



Thomas J. Sniscak
(717) 703-0800
tjsniscak@hmslegal.com

Whitney E. Snyder
(717) 703-0807
wesnyder@hmslegal.com

Kevin J. McKeon
(717) 703-0801
kjmckeon@hmslegal.com

Melissa A. Chapaska
(717) 703-0815
machapaska@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

February 1, 2021

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

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

Dear Secretary Chiavetta:

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

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

Very truly yours,

/s/ Kevin J. McKeon

Thomas J. Sniscak
Kevin J. McKeon
Whitney E. Snyder
Melissa A. Chapaska

*Counsel for Sunoco Partners Marketing
& Terminals, L.P./Energy Transfer*

WES/das
Enclosures

cc: Honorable Angela T. Jones (via email angeljones@pa.gov)
Honorable Charles E. Rainey, Jr. (via email crainey@pa.gov)
Office of Special Assistants (ra-OSA@pa.gov)
Per Certificate of Service

PUBLIC VERSION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**SUNOCO PARTNERS MARKETING & TERMINALS, L.P.
REPLIES TO EXCEPTIONS**

Thomas J. Sniscak
Kevin J. McKeon
Whitney E. Snyder
Melissa A. Chapaska
Hawke, McKeon & Sniscak LLP
100 North 10th Street
Harrisburg, PA 17101
(717) 236-1300 (P)
(717) 236-4841 (F)

February 1, 2021

*Counsel for Sunoco Partners Marketing &
Terminals, L.P.*

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I. INTRODUCTION AND SUMMARY

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

SPMT filed its own Exceptions to the R.D., so as to place before the Commission alternative and/or additional reasons for denying the Application, which are fully developed in the evidentiary record, but not addressed in the R.D. All of those exceptions, **SPMT Exceptions 1 through 6**, are responsive to various of Aqua's Exceptions, so in addition to these SPMT replies, SPMT incorporates its Exceptions by reference here as replies to Aqua's exceptions. Although SPMT opposes all of Aqua's Exceptions 1 through 10, the primary focus of these replies are Aqua's Exception 6 (excepting to the R.D.'s fully justified failure to find that Aqua's acquisition of DELCORA confers affirmative public benefits) and Aqua's Exception 9 (excepting to the R.D.'s failure to address and reject SPMT's arguments that Aqua has failed to address and resolve very serious environmental concerns) because they aggregate the issues of most concern to SPMT.

The R.D. arrived at the correct result in denying Aqua's Application. Aqua's burden is to prove "not only that no harm will come from the transaction" but also that "substantial affirmative benefits" will flow from it. *McCloskey v. Pennsylvania Public Utility Commission*, 195 A.3d 1055, 1064 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*). Aqua did neither on this record.

Aqua Exception 6 attempts without success to make the case that its purchase of DELCORA will confer affirmative public benefits. Virtually all alleged benefits, however, are attributes DELCORA already possesses and that its customers presently enjoy. The remainder are vague claims of "economies of scale" that have no support in the record. **The reality, in plain sight for all to see,**

is that DELCORA is a publicly owned wastewater system that is much more extensive, its customer base far larger, its wastewater staff much more experienced, and its customer rates far lower, than Aqua’s comparable existing wastewater service pretensions. DELCORA is a robust and solvent going concern. DELCORA’s customers are in no need of, and will get no benefit from, Aqua’s acquisition of DELCORA. DELCORA in no way resembles a troubled wastewater system – either in financial or technical terms – and is in no need of rescue.

Balanced against this dearth of affirmative benefits is the harm that will come from Aqua’s acquisition of DELCORA. In deciding whether Aqua’s acquisition of the DELCORA wastewater system results in a “substantial public benefit,” the Commission must address its impact on rates. *McCloskey*, 195 A.3d at 1066. The evidence reveals a dismal forecast, not only for DELCORA ratepayers, but also for Aqua’s existing wastewater customers. If the Application is approved, DELCORA customers will be penalized with a revenue requirement that would be at least \$36 to \$44 million per year more than the revenue requirement under continued DELCORA ownership, resulting in a very significant adverse rate impact on DELCORA customers, with no positive factors from the acquisition to outweigh it. Moreover, as discussed herein in response to Aqua’s Exception 6, Aqua’s promise to shift a portion of the DELCORA system’s revenue requirement to its other existing wastewater customers would have the effect of raising the rates of Aqua’s existing customers by more than an additional fifty percent over and above the immediate increase Aqua itself projects. As established in additional detail in **SPMT’s Exception 5**, the detriments far outweigh the alleged benefits. As set forth in **SPMT Exceptions 2 and 3**, the adverse rate impacts are severe and will not be offset by the proposed DELCORA Customer Trust.

Aqua Exception 9 similarly attempts without success to address and rebut, under the rubric of “environmental issues,” a number of other harmful effects that a grant of the Application would have as the result of migrating a publicly owned wastewater system to private status:

- In Aqua Exception 9.B [**Begin HC**] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[End HC] This issue also is addressed in detail in **SPMT Exception 1.**

- In Aqua Exception 9.C, Aqua asks the Commission to address and reject SPMT's documented concern based on indisputable statutory requirements, that Aqua's acquisition of DELCORA will trigger a requirement that Aqua make enormous capital expenditures (expenditures not as-yet included in Aqua's already steep planned rate increases that would be passed on to DELCORA system customers) to completely eliminate, rather than control, DELCORA's combined sewer overflow (CSO) problem. This issue also is addressed in detail in **SPMT Exception 4.**
- In Aqua Exception 9.D, Aqua without basis asks the Commission to address and discount SPMT's point that Aqua's acquisition and privatization of DELCORA will deprive both DELCORA system customers and all Pennsylvania publicly owned treatment works (POTWs) of benefits bestowed under Section 1383 of the Clean Water Act, which allows the states to provide financing assistance to POTWs at below market rates for infrastructure projects.
- In Aqua Exception 9.E, Aqua addresses and attempts to minimize the significance of the requirements of Presidential Executive Order 12803 (E.O.12803) even though Aqua was unaware of its existence until informed by SPMT, and even though "Aqua and DELCORA have not officially started the process for addressing" the approvals and obligations it mandates. Aqua Exceptions at 77. There is no evidence to support Aqua's arguments that the Commission should agree with Aqua that those requirements "will not have a material impact on closing" the transaction, *id.*, and that "[i]mportantly," implementation of E.O. 12803 "in no way diminishes the affirmative benefits" of the transaction. *Id.* at 78.
- Finally, in Aqua Exception 9.F, Aqua urges the Commission to condition a grant of the Application rather than deny the Application outright as the R.D. recommends. This is not a viable alternative, and the Commission should reject it. If the Commission nonetheless decides to grant the Application with conditions, the conditions Aqua proposes for the issues addressed in Aqua Exception 9 are of no help. If the Commission opts for conditional approval (it should not) the minimum conditions needed for the above issues are those set forth in **Section III of these Replies to Exceptions.**

II. REPLIES TO EXCEPTIONS

1. SPMT Reply to Aqua Exception 1: Legal Principles and Burden of Proof

Aqua's Exception 1 recites the legal principles the Commission must apply under Sections 507, 1102, 1103, and 1329 of the Public Utility Code in considering Aqua's Application for approval to acquire DELCORA's assets. The R.D. correctly applied these principles and correctly concluded that Aqua failed to meet its burden of proof. Although the R.D. did not address all issues Aqua raises in its Exceptions 2 through 10, it reached the correct result and denied the Application, because a grant of Aqua's Application is not "necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. § 1103(a). For the reasons set forth in the R.D., in SPMT's replies to Aqua's Exceptions 2 through 10, and in **SPMT's Exceptions 1 through 6**, the Commission should deny Aqua's Application.

Aqua Exception 1 should be denied.

2. SPMT Reply to Aqua Exception 2: Ongoing Litigation – Municipal Contracts

In recommending denial of the Application, the R.D. focuses primarily on the fact that the pendency of the Municipal lawsuits makes it uncertain whether DELCORA will be permitted to transfer the Municipalities' assets to Aqua, R.D. at 20, such that a grant of the Application "may result in Aqua being obligated to serve areas where it would not have sufficient facilities to provide service." *Id.* The R.D. focuses on those municipalities that have been involved in this proceeding and also filed separate suits related to their rights under valid agreements between the municipalities and DELCORA. However, there are other municipalities such as the City of Chester that have not yet asserted their rights related to the assets nor have they entered into an assignment of their agreement with DELCORA to Aqua. SPMT Statement No. 2 at 35:17 – 37:11. The R.D. is correct that lack of assent from municipalities that have legal claims to assets Aqua is purporting to acquire

from DELCORA is a serious problem, but it is only part of the tangle of loose ends involving critical issues for which Aqua needs approvals by entities other than the Commission that it has not yet obtained, as explained in **SPMT Exception 6**, which SPMT incorporates here by reference.

*Aqua Exception 2 should be denied.*¹

3. SPMT Reply to Aqua Exception 3: DELCORA Municipal Contracts

As its reply to Aqua Exception 3, SPMT incorporates by reference its reply to Aqua Exception 2.

*Aqua Exception 3 should be denied.*²

4. SPMT Reply to Aqua Exception 4: Ongoing Litigation – Delaware County

Aqua's Exception 4 faults the R.D. for failure to acknowledge that the Delaware County Court of Common Pleas dismissed the County's lawsuit against DELCORA on December 28, 2020, and argues that the court's order "removes that litigation as an impediment" to the transaction. Aqua Exceptions at 18. However, the County has appealed the trial court order to the Commonwealth Court, and its appeal operates as an automatic supersedeas of the trial court's order pursuant to Pa. R.A.P. 1736 (b). The result is that the litigation continues, the trial court order is of no present effect, and the pending controversy remains as one of the many impediments to closing the transaction. See **SPMT Exception 6**, which SPMT incorporates here by reference.

Aqua Exception 4 should be denied.

¹ DELCORA Exception 1 makes a similar argument and should be denied for the same reasons.

² DELCORA Exception 1 makes a similar argument and should be denied for the same reasons.

5. SPMT Reply to Aqua Exception 5: Rate Stabilization Plan

The R.D. correctly finds as a matter of law that the Application must be denied because the proposed Trust, which allegedly will be sufficiently funded so as to offset until 2028 the steep rate increases that DELCORA customers will suffer under Aqua ownership, would in reality be a “de facto rate stabilization plan” that should have been (but was not) submitted for approval as part of Aqua’s Application and that, “in effect, functions to bypass the Commission’s ratemaking authority,” R.D. at 22. Despite having testified that the Trust is the transaction’s “primary benefit” Aqua Statement No. 2 at 13:16-17; Aqua Statement No. 5 at 11:12-14, but that the Commission has no jurisdiction over it, Aqua now takes the position that the Trust is irrelevant to the transaction, seeks to distance itself from the Trust, and blames the R.D. for even suggesting that it is Aqua that has proposed to “create and fund the Trust.” Aqua Exceptions at 20-21. That the Trust’s role in the transaction and the Application is ill-defined and legally suspect is the fault of no one but Aqua. The R.D. properly refused to correct or reform Aqua’s deficient presentation of the Trust concept to create a vehicle that could be acceptable under the Public Utility Code.

Moreover, quite apart from the Trust’s murky legal pedigree, the record demonstrates that the Trust would not be funded at anywhere near the \$200 million level Aqua alleges, and likely would never be funded at all. The R.D. failed to address this factual issue, but the Commission should. In support, SPMT incorporates by reference here **SPMT Exception 3**.

*Aqua Exception 5 should be denied.*³

6. SPMT Reply to Aqua Exception 6: Alleged Affirmative Benefits

Aqua’s Exception No. 6 bundles together under the heading “Affirmative Public Benefits” several issues that SPMT addressed as separate exceptions. For ease of reference, SPMT replies using Aqua’s organization. Cross-references to SPMT’s exceptions on the same issues are provided.

³ DELCORA Exception 2 makes a similar argument and should be denied for the same reasons.

A. Introduction

Aqua must prove “not only that no harm will come from the transaction” but also that “substantial affirmative benefits” will flow from it. *McCloskey*, 195 A.3d at 1064. The R.D. did not reach this issue, but the record reveals that Aqua has proved neither. As established in detail in **SPMT’s Exception 5**, the detriments far outweigh the alleged benefits. As set forth in **SPMT Exceptions 2 and 3**, the adverse rate impacts are severe and will not be offset by the proposed Trust. Aqua’s arguments to the contrary in its Exception No. 6 are not supported by the record evidence.

B. Alleged Affirmative Public Benefits

1. There Are No Public Benefits, Only Aqua Shareholder Benefits

Aqua’s litany of alleged public benefits, Aqua Exceptions at 27-30, is fully refuted in **SPMT’s Exception 5**, which contrasts each *Aqua alleged benefit* with *reality*, and which SPMT incorporates by reference here. Aqua’s narrative that its acquisitions of struggling wastewater systems inherently creates public benefits because of Aqua’s superior experience, scope, and scale may be apt for other acquisitions, but it is decidedly counterfactual here. DELCORA is much larger than Aqua’s comparatively small and scattered portfolio of wastewater operations. DELCORA already serves a huge area that is a contiguous “region” unto itself, and its customer base dwarfs Aqua’s.⁴ DELCORA has a long track record of providing quality service at a customer cost far lower than Aqua presently offers or will be able to provide in the future. DELCORA is solvent. Virtually all of the benefits Aqua claims as a result of the transaction are attributes DELCORA already possesses and that its customers presently enjoy. DELCORA is in no need of “rescue” by Aqua. Putting aside the undeniable harms the transaction will cause SPMT,⁵ the facts that the acquisition

⁴ DELCORA is far larger than Aqua’s entire existing wastewater operation, serving 197,000 Equivalent Dwelling Units to Aqua’s approximately 35,000. SPMT Statement No. 2 at 13:3-13; 15:11-19; SPMT Statement No. 2SR 2R at Exhibit HJW-1SR p. 12; Aqua Exceptions at 28.

⁵ See SPMT Exception 1; see *infra* SPMT reply to Aqua Exception No. 9.B.

will cause DELCORA system rates to spike, and that there will be no public benefits from this transaction, are obvious. They were obvious to thoughtful members of the public who testified at the public input hearings.⁶ Expert testimony from intervenor witnesses has corroborated and confirmed the evident harms and the absence of benefits. In imploring its audience to pretend to see public benefits where plainly none exist, Aqua calls to mind the rogue tailors who wove invisible cloth for the *Emperor's New Clothes*. Like them, Aqua is hoping that no one will say out loud what is clear for all to see.⁷

2. Adverse Rate Impact

Aqua argues that the “potential” rate impact of its acquisition is minimal, Aqua Exceptions at 31-33, that concerns raised by intervenors about Aqua future rates are unfounded, Aqua Exceptions at 33-36, and that in any event Aqua’s projections of the rates DELCORA would charge in the future on a continued stand-alone basis absent Aqua’s acquisition of DELCORA would be higher than the rates Aqua expects to charge DELCORA customers if the acquisition proceeds. Aqua Exceptions at 36-38. Each of these points is incorrect and already has been exposed as such in detail in **SPMT’s Exception 2**, which SPMT incorporates here. The record is clear that DELCORA customers will pay far more for the same service they currently receive from DELCORA once Aqua acquires the DELCORA system, with no improvement in DELCORA’s more-than-adequate existing service:

- Aqua’s revenue requirement associated with purchasing DELCORA’s assets, assuming all assets transfer at the full amount of \$276.5 million, ***will be double the cost of existing DELCORA debt service***, increasing the revenue requirement from

⁶ See *infra*, SPMT’s reply to Aqua Exception No. 6.C, collecting public statements of DELCORA customers who oppose Aqua’s Application.

⁷ Hans Cristian Anderson, *The Emperor’s New Clothes*:

So off went the Emperor in procession under his splendid canopy. Everyone in the streets and the windows said, "Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!" Nobody would confess that he couldn't see anything, for that would prove him either unfit for his position, or a fool. No costume the Emperor had worn before was ever such a complete success.

"But he hasn't got anything on," a little child said.

[Hans Christian Andersen : The Emperor's New Clothes \(sdu.dk\)](http://sdu.dk).

approximately \$15 million per year to approximately \$30 million. SPMT Statement No. 2 at 6:11-7:2; 18:17-21:2; Schedule HJW-1.

- The increase in Aqua’s revenue requirement associated with the purchases of DELCORA’s assets will ***increase DELCORA customers’ rates by 12.55%, increase existing Aqua wastewater customer rates by 14.32%, and increase existing Aqua water customer rates by 4.58%***. SPMT Statement No. 2 at 6:2-9.
- In addition to the rate increases associated with the purchase price Aqua will pay, there is the revenue requirement associated with proposed capital improvements to the DELCORA system that DELCORA has planned and that Aqua now will implement; if the Commission approves Aqua’s Application, the revenue requirement for these very same improvements will be ***\$46 million more per year*** than if DELCORA retained the assets and made the investments. If DELCORA were to retain ownership and implement the improvements it has planned itself, the net present value of savings for DELCORA customers would be nearly half a billion dollars – \$462.9 million – over the period ending 2040. SPMT Statement No. 2 at 7:4-14; 23:14-28:15; Schedules HJW-2, HJW-3, and HJW-4.
- SPMT’s total bill under Aqua ownership over the period ending 2040, with Aqua implementing DELCORA’s capital improvement program, will be ***\$18.6 million more on a net present value basis*** than it would be under DELCORA’s continued ownership. SPMT Statement No. 2 at 35: 5-15; Schedule HJW-6.

Although this summary of adverse rate impacts is sufficient to be dispositive, SPMT also responds briefly to two aspects of Aqua’s discredited claim in Aqua Exception No. 6 that a DELCORA sale to Aqua “results in an overall *lower* revenue requirement and a benefit to DELCORA customers” (Aqua Exceptions at 33) (emphasis in original).

First, Aqua’s claim is based on false revenue requirement comparisons. Aqua continues to make revenue requirement comparisons that assume DELCORA customer receipt of offset payments from the proposed Trust. This is problematic because Aqua Exception No. 5 (Rate Stabilization Plan) asserts that the Trust is irrelevant to the Commission’s approval of the transaction. *See* Aqua Exceptions at 20 (“It appears that the non-Commission jurisdictional Trust has created unnecessary controversy and distraction. *Had DELCORA simply decided to use the funds from the Proposed Transaction to build a new community center or fire house, many of the issues here would disappear.*”) (emphasis added). If the Trust is irrelevant to approval of the transaction, Aqua’s

continued reliance on its “no sale” vs. “sale” revenue requirement comparison table (*see* Aqua Exceptions at 35), which assumes payments from the Trust for years 2020-2028 to offset Aqua’s revenue requirement associated with acquiring the DELCORA system (but fails to even display Aqua’s actual revenue requirement for the DELCORA system for each of those years), is even more misleading now than when originally presented in Aqua’s testimony.

Specifically, Aqua’s Table purports to demonstrate that the revenue requirement for the DELCORA system will be far less under Aqua ownership than under DELCORA’s continued ownership by comparing (i) the future revenue requirements for DELCORA on a stand-alone “no sale” basis as projected by County Witness Faryniarz (Column A), SPMT Witness Woods (Column A.1), and Aqua Witness Pileggi⁸ (Column B), with (ii) Aqua’s projections of future revenue requirements under a “sale to Aqua” scenario (Column C). Aqua’s “sale to Aqua” revenue requirement scenario (Column C), however, assumes that Aqua’s revenue requirement associated with the DELCORA system will be reduced by payments out of the Trust to DELCORA customers, with the result that Aqua’s revenue requirement for those years is represented to be far less than any of the three projections of DELCORA’s “no sale” stand alone revenue requirement. But given that Aqua’s treatment of Trust payments is irrelevant, Aqua’s actual revenue requirement associated with the DELCORA system is the only proper comparison. SPMT Witness Woods computed that Aqua revenue requirement in his testimony (calculations Aqua agreed appeared to be accurate)⁹, and it shows –as one would expect, given an Aqua cost of capital at least double DELCORA’s – that Aqua’s actual revenue requirement for the DELCORA system without an offset for the Trust payments would greatly exceed DELCORA’s continued stand-alone “no sale” revenue requirement as calculated by Mr. Woods. Indeed Aqua’s actual revenue requirement would even exceed Aqua

⁸ Mr. Pileggi is DELCORA’s chief financial officer who testified as an Aqua witness. Aqua St. Nos. 6 and 6-R.

⁹ Aqua Statement No. 2-R at 52:21-53:1.

Witness Pileggi's artificially inflated ¹⁰ DELCORA "no sale" revenue requirement.¹¹ *The takeaway is that revenue requirement drives rates, the revenue requirement for the DELCORA system will be much higher under Aqua ownership than under DELCORA's continued stand-alone ownership, and the impact, if any, of Trust payments to DELCORA customers cannot be considered.*¹²

Second, Aqua's claim is based on doubtful cost-shifting assumptions. Aqua assumes in the same revenue requirement comparison table (Aqua Exceptions at 35, Table Column D) that in the years following exhaustion of the hypothetical Trust funds beginning in 2029, Aqua will be able to shift 10% (*i.e.*, \$15 million) of the DELCORA system's annual revenue requirement to other Aqua wastewater customers. The rate impact of such a shift confirms that the acquisition will have a very significant adverse rate impact not only on DELCORA system customers, but also on existing Aqua wastewater customers. Consider: There are 35,000 existing Aqua wastewater customers pre-acquisition, who pay an average monthly bill of \$68.27. Aqua Exceptions at 31, citing Aqua St. No. 2 at 10. If Aqua shifts \$15 million of the annual revenue requirement for the DELCORA system onto the bills of these existing Aqua customers, the monthly bill for those existing customers will increase by \$35.71 (\$15 million/ 35,000 = \$428.57; \$428.57/12 = \$35.71), resulting in a jump of 52.3% (\$35.71 (increase) / \$68.27 (existing bill) = 52.3%). Assuming the Commission would ever approve a shift resulting in such a rate-shock inducing increase, *the takeaway from Aqua's proposed ratesetting*

¹⁰ As explained in **SPMT's Exception 2** at 13-14, the Pileggi projection (Column B of Aqua's Table) grossly overstates DELCORA'S stand-alone revenue requirement because he assumed DELCORA fund long term capital improvements with cash from current rates instead of long term low interest bonds.

¹¹ SPMT Witness Woods' calculation of Aqua' revenue requirement for the DELCORA system is in the record as SPMT Statement No. 2, Schedule HJW-4. (A copy is attached to these replies to exceptions as **Appendix 1**). The "Aqua Implemented" annual revenue requirement column is Aqua's actual revenue requirement for the DELCORA system for the years 2020-2040, and for a proper comparison should be substituted for the values in Column C of Aqua's Table.

¹² Trust payments cannot be considered both because Aqua maintains the Trust is irrelevant to the Application (while, in contradiction, continuing to maintain that the Trust is the transaction's primary benefit, Aqua Exceptions at 28), and because, as SPMT has demonstrated at length and in detail in **SPMT Exception 3**, the Trust is illusory because it is not likely to have any funding at all.

sleight of hand is that all customers, not simply DELCORA customers, will lose as the result of Aqua's acquisition of DELCORA.

As the following excerpts from public input testimony reveal, DELCORA customers who took the time to consider the matter see through Aqua's false claims of affirmative benefits. They oppose the transaction because they understand and appreciate that DELCORA as a public provider has a long track record of competently providing quality service, and is perfectly capable of managing on its own the major capital investments that DELCORA had planned before the deal with Aqua was struck. They understand that given DELCORA's high level of ability and Aqua's plan to retain the entire DELCORA team to continue the job it has been doing, there will be no "value added" with Aqua ownership. The only material change that will come with Aqua ownership will be higher rates for the same service, in order to produce revenue for Aqua shareholders.

C. Public Witnesses Recognized the Lack of Benefits

While Aqua's Exceptions attempt to paint a picture of universal public support for the acquisition based on snippets from public input hearing testimony, Aqua Exceptions at 38-40, Aqua understandably ignores well informed and articulate witnesses who testified in opposition. As a reading of their comments reveals, they are in a position to know that DELCORA is not in need of rescue, and they see through Aqua's false claims about the public benefits that will flow from the transaction:

Ross Schmucki, Swarthmore Borough Council [T]he trust is a circular transaction...
[B]uying the assets of the ratepayers goes from Aqua to an Aqua subsidiary.

...

[W]hen this trust expires, eight years of accumulated rate increases with no stabilization will hit them, wham. And they're going to holler, and it will be too late for them to do anything about it because they won't be able to go back and undo eight years of rate increases. ... [B]ut don't do us that favor, okay. Instead, come in and give us a rate stabilization plan right up front. Let us see what's really happening.

...

[I]n 2018, as part of my committee, the public works committee, DELCORA said they wanted to come into us. So the chief engineer for DELCORA ... and the outside engineer... came into my committee and we met with them, and they made a big presentation, okay, you know the blowups, the engineering blowups and everything.

They talked about, we've got this problem with the Philadelphia plan. This is the big, what Aqua says is the \$1.2 billion problem. And they said, "This is our solution. We're going to put a force main in. We're going to buy property. We're going to put a new line in going south down to Chester, and we're going to divert the sewage away from Philadelphia to Chester, and it's going to cost \$8 million and change, and it will end up being \$14.25 per household. This is our plan. This is how we're going to deal with the big problem. And we want you to pass a resolution. We want the borough and eight other municipalities to pass a resolution supporting this solution."

I said okay. You know, we have a good relationship with DELCORA, and a relationship of trust. And so I took their plan. We took their resolution. We considered it in council and we passed, to approve their new Act 537 sewer plan.

And we had a public hearing about that, and we passed a resolution, it's 2018-07, in support of their big plan. And it had dates, you know. I can show it to you if you want. It had dates on when they were going to do all this. It wasn't way far out. It was like two or four years to get this done.

So then I went back and our manager, and then for the next year after that, I kept asking the manager, how are they doing on the big plan to solve the problem? Because we passed the resolution.

And we heard nothing. And now I know why we heard nothing, because they were off negotiating to get jobs with Aqua. And the next thing I heard was, DELCORA's sold. I went from being in a meeting with DELCORA telling us, we've got a solution, pass this resolution, to the next thing is being shocked to hear they sold DELCORA.

N.T. 70-71, 74, 81-85 (Ross Schmucki, Swarthmore Borough Council Member and Chair of Public Works Committee).

Maureen Ganley, customer: I have been a DELCORA ratepayer for over 40 years here. I've always been pleased with the job DELCORA has done. I've paid attention to some of the details about local government for some time now. DELCORA is a well-run authority that has always cared about the environment.

...

Q. One last question. You said DELCORA has been a well-run authority. Do I take that to mean that in your experience, DELCORA has operated the system capably and provided you with reasonable public service over the 40 years you've been a customer?

A. I believe so, yes.

N.T. 151, 153 (Maureen Ganley).

John Butler, customer: Aqua is going to add \$278 million into their base, and I have a question. How much do they get in a return on their base, because right now, to me,

that's going to be a rate increase. Where DELCORA answer to the residents, Aqua answers to the tax -- to their shareholders, and they're going to get a return on that \$278 million. So that to me is a rate increase coming up.

...

Aqua will also have a higher borrowing cost than DELCORA, because DELCORA borrows tax-free and Aqua is going to have to borrow on a taxable bond issue. So that in my mind is going to increase the cost for this project.

...

And really, what I thought, they're going to stabilize the rates by using the money they get from the sale. That really isn't -- the rate is still going to go up.

...

the rest of the people in the DELCORA area really don't want to pay to eliminate the combined sewage system in Upper Darby. That's really a separate issue. And Aqua has -- wherever Aqua has gone in, the rates have gone up, regardless of what they say. I do have a property in New Jersey, and Aqua rates down in New Jersey are substantially higher than in a municipally owned system, whether it's wastewater or water, because they have to pay the ratepayers -- they have to pay their bond, their stockholders, where DELCORA only has to answer to users. And DELCORA is the size of an operation that has the efficiencies, and I don't see where Aqua is going to add much more efficiency than that.

...

So you know, I don't see we're going to get anything, and Aqua is not inclined to reduce the use of natural gas because now they bought a natural gas utility in the Pittsburgh area, so they want to burn more natural gas rather than try to make a digester plant which would help everybody. And that's it.

...

JUDGE JONES: I do have a fundamental question. Are you for or against the application, sir?

THE WITNESS: I'm against it.

N.T. 158-162 (John Butler).

Daniel Procopio, Aldan Borough Planning Commission: I happen to be a member of the Aldan Borough Council, and also a member of the Aldan Borough Planning Commission. And that commission voted unanimously to our council to vote no on this transaction. The council was due to vote at the September meeting last week, but we were informed that DELCORA had postponed the need to have that vote taken, and we will reconsider it at our October meeting. As a member of the planning commission, we held two discussion hearings and we sent a number of questions to Aqua that we felt were not answered in the documents that we read.

...

So we asked a certain number of questions that have been brought up before about this rate quote-unquote stabilization plan, and it was brought up by Mr. Ross Schmucki of Swarthmore Borough earlier today, that essentially Aqua was

negotiating with themselves because they had guaranteed the members of the negotiating team from DELCORA that they would hire them. And as he mentioned, the price is even \$32 million below the lowest estimate given by appraisers of the use of the facility or the assets of the facility and DELCORA, and the \$211 million rate fund is not guaranteed over the course of the ten years, which is what has been discussed. So he was trying to give an example, and I give I think one that makes more sense. If all the ratepayers for Aqua sewer are paying a dollar and Aqua raises their rates ten percent to \$1.10, DELCORA customers can only go to \$1.03 because they're going to take the other seven cents out of that fund to pay the differential, and it will continue along that line until the rate fund is -- or the fund is depleted.

Our calculations indicate that that could happen in year five or six, and what would happen then is, we would be paying maybe a buck and a quarter and the rest of the ratepayers Aqua Wastewater would be paying \$1.80. And I believe Mr. Schmucki mentioned this this afternoon but didn't bring it to the attention of -- that you can understand it. The next year, when the rates go up another 10 percent or whatever the number is and it goes to \$1.98, the people in the DELCORA system that have been paying \$1.25 will need to meet that \$1.98. That is a tremendous balloon payment that will put tremendous stress upon the municipality. So initially it's a good deal, but as a governing agency you have to look down the road and see what the deal's going to look like later. And this deal is very bad in that regard. It does not allow us to have rate stabilization where when we come out of the fund, we would be capped at the \$1.25 level and we would get our rate increases from that level in the future. And DELCORA's response to us was that they would not do that, meaning the Aldan Borough Planning Commission.

...

So if you do the math, by adding 165,000 equivalent customers in the County of Delaware to DELCORA, we are taking Aqua Wastewater from 40,000 to 200,000. So that represents 80 percent of DELCORA, and they're hiring all 136 employees, so my argument would be, they're using the wastewater experience of the DELCORA people as the experts because most of Aqua's work is with fresh water, although they have, as Mr. Butler mentioned just before me, been branching out. They changed the name of the parent company to Essentials Utility. They purchased Peoples Gas in Pittsburgh. They purchased wastewater systems. One of the problems we see, meaning the Aldan Borough Planning Commission, with this sharing of cost is, we have no idea down the road what other municipal authority wastewater systems that Aqua will buy.

...

So I may be off in some of the numbers a little bit, but essentially it's an open-end agreement that we in Delaware County who are looking at a large, significant capital expenditure in order to meet the consent decree that DELCORA has guaranteed with the EPA, we could be doing the same for another 200, 300 thousand people across the state of Pennsylvania. So not only will we be carrying our costs, we'll be carrying their costs as well, and there was no indication from Aqua as to what that number was, what that number could be. And again, if they know this information, they have not made it available to the best of my knowledge.

Lastly, Mr. Butler touched on this a little bit. The Delaware County Regional Water Quality Control, DELCORA, is in a municipally owned authority. It has nine board members which are appointed by the authorizing agency, which happens to be Delaware County Municipal Governing Council, and they get three members appointed each year for a three year term in a rotation. So the current nine members were appointed by the previous council because the majority in the council switched at the end of January of this year. And this deal has a little bit of political element to it as well, so that those individuals would be able to save their jobs and the board of directors would be able to save their positions. And that is why this has moved along at what other individuals would consider to be a relatively rapid pace.

...

And I agree completely with Mr. Butler that Aqua, although they have a good record of replacing their equipment, they always go in for rate increases to cover that because they are answerable to their shareholders, not to the residents of Delaware County, whereas although the authority is the independent agency and a quasi-state agency, there is some local control and representation and there is no guarantee that Aqua will have any representation, even though it was founded thanks to the Swarthmore College professors, was based in Bryn Mawr, they have spread out all over the United States, possibly all over the world.

...

we think that the open-ended agreement of this, meaning Aldan Borough Planning Commission, and the non-guarantees and the fact that within five or six years there will be a tremendous balloon payment that the municipalities will have to collect from their customers, their residents, that this is a very bad deal.

N.T. 165-166, 169-177 (Daniel Procopio, Aldan Borough Planning Commission).

D. Conclusion

Aqua must prove “not only that no harm will come from the transaction” but also that “substantial affirmative benefits” will flow from it. *McCloskey*, 195 A.3d at 1064. The R.D. did not reach this issue, but the record reveals that Aqua has proved neither. As demonstrated in **SPMT Exception 1**, the transaction threatens SPMT and other industrial customers with existential harm. **SPMT Exceptions 2 and 3** document the harm that will be visited on DELCORA customers through Aqua’s planned steep rate increases and the illusory nature of funding for the DELCORA Customer Trust. **SPMT Exception 4** shows that vast additional costs may be imposed on DELCORA’s ratepayers because Aqua has no pretense as a private entity to participate in the EPA’s Combined Sewer Overflow program. Against these significant harms, **SPMT Exception 5** shows Aqua’s

claimed benefits are not substantial – indeed, they are not even real. Nothing in Aqua’s Exception No. 6 undercuts these showings. There will be serious harm if the Commission approves Aqua’s Application, and there will be no affirmative benefits.

*Aqua Exception 6 should be denied and SPMT’s Exceptions granted.*¹³

7. SPMT Reply to Aqua Exception 7: Conditions for Approval of Application

Aqua Exception 7 faults the R.D. for failing to approve the Application subject to the conditions Aqua agreed to accept during the course of the proceeding. Aqua is of course correct that the Commission has the power under Section 1103 of the Public Utility Code to condition the grant of certificates of public convenience. The R.D.’s failure to recommend approval of the transaction with Aqua’s proposed conditions, however, is wise, because in addition to the valid reasons the R.D. gave for denial, Aqua has failed on this record, as explained in SPMT’s Exceptions, to demonstrate “not only that no harm will come from the transaction” but also that “substantial affirmative benefits” will flow from it. *McCloskey*, 195 A.3d at 1064, *citing City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825, 828 (Pa. 1972).

In the event the Commission considers granting Aqua’s Exception 7 and approving the Application with conditions, Aqua’s proposed conditions relating to issues raised by SPMT including [Begin HC] [REDACTED] [End HC] and Aqua and DELCORA’s compliance with E.O. 12803, are wholly inadequate, as explained in SPMT’s reply to Aqua Exception 9.B, 9.E, and 9.F. In the event the Commission approves the Application with conditions, the Commission should impose the conditions SPMT has specified in Section III of these Replies to Aqua’s Exceptions.

Aqua Exception 7 should be denied and SPMT’s Exceptions granted, or, alternatively, SPMT’s proposed conditions should be imposed on any grant of Aqua’s Application.

¹³ DELCORA Exception 3 makes similar arguments and should be denied for the same reasons.

8. SPMT Reply to Aqua Exception 8: Ratemaking Rate Base

Aqua Exception 8 argues that the R.D. erred by concluding that “outstanding issues surrounding DELCORA’s legal ability to transfer assets prevent a reliable determination of the appropriate ratemaking rate base and fair market value” for purposes of Section 1329 of the Public Utility Code. Aqua Exceptions at 49. Aqua points to Trainer Borough’s withdrawal of its protest, ongoing negotiations with the other Municipal Protestants, and its belief that removal of the “Upland/Trainer/Edgmont collection system assets” from any sale to Aqua will not affect the proposed ratemaking rate base of \$276,500,000 because the average appraisal value is much higher than that amount. *Id.* at 50-51. Regardless of whether Aqua reaches a settlement that allows the “Upland/Trainer/Edgmont” assets to transfer, however, there are similarly situated municipalities that are not protestants including the City of Chester and Marcus Hook Borough, and perhaps others, that have contracts with DELCORA that contain asset reversionary rights. SPMT Statement No. 2 at 35:17-39:7. As the R.D. correctly found, if the fundamental inventory of transferable assets is not known, the Commission is not in a position where it can reasonably pass judgement on the requested rate base determination. Similarly, the appropriate sale price cannot be known if material portions of the assets will not be sold or will revert to municipal ownership. Moreover, as discussed *infra* in SPMT’s reply to Aqua Exception 9.E, E.O. 12803 requires that the United States Environmental Protection Agency (EPA) and the Office of Management and Budget (OMB) must establish for themselves the purchase price for the DELCORA asset sale to Aqua, because DELCORA’s assets were funded in part with federal funds and the sale of the system was not publicly bid. As a consequence, Aqua’s laborious recapitulation of the asset valuation testimony in its Exception 8, Aqua Exceptions at 49-65, fails to provide answers to the basic questions of (a) which assets in the inventory will actually be able to be transferred?, and (b) what will be the transfer price for rate base purposes? The R.D. correctly concluded that the answers to these questions are unknowable at this time on the existing record.

Aqua Exception 8 should be denied.

9. SPMT Reply to Aqua Exception 9: Environmental Issues

Aqua's Exception 9 bundles together under the heading "Environmental Issues" several issues that SPMT addressed as separate exceptions. For ease of reference, SPMT replies using Aqua's organization. Cross-references to SPMT's exceptions on the same issues are provided.

A. Introduction

Aqua failed to anticipate and resolve a number of thorny issues that arise when a publicly owned wastewater system such as DELCORA is purchased by a private entity such as Aqua. All affect the question of whether Aqua's acquisition of DELCORA results in a "substantial public benefit" *McCloskey* at 1066. All remain unresolved, only weeks before Aqua asks the Commission to approve its Application. Aqua's blindness (intentional or otherwise) to the critical differences that exist in the environmental arena between the way that public entities and private entities are regulated has infected this proceeding from the outset. It may be that Aqua wants to do what DELCORA is currently doing in the very same way that DELCORA is doing it. But that cannot erase the fundamental distinction that DELCORA is a public entity and Aqua is a private entity. That distinction matters immensely in terms of the legal requirements that apply to those activities. Environmental regulations recognize that public entities are not the same as private entities and have included exceptions, exclusions and separate requirements that are available to public entities but not private entities. Much as Aqua might wish otherwise for this purpose, it simply does not stand on the same footing as DELCORA.

One unresolved issue in particular, [Begin HC] [REDACTED]

[REDACTED]

[REDACTED] [End HC] Backed into a corner on this issue, Aqua now urges that instead of denying its Application for want of an essential permit, the Commission

should grant the Application with conditions. The condition Aqua proposes to cure **[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[End HC]**

Aqua has taken a similarly unjustified “hope for the best” posture on the other unresolved issues it groups together in Exception 9. For example, Aqua is inexplicably confident that its plan to assume DELCORA’s obligations under the 2015 federal Consent Decree designed to remediate DELCORA’s combined sewer overflows (CSOs) will be approved so that DELCORA system ratepayers will not be saddled with the very costly obligation to implement “best available technology” that the federal Clean Water Act requires of private wastewater entities. Aqua is likewise dismissive of the negative impact its acquisition of DELCORA will have on the DELCORA system’s and all other Pennsylvania POTWs’ access to federal funding. Finally, Aqua’s representation that “the existence and implementation” of E.O. 12803 (another regulatory

¹⁴ **[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[End HC]**

requirement about which Aqua was unaware until addressed in SPMT’s testimony) “in no way diminishes the affirmative benefits” of Aqua’s acquisition of DELCORA, is simply false. E.O. 12803’s mandatory local government payback requirements will likely strip the transaction of the money needed to fund what Aqua represented as the transaction’s “primary benefit,” Aqua Statement No. 5 at 11:12-14, the DELCORA Customer Trust.

If only Aqua and its shareholders were going to suffer the consequences of closing a transaction before all the regulatory pieces are in place, it would be bad enough; but the serious regulatory and financial risks that Aqua is triggering fall most heavily on others – SPMT together with all of DELCORA’s other customers. The Commission has the power to prevent this, and it should.

B. Environmental Permits (SPMT Exception 1)

[Begin HC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

16 [REDACTED]
[REDACTED]

17 [REDACTED]

18 [REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED]
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- [REDACTED]
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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End HC]

None of this is “exaggeration.” It is concern born of prudence that Aqua should share, but apparently, and without basis, does not. This alone is reason to deny the Application of an entity that touts as one of the benefits of the transaction its “expertise in ... compliance with Pennsylvania Department of Environmental Protection and US Environmental Protection Agency regulations,” Aqua Statement No. 2 at 14:5-7.

Aqua proposes to cure [Begin HC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End
HC]

Aqua's Exception 9.B should be denied, and SPMT Exception 1 granted.

C. CSOs and the Long Term Control Plan (SPMT Exception 4)

Aqua's Exception No. 9.C (Aqua Exceptions at 73-74) asks the Commission to address and reject SPMT's concern that Aqua's acquisition of DELCORA will trigger a requirement that Aqua make enormous capital expenditures (expenditures that would be passed on to DELCORA system customers) to eliminate, rather than control, DELCORA's combined sewer overflow (CSO) problem. As explained in SPMT's Exception 4, however, the public-to-private CSO remediation cost concern is well founded, Aqua has done nothing to allay the concern, and it stands as one more reason among many that the Commission should deny Aqua's Application. The Commission should grant SPMT's Exception 4 and deny Aqua's Exception No. 9.C.

SPMT's position on this issue is based on a fact that Aqua has not disputed and cannot dispute: DELCORA presently is remediating its combined sewer overflow problem based on a government program available only to publicly owned wastewater systems; there is no reason to believe that the same program would continue to apply once Aqua, a private entity, owns

²¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

DELCORA's WRTP and the 26 additional CSO outfall regulators. As SPMT Witness Woods

explained:

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

SPMT Statement No. 2 at 41:16-42.16.

Aqua argues that "no basis was provided by Mr. Woods, other than Aqua's status as a private company, for his view." Aqua Exceptions at 73. Aqua's "status as a private company," however, is the dispositive basis, because the CSO Control Policy only applies to states and municipalities. This is not a matter of opinion. EPA adopted its CSO Control Policy in 1994, 59 Fed. R. 18688 (April 19, 1994), with the goal of "providing sufficient flexibility to *municipalities*, especially financially disadvantaged communities, to consider the site-specific nature of CSOs and to determine the most

cost-effective means of reducing pollutants and meeting CWA objectives and requirements.” *Id.* at 18689 (emphasis added). It remains in effect today, as administered in Pennsylvania by PA DEP.²² That the policy is not available to privately owned wastewater systems is a fact obvious from the EPA’s definitions. A “CSO” is a discharge from a combined sewer system (CSS), and a “CSS” is *a wastewater collection system owned by a State or municipality*:

A combined sewer system (CSS) is a wastewater collection system owned by a State or municipality (as defined by section 502(4) of the C[lean]W[ater]A[ct])²³ which conveys sanitary wastewaters (domestic commercial and industrial wastewaters) and storm water through a single-pipe system to a Publicly Owned Treatment Works (POTW) Treatment Plant (as defined in 40 CFR 403.3(p)). A CSO is the discharge from a CSS at a point prior to the POTW Treatment Plant. CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment requirements applicable to POTWs.

Id.

SPMT explained all of this in testimony: “the Clean Water Act does not permit EPA to implement the Combined Sewer Overflow requirements where private combined point source discharges are concerned but instead must impose Best Available Technology requirements on these discharges.” SPMT Statement No. 2-SR at 28:10-13.²⁴ Nevertheless, Aqua continues to assume, without any proffered explanation or justification, that Aqua will be permitted to simply step into

²² See, e.g., http://files.dep.state.pa.us/Water/BNPNSM/WastewaterManagement/CSOs/CSO_FAQ.pdf.

²³ Section 502(4) of the Clean Water Act defines a municipality as:

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

33 U.S.C. § 1362.

²⁴ Combined Sewer Overflows are “point source discharges” 59 Fed. R. 18689. Under Section 301(b)(1)(A) of the Clean Water Act, point source discharges that are not owned by a State or municipality are private point source discharges that require application of best available technology (“effluent limitations for point sources, **other than publicly owned treatment works**, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act.”) (emphasis added). Further, Section 402(q) of the Clean Water Act addresses combined sewer overflows and applies only to “municipal combined storm and sanitary sewers.”

DELCORA's CSO remediation obligations under the 2015 federal court consent decree with EPA and PA DEP, even though that decree presupposes that DELCORA's combined sewers qualify as "CSOs" because they are publicly owned. Aqua Exceptions at 74 ("Aqua and DELCORA ... plan to formally request the substitution of Aqua for DELCORA in the Consent Decree at or near the time the Proposed Transaction is expected to close."). But of course, once Aqua owns the DELCORA system, the combined sewers will be privately owned. Given the immense potential capital expense that could follow privatization of DELCORA's combined sewers, the fact that Aqua did not anticipate and resolve the issue before filing its Application leaves the Commission in the dark on a critical future rate consequence that could be triggered by its grant of the Application. That Aqua can afford to be blasé about the issue because it can pass on the added capital expense to its customers through rate base additions that will provide Aqua a handsome return is understandable. The Commission, however, should deny the Application because Aqua here again has failed to provide any answer on a critical public-to-private regulatory issue.

Aqua's Exception 9.C should be denied, and SPMT Exception 4 granted.

D. Impact on Federal Funding (SPMT Exception 2, p. 15 footnote 12)

Aqua Exception No. 9.D (Aqua Exceptions at 74-75) asks the Commission to address and discount SPMT's point that Aqua's acquisition and privatization of DELCORA will deprive both DELCORA system customers and all Pennsylvania POTWs of benefits bestowed under Section 603 of the Clean Water Act, 33 U.S.C. § 1383, which allows the states to provide financing assistance to POTWs at below market rates for infrastructure projects. SPMT Statement No. 2 at 42:20-21.²⁵ **The loss of low-cost funding is an indisputable detriment of the transaction.** SPMT M.B. at 28-30.

²⁵ SPMT did not file a discrete exception on this issue, but instead included it as part of its discussion of the adverse rate impacts Aqua's acquisition of DELCORA will have of DELCORA customers. SPMT Exceptions at 15, n. 12.

Aqua's refusal to acknowledge it – to the point of filing an exception on the issue – suggests that Aqua itself realizes that the overall transaction offers no net public benefits.

The detrimental impact on DELCORA system customers arises because, prior to and independent of DELCORA's decision to sell to Aqua, DELCORA had planned a \$1 billion capital investment in order to expand the WRTP so it could eliminate reliance on the Philadelphia Water Department treatment plant. SPMT Statement No. 2 at 16-18. DELCORA could have financed that investment with a Clean Water Act loan, available only to publicly owned wastewater systems, below market rates. Instead, under private Aqua ownership, the capital cost of a project DELCORA had already planned will be much higher, with no added benefit. As SPMT Witness Woods explained:

Section 1383 of the Clean Water Act allows the states to provide financing assistance to priority projects through the revolving loan program. Loans can be made available at below market rates under this program. However, these loans can only be made to POTWs. Private systems are excluded from the program. This is a detriment to the residents and businesses in Delaware County because these low interest funds, including interest free loans, will not be available to finance the necessary improvements to the system once it is sold to AQUA. If the sale of the system is approved and this becomes a private system, the capital improvements will be financed at much higher investor-owned utility capital costs, thereby burdening the ratepayers with a higher revenue requirement than that which would otherwise be possible if the system remained in public hands.

SPMT Statement No. 2 at 43:21-44:8.

Aqua's only response to this obvious detriment, repeated in its Exceptions, are vague and unsupported assertions disparaging the usefulness of the Clean Water Act funding. Aqua Exceptions at 75.

The detrimental impact on all other Pennsylvania POTWs from Aqua's privatization of the WRTP expansion project is simply a product of funding formula arithmetic. The formula used to allocate funds is a simple ratio of all POTW capital needs in Pennsylvania divided by all POTWs in the United States. Because the DELCORA system's \$1 billion investment will not be included in the

formula if DELCORA is acquired by Aqua, Pennsylvania's allocated share will decrease, with the result that all remaining Pennsylvania POTWs will lose out. As Mr. Woods explained:

Pennsylvania's current allotment of the annual Federal Clean Water Act appropriation for wastewater system improvements is 3.9%, as I noted in my Direct Testimony. Let me illustrate the impact of the sale of DELCORA by focusing on the potential impact of removing a single year's capital needs from the calculation of the appropriation. Let's assume that the total annual need for Pennsylvania is \$400,000,000. The comparable US need with Pennsylvania's ratio at 3.9% would be roughly \$10,256,410,000. Now, let's remove a one-year \$30,000,000 need for DELCORA from both the numerator (\$400,000,000 - \$30,000,000) and denominator (\$10,256,410,000 - \$30,000,000) and recalculate the ratio. In doing so, we will find that the Pennsylvania ratio is reduced from 3.9% to 3.6%. Pennsylvania will receive a smaller share of the Federal Clean Water Act construction fund appropriation as a result of this sale.

SPMT Statement No. 2SR at 26:3-15.

Aqua offered no rejoinder on this point, resting on its argument that it does not matter because Pennsylvania's infrastructure needs will be less. This position is breathtaking in its implications. Pennsylvania's infrastructure needs will not be less. Aqua still intends to implement the \$1 billion in capital improvements that DELCORA had planned. However, the money to pay for those improvements will necessarily come from Aqua's customers rather than federal grants and loans supported by tax payers across the Country. Aqua's cavalier approach to the issue underscores the utter disregard that it has for DELCORA's customers who will be used and abused for Aqua's benefit.

Aqua's Exception 9.D should be denied.

E. Executive Order (E.O.) 12803²⁶ (SPMT Exceptions 3 and 6)

Aqua's Exception No. 9.E (Aqua Exceptions at 75-78) asks the Commission to address SPMT's evidence that E.O. 12803 places significant unaddressed obstacles in the path of the

²⁶ A copy of Presidential Executive Order 12803, in evidence as SPMT Statement No. 2 Appendix C, is attached to SPMT's Exceptions as Appendix A.

transaction, and further asks that even though “Aqua and DELCORA have not officially started the process for addressing” the approvals and obligations mandated by E.O.12803, Aqua Exceptions at 77, the Commission should agree with Aqua that those requirements “will not have a material impact on closing” the transaction, *id.*, and that “[i]mportantly,” implementation of E.O. 12803 “in no way diminishes the affirmative benefits” of the transaction. *Id.* at 78. There is no evidence in the record on which the Commission could reach the conclusions Aqua urges. Although Aqua attempts to shift onto SPMT the burden to prove that Aqua and DELCORA will be unable to overcome E.O. 12803’s challenges, arguing that SPMT’s “concerns are speculative at best,” *id.* at 77, the burden to show that Aqua will be able to satisfy E.O. 12803’s requirements – obstacles that stand in the way of the sale coming to fruition -- falls squarely on Aqua as applicant.

Aqua concedes, as it must, that E.O. 12803 applies to DELCORA’s sale of its assets to Aqua.²⁷ While allowing for the privatization of publicly owned infrastructure assets that were funded in part by federal funds, E.O. 12803 imposes significant restrictions on DELCORA’s sale of those assets to Aqua. These include:

- EPA and OMB must consent to the sale of DELCORA assets to Aqua;
- EPA and OMB must establish for themselves the purchase price under E.O. 12803 for the DELCORA asset sale to Aqua because the sale of the system was not publicly bid; and
- DELCORA must apply the proceeds of the sale to Aqua to repay to the federal government the undepreciated value of assets acquired with federal funds and repay to the municipalities DELCORA serves the **full unadjusted amount** of assets

²⁷ Aqua made no mention of E.O. 12803 in its Application or in the testimony supporting it, and appears to have been unaware of its existence until SPMT raised the issue in its testimony. Aqua agrees it applies because DELCORA obtained federal grants to construct certain of its wastewater facilities. Aqua Exceptions at 77.

acquired with municipal funds before DELCORA is permitted to use any of the proceeds to fund DELCORA's proposed Trust.

See SPMT Statement No 2 at 44-50; SPMT Statement No. 2SR at 20-25. As of the close of the record in this case, and now in Exceptions, Aqua has nothing to offer but its optimism "about obtaining the necessary resolution of the EO from all parties." But more is required as to each.

As for EPA and OMB's consent to the sale, the Commission has no assurance, even if it conditions approval of the transaction on EPA and OMB's consent -- as Aqua urges, Aqua Exceptions at 78 -- that the EPA and OMB will consent to the sale of all of DELCORA's assets; if they do not so consent, and Aqua and DELCORA nonetheless seek to close the transaction, it will be a different transaction than the Commission approved, requiring the Commission to revisit the issue of whether the new transaction is in the public interest.

The same is true for the purchase price, except that the stakes are much higher, because if the EPA and OMB fix a price different from the price chosen by the parties without the discipline of competitive bidding, the Commission will need to revisit one of the fundamental issues in the case. As SPMT Witness Woods explained, the outcome at EPA and OMB could force the Commission to re-establish Aqua's rate base for the acquisition:

Because federal funds have been used to construct the facilities, the Transfer Price must be established by the Office of Management and Budget and the US Environmental Protection Agency. **Until this Transfer Price is determined, the actual purchase price of the assets is not known or measurable.** The Company has asked the Commission to set rate base as the purchase price negotiated with DELCORA, but this amount may be higher or lower than the Transfer Price defined in E.O. 12803. Until the Transfer Price is known, the negotiated purchase price should not be relied upon to establish rate base.

SPMT Statement No. 2 at 46:16-22.

More troubling still, and as set forth in detail in **SPMT's Exception 3**, E.O. 12803's mandate that DELCORA repay to the municipalities DELCORA serves the **full unadjusted amount** of assets

contributed by them²⁸ could and likely would leave little or nothing of the proceeds with which to fund the proposed DELCORA Customer Trust that Aqua has asserted is the primary public benefit of the transaction. Aqua Statement No. 2 at 13:16-17; Aqua Statement No. 5 at 11:12-14. In light of this reality, and the fact that Aqua admits that the calculation of the required payback amounts has not even commenced, Aqua Exceptions at 77, Aqua’s claim that E.O. 12803 “in no way diminishes the affirmative benefits” of the transaction, *id.* at 78, can only be true because there is no way on the present record to actually assess whether the transaction’s claimed “primary benefit” (the Trust) will actually confer any benefit at all.

Aqua’s Exception 9.E should be denied, and SPMT Exceptions 3 and 6 granted.

F. Conclusion and Conditions (SPMT Exception 1 and Part III pp. 31-33)

Aqua caps off its Exception 9 with Exception 9.F, in which it urges the Commission to condition a grant of the Application rather than deny it outright as the R.D. recommends. This is not a viable alternative, and the Commission should reject it. Conditions requested by an applicant should not be used as a second bite of the evidentiary apple to prove and have in place what it should have done in presenting its evidentiary case. These fundamental voids in technical and legal fitness required for certification warrant denial of the application.

The conditions Aqua agrees to accept here have already been exposed as meaningless in SPMT’s replies to Aqua Exception 9.B and 9.E. **[Begin HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁸ E.O. 12803 makes a clear distinction between the amount to be repaid to local governments, which shall “recoup in full the unadjusted dollar amount of their portions of total project costs” and the amount to be repaid to the federal government, which shall “recoup in full the amount of Federal grant awards...less the applicable share of accumulated depreciation.” Thus, the repayment amount to DELCORA’s local government contributors cannot to be reduced to reflect accumulated depreciation – in other words, local governments must be repaid the full undepreciated original cost value.

[REDACTED]
[REDACTED]
[REDACTED] **[End HC]**

Aqua’s agreement to condition closing on obtaining “an appropriate waiver or other resolution of the Executive Order 12803” likewise misses the mark. The EPA and OMB could in the course of their review alter the transaction’s fundamentals, necessitating a reassessment by the Commission. And as explained in detail in **SPMT Exception No. 3**, whatever ability EPA and OMB may have to “waive” some requirements of E.O. 12803, the plain language of the executive order precludes any ability to dispense with the local municipality repayment obligations, enforcement of which is likely to leave the transaction’s alleged “primary benefit” – the Trust – without any funds to offset Aqua’s planned steep rate increases.

The Commission should deny Aqua’s Exception 9.F, and thereby reject Aqua’s proposal to condition a grant of the Application on safeguards that are utterly inadequate.

Aqua Exception 9.F should be denied.

10. SPMT Reply to Aqua Exception 10: Section 507 Approvals

Aqua’s Exception 10 faults the R.D. for concluding that Aqua failed to establish a record upon which the Commission can make a determination about Aqua’s request for approval to assume DELCORA’s municipal contracts and other contracts pursuant to Section 507 of the Public Utility Code, in part because of pending litigation. Aqua relies on the fact that the Delaware County Court of Common Pleas dismissed Delaware County’s lawsuit against DELCORA on December 28, 2020, and argues, as in Aqua Exception 4, that now no pending litigation impedes the transaction. Aqua Exceptions at 79. However, the County has appealed the trial court order to the Commonwealth Court, and its appeal operates as an automatic supersedeas of the trial court’s order pursuant to Pa. R.A.P. 1736 (b). The result is that the litigation continues and remains as one of the many

impediments to closing the transaction. Aqua also argues that because it is in “active settlement discussions with the four remaining Municipal Protestants to resolve their individual Protests,” there are no remaining uncertainties concerning assignment of municipal contracts. *Id.* But again, there are similar asset reversion provisions in DELCORA’s contracts with the City of Chester and the Borough of Marcus Hook, and perhaps other municipalities. Together with all of the other loose ends and remaining uncertainties that plague Aqua’s Application, see **SPMT Exception 6**, which SPMT incorporates here by reference, the uncertainties concerning DELCORA’s ability to assign these contracts to Aqua justify the R.D.’s recommendation to deny the Application.

Aqua Exception 10 should be denied.

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

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

[REDACTED]

[REDACTED]

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

- I. The Commission should condition approval of the Application on DELCORA retaining ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators; to accomplish this under the terms of the Asset Purchase Agreement, these DELCORA assets could be designated as Non-

Assignable Assets in the context of Section 2.06 of the Asset Purchase Agreement, except that the designation would be permanent rather than transitional;

- II. The Commission should condition approval of the Application on removing the value of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from Aqua's post-acquisition rate base, as these assets will be retained by DELCORA; and
- III. The Commission should condition approval of the Application on DELCORA retaining SPMT as a DELCORA customer under the existing contract between the parties, consistent with Section 2.06 of the Asset Purchase Agreement.
- IV. In the alternative regarding the rate issue, and to preclude impairment of existing contracts, the Commission should direct Aqua as a compliance filing in this proceeding to adhere to the terms and conditions of the present contract for service between SPMT and DELCORA for the remainder of such contract's term.

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

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

[Begin HC] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End HC]

- B. Aqua may not include the value of DELCORA's Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators in its rate base until the Commission has approved the transfer of those assets from DELCORA to Aqua consistent with the provisions of Section A of these alternative proposed conditions; and
- C. Service to SPMT shall continue under SPMT's contract with DELCORA until the later of (a) the effective date of rates in Aqua's first rate case following the transfer of ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from DELCORA to Aqua consistent with the provisions of Section A of these alternative proposed conditions; or (b) the remainder of the term of SPMT's contract with DELCORA, whichever is later.

IV. CONCLUSION WITH REQUESTED RELIEF

The Application should be denied, for the reasons specified in the R.D., and for the additional reasons advanced in SPMT's Exceptions and in these replies to the Exceptions of Aqua and DELCORA, which are fully supported in the evidentiary record. DELCORA in no way resembles a troubled wastewater system – either in financial or technical terms – and is in no need of rescue. The transaction provides no benefits, let alone substantial affirmative public benefits. Instead, the transaction actively causes harm, by needlessly increasing rates with no corresponding benefit **[Begin HC]** [REDACTED]

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

If the Application is not denied outright, the Commission must impose conditions that address these issues. In particular, the Commission should require DELCORA to retain ownership on a

permanent basis of the W RTP and the 26 CSO regulators [Begin HC]

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

Respectfully submitted,

/s/ Kevin J. McKeon

Thomas J. Sniscak, Esq. (PA ID No. 33891)

Kevin J. McKeon (PA ID No. 30428)

Whitney E. Snyder, Esq. (PA ID No. 316625)

Hawke, McKeon & Sniscak LLP

100 North Tenth Street

Harrisburg, PA 17101

Tel: (717) 236-1300

tjsniscak@hmslegal.com

kjmckeon@hmslegal.com

wesnyder@hmslegal.com

*Attorneys for Sunoco Partners Marketing &
Terminals, L.P.*

Dated: February 1, 2021

Appendix

1

Schedule HJW-4: Comparison of Annual Revenue Requirements

YEAR	AQUA		DELCORA		Variance
	Calculated	Implemented	Calculated	Implemented	
2020	\$ 79,912,409	\$ 79,912,409	\$ 70,978,127	\$ 70,978,127	\$ 8,934,282
2021	\$ 82,298,516	\$ 82,298,516	\$ 74,527,033	\$ 74,527,033	\$ 7,771,483
2022	\$ 85,489,148	\$ 85,489,148	\$ 78,253,385	\$ 78,253,385	\$ 7,235,763
2023	\$ 91,865,310	\$ 91,865,310	\$ 82,166,054	\$ 82,166,054	\$ 9,699,256
2024	\$ 96,204,535	\$ 96,204,535	\$ 86,274,357	\$ 86,274,357	\$ 9,930,178
2025	\$ 101,133,400	\$ 101,133,400	\$ 90,588,075	\$ 90,588,075	\$ 10,545,325
2026	\$ 117,759,304	\$ 117,759,304	\$ 95,117,479	\$ 95,117,479	\$ 22,641,826
2027	\$ 136,596,484	\$ 136,596,484	\$ 99,873,353	\$ 99,873,353	\$ 36,723,131
2028	\$ 152,158,031	\$ 152,158,031	\$ 105,865,754	\$ 105,865,754	\$ 46,292,277
2029	\$ 143,289,854	\$ 152,158,031	\$ 105,865,754	\$ 105,865,754	\$ 46,292,277
2030	\$ 141,805,600	\$ 152,158,031	\$ 105,865,754	\$ 105,865,754	\$ 46,292,277
2031	\$ 140,998,671	\$ 152,158,031	\$ 105,865,754	\$ 105,865,754	\$ 46,292,277
2032	\$ 141,345,471	\$ 152,158,031	\$ 105,865,754	\$ 105,865,754	\$ 46,292,277
2033	\$ 142,709,336	\$ 152,158,031	\$ 105,865,754	\$ 105,865,754	\$ 46,292,277
2034	\$ 144,174,781	\$ 152,158,031	\$ 111,159,041	\$ 111,159,041	\$ 40,998,989
2035	\$ 145,324,877	\$ 152,158,031	\$ 111,159,041	\$ 111,159,041	\$ 40,998,989
2036	\$ 143,923,738	\$ 152,158,031	\$ 111,159,041	\$ 111,159,041	\$ 40,998,989
2037	\$ 142,339,740	\$ 152,158,031	\$ 111,159,041	\$ 111,159,041	\$ 40,998,989
2038	\$ 140,263,994	\$ 152,158,031	\$ 111,159,041	\$ 111,159,041	\$ 40,998,989
2039	\$ 138,014,136	\$ 152,158,031	\$ 111,159,041	\$ 111,159,041	\$ 40,998,989
2040	\$ 135,598,617	\$ 152,158,031	\$ 111,159,041	\$ 111,159,041	\$ 40,998,989
NPV Savings					\$462,871,937

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the persons listed below in accordance with the requirements of § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ONLY

Thomas T. Niesen, Esquire
Thomas, Niesen & Thomas, LLC
212 Locust Street, Suite 302
Harrisburg, PA 17101
tniesen@tntlawfirm.com

Counsel for Aqua Pennsylvania Wastewater, Inc.

John F. Povilaitis, Esquire
Alan M. Seltzer, Esquire
Buchanan Ingersoll & Rooney, PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
John.povilaitis@bipc.com
Alan.seltzer@bipc.com

Counsel for Aqua Pennsylvania Wastewater, Inc.

Christine Maloni Hoover, Esquire
Erin L. Gannon, Esquire
Harrison W. Breitman, Esquire
Santo G. Spataro, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
OCADelcora@paoca.org
Counsel for Office of Consumer Advocate

Steven C. Gray, Esquire
Office of Small Business Advocate
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
sgray@pa.gov
Counsel for Office of Small Business Advocate

Alexander R. Stahl, Esquire
Aqua Pennsylvania
762 W. Lancaster Avenue
Bryn Mawr, PA 19010
astahl@aquaamerica.com

Counsel for Aqua Pennsylvania Wastewater, Inc.

Gina L. Miller, Esquire
Erika L. McLain, Esquire
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
ginmiller@pa.gov
ermclain@pa.gov
Counsel for Bureau of Investigation and Enforcement

Ralph C. Smith
Larkin & Associates, PLLC
15728 Farmington Road
Livonia, MI 48154
ocadelcora@paoca.org
Consultant for OCA

Brian Kalcic
Excel Consulting
225 S. Meramec Avenue
Suite 720T
St. Louis, MO 63105
Excel.consulting@sbcglobal.net
Consultant for OSBA

Michelle M. Skjoldal
Justin G. Weber
Troutman Pepper Hamilton Sanders LLP
Suite 200
100 Market Street
P.O. Box 1181
Harrisburg, PA 17108-1181
Michelle.skjoldal@troutman.com
Justin.weber@troutman.com
*Counsel for Kimberly-Clark Corporation and
Kimberly-Clark Pennsylvania, LLC*

Jason T. Ketelsen
Troutman Pepper Hamilton Sanders LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
Jason.ketelsen@troutman.com
*Counsel for Kimberly-Clark Corporation and
Kimberly-Clark Pennsylvania, LLC*

Marc D. Machlin
Troutman Pepper Hamilton Sanders LLP
2000 K Street, N.W., Suite 600
Washington, DC 20006
Marc.machlin@troutman.com
*Counsel for Kimberly-Clark Corporation and
Kimberly-Clark Pennsylvania, LLC*

Scott J. Rubin, Esquire
333 Oak Lane
Bloomsburg, PA 17815
Scott.j.rubin@gmail.com
*Counsel for Edgmont Township, Lower
Chichester Township, Southwest Delaware
County Municipal Authority, Trainer
Borough, and Upland Borough*

Kenneth R. Stark, Esquire
McNees Wallace & Nurick LLC
P.O. Box 1166
Harrisburg, PA 17108-1166
kstark@mcneeslaw.com
Counsel for County of Delaware

Thomas Wyatt, Esquire
Matthew S. Olesh, Esquire
Obermayer Rebmann Maxwell & Hoppel, LLP
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Thomas.Wyatt@obermayer.com
Matthew.Olesh@obermayer.com
Counsel for DELCORA

/s/ Kevin J. McKeon

Thomas J. Sniscak, Esquire
Kevin J. McKeon, Esquire
Whitney E. Snyder, Esquire
Melissa A. Chapaska, Esquire

Dated: February 1, 2021