



THOMAS, NIESEN & THOMAS, LLC

Attorneys and Counsellors at Law

THOMAS T. NIESEN
Direct Dial: 717.255.7641
tniesen@tntlawfirm.com

May 7, 2021

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

We are counsel for Aqua Pennsylvania Wastewater, Inc. in the above matter and are submitting, via electronic filing with this letter, the Company's Brief in Support of Petition for Interlocutory Review of Order Staying Proceeding. Copies of the Brief are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By 

Thomas T. Niesen

cc: Certificate of Service (w/encl.)
The Honorable F. Joseph Brady, Administrative Law Judge (via email, w/encl.)
Alexander R. Stahl, Esquire (via email, w/encl.)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Honorable F. Joseph Brady, Presiding

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

**BRIEF OF AQUA PENNSYLVANIA WASTEWATER, INC. IN SUPPORT OF PETITION
FOR INTERLOCUTORY REVIEW OF ORDER STAYING PROCEEDING**

Thomas T. Niesen, Esquire
PA Attorney ID # 31379
Thomas, Niesen & Thomas, LLC
212 Locust Street, Suite 302
Harrisburg, PA 17101

John F. Povilaitis, Esquire
PA Attorney ID #28944
Alan M. Seltzer, Esquire
PA Attorney ID # 27890
Buchanan Ingersoll & Rooney, PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357

*Attorneys for
Aqua Pennsylvania Wastewater, Inc.*

DATED: May 7, 2021

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY OF ARGUMENT	2
III.	ARGUMENT	3
	A. Legal Standards for Interlocutory Review	3
	B. The Stay Order Is Inconsistent with the Language and Intent of the March 30 Order	3
	C. A Stay of the Proceeding Is Not Warranted	5
IV.	CONCLUSION	8

TABLE OF CITATIONS

Cases

<i>Evans v. FirstEnergy Solutions Corporation,</i> Docket No. P-2014-2421556 (Order entered January 26, 2015)	3
<i>Joint Application of Bell Atlantic Corp. and GTE Corp.,</i> Docket No. A-310200F0002 (Order entered June 14, 1999)	3
<i>Pa. P.U.C. v. Process Gas Consumers Group,</i> 502 Pa. 545, 467 A.2d 805, 1983 Pa. LEXIS 728 (1983)	5
<i>Saucon Creek Assoc., Inc. v. Borough of Hellertown,</i> 69 Pa. P.U.C. 467 (1989)	3

Statutes, Regulations, Texts and Codes

52 Pa. Code § 5.302	3
52 Pa. Code § 5.302(b)	2

I. INTRODUCTION

This proceeding concerns the Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua” or “Company”), filed with the Public Utility Commission (“Commission”) pursuant to Sections 1329, 1102 and 507 of the Public Utility Code (“Code”). The Application asks the Commission to approve, *inter alia*, Aqua’s acquisition of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (“DELCORA”).

By Recommended Decision issued January 12, 2021, Administrative Law Judges (“ALJ’s”) F. Joseph Brady and Angela T. Jones recommended that the Commission deny the Application. Subsequently, the Commission, by Opinion and Order entered March 30, 2021 (“March 30 Order”),¹ vacated the Recommended Decision and, in Ordering Paragraph 2 thereof, directed:

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.

In doing so, the Commission found that it is in the public interest to reopen the record of this proceeding, thereby providing the Parties an opportunity to present testimony, subject to cross examination, related to, among other things, “numerous additional filings”² submitted at the docket, extra-record assertions related to the withdrawal of the Aqua/DELCORA “bill discount proposal” and replacement with the alternate approach of mailing checks directly to DELCORA customers.³

“After conducting any further proceedings as deemed necessary, [the Commission directs] the presiding officer to prepare a Recommended Decision on Remand evaluating and recommending the disposition of the entire Application.” Footnote 7 of the March 30 Order further

¹ A copy of the March 30 Order is attached as Appendix A. On April 29, 2021, the County of Delaware filed a petition for review with the Commonwealth Court requesting interlocutory review of the March 30 Order.

² See March 30 Order at 13 listing various notices of withdrawal and stipulations resolving several protests to the Application.

³ See March 30 Order at 14 regarding extra-record assertions related to the rate stabilization plan.

explains that, “[b]y 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 [Public Utility] Code.”

On April 16, 2021, ALJ Brady *sua sponte* issued an Order Staying Proceeding (“Stay Order”) “pending a final unappealable decision in the County of Delaware’s lawsuit against DELCORA currently before the Commonwealth Court at Docket No. 148 CD 2021,” thereby indefinitely delaying the reopening of the record, the issuance of a Recommended Decision on Remand and the Commission’s full evaluation of the Application.

On April 27, 2021, Aqua filed a Petition for Interlocutory Review of Order Staying Proceeding (“Petition”) presenting the following Material Question for review and answer.

Should the Commission reverse the Stay Order because it is inconsistent with the March 30 Order and direct the OALJ to promptly schedule hearings and briefing in the remanded proceeding, thereby allowing (i) the Parties the opportunity to present appropriate evidence as deemed necessary so as to permit a full evaluation of the Application pursuant to Sections 1102, 1329, and 507 of the Code, and (ii) the presiding officer to prepare a Recommended Decision on Remand evaluating and recommending the disposition of the Application.

Aqua submits this Brief pursuant to 52 Pa. Code Section 5.302(b) in support of its Petition, an affirmative answer to the Material Question and a lifting of the stay imposed by the Stay Order.

II. SUMMARY OF ARGUMENT

Because the Stay Order is inconsistent with the clear language and intent of the March 30 Order, the Stay Order must be reversed. In addition, the Commission should direct the Office of Administrative Law Judge (“OALJ”) to promptly schedule hearings and briefing in the remanded proceeding, thereby allowing (i) the Parties the opportunity to present appropriate evidence as deemed necessary so as to permit a full evaluation of the Application pursuant to Sections 1102,

1329, and 507 of the Code, and (ii) the presiding officer to prepare a Recommended Decision on Remand evaluating and recommending the disposition of the Application.

III. ARGUMENT

A. Legal Standards for Interlocutory Review

Under Commission rule 52 Pa. Code Section 5.302, the petitioner (i.e., Aqua) must demonstrate why granting interlocutory review “will prevent substantial prejudice or expedite the conduct of the proceeding.” 52 Pa. Code § 5.302. “The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is the, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process.” *Evans v. FirstEnergy Solutions Corporation*, Docket No. P-2014-2421556 (Order entered January 26, 2015), at 6; *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002 (Order entered June 14, 1999). The correctness of the ALJ’s ruling is not a determinative issue when the Commission sets out to examine whether a petitioner has fulfilled the regulatory requirements for interlocutory review and answer to a material question. See, *Saucon Creek Assoc., Inc. v Borough of Hellertown*, 69 Pa. P.U.C. 467 (1989).

The Stay Order has postponed a Commission decision on the merits of the Application for an indefinite period of time. Moreover, the spirit of the Commission’s March 30 Order was to complete the record, rather than postpone its completion. Interlocutory review is needed to prevent substantial prejudice to Aqua.

B. The Stay Order Is Inconsistent with the Language and Intent of the March 30 Order

The sole basis for the Stay Order is the existence of a County appeal proceeding currently pending before the Commonwealth Court. The Stay Order explained as follows:

In this matter, the County lawsuit is currently pending before the Commonwealth Court. The issues in the County lawsuit are the legality, enforceability, and integrity of the APA between DELCORA and Aqua, the enforcement of the County ordinance 2020-04, and the funding of the Rate Stabilization Fund Trust between DELCORA and Aqua. All of these issues are also threshold issues in this Application. For example, if it is determined that the APA is illegal and unenforceable, the entire Application becomes moot.⁴

The Commission, however, was aware of the Commonwealth Court proceeding when it issued its March 30 Order.⁵ The Commission, in fact, specifically cited the Court proceeding as a matter that may need to be considered when evaluating the Application. The Commission stated that:

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.

Because the Commission was aware of the Commonwealth Court proceeding when it vacated the Recommended Decision, reopened the record and remanded the proceeding for issuance of a Recommended Decision on Remand *but did not stay the proceeding*, the Commonwealth Court proceeding cannot, and does not, provide a basis for now staying and delaying the proceeding as provided in the Stay Order. The Commonwealth Court proceeding, in short, provides no basis for ALJ Brady to stay the proceeding when the Commission could have but did not do so in the first instance.

⁴ Stay Order at 3.

⁵ See March 30 Order at 15.

The March 30 Order concludes that it is in the public interest to reopen the record for the express purpose of providing the Parties with the due process opportunity to present evidence concerning “recent filings” and “averments” that are “not part of the evidentiary record.” In doing so, the March 30 Order intends to prevent prejudice to any Party that might occur as a result of the Commission’s consideration of non-record matters while, at the same time, presenting the Commission with additional evidence material to the Application and its evaluation of the public interest.

The Stay Order delays indefinitely the due process opportunity specifically afforded the Parties by virtue of the March 30 Order, thus prejudicing their respective interests. Equally significant, the Stay Order delays the reopening of the record, which the Commission has already found to be in the public interest. Removing the stay is a compelling reason for interlocutory review and an affirmative answer to the Material Question. Removing the stay will prevent substantial prejudice to the Parties, expedite the conduct of the proceeding and further the public interest consistent with the March 30 Order.

C. A Stay of the Proceeding Is Not Warranted

The Supreme Court of Pennsylvania addressed the criteria for staying a proceeding in *Pa. P.U.C. v. Process Gas Consumers Group*, 502 Pa. 545, 467 A. 2d 805, 1983 Pa. LEXIS 728 (1983), holding, in the context of a Commission proceeding, that the grant of a stay is warranted if:

1. The petitioner makes a strong showing that he is likely to prevail on the merits;
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury;
3. The issuance of a stay will not substantially harm other interested parties in the proceedings; and

4. The issuance of a stay will not adversely affect the public interest.

The Court explained that the foregoing “traditional criteria” requiring the court to balance the interests of all parties, and the public where applicable, and requiring the applicant to demonstrate a probability of success on the merits, are favored and followed in the federal circuit courts.

Here, the Commission has already determined that the public interest will be furthered by reopening the record and remanding the proceeding. Accordingly, although the Stay Order did not apply the traditional criteria, it is clear that the public interest does not support a stay but rather supports a reopening of the record and moving forward with the remanded proceeding as envisioned by the Commission and as so directed in the March 30 Order.

Although it cites Delaware County’s Commonwealth Court appeal proceeding as the basis for the stay, the Stay Order does not suggest that County has made a strong showing that it is likely to prevail on the merits of that proceeding and Aqua submits that a strong showing of success on the merits cannot be made. The County is challenging a County Court decision at No. CV-2020-003185, which firmly rejected the County’s challenges to the Asset Purchase Agreement for the proposed transaction and its efforts to stop the transaction, stating, in part, that:

... [T]he Asset Purchase Agreement between DELCORA and AQUA is a legal and enforceable contract, not in violation of the Municipalities Authority Act, public policy, or any other applicable law. This Court further finds that the Asset Purchase Agreement is authorized by Sections 5607, 5619, and 5622 of the Municipalities Act, subject to the approval of the Pennsylvania Public Utility Commission.

* * *

The COUNTY of Delaware is hereby permanently enjoined and restrained from terminating or contractually interfering with the Asset Purchase Agreement, any amendment thereto, and the COUNTY is further enjoined and restrained from terminating the Delaware County Regional Water Control Authority prior to

closing on the Asset Purchase Agreement between DELCORA and AQUA Pennsylvania Wastewater, Inc.

* * *

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

The issues before the Commonwealth Court in CV-2020-003185 are separate and distinct from the issues before the Commission in the Application case. And the Commission's exercise of its jurisdiction on the merits of the Application does not depend on a particular outcome in that appeal.

Additionally, no Party to this proceeding will suffer irreparable injury or substantial harm as a result of the reopening of the record and conducting further hearings and briefing. The Commission, to the contrary, found that reopening the record and remanding the proceeding will prevent prejudice and harm by providing the Parties with the opportunity to present appropriate evidence, subject to cross examination. The public interest, moreover, does not support the issuance of a stay. The Commission, as set forth above and in its March 30 Order, has already found that the public interest will be furthered not by a stay but rather by a reopening of the record and a remand of the proceeding.⁶


⁶ The Commission, moreover, previously declined to stay the proceeding in its Opinion and Order entered August 31, 2020, addressing a Petition of Delaware County for Interlocutory Review.

IV. CONCLUSION

Aqua submits, for the reasons set forth above, that the Commission should grant Aqua's Petition for Interlocutory Review of Order Staying Proceeding, reverse the Stay Order because it is inconsistent with the March 30 Order and direct the Office of Administrative Law Judge to promptly schedule hearings and briefing in the remanded proceeding, thereby allowing (i) the Parties the opportunity to present appropriate evidence as deemed necessary so as to permit a full evaluation of the Application pursuant to Sections 1102, 1329, and 507 of the Code, and (ii) the presiding officer to prepare a Recommended Decision on Remand evaluating and recommending the disposition of the Application. A stay is not required to protect the substantial rights of the parties but, rather, will cause substantial prejudice by indefinitely delaying the opportunity to present appropriate evidence subject to cross examination as, Aqua submits, was intended by the Commission in the March 30 Order.

Respectfully submitted,

AQUA PENNSYLVANIA WASTEWATER, INC.

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

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.

Date: May 7, 2021

APPENDIX A

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

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

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 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:

¹ Subsequently, on August 31, 2020, the County filed a Protest to the Application.

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

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*).

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.

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-2020-0074691; (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 On March 9, 2021, Lower Chichester Township filed a letter in response to the Objections to the Lower Chichester Stipulation (Lower Chichester Letter).⁴

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

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.

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.

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

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

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.

⁶ The Trainer Notice of Withdrawal and the Trainer Stipulation were filed a

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).

few days before the issuance of the Recommended Decision. The remainder of the documents were filed after the issuance of the Recommended Decision.

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

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.

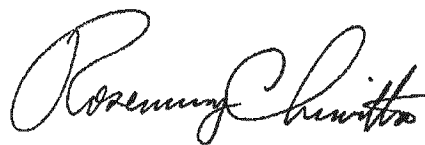
Conclusion

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania : Docket No. A-2019-3015173
Wastewater, Inc. Pursuant to Sections :
1102, 1329 and 507 of the Public Utility :
Code :

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of May, 2021, served a true and correct copy of the foregoing Brief of Aqua Pennsylvania Wastewater, Inc. in Support of Petition for Interlocutory Review of Order Staying Proceeding, upon the persons and in the manner set forth below:

VIA ELECTRONIC MAIL

Gina L. Miller, Prosecutor
Erika L. McLain, Prosecutor
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
ginmiller@pa.gov
ermclain@pa.gov

Christine Maloni Hoover
Erin L. Gannon
Senior Assistant Consumer Advocates
Harrison W. Breitman
Santo G. Spataro
Assistant Consumer Advocates
Office of Consumer Advocate
OCADELCORA@paoca.org

Steven C. Gray
Senior Supervising
Assistant Small Business Advocates
Office of Small Business Advocate
sgray@pa.gov

Adeolu A. Bakare, Esq.
Robert F. Young, Esq.
Kenneth R. Stark, Esq.
McNees Wallace & Nurick LLC
abakare@mcneeslaw.com
ryoung@mcneeslaw.com
kstark@mcneeslaw.com

Kenneth D. Kynett, Esq.
Charles G. Miller, Esq.
Petrikin, Wellman, Damico, Brown & Petrosa
kdk@petrikin.com
cgm@petrikin.com

Thomas Wyatt, Esq.
Matthew S. Olesh, Esq.
Obermayer Rebmann Maxwell & Hippel, LLP
Thomas.Wyatt@obermayer.com
Matthew.Olesh@obermayer.com

Scott J. Rubin, Esq.
scott.j.rubin@gmail.com

Justin Weber, Esq.
Michelle M. Skjoldal, Esq.
Jason T. Ketelson, Esq.
Marc Machlin, Esq.
Troutman Pepper Hamilton Saunders LLP
michelle.skjoldal@troutman.com
jason.ketelson@troutman.com
justin.weber@troutman.com
marc.machlin@troutman.com

John F. Povilaitis, Esquire
Alan M. Seltzer, Esquire
Buchanan Ingersoll & Rooney, PC
john.povilaitis@bipc.com
alan.seltzer@bipc.com

Ross Schmucki
rschmucki@gmail.com

Patricia Kozel
Pattyk6@icloud.com

Peter Ginoplus
pete@kiddertax.com

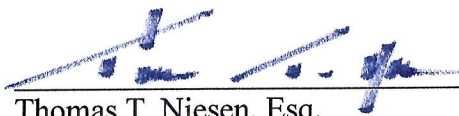
Robert W. Scott, Esq.
rscott@robertwscottpc.com

Thomas J. Sniscak, Esq.
Kevin J. McKeon, Esq.
Whitney E. Snyder, Esq.
Melissa A. Chapaska, Esq.
Hawke McKeon & Sniscak LLP
tjsniscak@hmslegal.com
kjmckeon@hmslegal.com
wesnyder@hmslegal.com
machapaska@hmslegal.com

Cynthia Pantages
C&L Rental Properties, LLC
cyndipantages@gmail.com

Edward Clark, Jr.
Treasure Lake Property Owners Association
gm@treasurelake.us

Lawrence and Susan Potts
Susie01213@aol.com



Thomas T. Niesen, Esq.
PA Attorney ID No. 31379
Counsel for Aqua Pennsylvania Wastewater, Inc.