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February 1, 2021

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

**Via E-Mail**

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

Dear Secretary Chiavetta:

Attached please find for filing with the Pennsylvania Public Utility Commission the Reply Exceptions of the County of Delaware, Pennsylvania to Exceptions of Aqua Pennsylvania Wastewater, Inc. and Delaware County Regional Water Quality Control Authority to the Recommended Decision of Administrative Law Judges Angela T. Jones and F. Joseph Brady, issued on January 11, 2021, in the above-referenced proceeding.

As shown by the attached Certificate of Service and per the Commission's March 20, 2020, Emergency Order, all parties to these proceedings are being duly served via email only due to the current COVID-19 pandemic. Upon lifting of the aforementioned Emergency Order, we can provide parties with a hard copy upon request.

Sincerely,

McNEES WALLACE & NURICK LLC

By   
Kenneth R. Stark

Counsel to County of Delaware, Pennsylvania

KRS/ams

Enclosure

c: The Honorable Angela T. Jones (via email only)  
The Honorable Joseph Brady (via email only)  
Pamela McNeal, Legal Assistant to ALJ (via email only)  
Certificate of Service (via email only)

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## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

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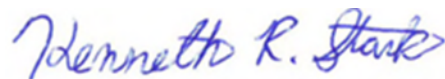
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Dated this 1<sup>st</sup> day of February, 2021, in Harrisburg, Pennsylvania

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**THE COUNTY OF DELAWARE, PENNSYLVANIA’S REPLIES TO EXCEPTIONS OF  
AQUA PENNSYLVANIA WASTEWATER, INC. AND  
DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL AUTHORITY**

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## **I. INTRODUCTION/BACKGROUND**

On January 11, 2021, Presiding Administrative Law Judges (“ALJs”) Angela T. Jones and F. Joseph Brady issued a Recommended Decision (“RD”) recommending that the Pennsylvania Public Utility Commission (“Commission” or “PUC”) deny the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua”) seeking approval of the acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”). Because the RD’s recommendation is supported by substantial evidence and sound reasoning, the County of Delaware, Pennsylvania (“the County”) requests that the Commission affirm the RD and deny the Exceptions of Aqua and DELCORA.

The County opposes the proposed transaction on several grounds, starting with the process and mean by which Aqua proposed to acquire DELCORA. As discussed in the County’s Main and Reply Briefs and further addressed below, DELCORA and Aqua engaged in an exclusive negotiation process without meaningful public engagement or competition. This alone disqualifies the parties from utilizing the Commission’s fair market valuation process as Section 1329 of the Public Utility Code<sup>1</sup> explicitly and unequivocally applies only to transactions conducted at arm’s length. While the RD rejected the Application on other grounds and did not address compliance with the arm’s length transaction requirement of Section 1329, it remains a legal insufficiency supporting denial of the Application.

The RD correctly determined that the patent deficiencies in Aqua’s Application regarding the Rate Stabilization Plan/DELCORA Customer Trust (“Trust”), the ongoing uncertainty regarding the municipal lawsuits and the Delaware County litigation, and the inability to determine an appropriate ratemaking rate base prevent the Presiding ALJs and the Commission

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<sup>1</sup> 66 Pa. C.S. § 1329 (d) (definitions for *acquiring public utility* and *selling utility* require “a voluntary arm’s-length transaction between the buyer and seller”).

from fully analyzing the Application and making an informed public interest determination.<sup>2</sup> Critically, Aqua does not possess the legal fitness under Section 1102 of the Public Utility Code, 66 Pa. C.S. § 1102, to acquire DELCORA's assets. While the Commission's docket in this proceeding was inactive, the County filed a complaint against DELCORA in the Court of Common Pleas of Delaware County asserting that DELCORA's creation of the Trust violates DELCORA's Articles of Incorporation, was *ultra vires*, and violates the Municipality Authorities Act ("Authorities Act").<sup>3</sup> On June 3, 2020, the Delaware County Council approved and enacted Ordinance 2020-4 directing the orderly termination of DELCORA.<sup>4</sup> On January 21, 2021, the County filed a Notice of Appeal of the Common Pleas Order issued on December 28, 2020.<sup>5</sup> The civil appeal is pending at Commonwealth Court.

On Exceptions, Aqua bemoans that the RD "summarily dismisses Aqua's Application on a threshold issue, akin to the Applicant missing filing requirements" and argues that the Presiding ALJs should have brought this threshold issue to Aqua's attention before allowing the parties "to extensively deploy[] time and resources on an Application that was not perfected for filing in the ALJs' minds from the start."<sup>6</sup> However, the Commission already accepted Aqua's

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<sup>2</sup> See RD at 26, Conclusions of Law #2, 10, 11, 12, 13, 14, 15, and 16.

<sup>3</sup> All documents in the Common Pleas Action are available by searching the Delaware County Court's website at [https://delcopublicaccess.co.delaware.pa.us/search/case\\_under\\_Docket\\_No.\\_CV-2020-003185](https://delcopublicaccess.co.delaware.pa.us/search/case_under_Docket_No._CV-2020-003185). The County filed a notice of appeal (regarding an appeal of the Common Pleas order to the Commonwealth Court) on January 21, 2021.

<sup>4</sup> 53 Pa. C.S. § 5619; see also *Township of Forks v. Forks Twp. Mun. Sewer Auth.*, 759 A.2d 47, 53 (Pa. Cmwlth. 2000) ("[T]he creating municipality has the power to dissolve its authority under Section 18A once the impediments of Sections 14 and 18 are removed, particularly the discharge of all indebtedness, regardless of its character. Under the Act, the power to dissolve includes the power to order the Authority, prior to dissolution, to remove legally removable impediments...").

<sup>5</sup> See "Petition for Official and Judicial Notice of Facts," *Application of Aqua Pa. Wastewater, Inc.*, Docket No. A-2019-3015173 (filed Jan. 29, 2021) (asking the Commission to take judicial notice of the Notice of Appeal).

<sup>6</sup> See Aqua Exceptions at 2 (arguing that "[t]his is not an acceptable process or outcome"). Attempting to read into the minds of the ALJs, Aqua concludes, without any evidence, that the ALJs preferred to have the parties fully litigate "while knowing that they were prepared to summarily reject the Application for not including a Rate Stabilization Plan." *Id.* at 3. The record does not contain any evidence as to when the ALJs determined that Aqua's Application was patently defective for that reason. See *Application of Aqua Pa. Wastewater, Inc.*, Docket No. A-2019-3015173 (issued Nov. 18, 2020). Moreover, Aqua has known that the Section 1329 requirement to include a Rate Stabilization Plan is a contested issue since the outset of this proceeding and an issue set for hearing by the

Application “for the Commission’s consideration,”<sup>7</sup> and therefore the ALJs did not seek to overturn Commission acceptance of the Application. Moreover, the Commission expressly set the issue as to whether a Rate Stabilization Plan is part of Aqua’s Application for hearing in this proceeding. Specifically, the Commission determined:

...the County and the Company [Aqua] present a factual dispute of whether a Rate Stabilization Plan exists and whether it is applicable to the Application. At this stage of the Application proceeding, therefore, it would be premature and potentially violative of due process for the Commission to make a determination about this factual dispute without the development of a full evidentiary record.

Notwithstanding the six-month consideration period set forth in Section 1329, there is sufficient time for the Parties to conduct discovery and present their testimony and arguments regarding the Rate Stabilization Plan question during the normal administrative litigation process.<sup>8</sup>

Consistent with the Commission’s directive, the parties issued discovery, testified, and advanced arguments about the Rate Stabilization Plan question, and the ALJs received into the record evidence on the issue in accordance with their duties and obligations.<sup>9</sup> Upon receiving evidence and arguments from the parties, the ALJs adjudicated the issue.<sup>10</sup> The RD, agreeing with the arguments of the County, found that the Application should be denied (or re-filed) for failing to

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Commission. *See Application of Aqua Pa. Wastewater, Inc.*, Docket No. A-2019-3015173, at p. 16 (Order entered Aug. 27, 2020) (hereinafter “August 2020 Reconsideration Order”).

<sup>7</sup> *See Application of Aqua Pa. Wastewater, Inc.*, Docket No. A-2019-3015173, (Secretarial Letter issued July 27, 2020). Importantly, the Commission in its Final Supplemental Section 1329 Implementation Order, reiterated that the Commission’s Bureau of Technical Utility Services (“TUS”) “does not review the veracity or substantive quality of information that an applicant may submit to fulfill the threshold requirements of the [Section 1329] Application Filing Checklist.” *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193, at p. 43 (Order entered Feb. 28, 2019). Therefore, the Commission’s review is the first opportunity for parties to challenge the veracity of Aqua’s claim that its Application does not include a Rate Stabilization Plan.

<sup>8</sup> August 2020 Reconsideration Order at p. 16.

<sup>9</sup> *See* 52 Pa. Code § 5.481(a) (authorizing an ALJ to admit evidence into the record), § 5.485 (requiring an ALJ to conduct a fair and impartial hearing).

<sup>10</sup> Aqua disparages the ALJs for not “utiliz[ing] the tools available to them under the Commission’s regulations to seek immediate review by the Commission on this important gatekeeping issue.” Aqua Exceptions at 3. The Commission had already determined that Aqua’s compliance with the Rate Stabilization Plan filing requirement was a contested issue for resolution by the ALJs. August 2020 Reconsideration Order at p. 16.

comply with the statutory requirements of Section 1329.<sup>11</sup> The RD found that the Memorandum of Understanding (“MOU”) between Aqua and DELCORA establishes a Trust that constitutes a 7-year phase-in Rate Stabilization Plan that should have been filed with the Commission and subject to the Commission’s ratemaking review and jurisdiction.<sup>12</sup> The RD agreed with the Bureau of Investigation & Enforcement’s (“I&E”) position that the MOU’s proposed bill discount through the Trust mechanism results in Aqua illegally issuing the DELCORA customers’ bills with charges that are lower than applicable tariff rates in violation of Section 1303, 66 Pa. C.S. § 1303.<sup>13</sup>

The RD did not simply make a procedural threshold ruling relating to the filing of the Rate Stabilization Plan, and then avoid ruling on the merits of Aqua’s Application. The RD extensively reviewed the record to make a determination that Aqua had not met its burden to demonstrate that its Application benefits the public in some substantial way, that the MOU/Trust violates Section 1303 and 1329 of the Public Utility Code,<sup>14</sup> and that too much uncertainty exists to allow the ALJs and the Commission to determine whether the Application is in the public interest. Upon making those key substantive findings, the RD need not further review other aspects of the Application, including the various concerns and positions of the protestants and the statutory advocates. Without clarity on the functioning of the Trust (*i.e.*, the Rate Stabilization Plan) and the placement of that Trust under the Commission’s jurisdiction and without an appropriate ratemaking rate base in light of the ongoing civil litigation regarding the DELCORA assets and DELCORA’s authority to sell all of its assets to Aqua, the ALJs prudently

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<sup>11</sup> RD at 25 (citing 66 Pa. C.S. § 1329(g)).

<sup>12</sup> See RD at 23-25.

<sup>13</sup> See *id.* at 26

<sup>14</sup> 66 Pa. C.S. §§ 1303, 1329.

determined that they (and the Commission) could not rule on or prejudge other issues associated with Aqua's Application.

Importantly, the Commission retains discretion in determining how it rules on an application before it, as "[it] is well settled that [the Commission is] not required to consider expressly or at length each contention or argument raised by the parties."<sup>15</sup> The Commonwealth Court has held that "[t]he PUC is not limited to any fixed rule but must only consider all relevant factors and render an order which is just and reasonable."<sup>16</sup> Furthermore, the Commonwealth Court has determined that the Commission's determination is adequate on each of the issues raised, where "the [PUC] was merely presented with a choice of actions, each fully developed in the record, and its choice on each issue amounted to an implicit acceptance of one party's thesis and the rejection of the other party's contention."<sup>17</sup>

The RD, accordingly, correctly denied Aqua's Application, and supported that denial with sound reasoning<sup>18</sup> and substantial evidence.<sup>19</sup>

## **II. AQUA'S EXCEPTIONS FAIL TO ADHERE TO COMMISSION REGULATIONS AND THE RULES OF EVIDENCE**

As a general matter, Aqua's Exceptions violate the Commission's regulations and the Pennsylvania Rules of Evidence in three distinct ways and should be disregarded.

First, Aqua's Exceptions contain extra-record evidence and new proposals/positions not presented or adjudicated before the presiding Administrative Law Judges. For example, the

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<sup>15</sup> *Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001); *see also Metro. Edison Co. v. Pa. PUC*, 22 A.3d 353, 371 (Pa. Cmwlth. 2011); *see generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984); [*Joint Application of PECO Energy Company And Public Service Electric and Gas Company for Approval of the Merger of Public Service Enterprise Group, Inc. with and into Exelon Corporation*, 2006 Pa. PUC LEXIS 33 (2006).]

<sup>16</sup> *Pa. Game Comm'n v. Pa. PUC*, 651 A.2d 596, 606 (Pa. Cmwlth. 1994).

<sup>17</sup> *Barasch v. Pa. PUC*, 515 A.2d 651, 655 (Pa. Cmwlth. 1986).

<sup>18</sup> *See, e.g., Application of J. Andrews Associates et al.*, Docket No. A-2011-2241747, 2012 Pa. PUC LEXIS 1832 at \*20 (Order entered Dec. 20, 2012) ("None of the arguments found in those Exceptions overcome the ALJ's sound reasoning, which is supported by ample record evidence.")

<sup>19</sup> *See PECO Energy Co. v. Pa. PUC*, 791 A.2d 1155, 1160 (Pa. 2002).

proposal of Aqua and DELCORA to distribute Trust proceeds to former DELCORA customers by directly mailing checks on a quarterly basis<sup>20</sup> is a new proposal that was not developed on the record or adjudicated at the evidentiary hearing. Aqua explains that it and DELCORA will develop a process that ensures certain customer protections when directly mailing checks to customers. Aqua indicates that it will limit the amount of customer data being provided, will file quarterly reports with the Commission regarding the Trust distributions, and will develop a process for returned checks.<sup>21</sup> Importantly, the details of Aqua's proposal have not been presented or examined, and parties have not had an opportunity to issue discovery on the proposal or otherwise contest the legal or factual validity of the new proposal.<sup>22</sup> Moreover, the proposal is merely a conceptual response to the RD's finding that the Trust mechanism as proposed in Aqua's Application violates the Public Utility Code.<sup>23</sup> In fact, Aqua's proposal to restructure the Trust payment mechanism from Aqua bill credits to DELCORA-issued checks is exactly the kind of modification the parties could consider implementing within the context of a refiled Application and develop through the record in that proceeding.

Further, the Commission has generally refused to consider new arguments and extra record evidence submitted in support of new arguments made after the close of the record.<sup>24</sup> The evidentiary hearings were held on November 9 and 10, 2020, and the Presiding ALJ issued an

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<sup>20</sup> See Aqua Exceptions at 6, 8, 23-25, fn. 54, 44, 47; DELCORA Exceptions at 13, 16, 19.

<sup>21</sup> See Aqua Exceptions at 47.

<sup>22</sup> See *Hess v. Pa. PUC*, 107 A. 3d 246, 266-267 (Pa. Cmwlth. 2014) (finding that a party "would have been very clearly prejudiced if the argument and evidence was allowed in the after the record"); see, e.g., *Patrick Rafferty v. Verizon Pennsylvania, Inc.* Docket No. F-02211831 (Order entered December 22, 2008); see also *Pa. PUC v. Verizon Pennsylvania, Inc.; Rhythms Links, Inc. v. Verizon Pennsylvania, Inc.* Docket Nos. R-00994697; R-00994697C0001 (Order entered on June 3, 2001) ("[I]nasmuch as Verizon's Exceptions contain extra-record evidence, they are stricken and will not be used to resolve the merits of any contested matters.").

<sup>23</sup> See RD at 25-26.

<sup>24</sup> *Application of PPL Electric Utilities Corporation* Docket Nos. A-2011-2267349, A-2011-2267352, A-2011-2267353, A-2011-2267416, A-2011-2267418, A-2011-2267426, A-2011-2267429, A-2011-2267446, A-2011-2267448 (Order entered July 16, 2013) (finding that certain parties attempted to advance arguments not previously made and factual evidence not of record at the exceptions phase).

order denying a request to keep the record open on December 7, 2020.<sup>25</sup> Importantly, “additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion.” 52 Pa. Code § 5.431. Aqua has not petitioned to reopen the record per 52 Pa Code 5.571. Accordingly, the County asks the Commission to refrain from considering Aqua’s new proposal regarding the distribution of Trust proceeds and to review Aqua’s Application based on the record.

Second, Aqua and DELCORA on Exceptions submit information and evidence regarding ongoing settlement discussions with certain Municipal Protestants<sup>26</sup> in an apparent effort to disprove and contest the RD’s finding that the ongoing uncertainty with the municipal and County lawsuits prevent the ALJs and the Commission from fully analyzing the Application and making an informed decision about whether it is in the public interest.<sup>27</sup> In describing those settlement discussions, Aqua attempts to insert additional evidence into the record and even speculates on how such settlements would be resolved:

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.<sup>28</sup>

The inclusion of such content about settlement discussions in Exceptions is inappropriate and such information is impermissible under Commission rules, Rule 408 of the Pennsylvania Rules of Evidence, and appellate precedent. Rule 408 provides that evidence about compromise offers and negotiations is not admissible to prove or disprove the validity of a disputed claim except in certain circumstances where the evidence is used for another purpose, such as showing a

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<sup>25</sup> See “Order Denying the Motion of Aqua Pennsylvania Wastewater, Inc. to Keep the Record Open,” Docket No. A-2019-3015173 (issued Dec. 7, 2020).

<sup>26</sup> See Aqua Exceptions at fn. 2, 4, 12, 79.

<sup>27</sup> See RD at 26.

<sup>28</sup> Aqua Exceptions at 12; see DELCORA Exceptions at 5, 10-11.



witness's bias or prejudice.<sup>29</sup> Aqua has not petitioned to reopen the record per 52 Pa Code 5.571 to allow any new evidence of settlement discussions.<sup>30</sup> Furthermore, the Commonwealth Court has held that "the nonunanimous settlement process places some parties at a severe disadvantage."<sup>31</sup> Accordingly, the County asks the Commission to review Aqua's Application based on the record, and not consider evidence of any pending settlement discussions and new proposals between Aqua/DELCORA and the Municipal Protestants or any other parties.

Third, Aqua violates the Commission's filing specifications for spacing and page limitations and the rules for Exceptions in Section 1.32(a)-(b) and Section 5.333 of the Commission's regulations.<sup>32</sup> Section 1.32(a) requires that filings "shall be double spaced, except that quotations in excess of a few lines shall be single spaced and indented."<sup>33</sup> Aqua violates the double-spacing requirement throughout its Exceptions, primarily through the use of single-space bullet points for non-quoted content and argument on approximately 20 pages of its 80 page filing.<sup>34</sup> Aqua did not request a waiver of the Commission's spacing requirement pursuant to 52 Pa. Code § 1.91 (applications for waiver of formal requirements). The Director of the Office of Special Assistants ("OSA") granted Aqua's request to extend the page limitation for Exceptions from 40 pages to 80 pages. The County was agreeable to Aqua's request to extend the page limitation. However, Aqua failed to comply with that agreement. When Aqua's 80-page Exceptions are appropriately double spaced, they are well in excess of the 80-page limit and

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<sup>29</sup> 225 Pa. Code § 408. Similarly, 52 Pa. Code § 5.231(d) provides that offers of settlement "not agreed to by every party" are not admissible in evidence.

<sup>30</sup> See *Hess v. Pa. PUC*, 107 A. 3d 246, 266-267, n. 12 (Pa. Cmwlth. 2014).

<sup>31</sup> *ARIPPA v. Pa. PUC*, 792 A.2d 636, 659 (Pa. Cmwlth. 2002)

<sup>32</sup> 52 Pa. Code §§ 1.32(a)-(b), 5.533.

<sup>33</sup> *Id.* at § 1.32(a)(1).

<sup>34</sup> See Aqua Exceptions at 27-32, 40-43, 45-49 (employing single spaced bullet points to restate its point on brief); see also *id.* at 78-80.

appear to approach 100 pages. This violation furthers the pattern of noncompliance observed throughout this proceeding and further mitigates against consideration of Aqua's Exceptions.

Given the foregoing, the County submits the Commission should disregard extra-record factual representations in Aqua's Exceptions, including the unsupported proposal to transition to the proposed bill credits to direct check issuances and the various claims of ongoing settlement discussions.

### **III. REPLIES TO EXCEPTIONS OF AQUA AND DELCORA<sup>35</sup>**

#### **Reply to Aqua Exception No. 1 – The RD correctly determined that Aqua failed to satisfy its burden of proof and correctly recommended that the Application be denied.**

Aqua argues it met its burden “in all respects” and that its Application should be approved.<sup>36</sup> As the applicant, Aqua bears the burden of proof to establish that it is entitled to the relief sought<sup>37</sup> and to demonstrate that proposed acquisition of the DELCORA Assets provides substantial affirmative benefits and is in the public interest.<sup>38</sup>

The Supreme Court of Pennsylvania has held that the party with the burden of proof in a PUC proceeding must establish that “the elements of [its case] are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.”<sup>39</sup> An applicant in a merger/acquisition proceeding must

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<sup>35</sup> The County replies directly to Aqua's enumerated Exceptions. Because DELCORA's Exceptions involve the same concerns and issues raised in Aqua's Exceptions, the County will not separately respond to DELCORA's Exceptions.

<sup>36</sup> Aqua Exceptions at 10.

<sup>37</sup> See RD at 18 (citing 66 Pa. C.S. § 332(a) and *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990))

<sup>38</sup> See 66 Pa. C.S. § 332(a) (“the proponent of a rule or order has the burden of proof.”); 66 Pa. C.S. § 315(a) (the burden to show that the proposed course of action “is just and reasonable shall be upon the public utility”).

<sup>39</sup> *Burleson v. Pa. PUC*, 461 A.2d 1234, 1236 (Pa. 1983) (citing *Lear v. Shirk's Motor Express Corp.*, 152 A.2d 883 (1959)).

demonstrate that the proposed transaction will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.”<sup>40</sup>

The RD correctly found that Aqua had not presented a record upon which the Commission could make the requisite public interest determination.<sup>41</sup> Accordingly, and as further demonstrated throughout the County’s Reply Exceptions, Aqua has not met its burden to demonstrate that the proposed transaction is in the public interest and the Application should be approved under Sections 507, 1102, 1103, and 1329 of the Public Utility Code.<sup>42</sup>

**Reply to Aqua Exception Nos. 2 and 3<sup>43</sup> – The RD correctly determined that the ongoing uncertainty of the municipal lawsuits prevents the ALJs and the Commission from fully analyzing the Application and making an informed public interest determination.**

Aqua excepts to the RD’s conclusions about the Municipal Protestants’ ongoing lawsuits and excepts to the RD’s decision to not render a determination on the pre-existing service contracts between DELCORA and the Municipal Protestants.<sup>44</sup>

The issue of unassigned contracts and other assets is fundamentally a legal fitness issue under Section 1102 of the Public Utility Code, 66 Pa. C.S. § 1102. Aqua has the burden of establishing it has the legal fitness to acquire each contract and physical assets it proposes to acquire from DELCORA. Despite Aqua claiming that the Asset Purchase Agreement (“APA”) addresses the issue of unassigned assets, Aqua fails to acknowledge that its valuation was based on the assumption that there were “zero nonassignable assets” and thus do not reflect the omission of any unassigned assets.<sup>45</sup> While Aqua and DELCORA attempt to marginalize the

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<sup>40</sup> *City of York v. PUC*, 295 A.2d 825, 828 (Pa. 1972).

<sup>41</sup> See RD at 18 (citing *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950)).

<sup>42</sup> 66 Pa. C.S. §§ 332(a), 507, 1102, 1103, 1329.

<sup>43</sup> This Reply is also responsive to DELCORA Exception No. 1 regarding the Municipal Protestants.

<sup>44</sup> See Aqua Exceptions at 11-18.

<sup>45</sup> See November 9, 2020 Hearing Transcript, Docket No. A-2019-3015173, p. 391, lines 13-19:

Q. But when you did your valuation, you assumed that there were zero non-assignable assets, correct?

quantifiable significance of this error, the fact remains that the valuations entered into the record include assets for which DELCORA's right to sell was not established.<sup>46</sup> Accordingly, the RD correctly determined that Aqua and DELCORA's failure to address nonassignable assets in the valuation by the Utility Valuation Experts ("UVEs") would require adjustments to the valuations "if it is determined that DELCORA does not own or cannot transfer those assets..."<sup>47</sup>

The Municipal Protestants' Main Brief concisely summarized the reasons why Aqua's proposed treatment of unassigned contracts was problematic<sup>48</sup> and concluded as follows:

In summary, DELCORA lacks the ability to transfer, and Aqua lacks the ability to acquire, the contract rights used to serve more than 2,600 retail customers in Edgmont, Trainer, and Upland. This represents approximately one-sixth of DELCORA's retail customer base. Further, DELCORA lacks the ability to transfer, and Aqua lacks the ability to acquire, the contract rights needed to provide wholesale service to Lower Chichester and SWDCMA.<sup>49</sup>

Aqua's discussions with DELCORA's affected wholesale customers began in July 2019. Nonetheless, Aqua claims it is "hopeful" that ongoing discussions will resolve the protests of the Municipal Protestants.<sup>50</sup> However, Aqua asserts "the APA addresses how DELCORA and Aqua may handle" contracts which are not assigned.

The Municipal Protestants' Main Brief described the APA provisions regarding unassigned contracts as "a convoluted scheme to try to cure this fundamental defect in the

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A. We assumed all assets were assigned.

Q. Okay. So you basically ignored the provision of the asset purchase agreement that says, gee, there may be non-assignable assets and here's what we'll have to do to deal with that."

<sup>46</sup> See Aqua Exceptions at 50.

<sup>47</sup> RD at 21.

<sup>48</sup> Municipal Protestants' Main Brief at 16-20.

<sup>49</sup> *Id.* at 21 (footnotes omitted).

<sup>50</sup> Aqua Exceptions at 12. The County recognizes that two of the Municipal Protestants, Trainer Borough and Upland Borough, withdrew their protests and submitted a notice of a stipulation with Aqua and DELCORA on January 27, 2021.

Application.”<sup>51</sup> The evidentiary hearing affirmed the prescience of this observation, as Aqua could not explain how the unassigned contracts would be resolved.<sup>52</sup> Aqua and DELCORA have failed to provide the Commission with any details as to how they would implement the nonassignable assets provisions of the APA. Instead, they refer to a scheme where DELCORA has Aqua operate the nonassignable assets as DELCORA’s “agent/subcontractor.”<sup>53</sup> However, consistent with the rampant uncertainties and deficiencies associated with the Application, the record includes no details as to this agency agreement, much less a Section 507 filing, 66 Pa. C.S. § 507, to initiate Commission review of the details of the agency relationship.<sup>54</sup> More importantly, Aqua and DELCORA failed to provide any discussion whether the municipal contracts at issue would permit the “agent/subcontractor” arrangement they propose.

These issues cannot be resolved by conditions imposed “to ensure that any perceived uncertainty would be alleviated before closing....”<sup>55</sup> The purpose of just and reasonable conditions authorized by Section 1103 is to “properly safeguard, under the particular circumstances, the public interest”<sup>56</sup> and not to allow deficient applications to be cured after the fact. Accordingly, Aqua has failed to meet its burden of proving that it has the legal fitness to operate the DELCORA wastewater assets.

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<sup>51</sup> Municipal Protestants’ Main Brief at 16.

<sup>52</sup> *Id.* at 20 (“Aqua witness Packer was asked on November 9, the day before the record closed: “Do you know what procedure will be used to provide service to Southwest Delaware County Municipal Authority if it does not consent to the transfer?” His answer was simple: “I don’t know that.” Tr. 287.”)

<sup>53</sup> Aqua Exceptions at 15.

<sup>54</sup> *Id.* at 15-16. “If it becomes necessary to implement the Aqua-DELCORA agent/subcontractor arrangement, the parties would develop and implement a form of agreement defining their duties and responsibilities as principal and agent.” (footnote omitted).

<sup>55</sup> *Id.* at 17.

<sup>56</sup> *West Penn Railways Co. v Pa. PUC*, 15 A.2d 539, 544 (Pa. Super. 1940).

**Reply to Aqua Exception No. 4 – The RD correctly determined that the ongoing uncertainty with the Delaware County Court of Common Pleas litigation at Docket No CV-2020-003185 prevents the ALJs and the Commission from fully analyzing the Application and making an informed public interest determination.**

Aqua makes two separate arguments in this Exception. First, Aqua asserts that the County's legal challenges in the Common Pleas litigation are not matters within the Commission's jurisdiction.<sup>57</sup> In its second argument, Aqua essentially claims that the Common Pleas Court's decision of December 28, 2020 is final.<sup>58</sup> The County will address these two issues in reverse order.

Contrary to Aqua's implications and assertions, the Common Pleas matter remains ongoing. Aqua's Exception discussing that litigation failed to inform the Commission that the County filed post-trial motions on January 7, 2021.<sup>59</sup> Despite filing its Exceptions on January 22, 2021, Aqua further failed to inform the Commission that the County filed a Notice of Appeal of the Common Pleas Decision on January 21, 2021. These omitted facts and continued references to the December 28, 2020 Order are particularly misleading as, Rule 1736(b) of the Rules of Appellate Procedure provide the County with an automatic supersedeas of the Common Pleas decision.<sup>60</sup>

With regard to Aqua's initial argument in the Exception, Aqua's argument is overly simplistic. While the County has long argued in the Common Pleas action that the Commission has exclusive jurisdiction to adjudicate the Aqua and DELCORA counterclaims regarding the APA, the County has never argued that the Commission has subject matter jurisdiction over the

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<sup>57</sup> Aqua Exceptions at 18.

<sup>58</sup> *Id.* at 18-19.

<sup>59</sup> On January 29, 2021 the County filed a Petition to Take Official and Judicial Notice with this Commission regarding the facts contained in this paragraph.

<sup>60</sup> Pa. R.A.P. 1736(b).

“legal challenge to the Trust arrangement and (b) the County’s desire to dissolve DELCORA.”<sup>61</sup>

To the contrary, the County has consistently argued both to the Commission and to the Common Pleas Court that the legal issues in the Common Pleas action are threshold matters which should be resolved prior to the Commission’s adjudication of Aqua’s application.

The legal issue before the Commission is not the scope of the Commission’s jurisdiction over the Trust. The issue is whether Aqua has provided substantial competent evidence that the Trust arrangement is an affirmative public benefit of the proposed transaction. To ascertain the veracity of Aqua’s claim, the Commission must review the legal and factual predicates underlying Aqua’s claim, which are being challenged by the County, other protestants, and statutory advocates.

DELCORA’s legal authority to implement the Trust arrangement under the powers granted by the Municipality Authorities Act is a matter before the Commonwealth Court. If DELCORA cannot lawfully implement the Trust arrangement, the claimed “unique and substantial affirmative public benefit”<sup>62</sup> associated with the Trust cannot exist because under the Municipality Authorities Act, the property of DELCORA reverts to the County upon DELCORA’s termination.<sup>63</sup> Thus, the ALJs correctly stated it “may be that the alleged benefits of Aqua’s Application never materialize or change substantially”<sup>64</sup> and, therefore, they (and the Commission) cannot determine whether the transaction is in the public interest.

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<sup>61</sup> Aqua Exceptions at 18.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> See 53 Pa. C.S. § 5619(c) “Upon recording [of the certificate of termination], the property of the authority shall pass to the municipality or municipalities or, if the property is public school property, then to the school district for which the property was financed; and the authority shall cease to exist.”

<sup>64</sup> RD at 22.

As the Applicant, Aqua bore the burden to establish DELCORA's legal authority to create, fund, and implement the proposed Trust arrangement. Aqua did not meet its burden and therefore its Exception No. 4 should be denied.

**Reply to Aqua Exception No. 5<sup>65</sup> – The RD Correctly determined that Aqua's Application failed to comply with the statutory requirements of Section 1329 regarding the inclusion of the applicable Rate Stabilization Plan.**

**A. The Commission should reject Aqua's unsupported extra-record amendment to its Rate Stabilization Plan**

With regard to Aqua's proposed Rate Stabilization Plan, the Commission should not consider Aqua's' extra-record proposal to transition from a bill-credit mechanism to an undetermined process for working with DELCORA to issue direct checks to the acquired customers. Although Aqua's Direct Testimony referenced that direct checks could be issued as an alternative to the bill credit mechanism, Aqua subsequently executed the MOU and submitted it to the record with its Rebuttal Testimony.<sup>66</sup> The executed MOU adopts the bill credit methodology and contains no reference to other alternatives. Aqua has not proposed to reopen the record to amend the executed MOU. The extra-record proposal to develop a process for the issuance of direct checks is contrary to due process and yet another indication of the disjointed nature of this Application, where critical evidentiary components of the proposed transaction remain undeveloped.<sup>67</sup> There is no basis for consideration of this extra-record proposal.

Even if the Commission considers and accepts the extra-record proposal, the Commission should still adopt the RD's conclusion that Aqua failed to include the Rate Stabilization Plan in its Application and thus cannot avail itself of the Section 1329 fair market value process.

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<sup>65</sup> This reply is also responsive to DELCORA Exception No. 2 regarding rate stabilization and sale proceeds.

<sup>66</sup> Aqua Statement No. 2-R, WCP-2R Schedule E at 2.

<sup>67</sup> See *supra* footnotes 22 and 24.



**B. The Rate Stabilization Plan is associated with the proposed transaction and was improperly omitted from the Application in violation of Section 1329.**

The County raised concerns with the omission of the Rate Stabilization Plan from Aqua's Application early in this proceeding through the Petition for Reconsideration of Staff Action filed on June 23, 2020 ("Petition for Reconsideration"). The Petition for Reconsideration alleged that Aqua omitted complete documentation of its Rate Stabilization Plan in its Application and requested that the Commission revoke its conditional acceptance of Aqua's Application. Following additional responsive pleadings from Aqua, DELCORA, and the County, the Petition for Reconsideration was initially denied through a July 11 Secretarial Letter for lack of ripeness and finally denied through a Commission Order entered on August 27, 2020 ("August 2020 Reconsideration Order"). Importantly, in denying the Petition for Reconsideration, the Commission concluded that the County raised issues to be addressed through the evidentiary record.<sup>68</sup>

While the Commission denied the Petition for Reconsideration, it preserved parties' opportunity to address the question of whether Aqua's Application includes a Rate Stabilization Plan following development of an evidentiary record in this proceeding. Specifically, the Commission determined that the issues raised by the County fall outside the scope of authority delegated to TUS for review of sufficiency of Aqua's Application, but acknowledged that "the County and the Company present a factual dispute of whether a Rate Stabilization Plan exists and whether it is applicable to the Application."<sup>69</sup> At that point, Aqua was put on notice that its compliance with the Section 1329 requirement to include any associated Rate Stabilization Plan in the Application and its tariff was subject to disposition through the normal hearing process.

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<sup>68</sup> See August 2020 Reconsideration Order at p. 16.

<sup>69</sup> *Id.*

Aqua could have voluntarily refiled its Application at that point to cure this deficiency, but it elected to press forward and litigate the issue.

Section 1329 clearly defines a Rate Stabilization Plan as a “[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case.”<sup>70</sup> Despite previously arguing the Application does not propose a Rate Stabilization Plan, Aqua eventually provided the above-referenced executed MOU in response to discovery that confirmed the intent to phase-in rate increases for the DELCORA customers. Specifically, the revised MOU affirms the following:

the purpose of this Memorandum is to set forth the process by which the Customer Assistance Amount is calculated and distributed so that the effect of the rate to be paid by DELCORA Customers for Wastewater Utility Services will increase by no more than three percent (3%), compounded annually, on the Rate Case Effective Date and each anniversary of such date during the DELCORA Customer Assistance Trust Payment Period.<sup>71</sup>

Importantly, this executed MOU, which was executed between DELCORA *and* Aqua, is the only document in the record detailing the rate stabilization terms.

Aqua’s attempts to avoid characterizing the plan as “rate stabilization” are contrary to the statutory language in Section 1329. In an effort to avoid correct designation of its plan, Aqua seeks to draw a distinction between a Rate Stabilization Plan administered by Aqua and a Rate Stabilization Plan administered by DELCORA.<sup>72</sup> This is a distinction without a difference, as the statute requires that any Rate Stabilization Plan applicable to the Application must be included with the filing.<sup>73</sup> Further, while the Trust would be created by DELCORA, the application of funds from the Trust to reduce wastewater rates for DELCORA customers is an

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<sup>70</sup> 66 Pa. C.S. § 1329(g).

<sup>71</sup> Aqua Statement No. 2-R, WCP-2R Schedule E at 3; *see also* Delaware County Statement No. 1 at 15.

<sup>72</sup> *See* Aqua Answer to County Petition for Reconsideration of Staff Action, Docket No. A-2019-3015173 at ¶¶ 11-14 (filed July 9, 2020).

<sup>73</sup> 66 Pa. C.S. § 1329(g).

Aqua proposal. As stated above, the only document establishing the commitment to limit payments for DELCORA customers to 3% annual increases is the MOU between Aqua and DELCORA.<sup>74</sup> The transparent effort to style the MOU as merely an “Information Sharing” agreement is a farce.<sup>75</sup> While the document does set forth the mechanisms through which Aqua and DELCORA would exchange information necessary to implement the bill credits, it also serves as the operative document dictating the amount of funds to be transferred from the Trust to the customers. Accordingly, Aqua’s role extends beyond the facilitator of bill credits; Aqua approved and executed the actual Rate Stabilization Plan.

Aqua also suggests it is not proposing to reduce the tariff rates assessed upon DELCORA customers, alleging “the proposal is not a Rate Stabilization Plan that impacts future rates charged by Aqua after the Proposed Transaction Closing or at any future point in time.”<sup>76</sup> This is only true in the sense that the DELCORA customers would be charged the full applicable retail service rates subject to the bill credits. In other words, Aqua’s Rate Stabilization Plan does not change the total bill, but it reduces the portion of the bill to be directly paid by DELCORA customers.

Regardless, the Public Utility Code does not accord with Aqua’s narrow definition of rates. As the RD emphasized, Aqua, as a Section 1329 applicant, had an obligation to include the Rate Stabilization Plan with its filing and as part of its tariff.<sup>77</sup> Section 1303 of the Public Utility Code unequivocally establishes that public utilities cannot “*directly or indirectly*, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater *or less* rate for any service rendered or to be rendered by such public utility

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<sup>74</sup> Aqua Statement No. 2-R, WCP-2R Schedule E at 2.

<sup>75</sup> See generally *id.*

<sup>76</sup> Aqua Statement No. 2-R at 20.

<sup>77</sup> RD at 25-26.

than that specified in the tariffs of such public utility applicable thereto.”<sup>78</sup> As the proposed Rate Stabilization Plan would indirectly reduce the rate received from the DELCORA customers, the omission of the bill credit from Aqua’s tariff conflicts with Section 1303.

Furthermore, the statutory definition of “rate” includes “every individual, or joint fare, toll, charge, rental, **or other compensation whatsoever** of any public utility, or contract carrier by motor vehicle, made, demanded, **or received** for any service within this part, offered, rendered, or furnished by such public utility...”<sup>79</sup> The Commonwealth Court recently agreed that the Public Utility Code defines “rate” broadly, stating that:

It is clear from the General Assembly’s use of the term “base rate” in those Code sections that the General Assembly knew how to differentiate between “base rates” and “rates” and did so in drafting the legislation. In Section 1301.1(a) of the Code, it used the defined term, “rate[s].” 66 Pa.C.S. § 102. That term in the first two sentences of Section 1301.1(a) of the Code is not ambiguous because it is defined to include “[e]very . . . charge . . . **whatsoever of any public utility**”<sup>80</sup>

Similar to the Commonwealth Court’s finding that a reference to “rate” is not limited to “base rates,” the reference in Section 1329 to “rate” is not limited to the total bill. Accordingly, the proposal to fix the portion of the rate to be received from a DELCORA customer to increase by no more than 3% annually does in fact constitute rate stabilization under the Public Utility Code.

The RD also recounted the distinction between Aqua and DELCORA’s proposed Rate Stabilization Plan and prior arrangements the Commission found did not constitute Rate Stabilization Plans. The Commission has previously indicated that proposals that do not bind the Commission rate-setting authority will not be considered Rate Stabilization Plans.<sup>81</sup> Here,

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<sup>78</sup> 66 Pa. C.S. § 1303 (emphasis added).

<sup>79</sup> 66 Pa. C.S. § 102 (emphasis added). *See also McCloskey v. Pa. Pub. Util. Comm.*, 219 A.3<sup>rd</sup> 1216 (Pa. Cmwlth. 2019).

<sup>80</sup> *McCloskey*, 219 A.3d at 1225 (emphasis added).

<sup>81</sup> County Main Brief at 16 (citing *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 & 1329 of the Pub. Util. Code for Approval of Its Acquisition of the Wastewater Sys. Assets of New Garden Twp. & the New Garden Twp. Sewer Auth.*, No. A-2016-2580061, 2017 WL 4552494 (Oct. 5, 2017) (“New Garden”)).

Aqua's Rate Stabilization Proposal impacts the Commission's rate-setting process because the rate increases approved by the Commission will determine the contributions necessary to limit annual rate increases to 3%.<sup>82</sup> If the Commission approves rates higher than Aqua's projections, it will accelerate the depletion of the Trust funds and shorten the rate stabilization period.<sup>83</sup> Lower Commission-made rates would have the opposite effect and extend the rate stabilization period.<sup>84</sup> Aqua's proposal places the Commission in the de facto position of modifying both the bill credit and the phase-in period each time it approves a rate increase. The Rate Stabilization Plan cannot be considered a purely private contractual proposal when the mechanics and efficacy of the proposal are directly contingent on outcomes of future Commission rate proceedings. This makes the case here a clearer example of rate stabilization than the circumstances in *New Garden*.<sup>85</sup>

Finally, the omission of the Rate Stabilization Plan from the filing cannot be cured by reference to information provided through discovery and hearings. The requirement to include any associated Rate Stabilization Plan with a Section 1329 Application is a statutory requirement, not a procedural regulation subject to waiver. The very fact that parties have devoted significant resources in an already time-constrained and time-consuming proceeding to confirm the nature of the Rate Stabilization Plan, as well as Aqua's ongoing efforts to modify the Rate Stabilization Plan even in its Exceptions, evidences the importance of compliance with this unequivocal filing requirement for efficient review of Section 1329 Applications. As correctly

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<sup>82</sup> See *id.* at 16.

<sup>83</sup> Delaware County Statement No. 1 at 15 (explaining the impact of rate increases on the Rate Stabilization Plan bill credit, which is defined in the revised MOU as the "DELCORA Customer Assistance Payment").

<sup>84</sup> Delaware County Statement No. 1 at 15.

<sup>85</sup> See RD at 23-24.

determined by the RD, approval of the Application must be denied for failure to conform to the statutory requirements of Section 1329.<sup>86</sup>

**Reply to Aqua Exception No. 6 – The RD correctly determined that Aqua failed to demonstrate that the proposed acquisition promotes the service, accommodation, convenience, and safety of the public in some substantial way and that the transaction provides substantial affirmative public benefits.**

Aqua excepts to the RD's purported "failure" to address the alleged affirmative public benefits of the proposed transaction.<sup>87</sup> The Commission should reject this argument. As demonstrated by the RD, Aqua's Application and presentation of evidence failed to meet the burden of proving the Application is necessary or proper for the service, accommodation, convenience, or safety of the public."<sup>88</sup> As noted earlier, the ALJs and the Commission are not required to consider every argument advanced by an Applicant in ruling on an Application.<sup>89</sup> Accordingly, the RD appropriately issued a ruling finding that multiple deficiencies in the Application obviated the necessity for review of additional argumentation.

To the extent the Commission wishes to consider Aqua's claims of affirmative public benefits, such consideration should result in denial of the Application. As extensively detailed in the County's Main and Reply Briefs, Aqua seeks to position this Application as business as usual when it is anything but. The proposed transaction presents markedly different circumstances compared to other water or sewer system acquisitions reviewed by the Commission.

While the Commission's policies favor regionalization, the Commission should consider that DELCORA is already a regionalized utility. As detailed in the County's Main and Reply Briefs and further discussed below, DELCORA's sewer system is larger than Aqua's sewer system. Thus, allegations of economies of scale resulting from this transaction are simply not

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<sup>86</sup> See RD at 25-26.

<sup>87</sup> See Aqua Exceptions at 27.

<sup>88</sup> RD at 20.

<sup>89</sup> See *supra* footnotes 15-17.

compelling. From this vantage point, Aqua's repetitive claims of economies of scale and efficiencies cannot form the basis for a finding of affirmative public benefits.

Even if the Commission finds that the proposed transaction would generate some measure of efficiencies and economies of scale, the Application is beset with legal deficiencies that must be resolved before the Commission can make a public benefits determination. Further, the record shows the proposed transaction will substantially increase rates for all customers, including Aqua's existing wastewater and water customers. Aqua's allegations to the contrary are unsupported and should be given no weight. Lastly, Aqua's one-sided characterization of the public input hearings fails to reflect the record. As the public testimony includes detailed and thorough testimony in opposition to the proposed transaction, Aqua's selective references do not support its claims of affirmative public benefits.

**A. The RD correctly concluded that Aqua has failed to demonstrate that the transaction will provide substantial affirmative public benefits.**

Over several pages of its Exceptions, Aqua recounts numerous alleged benefits from its Application and testimony. Most of these alleged benefits are predicated on Aqua's repeated assertions that DELCORA's customers will become part of a larger utility. Contrary to Aqua's representations, the record establishes DELCORA as a uniquely large and regionalized municipal utility.

As referenced in the County's Main Brief, Aqua's own Direct Testimony addresses the uniqueness of this transaction in terms of the size of DELCORA compared to the size of Aqua's existing wastewater operations.<sup>90</sup> In Direct Testimony, Aqua Witness Packer distinguishes the DELCORA transaction from prior transactions as follows:

In past Section 1329 applications, I have compared the Company's current rate base per customer to the rate base per customer of the acquired system. For this

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<sup>90</sup> County Main Brief at 31.

Application, this comparison needs further explanation because DELCORA contains significantly more wholesale transmission and treatment services, compared to the Company's existing collection and treatment systems.<sup>91</sup>

While Aqua is an established sewer system operator in Pennsylvania, the DELCORA system itself is a vast network of wastewater treatment, conveyance, and collection assets across 49 municipalities that serves 197,000 EDUs and 500,000 people in Southeast Pennsylvania.<sup>92</sup> On the other hand, the combined services of Aqua and its water affiliate (Aqua Pennsylvania, Inc.) shows wastewater accounts for just 4.24% of total customers.<sup>93</sup> Aqua itself represents that the "addition of the DELCORA Wastewater system will increase Aqua's customer base by 45%."<sup>94</sup> Indeed, DELCORA's Executive Director even explained his failure to consider other potential buyers with more substantial wastewater operations by noting that "we [DELCORA] are the experts in wastewater."<sup>95</sup>

The County's Main Brief also distinguished DELCORA's predominantly wholesale services compared to municipal utility systems directly serving end-use customers. As stated above, DELCORA primarily provides wholesale sewer treatment and conveyance services to other municipal sewer systems. Retail sewer service to end-use customers accounts for just \$9.34 million of DELCORA's \$70.9 million annual revenue.<sup>96</sup> These service characteristics should be considered in weighing the public benefits of the proposed transaction. County Witness Faryniarz explains the relationship between DELCORA's services and the assessment of public benefits as follows: "as DELCORA operates conveyance and treatment facilities that

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<sup>91</sup> Aqua Statement No. 2 at 9.

<sup>92</sup> County Main Brief at 27 (*citing* Delaware County Statement No. 1 at 10); Application at 3 (confirming DELCORA's system serves customers in 49 municipalities).

<sup>93</sup> County Main Brief at 27.

<sup>94</sup> Aqua Exceptions at 29.

<sup>95</sup> Delaware County Statement No. 2, Exhibit BPZ-3 at 48 (Willert deposition at Court of Common Pleas).

<sup>96</sup> Delaware County Statement No. 1 at 3 (*citing* Aqua Statement No. 2 at 10).



mostly serve wholesale municipal and industrial customers, expanded customer service capabilities are not as relevant as they might be for a utility serving primarily end-use customers.”<sup>97</sup> Accordingly, the Commission should consider that the vast majority of customers served by DELCORA’s system reap no benefits from Aqua’s professed customer service enhancements because they will not be directly served or billed by Aqua.

When considered in light of the unique circumstances presented by this Application, where Aqua seeks to acquire a large, regionalized wastewater utility serving primarily wholesale customers, bald assertions of economies of scale are not compelling. The County recognizes that the Commission has not required applicants to quantify asserted public benefits in prior proceedings, but cautions that the preponderance of evidence standard requires the applicant in this proceeding to show evidence of economies of scale more persuasive than the evidence that would be furnished in a more traditional acquisition of a smaller municipal system. Here, DELCORA has failed to furnish such evidence, as its allegations of affirmative public benefits amount to repetitive platitudes generally asserting that Aqua is a large utility operator and can provide economies of scale.

Tellingly, Aqua’s attempt to offer specific benefits underscores the lack of record support for the generalized assertions of affirmative benefits. The County provided a detailed rebuttal of Aqua’s claims of affirmative public benefits in its Main Brief.<sup>98</sup> Generally, Aqua claims that the proposed transaction would yield benefits such as lower operating and maintenance costs, large-scale capital planning, and other efficiencies, but offers no specific demonstration of incremental public benefits when the system being acquired is already a large and operationally sophisticated utility. For example, Aqua’s asserts it can provide “efficiencies

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<sup>97</sup> County Main Brief at 44-45 (citing Delaware County Statement No. 1 at 29).

<sup>98</sup> Delaware County Main Brief, at 11-16.

in administrative and general costs, such as insurance, auditing, legal among others.”<sup>99</sup> The County propounded discovery upon Aqua seeking qualifications of these operations and maintenance savings and supporting workpapers.<sup>100</sup> In response, Aqua provided a list of select operations and maintenance line items showing DELCORA costs of \$3,718,872 and Aqua costs of \$638,875 (representing alleged savings of \$3,079,997 compared to DELCORA costs).<sup>101</sup> However, Aqua declined to respond to the County’s request for supporting workpapers. While the Commission does not require a public utility to quantify all public benefits, the Commission’s evidentiary standards require that any offered quantifications be supported by substantial evidence.<sup>102</sup> As a result, Aqua’s unsubstantiated benefit quantifications should be disregarded.

As a result, Aqua has failed to provide the Commission with a record establishing affirmative public benefits by a preponderance of the evidence.

**B. The Application’s legal deficiencies preclude a finding of affirmative public benefits.**

Even if the Commission finds that Aqua and DELCORA have identified some benefits resulting from the proposed transaction, the various legal deficiencies mitigate against an overall finding of affirmative public benefits. The Application is beset with legal deficiencies, including the pending lawsuits discussed earlier and the failure to comply with the Rate Stabilization Plan requirements of Section 1329. Additionally, the Commission should consider that Aqua and DELCORA failed to meet their burden of proving the transaction was conducted at arm’s length.

The County is deeply concerned about Aqua and DELCORA’s failure to furnish evidence of an arm’s length transaction. This issue arises not from consideration of one specific fact, but

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<sup>99</sup> Delaware County Reply Brief at 13.

<sup>100</sup> *Id.* (citing Delaware County Hearing Exhibit No. at 8-9 (attaching Aqua Response to County Set X-4)).

<sup>101</sup> *Id.*

<sup>102</sup> *See Popowsky v. Pa. PUC*, 683 A.2d 958, 962-963 (Pa. Cmwlth. 1996).

from the overall landscape of the record.<sup>103</sup> DELCORA accepted Aqua as the purchaser of its assets without competition, transparency, or sufficient public input.<sup>104</sup> County Council Chairman Brian Zidek described the absence of competitive solicitations as follows:

As a public official, I find the lack of competitive bidding to be profoundly concerning and counter to generally-accepted municipal practices. Regardless of whether it is required by the letter of the law, I would encourage the Commission to consider exercising its authority to act in the interest of the public and deny Aqua's Application.<sup>105</sup>

Mr. Zidek also observes that public engagement regarding the proposed transaction occurred only after Aqua and DELCORA entered into an exclusive Letter of Intent.<sup>106</sup> The exclusive nature of the negotiations became further apparent when Pennsylvania-American Water Company ("PAWC") expressed interest in making an offer to purchase DELCORA, but PAWC could not negotiate or engage in discussions with DELCORA due to the Letter of Intent.<sup>107</sup> Furthermore, an employment offer for DELCORA's Executive Director, who was directly involved in the negotiations and receives unique contractual benefits, erodes the independence of DELCORA's negotiation team and undercuts Aqua's assertion that the parties engaged in arm's length negotiations.<sup>108</sup> Additionally, after eschewing a competitive bidding process or even entertaining other direct proposals, Aqua and DELCORA agreed to a purchase price of \$276 million where the fair market value price from averaging the valuations was 30% higher at \$358 million.<sup>109</sup>

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<sup>103</sup> County Main Brief at 18-24.

<sup>104</sup> *Id.* at 19-21 (citing Delaware County Statement No. 2 at 3-5 and Delaware County Hearing Exhibit No. 2).

<sup>105</sup> County Main Brief at 20 (citing Delaware County Statement No. 2 at 5).

<sup>106</sup> *Id.* at 20-21.

<sup>107</sup> *See* Delaware County Statement No. 2, Exhibit BPZ-3, at 70.

<sup>108</sup> *See* County Main Brief at 21-22 (citing Delaware County Statement No. 2 at fn 1 (citing BPZ Exhibit 3, 48:1-15, 59)).

<sup>109</sup> *See id.* at 23-24 (citing Delaware County Statement No. 1 at 29-30, Delaware County Statement No. 2 at 5-7).

Taken as a whole, the preponderance of evidence standard compels a finding that Aqua and DELCORA have not met their burden for furnishing evidence of an arm's length transaction as required under Section 1329. This deficiency further weighs against a finding of affirmative public benefits.

**C. The proposed transaction would cause detrimental rate impacts, expected rate increases, and rate shock.**

In its Exceptions, Aqua concedes that the potential rate impact is a 12.55% increase to DELCORA customers, a 14.32% increase to Aqua wastewater customers, and a 4.58% increase to Aqua water customers.<sup>110</sup> Approximately \$15 million of Aqua's projected 2020 revenue requirement is being driven by the equity component earned on a rate base of \$276.5 million (the sale price).<sup>111</sup> Yet, Aqua argues that the hypothetical rate impact is outweighed public benefits and economies of scale.<sup>112</sup> As discussed above, the transaction does not provide affirmative public benefits or economies of scale. The RD found that Aqua failed to meet its burden to show that the transaction benefits the public in some substantial way.<sup>113</sup> Accordingly, Aqua's use of *McCloskey v. Pa. PUC*, 195 A.3d 1055 (Pa. Cmwlth. 2018) for the general proposition that "increased rates can be outweighed by other positive benefits of a transaction" should not apply here.<sup>114</sup> Moreover, the detrimental rate impact serves as an additional reason that precludes a finding of substantial affirmative public benefits.

As demonstrated on brief and in testimony by the County, the proposed transaction increases the revenue requirement for the DELCORA system.<sup>115</sup> Because Aqua has a higher cost

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<sup>110</sup> Aqua Exceptions at 31; *see* Aqua Statement No. 2 at 12:11-14.

<sup>111</sup> Delaware County Statement No. 1 at 19.

<sup>112</sup> *Id.*

<sup>113</sup> RD at 2, 20, 21, Conclusion of Law #10.

<sup>114</sup> *See* Aqua Exceptions at 32 (citing

<sup>115</sup> County Main Brief at 34-41; Delaware County St. No. 1 at 23-29; Delaware County St. No. 1-SR at 10-14.

of capital, County Witness Faryniarz concluded that the present value of revenue requirements (“PVRR”) over a 21-year period is \$266 million higher for the DELCORA assets under Aqua ownership than under continued DELCORA public ownership with municipal ratemaking.<sup>116</sup>

County Witness Faryniarz includes the following results in his testimony:

Table 4: Revenue Requirements Comparison for DELCORA vs. Aqua <sup>117</sup>		
Year	DELCORA no sale	Aqua
2020	\$70,978,127	\$78,361,849
2021	\$67,754,039	\$88,253,121
2022	\$68,973,113	\$93,597,488
2023	\$75,328,305	\$99,650,852
2024	\$83,788,448	\$106,735,892
2025	\$87,837,306	\$112,612,323
2026	\$89,407,570	\$126,716,985
2027	\$101,931,332	\$130,683,688
2028	\$101,939,204	\$141,246,722
2029	\$113,460,959	\$146,208,143
2030	\$115,724,467	\$146,330,696
2031	\$117,897,846	\$147,055,959
2032	\$120,620,368	\$148,975,187
2033	\$124,141,994	\$152,073,517
2034	\$128,374,653	\$155,584,070
2035	\$131,725,551	\$158,960,753
2036	\$135,994,218	\$160,348,040
2037	\$138,364,117	\$161,089,047
2038	\$138,644,590	\$161,581,056
2039	\$141,176,194	\$161,917,331
2040	\$143,705,172	\$162,201,238
<b>Total</b>	<b>\$2,297,767,578</b>	<b>\$2,840,183,954</b>
<b>PVRR</b>	<b>\$1,039,447,534</b>	<b>\$1,305,089,904</b>

<sup>116</sup> *Id.* at 34-37 (citing Delaware County Statement No. 1 at 26).

<sup>117</sup> *See* Delaware County Statement No. 1 at 27:1-3.

Even after offsetting the temporary rate reductions from the proposed Rate Stabilization Plan, the PVRR under Aqua operation still exceeds the PVRR under continued DELCORA operation by \$114 million.<sup>118</sup>

Aqua continues to criticize Witness Faryniarz's assumption that DELCORA would fund its capital projects using debt instead of cash.<sup>119</sup> However, Mr. Faryniarz explained that DELCORA is far more likely to fund such significant infrastructural investments with debt:

It simply would not be prudent to increase rates to customers in order to generate the cash necessary to finance these projects. Financing these projects with cash mismatches the life of these investments (which will benefit a generation of customers), and place the onus on existing ratepayers. Instead, classic, longstanding ratemaking principles suggest spreading out and recovering the costs of such significant investments over the life of the assets.<sup>120</sup>

In addition, Witness Faryniarz explained that “in the current low interest rate environment, DELCORA would have a strong incentive to borrow to meets its capital investment objectives.”<sup>121</sup>

Aqua also criticizes Mr. Faryniarz's revenue projections on grounds he fails to incorporate modified revenue projections introduced by DELCORA in its Rebuttal Testimony.<sup>122</sup> Aqua continues to ignore the fact that it failed to provide critical evidence required to examine these claimed adjustments. Specifically, Mr. Faryniarz testified that the revised spreadsheet relies on hardcoded data without backup source data.<sup>123</sup> The Commission should similarly disregard the unsupported revenue data relied upon by Aqua and DELCORA in favor of Mr. Faryniarz's revenue projections.

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<sup>118</sup> County Main Brief at 37 (citing Delaware County Statement No. 1 at 29).

<sup>119</sup> See Aqua Exceptions at 38.

<sup>120</sup> Aqua Main Brief at 39-40 (quoting Delaware County Statement No. 1-SR at 10-11).

<sup>121</sup> *Id.* at 40 (quoting Delaware County Statement No. 1-SR at 11).

<sup>122</sup> Aqua Exception at 37.

<sup>123</sup> County Statement No. 1-SR at 12-15.

Additionally, although Aqua touts its legally unsound Trust<sup>124</sup> as a significant rate mitigation tool, it relies on a bill credit mechanism at odds with the Public Utility Code.<sup>125</sup> The Trust also offers no benefits to existing Aqua wastewater customers, who will bear even higher rate increases than the DELCORA customers.<sup>126</sup> Moreover, the expiration of the Trust in or around 2028-2029 will result in rate shock for the DELCORA customers.<sup>127</sup> In referring to County Witness Faryniarz's testimony, the RD explained that the Trust would be depleted in or around 2028 and result in an approximate 70% rate increase between 2027 and 2029.<sup>128</sup> The RD explained that "the mechanics and efficacy of the [Trust] proposal are directly contingent on outcomes of future Commission proceedings."<sup>129</sup> In finding the County's arguments to be persuasive, the RD concluded that the proposed bill discount arrangement through the Trust payments circumvents Section 1303 of the Public Utility Code<sup>130</sup> and is a Rate Stabilization Plan that must be filed with the Commission and included as a component of Aqua's tariff.<sup>131</sup> As recognized by the RD, the Trust is riddled with legal uncertainties and cannot be considered an affirmative public benefit due to the ongoing civil litigation.

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<sup>124</sup> See I&E Letter in Support of the County of Delaware's Petition for Stay, A -2019-3015173 (filed Aug. 13, 2020); Surrebuttal Testimony of Lisa Gumby, I&E Statement No. 1-R at 2:18-3:15; Direct Testimony of Lisa Gumby, I&E Statement No. 1 at 9:9-10:2 (expressing concerns that the pending Common Pleas litigation impacts the authority of DELCORA to sell all of its system assets), 14:17-15:14 (expressing concerns that the Trust violates the Public Utility Code).

<sup>125</sup> See Aqua Answer to Petition of Delaware County for Reconsideration of Staff Action, Docket No. A-2019-3015173, at ¶¶ 15-25 (filed July 9, 2020) (arguing that DELCORA's use of the sale proceeds in creating a Trust is not a PUC-jurisdictional matter and will have no impact on PUC jurisdictional rates).

<sup>126</sup> See Aqua Application at ¶ 36 (explaining that the Trust would only benefit existing DELCORA customers and would facilitate payments from the Trust to DELCORA customer bills); see also OCA Statement No. 1 at 38 (showing Aqua projects an initial 14.32% increase for existing wastewater customers resulting from the proposed transaction).

<sup>127</sup> County Main Brief at 42 (citing Delaware County Statement No. 1 at 43:7-8).

<sup>128</sup> RD at 24 (citing Delaware County Main Brief at 45).

<sup>129</sup> *Id.* (citing Delaware County Main Brief at 15-16).

<sup>130</sup> 66 Pa. C.S. § 1303.

<sup>131</sup> RD at 25.

As to other rate impacts and expected rate increases, Aqua will at some point charge a Distribution System Improvement Charge (“DSIC”) to the acquired DELCORA customers, even if Aqua eventually creates a second operating division for the acquired DELCORA customers.<sup>132</sup> Additionally, Aqua “could reprioritize DELCORA’s long-term capital investment plan in a way that would accelerate capital investment and bring costs forward, resulting in a revenue deficiency that must be offset by a rate increase earlier than planned.”<sup>133</sup> On exceptions, Aqua generically indicates it could use Act 11’s revenue reallocation (shifting Aqua wastewater costs to Aqua water customers) to provide rate benefits for DELCORA customers.<sup>134</sup> However, such a future reallocation cannot be construed as a guaranteed benefit of this transaction because any future reallocation must be approved by the Commission in a separate proceeding.<sup>135</sup> Aqua also has not previously received Commission approval for Act 11 reallocations “of the magnitude that would be necessary to bridge the gap between the projected Aqua revenue requirements for DELCORA and the revenue requirements projected under continued DELCORA ownership.”<sup>136</sup> Significantly, Aqua fails to acknowledge that because the vast majority of DELCORA wastewater customers are also Aqua water customers, DELCORA customers would still pay a portion of the Act 11 reallocation through payments made on their water bill.<sup>137</sup>

Aqua has failed to demonstrate that any alleged benefits to the transaction overcome the numerous detrimental rate impacts associated with the transaction.

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<sup>132</sup> County Main Brief at 41-42 (citing Delaware County Statement No. 1 at 40:4-6). Aqua indicates it will apply the DSIC to DELCORA customers upon the requisite approval of an amendment to its Long-Term Infrastructural Improvement Plan. OCA Statement No. 1, Exhibit RCS-8 at 48.

<sup>133</sup> County Main Brief at 42 (citing Delaware County Statement No. 1 at 40:6-10).

<sup>134</sup> See Aqua Exceptions at 36.

<sup>135</sup> County Main Brief at 43 (citing Delaware County Statement No. 1 at 41:12-14).

<sup>136</sup> *Id.* at 43 (citing Delaware County Statement No. 1 at 41:14-18).

<sup>137</sup> *Id.* at 43 (citing Delaware County Statement No. 1 at 41:19-42:3).



**D. Public witnesses opposing the transaction testified in more depth than those witnesses supporting the transaction.**

Even though the RD did not address the public input hearings that occurred on September 16, 2020, Aqua cites to certain witness testimony to argue that its Application enjoys widespread public support or otherwise provides public benefits.<sup>138</sup> First, the Delaware County Council, which represents the citizens of Delaware County (and most of the DELCORA customers), deeply disputes not only the alleged benefits of the transaction but the legality of the APA and has filed suit against DELCORA to prevent the acquisition from being finalized. Second, two of the County's largest employers – Sunoco and Kimberly Clark<sup>139</sup> – heavily protested the acquisition. Third, Aqua fails to explain how the public input testimony supports its Application and provides substantial affirmative benefits; instead, Aqua merely excerpts select quotes from a handful of certain witnesses while disregarding witness testimony opposing the transaction.

Importantly, the witnesses that testified in opposition to the transaction testified in more depth than any witnesses that testified on behalf of Aqua.<sup>140</sup> Ross Schmucki, a Borough Council Member for Swarthmore Borough,<sup>141</sup> who prepared exhibits with his testimony, testified:

- that the Trust is a “circular transaction”<sup>142</sup> and a Rate Stabilization Plan<sup>143</sup>;
- the fair market value of the DELCORA assets should be the sale price and it should be paid to ratepayers;<sup>144</sup>

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<sup>138</sup> See Aqua Exceptions at 38-40.

<sup>139</sup> On January 28, 2021, Kimberly Clark and Aqua submitted a joint stipulation in this proceeding. However, that joint stipulation is contingent on the approval of Aqua's application and approval of a new tariff rider known as Rider LWCUR – Large Wastewater Customer User. Importantly, that tariff supplement was not filed with the Commission and is not part of the record in this proceeding, thereby preventing review of the tariff by other parties, the ALJs, and the Commission.

<sup>140</sup> The Commission has the discretionary authority to consider the quality of the testimony submitted by witnesses opposing the Application in comparison to the witnesses supporting the Application. See *Vertis Group v. Pa. PUC*, 840 A.2d 390, 395 (Pa. Cmwlth. 2003).

<sup>141</sup> September 16, 2020 Tr. at 72-87.

<sup>142</sup> *Id.* at 74:11.

<sup>143</sup> *Id.* at 81:4-15

- customers will experience rate shock at the expiration of the Trust;<sup>145</sup>
- Aqua and DELCORA rushed the deal with limited public input;<sup>146</sup> and
- municipal representatives publicly questioned DELCORA about “the lack of bidding and the lack of openness in the setting of the price.”<sup>147</sup>

John Butler, testifying in opposition to the transaction, asserted:

- another rate case will be looming as Aqua expands its rate base and earns a return on that expanded rate base;<sup>148</sup>
- Aqua has no interest in funding any water conservation program;<sup>149</sup>
- Aqua has higher borrowing costs than DELCORA;<sup>150</sup>
- rates increase “wherever Aqua has gone in”;<sup>151</sup> and
- Aqua will not add more operational efficiencies.<sup>152</sup>

Additionally, Daniel Procopio, a member of the Aldan Borough Council and Planning Commission testified about his firsthand interactions with Aqua and concluded that Aqua did not answer the questions from the Aldan Borough Planning Commission.<sup>153</sup> In concurring with Mr. Schmucki, Mr. Procopio testified:

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<sup>144</sup> *Id.* at 78:9-15.

<sup>145</sup> *Id.* at 81:20-82:8.

<sup>146</sup> September 16, 2020 Tr. at 84:16-85 (adding that “they [DELCORA and Aqua] just wanted to get it done”).

<sup>147</sup> *Id.* at 87:8-10.

<sup>148</sup> *Id.* at 158:4-11.

<sup>149</sup> *Id.* at 159:13-16.

<sup>150</sup> *Id.* at 159:22-23.

<sup>151</sup> *Id.* at 161:6-7.

<sup>152</sup> September 16, 2020 Tr. at 161:13-15.

<sup>153</sup> *Id.* at 165:25-166:3.

- the sale price is \$32 million lower than lower estimates given by appraisers, the Trust fund is not guaranteed, and rate shock will occur upon expiration of the Trust;<sup>154</sup>
- Aqua Wastewater, which only has 40,000 wastewater customers would be adding approximately 165,000 DELCORA customers, and as a result, the transaction would not yield efficiencies and cost savings but will require the existing DELCORA footprint to bear Aqua's costs as well<sup>155</sup>; and
- the transaction overall "is a very bad deal" for various reasons.<sup>156</sup>

Given the foregoing, Aqua's reliance on public input testimony fails to demonstrate that its Application enjoys broad public support or otherwise demonstrates affirmative public benefits.

**Reply to Aqua Exception No. 7 – The RD correctly determined that Aqua's Application should not be approved subject to certain conditions.**

Aqua argues that the RD should have approved the Application subject to conditions.<sup>157</sup> Aqua argues that the RD "inexplicably and improperly fails to use conditions to address open and uncertain issues" and that the RD's failure here is an "unrealistic view of how such transactions work."<sup>158</sup> Aqua further generically argues that issues arise during transactions, as different agency approvals need to be received and "different reports must be filed" before closing.<sup>159</sup> Aqua's Application does not merely involve a few outstanding reports that need to be filed or a few uncertainties that are characteristic of other water/wastewater system acquisitions subject to the Commission's jurisdiction. Aqua's Application involves substantial uncertainties

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<sup>154</sup> *Id.* at 170:5-171:15.

<sup>155</sup> *Id.* at 172:18-173:23.

<sup>156</sup> *Id.* at 176:18.

<sup>157</sup> Aqua Exceptions at 40-41.

<sup>158</sup> *Id.* at 5.

<sup>159</sup> *Id.* at 40-41.

involving outside civil litigation on many fronts and is heavily contested at the PUC by a broad spectrum of intervenors as well as I&E. Delaware County, as the incorporating municipality of DELCORA, contests the both the legal rights of Aqua and DELCORA to close on the transaction and the public benefits resulting therefrom.<sup>160</sup> Additionally, Aqua and DELCORA failed to comply with the requirements in Section 1329 of the Public Utility Code by not providing a Rate Stabilization Plan with the Application.

The purpose of conditions is not to provide an applicant with opportunities to fix “open and uncertain issues.” Under Section 1103(a) of the Code, the Commission can impose conditions on a certificate of public convenience in order to protect the public interest.<sup>161</sup> However, no amount of conditions can cure the myriad deficiencies in Aqua’s Application. The sheer volume of requested conditions,<sup>162</sup> collectively, demonstrates that the Application is deeply flawed, legally deficient, and should be outright rejected. The RD correctly determined that the Application should be denied outright and not approved subject to conditions. Given that the RD recommended that the Application be denied and that the RD found that Aqua did not demonstrate substantial affirmative public benefits, the RD did not need to address and evaluate any proposed conditions.<sup>163</sup>

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<sup>160</sup> See County Main Brief at 8, 28, 46-47, 52 (discussing the civil litigation); see also *id.* at 29-45 (countering Aqua’s claims of public benefits).

<sup>161</sup> “The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.” 66 Pa.C.S. § 1103.

<sup>162</sup> See OCA Main Brief at 40-42 (recommending 12 detailed conditions prior to approval to limit ratepayer exposure to the risks of the acquisition), I&E Main Brief at 53-54 (seeking rejection of the Trust and for closing not to occur until pending Common Pleas litigation is known not to materially impact the APA), Municipal Protestants Main Brief at 30-31, Sunoco Main Brief at 44-46 (requesting that DECLORA retain ownership of the Western Regional Treatment Plant), OSBA Main Brief at 8-9, and Kimberly Clark Main Brief at 22-23.

<sup>163</sup> *Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001); *Metro. Edison Co. v. Pa. PUC*, 22 A.3d 353, 371 (Pa. Cmwlth. 2011); *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984); *Pa. Game Comm’n v. Pa. PUC*, 651 A.2d 596, 606 (Pa. Cmwlth. Ct. 1994). *Barasch v. Pa. PUC*, 515 A.2d 651, 655 (Pa. Cmwlth. Ct. 1986).

To the extent the Commission considers approving Aqua's Application subject to conditions, the Commission should approve the below condition proposed in the County's Main and Reply Briefs:

- Closing on the transaction cannot occur until the civil litigation dockets, including the Court of Common Pleas of Delaware County at No. CV-2020-003185 and any appeals thereto, are concluded.

Approval of this condition will preserve due process for all parties by ensuring parties have an opportunity to address a court ruling that invalidates the Trust or otherwise impacts the record offered by Aqua in support of the Application.

**Reply to Aqua Exception No. 8 – The RD Correctly determined that the outstanding issues and uncertainties regarding DELCORA's legal ability to transfer its wastewater assets prevents a reliable determination of the appropriate ratemaking rate base.**

The County incorporates by reference here its responses in Reply Exception Nos. 2-4, which explain why the outstanding issues and uncertainties regarding DELCORA's legal ability to transfer its assets to Aqua prevent the ALJs and the Commission from being able to fully analyze and determine whether the Application is in the public interest.

**Reply to Aqua Exception No. 9 – The RD Correctly determined that it need not accept Aqua's proposed conditions with respect to the environmental concerns of Sunoco and Kimberly Clark.**

Aqua excepts to the RD's determination to not discuss or resolve the environmental concerns raised by Sunoco and Kimberly Clark.<sup>164</sup> The County did not brief environmental issues in this proceeding; however, the County does agree with the Exceptions of Sunoco insofar as that the outstanding environmental issues and concerns serve as an additional reason for denying Aqua's Application.<sup>165</sup>

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<sup>164</sup> See Aqua Exceptions at 65.

<sup>165</sup> See Sunoco Exceptions at 1-3 (agreeing with the RD's outcome and recommendation but highlighting additional reasons to deny the Application).

**Reply to Aqua Exception No. 10<sup>166</sup> – The RD correctly determined that Aqua failed to establish a record to enable the Commission to decide the reasonableness, legality, or validity of the APA and certain municipal contracts.**

Aqua mistakenly argues that there is no impediment to grant approval of the APA and all of the municipal contracts under Section 507 of the Public Utility Code.<sup>167</sup> To a large extent, the Commission’s duty to review and approve the APA under Section 507 overlaps with the Applicant’s legal fitness under Section 1103, 66 Pa. C.S. §§ 507, 1103. Per Section 507 of the Public Utility Code, contracts or agreements between a public utility and a municipal corporation must be filed with the PUC at least 30 days prior to the effective date of the agreement.<sup>168</sup> The PUC will then consider the reasonableness, legality, or any other matter affecting the validity of the agreement.

The Commission’s powers under Section 507 are extremely broad and include not simply “reasonableness” but the “legality” of the Agreement under review as well as “any other matter affecting the validity” of the agreement. In this proceeding before the Commission, the County is challenging the legality of the APA under the Authorities Act and the Public Utility Code.

**A. Asset Purchase Agreement**

Section 5614(e) of the Authorities Act is subtitled “conflict of interest” and states:

(e) Conflict of interest. —No member of the authority or officer or employee of the authority may directly or indirectly be a party to or be interested in any contract or agreement with the authority if the contract or agreement establishes liability against or indebtedness of the authority. Any contract or agreement made in violation of this subsection is void, and no action may be maintained on the agreement against the authority.

As discussed earlier, DELCORA’s executive director, was heavily involved in negotiating the sale of DELCORA to Aqua. The APA establishes “liability or indebtedness” of DELCORA,

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<sup>166</sup> This Reply is also responsive to DELCORA Exception No. 3 regarding the record in this proceeding.

<sup>167</sup> Aqua Exceptions at 79.

<sup>168</sup> 66 Pa. C.S. § 507.

not only to Aqua, but also to the parties to numerous other agreements DELCORA intends to assign (or have assigned) to Aqua. As its Executive Director, Mr. Willert is an “officer or employee” of DELCORA. Therefore, if Mr. Willert is directly or indirectly a party to or interested in any contract or agreement, that agreement is null and void.

Mr. Willert is the signatory to the APA for DELCORA and received an executive employment offer to join Aqua’s parent company. Moreover, the APA dictates that approximately \$3,200,000 of the sale proceeds will fund DELCORA’s outstanding pension obligations. Mr. Willert personally and uniquely benefits from the full funding of the pension plan as paragraph 2(c) of his 2015 employment contract with DELCORA entitles him and him alone to \$50,000 of annual deferred compensation.<sup>2019</sup> Mr. Willert’s five-year 2015 contract has remained in effect since January 1, 2015 and was renewed for an additional five-year term effective January 1, 2020. Accordingly, Mr. Willert’s cumulative deferred compensation interest alone is worth more than \$250,000. The County submits that these circumstances violate the conflict of interest provision in Section 5614(e) of the Authorities Act and warrant denying Section 507 approval of the Application.

The County further submits that Section 5614(e) of the Authorities Act is independent of similar statutory authority set for the Pennsylvania State Ethics Act (“State Ethics Act”), 65 C.S. § 1101 *et seq.* There is very little caselaw interpreting Section 5614(e), but legislative documents suggest the conflicts rule in the Authorities Act is distinct from the rules under the State Ethics Act. Accordingly, exceptions to conflicts of interest provisions considered under the Pennsylvania State Ethics Act, such as the subclass exemption, would not apply.

## **B. Municipal Protestants’ contracts**

As further evidence of Aqua’s lack of legal fitness to acquire the DELCORA Assets, the Municipal Protestants have explained that the proposal to transfer DELCORA Assets to Aqua

triggers reversionary interests that require consent of the individual Municipal Protestants before certain DELCORA Assets can transfer to Aqua.<sup>169</sup> Aqua's failure to demonstrate that it has legal access to certain assets it proposes to acquire in its Application, including wastewater facilities and contract rights of the Municipal Protestants, confirms that Aqua cannot meet the necessary requirements of a certificate of public convenience to serve the DELCORA customers. The County recognizes that Trainer Borough filed a stipulation with Aqua on January 8, 2021 while Upland Borough filed a stipulation with Aqua on January 27, 2021. Importantly, the filing of recent stipulations and withdrawal of protests after the close of the record (and after the issuance of the RD) does not provide sufficient certainty that Aqua has clear legal authority to acquire the DELCORA assets. To the contrary, these post-hearing stipulations and extra-record proposals and settlement discussions confirm the RD's determination that the transaction remains riddled with uncertainties. Accordingly, the failure of Aqua and DELCORA to demonstrate clear legal authority to transfer assets that are the subject of the proposed acquisitions militates against the approval of Aqua's Application.

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<sup>169</sup> See Delaware County Main Brief at 26-29, 46-47.



#### **IV. CONCLUSION**

**WHEREFORE**, the County of Delaware respectfully requests that the Pennsylvania Public Utility Commission (1) deny the Exceptions of Aqua Pennsylvania Wastewater, Inc. and Delaware County Regional Water Quality Control Authority and (2) deny Aqua's Application consistent with the Recommended Decision and these Reply Exceptions.

Respectfully submitted,

By \_\_\_\_\_

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February 1, 2021