PENNSYLVANIA

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

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|  | Public Meeting held March 25, 2021 |
| Commissioners Present:  Gladys Brown Dutrieuille, Chairman  David W. Sweet, Vice Chairman  John F. Coleman, Jr.  Ralph V. Yanora | |
| Application of Aqua Pennsylvania Wastewater, Inc., pursuant to Sections 507, 1103, and 1329 of the Public Utility Code for Approval of its Acquisition of  the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority | A-2019-3015173 |
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**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Aqua Pennsylvania Wastewater, Inc. (Aqua or Company), the Delaware County Regional Water Quality Control Authority (DELCORA), and Sunoco Partners Marketing & Terminals, L.P./Energy Transfer (Sunoco or SPMT) filed on January 22, 2021, in the above-captioned proceeding. The Exceptions were filed in response to the Recommended Decision of Administrative Law Judges (ALJs) Angela T. Jones and F. Joseph Brady issued on January 12, 2021. On February 1, 2021, the Commission’s Bureau of Investigation and Enforcement (I&E), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), and the County of Delaware, Pennsylvania (County) filed Replies to Exceptions. Aqua and Sunoco each filed public and confidential versions of their Replies to Exceptions on February 1, 2021. For the reasons below, we shall decline to rule on the Exceptions of Aqua, DELCORA, and Sunoco. Additionally, we shall vacate the Recommended Decision, reopen the record, remand the proceeding to the Office of Administrative Law Judge (OALJ) for such further proceedings as may be appropriate, and direct the issuance of a Recommended Decision on remand, all consistent with this Opinion and Order.

# History of the Proceeding

This matter concerns the Application of Aqua filed on March 3, 2020, pursuant to Sections 1102, 1329 and 507 of the Public Utility Code (Code), 66 Pa. C.S. §§ 1102, 1329 and 507. In its Application, Aqua requests the issuance of an Order and Certificates of Public Convenience for the: (1) approval of the acquisition by Aqua of the wastewater system assets of DELCORA situated within all or part of 49 municipalities within portions of Chester and Delaware Counties, Pennsylvania; (2) approval of the right of Aqua to begin to offer, render, furnish and supply wastewater service to the public in portions of Delaware County and Chester County, Pennsylvania; and (3) assignments of 163 municipal contracts, between Aqua and DELCORA, pursuant to Section 507 of the Code, approval of the Asset Purchase Agreement (APA), and approval of the terms of a Memorandum of Understanding (MOU) it has entered with DELCORA. In its Application, Aqua also requested, pursuant to Section 1329(c)(2), the Commission’s approval of a ratemaking rate base value of the assets to be acquired by Aqua in the amount of $276,500,000. 66 Pa. C.S. § 1329(c)(2).

On March 26, 2020, the OSBA filed a Notice of Appearance and Intervention. On April 2, 2020, the OCA filed a Protest to the Application and counsel for the OCA and I&E filed their respective Notices of Appearance.

On May 14, 2020, the County filed a complaint against DELCORA and the DELCORA Rate Stabilization Trust in the Delaware County Court of Common Pleas, docketed at CV-2020-003185 (County lawsuit). Thereafter, the County amended its lawsuit to enforce an ordinance that would dissolve DELCORA, and Aqua intervened in the County lawsuit seeking to protect its interests in its APA with DELCORA.

On May 18, 2020, the County filed a Petition to Intervene in the Application proceeding.[[1]](#footnote-2) DELCORA filed a Petition to Intervene on June 6, 2020. Thereafter, by Secretarial Letter dated June 11, 2020 (*June 2020 Secretarial Letter*), the Commission notified Aqua of the conditional acceptance of the Application for filing. However, the Commission directed the Company: (1) to proceed to provide notice of the filing of the Application; (2) to amend its Application to include certain supplemental materials; and (3) to ensure verification of the supplemental materials.

On June 15, 2020, Edgmont Township of Delaware County (Edgmont Township) filed a Petition to Intervene.

On June 23, 2020, the County filed a Petition for Reconsideration of Staff Action (County Reconsideration Petition) requesting the rescission of the *June 2020 Secretarial Letter* and the reissuance of an amended Secretarial Letter with the following additional condition:

Require Aqua to comply with Section 1329(d)(1)(v) of the Public Utility Code and amend its Application to include all relevant documents related to the Rate Stabilization Plan (referenced in Paragraph 36 of the Application and in various direct testimony statements) prior to filing a verification letter with the Commission.

County Reconsideration Petition at 1-2.

On June 25, 2020, DELCORA filed a Petition to Intervene.

On July 9, 2020, Aqua filed an Answer to the County Reconsideration Petition averring that there is no Rate Stabilization Plan referenced in Paragraph 36 of the Application or in various direct testimony statements. The Company objected to the County Reconsideration Petition arguing, in part, that the Petition was not ripe for review. Answer to County Reconsideration Petition at 6.

By Secretarial Letter dated July 14, 2020, the Commission notified the Parties that the docket was inactive but, if Aqua satisfied all of the conditions in the *June 2020 Secretarial Letter* and the docket became active as a result of that satisfaction, the County Reconsideration Petition, and any responsive filings, would be accepted into the docket and assigned for formal action and disposition.

On July 15, 2020, the County filed an Answer and Reply to the Answer of Aqua to the County Reconsideration Petition or, in the alternative an Amended Petition for Reconsideration of Staff Action (County Amended Reconsideration Petition), incorporating the averments of the initial Reconsideration Petition and averring “new and additional information concerning developments in a civil court proceeding that arose after the County filed its Petition.” County Amended Reconsideration Petition at 2.

On July 17, 2020, Southwest Delaware County Municipal Authority (SWDCMA) filed a Protest to the Application.

On July 23, 2020, Aqua filed a letter confirming completion and satisfaction of the notice requirements and conditions set forth in the *June 2020 Secretarial Letter* and requested that the Commission finally accept the Application.

By Secretarial Letter dated July 27, 2020, the Commission acknowledged receipt of the Company’s completion of the requirements and conditions of filing and accepted Aqua’s Application for consideration. By Hearing Notice dated July 27, 2020, the OALJ scheduled an Initial Call-in Telephonic Prehearing Conference for September 2, 2020, before ALJ Jones.

On July 30, 2020, Edward Clark, Jr., filed a Protest on behalf of Treasure Lake Property Owners Association. On July 31, 2020, Ross Schmucki filed a Protest to the Application.

On August 4, 2020, Aqua filed its Answer to the County Amended Reconsideration Petition.

Upland Borough and Lower Chichester Township filed Protests to the Application on August 7, 2020. Also, on August 7, 2020, the County filed a Petition for Stay and Request for Commission Review and Answer to a Material Question (Interlocutory Petition).[[2]](#footnote-3)

On August 11, 2020, Cynthia Pantages filed a Protest for C&L Rental Properties.

On August 13, 2020, I&E filed a letter in support of the Interlocutory Petition. Additionally, the OCA filed its brief in support of the Interlocutory Petition on August 14, 2020.

Also, on August 14, 2020, the OCA filed an Expedited Motion requesting an extension of the suspension period by sixty days due to the COVID-19 pandemic. The OCA filed the Expedited Motion pursuant to Emergency Orders issued by the Commission pertaining to the pandemic. *See* *Suspension of Regulatory and Statutory Deadlines: Modification to Filing and Service Requirements* *– Emergency Order*, Docket No. M‑2020‑3019262 (March 20, 2020) (*Emergency Order*);and *Suspension of Regulatory and Statutory Deadlines: Modification to Filing and Service Requirements* *– Ratification Order*, Docket No. M-2020-3019262 (Order adopted March 26, 2020) (*Ratification Order*).

Notice of the Application was published in the *Pennsylvania Bulletin* on August 15, 2020, and a deadline of August 31, 2020 was established for the filing of protests or petitions to intervene. 50 *Pa. B.* 4220.

On August 17, 2020, Aqua and DELCORA filed their respective briefs in opposition to the Interlocutory Petition. Also, on August 17, 2020, Trainer Borough filed a Protest to the Application.

On August 20, 2020, Edgmont Township, Lower Chichester Township, SWDCMA, Trainer Borough, and Upland Borough (collectively, Municipal Protestants) filed an Answer in support of the Expedited Motion. On August 21, 2020, Edgmont Township withdrew its Petition to Intervene and filed a Protest to the Application.

On August 24, 2020, Aqua, DELCORA, the Municipal Protestants, the County, and the OSBA filed Answers to the OCA’s Expedited Motion for a 60-day extension of the statutory deadline.

By Opinion and Order entered August 27, 2020, the Commission denied both the County Reconsideration Petition and the County Amended Reconsideration Petition. Also, on August 27, 2020, Aqua and DELCORA each filed Answers to the Interlocutory Petition.

Subsequently, on August 31, 2020, the Commission issued an Opinion and Order in which the Commission declined to answer the material question posed by the Interlocutory Petition filed by the County. Also, on August 31, 2020, Chief Administrative Law Judge (CALJ) Charles E. Rainey, Jr., granted the OCA’s Expedited Motion (*Extension Order*). The *Extension Order* extended the statutory suspension period in this case by sixty days or until March 26, 2021. *Extension Order* at 2.

On August 31, 2020, Aqua also filed a Petition for Protective Order and Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark Corporation (Kimberly-Clark) filed a Protest to the Application.

On September 4, 2020, Aqua filed a Petition for Reconsideration of Staff Action (Reconsideration Petition) in response to the *Extension Order*. On September 10, 2020, and September 22, 2020, the OSBA and the OCA filed their respective Answers in opposition to the Reconsideration Petition.

Public Input Hearings were held on the afternoon and evening of September 16, 2020, at which fifteen witnesses appeared and testified.

On September 25, 2020, the Municipal Protestants filed a Motion for Summary Judgment.

By Opinion and Order entered October 8, 2020, the Commission denied the Reconsideration Petition.

On October 15, 2020, Aqua and DELCORA filed Answers in Opposition to the Motion for Summary Judgment and the County filed an Answer in support. On October 16, 2020, I&E filed a letter addressing Aqua’s Answer to the Motion. By Order dated October 30, 2020, ALJ Jones denied the Municipal Protestants’ Motion for Summary Judgment.

Between November 3-6, 2020, three of the Municipal Protestants filed lawsuits against DELCORA and the DELCORA Rate Stabilization Trust in Delaware County Court of Common Pleas for breach of contract and to assert certain property interests that conflict with DELCORA’s representations in the APA. These lawsuits, (collectively the Municipal lawsuits) are comprised of the following individual actions: (1) *SWDCMA v. DELCORA and the DELCORA Rate Stabilization Trust*, Docket No. CV‑2020-007469l; (2) *Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust*, Docket No. CV-2020­007552; and (3) *Upland Borough v. DELCORA and the DELCORA Rate Stabilization Trust*, Docket No. CV-2020-007596.

Evidentiary hearings for this proceeding were held as scheduled on November 9 and 10, 2020. At the hearing, testimony and exhibits were entered into the record and cross-examination was conducted.

By notice dated November 18, 2020, ALJ Brady was assigned to this proceeding as an additional ALJ. Main Briefs were filed by the Parties on December 1, 2020, and Reply Briefs were filed on December 14, 2020. The record closed on December 14, 2020, upon receipt of the Parties’ Reply Briefs.

On December 28, 2020, the Court of Common Pleas of Delaware County issued an Order in the County lawsuit at No. CV-2020-003185. There was no objection to the ALJs’ taking notice of the County Court’s Order.

On January 8, 2021, Trainer Borough filed a Notice of Withdrawal of its Protest (Trainer Notice of Withdrawal) and a Joint Stipulation of Aqua, DELCORA, and Trainer Borough for settlement (Trainer Stipulation).

In their Recommended Decision issued on January 12, 2021, the ALJs recommended the denial of the Application because of Aqua’s failure to meet its burden of proof.

On January 22, 2021, Aqua, DELCORA, and Sunoco filed their respective Exceptions.

On January 27, 2021, Upland Borough filed a Notice of Withdrawal of its Protest (Upland Notice of Withdrawal). Also, on January 27, 2021, Aqua, DELCORA and Upland Borough filed a Joint Stipulation for settlement which includes Upland Borough’s agreement to discontinue its Complaint against DELCORA and other parties in the Municipal lawsuit at No. CV‑2020‑007596 (Upland Stipulation).

On January 28, 2021, Kimberly-Clark filed a Notice of Withdrawal of its Protest (Kimberly-Clark Notice of Withdrawal). Also, on January 28, 2021, Aqua and Kimberly-Clark filed a Joint Stipulation by which Kimberly-Clark would terminate any outstanding litigation related to the Application subject to the Commission’s approval (Kimberly-Clark Stipulation).

On January 29, 2021, the County filed a Petition for Official and Judicial Notice of Facts pursuant to 52 Pa. Code §§ 5.41 and 5.408 (County Appeal Notice Petition). The County requests the Commission to take notice of its filing of a Notice of Appeal of the Order of the Court of Common Pleas in the County lawsuit. County Appeal Notice Petition at 2-3.

On February 1, 2021, Aqua, I&E, the OCA, the OSBA, the County, and Sunoco filed Replies to Exceptions.

On February 9, 2021, SWDCMA filed a Notice of Withdrawal of its Protest (SWDCMA Notice of Withdrawal). Also, on February 9, 2021, Aqua, DELCORA, and SWDCMA filed a Joint Stipulation for settlement which includes SWDCMA’s agreement to discontinue its Complaint against DELCORA and other parties in the Municipal lawsuit at No. CV‑2020-007469 (SWDCMA Stipulation).

On February 18, 2021, Aqua filed an Answer to the Notice Petition indicating that it had no objection to the Commission taking notice of the County’s appeal of the Court of Common Pleas order.

On February 19, 2021, the County filed Objections to the Joint Stipulation for settlement filed by Aqua, DELCORA, and SWDCMA (Objections to SWDCMA Stipulation).

On February 25, 2021, Aqua and DELCORA each filed Answers to the County’s Objections to the SWDCMA Stipulation. On February 26, 2021, SWDCMA filed an Answer to the County’s Objections.

Also, on February 26, 2021, Edgmont Township filed a Notice of Withdrawal of its Protest (Edgmont Notice of Withdrawal). Attached as an appendix to the Notice of Withdrawal is a Joint Stipulation of Aqua, DELCORA and Edgmont Township for settlement.

On March 4, 2021, Lower Chichester Township filed a Notice of Withdrawal of its Protest (Lower Chichester Notice of Withdrawal). Attached as an appendix to the Notice of Withdrawal is a Joint Stipulation of Aqua, DELCORA and Lower Chichester Township for settlement, which includes Lower Chichester’s agreement to discontinue its Complaint against DELCORA and other parties in the Municipal lawsuit at No. CV‑2020‑007552 (Lower Chichester Stipulation).

On March 8, 2021, the County filed Objections to the Joint Stipulations contained in the Edgmont Notice of Withdrawal (Objections to Edgmont Stipulation) and the Lower Chichester Notice of Withdrawal (Objections to Lower Chichester Stipulation) (collectively, Objections to Edgmont Stipulation and Objections to Lower Chichester Stipulation).[[3]](#footnote-4) On March 9, 2021, Lower Chichester Township filed a letter in response to the Objections to the Lower Chichester Stipulation (Lower Chichester Letter).[[4]](#footnote-5)

On March 10, 2021, Edgmont Township filed a letter in response to the Objections to the Edgmont Stipulation which contain the same assertions set forth in the Lower Chichester Letter. Also, on March 10, 2021, Aqua filed a letter stating that it is voluntarily extending the deadline for the Commission’s issuance of a final order as set forth in Section 1329(d)(2) of the Code to permit the issuance of a final order beyond March 26, 2021 (Extension Letter). In its Extension Letter, Aqua references, in part, the County’s filing of Objections to the SWDCMA, Edgmont and Lower Chichester Stipulations, Aqua’s Answer to the Objections to the SWDCMA Stipulation and Aqua’s intention to file Answers to the Objections to Edgmont Stipulation and the Objections to Lower Chichester Stipulation. According to Aqua, extending the consideration period will allow the Commission to take the appropriate time to address the recent filings. Extension Letter at 2.

On March 10, 2021, Aqua filed an Answer to the Objections to the Edgmont Stipulation and an Answer to the Objections to the Lower Chichester Stipulation. On March 11, 2021, DELCORA filed an Answer to the Objections to the Edgmont Stipulation and an Answer to the Objections to the Lower Chichester Stipulation.[[5]](#footnote-6)

On March 19, 2021, the County filed a letter in opposition to the Extension Letter. In its filing, the County states that Aqua has failed to provide the Commission with any legal basis for its unilateral extension request and asserts that the Commission should decline to consider the Extension Letter.

# Discussion

Following the close of the record, numerous additional filings have been submitted at this docket. These include the following recent filings:

* January 8, 2021 – Trainer Notice of Withdrawal
* January 8, 2021 – Trainer Stipulation
* January 27, 2021 – Upland Notice of Withdrawal
* January 27, 2021 – Upland Stipulation
* January 28, 2021 – Kimberly-Clark Notice of Withdrawal
* January 28, 2021 – Kimberly-Clark Stipulation
* January 29, 2021 – County Appeal Notice Petition
* February 9, 2021 – SWDCMA Notice of Withdrawal
* February 9, 2021 – SWDCMA Stipulation
* February 26, 2021 – Edgmont Notice of Withdrawal (containing Edgmont Stipulation)
* March 4, 2021 – Lower Chichester Notice of Withdrawal (containing Lower Chichester Stipulation)[[6]](#footnote-7)

Although the County filed Objections to some of the Stipulations as noted *supra*, the remainder of the Parties may not have had adequate opportunities to review and respond to the recent filings. In addition, both Aqua and DELCORA filed Exceptions containing extra-record assertions related to the rate stabilization plan issue. Specifically, Aqua in its Exception No. 5 and DELCORA in its Exception No. 2 indicate that they are withdrawing the request to include the customer assistance payments from the Trust on the Company’s bills, *e.g.*, the bill discount proposal. Instead, they are now proposing an alternate approach of mailing checks directly to customers and offering information sharing procedures to implement its new proposal. *See* Aqua Exc. at 22-23; DELCORA Exc. at 17-20. However, it is axiomatic that extra-record material included in Exceptions, but never introduced into the record of a proceeding, cannot form the basis of a Commission decision. *See* *Ross Schell v. PPL Electric Utilities*, Docket No. C-2019-3012244 (Order entered August 6, 2020).

Our Regulations authorize the reopening of the record after the issuance of a Recommended Decision as follows:

(d) The record may be reopened upon notification to the parties in a proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

…

(2) The Commission may reopen the record after the presiding officer has issued a decision or certified the record to the Commission.

52 Pa. Code § 5.571(d)(2).

At present, the recent filings and the averments contained in them are not part of the evidentiary record. Thus, there has been no opportunity for any of the Parties to present testimony subject to cross examination related to these purported evidentiary matters. Moreover, we highlight the County Appeal Notice Petition filed on January 29, 2021. This submission indicates that outstanding litigation remains which may need to be considered when evaluating this Application. Upon review, we find that it is in the public interest to reopen the record, as provided in Section 5.571(d)(2) of our Regulations, to consider the filings submitted after the close of the record outlined above because they may impact the Commission’s ultimate evaluation of the Application.

On March 10, 2021, Aqua filed the Extension Letter by which it voluntarily waived the statutory deadline in this matter. Accordingly, it is not necessary to rule on the Exceptions at this time. Aqua’s action in filing the Extension Letter allows the Commission the opportunity to reopen the record and remand the matter for further proceedings as necessary.

Thus, we shall vacate the Recommended Decision, reopen the record, and remand the proceeding to the OALJ for such further proceedings as may be appropriate in light of the new developments in the case. After conducting any further proceedings as deemed necessary, we direct the presiding officer to prepare a Recommended Decision on Remand evaluating and recommending the disposition of the entire Application.[[7]](#footnote-8)

# Conclusion

For the reasons set forth above, we shall decline to rule on the Exceptions of Aqua, DELCORA, and Sunoco. Additionally, we shall vacate the Recommended Decision, reopen the record, remand the proceeding to the OALJ for such further proceedings as may be deemed appropriate, and direct the issuance of a Recommended Decision on Remand, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Recommended Decision of Administrative Law Judges Angela T. Jones and F. Joseph Brady issued on January 12, 2021, is vacated, consistent with this Opinion and Order.

2. That this matter is remanded to the Office of Administrative Law Judge for such further proceedings as deemed necessary and the issuance of a Recommended Decision on Remand consistent with this Opinion and Order.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: March 25, 2021

ORDER ENTERED: March 30, 2021

1. Subsequently, on August 31, 2020, the County filed a Protest to the Application. [↑](#footnote-ref-2)
2. In its Interlocutory Petition, the County requested that the Commission answer the following material question in the affirmative:

   Should Aqua’s Application be stayed until there is a final determination in the pending Court of Common Pleas Action at Docket No. CV-2020-003185 regarding (1) the County’s complaint against DELCORA’s creation of a Rate Stabilization Trust; and (2) the County’s Ordinance 2020-4 (providing for the orderly termination of DELCORA pursuant to the Municipality Authorities Act), each issue directly bearing on Aqua’s PUC Application?

   Interlocutory Petition at 2. [↑](#footnote-ref-3)
3. The County indicates that it does not object to the withdrawal of the Protests of Edgmont and Lower Chichester but argues, in part, that the stipulations are extra-record evidence that should not be considered by the Commission in rendering a final determination on Aqua’s Application. Objections to Edgmont Stipulation at 2 and Objections to Lower Chichester Stipulation at 2. The arguments contained in both of these recently filed Objections are substantially similar to the arguments contained in the County’s Objections to the SWDCMA Stipulation. [↑](#footnote-ref-4)
4. In its letter, Lower Chichester states that its Notice of Withdrawal pursuant to 52 Pa. Code § 5.49(b) does not require Commission approval and that no party can object to it. Lower Chichester asserts that the County is objecting to an appendix to its Notice of Withdrawal and that the Commission should disregard the County’s pleading. Lower Chichester Letter at 1. [↑](#footnote-ref-5)
5. In each of its filings, DELCORA states that it is joining in and incorporating by reference the arguments of Aqua in its Answers to the Objections to the Edgmont Stipulation and Answers to the Objections to the Lower Chichester Stipulation. [↑](#footnote-ref-6)
6. The Trainer Notice of Withdrawal and the Trainer Stipulation were filed a few days before the issuance of the Recommended Decision. The remainder of the documents were filed after the issuance of the Recommended Decision. [↑](#footnote-ref-7)
7. We acknowledge the ALJs’ prior concerns about the outstanding issues present at the close of the evidentiary record and the concerns about issuing what would be tantamount to a hypothetical recommendation. *See* R.D. at 26. By directing the reopening of the record and remanding the proceeding, we are affording the Parties the opportunity to present appropriate evidence as deemed necessary in light of the recent developments so as to permit a full evaluation of the Application pursuant to Sections 1102, 1329, and 507 of the Code. [↑](#footnote-ref-8)