity and predictability of contracts when legally adopted, shall be relied upon by the parties, represents good public policy, and the COUNTY shall hereby provide full faith and credit to the Asset Purchase Agreement, even as COUNTY administrations may change.
11. AQUA relies upon the representations and warranties (see Article 4 of the Asset Purchase Agreement) provided by DELCORA, as well as relying upon the COUNTY's 2019 consent to the sale transactions.
12. AQUA has a fully binding and enforceable agreement to acquire DELCORA's system, which requires the representations and warranties that can only be made by DELCORA.

13. The COUNTY also asserts that the Asset Purchase Agreement is void ab initio because of the alleged involvement of Robert Willert, Executive Director of DELCORA and Section 5614(e) of the Municipality Authorities Act and as such violates public policy.
14. This Court further finds that the COUNTY's allegation of a conflict of interest is pure speculation, hyperbole, and mere rhetoric, (see Exhibit D-12 and D-13) and not supported by the weight of evidence.
15. Credible testimony and evidence confirms that both DELCORA's Board of Directors and Attorneys' and AQUA representatives dictated, negotiated, drafted, and approved the terms of Asset Purchase Agreement. There is no affirmative evidence whatsoever that Mr. Willert played a material role in the sale. Both deposition and trial testimony confirm he did not undertake to negotiate anything for himself whatsoever. Similar to any existing contract, Mr. Willert's employment contract survives the sale; and he receives no new, supplemental, or additional compensation, benefits, enhancements, or financial gain whatsoever. Nor is there any further modification to his employment contract.
16. This Order does not contest the COUNTY's general authority to terminate DELCORA, but the COUNTY cannot interfere, or restrain, or refuse to comply with the contractual obligations set forth in the Asset Purchase Agreement and amendments thereto.
17. The COUNTY shall be enjoined and restrained from terminating DELCORA prior to the closing of the DELCORA/AQUA Asset Purchase Agreement and enjoined and restrained from interfering in any way with AQUA's existing contractual relationship with DELCORA. DELCORA's and AQUA's requested injunction is necessary to prevent irreparable harm that cannot be adequately compensated in damages.
18. Upon the parties effectuating the sale, as detailed in the Asset Purchase Agreement, and Amendment(s) thereto, all parties to this matter shall cooperate to comply with all sale requirements and conditions, and thereafter cooperate with the efficient winding down and dissolution of DELCORA as Ordinance may require, or as the parties mutually agree, but the winding down shall not interfere or obstruct the terms of the Asset Purchase Agreement, all Amendments thereto, and the funding and Administration of the Rate Stabilization Fund Trust.

#### **Rate Stabilization Fund Trust**

19. The amendment to DELCORA's Articles of Incorporation on or about December 18, 2019 empowered DELCORA to create and fund the Rate Stabilization Fund Trust (the "Trust").
20. On or about December 18, 2019, the COUNTY amended DELCORA's Articles to add the following to the "purpose" provision: "In anticipation of the dissolution of the Authority and/or the transfer and sale of all, or substantially all of the Authority's assets, property and projects in exchange for the receipt of a cash payment, the Authority and its Board, in addition to any other authority granted by applicable law, shall have the full



authority, without limitation to: (1) establish a trust or non-profit entity to exist for the benefit of rate payers to distribute to rate payers some or all of the proceeds received from any transfer and sale, in accordance with applicable law and any agreements concerning the transfer and sale of any assets and/or the Authority's dissolution; and (2) execute any necessary agreement to effectuate this purpose prior, during, or after any transfer and sale and/or dissolution."

21. "According to the Amended Articles, assets of a trust or non-profit entity will be distributed to the rate payers, (DELCORA's Customers) for the purpose of "rate stabilization."
22. On or about December 27, 2019, the Trust between DELCORA, as settlor, and Univest Bank and Trust Co., as Trustee, was created. The validity of the Trust is the subject of this litigation. The stated purposes of the Trust are to benefit the beneficiaries, defined as DELCORA's Customers, by providing Rate Stabilization.
23. The Municipality Authorities Act, 53 Pa. C.S. §§ 5601 et seq. (the "MAA"), provides an independent legal basis for DELCORA to create and fund the Trust. DELCORA had the authority to create the Rate Stabilization Fund Trust (the "Trust") and authority to fund it.
24. The Municipality Authorities Act states that "[t]he purpose and intent of this chapter [is] to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety, and prosperity." 53 Pa. C.S. § 5607(b)(2).
25. The Municipality Authorities Act states, without limitation, that "[e]very authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section." 53 Pa. C.S. §5607(d).
26. Under the Municipality Authorities Act, DELCORA has the power to "acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by it." 53 Pa. C.S. §5607(d)(4).
27. Under the Municipality Authorities Act, DELCORA has the power to "make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business." 53 Pa. C.S. §5607(d)(13). The Trust, by its very name, terms and provisions, is an agreement.
28. Under the Municipality Authorities Act, DELCORA has the power to "pledge, hypothecate or otherwise encumber all or any of the revenues or receipts of the authority as security for all or any of the obligations of the authority." 53 Pa. C.S. §5607(d)(16).
29. Under the Municipality Authorities Act, DELCORA has the power to "do all acts and things necessary or convenient for the promotion of its business and the general welfare

of the authority to carry out powers granted to it by this chapter or other law.” 53 Pa. C.S. §5607(d)(17).

30. The Municipality Authorities Act thus allows DELCORA to create the Trust and allows DELCORA to convey proceeds of the DELCORA/AQUA sale into the Trust.
31. The Trust is consistent with 53 Pa. C.S. §5612 because (a) it was authorized by DELCORA’s Articles, as amended, and (b) the money to be placed in the Trust is derived from DELCORA’s fulfillment of its mission and purpose, and will be used to provide a service for the benefit of the customers of DELCORA’s system, who DELCORA served in accordance with its mission, in the form of distributions to offset rate increases.
32. The Trust does not violate the Uniform Trust Act because DELCORA had the capacity to create the Trust when it was created.
33. This Court opines, subject to the Pennsylvania Public Utility Commission’s authority to review, the Rate Stabilization Fund Trust, and operating memorandums thereto or any reasonable legal Rate Stabilization methodology benefits and serves the Wastewater customers both residential and commercial, as opposed to any successor to DELCORA absorbing the assets and funds.
34. SUMMARY JUDGEMENT REGARDING THE VALIDITY AND ENFORCEMENT OF THE ASSET PURCHASE AGREEMENT AND ANY AMENDMENT THERETO AND COUNTY ORDINANCE 2020-04:
  - a. Judgment is hereby ENTERED, and Motions are GRANTED in favor of DELCORA’s Motion for Summary Judgment on Count V of the COUNTY’s Amended Complaint and Counts II and III of DELCORA’s counterclaim, and any responses thereto. Count V of the COUNTY’s Amended Complaint seeking injunctive and mandamus relief regarding DELCORA to comply with the COUNTY’s Ordinance is hereby DISMISSED;
  - b. Judgment is hereby ENTERED, and Motions are GRANTED in favor of Intervenor AQUA Pennsylvania Wastewater Inc., and against the COUNTY, on Count 1 of its Counterclaim for Declaratory Relief, and Count V of the Plaintiff COUNTY of Delaware’s Amended Complaint, and all responses thereto. Count V of the COUNTY’s Amended Complaint seeking injunctive and mandamus relief requiring DELCORA to comply with the COUNTY’s Ordinance is hereby DISMISSED;
  - c. The Court hereby issues a DECLARATORY JUDGMENT that the Asset Purchase Agreement dated September 17, 2019 (as amended on February 24, 2020) between AQUA and DELCORA is a valid, binding, and enforceable contract between AQUA and DELCORA authorized by Sections 5607, 5619, and 5622 of the Municipalities Authorities Act, subject to approval of the transaction by the Pennsylvania Public Utility Commission, and that any

termination of DELCORA by the COUNTY cannot occur prior to the closing on the Asset Purchase Agreement;

- d. The COUNTY of Delaware is hereby permanently enjoined and restrained from terminating or contractually interfering with the Asset Purchase Agreement, any amendment thereto, and the COUNTY is further enjoined and restrained from terminating the Delaware County Regional Water Control Authority prior to closing on the Asset Purchase Agreement between DELCORA and AQUA Pennsylvania Wastewater Inc;
- e. The injunctive relief is reasonably suited to abate the offending activity, as the Court does not intend to challenge the COUNTY's authority to wind down and terminate DELCORA. DELCORA and AQUA only seek to preserve the Asset Purchase Agreement by requiring that closing occur prior to termination of DELCORA.
- f. Judgment is hereby ENTERED in favor of Darby Creek Joint Authority's Counterclaim (Count I) to the COUNTY's Amended Complaint, hereby entering a Declaratory Judgment that the Service Agreement, Exhibit DC-1, between DELCORA and DCJA and the Assignment Consent, Exhibit DC-2, are valid and enforceable contracts. The further request of Darby Creek Joint Authority to enjoin the COUNTY from dissolving DELCORA is DENIED as moot in light of this Order;
- g. Judgment is further ENTERED in favor of the Southern Delaware County Authority confirming the legality and enforceability of the Asset Purchase Agreement and Rate Stabilization Fund Trust for all the reasons set forth herein.

35. SUMMARY JUDGMENT REGARDING ALL COUNTS RELATING TO THE DELCORA RATE STABILIZATION FUND TRUST:

- a. Judgment is hereby ENTERED in favor of Defendant, Delaware County Regional Water Quality Control Authority (DELCORA), and against Plaintiff, the COUNTY of Delaware, Pennsylvania, (COUNTY), on all Counts I, II, III, and IV of the COUNTY's Amended Complaint and Count I of DELCORA's Counterclaim;
- b. It is hereby DECLARED that the DELCORA Rate Stabilization Fund Trust does not violate (i) DELCORA's Articles of Incorporation, (ii) the Municipality Authorities Act, (iii) the Uniform Trust Act, (iv) public policy, or (v) any other applicable law;
- c. It is hereby DECLARED that upon the completion of the transaction between DELCORA and AQUA Pennsylvania Wastewater, Inc., (AQUA), sale proceeds shall be deposited into the Trust pursuant to the terms of that transaction as set

forth in the Asset Purchase Agreement between DELCORA and AQUA and all related agreements, including the Rate Stabilization Fund Trust, and any enabling Trust agreements, and the COUNTY is hereby ENJOINED from preventing same in any way.

36. The Counterclaims of Tortious Interference with existing Contractual Relationships for compensatory and Punitive Damages and Attorney fees filed by AQUA Pennsylvania Wastewater Inc and Darby Creek Joint Authority have both been withdrawn subsequent to the December 1, 2020 hearing.
37. This Order is not intending to interfere with the authority and jurisdiction of the Pennsylvania Utility Commission at Docket No. A-2019-3015173 (PUC Application).
38. In consideration of this Order, the Stipulated Injunction Order of September 9, 2020 is now moot and hereby VACATED.
39. This Court reserves jurisdiction, upon Petition and hearing, if necessary, to enforce the terms and conditions of this Order.

BY THE COURT:



J. Barry C. Dozor

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

---

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

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<b>Application of Aqua Pennsylvania</b>	<b>:</b>	<b>Docket No. A-2019-3015173</b>
<b>Wastewater, Inc. Pursuant to Sections</b>	<b>:</b>	
<b>1102, 1329 and 507 of the Public Utility</b>	<b>:</b>	
<b>Code for Approval of its Acquisition of the</b>	<b>:</b>	
<b>Wastewater System Assets of the</b>	<b>:</b>	
<b>Delaware County Regional Water Quality</b>	<b>:</b>	
<b>Control Authority</b>	<b>:</b>	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 22<sup>nd</sup> day of January, 2021, served a true and correct copy of the foregoing Exceptions of Aqua Pennsylvania Wastewater, Inc. to the Recommended Decision of Administrative Law Judges Angela T. Jones and F. Joseph Brady, upon the persons and in the manner set forth below:

**VIA ELECTRONIC MAIL**

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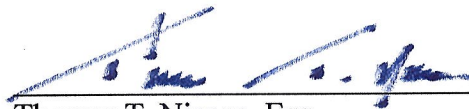
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