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May 7, 2021

Rosemary Chiavetta, Secretary  
Pa. Public Utility Commission  
P.O. Box 3265  
Harrisburg PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing please find the Brief of Upland Borough in Support of Petition for  
Interlocutory Review in the above-referenced proceeding.

This document is being served on the Administrative Law Judge, the Office of Special  
Assistants, and all parties of record. The document was filed electronically with the Commission  
on this date.

Sincerely,



Enclosure

cc: F. Joseph Brady, Administrative Law Judge  
Office of Special Assistants  
All parties of record

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 507, 1102 and 1329 of the Public Utility Code for, inter alia, approval of the acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority	: : : : : :	Docket No. A-2019-3015173
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**BRIEF OF UPLAND BOROUGH IN SUPPORT OF  
PETITION FOR INTERLOCUTORY REVIEW**

Introduction

On April 27, 2021, Aqua Pennsylvania Wastewater, Inc. (“Aqua”) filed a Petition for Interlocutory Review of Order Staying Proceeding. Pursuant to 52 Pa. Code § 5.302(b), Upland Borough (“Upland”) files this brief in support of Aqua’s petition.

Status of Upland Borough in this Proceeding

On January 27, 2021, Upland withdrew its Protest in this matter and filed a Joint Stipulation with Aqua and DELCORA explaining the resolution of Upland’s Protest. Under normal circumstances, Upland would no longer be considered a party to this proceeding.

The purpose of the Commission’s remand ordered on March 30, 2021, however, is for an Administrative Law Judge (“ALJ”) to take any evidence associated with the Upland Joint Stipulation and various other events that occurred after the close of the record. Upland submits, therefore, that it should be permitted to participate in the remand proceeding solely for the purpose of any matters related to review of its Joint Stipulation. Upland is filing this Brief so that the review of its Joint Stipulation can proceed in a timely manner.

### The Order Under Review

Aqua seeks review of an order issued by ALJ Brady on April 16, 2021, that stayed the Commission's remand of this proceeding to the ALJ "pending a final unappealable decision in the County of Delaware's lawsuit against DELCORA [Delaware County Regional Water Quality Control Authority] currently before the Commonwealth Court at Docket No. 148 CD 2021." ALJ Brady issued this order *sua sponte* and, before doing so, he did not solicit any opinions or arguments from any parties to the case.

### Failure to Acknowledge the Commission's August 31 Order

ALJ Brady's Order does not mention the fact that the Commission had previously declined to provide exactly the same relief that the ALJ granted *sua sponte*.<sup>1</sup> Specifically, on August 31, 2020, the Commission issued an order denying Delaware County's petition for interlocutory review. The County had requested a stay of the proceeding until the exact same Common Pleas litigation against DELCORA was resolved.<sup>2</sup> The Commission denied that request, holding: "the conclusion that key components of the Application are pending and first require resolution in the Common Pleas Action is speculative at the present posture of this proceeding." Aug. 31, 2020, Order at 30.

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<sup>1</sup> Upland notes that ALJ Brady was not assigned to this matter until November 18, 2020, presumably to provide assistance to the late ALJ Angela Jones during her illness.

<sup>2</sup> The August 31 Order states the material question sought to be reviewed as follows: "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 [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?" Aug. 31, 2020, Order at 2.

In so doing, the Commission noted that the standards for issuing a stay in *Pa. PUC v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983), did not apply because the Commission lacked the expertise to assess the likelihood of success on the merits in a civil case. The Commission, therefore, concluded that there was no basis for staying a proceeding while awaiting a ruling in a civil action, unless there was some form of a “reverse” doctrine of primary jurisdiction. The Commission concluded that primary jurisdiction did not apply in reverse. The doctrine of primary jurisdiction suggests that, under certain circumstances, a court can stay a proceeding while awaiting a ruling from an expert administrative agency on a matter material to the litigation. The Commission found no precedent for applying the doctrine in reverse against an administrative agency. Order at 32-33.

#### The Only Changes Since August Reinforce the Wisdom of the Commission’s August 31 Order

The posture of the civil litigation is even less favorable to the County today than it was on August 31 when the Commission issued its order. On December 28, 2020, the Delaware County Court of Common Pleas ruled against the County on all counts and issued an order prohibiting the County from taking any actions to interfere with DELCORA’s lawful contract with Aqua.<sup>3</sup> Thus, even if the Commission is unable to assess the likelihood of the County’s success on the merits, a judge from the Court of Common Pleas has made that judgment and found that the County should not prevail on any of its claims.

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<sup>3</sup> The County Court’s order was filed in this docket as an attachment to a letter from Aqua’s counsel on December 28, 2020.

## Conclusion

In summary, when the relevant history of this proceeding is considered, including the Commission's order of August 31, 2020, Upland respectfully submits that the Commission should reverse the ALJ's order staying the proceeding. The ALJ apparently was not aware that the Commission already had denied a stay request based on exactly the same litigation in civil courts. The ALJ's order does not discuss that previous order and does not apply the standards the Commission ordered to be applied.

Indeed, it appears that the only significant factor that has changed since the Commission's order was issued on August 31, is that the Court of Common Pleas denied all of the County's claims. There is no reason why the issuance of a civil order denying all of the County's claims should justify the issuance of a stay when it was not justified in August. Simply stated: How can it be more likely today than it was in August that the County would succeed on the merits of the civil litigation?

WHEREFORE, Upland respectfully requests that the Commission grant Aqua's Petition and answer the Material Question in the affirmative. The ALJ's stay order is directly contrary to the Commission's denial of the same relief on August 31, 2020.

Respectfully submitted,



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Dated: May 7, 2021

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CERTIFICATE OF SERVICE

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I hereby certify that I have this day served a true copy of foregoing document upon the following parties by electronic mail. Service by first-class mail will be provided to any party that requests such service.

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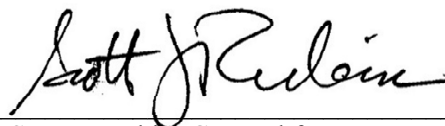
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