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May 7, 2021

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

**RE: Docket No. A-2019-3015173; Application of Aqua Pennsylvania
Wastewater, Inc. – Delaware County Regional Water Quality Control
Authority**

Dear Secretary Chiavetta:

We serve as counsel to the Delaware County Regional Water Quality Control Authority (“DELCORA”) in the above matter and are submitting, with this letter, the Brief in Support of the Petition of Aqua Pennsylvania Wastewater, Inc. for Interlocutory Review of Order Staying Proceeding by Administrative Law Judge F. Joseph Brady.

This document is being served via electronic mail on the Administrative Law Judge presiding over this matter and all parties of record. The document was also filed electronically with the Public Utility Commission on this date.

Very truly yours,

Matthew S. Olesh

cc: The Honorable F. Joseph Brady, Administrative Law Judge
All parties of record

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 its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority

A-2019-3015173

**BRIEF OF THE DELAWARE COUNTY REGIONAL
WATER QUALITY CONTROL AUTHORITY IN SUPPORT OF
THE PETITION OF AQUA PENNSYLVANIA WASTEWATER, INC.
FOR INTERLOCUTORY REVIEW OF ORDER STAYING PROCEEDING**

I. Introduction

The Delaware County Regional Water Quality Control Authority (“DELCORA”) respectfully submits this brief in support of the Petition of Aqua Pennsylvania Wastewater, Inc. (“Aqua”) for Interlocutory Review of Order Staying Proceeding (the “Petition”).

Stays of proceedings are warranted when needed to protect the substantial rights of the parties. Here, a stay would have the opposite effect in that it would prejudice many rights of the parties – most significantly, DELCORA’s – by unnecessarily and indefinitely delaying any final Commission decision on the Aqua/DELCORA acquisition, which is the subject of this proceeding. For this reason, the Commission should review and reverse the April 16, 2021 decision of the Administrative Law Judge (“ALJ”) staying this proceeding (the “Stay Order”).

The Commission has already considered and soundly rejected a request to stay this proceeding based upon the exact same grounds relied upon by the ALJ. Last August, after suing DELCORA and Aqua in the Court of Common Pleas of Delaware County, Pennsylvania, the County of Delaware (the “County”) sought to have all Pennsylvania Public Utility Commission (“Commission” or “PUC”) proceedings delayed pending the outcome of the baseless litigation that

it itself initiated (the “Common Pleas Action”). The Commission rightly rejected the request, explicitly holding that it is not “authorized to sit back and wait for some future ruling by the Common Pleas Court particularly when the General Assembly has established a time frame for a Commission determination of a Section 1329 proceeding.” *See* Commission’s August 31, 2020 Order and Opinion, attached as Exhibit A, p. 31.

This holding is equally applicable now as it was at the time that the Commission first made it, if not more so given the fact that DELCORA and Aqua have now defeated the County’s legal challenge to the Aqua/DELCORA transaction brought in the Common Pleas Action. The fact that the County has appealed its defeat does not suddenly present a basis to delay going forward with the instant proceedings – in fact, a stay on this basis is even less warranted now than it was when originally rejected by the Commission. Indeed, if the only obstacle to Commission approval is the resolution of the County’s appeal, then the Commission can easily condition its approval on the appeal resolving in favor of Aqua and DELCORA. The instant proceedings must move forward as expeditiously as possible to arrive at that point.

The Commission’s rationale in denying the County’s prior stay request is instructive in illustrating that while there would be no prejudice if this proceeding proceeds, the prejudice DELCORA would suffer if it is stayed would be immense. As the Commission previously established in its August 31, 2020 Order and Opinion, there is no harm that any party would suffer if this proceeding goes forward. *See* Exhibit A, pp. 29-30 (“the time, effort, and expense associated with having to litigate a case does not typically amount to substantial prejudice for purposes of granting interlocutory review.”). Nothing has occurred that would change this determination. Other than the time and cost of litigating, which does not amount to the requisite harm, ***no party will suffer any prejudice whatsoever*** if this proceeding goes forward on a parallel

track to the appeal of the Common Pleas Action.

The Commission also held that any delay “could as likely prove harmful to the Parties if this proceeding were to be stayed – and the Parties and the Commission were denied the timely opportunity to investigate and evaluate the Application – and the court in the Common Pleas Action later determines that the County’s amended complaint should be dismissed.” *See* Exhibit A, p. 31. In addition to predicting exactly what has happened, the Commission was correct that continued delay would be harmful to the parties – most notably, DELCORA and its ratepayers.

As detailed in the record in this proceeding, DELCORA’s sale to Aqua came about in large part due to the rapidly rising expenses that would need to be incurred by DELCORA in the short and medium term if it continued to have a portion of its flow serviced by the Philadelphia Water Department (“PWD”), as is currently the case. DELCORA concluded that it would be less expensive to part ways with PWD and is undertaking capital improvements to effectuate this result. However, the costs of doing so are still significant – upwards of \$450 million. The transaction with Aqua was designed to offset these costs to DELCORA’s ratepayers by creating a trust with the sale proceeds that will provide customer bill assistance payments to the DELCORA customers. Any delay will necessarily result in increased rates to customers due to these capital costs, which the transaction with Aqua was designed to address.

In addition, DELCORA respectfully submits that delaying the instant proceeding to allow the parallel civil litigation to run its course would set a dangerous precedent for future applications before the Commission. Here, though armed with thin legal arguments, the County has stopped at nothing to try and prevent the Aqua/DELCORA transaction. As the trial court acknowledged, the Common Pleas Action consists of fabricated claims that were without any factual or legal basis whatsoever, and instead were intended and designed to “thwart, reverse, interfere and extinguish”

the Asset Purchase Agreement between Aqua and DELCORA (the “APA”). *See* December 28, 2020 Order, attached as Exhibit B, ¶ 8. To give deference to such legal claims and subordinate the pending application before the Commission would set a dangerous precedent that all a party opposing a transaction needs to do to delay Commission approval would be to file a lawsuit and let the process play out, which could stymie an application for months or years no matter how frivolous the claims. Such a precedent would be particularly inappropriate here, where the County has already lost on the merits in the trial court and is now pursuing a meritless appeal, and flatly undercut the Commission’s “policy of consolidation and regionalization of its wastewater assets that allows for the increased maintenance, upgrade and expansion of public sewer and water facilities.” *McCloskey v. Pa. P.U.C.*, 195 A.3d 1055, 1065 (Pa. Cmwlth. 2018).

Moreover, even if not sacrosanct, compliance with the statutory six-month period for review of applications before the Commission requires the elimination of unnecessary delay to this proceeding. The stay contemplated by the ALJ would constitute such a delay, particularly where there will be no prejudice to any party if the Commission proceeds with its review and, if it believes approval is warranted, grants conditional approval based upon the County’s appeal resolving in favor of Aqua and DELCORA.

A stay here is thus problematic on nearly every front. For all of these reasons, as well as all of the other reasons set forth herein, DELCORA respectfully requests that the Commission grant Aqua’s petition, answer its material question in the affirmative and reverse the Stay Order.

II. Argument

A. The Commission Has Already Held That A Stay of This Proceeding Is Not Warranted and Would Prejudice the Parties.

As noted above, this is not the first time that the Commission has considered whether the instant Application should be stayed pending the completion of the Common Pleas Action filed

by the County. The Commission heard – and rejected – a petition submitted by the County on August 7, 2020 requesting precisely that relief for the exact same reasons used by the ALJ in issuing the Stay Order that is the subject of Aqua’s petition.

The Commission’s rejection of the County’s petition and ruling on the issues therein is binding in this proceeding as the law of the case. Under the “law of the case” doctrine, “a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.” *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995). The “law of the case” doctrine seeks to protect the parties’ settled expectations, ensure uniformity and consistency of decisions in a particular matter, effectuate the streamlined administration of justice, and bring litigation to an end in the interest of judicial economy. *Id.* This doctrine unquestionably applies to administrative agencies. *See Sugarhouse HSP Gaming, L.P. v. Pa. Gaming Bd.*, 162 A.3d 353, 368 fn. 22 (Pa. 2016) (“Although our Court has articulated the law of the case doctrine in the context of a parallel relationship between trial courts, or the hierarchal relationship between appellate and trial courts, given that an administrative tribunal performs similar adjudicative functions as trial courts, and is similarly bound to follow the directives of an appellate court on remand, we consider this doctrine to be equally applicable in administrative proceedings, as is already the practice in the federal court system.”).

Departure from the “law of the case” is only permitted “in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed.” *Starr*, 600 A.2d at 1332. No such change in facts, evidence, and law or threat to justice exists here, as the circumstances and reasons

for the Commission's denial of the County's Interlocutory Petition largely remain the same. In fact, the only material difference between the circumstances surrounding the denial of the County's petition for a stay and the ALJ's Stay Order is that now the County's efforts in attempting to block the transaction by way of the Common Pleas Action have already failed in the trial court. This does not present any new compelling reason for the issuance of a stay – if anything, the case for a stay now is significantly *worse* than it was before.

Simply put, not only are there no new circumstances warranting a stay, but the law requires that the Commission follow its prior ruling denying the County's stay request. It should reverse the ALJ's Stay Order as a result.

B. A Stay is Inconsistent with the Commission's Order Remanding this Application for Further Proceedings and the Statutory Review Period.

Aqua's instant application was addressed by the Commission at its March 25, 2021 public meeting. At that time, the Commission voted to reopen the record because "recent filings and the averments contained in them are not part of the evidentiary record" and "there has been no opportunity for any of the Parties to present testimony subject to cross examination related to these purported evidentiary matters." *See* Commission's March 30, 2021 Opinion and Order, attached as Exhibit C, p. 15. The Commission noted the County's appeal, observing that it "indicates that outstanding litigation remains which may need to be considered when evaluating this Application." Consequently, the Commission held 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." *See id.*

The ALJ's Stay Order does not comply with the Commission's Opinion and Order – in fact, it does the opposite. If the Commission wished to stay this proceeding until the appeal of the

Common Pleas Action ran its course, it could have done so itself. Instead, it ordered that the record be opened so that the ALJ could consider the issues relating to not just the Common Pleas Action, but all of the issues raised by the parties in their recent filings. This simply cannot happen if these proceedings are stayed. Moreover, there is no need to wait for the appeal of the Common Pleas Action to run its course to accomplish this result. The outstanding issues of interest to the PUC can be addressed, and if approval is appropriate, it can easily be conditioned on the appeal of the Common Pleas Action terminating favorably for Aqua and DELCORA.

Proceeding in this manner is not just the only way to comply with the Commission's March 30, 2021 Opinion and Order – it is the only way to proceed that is consistent with the Public Utility Code itself, which suggests that applications under 66 Pa.C.S. § 1329 be acted upon by the Commission within six months. 66 Pa.C.S. § 1329(d)(2). While the parties have taken differing positions as to the import of this provision, there can be no doubt that it represents the preference of the Legislature that such applications be acted upon as expeditiously as possible. Issuing a stay would be directly contrary to this preference, as well as the spirit and intent of the Code. The Commission even recognized as such in its August 31, 2020 Opinion and Order. *See* Exhibit A, p. 31 (“Plainly, we are unable to engage in speculating the winners of the County Pleas Action. This does not mean, however, that the Commission is authorized to sit back and wait for some future ruling by the Common Pleas when the General Assembly has established a time frame for a Commission determination of a Section 1329 proceeding.”).

In sum, the issuance of a stay of this proceeding would not only violate the specific mandate passed down by the Commission in its most recent Order and Opinion, but would also violate the Legislature's express preference that the application proceed expeditiously without delay. *See* Exhibit A, p. 33 (holding that a stay “would potentially impede the timely regulatory review

process intended by the General Assembly.”). The ALJ’s Stay Order should be reversed as a result.

C. A Stay Would Establish Dangerous Precedent and Embolden Litigation Designed Solely to Impede the Business of the Commission and Undermine its Jurisdiction.

1. A Stay Would Create Dangerous Precedent and a Blueprint to Defeat Any Application Simply by Fabricating Frivolous Litigation.

The Commission must consider the dangerous precedent that would be established if a stay is granted in deference to the Common Pleas Action. Rather than focus on litigating the merits of the Aqua/DELCORA transaction at the Commission, the County filed the Common Pleas Action in an attempt to thwart the transaction at all costs. As the Delaware County Court of Common Pleas recognized, the actions taken by *the* County that led to the Common Pleas Action were grounded in “the whims of politics” and were taken solely to thwart the APA. *See* March 17, 2021 Opinion of the Delaware County Court of Common Pleas, attached as Exhibit D, p. 17. Moreover, the Court found that the County’s arguments by which it sought to undercut the APA were “pure speculation, hyperbole, and mere rhetoric, and not supported by the weight of the evidence.” *See id.*, p. 20. Indeed, the Court found that the County’s actions “directly and immediately interfered with and imploded DELCORA’s ability to perform contractual obligations to effectuate the sale and further interferes with Aqua’s contractual rights.” *See id.*, pp. 27-28.

If the Commission were to stay all proceedings in favor of the County’s improper conduct, it would set the precedent that all a party had to do in order to block a transaction and delay an application before this Commission is to concoct and file baseless litigation. The Commission should decline to do so, particularly given the County’s shifting positions regarding the six-month review period specified in 66 Pa.C.S. § 1329(d)(2). Even now, the County seeks to unilaterally prevent *any* further proceedings by (improperly) seeking appellate review of the Commission’s

March 30, 2021 remand Order, arguing that the six-month review period precludes anything further from taking place before the Commission. The County does so notwithstanding its prior position that this time limitation is directory, rather than mandatory. *See* County’s July 22, 2020 petition to stay this proceeding, attached as Exhibit E, p. 16, fn. 7.

The County essentially would have the Commission create a precedent by which (a) a party could force a stay of any application’s consideration by filing frivolous litigation, thereby delaying an application’s full consideration before the Commission, and (b) the party could subsequently seek the denial of an application as a result of its own conduct in forcing the proceeding to take longer than six months by virtue of the stay. The Commission should reject the proposition that litigation of non-Commission jurisdictional issues in other forums are a basis for delaying the Commission’s exercise of its own exclusive jurisdiction over Section 1329 applications.

2. There is No Legal Basis for the Commission to Abdicate its Jurisdiction In Deference to the County’s Pending Civil Appeal.

Finally, a stay would constitute an attack on the Commission’s own jurisdiction by giving deference to a parallel proceeding that does not infringe upon the matters that are within the scope of the Commission’s purview. As the trial court in the Common Pleas Action properly held, the issues before it did not overlap with the matters that fall within the Commission’s jurisdiction. *See* Exhibit D, p. 21. Instead, the Court was focused on (a) whether the trust created by DELCORA was valid under applicable law and (b) whether the County had the ability to terminate DELCORA and taken possession of its assets without assuming the obligations under the APA. These issues are not before the Commission, which is tasked with making judgments as to whether transaction is in the public interest and determining the applicable rate base based on the value of the acquired assets. *See* Exhibit A, p. 30 (holding that stay is inappropriate because “it requires the evaluation of the likely success of a newly asserted cause of action *in another tribunal relating to issues over*

which the Commission has no jurisdiction.”) (emphasis added).

If the Commission were to stay this proceeding, it would effectively be subjugating its own jurisdiction in deference to that of the trial court, even though the respective jurisdictions do not overlap or impede the other from proceeding with the matters before it. There is no legal basis for such action. In fact, in analyzing the doctrine of primary jurisdiction, as raised by the County in the context of its prior stay request, the Commission specifically acknowledged this, holding that it would not “refrain from hearing the Application proceeding and defer to a determination in the Common Pleas Action” because “taking such an action would not protect the integrity of the regulatory scheme pertaining to the consideration of the Application under Section 1329. Rather, it would potentially impede the timely regulatory review process intended by the General Assembly.” *See id.*, pp. 32-33.

Thus, in addition to there being no good reason for the Commission to abdicate its jurisdiction in favor of the Common Pleas Action, there is no legal basis for it to do so. If anything, the doctrine of primary jurisdiction could have conceivably been used to stay the Common Pleas Action from proceeding in deference to the instant proceedings before the Commission – not the other way around. However, as all tribunals recognized, the parties and the public have been – and should continue to be – best served by proceeding with all legal challenges to the Aqua/DELCORA transaction concurrently and as expeditiously as possible.

III. Conclusion

For all of the foregoing reasons, DELCORA respectfully requests that the Commission grant Aqua’s petition, answer its material question in the affirmative and reverse the Stay Order.

Respectfully submitted,

/s/ Matthew S. Olesh

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Dated: May 7, 2021

CERTIFICATE OF SERVICE

I, Matthew Olesh, Esq., hereby certify that I have served a true and correct copy of the foregoing motion response upon the parties list below in accordance with the requirements of 52 Pa. Code §§ 1.54 (relating to service by a party) via electronic mail.

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/s/ Matthew Olesh

Matthew Olesh, Esquire

Dated: May 7, 2021

EXHIBIT “A”

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

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 is the Petition for Stay and Request for Commission Review and Answer to a Material Question (Interlocutory Petition), filed by the County of Delaware, Pennsylvania (County) on August 7, 2020, in the above-captioned proceeding. On August 13, 2020, the Commission's Bureau of Investigation and Enforcement (I&E) filed a letter in support of the Interlocutory Petition (I&E Letter). The Office of Consumer Advocate (OCA) filed a brief in support of the Interlocutory

Petition on August 14, 2020. On August 17, 2020, Aqua Pennsylvania Wastewater, Inc. (Aqua or Company) and the Delaware County Regional Water Quality Control Authority (DELCORA) each filed a brief in opposition to the Interlocutory Petition.

In the Interlocutory Petition, the County requests that the Commission review and answer the following material question:

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?

The County asks that the Commission answer the material question in the affirmative. Interlocutory Petition at 2.

For the reasons discussed below, we shall decline to answer the material question or to issue a stay of the proceeding as requested by the County.

History of the Proceeding

This matter concerns the Application of Aqua filed on March 3, 2020, pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (Code), 66 Pa. C.S. §§ 507, 1102, and 1329. In its Application, Aqua requests the issuance of an Order and Certificates of Public Convenience approving the Company's acquisition of the wastewater system assets of DELCORA and the resulting ratemaking rate base pursuant to Section 1329(c)(2) of the Code.

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 18, 2020, the County filed a Petition to Intervene in the Application proceeding. 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 23, 2020, the County filed a Petition for Reconsideration of Staff Action (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.

Reconsideration Petition at 1-2.

On July 9, 2020, Aqua filed an Answer to the 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's Reconsideration Petition arguing, in part, that the Petition was not ripe for review. Answer to 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 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 Reconsideration Petition or, in the alternative an Amended Petition for Reconsideration of Staff Action (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.” Amended Reconsideration Petition at 2.

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 Office of Administrative Law Judge (OALJ) scheduled an Initial Call-in Telephonic Prehearing Conference for September 2, 2020, before Administrative Law Judge (ALJ) Angela Jones.

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

As noted above, the County filed its Interlocutory Petition on August 7, 2020. On August 13, 2020, I&E filed its letter in support of the Interlocutory Petition.

Additionally, the OCA filed its brief in support of the Interlocutory Petition on August 14, 2020.¹

The Commission published notice of the Application in the August 15, 2020, edition of the *Pennsylvania Bulletin*, which stated that any protests and petitions to intervene must be filed by August 31, 2020. 50 Pa. B. 4220.

On August 17, 2020, Aqua and DELCORA filed their respective briefs in opposition to the Interlocutory Petition.²

By Opinion and Order entered August 27, 2020, the Commission denied both the Reconsideration Petition and the Amended Reconsideration Petition. Also, on August 27, 2020, Aqua and DELCORA each filed Answers to the Interlocutory Petition. Since the County also filed its Interlocutory Petition pursuant to 52 Pa. Code § 5.41, pertaining to petitions generally, Aqua and DELCORA submit that their Answers advise

¹ Also, on August 14, 2020, the OCA filed an Expedited Motion for an Extension of the Statutory Suspension Period of Aqua's Application (Expedited Motion) which requested an extension of the suspension period by sixty days. The OCA filed the Expedited Motion pursuant to the *Suspension of Regulatory and Statutory Deadlines: Modification to Filing and Service Requirements – Emergency Order*, Docket No. M-2020-3019262 (March 20, 2020); *see also*, *Suspension of Regulatory and Statutory Deadlines: Modification to Filing and Service Requirements – Ratification Order*, Docket No. M-2020-3019262 (Order adopted March 26, 2020) (*Emergency Order*). According to the OCA, the suspension is necessary to meet the mounting challenges resulting from the COVID-19 pandemic and will ensure that the OCA has sufficient time to investigate and support its position in the Application proceeding. The OCA submits that its Expedited Motion should not be viewed as an alternative resolution to the issues raised in the Interlocutory Petition. Expedited Motion at 4. In the Procedural Order dated August 18, 2020, ALJ Jones directed the Parties to address the Expedited Motion in writing by August 24, 2020. To date the Expedited Motion remains pending before the OALJ.

² On August 24, 2020, the County filed a Reply to the Briefs of Aqua and DELCORA. For the reasons discussed below, we shall decline to consider this additional filing.

the Commission, pursuant to 52 Pa. Code § 5.61(e), that they oppose the County's request for a stay. In its Answer, Aqua requests that the County's request for a stay be denied and in support restates the Company's positions presented in its' brief in opposition to the Interlocutory Petition. DELCORA's Answer also requests that the Commission deny the stay request and in support attaches its brief in opposition to the Interlocutory Petition.

Discussion

Preliminary Matters

As a preliminary matter, we note that 52 Pa. Code § 5.302(a) specifies that a "party" to a proceeding may file a petition for interlocutory review. Likewise, a "party" to a proceeding is permitted to file a brief supporting or opposing the petition for interlocutory review. 52 Pa. Code § 5.302(b). Here, the County and DELCORA filed their Petitions to Intervene on May 18, 2020, and June 6, 2020, respectively. To date, the Commission has not ruled on these intervention petitions.

Intervention is governed by Sections 5.71 to 5.76 of our Regulations, 52 Pa. Code §§ 5.71-5.76. A party may file an answer to a petition to intervene within twenty days of service. 52 Pa. Code § 5.66. Failure to file an answer to a petition to intervene may be deemed a waiver of objection to the granting of the petition. *Id.* In this proceeding, no Party has filed an objection to the Petitions to Intervene filed by the

County and DELCORA.³ Moreover, none of the filings pertaining to the proceeding raise any objections to the intervention status of either the County or DELCORA. Accordingly, we find that any objections have been waived and, thus, we shall grant the Petitions to Intervene of the County and DELCORA.

Next, we acknowledge that the County's Interlocutory Petition does not comply with the three-page limit set forth in 52 Pa. Code § 5.302(a). Aqua objects to the Interlocutory Petition, in part, for failure to comply with this limitation because the filing totals eighteen pages. Aqua Brief at 2.

Section 5.302(b) of our Regulations permits any party to file a brief in support of, or opposition to, the petition for interlocutory review within ten days of service of the petition and such brief shall not exceed fifteen pages. 52 Pa. Code § 5.302(b). Here, the County did not file a brief in support of the Interlocutory Petition pursuant to Section 5.302(b). However, since the County's Interlocutory Petition does not exceed the total page allowance for both a petition for interlocutory review and a brief in support – and in order to secure a just and speedy resolution of the matter pursuant to 52 Pa. Code § 1.2(a) – we shall accept the Interlocutory Petition as filed.

Regarding the County's filing of a Reply to the Briefs of Aqua and DELCORA, Section 5.302(d) of our Regulations prohibits such a filing unless specifically directed by the Commission. 52 Pa. Code § 5.302(d). Here, the Commission

³ Both Petitions to Intervene were filed before the Application was finally accepted for filing on July 27, 2020, and when the docket became active. However, even if we were to apply the later date of July 27, 2020, for purpose of starting the clock for responses, no objections have been filed in this matter as of the date of this Opinion and Order. Pursuant to 52 Pa. Code § 5.75(b), we are taking action on the Petitions to Intervene of the County and DELCORA in order to address the Interlocutory Petition and the responses thereto and to provide timely guidance to the ALJ and the Parties on the Interlocutory Petition issues prior to the Prehearing Conference.

did not authorize the filing of additional briefs and the County requests that we waive this Regulation. However, waiving Section 5.302(d) to allow the County to file an additional brief would necessarily require us, in the interest of ensuring due process, to offer similar filing opportunities for the other Parties. Doing so would unnecessarily delay the disposition of the Interlocutory Petition which the County has requested prior to September 2, 2020. Accordingly, we shall decline to waive 52 Pa. Code § 5.302(d) or to consider the County's Reply to the Briefs of Aqua and DELCORA filed on August 24, 2020.

Finally, we note that any issue not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Legal Standards

During the course of a proceeding and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review and answer to a material question which has arisen or is likely to arise. The standards for interlocutory review are well established. *See* 52 Pa. Code § 5.302(a). Section 5.302(a) of the Commission's Regulations requires that the petitioning party "state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999) (*Bell Atlantic*); *Pa. PUC v. Frontier*

Communications of Pa. Inc., Docket No. R-00984411 (Order entered February 11, 1999) (*Frontier Communications*); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985) (*Knights Limousine*).

Pursuant to 52 Pa. Code § 5.303, the Commission may take one of the following courses of action on requests for interlocutory review and answer to a material question:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

Generally, Petitions for Interlocutory Review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3.

The interlocutory review standard has also been interpreted in *Knights Limousine*, where the Commission stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. The Commission has determined that such a showing may be accomplished by a petitioner by its proving that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief

sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and R- 2009-2139884 (Order entered April 15, 2010).

Positions of the Parties

The County

In its Interlocutory Petition, the County argues that there are complex disputed issues in another proceeding pending before the Court of Common Pleas of Delaware County at Docket No. CV-2020-003185 (Common Pleas Action). The County submits that the issues in the Common Pleas Action must be resolved prior to adjudication of the Application. Accordingly, the County requests that the Commission answer the material question in the affirmative and issue a stay of this proceeding until January 31, 2021, or such earlier time until the Court in the Common Pleas Action enters a final order in that proceeding. Interlocutory Petition at 17-18.

The County begins by outlining the procedural history of the Common Pleas Action. It asserts that on or about October 20, 1971, the County created DELCORA and pursuant to Section 5619 of the Municipality Authorities Act (Authorities Act), 53 Pa. C.S. § 5619, it has the exclusive right, power and authority to terminate DELCORA. On May 14, 2020, while this proceeding was inactive, the County initiated the Common Pleas Action by filing a complaint against DELCORA and the Trust, asserting that DELCORA's creation of the Trust violates DELCORA's articles of incorporation, was *ultra vires*, and violates the Authorities Act. Interlocutory Petition at 5-6.

The County continues that on June 3, 2020, the County Council approved and enacted Ordinance 2020-4 (Ordinance) directing the orderly termination of DELCORA. Thereafter, on June 15, 2020, the County filed an Amended Complaint in the Common Pleas Action, seeking a court order enforcing the Ordinance to terminate DELCORA. Also, on June 15, 2020, Aqua filed a petition to intervene in the Common Pleas Action, stating that the Asset Purchase Agreement (APA) in this proceeding “is structured in such a way as to protect DELCORA’s customers by capping all rate increases for customers at 3% per year, by placing the proceeds of the sale (after paying down DELCORA’s obligations) into an independently managed irrevocable trust for the benefit of these customers, with Univest Bank and Trust Co. serving as trustee (“Univest”).” Interlocutory Petition at 6 (quoting Aqua petition to intervene in Common Pleas Action at ¶ 5).

The County notes, however, that Aqua asserted in its Answer to the Reconsideration Petition in this proceeding that the Commission does not have jurisdiction over the Trust. Additionally, the County states that Aqua’s petition to intervene in the Common Pleas Action provides that “[a]lthough the Amended Complaint and the Ordinance do not expressly purport to challenge or attack the enforceability of the APA, the practical effect of the relief requested in the Amended Complaint and the Ordinance constitutes a direct attack on the APA if in fact the County is permitted to terminate DELCORA prior to closing on the APA.” Interlocutory Petition at 6 (quoting Aqua petition to intervene in Common Pleas Action at ¶ 22).

The County states that an order issued in the Common Pleas Action on July 2, 2020, granted Aqua’s petition to intervene and held “this Court determines that Aqua has a real financial interest, referred to as a third-party beneficiary of the DELCORA Trust Agreement” and that “the impact of this case on the agreement between Aqua and DELCORA will be direct, significant and real.” Interlocutory Petition at 7 (quoting Common Pleas Action Order at 2).

The County further emphasizes that it did not name Aqua as a party to the Common Pleas Action, but rather the Company inserted itself as an intervenor into the Common Pleas Action. Since successfully intervening in the Common Pleas Action, Aqua has made itself an active participant and on July 22, 2020, filed a petition for preliminary injunction in the Common Pleas Action. According to the County, Aqua does not challenge the County's right to ultimately terminate DELCORA, but seeks to enjoin the County from terminating DELCORA prior to closing on the Application in this proceeding. Interlocutory Petition at 7.

The County asserts that on July 29, 2020, the judge in the Common Pleas Action issued an interim stay and scheduled dates for hearings on the County's Complaint (regarding the Trust) and Aqua's preliminary injunction (regarding termination of DELCORA), commencing with an initial hearing on September 9, 2020, and ending with a final hearing on October 21, 2020. *Id.*

Next, the County argues that consideration of the Application before the Common Pleas Action is premature for two reasons. First, there are unresolved issues regarding DELCORA's formation and administration of the Trust intended to administer the Rate Stabilization Plan; and second, there are unresolved issues regarding the termination of DELCORA. Interlocutory Petition at 8-13.

Regarding the purported unresolved issues of the Trust, the County submits that there is no dispute of DELCORA's formation and administration of the Trust, which is intended to fund the Rate Stabilization Plan, as being integral to the transaction structured by Aqua and DELCORA. The County submits that the Memorandum of Understanding (MOU) included in the Application demonstrates that the rate stabilization to be provided by Aqua in the form of "customer assistance payments" is contingent on

distributions from the Trust which is the subject of legal challenge in the Common Pleas Action. Interlocutory Petition at 9.⁴

The County requests that we apply the standard for stay requests set forth in *Pa. PUC v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983) (*Process Gas*).⁵ Under the first prong of *Process Gas*, the County argues that it is likely to succeed on the merits in demonstrating in the Common Pleas Action that the Trust agreement and the APA were entered into in violation of the Authorities Act. In support, the County references its allegations that DELCORA violated the Authorities Act by:

- (1) creating the Trust when it had no power to do so; (2) devising a funding structure through which DELCORA would continue to exist and hold and distribute public monies, even

⁴ The County cites to the MOU contained in the Direct Testimony of William C. Packer as follows:

3. Aqua Wastewater shall calculate the customer assistance payment amount for each DELCORA customer and the total customer assistance payment amount for each billing period, and shall provide its calculation, along with any and all information necessary to confirm the calculation of both payment amounts to the designated calculation agent.

4. DELCORA shall timely direct the Trustee under the Trust Agreement to transfer to Aqua Wastewater by Fedwire amount equal to the total customer assistance amount confirmed by the designated calculation agent for the applicable billing period.

Id. (citing Aqua St. No. 2, App. B).

⁵ In *Process Gas*, the Pennsylvania Supreme Court held that the courts of the Commonwealth should apply the following criteria when considering the issuance of a stay: (1) the petitioner makes a strong showing of being likely to prevail on the merits; (2) the petitioner has shown that without the requested relief it will suffer irreparable injury; (3) the issuance of the stay will not substantially harm other interested parties; and (4) the issuance of the stay will not adversely affect the public interest. 467 A.2d at 809.

after transferring the sewer system it was created to operate;
(3) adopting a funding process in the Trust which is contrary to
and violates DELCORA's Articles of Incorporation; and (4)
refusing to comply with the mandates of County Ordinance
2020-4.

Interlocutory Petition at 9.

The County submits that, as the only incorporating municipality of DELCORA, the County has clear legal rights and a vested interest in the legality of the Trust and the termination of DELCORA, which are properly set forth in the Common Pleas Action and not in the Commission's Application proceeding. Under the second *Process Gas* standard, the County asserts that it will suffer irreparable injury through the protracted and unnecessary litigation that would occur if the Commission denies the stay request. Moreover, the County argues that the Commission, the ALJ and other intervenors would be faced with a six-month litigation schedule while key components of the Application remain subject to the Common Pleas Action. Interlocutory Petition at 10.

The County adds that the Company and DELCORA view the Trust as a key justification for the Application and that the Trust confers benefits on DELCORA customers. According to the County, the determination of such benefits is critical to the Commission's review and adjudication of the public interest component of the Application. The County submits, however, its' challenges to the Trust remain pending in the Common Pleas Action and the Commission cannot effectively discharge its' duties to adjudicate the Application while fundamental components of the Application remain uncertain pending active litigation. *Id.*

Regarding the last two prongs of *Process Gas*, the County proffers that a stay will not substantially harm the Parties or adversely impact the public interest. The County contends that all the Parties would benefit from a clear resolution of the legality

of the Trust and the termination of DELCORA prior to adjudication of the Application, which involves both disposition of the funds from the contested Trust and a transfer of assets from DELCORA. As to any concerns about the stay impacting the potential transaction, the County submits that the APA contemplates that the closing will occur after any necessary litigation. *Id.* at 10-11 (citing the APA at 8 (defining “Outside Date” for closing as occurring sixty days following the unappealable resolution of any litigation concerning the transaction)).

In addition, the County argues that judicial economy and administrative efficiency support the issuance of a stay thereby serving the public interest. Interlocutory Petition at 10.

Regarding its second argument that consideration of the Application before the resolution of the Common Pleas Action is premature, the County contends that the Ordinance directs the orderly termination of DELCORA. The Ordinance requires the winding down of DELCORA’s operations including the satisfaction of outstanding debts and obligations and the removal of any impediments to its termination. The County notes, however, that Aqua has filed a preliminary injunction in the Common Pleas Action seeking to enjoin the enforcement of the Ordinance and the termination of DELCORA in advance of the closing in the Application proceeding. Interlocutory Petition at 11-12.

In applying the *Process Gas* standards for a stay, the County argues that it will succeed in enforcing the Ordinance and terminating DELCORA. Since it is the only incorporating municipality of DELCORA, the County contends that it has a clear right to terminate DELCORA; and, regardless of the potential sale transaction, the County is entitled to a writ of mandamus to require DELCORA to comply with the Ordinance. Similar to its prior *Process Gas* arguments, the County argues that denial of the stay will cause irreparable harm to the Commission, the ALJ and other intervenors to proceed with a compressed six-month litigation schedule while the ultimate existence of the

counterparty to the APA remains subject to litigation. The County asserts that enforcement of the Ordinance could have significant impacts on the proposed transaction, highlighting Aqua's argument in its petition to intervene in the Common Pleas Action that the Company's entry into the APA was conditioned on DELCORA remaining a counterparty. The County also reiterates its prior arguments that the proposed stay would not harm the Parties to the Application proceeding or the public interest. Interlocutory Petition at 12-13.

As an alternative to the *Process Gas* factors, the County argues that the doctrine of primary jurisdiction also supports the issuance of the proposed stay. The County contends that the doctrine of primary jurisdiction is a jurisprudential rule allowing administrative agencies and courts of common pleas to defer to each other when litigation, parties, and jurisdictional issues overlap. Here, the County submits that it is not suggesting the Commission lacks jurisdiction over a Section 1329 application, but that the Commission may not have jurisdiction over many substantive issues fundamental to the Application herein. Accordingly, the County requests that the Commission defer the exercise of its jurisdiction by staying this proceeding and allowing the critical non-jurisdictional issues to proceed in the Common Pleas Action. *Id.* at 13-14.⁶

As a final matter, the County addresses the six-month time frame for issuance of an order on the Application under Section 1329 and the Commission's *Emergency Order*. Regarding the Section 1329 timeframe for disposition of the Application, the County submits that the ongoing litigation in the Common Pleas Action presents extraordinary circumstances warranting the exercise of Commission discretion

⁶ The County notes that neither DELCORA nor Aqua raised the doctrine of primary jurisdiction in the Common Pleas Action and, therefore, they waived raising it. To the contrary, the County continues, Aqua intervened in the Common Pleas Action by asserting that the County's Amended Complaint and the Ordinance were a direct attack on the APA. Interlocutory Petition at 15.

to grant the requested stay. According to the County, the unusual circumstances involve Aqua's implication of the subject matter of the Application in the Common Pleas Action. Thus, the County continues, it would be appropriate for the Commission to stay the proceeding because the procedural deadlines in Section 1329 are directory and not mandatory. Interlocutory Petition at 16 (citing *Public Service Water Co. v. Pa. PUC*, 645 A.2d 423 (Pa. Cmwlth. 1994)).

As to the *Emergency Order*, the County asserts that the Interlocutory Petition will occur during the COVID-19 pandemic and the Commission has already acknowledged that strict adherence to deadlines may not be possible. Under these circumstances, the County submits that an order staying all substantive proceedings in this matter would be in the public interest. Interlocutory Petition at 17.

I&E and OCA

In its letter in support of the Interlocutory Petition, I&E emphasizes that the final hearings in the Common Pleas Action are not set to conclude until October 21, 2020, but that the Prehearing Conference in this proceeding is scheduled for September 2, 2020. If the stay is denied, I&E submits that the Parties in this proceeding will be engaging in discovery, serving written testimony, and litigating the merits of the Application prior to the conclusion of the Common Pleas Action. I&E argues that this will likely result in the Parties, the ALJ, and the Commission expending significant time in litigating and considering the Application without knowing for certain whether DELCORA has the legal authority to act as a qualifying "selling utility" as defined in Section 1329 of the Code. I&E Letter at 1-2.

I&E supports the Interlocutory Petition for two reasons. First, I&E contends that the Commission will be prevented from determining if the Application affirmatively promotes the service, accommodation, convenience or safety of the public

in some substantial way and be in the public interest because the seller's status and authority to make commitments that underlie the APA are uncertain and subject to the outcome of pending litigation. According to I&E, it envisions the possibility of a Commission determination about the public benefits of the transaction being reversed by a subsequently-issued order in the Common Pleas Action. *Id.* at 2.

In its second supporting reason, I&E agrees with the County that the Commission, the ALJ, and intervenors would be irreparably harmed by being compelled to litigate the complex Application involving a voluminous record and truncated statutory timeframe subject to the risk of litigation in the Common Pleas Action. Additionally, I&E argues that the Commission's six-month consideration period under Section 1329(d)(2) of the Code is not triggered in this proceeding because DELCORA's status as a "selling utility" appears to be directly at issue in the Common Pleas Action. I&E Letter at 2.

The OCA also supports the Interlocutory Petition for the same reasons asserted by the County. Additionally, the OCA highlights that Aqua described the benefits of the transaction in its Application. Specifically, the Company submitted testimony that the "impact on bills for DELCORA's customers was one of the driving forces behind the transaction and is the primary benefit." OCA Brief at 2 (quoting Aqua St. No. 5 at 11). The OCA further notes Aqua's testimony describing how the sale proceeds will be placed in an irrevocable trust for the benefit of DELCORA's customers and how "this is a relatively unique feature for a transaction of this nature and provides a substantial benefit to our customers." *Id.* The OCA contends that, since the Trust is being claimed as a primary benefit of the proposed transaction for customers and a unique feature of the transaction, the disputed legality of the Trust in the Common Pleas Action will impact the Application and could come into contact with the Commission's determination in this proceeding. OCA Brief at 2.

The OCA also argues that approval of the Application without resolving the issues in the Interlocutory Petition could lead to irreparable harm for existing Aqua and DELCORA customers. In support, the OCA notes that the Common Pleas Action encompasses the same APA as this proceeding and includes many of the same Parties. The OCA also contends that, regardless of the outcome in the Common Pleas Action, a stay would promote judicial efficiency by lessening the time and expense that the Commission and the Parties will expend litigating issues in this proceeding which are subject to ongoing litigation in the civil proceeding. *Id.* at 3.

In further support of the Interlocutory Petition, the OCA proffers that the issuance of a stay until the issues in the Common Pleas Action are resolved would promote a settlement in this proceeding. The OCA reasons that during the pendency of the ongoing Common Pleas Action the Parties may be less inclined to settle while the issues in that proceeding remain unresolved. According to the OCA, after conclusion of the Common Pleas Action, any issues that may overlap between the Common Pleas Action and this proceeding would be resolved which would lead to more certainty between the Parties and the Commission in determining whether a settlement is in the public interest. *Id.*

Aqua

Aqua makes two threshold objections to the Interlocutory Petition. First, the Company argues that the County has failed to satisfy the requirements for interlocutory review and answer to a material question; and second, the Commission is prevented from staying the proceeding and thereby extending the resolution of the proceeding beyond the six-month statutory review period. Aqua Brief at 2-6.

Regarding the standards for interlocutory review, Aqua asserts that the County fails to explain how it is being prejudiced or how interlocutory review would

expedite the conduct of this Section 1329 proceeding. Since the County fails to identify extraordinary circumstances or compelling reasons for interlocutory review, the Company proffers that the Interlocutory Petition should be denied without addressing the material question. Aqua Brief at 3.

Rather than expedite the proceeding, Aqua contends that the County is seeking to delay it until a final determination in the Common Pleas Action which is inconsistent with the recognized criteria for interlocutory review. In addition, the Company asserts that the County is not being prejudiced by this proceeding and that the Commission has no jurisdiction to address the issues in the Common Pleas Action. In this regard, Aqua highlights the County's admission that the legality of the Trust and the County's effort to terminate DELCORA are properly before the court in the Common Pleas Action and not before the Commission. *Id.* at 4 (citing Interlocutory Petition at 10).

In response to the County's argument that denial of the stay would lead to protracted litigation and potential re-litigation of issues, Aqua submits that such concerns do not constitute substantial prejudice. Moreover, the Company argues that the Commission should not presume that the County will prevail in the Common Pleas Action which involve disputed issues and that the pertinent matter for consideration in this proceeding is whether there are substantial public benefits in support of the Application. According to Aqua, these public benefits include rate issues as well as the continuation of reasonable and adequate wastewater service. The Company contends that the Commission should move forward with its review and consideration of those public benefits. *Id.* at 4.

Regarding the County's citation to the *Emergency Order*, Aqua argues that the COVID-19 pandemic restrictions are not hampering the processing of the Company's Application. Rather, Aqua continues, remote processing, discovery via electronic mail,

and the scheduling of a telephonic prehearing conference all indicate that the COVID-19 restrictions provide no bases for staying this proceeding. *Id.*

As to the second threshold objection, Aqua asserts that Section 1329 requires the Commission to issue a final order within six months of the acceptance of the Application, *i.e.*, by January 23, 2021. Aqua argues that the six-month timeframe is an integral part of Section 1329, which was enacted to encourage the acquisition of municipal water and wastewater systems. The Company characterizes the statutory time period as a mandatory deadline and not a directory pronouncement. Aqua Brief at 5 (citing *West Penn Power Co. v. Pa. PUC*, 521 A.2d 75 (Pa. Cmwlth. 1987)). Additionally, Aqua contends that the six-month review period may not be ignored for litigation scheduling purposes as suggested by the County. In support, the Company submits that all statutory provisions are meant to be followed regardless of whether the provision is directory or mandatory. Aqua Brief at 5-6 (citing *In re Condemnation by the Com. of Pa.*, 131 A.3d 625, 631-32 (Pa. Cmwlth. 2016) (*In re Condemnation*) (“It is only in the effect of non-compliance that a distinction [between directory and mandatory language] arises.”) (internal citations omitted)).

Aqua also asserts that Commission precedent supports the conclusion that the Commission must issue a final order in a Section 1329 proceeding within six months. Aqua Brief at 5 (citing *Application of Aqua Pennsylvania Wastewater, Inc. – New Garden Township*, Docket No. A-2016-2580061 (Order entered February 15, 2017)).

If the Commission decides to answer the material question, Aqua requests that it be answered in the negative. In support, Aqua argues that the *Process Gas* criteria for a stay do not support the Interlocutory Petition. As an initial matter, the Company submits that *Process Gas* addresses the standards for a stay of a Commission order pending appeal and has no application to the circumstances of this matter where the County is seeking a Commission stay of the Application proceeding pending the

resolution of the Common Pleas Action. Aqua states that the County acknowledges the differing circumstances for applying *Process Gas*, but the County suggests without support that *Process Gas* may assist the Commission in rendering a decision on the Interlocutory Petition. Aqua Brief at 6.

Addressing the *Process Gas* factors, Aqua argues that the pending Common Pleas Action involves matters in dispute and, thus, the Commission should not presume that the County will prevail in that litigation. Citing to its averments in the Common Pleas Action, Aqua submits that it has requested a ruling in the Common Pleas Action declaring the APA to be a valid, binding and enforceable agreement and that closing on the APA must occur prior to termination of DELCORA by the County. Aqua also notes that it has filed a preliminary injunction in the Common Pleas Action requesting the court to enjoin and restrain the County from terminating DELCORA prior to closing and to enjoin and restrain the County from interfering in any way with the Company's existing contractual relationship with DELCORA. Aqua Brief at 7-8.

Aqua also references DELCORA's averments in response to the County's challenge to DELCORA's authority to establish the Trust. Here, Aqua emphasizes that it is not requesting the Commission to address these issues; rather, the Company asserts it is highlighting these averments to show that it is not likely that the County will prevail in the Common Pleas Action. *Id.* at 8.

Under the second *Process Gas* factor, Aqua argues that the County will not suffer irreparable harm absent a stay. Noting the County's contention that it will suffer protracted and unnecessary litigation, Aqua asserts that litigation may be inconvenient, time consuming, and expensive, but it is not irreparable harm. The Company also discounts the underlying assumption in the County's contention that it will likely prevail in the Common Pleas Action. Aqua proffers that it is entirely likely that the County will not prevail in the civil action. As a counter to the alleged litigation harm, Aqua cites to

various proffered benefits to the transaction set forth in the Application which provide benefits to DELCORA's customers and are in the public interest. Aqua Brief at 9-10.

Regarding the third *Process Gas* factor, Aqua argues that a stay will cause substantial harm to the Company. Aqua contends that it has a binding and enforceable agreement to acquire the DELCORA system and its Application requires a final order from the Commission within six months of the date of being fully accepted. According to Aqua, a stay would frustrate the Company's desire to close the proceeding within a reasonable time after the Commission completes its six month review. Aqua argues that a stay extending the review period beyond six months would constitute a violation of law, which constitutes *per se* irreparable harm. *Id.* at 10 (citing *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Cmwlth. 2016)).

As to the final *Process Gas* factor, Aqua submits that the General Assembly has encouraged the sale of public water and wastewater assets at market rates pursuant to Section 1329 of the Code. The Company argues that it is furthering this recognized statutory objective in its proposed transaction which is a sale of a municipal wastewater system at market rates. Thus, Aqua proffers that a stay would adversely affect this public interest. Aqua Brief at 10-11.

Regarding the County's alternative argument that the doctrine of primary jurisdiction supports a stay, Aqua notes that the doctrine is typically applied in civil proceedings where a litigant is seeking damages caused by an alleged lack of reasonable utility service. Under that scenario, the court may refer the service question to the Commission, which has no jurisdiction to award monetary damages but can address the service issue applying its special expertise. After the Commission determines the regulatory issue within its jurisdiction, the civil litigation continues guided in scope and direction by the Commission. *Id.* at 11 (citing *Elkin v. Bell Tel. Co.*, 491 Pa. 123, 420 A.2d 371 (1980) (*Elkin*)).

Aqua argues that the doctrine of primary jurisdiction – which exists so that the courts can have the benefit of the agency’s views on issues within the agency’s competence – does not support the County’s attempt to stay a Commission proceeding. According to the Company, the doctrine would allow a civil court to refer a matter of utility service to the Commission but does not contemplate a stay of a Commission proceeding addressing issues of public interest for wastewater service. Aqua Brief at 11-12.

DELCORA

In its brief, DELCORA requests that the Commission deny the Interlocutory Petition and in support presents four main arguments. First, DELCORA asserts that the six-month consideration period for the Application set forth in Section 1329(d)(2) of the Code is mandatory. Second, DELCORA submits that even if the Commission were to disregard the statutory mandate of a six-month review, a stay is unwarranted here because the Commission’s review of the Application is not dependent on the disposition of the Common Pleas Action. Third, DELCORA contends that even if the *Process Gas* test were to be applied, the County fails to satisfy it. Fourth, DELCORA argues that the doctrine of primary jurisdiction does not support a stay because the County asserted the Commission’s jurisdiction as a defense in the Common Pleas Action. DELCORA Brief at 5-15.

In its first argument, DELCORA contends that there are no exceptions to the statutory six-month requirement for the issuance of a Commission final order pertaining to the Application. Additionally, DELCORA attempts to distinguish the caselaw pertaining to mandatory and directory statutory provisions. According to DELCORA, the County ignores the well-established holding that distinctions between mandatory and directory deadlines are drawn only in the context of determining the consequences of missing such a deadline. DELCORA argues that the Commission may

not disregard a statutory deadline at the start of an administrative proceeding regardless of the characterization of the statutory language. DELCORA Brief at 5-6 (citing *In re Condemnation*, 131 A.3d at 631-32).

DELCORA submits that granting a stay would be unprecedented, violate clear legal principles, and set a dangerous precedent for Section 1329 applications before the Commission. Additionally, DELCORA objects to I&E's argument that the six-month statutory review period has not been triggered because DELCORA's status as a selling utility under Section 1329(d)(1) appears to be at issue in the Common Pleas Action. DELCORA contends that I&E's argument has no legal support. DELCORA also avers that it is presently the selling utility and that a counterparty to Aqua in the APA will always be present. DELCORA Brief at 6-7.

In its second argument, DELCORA proffers that a stay is unwarranted because the Commission's review of the pending transaction is in no way dependent on the disposition of the issues in the Common Pleas Action. As support, DELCORA asserts that the APA is a valid, enforceable agreement and the County concedes that the Common Pleas Action will not alter this fact. Here, DELCORA cites to the County's answer to Aqua's preliminary injunction in the Common Pleas Action and emphasizes the County's averments that its' amended complaint does not challenge the APA or the sale of assets from DELCORA to Aqua. DELCORA Brief at 7, Exh. D at ¶¶ 51-52.

DELCORA submits that the issues before the Commission which pertain to the APA and the sale of assets from DELCORA to Aqua are distinct and severable from the issues in the Common Pleas Action. According to DELCORA, the APA was validly executed by both DELCORA and Aqua and that DELCORA had the legal authority under the Authorities Act to do so. *Id.* at 7-8 (citing 53 Pa. C.S. § 5607(d)(13)).

In further support of its second argument, DELCORA argues that the County's attempt to terminate DELCORA does not prevent the Commission from reviewing the instant transaction with Aqua. DELCORA contends that the Authorities Act is clear that the County can only terminate DELCORA after assumption of DELCORA's binding obligations under the APA. Since those obligations would survive DELCORA's termination, the consideration of DELCORA's termination in the Common Pleas Action would have no bearing in this proceeding and does not support the issuance of a stay. DELCORA Brief at 8-9 (citing 53 Pa. C.S. §§ 5619, 5622).

Continuing with its second main argument, DELCORA contends that nothing about the County's challenge to the Trust in the Common Pleas Action provides a legal basis for the Commission to stay this proceeding. DELCORA asserts that it has committed to applying the proceeds of the transaction to be used for the benefit of its ratepayers via the Trust. According to DELCORA, the fact that the validity of the Trust is being challenged in the Common Pleas Action is ultimately irrelevant to this proceeding because the APA is not conditioned on the Trust's validity. If the Trust is held to be invalid, DELCORA continues, the transaction can go forward with or without the Trust component. DELCORA explains that, absent the Trust, the money paid to DELCORA will still be available for its ratepayers' benefit and be applied for that purpose in another way not requiring Commission jurisdiction. DELCORA Brief at 9-10.

Regarding its third main argument pertaining to *Process Gas*, DELCORA states that the application of the test to this proceeding would be unwarranted and without precedent. However, DELCORA continues, if the Commission were to apply *Process Gas* to the Interlocutory Petition, the County has not satisfied it. DELCORA Brief at 11.

As to the first prong of the *Process Gas* standard – of whether there is a strong showing of success on the merits – DELCORA argues that the County simply makes bald, conclusory averments that the Trust violates DELCORA's articles of

incorporation, is an invalid governmental entity, and violates the Authorities Act and the Uniform Trust Act. In response, DELCORA attaches copies of its articles of incorporation and the Trust agreement and makes legal arguments that the Trust does not violate the articles of incorporation and cannot be deemed a governmental entity. DELCORA Brief at 11-12 (citing Exhs. G and H). Additionally, DELCORA makes legal arguments that the Trust does not violate either the Authorities Act or the Uniform Trust Act. According to DELCORA, the County's claim that it has made out a strong showing of being likely to prevail on the merits is false. DELCORA Brief at 12-13.

Under the second Process Gas standard, DELCORA argues that the County has failed to show or sufficiently allege that it will suffer irreparable harm if a stay is denied. DELCORA submits that the County's concerns of protracted and unnecessary litigation in the absence of a stay are unfounded for three reasons. First, DELCORA contends that having to litigate an action does not constitute irreparable harm. Second, by operation of the six-month time limit under Section 1329 of the Code, the County's claim of a protracted proceeding are incorrect. Third, DELCORA contends that the County has not specified what would be different in this proceeding if the County were successful in the Common Pleas Action. *Id.* at 13.

According to DELCORA, the Commission is able to consider whether the Application is in the public interest both with and without the prospect of the Trust. Moreover, DELCORA asserts that the County has not explained how the proposed transaction would be impacted if DELCORA is terminated and the County replaces DELCORA as a party to the APA. DELCORA further alleges that the County has consistently stated that the Commission's ruling on the APA and the sale needs to occur before the County can step into the shoes of DELCORA as a party to the APA. *Id.* (citing Exh. C, Response Nos. 3, 6, 7).

Regarding the final *Process Gas* prong – substantial harm to other interested parties – DELCORA reiterates the argument that violation of the six-month consideration period under 66 Pa. C.S. § 1329(d)(2) would itself constitute *per se* irreparable harm. DELCORA also contends that the Interlocutory Petition is a delay tactic that will cause significant harm to DELCORA and its ratepayers. DELCORA Brief at 14.

In support, DELCORA cites to the testimony of its' Executive Director submitted with the Application who stated that the sale to Aqua resulted in large part because DELCORA was facing expenses of at least \$606 million to remain with the Philadelphia Water Department (PWD) which handles a portion of DELCORA's wastewater flow. DELCORA notes that, in contrast, separation from PWD will cost approximately \$450 million. As a result, DELCORA explains, it decided to leave PWD and enter into the APA to facilitate the separation. DELCORA asserts that the work to separate from PWD must occur immediately to be in a position to disconnect from PWD in 2028, when DELCORA's current contract with PWD ends. *Id.* (citing Aqua St. No. 5 at 6-9).

DELCORA argues that any delay in these proceedings would delay this critical work. DELCORA warns that such a scenario could have drastic implications for its ratepayers who would face the burden of bearing even more significant capital improvement costs. In addition, DELCORA asserts that there would be a risk that the work would not be completed by 2028 thereby leaving DELCORA without a way to treat a portion of its wastewater at that time. DELCORA submits that it faces real-life consequences for its ratepayers as opposed to supposed harms alleged by the County involving the payment of attorney fees for litigation in proceedings it decided to initiate or intervene in. DELCORA Brief at 14-15.

In its last main argument, DELCORA incorporates the arguments of Aqua opposing the application of the doctrine of primary jurisdiction. Additionally, DELCORA alleges that the County's own pleadings unequivocally assert as a defense in the Common Pleas Action that the APA is subject to the Commission's exclusive jurisdiction. As an example, DELCORA cites to and attaches a copy of the County's preliminary objections to the counterclaims of DELCORA. *Id.* at 15, Exh. J. at ¶ 19.

In summary, DELCORA submits that the Commission is fully capable of reviewing the Application before it, while the court in the Common Pleas Action hears the claims related to the Trust and the Ordinance. DELCORA argues that both proceedings can, and should, proceed concurrently. DELCORA Brief at 15.

Disposition

Upon review, we decline to answer the material question set forth in the Interlocutory Petition. First, the County has not shown that granting interlocutory review will prevent substantial prejudice. The pertinent consideration is whether the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *See, Bell Atlantic, Frontier Communications, and Knights Limousine, supra.* Here, the County alleges that it will suffer irreparable injury through protracted and unnecessary litigation that would occur if the Commission were to deny the stay request. Thus, this alleged prejudice is associated with having to participate as an intervenor in the Application proceeding if the Commission denies its Interlocutory Petition. However, the Commission has found that the time, effort, and expense

associated with having to litigate a case does not typically amount to substantial prejudice for purposes of granting interlocutory review.⁷

The County also alleges that the Commission, the ALJ, and the other intervenors would be faced with the prospect of litigating the Application subject to a six-month review period while key components of the Application remain subject to and conditioned upon the outcome of the Common Pleas Action. Again, the obligations and responsibilities of the Parties related to the administrative litigation schedule before the Commission are not considered substantial prejudice in our evaluation of interlocutory review petitions. Moreover, 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.

The County's claims of prejudice rests on the assumption that it will prevail in the Common Pleas Action. This contention is further premised on its arguments in support of its stay under the *Process Gas* criteria. Although the Commission has adopted the standards of *Process Gas* in reviewing petitions which seek to stay the effect of Commission Orders, the Interlocutory Petition herein does not seek the stay of any particular Commission Order. Despite this, the County requests that we apply *Process Gas* and impose a stay of the entire Application proceeding until the disposition of the Common Pleas Action. A review of the first prong of *Process Gas* makes clear that such a request is inappropriate because it requires the evaluation of the likely success of a newly asserted cause of action in another tribunal relating to issues over which the Commission has no jurisdiction. The *Process Gas* criteria more properly pertain to stay

⁷ See, e.g., *Mobilfone of Northeastern PA, Inc. v. Paul Kelly d/b/a American Teletronix*, 67 Pa. P.U.C. 256 (1988); *Petition of West Penn Power Company d/b/a Allegheny Power*, Docket No. P-2010-2158084 (Order entered November 8, 2010); and *Alderwoods (Pennsylvania), Inc., v. Duquesne Light Company*, Docket Nos. P-2016-2541570 and C-2016-2522634 (Order entered October 13, 2016).

requests of Commission Orders and not to the evaluation of the likely success of a civil complaint proceeding involving legal issues which at present appear to be beyond our ken.

Nonetheless, the County invites us to make a determination that it will likely be successful in its Common Pleas Action and that proceeding any further on the Application may cause the Parties to suffer substantial injury. In contrast, Aqua and DELCORA argue that the County's Common Pleas Action will just as likely prove unsuccessful and that both actions can, and should be, considered concurrently. Plainly, we are unable to engage in speculating the winners of the County Pleas Action. This does not mean, however, that the Commission is authorized to sit back and wait for some future ruling by the Common Pleas Court particularly when the General Assembly has established a time frame for a Commission determination of a Section 1329 proceeding. Such a delay could as likely prove harmful to the Parties if this proceeding were to be stayed – and the Parties and the Commission were denied the timely opportunity to investigate and evaluate the Application – and the court in the Common Pleas Action later determines that the County's amended complaint should be dismissed.

In applying the additional factors for evaluating petitions for interlocutory review, we also determine that the County has not shown that granting interlocutory review will expedite the conduct of the proceeding. Section 1329(d)(2) of the Code states that the Commission “shall issue a final order on an application submitted under this section within six months of the filing date of an application meeting the requirements of subsection (d)(1).” 66 Pa. C.S. § 1329(d)(2). The Commission issued the Secretarial Letter finally accepting the Application for filing on July 27, 2020, and Section 1329(d)(2) requires the Commission to issue a final Order on the Application within six months of the filing acceptance date.

The Parties argue whether the language of Section 1329(d)2) is mandatory or directory. However, we need not resolve that dispute in this Opinion and Order because the Commission has already taken the appropriate steps to help ensure compliance with the legislative directive. *See, e.g., Further Corrected Prehearing Conference Order* dated August 17, 2020 (setting forth a proposed litigation schedule but indicating a required date for the issuance of a final Commission determination by the Public Meeting of January 14, 2021). In this regard, we acknowledge that both mandatory and directory provisions of the General Assembly are meant to be followed and it is only in the effect of non-compliance that a distinction arises. *See In re Condemnation*, 131 A.2d at 631-32.⁸ Granting a stay in this proceeding would impede the expeditious consideration of the Application as contemplated under Section 1329.

Finally, we decline the invitation to apply the doctrine of primary jurisdiction in this matter. This doctrine generally applies to a court refraining from hearing a case in order to protect the integrity of the regulatory scheme and to allow the initial resolution of a dispute before an administrative agency. *County of Erie v. Verizon North, Inc.*, 879 A.2d 357, 363 (Pa. Cmwlth. 2005). As the Pennsylvania Supreme Court has explained, a purpose of the doctrine is to make use of an administrative agency's experience and expertise in complex areas and to promote consistency and uniformity in the area of administrative policy. *Elkin*, 420 A.2d at 376. We are not persuaded to apply the doctrine in reverse – that is, to refrain from hearing the Application proceeding and defer to a determination in the Common Pleas Action. In our view, taking such an action would not protect the integrity of the regulatory scheme pertaining to the consideration of

⁸ However, we recognize that there may be circumstances which could prevent the Commission from meeting a statutory compliance date such as those outlined in the *Emergency Order*. Furthermore, this Opinion and Order does not address the OCA's Expedited Motion, and the responses thereto, pertaining to the *Emergency Order* because that matter is currently pending before the OALJ.

the Application under Section 1329. Rather, it would potentially impede the timely regulatory review process intended by the General Assembly.

Conclusion

For the reasons set forth above, we shall grant the Petitions to Intervene filed by the County and DELCORA, and shall decline to answer the material question or to issue a stay of the proceeding as requested by the County in the Interlocutory Petition, consistent with the discussion in this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition to Intervene filed by the County of Delaware, Pennsylvania on May 18, 2020, is granted, consistent with this Opinion and Order.

2. That the Petition to Intervene filed by the Delaware County Regional Water Quality Control Authority on June 6, 2020, is granted, consistent with this Opinion and Order.

3. That with regard to the Petition for Stay and Request for Commission Review and Answer to a Material Question filed by the County of Delaware, Pennsylvania on August 7, 2020, we shall decline to answer the following material question:

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?

4. That this matter is returned to the Office of Administrative Law Judge for such proceedings as may be necessary.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first name being more prominent.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 31, 2020

ORDER ENTERED: August 31, 2020

EXHIBIT “B”

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL DIVISION**

County of Delaware, Pennsylvania	:	
Plaintiff	:	
v.	:	NO: CV- 2020-003185
	:	
Delaware County Regional Water Quality	:	
Control Authority, and Delcora Rate	:	
Stabilization Fund Trust Agreement b/t	:	
The Delaware County Regional Water	:	
Quality Control Authority as Settlor and	:	
Univest Bank and Trust Co. as Trustee	:	
Defendants	:	
	:	
Darby Creek Joint Authority, Southern	:	
Delaware County Authority, and Aqua	:	
Pennsylvania Wastewater, Inc.	:	
Intervenors	:	

Carol Steinour Young, Esquire, Dana Chilson, Esquire, Thomas Markey, Esquire, William F. Martin, Esquire, Carl Ewald, Esquire,
for the Plaintiff

Nicholas Poduslenko, Esquire, Matthew S. Olesh, Esquire, Thomas S. Wyatt, Esquire,
for Defendant, DELCORA

William Hinchman, Esquire and Monica Platt, Esquire for Univest Bank and Trust

Joel Frank, Esquire, Michael Puppio, Esquire,
for Petitioning Intervenor/Defendant, Aqua Pennsylvania Wastewater

Andrew Reilly, Esquire, Jacquelyn Goffney, Esquire,
for Intervenor/Defendant, Southern Delaware County Authority

William Malone, Esquire,
for Intervenor/Defendant, Darby Creek Joint Authority

ORDER

AND NOW, this th28 day of December, 2020, upon consideration of the Amended Complaint, all replies thereto, all Counterclaims, and Motions for Summary Judgment, as well as all Exhibits, including Statements of Admission of Parties and hearings on October 21, 27, and December 1 and 2, 2020, NOW, THEREFORE, it is hereby ORDERED as follows;

1. The fundamental issues of this case are the legality, enforceability and integrity of a contract, that being the Asset Purchase Agreement between Delaware County Regional Water Control Authority (“DELCORA”) and Aqua Pennsylvania Wastewater Inc. (“AQUA”), the enforcement of Delaware County’s (COUNTY) Ordinance 2020-04 and the COUNTY’s actions in opposing and allegedly interfering with DELCORA’s performance of the same contract, and the legality and funding of the Rate Stabilization Fund Trust between DELCORA and AQUA.
2. The enforcement of legally binding contracts is the foundation of our law. A COUNTY’s change of governmental administration, management, or political persuasion, being a party to a legally binding contract, may endeavor to renegotiate or not renew nor extend a contract, but the alleged intentional interference, termination, and obstruction requires critical judicial examination. All the parties professionally, skillfully and civilly presented their juxtapose case.
3. Despite the obvious impasse of the legality and enforceability of the Asset Purchase Agreement, and DELCORA’s understandable reluctance to deliver to the COUNTY a Certificate of Termination, this Court heard credible testimony and viewed Exhibits that confirm that DELCORA has significantly cooperated in providing information and documents at the request of the COUNTY.

Asset Purchase Agreement

4. This Court finds that the Asset Purchase Agreement between DELCORA and AQUA is a legal and enforceable contract, not in violation of the Municipality Authorities 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 Authorities Act, subject to the approval of the Pennsylvania Public Utility Commission.
5. This Order is not intended to provide commentary on the pros and cons, advantages or disadvantages of the DELCORA and AQUA Asset Purchase Agreement, but only to confirm the enforceability of a legally adopted Contract. The whims of politics or changing COUNTY administrations do not waive away legally enforceable binding contracts. The reliance and predictability of valid legal contracts is paramountly important and serves public policy.
6. The COUNTY requests that the COUNTY Ordinance 2020-04 be declared valid and enforceable and requests a Writ of Mandamus to DELCORA to comply with the Ordinance and cooperate with termination. But clearly, by way of enforcing Ordinance 2020-04, the COUNTY directs the termination or as the COUNTY refers to the “winding down” of DELCORA. This Court finds that the COUNTY Ordinance 2020-04 does more than “wind down” DELCORA rather interferes and implodes DELCORA’s ability and contractual obligations to perform contractual obligations to effectuate the sale and further interferes with AQUA’s contractual rights.

7. This Court heard testimony that the COUNTY, despite this litigation beginning May 14, 2020, and the significant merits of DELCORA's and AQUA's defense and counterclaims, are presently investigating, planning, and assuming costs and resources in creating a wastewater utility to replace the function and services of DELCORA. The costs and expenses, and efficiency of creating a COUNTY utility, and the retainment of employees, customer Rate Stabilization, the use and application of DELCORA's assets and funds, and the effect on partnering municipal sewer authorities, as well as any public notice, dialogue or actions to create a new COUNTY authority, are all unknown to this Court and not the subject of these proceedings. (See the testimony of Plaintiff witness Steven A. Goldfield and County Executive Director, Howard Lazarus)
8. The directives, terms, and provisions of the COUNTY's June 3, 2020 Ordinance 2020-04, Exhibit P-1, as demonstrated by the County Solicitor Letter, Exhibit P-2, dated June 4, 2020, and public rhetoric with strong political overtones, evidences the COUNTY's intent and design to thwart, reverse, interfere and extinguish the contractual agreements, and contract previously publicly debated, considered and legally adopted by DELCORA, AQUA and DELAWARE COUNTY. See Exhibits P-1, P-2, D-10, D-11, D-12, D-13 and admitted excerpts of Depositions.
9. The COUNTY's Ordinance of dissolution and termination, evidenced by Ordinance 2020-04 requirements, and the COUNTY Solicitors June 4, 2020 directive, as referred above, that DELCORA immediately provide COUNTY with a Certificate of Termination, and restrictions on expenses, and constraints on the actions and performance required of the Asset Purchase Agreement is a functional equivalent to termination and interference of contractual obligations, as well as essential services and imposes and creates immediate and irreparable harm. Various terms and conditions of Ordinance 2020-04 are a substantial obstacle to DELCORA and AQUA's performance of contract.
10. Contracts, binding agreements, and various legally public actions are not to be extinguished or interfered with merely because of a reorganization of County Council or partisan differences. The integrity and predictability of contracts when legally adopted, shall be relied upon by the parties, represents good public policy, and the COUNTY shall hereby provide full faith and credit to the Asset Purchase Agreement, even as COUNTY administrations may change.
11. AQUA relies upon the representations and warranties (see Article 4 of the Asset Purchase Agreement) provided by DELCORA, as well as relying upon the COUNTY's 2019 consent to the sale transactions.
12. AQUA has a fully binding and enforceable agreement to acquire DELCORA's system, which requires the representations and warranties that can only be made by DELCORA.

13. The COUNTY also asserts that the Asset Purchase Agreement is void ab initio because of the alleged involvement of Robert Willert, Executive Director of DELCORA and Section 5614(e) of the Municipality Authorities Act and as such violates public policy.
14. This Court further finds that the COUNTY's allegation of a conflict of interest is pure speculation, hyperbole, and mere rhetoric, (see Exhibit D-12 and D-13) and not supported by the weight of evidence.
15. Credible testimony and evidence confirms that both DELCORA's Board of Directors and Attorneys' and AQUA representatives dictated, negotiated, drafted, and approved the terms of Asset Purchase Agreement. There is no affirmative evidence whatsoever that Mr. Willert played a material role in the sale. Both deposition and trial testimony confirm he did not undertake to negotiate anything for himself whatsoever. Similar to any existing contract, Mr. Willert's employment contract survives the sale; and he receives no new, supplemental, or additional compensation, benefits, enhancements, or financial gain whatsoever. Nor is there any further modification to his employment contract.
16. This Order does not contest the COUNTY's general authority to terminate DELCORA, but the COUNTY cannot interfere, or restrain, or refuse to comply with the contractual obligations set forth in the Asset Purchase Agreement and amendments thereto.
17. The COUNTY shall be enjoined and restrained from terminating DELCORA prior to the closing of the DELCORA/AQUA Asset Purchase Agreement and enjoined and restrained from interfering in any way with AQUA's existing contractual relationship with DELCORA. DELCORA's and AQUA's requested injunction is necessary to prevent irreparable harm that cannot be adequately compensated in damages.
18. Upon the parties effectuating the sale, as detailed in the Asset Purchase Agreement, and Amendment(s) thereto, all parties to this matter shall cooperate to comply with all sale requirements and conditions, and thereafter cooperate with the efficient winding down and dissolution of DELCORA as Ordinance may require, or as the parties mutually agree, but the winding down shall not interfere or obstruct the terms of the Asset Purchase Agreement, all Amendments thereto, and the funding and Administration of the Rate Stabilization Fund Trust.

Rate Stabilization Fund Trust

19. The amendment to DELCORA's Articles of Incorporation on or about December 18, 2019 empowered DELCORA to create and fund the Rate Stabilization Fund Trust (the "Trust").
20. On or about December 18, 2019, the COUNTY amended DELCORA's Articles to add the following to the "purpose" provision: "In anticipation of the dissolution of the Authority and/or the transfer and sale of all, or substantially all of the Authority's assets, property and projects in exchange for the receipt of a cash payment, the Authority and its Board, in addition to any other authority granted by applicable law, shall have the full

authority, without limitation to: (1) establish a trust or non-profit entity to exist for the benefit of rate payers to distribute to rate payers some or all of the proceeds received from any transfer and sale, in accordance with applicable law and any agreements concerning the transfer and sale of any assets and/or the Authority's dissolution; and (2) execute any necessary agreement to effectuate this purpose prior, during, or after any transfer and sale and/or dissolution."

21. "According to the Amended Articles, assets of a trust or non-profit entity will be distributed to the rate payers, (DELCORA's Customers) for the purpose of "rate stabilization."
22. On or about December 27, 2019, the Trust between DELCORA, as settlor, and Univest Bank and Trust Co., as Trustee, was created. The validity of the Trust is the subject of this litigation. The stated purposes of the Trust are to benefit the beneficiaries, defined as DELCORA's Customers, by providing Rate Stabilization.
23. The Municipality Authorities Act, 53 Pa. C.S. §§ 5601 et seq. (the "MAA"), provides an independent legal basis for DELCORA to create and fund the Trust. DELCORA had the authority to create the Rate Stabilization Fund Trust (the "Trust") and authority to fund it.
24. The Municipality Authorities Act states that "[t]he purpose and intent of this chapter [is] to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety, and prosperity." 53 Pa. C.S. § 5607(b)(2).
25. The Municipality Authorities Act states, without limitation, that "[e]very authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section." 53 Pa. C.S. §5607(d).
26. Under the Municipality Authorities Act, DELCORA has the power to "acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by it." 53 Pa. C.S. §5607(d)(4).
27. Under the Municipality Authorities Act, DELCORA has the power to "make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business." 53 Pa. C.S. §5607(d)(13). The Trust, by its very name, terms and provisions, is an agreement.
28. Under the Municipality Authorities Act, DELCORA has the power to "pledge, hypothecate or otherwise encumber all or any of the revenues or receipts of the authority as security for all or any of the obligations of the authority." 53 Pa. C.S. §5607(d)(16).
29. Under the Municipality Authorities Act, DELCORA has the power to "do all acts and things necessary or convenient for the promotion of its business and the general welfare

of the authority to carry out powers granted to it by this chapter or other law.” 53 Pa. C.S. §5607(d)(17).

30. The Municipality Authorities Act thus allows DELCORA to create the Trust and allows DELCORA to convey proceeds of the DELCORA/AQUA sale into the Trust.
31. The Trust is consistent with 53 Pa. C.S. §5612 because (a) it was authorized by DELCORA’s Articles, as amended, and (b) the money to be placed in the Trust is derived from DELCORA’s fulfillment of its mission and purpose, and will be used to provide a service for the benefit of the customers of DELCORA’s system, who DELCORA served in accordance with its mission, in the form of distributions to offset rate increases.
32. The Trust does not violate the Uniform Trust Act because DELCORA had the capacity to create the Trust when it was created.
33. This Court opines, subject to the Pennsylvania Public Utility Commission’s authority to review, the Rate Stabilization Fund Trust, and operating memorandums thereto or any reasonable legal Rate Stabilization methodology benefits and serves the Wastewater customers both residential and commercial, as opposed to any successor to DELCORA absorbing the assets and funds.
34. SUMMARY JUDGEMENT REGARDING THE VALIDITY AND ENFORCEMENT OF THE ASSET PURCHASE AGREEMENT AND ANY AMENDMENT THERETO AND COUNTY ORDINANCE 2020-04:
 - a. Judgment is hereby ENTERED, and Motions are GRANTED in favor of DELCORA’s Motion for Summary Judgment on Count V of the COUNTY’s Amended Complaint and Counts II and III of DELCORA’s counterclaim, and any responses thereto. Count V of the COUNTY’s Amended Complaint seeking injunctive and mandamus relief regarding DELCORA to comply with the COUNTY’s Ordinance is hereby DISMISSED;
 - b. Judgment is hereby ENTERED, and Motions are GRANTED in favor of Intervenor AQUA Pennsylvania Wastewater Inc., and against the COUNTY, on Count 1 of its Counterclaim for Declaratory Relief, and Count V of the Plaintiff COUNTY of Delaware’s Amended Complaint, and all responses thereto. Count V of the COUNTY’s Amended Complaint seeking injunctive and mandamus relief requiring DELCORA to comply with the COUNTY’s Ordinance is hereby DISMISSED;
 - c. The Court hereby issues a DECLARATORY JUDGMENT that the Asset Purchase Agreement dated September 17, 2019 (as amended on February 24, 2020) between AQUA and DELCORA is a valid, binding, and enforceable contract between AQUA and DELCORA authorized by Sections 5607, 5619, and 5622 of the Municipalities Authorities Act, subject to approval of the transaction by the Pennsylvania Public Utility Commission, and that any

termination of DELCORA by the COUNTY cannot occur prior to the closing on the Asset Purchase Agreement;

- d. 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;
- e. The injunctive relief is reasonably suited to abate the offending activity, as the Court does not intend to challenge the COUNTY's authority to wind down and terminate DELCORA. DELCORA and AQUA only seek to preserve the Asset Purchase Agreement by requiring that closing occur prior to termination of DELCORA.
- f. Judgment is hereby ENTERED in favor of Darby Creek Joint Authority's Counterclaim (Count I) to the COUNTY's Amended Complaint, hereby entering a Declaratory Judgment that the Service Agreement, Exhibit DC-1, between DELCORA and DCJA and the Assignment Consent, Exhibit DC-2, are valid and enforceable contracts. The further request of Darby Creek Joint Authority to enjoin the COUNTY from dissolving DELCORA is DENIED as moot in light of this Order;
- g. Judgment is further ENTERED in favor of the Southern Delaware County Authority confirming the legality and enforceability of the Asset Purchase Agreement and Rate Stabilization Fund Trust for all the reasons set forth herein.

35. SUMMARY JUDGMENT REGARDING ALL COUNTS RELATING TO THE DELCORA RATE STABILIZATION FUND TRUST:

- a. Judgment is hereby ENTERED in favor of Defendant, Delaware County Regional Water Quality Control Authority (DELCORA), and against Plaintiff, the COUNTY of Delaware, Pennsylvania, (COUNTY), on all Counts I, II, III, and IV of the COUNTY's Amended Complaint and Count I of DELCORA's Counterclaim;
- b. It is hereby DECLARED that the DELCORA Rate Stabilization Fund Trust does not violate (i) DELCORA's Articles of Incorporation, (ii) the Municipality Authorities Act, (iii) the Uniform Trust Act, (iv) public policy, or (v) any other applicable law;
- c. 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.

36. The Counterclaims of Tortious Interference with existing Contractual Relationships for compensatory and Punitive Damages and Attorney fees filed by AQUA Pennsylvania Wastewater Inc and Darby Creek Joint Authority have both been withdrawn subsequent to the December 1, 2020 hearing.
37. This Order is not intending to interfere with the authority and jurisdiction of the Pennsylvania Utility Commission at Docket No. A-2019-3015173 (PUC Application).
38. In consideration of this Order, the Stipulated Injunction Order of September 9, 2020 is now moot and hereby VACATED.
39. This Court reserves jurisdiction, upon Petition and hearing, if necessary, to enforce the terms and conditions of this Order.

BY THE COURT:

J. Barry C. Dozor

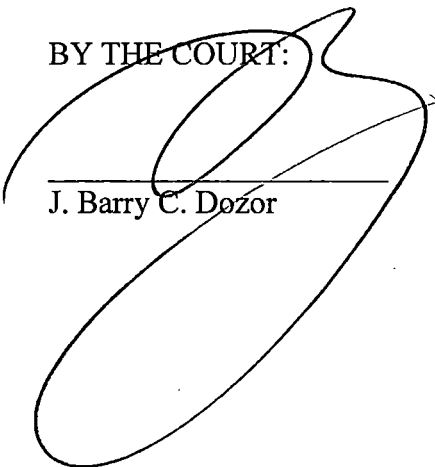


EXHIBIT “C”

**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

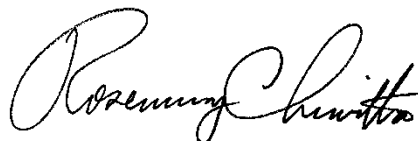
For the reasons set forth above, we shall decline to rule on the Exceptions of Aqua, DELCORA, and Sunoco. Additionally, we shall vacate the Recommended Decision, reopen the record, remand the proceeding to the OALJ for such further proceedings as may be deemed appropriate, and direct the issuance of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

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta", written in a cursive style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: March 25, 2021

ORDER ENTERED: March 30, 2021

EXHIBIT “D”

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL DIVISION**

COUNTY OF DELAWARE, PENNSYLVANIA

Plaintiff

v.

DELAWARE COUNTY REGIONAL WATER QUALITY
CONTROL AUTHORITY, AND DELCORA RATE
STABILIZATION FUND TRUST AGREEMENT B/T
THE DELAWARE COUNTY REGIONAL WATER
QUALITY CONTROL AUTHORITY AS SETTLOR AND
UNIVEST BANK AND TRUST CO. AS TRUSTEE

Defendants

DARBY CREEK JOINT AUTHORITY, SOUTHERN
DELAWARE COUNTY AUTHORITY, AND AQUA
PENNSYLVANIA WASTEWATER, INC.

Intervenors

:
:
: NO: CV- 2020-003185
:

Carol Steinour Young, Esquire, Dana Chilson, Esquire, Thomas Markey, Esquire,
William F. Martin, Esquire, Carl Ewald, Esquire, for the Plaintiff

Nicholas Poduslenko, Esquire, Matthew S. Olesh, Esquire, Thomas S. Wyatt, Esquire,
for Defendant, DELCORA

William Hinchman, Esquire and Monica Platt, Esquire for Univest Bank and Trust

Joel Frank, Esquire, Michael Puppio, Esquire,
for Petitioning Intervenor/Defendant, Aqua Pennsylvania Wastewater

Andrew Reilly, Esquire, Jacquelyn Goffney, Esquire,
for Intervenor/Defendant, Southern Delaware County Authority

William Malone, Esquire,
for Intervenor/Defendant, Darby Creek Joint Authority

OPINION

Dozor, J.

March 17, 2021

NATURE AND HISTORY OF THE CASE:

This is an Appeal from the Court's Order issued a Final Order¹ on December 28, 2020 which was issued by the Court in consideration of the Amended Complaint and Replies thereto, including Counterclaims, and Trial on October 21 and 27, 2020 and December 1 and 2, 2020. This instant Appeal was filed by Plaintiff/Appellant (hereinafter the "COUNTY"). This Court notes initially that Plaintiff/Appellant's filed a Motion for Post Trial Relief on January 7, 2021, which this Court promptly issued an Order requiring responses from Defendant/Intervenors/Appellees. This Court notes that the Answers were timely filed. Before this Court was able to rule on the Motions, and in fact, before the Answers to the Motion for Post Trial Relief were due, the County filed a Notice of Appeal. Thereafter, this Court, believing that the Notice of Appeal divested the undersigned of jurisdiction to rule on the Motion for Post Trial Relief, issued an Order on January 27, 2021 finding that the Motions were Moot and issued a separate Order requiring a Concise Statement of Matters Complained of on Appeal. The entire procedural history of this case follows below.

¹ All parties in this litigation, entered a Stipulation that was subsequently approved and signed by the undersigned. Said Stipulation and Order signed by the undersigned provides as follows:

1. This Court's Order of January 27, 2021, finding the County's Post-Trial Motions moot is hereby WITHDRAWN.
2. The County's Post-Trial Motions are hereby DENIED, without the County waiving any of the issues preserved in the County's January 7, 2021 Post-Trial Motions.
3. The County's Post-Trial Motions having been denied, the County's Notice of Appeal filed January 21, 2021 shall be treated as filed after the entry of this Stipulated Final Order and on the day thereof pursuant to Pa. R.A.P. 905(a)(5).
4. The County's Pa. R.A.P. 1925(b) Statement of Errors Complained of on Appeal filed January 27, 2021 shall be treated as timely filed following the entry of this Stipulated Final Order and on the day thereof
5. After consideration of the County's Pa. R.A.P. 1925(b) Statement of Errors Complained of on Appeal, this Court shall in due course file of record a Pa R.A.P. 1925(a) Opinion and transmit the record to the Commonwealth Court in compliance with Pa. R.A.P. 1931.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Defendant/Appellant (hereinafter "DELCORA") is a municipal authority formed by the COUNTY pursuant to the Municipal Authorities Act of 1945 (now codified in the Municipal Authorities Act, Title 53 Pa.C.S.A. Sections 5601 et seq. in 1971) (hereinafter "Authorities Act"), for the purpose of collecting, conveying and treating wastewater generated by residents and businesses located in the COUNTY². On or about October 20, 1971, the COUNTY, as a governing body under the Authorities Act, created DELCORA by filing Articles of Incorporation pursuant to Title 53 Pa.C.S.A. Section 5603 (the "Articles") with the Department of State. The COUNTY is the only municipal incorporator of DELCORA. The COUNTY is governed under its Home Rule Charter and consists of five elected council members. The original Articles provide that DELCORA:

shall be organized for the purpose only to acquire, hold, construct, improve, maintain, operate, own and lease, either in the capacity of lessor or lessee, projects of the following kind and character, sewers, sewer systems or parts thereof, sewerage treatment works, including works for the treating and disposing of industrial waste, in and for the County of Delaware and such other territory as it may be authorized to serve and to contract with individuals, corporations, municipal corporations, authorities, and other governmental bodies or regulatory agencies both within and without the County of Delaware, and shall exercise all of the powers granted to an Authority organized for such purpose by the Municipality Authorities Act of 1945 under which it is organized.

The Articles were subsequently amended by the COUNTY through the filing of Articles of Amendment on or about November 9, 1977 to increase the number of board members of DELCORA from seven to nine. On or about April 16, 2002, the Articles were

² DELCORA has contracts and/or agreements to provide services with various local sewer authorities and municipalities in Delaware County and also provides services to certain residents and businesses in Chester County.

again amended to extend the term of existence of DELCORA from October 20, 2021 to January 15, 2052.

DELCORA currently owns, operates and maintains wastewater collection systems that serve approximately a half million people in forty-two (42) municipalities in both Delaware and Chester Counties. DELCORA is responsible for building and operating interceptors, force mains and pump stations, operating a regional wastewater treatment plant and acquiring treatment capacity from the Philadelphia Water Department. DELCORA also currently owns and operates sewer collection systems serving eight municipalities: the City of Chester, parts of the Township of Chester, and the Boroughs of Parkside, Upland, Trainer, Marcus Hook, Rose Valley and Edgemont. In addition, DELCORA owns and operates two treatment plants in Pocopson Township, Chester County. Intervenor³ Darby Creek Joint Authority (hereinafter "DCJA") and Southern Delaware County Authority (hereinafter "SDCA") both have service contracts with DELCORA and rely upon DELCORA's wastewater collection and treatment, as they represent various communities themselves.⁴

In 2019, when faced with dramatically increasing estimated capital costs that would substantially increase rates that would have to be charged to its customers, DELCORA engaged in discussions with Intervenor AQUA Pennsylvania Wastewater, Inc (hereinafter "AQUA"), a provider of wastewater utility service in Pennsylvania, for the purchase of DELCORA's system. At its regularly scheduled meeting on September 17, 2019, the DELCORA Board unanimously approved a \$276.5 million sale to AQUA. The

³ Without objection, by Orders of June 18, 2020 both authorities were granted intervention.

⁴ In advance of this litigation, they have both agreed to assign their service contracts to AQUA.

Asset Purchase Agreement (hereinafter the "APA") is dated September 17, 2019 and was subsequently amended on February 24, 2020. The Asset Purchase Agreement is structured in such a way as to protect DELCORA's customers by capping all rate increases for customers at 3% per year. Through a separate DELCORA Trust Agreement, known as the Rate Stabilization Fund Trust, DELCORA agreed to place the proceeds of the sale (after paying down DELCORA's obligations) into an independently managed irrevocable trust for the benefit of DELCORA's customers, with Intervenor Univest Bank and Trust Co. serving as trustee (hereinafter "Univest"). AQUA is identified as a third-party beneficiary under the DELCORA Trust Agreement.

As a municipal authority that is governed by the Municipal Authorities Act, Title 53 Pa.C.S.A. Section 5601 et seq., DELCORA has all the rights, powers and duties that are set forth in the Municipal Authorities Act, including the right and power to sell its system to an investor owned utility such as AQUA. The Asset Purchase Agreement, dated September 17, 2019, was properly authorized and properly entered into by DELCORA in full compliance with law and the Municipal Authorities Act, at a public meeting and constitutes a binding, enforceable agreement and contractual obligation of DELCORA. *See* MAA Section 5613(b)(12).

The Asset Purchase Agreement contains multiple provisions which in effect mandate that DELCORA proceed to closing on the sale to AQUA prior to any dissolution of DELCORA by the COUNTY. There are provisions in the APA that can only be satisfied by DELCORA prior to closing, and not the COUNTY, as evidenced by the following summary of relevant provisions of the APA:

Representations & Warranties	
Article IV, intro language	Seller (Delcora) makes its representations and warranties "[a]s a material inducement to Buyer (Aqua) to enter into this Agreement and to consummate the transactions contemplated by this Agreement...."
4.06	Seller must be able to confirm that there are no undisclosed liabilities for the system as of closing
4.09	The APA involves hundreds of distinct interests in real property and the ongoing searches may reveal many more. Seller is required to confirm at Closing that Aqua is getting all of Seller's real property interests. Only Delcora will have knowledge regarding whether the real property disclosure schedule (Schedule 4.09) remains accurate and complete.
4.13	Delcora's environmental representations and warranties are critical to the APA. The County, if it was permitted to dissolve Delcora prior to Closing, will be unable to determine whether the representations and warranties remain true and correct at Closing. Moreover, Aqua agreed to allow Delcora to make several representations and warranties subject to Delcora's knowledge of the conditions covered in those specific representations and warranties (4.13 (a), (b), (d), (f), (g) and (h)), which the County would be unable to make.
4.14	The transaction requires that Seller's permits be transferred. However, there is no indication that the County is prepared or would be permitted to assume the DEP permits that are required to operate this system.
4.15	The transaction requires the assignment of approximately 200 service contracts, many of which require the consent of the counterparty(ies). Several of the consents have been secured. Many of those required concessions and assurances by Delcora and/or Aqua. All consents secured thus far were based upon the understanding that the provision of service would be transferred from Delcora to Aqua. The County is in no position to honor some of the obligations that were made.

4.17(b)	This section provides assurance that the assets Aqua agreed to buy are sufficient to run the system. The County would be unable to make this representation at Closing.
9.03	This section requires that the Seller update representations and warranties within 3 days of becoming aware of information that implicates a disclosure, which Delcora alone would know.
12.02	Seller must certify at Closing that the representations and warranties made as of the date the parties signed the APA (9/17/19) remain true and correct as of the date of Closing. The County is not in a position to make that Closing certification. As a result, the Closing itself would be jeopardized or Aqua would be forced to decide whether to terminate or accept a substantially diluted closing certification, given the County's lack of knowledge of the issues set forth in the representations and warranties.
Other Provisions	
7.06	The section makes Closing contingent upon PUC approval. Given the existence of customers outside of Delaware County, the County would need to secure a 1 st PUC approval to take Delcora's assets back, then the subsequent sale to Aqua would require a 2 nd PUC approval, which could nullify the pending application to approve the sale directly from Delcora to Aqua and could threaten the outside closing date.
9.01	This section requires the Seller to operate the system in the ordinary course between signing and closing. Delcora credibly alleges that the County has no ability to do so.
Article VIII-Indemnity	
8.01/8.02	Seller's representations and warranties survive Closing for a full year, which means the County would be at risk of an indemnity claim for that full amount of time, in a situation where the County assumed obligations for representations and warranties that the County knows little to nothing about.
8.05(c)	Subject to certain carve outs, Aqua agreed to cap Delcora's post-closing indemnity obligation for failed representations and warranties at 5% of the purchase

	price. If Aqua had known that it would have to go to closing with a seller that has no knowledge of the system, Aqua never would have agreed to cap its post-closing indemnity right at 5% of the purchase price.
15.09	The County's intended action with Delcora would qualify as an assignment of Delcora's rights and obligations under the APA, thereby requiring Aqua's consent
15.11	The parties have a right of specific performance under this Agreement.

The Asset Purchase Agreement is subject to Pennsylvania Utility Commission ("PUC") approval, which is the subject of an application filed by AQUA that is pending before the PUC at Docket No. A-2019-3015173 ("PUC Application").

On or about December 18, 2019, the COUNTY amended DELCORA's Articles to add the following to the "purpose" provision:

In anticipation of the dissolution of the Authority and/or the transfer and sale of all or substantially all of the Authority's assets, property, and projects in exchange for the receipt of a cash payment, the Authority and its Board, in addition to any other authority granted by applicable law, shall have the full authority, without limitation to: (1) establish a trust or non-profit entity to exist for the benefit of rate payers to distribute to rate payers some or all of the proceeds received from any transfer and sale, in accordance with applicable law and any agreements concerning the transfer and sale of any assets and/or the Authority's dissolution; and (2) execute any necessary agreement to effectuate this purpose prior, during or after any transfer and sale and/or dissolution.

According to the Amended Articles, assets of a Trust or non-profit entity will be distributed to the rate payers for the purpose of "Rate Stabilization." On or about December 27, 2019, the Trust between DELCORA, as Settlor, and Univest Bank and Trust Co., as Trustee, was created. This Trust is known as the Rate Stabilization Fund

Trust. The stated purposes of the Trust are “to benefit the Beneficiaries [defined as DELCORA’s customers] by receiving Sale Proceeds deposited into the Trust Fund by the Settlor [DELCORA] and any additional contributions made to the Trust under Section 3.3 hereof [referring to other contributions in the form of cash, securities, or other property acceptable to the Trustee, including funds released from Escrow Accounts related to the sale to AQUA].”

On May 19, 2020, the COUNTY published and passed Ordinance No. 2020-4 (hereinafter the “Ordinance”) at a special zoom meeting on June 3, 2020. On June 3, 2020, the COUNTY approved and enacted Ordinance No. 2020-04 directing and ordering DELCORA to terminate its operation, wind up its affairs, satisfy outstanding debts, and take all actions necessary to remove any impediments to its termination, and refrain from taking any action or expending any funds inconsistent with DELCORA’s termination of its affairs and further authority.

Within twenty-four (24) hours of the COUNTY adopting Ordinance 2020-4, the County Solicitor sent a letter to DELCORA on June 4, 2020, which in part states and directs that DELCORA is “to take all actions necessary to effectuate its termination....and take all steps necessary to effectuate the transfer of all its assets, funds, and other property [to the County]... . The County strongly cautions the Authority against approving any course of action or expenditure of funds that is inconsistent with termination, such as incurring additional debt, transferring assets to the illegally created Rate Stabilization Fund Trust, or entering into long term contracts, without the express authority of the County.” *See Plaintiff’s Exhibit, P-1 Copy of the*

Ordinance and *see* Plaintiff's Exhibit, P-2, letter to DELCORA by the County Solicitor, dated 6/4/2020.

The COUNTY Solicitor's letter further cautions the Authority that "any expenditure of funds by the Authority that is contrary to the directives and objectives of the COUNTY in the Ordinance is a violation of the restrictions on the expenditure of funds of the Authority." *See* Plaintiff's Exhibit, P-2, letter to DELCORA by the County Solicitor, dated 6/4/2020. The letter from the County Solicitor, Mr. William F. Martin, directs that "the Authority is hereby directed to cease any activities – and the expenditure of any funds in connection with such activities - that are contrary to the County's directives as set forth in the Ordinance." *See* Plaintiff's Exhibit, P-2, p.2, letter to DELCORA by the County Solicitor, dated 6/4/2020.

On May 14, 2020 the COUNTY filed their initial Complaint with four counts. On June 15, 2020, the COUNTY filed an Amended Complaint asserting five separate causes of action with the first four counts identical to the original Complaint. Count I of the Amended Complaint asserts a claim for alleged violation by DELCORA of its own Articles of Incorporation, and requests a judgment finding that DELCORA's adoption of the funding mechanism set forth in the Trust is a violation of the Articles of Incorporation. Counts II, III and IV of the Amended Complaint assert claims for various alleged statutory violations, and the relief requested includes an order terminating the Trust and preventing funding of the Trust. The COUNTY alleges that the Trust, created on or about December 27, 2019, between DELCORA, as settlor, an Univest Bank and Trust Co., as Trustee is unlawful, violating the Amended Articles of Incorporation and the

Municipal Authorities Act. *See* 53 Pa. C.S.A. §§ 5603 and 5607(a) and 5612 and the Uniform Trust Act, 7701 et seq. Count V of the Amended Complaint request a Writ of Mandamus compelling DELCORA to comply with the Ordinance. The Ordinance provides inter alia that "County Council hereby directs and orders that [DELCORA] be terminated." *See* Plaintiff's Exhibit, P-1 Copy of the Ordinance, Section 1. The COUNTY alleges that the Ordinance adopted June 3, 2020 is enforceable and requires DELCORA's immediate compliance in the windup and termination of DELCORA.

The COUNTY further sought a Preliminary Injunction enjoining DELCORA from (1) dissipating its assets and (2) taking any actions that are not required to effectuate its termination. DELCORA and AQUA, and intervening Authorities, SDCA and DCJA plead that the COUNTY's actions, demands, pleadings, and Ordinance substantially, practically, and immediately interferes with DELCORA's performance required by the Asset Purchase Agreement. DELCORA and AQUA allege that any effort to scuttle the Asset Purchase Agreement or the sale of DELCORA's system to AQUA, or any effort to dissolve DELCORA prior to closing on the Asset Purchase Agreement, would be a violation of the law, the Municipal Authorities Act, an unlawful interference of contracts, as well as AQUA's contractual rights.

DELCORA, AQUA, and two (2) other intervening sewer authorities also sought Preliminary Injunctions to prevent irreparable harm and enjoin the COUNTY from interfering with DELCORA's Contract obligation to perform as the Asset Purchase Agreement requires, and otherwise continue to operate to complete contractual obligations, till further Order.

As a part of their Answers to the Amended Complaint, DELCORA and AQUA also filed Counterclaims for Declaratory Relief to confirm the legality and enforceability of the Asset Purchase Agreement and Rate Stabilization Trust Fund, and a declaratory judgment and injunctive relief that COUNTY Ordinance is unenforceable. DELCORA and AQUA further argued that although the COUNTY does not challenge the legality of the Asset Purchase Agreement, the COUNTY's demand for timely compliance with the Ordinance will thwart, interfere, frustrate, and impede compliance with the Asset Purchase Agreement. DELCORA, AQUA, and the two (2) intervening Municipal Authorities in New Matter and Counterclaims request a Declaratory Judgment and relief to enforce the Asset Purchase Agreement between DELCORA and AQUA, and the Rate Stabilization Fund Trust, and further equitable relief to enjoin the COUNTY from enforcing the Ordinance, but limited to the extent of conflicting with and interfering with legally enforceable contracts, including the Asset Purchase Agreement and Rate Stabilization Fund Trust.

The New Matter and Counterclaim filed by DELCORA and AQUA to the COUNTY's Amended Complaint avers that the COUNTY misrepresents the terms and purpose of the Rate Stabilization Fund Trust and the Trust does not violate its Articles of Incorporation, nor the Municipalities Authorities Act and the Uniform Trust Act, and at all relevant times, DELCORA acted properly, appropriately and in compliance with all applicable law.

Intervenor, DCJA Counterclaim (COUNT 1) requests a Declaratory Judgment that the Service Agreement between DELCORA and DCJA be declared valid and enforceable,

and the COUNTY be enjoined from enforcing the dissolution of DELCORA and prays injunctive relief (COUNT 2) to prevent the COUNTY from terminating DELCORA and further pursues a tortious interference⁵ claim for compensatory and punitive damages, and attorney fees. Intervenor, SDCA (COUNT 1) requests by declaratory judgment confirmation of the legality and enforceability of the Asset Purchase Agreement and the Rate Stabilization Fund Trust.

On September 9, 2020, this Court approved a Stipulated Order of all parties that resolved the issues raised in all the cross petitions for Preliminary Injunction as follows:

- A) DELCORA agrees not to deposit any money into the DELCORA Rate Stabilization Fund Trust (the "Trust") until the earlier of (a) any ruling by the Delaware County Court of Common Pleas on the legal challenges to the Trust in Counts I, II, III and IV of the COUNTY's Complaint or Count I of DELCORA's counterclaim or (b) the closing of the AQUA/DELCORA transaction;
- B) The COUNTY's appointment of new DELCORA Board members in the event of death, illness, resignation, or incapacitation of a current board member shall not be construed to be a violation of the Court's June 4, 2020 Order or this Order. The COUNTY, however, shall not take any action to remove any current board member, except for cause as that is described under the Municipality Authorities Act and applicable case law, and except in accordance with its power to appoint new board members in accordance with the Municipality Authorities Act.
- C) The COUNTY shall not request, take any action or argue before the Delaware County Court of Common Pleas that the instant case should be stayed for any reason. The parties agree that all aspects of the instant case should proceed as expeditiously as possible.

⁵ The COUNTY's Preliminary Objections to Intervenor's Crossclaim for Tortious Interference and request for compensatory and punitive damages, costs, and attorney's fees were reserved to be scheduled in future. Subsequent to the last day of Trial testimony, which occurred on December 2, 2020, the both AQUA and DCJA withdrew the tortious interference claims, so no further hearing was required..

By Order of September 23, 2020, the COUNTY's Preliminary Objections were disposed of, with the exception of Preliminary Objections to AQUA and DCJA's Counterclaim for Tortious Interference, compensatory and punitive damages, costs, and attorney fees, and the Court determined that a hearing on the COUNTY's Preliminary Objections to the tortious interference claims would be scheduled at a later date.⁶

On September 10, 2020, after a hearing on September 9, 2020, this Court entered a revised Scheduling Order to complete Discovery, depositions, dispositive motions and Motions in Limine for hearings on October 21 and 22 and November 4 and 5, 2020⁷. Exhaustive and combative discovery required this revised schedule.

The COUNTY filed, on October 5, 2020, a Motion for Summary Judgment requesting the Court declare the Rate Stabilization Trust Fund Agreement illegal, unenforceable and void. The COUNTY also filed, on October 5, 2020, a Motion for Summary Judgment, regarding Count IV of the COUNTY's Amended Complaint and Counts II and III of the Defendant DELCORA's Counterclaim.

On that same date, DELCORA, filed a Motion for Summary Judgment, regarding Counts I, II, III, and IV of the COUNTY's Amended Complaint related to the Rate Stabilization Trust Fund Agreement. DELCORA also filed, on October 5, 2020, a Motion for Summary Judgment as to Count II and Count III of the DELCORA Counterclaim.

⁶ Subsequent to the last day of Trial testimony, which occurred on December 2, 2020, the both AQUA and DCJA withdrew the tortious interference claims, so no further hearing was required.

⁷ This Court notes that the Hearings scheduled for November 4 and 5, 2020 were rescheduled to December 1 and 2, 2020, at the request of the attorneys approved by the Court based upon the scheduling of various attorneys, and the Court, related to the general election that was to occur on November 3, 2020.

AQUA, filed on October 5, 2020, a Motion for Summary Judgment on Count I of Defendants' Counterclaims and Count IV of Plaintiff's Amended Complaint.

In consideration of the Amended Complaint and Answers thereto, including Counterclaims, and the Motions for Summary Judgment, this Court by agreement of all the parties in this case, on October 21 and 27, 2020 and December 1 and 2, 2020, held a consolidated Trial on all matters and claims for relief filed by all parties.

Following the extended Trial, the Court took the matters under advisement and issued a comprehensive Final Order on December 28, 2020 which resolved the Amended Complaint and the Counterclaims raised thereto and all outstanding Motions and Claims for Relief. Plaintiff/Appellant's filed a Motion for Post Trial Relief on January 7, 2021, and this Court promptly issued an Order requiring responses from Defendant/Intervenors/Appellees. This Court notes that the Answers were timely filed. However, before this Court was able to rule on the Motions, and if fact, before the Answers to the Motion for Post Trial Relief were due, the County filed a Notice of Appeal. Thereafter, this Court, believing that the Notice of Appeal divested the undersigned of jurisdiction to rule on the Motion for Post Trial Relief, issued an Order on January 27, 2021 finding that the Motions were Moot⁸ and issued a separate Order requiring a Concise Statement of Matters Complained of on Appeal. Appellant raises the following issues on Appeal:

1. The Court erred in ruling that the Asset Purchase Agreement between Aqua Pennsylvania Wastewater, Inc ("Aqua") and Delaware County Regional Water Quality Control Authority ("DELCORA") was a valid agreement, both because the Court lacked jurisdiction to decide the issue and because the County of

⁸ See footnote 1 on page 2.

Delaware raised valid challenges to the validity and enforceability of the Agreement.

2. The Court erred in ruling that the DELCORA Rate Stabilization Fund Trust Agreement between the Delaware County Regional Water Control Authority as Settlor and Univest Bank and Trust Co. as Trustee (the "Trust") was valid and enforceable because the Trust violated the Uniform Trust Act, the Municipality Authorities Act and DELCORA's own Articles of Incorporation.
3. Delaware County Ordinance 2020-4 is valid and enforceable, and the Court erred by failing to issue a writ of mandamus compelling DELCORA to comply with the terms of the Ordinance, failing to enter an Order permanently enjoining DELCORA from taking any action contrary to the terms of the Ordinance, and in ruling that the Asset Purchase Agreement is an impediment that prevents the immediate dissolution of DELCORA as required by the Ordinance.
4. The Court erred in granting injunctive relief because neither DELCORA nor Aqua met the standard for such relief.
5. The Court erred in excluding evidence from the County of Delaware challenging the validity of the Asset Purchase Agreement, including evidence demonstrating that the Agreement violated public policy and was void as a matter of law.

DISCUSSION:

A. THE ASSET PURCHASE AGREEMENT BETWEEN AQUA PENNSYLVANIA WASTEWATER, INC ("AQUA") AND DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL AUTHORITY ("DELCORA") WAS A VALID AND ENFORCEABLE AGREEMENT, AND THE COURT HAD JURISDICTION TO DECIDE THE ISSUE.

The fundamental issues of this case are the legality, enforceability and integrity of a contract, that being the Asset Purchase Agreement between DELCORA and AQUA, the enforcement of the Ordinance and the COUNTY's actions in opposing and interfering with DELCORA's performance of the same contract, and the legality and funding of the Rate Stabilization Fund Trust between DELCORA and AQUA. The enforcement of legally binding contracts is the foundation of our law. When a county

government is a party to a legally binding contract, the change of governmental administration, management, or political persuasion, may create the desire to renegotiate or not renew nor extend a contract; but when there is, as there is here, an alleged intentional interference, termination, or obstruction of a legally binding contract, that requires critical judicial examination.

The Court's Order was not intended to provide commentary on the pros and cons, advantages or disadvantages of the DELCORA and AQUA Asset Purchase Agreement, but only to confirm the enforceability of a legally adopted Contract. The whims of politics or changing county administrations do not waive away legally enforceable binding contracts. The reliance and predictability of valid legal contracts is of paramount importance and serves public policy. The clarity and reliability of legally enforceable contracts is fundamentally important and provides public order and combats arbitrariness. Clearly, by way of enforcing the Ordinance, the COUNTY directs the termination, or as the COUNTY refers to the "winding down" of DELCORA. This Court found that the Ordinance does more than "wind down" DELCORA; rather it imploded DELCORA's ability and obligations to perform contractual obligations to effectuate the sale. The directives, terms, and provisions of the COUNTY's June 3, 2020 Ordinance 2020-04, as demonstrated by the County Solicitor's Letter dated June 4, 2020 and public rhetoric with strong political overtones, evidences the COUNTY's intent and design to thwart, reverse, interfere and extinguish the contractual agreements and contract previously publicly debated, considered and legally adopted by DELCORA, AQUA and DELAWARE COUNTY.

All the parties professionally, skillfully and civilly presented their juxtaposed positions. Despite the obvious impasse of the legality and enforceability of the Asset Purchase Agreement, and DELCORA's understandable reluctance to deliver to the COUNTY a Certificate of Termination, this Court heard credible testimony and viewed Exhibits that confirm that DELCORA has significantly cooperated in providing information and documents at the request of the COUNTY.

This Court found that the Asset Purchase Agreement between DELCORA and AQUA was a legal and enforceable contract, not in violation of the Municipality Authorities Act, public policy, or any other applicable law and Appellant COUNTY disputes the Court's ruling and the authority to make such a ruling.

More specifically, this Court found that Section 5607 of the Municipalities Authorities Act, permits DELCORA to enter into such a contract, while also finding that the contract terms were still subject to the approval of the Pennsylvania Public Utility Commission. As the Court has previously stated in this Opinion, DELCORA has the right to enter a contract and sell its system under Title 53 Pa.C.S.A. Section 5607, which states:

(d) Powers.--Every authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section, including, but without limiting the generality of the foregoing, the following rights and powers:

(4) To acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by it.

(13) To make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business.

53 Pa.C.S.A. § 5607(d)(4) and (13). The Municipalities Authorities Act does not limit transfer of authority's property only to a municipality or municipalities that created authority. See ***Moon Tp. Mun. Authority v. County of Allegheny***, 596 A.2d 1181, 141 Pa.Cmwlth. 647, Cmwlth.1991, appeal granted 602 A.2d 862, 529 Pa. 653, affirmed 671 A.2d 662, 543 Pa. 326.

AQUA had and has a fully binding and enforceable agreement to acquire DELCORA's system, which requires the representations and warranties that can only be made by DELCORA. Contracts, binding agreements, and various legally public actions are not to be extinguished or interfered with merely because of a reorganization of any County Council or partisan differences. The integrity and predictability of contracts when legally adopted, shall be relied upon by the parties, represents good public policy, and the COUNTY shall hereby provide full faith and credit to the Asset Purchase Agreement, even as COUNTY administrations may change. AQUA relied and continues to rely upon the representations and warranties provided by DELCORA, as well as relying upon the COUNTY's 2019 consent to the sale transactions. See Article 4 of the Asset Purchase Agreement.

The COUNTY also asserted that the Asset Purchase Agreement was void *ab initio* as violating public policy because of the alleged involvement of Robert Willert, who was the Executive Director of DELCORA, and Section 5614(e) of the Municipality Authorities.

The conflict of interest provisions in Section 5614(e) of the MAA is no applicable to this case, this section states:

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

This Court found that the COUNTY's allegation of a conflict of interest was pure speculation, hyperbole, and mere rhetoric, and not supported by the weight of evidence. *See* Exhibit D-12 and D-13. There was credible testimony and evidence that confirmed that both DELCORA's Board of Directors and Attorneys and AQUA representatives dictated, negotiated, drafted, and approved the terms of Asset Purchase Agreement. There was no affirmative evidence whatsoever that Mr. Willert played a material role in the sale. A review of both his deposition and trial testimony confirmed he did not undertake to negotiate anything for himself whatsoever. As with, any existing contract, Mr. Willert's employment contract survived the sale; and he receives no new, supplemental, or additional compensation, benefits, enhancements, or financial gain whatsoever. Nor is there any further modification to his employment contract. Neither DELCORA nor AQUA contested the COUNTY's general authority to terminate DELCORA, but the COUNTY cannot interfere, or restrain, or refuse to comply with the contractual obligations set forth in the Asset Purchase Agreement and amendments thereto.

The Court determined that the COUNTY was enjoined and restrained from terminating DELCORA prior to the closing of the DELCORA/AQUA Asset Purchase Agreement and enjoined and restrained from interfering in any way with AQUA's existing contractual relationship with DELCORA. DELCORA's and AQUA's requested injunction is necessary to prevent irreparable harm that cannot be adequately compensated in damages. Upon the parties effectuating the sale, as detailed in the Asset Purchase Agreement, and Amendment(s) thereto, all parties to this matter shall cooperate to comply with all sale requirements and conditions, and thereafter cooperate with the efficient winding down and dissolution of DELCORA as Ordinance may require, or as the parties mutually agree.

This Court's December 28, 2020 Order, see paragraph 37, finds that "this Order is not intending to interfere with the authority and jurisdiction of the Pennsylvania Utility Commission at Docket No. A-2019-3015173 (PUC Application.)"

The jurisdiction of Pennsylvania Utilities Commission is to make a determination that the proposed acquisition promotes the services, accommodation, convenience, and safety of the public in some substantial way and a determination of the appropriate rate making rate base. The Pennsylvania Utilities Commission, will undoubtedly mark and scope the boundaries of their authority, as well as their precedent and public interest. All the parties agreed that the PUC has a significant scope of authority. This Court's course of navigation was intended to keep "within this Court's lanes of traffic" that was mostly agreed upon, that are clearly the contractual issues, and alleged conflicts with governmental statutory requirements.

B. THE DELCORA RATE STABILIZATION FUND TRUST AGREEMENT BETWEEN THE DELAWARE COUNTY REGIONAL WATER CONTROL AUTHORITY AS SETTLOR AND UNIVEST BANK AND TRUST CO. AS TRUSTEE WAS VALID AND ENFORCEABLE AND DID NOT VIOLATE THE UNIFORM TRUST ACT, THE MUNICIPALITY AUTHORITIES ACT OR DELCORA'S OWN ARTICLES OF INCORPORATION.

Appellant incorrectly alleges that the Rate Stabilization Fund Agreement was invalid and unenforceable under the Uniform Trust Act, the Municipal Authorities Act and DELCORA's own Articles of Incorporation. For the foregoing reasons, Appellant's arguments are incorrect, and the Trust is valid and enforceable. This Court notes initially that the Trust was funded and created following the amendment to DELCORA's Articles of Incorporation on or about December 18, 2019, which further empowered DELCORA to create the Fund and went further created and funded the Rate Stabilization Fund Trust.

DELCORA's Articles of Incorporation were validly amended to explicitly authorize it to do so. The validity of the amendment has not been challenged and is not an issue before the Court.

When the Articles of Incorporation were amended on December 18, 2019, they gave DELCORA the ability to create and fund the Trust. The amendment added the following to the purpose provision of DELCORA's Articles

In anticipation of the dissolution of the Authority and/or the transfer and sale of all or substantially all of the Authority's assets, property and projects in exchange for the receipt of a cash payment, the Authority and its Board, in addition to any other authority granted by applicable law, shall have the full authority, without limitation, to (1) establish a trust or non-profit entity to exist for the benefit of rate payers to distribute to rate payers some or all of the proceeds received from any transfer and sale, in accordance with applicable law and any agreements concerning the transfer and sale of any

assets and/or Authority's dissolution; and (2) execute any necessary agreement to effectuate this purpose prior, during or after any transfer and sale and/or dissolution.

See Joint Exhibit 5.

Beyond DELCORA's Articles or Amended Articles of Incorporation, the Municipality Authorities Act, 53 Pa. C.S. Sections 5601 et seq. (the "MAA"), provides an independent legal basis for DELCORA to create and fund the Trust. Under the MAA, DELCORA had the authority to create the Rate Stabilization Fund Trust and authority to fund it. The Municipality Authorities Act states that "[t]he purpose and intent of this chapter [is] to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety, and prosperity." 53 Pa. C.S. § 5607(b)(2). The Municipality Authorities Act states, without limitation, that "[e]very authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section." 53 Pa. C.S. §5607(d).

Under the Municipality Authorities Act, DELCORA has the power to

acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by it.

53 Pa. C.S. §5607(d)(4). Furthermore, under the Municipality Authorities Act, DELCORA has the power to "make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business." 53 Pa. C.S. §5607(d)(13). The Trust, by its very name, terms and provisions, is an agreement. The Municipality Authorities Act also confers upon DELCORA the power to "pledge,

hypothecate or otherwise encumber all or any of the revenues or receipts of the authority as security for all or any of the obligations of the authority.” 53 Pa. C.S. §5607(d)(16). DELCORA has the power, through the Municipal Authorities Act to “do all acts and things necessary or convenient for the promotion of its business and the general welfare of the authority to carry out powers granted to it by this chapter or other law.” 53 Pa. C.S. §5607(d)(17).

Thus, per the Municipality Authorities Act, DELCORA is permitted to create the Trust and allows DELCORA to convey proceeds of the DELCORA/AQUA sale into that the Trust. The Trust created by DELCORA was created consistent with Title 53 Pa. C.S.A. Section 5612 because (a) it was authorized by DELCORA’s Articles, as amended, and (b) the money to be placed in the Trust is derived from DELCORA’s fulfillment of its mission and purpose, and will be used to provide a service for the benefit of the customers of DELCORA’s system, who DELCORA served in accordance with its mission, in the form of distributions to offset rate increases.

The Trust does not violate the Uniform Trust Act because DELCORA had the capacity to create the Trust when it was created. Appellants argue that the Uniform Trust Act controls and based upon that Act, the Court should have determined that the Trust was unenforceable. Appellants argue that under the Uniform Trust Act, the trust could have only been created if the capacity to create the trust exists. *See* 20 Pa.C.S.A. Section 7732. Capacity, however, is defined as mental capacity not authority to create the Trust. Here, based upon the MAA and the Articles of Incorporation, both initially and as amended on December 18, 2019, DELCORA had the authority to create the

Trust. See *Cty of Allegheny v. Moon Twshp Mun. Auth.*, 671 A.2d 662, 666 (Pa. 1996).

C. DELAWARE COUNTY ORDINANCE 2020-4 IS NOT VALID AND ENFORCEABLE, AND THERE WAS NO ERROR IN FAILING TO ISSUE A WRIT OF MANDAMUS COMPELLING DELCORA TO COMPLY WITH THE TERMS OF THE ORDINANCE, FAILING TO ENTER AN ORDER PERMANENTLY ENJOINING DELCORA FROM TAKING ANY ACTION CONTRARY TO THE TERMS OF THE ORDINANCE, OR RULING THAT THE ASSET PURCHASE AGREEMENT IS AN IMPEDIMENT THAT PREVENTS THE IMMEDIATE DISSOLUTION OF DELCORA AS REQUIRED BY THE ORDINANCE.

The COUNTY requested that the Ordinance be declared valid and enforceable and requested a Writ of Mandamus to DELCORA to comply with Ordinance No. 2020-04 and cooperate with termination; this Court disagreed with the position and arguments of the COUNTY. The Ordinance reads as follows:

Section 1. The County Council hereby directs and orders that the Authority be terminated.

Section 2. The Authority is directed and ordered to take all actions necessary to effectuate its termination, including, but not limited to, the following:

2.01. The Authority shall immediately terminate and cease any activity that is not consistent with the County's directives contained herein and as required to effectuate its termination.

2.02. The Authority shall cooperate with the County in an orderly windup of its activities, and take all steps necessary to effectuate the transfer of all of its assets, funds and other property, including, as applicable, any regulatory permits, to the County, and the assumption of all of its liabilities by the County. The Authority shall continue to operate its system in the normal course during this windup.

2.03. The Authority shall satisfy any outstanding debts and obligations of the Authority and settle all other claims which may be outstanding against it; provided, however, that the Authority shall seek approval of the County Council prior to satisfying any such outstanding debts, obligations and claims, and shall cooperate with

the County in the execution of any agreements, instruments, certificates, and other documents determined by the County to be necessary or appropriate to effectuate the satisfaction of any outstanding debts and obligations of the Authority.

2.04. The Authority shall approve, execute and deliver to the County on or prior to June 18, 2020 a Certificate of Termination, in the form attached hereto as Exhibit A (the "Certificate"), so that the County, as required by the Authorities Act, 53 Pa.C.S. §5619, may as and when appropriate file the executed Certificate with the necessary governmental authorities.

2.05. The Authority shall take all actions necessary to remove any impediments to its termination in accordance with the Authorities Act, subject, however to the prior approval of such actions by the County Council.

Section 3. The Authority hereby is prohibited from taking any action or expending any money in connection with any action that is inconsistent with its termination. The Authority shall not engage in any conduct or expend any money, directly or indirectly, for any purpose other than accomplishing the directives and objectives of the County as set forth in this Ordinance. Any expenditure of funds by the Authority that is contrary to the directives and objectives of the County as set forth in this Ordinance shall be a violation of the restrictions on the expenditure of funds of the Authority under the Authorities Act, 53 Pa.C.S. §5612 and a violation of the specification of projects to be undertaken by the Authority under the Authorities Act, 53 Pa.C.S. §5607(c).

Section 4. The County Council hereby approves the Certificate in the form attached hereto as Exhibit A.

Section 5. Upon enactment of this Ordinance and compliance with all executory provisions herein, the proper officers of the County Council are hereby authorized to file the Certificate in the Office of the Secretary of the Commonwealth of Pennsylvania.

Section 6. Upon receipt of the Certificate, the Secretary of the Commonwealth shall note the termination of existence of the Authority on the Authority's record of incorporation and return the Certificate with approval to the County Council. Upon receipt thereof, the proper 3 officers of the County Council are hereby authorized to record the Certificate in the Office of the Recorder of Deeds of Delaware County.

Section 7. Upon recordation of the Certificate with the Delaware County Recorder of Deeds, all property of the Authority shall pass to the County, the County shall assume any remaining liabilities of the Authority, and the Authority will be effectively terminated.

Section 8. The County Council, its Chair and Vice Chair, and the Chief Clerk are all, individually and collectively, authorized to take any further action necessary to effectuate the termination of the Authority, the removal of any impediments to such termination, the satisfaction of any outstanding debts and obligations of the Authority (whether by assumption of such debts and obligations by the County or through the incurrence by the County in accordance with applicable law of indebtedness, the proceeds of which shall be used to satisfy such debts and obligations), the transfer of the Authority's funds and assets to the County, and the assumption of any liabilities of the Authority.

Section 9. All funds, assets and other property required by this Ordinance to be turned over by Authority to the County shall be held and utilized by the County in a manner consistent with applicable laws.

Section 10. All ordinances, parts of ordinances, resolutions or parts of resolutions inconsistent herewith be and the same are hereby rescinded, cancelled and annulled.

Section 11. If any sentence, clause, section or part of this Ordinance is found to be unconstitutional, illegal or invalid, for any reason, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this Ordinance. It is hereby declared to be the legislative intent of the County Council that this Ordinance was enacted to terminate the Authority and should be interpreted to effectuate such intent.

Section 12. This Ordinance shall take effect on the earliest date permitted by law.

By way of enforcing the Ordinance, the COUNTY directed the termination of DELCORA which this Court determined directly and immediately interfered with and imploded DELCORA's ability to perform contractual obligations to effectuate the sale

and further interferes with AQUA's contractual rights. This Court notes that the Ordinance provides for the assumption of all DELCORA's liabilities by the COUNTY but does not provide an assumption of the obligations.

The directives, terms, and provisions of the COUNTY's June 3, 2020 Ordinance 2020-04, in context with the letter from the County Solicitor's Letter, indicates the COUNTY's intent and design to thwart, reverse, interfere and extinguish the contractual agreements, and contract previously publicly debated, considered and legally adopted by DELCORA, AQUA and DELAWARE COUNTY. See Plaintiff's Exhibits P-1, P-2; and Defendant's Exhibits D-10, D-11, D-12, D-13 and admitted excerpts of Depositions.

The requirements contained in the COUNTY's Ordinance of dissolution and termination and the COUNTY Solicitor's June 4, 2020 letter, directs that DELCORA immediately provide a Certificate of Termination, and places restrictions on expenses, and constraints on the actions and performance required of the Asset Purchase Agreement, which is the functional equivalent to termination and interference of contractual obligations, as well as essential services and imposes and creates immediate and irreparable harm. Various terms and conditions of Ordinance 2020-04 are a substantial obstacle to DELCORA and AQUA's performance of contract and the COUNTY has not removed any impediments to the termination of DELCORA. Under the MAA, the COUNTY was required to assume "all the obligations incurred" by DELCORA prior to the termination and that is not what the COUNTY sought in this case when they have taken no steps to remove the existing impediments and at the same time have consistently required a Certificate of Termination from DELCORA. *See* 53 Pa. C.S. § 5622(2).

The County sought a Writ of Mandamus; however, that extraordinary remedy was not available because there was no clear and specific legal right to the COUNTY. *See Cty. Of Mifflin v. Mifflin Cty. Airport Auth.*, 437 A2.d 781, 783 (Pa. Commw. 1981). Even assuming that the Ordinance was valid and enforceable, the COUNTY was still unable to prevail on this argument. The Ordinance approved by Delaware County Council is not specific in its directives to DELCORA and provides nothing more than DELCORA should "shall cooperate with the County in an orderly windup of its activities, and take all steps necessary to effectuate the transfer of all of its assets, funds and other property" (see § 2.02) and "take all actions necessary to remove any impediments to its termination in accordance with the Authorities Act" (see § 2.05). The Ordinance does not provide a specific set of instructions to DELCORA and contains vague and insufficient language that only provides a general course of conduct. The Appellate Courts have consistently determined that unless there is a specific course of conduct and not a general conduct, that relief in the form of mandamus is not appropriate. *See Francis v. Corleto*, 211 A.2d 503 (Pa 1965); *Cty. Of Mifflin v. Mifflin Cty. Airport Auth.*, 437 A2.d at 783; *Germantown Bus. Asso. v. Philadelphia*, 534 A.2d 553, 555 (Pa. Commw. 1987).

The Court further found that Mandamus relief was inappropriate as the Ordinance fails to address the impediments that exists that must be resolved prior to the termination of DELCORA. Numerous debts and financial obligations must be met prior to the termination of DELCORA, debts and obligations which at this time DELCORA is unable to sufficiently fund and of which the COUNTY has provided no steps to

provide DELCORA with any direction as to how DELCORA can remove this impediment where the debts cannot be discharged.

This Court has already, *supra*, addressed the validity of the Asset Purchase Agreement. As the APA has been found to be binding and valid, it is hence an obligation of DELCORA and the COUNTY must assume in order to terminate DELCORA and as such it is therefore an impediment to the termination.

D. THE COURT DID NOT ERR IN GRANTING DELCORA AND AQUA INJUNCTIVE RELIEF BECAUSE BOTH DELCORA AND AQUA MET THE STANDARD FOR SUCH RELIEF.

This Court did not err in ruling that the COUNTY is 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.

A permanent injunction is a remedy provided by a Court where it is necessary to prevent an irreparable harm that cannot be adequately compensated by damages. In this case both DELCORA and AQUA sought and were provided with Injunctive relief. In order to obtain permanent injunctive relief, the part seeking such relief must establish the following elements: "(1) the right to relief is clear, (2) the injunction is necessary to avoid an injury that cannot be compensated by damages, and (3) that greater injury will result if the court does not grant the injunction than if it does." See ***Mazin v. Bureau of Prof. and Occupational Affairs***, 950 A.2d 382, 389 (Pa. Cmwlth. 2008).

This Court has determined that the APA is valid and enforceable and an impediment to the termination of DELCORA, while not contesting the COUNTY'S right to terminate DELCORA, DELCORA AND AQUA successfully argued to this Court that the termination can only occur once the APA has been closed as there are fundamental portions of the APA which must be complied with prior to dissolution of DELCORA. Further, as this Court had a real concern that terminating DELCORA prior to the closing of the APA would result in violation of contracts as well as harm to the public, and violating state and federal laws. See ***Firearm Owners Against Crime v. Lower Merion Twp.***, 151 A.3d 1172, 1180 (Pa. Cmwlth. 2016) ("the violation of an express statutory provision constitutes per se irreparable harm"); ***Wolk v. Sch. Dist. of Lower Merion***, 2020 Pa. Cmwlth. LEXIS 209, at *30 (Pa. Cmwlth. 2020) ("For purposes of injunctive relief, statutory violations constitute irreparable harm per se."); ***Pennsylvania Pub. Util. Comm'n v. Israel***, 52 A.2d 317, 322 (Pa. 1947) ("When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.").

This Court issued the Order, which granted relief to DELCORA and AQUA and against the COUNTY based upon the laws and case law of the Commonwealth and this Court's determination that failure to do so would result in greater injury because terminating DELCORA prior to closing would render the COUNTY unable to make the required representations and warranties and would result in harm to a transaction that has already been found by all parties to be in the public's interest. As the COUNTY was unable to provide any specific or reasonable assurances related to the service,

DELCORA's ratepayers could lose access to uninterrupted, safe wastewater conveyance and treatment service, as the COUNTY witnesses themselves acknowledged that they presently lacked the requisite ability, experience, training or knowledge to manage a wastewater system of this size and scope.

The permanent injunction increased the ability of the impediments could be resolved prior to the dissolution of DELCORA and the ratepayers service would not be interrupted and the public interest in their services would not be caused any irreparable harm.

E. THE COURT DID NOT ERR IN EXCLUDING EVIDENCE FROM THE COUNTY OF DELAWARE CHALLENGING THE VALIDITY OF THE ASSET PURCHASE AGREEMENT, INCLUDING EVIDENCE DEMONSTRATING THAT THE AGREEMENT VIOLATED PUBLIC POLICY AND WAS VOID AS A MATTER OF LAW.

During the pendency of this short litigation, the Court was entrusted to rule on the DELCORA Trust, whether to grant injunctive and/or mandamus relief as requested by DELCORA, the COUNTY and AQUA. The Court, in anticipation of the Trial in this matter ruled on Motions in Limine and prevented testimony that was void as a matter of law or invaded the province of the Court as fact finder.

The Court prohibited the COUNTY from presenting evidence as to whether or not the APA violates "public policy." This Court barred this testimony and evidence as this would have invaded the jurisdiction of the Pennsylvania Public Utilities Commission ("PUC"), not this Court. As part of this litigation, the Court was to determine the enforceability of the APA as a contractual obligation pursuant to the counterclaims of DELCORA and Aqua. This Court notes that the COUNTY raised this issue as part of their

mandamus action and as such, DELCORA and AQUA sought a ruling from the Court that the APA was an obligation that needed to be assumed by the COUNTY. Whether or not the APA constitutes good public policy goes beyond this scope and exceeds the jurisdiction of the Court. The PUC is the entity that is tasked with reviewing the public benefits of the transaction and this Court could not invade their province. This Court notes that this Court was informed during the argument on this issue that the same information that the COUNTY sought to enter into evidence at this Trial, was already submitted to the PUC.

Furthermore, this Court notes that the law mandates that “[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.” ***Safe Auto Ins. Co. v. Oriental Guillermo***, 214 A.3d 1257, 1262 (Pa. 2019). “As the term “public policy” is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy[.]” ***Id.*** The County failed to meet this standard. The COUNTY did not identify to this Court any law or legal precedent supporting its theory that “misleading and inaccurate information renders the APA void because it violates public policy.” Additionally, this Court was not presented with any evidence that there was misleading or inaccurate information such that the contract would be deemed void. Thus, there is no merit to the County’s contentions that the APA is void of public policy regardless of the PUC’s jurisdiction.

Additionally, the COUNTY throughout the discovery process provided the opposing parties with an expert report issued by Daymark Energy Advisors (“Daymark”)

(the "Daymark Report") and thereafter, the COUNTY sought to present this evidence at trial. AQUA and DELCORA both filed Motions in Limine on October 5, 2020 seeking to preclude the testimony from Daymark Energy as well as the preclusion of the expert report. Timely Answers were filed, and the Court held oral argument on this issue on October 27, 2020 and issued a written ruling thereafter that

The issues of law, contract, and statutory interpretation, the validity and enforcement of various contracts, trusts, the legality of DELCORA and COUNTY official actions, Resolutions, Articles of Incorporation and amendments thereto and Ordinances are the province, scope, and authority of the Court, and not any fact or expert witness. The COUNTY is precluded from offering any evidence of opinion thereof, including but not limited to fact or expert testimony.

See ORDER GRANTING IN PART AND DENYING IN PART MOTIONS IN LIMINE, dated October 27, 2020, p. 2¶B.1.

This Court notes that the Daymark Report discusses the valuation of DELCORA's assets and the sale price that was agreed to by DELCORA and AQUA and renders a conclusion that "the proposed transaction does not offer substantial benefits to DELCORA customers" based on its valuation of the assets and the sale price.

As a part of the engagement between the COUNTY and Daymark, Daymark had eight separate tasks, which were

1. Review the two valuations associated with the sale for reasonableness;
2. Assess major differences between the two valuations and note any unusual assumptions that would impact valuation today, and in the future;
3. Review DELCORA's capital and operating expense projections;
4. Review the Rate Stabilization Trust Proposal;

5. Prepare independent draft and final rate path projections for a ten year horizon, both assuming no sale;
6. Determine the differences between the Daymark and Aqua/DELCORA rate path projections;
7. Assess whether the Trust fund balance is sufficient to offset increases implied by Daymark's estimated rate path projection;
8. Assess the likely magnitude of bill impacts when the rate stabilization period ends after ten years.

The tasks provided to Daymark report are not the relevant and material underlying issues in this case and were beyond the consideration of the undersigned. In ruling on this issue, this Court further determined that the

philosophy, policy preferences, opinions, wisdom, prudence, financial projections, valuations of DELCORA's assets, competing suitors to purchase DELCORA, the reasonableness of the purchase price, sale and projected wastewater rates are not relevant to legal issues, with no probative value to legal issues; but only prejudicial, and threatens to divert attention away from the duty to weigh impartially the legal issues.

See ORDER GRANTING IN PART AND DENYING IN PART MOTIONS IN LIMINE, dated October 27, 2020, p. 2¶B.2.

The Appellate Courts consistently hold that a Court "enjoy[s] broad discretion regarding the admissibility of potentially misleading and confusing evidence." **Vetter v. Miller**, 2017 PA Super 64, 157 A.3d 943, 949 (Pa. Super. Ct. 2017) *citing Rohe v. Vinson*, 158 A.3d 88, 95, 2016 WL 7449226, *11–12 (Pa. Super. 2016) (citing **Whyte v. Robinson**, 421 Pa. Super. 33, 617 A.2d 380, 382–83 (1992) (internal citations omitted)); **Coughlin v. Massaquoi**, 138 A.3d 638, 643 (Pa. Super. 2016), *aff'd*, 170 A.3d 399 (Pa. 2017) (citing **Daset Mining Corp. v. Indus. Fuels Corp.**, 473 A.2d 584, 588 (Pa. Super. 1984)). Relevance is a threshold issue for a trial court in

determining the admissibility of evidence. **Vetter v. Miller**, 2017 PA Super 64, 157 A.3d 943, 949 (Pa. Super. Ct. 2017) *citing* **Rohe v. Vinson**, 158 A.3d 88, 95, 2016 WL 7449226, *11–12 (Pa. Super. 2016) (citing **Whyte v. Robinson**, 421 Pa.Super. 33, 617 A.2d 380, 382–83 (1992) (internal citations omitted)).

In the Commonwealth, evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” **Pa.R.E. 401(a)-(b)**. All relevant evidence is admissible and conversely, all irrelevant evidence is inadmissible. **Pa.R.E. 402**. Additionally, all relevant evidence admitted by a court must be both material and have probative value. *See Gaudio v. Ford Motor Co.*, 976 A.2d 524, 538 (Pa. Super. 2009). However, even relevant evidence may be excluded if its probative value is outweighed by the danger of, *inter alia*, unfair prejudice. *See Pa.R.E. 403*. Under Pennsylvania Rule of Evidence 403 the probative value of otherwise relevant evidence may be “outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” **Pa.R.E. 403**. For evidence to have probative value, and thus be admissible at trial, it must have a “tendency to make a fact more or less probable than it would be without the evidence.” **Pa.R.E. 401**.

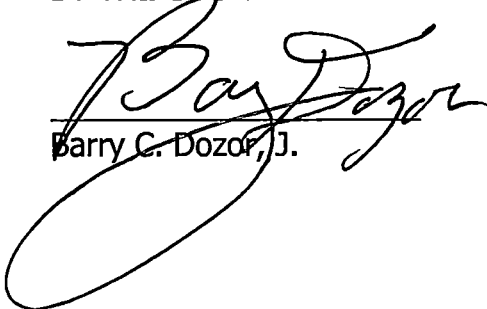
This Court determined that the report or testimony of any Daymark expert was not relevant to the determinations that were required by the Court and irrelevant to the threshold issues. Even if an appellate Court were to disagree and believe that the potential evidence and/or testimony was relevant, any potential probative value in the

Court being provided with such evidence was outweighed by the dangers of its admissibility during the Trial. As such the evidence was properly excluded by the Court and there was no error.

CONCLUSION:

After a full evidentiary Trial on all claims for relief and outstanding motions, subsequent to extensive discovery, and a review of all exhibits, including excerpts of depositions, this Court found no defenses or legal obstacles to the enforcement and reliance of contracts between DELCORA and AQUA, as well as Univest Bank and Trust Co., as Trustee. Potential theater may raise one's interest and personal preference but this Court found no statutory or case law that would retroactively void valid and enforceable legal contracts and DELCORA and AQUA reliance thereof. For all of the foregoing reasons, the Order dated December 28, 2020 was not issued in error and as such, this Appeal should be Dismissed.

BY THE COURT:



Barry C. Dozor, J.

EXHIBIT “E”



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August 7, 2020

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

VIA ELECTRONIC FILING

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

Dear Secretary Chiavetta:

Attached for filing with the Pennsylvania Public Utility Commission is the Petition of the County of Delaware, Pennsylvania for a Stay of the Section 1329 Application of Aqua Pennsylvania Wastewater, Inc. for the Acquisition of Delaware County Regional Water Quality Control Authority's Wastewater System Assets and Request for Commission Review and Answer to a Material Question, in the above-referenced proceeding.

The County respectfully requests that the Commission take any action necessary to render a decision on the Petition in advance of the September 2, 2020 Prehearing Conference for the above-captioned docket.

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

Sincerely,

McNEES WALLACE & NURICK LLC

By

A handwritten signature in black ink, appearing to read 'A. Bakare', written over a horizontal line.

Adeolu A. Bakare

Counsel to the County of Delaware, Pennsylvania

c: Administrative Law Judge Angela T. Jones
Certificate of Service

CERTIFICATE OF SERVICE

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

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Adeolu A. Bakare

Counsel to the County of Delaware,
Pennsylvania

Dated this 7th day of August, 2020, in Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**PETITION OF THE COUNTY OF DELAWARE, PENNSYLVANIA
FOR A STAY OF THE SECTION 1329 APPLICATION OF AQUA
PENNSYLVANIA WASTEWATER, INC. FOR THE ACQUISITION OF
DELAWARE COUNTY REGIONAL WATER QUALITY
CONTROL AUTHORITY'S WASTEWATER SYSTEM ASSETS AND
REQUEST FOR COMMISSION REVIEW
AND ANSWER TO A MATERIAL QUESTION**

BEFORE THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION

NOW COMES the County of Delaware, Pennsylvania (the "County"), by and through counsel, pursuant to 52 Pa. Code §§ 1.15, 5.41, 5.302, who files this Petition for Stay respectfully requesting the Pennsylvania Public Utility Commission ("PUC" or "Commission") stay all substantive proceedings in this docket – relating to the Application of Aqua Pennsylvania Wastewater, Inc. ("Aqua") to acquire the system assets of the Delaware County Regional Water Quality Control Authority ("DELCORA") (the "Application"). This Petition for Stay requests that the Commission stay the instant proceeding involving Aqua's Application until there is a final determination in the pending Delaware County Court of Common Pleas Action at Docket No. CV-2020-003185 (the "Common Pleas Action") resolving disputed issues that directly bear on Aqua's Application. Pursuant to 52 Pa. Code § 5.302, this Petition for Stay seeks Commission review and disposition of the following Material Question:

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?

Proposed Answer: Yes.

The County notes the Petition for Reconsideration of Staff Action it filed on June 23, 2020, ("June 23 Petition") is still pending before the Commission. The June 23 Petition asked that the Commission require Aqua to comply with Section 1329(d)(1)(v) of the Public Utility Code, 66 Pa. C.S. § 1329(d)(1)(v), and amend its Application to include all relevant documents related to the applicable rate stabilization plan prior to the Commission's acceptance of Aqua's Application. Through this Petition, the County additionally requests the Commission issue a stay of this proceeding involving Aqua's Application through January 31, 2021, in order to allow sufficient time for issuance of a final decision in the Common Pleas Action.

The County respectfully requests that the Commission take any action necessary to render a decision on the Petition in advance of the September 2, 2020 Prehearing Conference for the above-captioned docket.

In support thereof, the County states as follows:

I. Procedural History Before the Commission

1. By Secretarial Letter dated December 30, 2019, the Commission acknowledged receipt of Aqua's Letter/Notice of Licensed Engineer and Utility Valuation Expert Engagement Concerning Acquisition of the Delaware County Regional Water Quality Control Authority, Delaware and Chester Counties Sanitary Wastewater Collection and Treatment System, which was received by the Commission on Thursday, December 26, 2019.

2. Aqua filed the Application on or about March 3, 2020. Pursuant to the Commission's Section 1329 Implementation Order, Commission staff began its pre-acceptance review of the Application.

3. On May 18, 2020, the County filed a Petition to Intervene in this proceeding.

4. As referenced in the County's Petition to Intervene, the County filed a Complaint against DELCORA in the Court of Common Pleas of Delaware County.¹

5. On June 11, 2020, the Commission issued a Secretarial Letter ("June 11 Secretarial Letter") conditionally accepting Aqua's Application, subject to Aqua's completion of the notifications and conditions established in the June 11 Secretarial Letter. The June 11 Secretarial Letter expressly stated it was a staff determination subject to reconsideration by the Commission by a petition made pursuant to Section 5.44 of the Commission's procedural regulations. A true and correct copy of the June 11 Secretarial Letter is attached to this Petition for Stay as Exhibit 1.

6. On June 23, 2020, the County filed the Petition for Reconsideration of Staff Action requesting that the Commission rescind Staff's conditional acceptance of Aqua's Application. The County asked the Commission to reissue the June 11 Secretarial Letter with this additional condition placed upon Aqua: that Aqua 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 statements²). The County explained that DELCORA's formation of the Trust and the associated plan to stabilize post-transaction rates through Trust disbursements to Aqua was a "rate stabilization plan" *required*

¹ See County Petition to Intervene, n. 2. On June 15, 2020, the County filed an Amended Complaint against DELCORA in the Common Pleas Action.

² See, e.g., Aqua Statement No. 2 (Direct Testimony of William C. Packer) and Aqua Statement No. 3 (Direct Testimony of Erin M. Feeney).

to be included in an application made pursuant to Section 1329 of the Public Utility Code. The County asserted that the incomplete documentation regarding DELCORA's rate stabilization plan renders the Application deficient under Section 1329.

7. On July 9, 2020, Aqua filed an Answer ("July 9 Answer") to the County's June 23 Petition. In its Answer, Aqua claimed that its Application does not propose a rate stabilization plan and argued that DELCORA's plan to "stabilize" rates through the Trust is not a PUC-jurisdictional rate stabilization plan within the context of Section 1329. July 9 Answer at 4.

8. On July 14, 2020, the Commission issued a Secretarial Letter ("July 14 Secretarial Letter") stating that the instant docket "is currently inactive pending the satisfaction of the conditions established by the Commission in its June 11, 2020 Secretarial Letter..." and "[i]f Aqua satisfies all of these conditions and Docket No. A-2019-3015173 becomes active as a result of the satisfaction of the conditions, the Petition for Reconsideration of Staff Action filed by the County of Delaware, Pennsylvania, and any responsive filings thereto, will be accepted into the docket and assigned for formal action and disposition." (footnote omitted). A true and correct copy of the July 14 Secretarial Letter is attached to this Petition for Stay as Exhibit 2.

9. On July 14, 2020, the County filed an Answer and Reply to a New Matter raised in Aqua's July 9 Answer to the County's June 23 Petition ("July 14 Reply").

10. In the July 14 Reply, the County explained that, on July 2, 2020, the Delaware County Court of Common Pleas entered an Order granting Aqua's Petition to Intervene in the Common Pleas Action. The County explained that the July 2 Common Pleas Order is relevant to the Commission's disposition of the County's June 23 Petition because it provides the Commission with more complete information upon which to render a decision.

11. On July 23, 2020, Aqua filed a letter with the Commission asserting that Aqua has satisfied the conditions identified in the June 11 Secretarial Letter and requesting the Commission "finaliz[e] acceptance of the Application by July 27, 2020, at the latest, and publish notice of the filing of the Application in the Pennsylvania Bulletin on August 15, 2020...."

12. On July 27, 2020, the Commission issued a Secretarial Letter ("July 27 Secretarial Letter") accepting Aqua's Application without requiring Aqua to provide all rate stabilization plan documents applicable to the proposed transaction. The July 27 Secretarial Letter accepted the Application and activated the above-captioned docket.³ A copy of the July 27 Secretarial Letter is attached to this Petition for Stay as Exhibit 3.

13. Also, on July 27, 2020, the Commission issued a hearing notice, which reflected the assignment of the docket to the Commission's Office of Administrative Law Judge with Administrative Law Judge Angela Jones presiding.

II. Procedural History in and Relevant to the Common Pleas Action

14. On or about October 20, 1971, the County created DELCORA.

15. Pursuant to Section 5619 of the Municipality Authorities Act ("Authorities Act"), the County has the exclusive right, power and authority to terminate DELCORA. 53 Pa.C.S. § 5619.

16. On May 14, 2020, while the Commission's Docket Number A-2019-3015173 was inactive, the County filed a complaint against DELCORA and the Trust in the Court of Common Pleas of Delaware County, docked at CV-2020-003185 (*i.e.*, the Common Pleas Action), asserting

³ The July 27 Secretarial Letter also noted that the Commission will publish notice of the Application in the August 15, 2020, edition of the *Pennsylvania Bulletin* with a protest deadline of August 31, 2020.

that DELCORA's creation of the Trust violates DELCORA's Articles of Incorporation, was *ultra vires*, and violates the Authorities Act.⁴

17. On June 3, 2020, the County Council approved and enacted Ordinance 2020-4 directing the orderly termination of DELCORA. A true and correct copy of the County's Ordinance is attached to this Petition for Stay as Exhibit 4.

18. On June 15, 2020, the County filed an Amended Complaint in the Common Pleas Action, seeking a Court Order enforcing Ordinance 2020-4 to terminate DELCORA.

19. On June 15, 2020, Aqua filed a Petition to Intervene in the Common Pleas Action. Aqua states that the Asset Purchase Agreement dated September 17, 2019 ("Asset Purchase Agreement") "is structured in such a way as to protect DELCORA's customers by capping all rate increases for customers at 3% per year, by placing the proceeds of the sale (after paying down DELCORA's obligations) into an independently managed irrevocable trust for the benefit of these customers, with Univest Bank and Trust Co. serving as trustee ("Univest")." Aqua Petition to Intervene at ¶ 5.

20. However, Aqua's Answer in Opposition to the County's Petition for Reconsideration of Staff Action asserts that the Commission does not have jurisdiction over the Trust. Aqua Answer at 8.

21. Aqua's Petition to Intervene in the Common Pleas Action also states "[a]lthough the Amended Complaint and the Ordinance do not expressly purport to challenge or attack the enforceability of the APA, the practical effect of the relief requested in the Amended Complaint and the Ordinance constitutes a direct attack on the APA if in fact the County is permitted to terminate DELCORA prior to closing on the APA." Aqua Petition to Intervene at ¶ 22.

⁴ All documents in the Common Pleas Action are available by searching the Delaware County Court's website at <https://delcopublicaccess.co.delaware.pa.us/search/case> under Docket No. CV-2020-003185.

22. By order issued July 2, 2020, the Honorable Barry C. Dozor granted Aqua's Petition to Intervene in the Common Pleas Action. Judge Dozor's Order states "this Court determines that Aqua has a real financial interest, [is] referred to as a third party beneficiary of the DELCORA Trust Agreement... This court finds that the impact of this case on the agreement between Aqua and DELCORA will be direct, significant and real." A true and correct copy of Judge Dozor's Order is attached to this Petition for Stay as Exhibit 5.

23. The County notes that the County did not name Aqua as a party to the Common Pleas Action; the County named only DELCORA and the Trust as defendants.

24. Aqua inserted itself as an intervenor into the Common Pleas Action. Since successfully intervening into the Common Pleas Action, Aqua has made itself an active participant.

25. On July 22, 2020, Aqua filed a Petition for Preliminary Injunction ("Preliminary Injunction") in the Common Pleas Action in which Aqua does not challenge the County's right to ultimately terminate DELCORA, but seeks to enjoin the County from terminating DELCORA prior to Closing on the proposed transaction. A true and correct copy of Aqua's Preliminary Injunction is attached as Exhibit 6.

26. On July 29, 2020, Judge Dozor issued a Scheduling Order and Order Confirming Interim Stay ("Scheduling Order"). The Scheduling Order sets dates for hearings on the County's Complaint (regarding the Trust) and Aqua's Preliminary Injunction (regarding termination of DELCORA), commencing with an initial hearing on September 9, 2020 and ending with a final hearing on October 21, 2020.

III. Petition for Stay and Request for Commission Review and Answer to the Material Question.

27. The County respectfully submits that due to the litigation in the Court of Common Pleas, the Commission should, under its discretionary authority under the Public Utility Code,

66 Pa. C.S. § 501, and/or the doctrine of primary jurisdiction, place a stay on the instant proceeding involving Aqua's Application until there is a final determination on the related matters currently before the Delaware County Court of Common Pleas.

A. Consideration of Aqua's Application is Premature Due to Unresolved Issues Regarding DELCORA's Formation and Administration of the Trust Intended to Administer the Rate Stabilization Plan.

28. When reviewing a petition/application for stay, the Commission applies the Pennsylvania Supreme Court's factors and analysis in *Pa. PUC v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). *See Implementation of Act 40 of 2017; Petition of Cypress Renewables, LLC for a Stay et al.*, Docket No. M-2017-2631527, 2018 Pa. PUC LEXIS 286 (Order entered Aug. 2, 2018); *see also Application of Artesian Water Pa., Inc. et al.*, Docket No. G-2019-3013700 *et al.*, 2020 Pa. PUC LEXIS 86 (Order entered May 21, 2020). The Commission will grant a Petition for Stay when:

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.

Petition of Cypress Renewables, 2018 Pa. PUC LEXIS 286 (citing *Process Gas Consumers Group*, 467 A.2d at 809-809). While the Commission generally considers petitions for stay in the context of a PUC Order pending appeal, the County suggests that the application of some or all of the *Process Gas* factors may assist the Commission in rendering a decision on its Petition for Stay.

29. There is no dispute that DELCORA's formation and administration of the Trust intended to fund the rate stabilization plan is integral to the transaction structured by Aqua and DELCORA. The Memorandum of Understanding ("MOU") included in Aqua Statement No. 2 (Appendix B to the Direct Testimony of William C. Packer) describes at least a portion of Aqua's responsibilities under DELCORA's rate stabilization plan and in relation to the Trust.

3. Aqua Wastewater shall calculate the customer assistance payment amount for each DELCORA customer and the total customer assistance payment amount for each billing period, and shall provide its calculation, along with any and all information necessary to confirm the calculation of both payment amounts to the designated calculation agent.
4. DELCORA shall timely direct the Trustee under the Trust Agreement to transfer to Aqua Wastewater by Fedwire amount equal to the total customer assistance amount confirmed by the designated calculation agent for the applicable billing period.

As demonstrated by the MOU, the rate stabilization to be provided by Aqua in the form of "customer assistance payments" is contingent on distributions from the Trust which is subject to legal challenge before the Delaware County Court of Common Pleas.

30. The County is likely to succeed on the merits in demonstrating before the Court of Common Pleas that the Trust Agreement and the Asset Purchase Agreement were entered into in violation of the Authorities Act, 53 Pa. C.S. § 5601 *et seq.* Specifically, the County has alleged that DECLORA violated the Authorities Act by: (1) creating the Trust when it had no power to do so; (2) devising a funding structure through which DELCORA would continue to exist and hold and distribute public monies, even after transferring the sewer system it was created to operate; (3) adopting a funding process in the Trust which is contrary to and violates DELCORA's Articles of Incorporation; and (4) refusing to comply with the mandates of County Ordinance 2020-4.

31. As the only incorporating municipality of DELCORA, the County has clear legal rights and a vested interest in the legality of the Trust and the termination of DELCORA (which are properly before the Court of Common Pleas and not the PUC). Without allowing for the Common Pleas Action to proceed prior to the PUC Application, the County will suffer irreparable injury through the protracted and unnecessary litigation that would occur were the PUC to deny this Petition for Stay. Additionally, the Commission, the ALJ and other intervenors in the PUC Application docket would be faced with the prospect of litigating an Application subject to a 6-month review period while key components of the Application remain subject to and conditioned upon the outcome of active litigation.

32. Aqua and DELCORA view the Trust as a key justification for the transaction and contend the Trust confers benefits to the DELCORA customers. Accordingly, this is critical to the ALJ's and Commission's review and adjudication of the "public interest" component of the proposed transaction. *See* Aqua Application at 8. However, the County's challenges to the legality of the Trust remain pending before the county court. Accordingly, the Commission cannot effectively discharge its duties to review and adjudicate Aqua's Application while such fundamental components of the Application remains uncertain pending active litigation. This is consistent with Judge Dozor's Order in the Common Pleas Action, in which he writes "[t]his court finds that the impact of this case on the agreement between Aqua and DELCORA will be direct, significant and real." *See* Exhibit 5.

33. Finally, issuance of a stay will not substantially harm other parties or adversely impact the public interest. All parties are served by a clear resolution regarding the legality of the Trust and the termination of DELCORA prior to adjudication of Aqua's PUC Application involving both disposition of funds from the contested Trust and a transfer of assets from

DELCORA. With regard to any concerns that a stay may impact the potential transaction, the Asset Purchase Agreement specifically establishes that the Outside Date for Closing on the transaction shall be 60 days following the unappealable resolution of any litigation concerning the transaction, including applicable PUC proceedings. *See* Asset Purchase Agreement at 8 (defining "Outside Date"). Accordingly, the transacting parties would not be prejudiced because the Asset Purchase Agreement contemplates Closing to occur *after* any necessary litigated proceedings.

34. Judicial economy and administrative efficiency support the issuance of a stay. Waiting for resolution in the Common Pleas Action will enable the Commission to conduct an efficient review of Aqua's Application without uncertainty regarding the pending legal claims challenging the legality of the proposed transaction under the Authorities Act or the ultimate counterparty to the proposed transaction. Accordingly, the issuance of a stay serves the public interest.

35. For the reasons set forth above, the Commission should defer consideration of the Application until January 31, 2021 to allow for resolution of these issues in the Common Pleas Action. If a Final Order has not been issued in the Common Pleas Action by January 31, 2021, the Commission can revisit this matter at such time.

B. Consideration of Aqua's Application is Premature Due to Unresolved Issues Regarding the Termination of DELCORA.

36. As indicated above, the County enacted Ordinance 2020-4 directing the orderly termination of DELCORA. County Council unanimously approved and enacted the Ordinance in accordance with the Authorities Act on June 3, 2020. *See* Exhibit 4. Consistent with established precedent, the Ordinance orders DELCORA to cooperate with the County towards an orderly

windup of DELCORA's operations.⁵ As detailed therein, such cooperation includes satisfying DELCORA's outstanding debts and obligations and to take all actions necessary to remove any impediments to its termination. *Id.* The Ordinance further instructs DELCORA to refrain from taking any action or expending any funds inconsistent with DELCORA's windup of its affairs and termination. *See* 53 Pa.C.S. §5607(c) (authorizing the incorporating municipality to specify the powers and purposes of the authority from time to time).

37. Aqua has filed a Preliminary Injunction with the Court of Common Pleas seeking to enjoin the County from enforcing the Ordinance and terminating DELCORA in advance of the Closing on the transfer of DELCORA's system to Aqua.

38. The County will succeed in enforcing the Ordinance and terminating DELCORA. The County created DELCORA in October of 1971. Exhibit 4. As the only incorporating municipality of DELCORA, the County has a clear legal right to terminate DELCORA. Regardless of the potential sale transaction, the County is entitled to a writ of mandamus requiring DELCORA to take all necessary steps to terminate and to comply with the Ordinance (and the Authorities Act) directing the termination of DELCORA.

39. As with the litigation of the Trust, the Commission, the ALJ, and the other intervenors would be irreparably harmed by the prospect of litigating a voluminous record under a 6-month timeframe while the ultimate existence of the counterparty to the Asset Purchase Agreement remains subject to litigation. Enforcement of the County's termination Ordinance could have significant impacts on the proposed transaction, particularly as Aqua has suggested its

⁵ *Township of Forks v. Forks Twp. Mun. Sewer Auth.*, 759 A.2d 47, 53, 2000 Pa. Commw. LEXIS 494, *10 (Pa. Commw. 2000) (“[T]he creating municipality has the power to dissolve its authority under Section 18A once the impediments of Sections 14 and 18 are removed, particularly the discharge of all indebtedness, regardless of its character. Under the Act, the power to dissolve includes the power to order the Authority, prior to dissolution, to remove legally removable impediments...”).

entry into the Asset Purchase Agreement was conditioned on DELCORA remaining the counterparty. Aqua Petition to Intervene at ¶ 9.

40. The County further avers that its proposed stay would not harm parties to the PUC proceeding or the public interest. All parties are served by a clear resolution regarding the corporate existence of DELCORA and ownership of the sewer system. The proposed stay also comports with the language in the Asset Purchase Agreement allowing for Closing after conclusion of necessary legal proceedings. *See supra* ¶ [33].

41. For the same reasons adduced above in relation to the disputed Trust issues, consideration of the *Process Gas* analysis favors granting the proposed stay of proceedings to allow the Commission, the ALJ, and the parties to conduct a reasonable, thorough, and efficient investigation of Aqua's Application. *See supra* ¶ 32-33.

C. As an Alternative to the *Process Gas* Factors, the Doctrine of Primary Jurisdiction also Supports Issuance of the Proposed Stay.

42. The doctrine of primary jurisdiction is a jurisprudential rule allowing administrative agencies and courts of common pleas to defer to each other when litigation, parties, and jurisdictional issues overlap. Its purpose is to "allocate adjudicatory responsibility between courts and agencies." *Sunrise Energy, LLC v. FirstEnergy Corp.*, 148 A.3d 894, 903 (Pa. Cmwlth. 2016).

43. Pursuant to the doctrine, a trial court may defer to the ruling of an agency to enable the trial court to benefit from the agency's views on issues within the agency's competence. *See Elkin v. Bell Tel. Co.*, 420 A.2d 371 (Pa. 1980); *Sunrise Energy*, 148 A.3d at 903. However, some issues fall exclusively under the jurisdiction of a trial court and not the Commission. For example, the PUC generally lacks authority over civil claims seeking damages. *See Fairview Water Co. v. Pa. PUC*, 502 A.2d 162, 166-167 (Pa. 1985); *see also In re Condemnation of Sunoco Pipeline*,

143 A.3d 1000, 1018-19 (Pa. Cmwlth. 2016) (explaining that the Court of Common Pleas retained jurisdiction to evaluate the validity of an easement).

44. Where resolution of a claim does not hinge or depend on a PUC regulation or the PUC's particular expertise, a trial court should not refer the matter to the PUC under the doctrine of primary jurisdiction. *Ostrov v. I.F.T., Inc.*, 586 A.2d 409, 414-416 (1991) (citing *DeFrancesco v. Western Pa. Water Co.*, 453 A.2d 595, 596-597 (Pa. 1982)). Similarly, where the PUC's jurisdiction is not exclusive and where administrative remedies are not adequate and complete, an action for civil relief and damages may be brought in court. *See Di Santo v. Dauphin Consol. Water Supply*, 436 A.2d 197, 202 (Pa. Super. Ct. 1981). Here, the County asks the PUC to stay the Application proceeding and allow the Court of Common Pleas to first rule on claims challenging the legality of the Trust Agreement that is a core component of Aqua's proposed acquisition of DELCORA and the termination of DELCORA.

45. The County is not suggesting that the Commission lacks jurisdiction over a Section 1329 application by a public utility to acquire the assets of a municipal authority. It is axiomatic that the Commission has jurisdiction to review Aqua's Application. But, as discussed above, the Commission may not have jurisdiction over many substantive issues fundamental to the Application.

46. The County respectfully requests the Commission defer exercise of its jurisdiction by staying this proceeding and allowing the non-PUC jurisdictional issues critical to the proposed transaction to proceed in the forum that the applicable parties have chosen – the Delaware County Court of Common Pleas.

47. The County notes that neither DELCORA nor Aqua have raised the doctrine of primary jurisdiction in the Common Pleas Action.⁶ To the contrary, Aqua intervened in the Common Pleas Action and asserted that the Amended Complaint and the Ordinance were a "direct attack on the APA." Aqua Petition to Intervene at ¶ 22. The Delaware County Court of Common Pleas agreed and issued the Order stating "[t]his court finds that the impact of this case on the agreement between Aqua and DELCORA will be direct, significant and real." *See* Exhibit 5

48. The County respectfully requests that, for the reasons set forth above, the Commission grant this Petition for Stay.

D. Commission Review of the Material Question

49. The Commission's Regulations establish that: "[d]uring the course of a proceeding, a party may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise." 52 Pa. Code § 5.302(a).

50. The County recognizes the Commission's Secretary has already transferred Aqua's Application to the Office of Administrative Law Judge. Nonetheless, the County's Petition for Reconsideration of Staff Action has not been adjudicated.

51. Moreover, the initial call-in Prehearing Conference before the presiding ALJ is not scheduled until September 2, 2020. Given the six-month timeframe for Commission adjudication of a Section 1329 application and the Commission's recent acceptance of Aqua's Application, the County respectfully submits the Material Question should be immediately addressed by the Commission. Unlike a request for interlocutory review of discovery matters under Section 5.304

⁶ At this point, by not raising the doctrine of primary jurisdiction in the Common Pleas Action, Aqua and DELCORA have waived the opportunity to raise it. However, even if they had the ability to raise it, the issues in the Common Pleas Action do not arise under the Public Utility Code. While these issues significantly affect a case within the Commission's jurisdiction, the Commission has limited, if any, subject matter jurisdiction over the Common Pleas Action.

of the Commission's regulations or other matters generally raised throughout administrative litigations, *see* 52 Pa. Code § 5.304, the Petition for Stay presents a jurisdictional matter for resolution at the outset of this proceeding. The County thus requests that the Commission act to stay this proceeding and its associated six-month timeline to provide an opportunity for the Delaware County Court of Common Pleas to issue a determinative ruling on the civil claims impacting Aqua's Application, including the Trust and the termination of DELCORA.⁷

52. The Commission reserves authority to grant a stay of proceedings without oral argument to protect the substantial rights of the parties. *See* 52 Pa. Code § 5.303(a)(1). As discussed above, the County, as the only incorporating municipality of DELCORA, has clear legal rights and a vested interest in the legality of the Trust, the termination of DELCORA, and the related issues in Aqua's PUC Application proceeding. Granting this Petition for Stay will serve the public interest by avoiding protracted and inefficient litigation and potential re-litigation at the PUC were the Commission to deny this Petition for Stay.

53. Additionally, on March 20, 2020, the Commission issued an Emergency Order captioned "Suspension of Regulatory and Statutory Deadlines; Modification to Filing and Service Requirements" in which the Commission reserved the right to waive any statutory or regulatory deadline for action *sua sponte*, without request by any other party, in any proceeding in which it

⁷ With regard to the 6-month timeframe for issuance of a final order on Applications filed pursuant to Section 1329 of the Public Utility Code, the County submits that ongoing adjudications before the Delaware County Court of Common Pleas presents extraordinary circumstances warranting exercise of Commission discretion to grant the requested stay. Issuance of the stay under these more unusual circumstances (where the Applicant has implicated the subject matter of the Application in litigated proceedings before another tribunal) is consistent with the Commonwealth Court's finding that strictly procedural deadlines imposed upon the Commission are directory rather than mandatory. *Public Serv. Water Co. v. Pennsylvania Pub. Util. Comm'n*, 165 Pa. Commw. 463, 645 A.2d 423, 1994 Pa. Commw. LEXIS 340 (Pa. Commw. Ct. 1994) (finding that "the language of § 332(h), that the commission 'shall rule upon such exceptions within 90 days after filing,' is directory and not mandatory and thus, the commission's November 2, 1993 order was not untimely.").

has determined that strict adherence to an established deadline will interfere with its ability to administer the Public Utility Code. Docket No. M-2020-3019262, *ratified* March 25, 2020.

54. The Commission's review of the instant petition will occur during the COVID-19 pandemic and the Commission has already acknowledged that strict adherence to deadlines may not be possible. Particularly under these circumstances, an order staying all substantive proceedings in this matter would be in the public interest.

E. Conclusion

55. Aqua's Section 1329 Application involves an array of complex disputed issues that should be resolved before the Delaware County Court of Common Pleas prior to adjudication of Aqua's Application at the Commission. Accordingly, for the reasons discussed herein, the County requests the Commission grant this Petition for Stay and answer the Proposed Material Question in the affirmative.

WHEREFORE, the County of Delaware, Pennsylvania, respectfully requests the Pennsylvania Public Utility Commission expeditiously answer the proposed Material Question in the affirmative, grant the foregoing Petition for Stay, and issue an order staying the proceedings at PUC Docket No. A-2019-3015173 through the shorter of January 31, 2021, or such time until the Delaware County Court of Common Pleas enters a Final Order at Docket No. CV-2020-003185. The County respectfully requests that the Commission take any action necessary to render a decision on the Petition in advance of the September 2, 2020 Prehearing Conference for the above-captioned docket.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

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Counsel to the County of Delaware,
Pennsylvania

Dated: August 7, 2020



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
400 NORTH STREET, HARRISBURG, PA 17120

June 11, 2020

Exhibit 1
Page 1 of 2

IN REPLY PLEASE
REFER TO OUR FILE

Docket No. A-2019-3015173

Utility Code 230240

THOMAS T NIESEN ESQUIRE
THOMAS NIESEN & THOMAS LLC
212 LOCUST STREET SUITE 302
HARRISBURG PA 17101
tniesen@tntlawfirm.com

Re: Aqua Pennsylvania Wastewater, Inc. Section 1329 Application for Acquisition of Delaware County Regional Water Quality Control Authority's Wastewater System Assets at Docket No. A-2019-3015173

Dear Attorney Niesen:

The Commission writes to inform you that, upon review of the supplemental materials provided, it has conditionally accepted for filing the above-captioned application, as amended (Application).

It will be necessary for Aqua Pennsylvania Wastewater, Inc. (APW) to serve copies of the Application then file proof of such service with the Commission, pursuant to 52 Pa. Code §§ 1.57 and 1.58, upon the following entities:

1. Each city, borough, town, township, county, and related planning office, which is included, in whole or in part, in the proposed service area;
2. Each water or wastewater utility, municipal corporation or authority which provides water or wastewater collection, treatment, or disposal service to the public and whose service area abuts or is within 1 mile of the service area proposed in the application; and
3. The Office of Consumer Advocate, Office of Small Business Advocate, Office of Attorney General, and the Department of Environmental Protection's central and appropriate regional office.

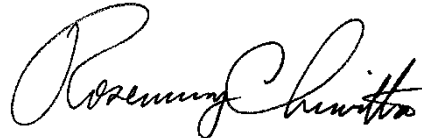
APW and Aqua Pennsylvania, Inc. (Aqua) are directed, upon receipt of this letter, to provide individualized notice of the proposed acquisition to all potentially affected APW and Aqua customers, consistent with the Commission's Final Supplemental Implementation Order entered February 28, 2019, at Docket No. M-2016-2543193. APW will inform the Commission when it begins providing such individualized notice. APW is also directed to ensure concurrent notice to all current Delaware County Regional Water Quality Control Authority wastewater customers in similar fashion. Additionally, APW shall publish the notice once a week for two consecutive weeks in a newspaper having a general circulation in the area involved and file proof of publication with the Commission after publication has occurred.

Additionally, APW shall further amend its Application to: 1) include a complete copy of the agreement provided as the Application's Exhibit F101 that includes all the agreement's referenced attachments, or provide evidence this agreement will not be assumed by APW and replace the agreement with a *pro forma* copy of the instrument APW intends to execute or assume in place of the incomplete agreement; and 2) include a complete copy of the agreement provided as the Application's Exhibit F103 that includes all the agreement's referenced attachments, or provide evidence this agreement will not be assumed by APW. These supplemental materials shall be verified pursuant to 52 Pa. Code § 1.36.

Upon completion of the notifications and conditions established herein, APW shall file a verification letter at this docket, indicating satisfaction of these notifications and conditions. The Commission will then issue a Secretarial Letter finalizing acceptance of the filing. After final acceptance of the filing, pursuant to 52 Pa. Code § 5.14, the Commission will proceed with publishing notice of the Application in the *Pennsylvania Bulletin*. This matter will receive the attention of the Commission and you will be advised of any further necessary procedure.

If you are dissatisfied with the resolution of this matter, you may, as set forth in 52 Pa. Code § 5.44, file a petition for reconsideration from the actions of staff with the Commission within 20 days of the date this letter is served.

Sincerely,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta", written in a cursive style.

Rosemary Chiavetta
Secretary

cc: Tanya McCloskey, Office of Consumer Advocate, tmccloskey@paoca.org
John Evans, Office of Small Business Advocate, jorevan@pa.gov
Richard Kanaskie, PUC Bureau of Investigation and Enforcement, rkanaskie@pa.gov
Alex Stahl, Aqua Pennsylvania Wastewater, Inc., astahl@aquaamerica.com



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
400 NORTH STREET, HARRISBURG, PA 17120

Exhibit 2
Page 1 of 2

IN REPLY PLEASE
REFER TO OUR FILE
A-2019-3015173

July 14, 2020

**Re: Aqua Pennsylvania Wastewater, Inc. Section 1329 Application for
Acquisition of Delaware County Regional Water Quality Control
Authority's Wastewater System Assets
Docket No. A-2019-3015173**

Dear Counsel:

Please be advised that on June 23, 2020, the Commission received the filing titled "Petition of the County of Delaware, Pennsylvania for Reconsideration of Staff Action by Secretarial Letter dated June 11, 2020" at Application Docket No. A-2019-3015173. That docket, however, is currently inactive pending the satisfaction of the conditions established by the Commission in its June 11, 2020 Secretarial Letter (*June Secretarial Letter*).

In the *June Secretarial Letter*, the Commission stated that - "it has conditionally accepted for filing the above-captioned application, as amended (Application)." Specifically the Commission noted that Aqua Pennsylvania Wastewater, Inc. (APW) must do the following, *inter alia*: (1) serve a copy of the Application on entities named in the *June Secretarial Letter*; (2) provide individualized notice of the proposed acquisition to all potentially affected APW and Aqua Pennsylvania, Inc. customers; (3) inform the Commission when it begins providing such individualized notice; (4) was directed to ensure concurrent notice to all current Delaware County Regional Water Quality Control Authority wastewater customers in similar fashion; (5) APW shall publish the notice once a week for two consecutive weeks in a newspaper having a general circulation in the area involved and file proof of publication with the Commission after publication has occurred; (6) shall further amend its Application to: a) include a complete copy of the agreement provided as the Application's Exhibit F101 that includes all the agreement's referenced attachments, or provide evidence this agreement will not be assumed by APW and replace the agreement with a *pro forma* copy of the instrument APW intends to execute or assume in place of the incomplete agreement; and b) include a complete copy of the agreement provided as the Application's Exhibit F103 that includes all the agreement's referenced attachments, or provide evidence this agreement will not be assumed by APW; and (7) that upon completion of the notifications and conditions established herein, APW shall file a verification letter at this docket, indicating satisfaction of these notifications and conditions.

If APW satisfies all of these conditions and Docket No. A-2019-3015173 becomes active as a result of the satisfaction of the conditions, the Petition for Reconsideration of Staff Action filed by the County of Delaware, Pennsylvania, and any responsive filings thereto,¹ will be accepted into the docket and assigned for formal action and disposition.

Sincerely,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first name "Rosemary" written in a larger, more prominent script than the last name "Chiavetta".

Rosemary Chiavetta
Secretary

¹ We note that on July 9, 2020, APW filed an Answer to the filing of the County of Delaware, Pennsylvania.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
400 NORTH STREET, HARRISBURG, PA 17120

July 27, 2020

Exhibit 3
Page 1 of 2

IN REPLY PLEASE
REFER TO OUR FILE

Docket No. A-2019-3015173
Utility Code 230240

THOMAS T NIESEN ESQUIRE
THOMAS NIESEN & THOMAS LLC
212 LOCUST STREET SUITE 302
HARRISBURG PA 17101
TNIESEN@TNTLAWFIRM.COM

Re: Aqua Pennsylvania Wastewater, Inc. Section 1329 Application for the Acquisition of
Delaware County Regional Water Quality Control Authority's Wastewater System Assets
at Docket No. A-2019-3015173

Dear Attorney Niesen:

The Commission writes to inform you that it has accepted for filing Aqua Pennsylvania Wastewater, Inc.'s (APW's) above-captioned application (Application). Specifically, this letter acknowledges receipt of APW's verification that it has provided individualized notice of the Application to all potentially affected APW wastewater and Aqua Pennsylvania, Inc. water customers and finalizes acceptance of the filing for the Commission's consideration. The Commission will proceed with publishing notice of the Application in the August 15, 2020, edition of the *Pennsylvania Bulletin* with a protest deadline of August 31, 2020.

If you are dissatisfied with the resolution of this matter, you may, as set forth in 52 Pa. Code § 5.44, file a petition for reconsideration from the actions of staff with the Commission within 20 days of the date this letter is served.

Sincerely,

Rosemary Chiavetta
Secretary

cc: Tanya McCloskey, Office of Consumer Advocate tmccloskey@paoca.org
Christine Hoover, Office of Consumer Advocate cHoover@pa.o.ca.org
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Erin Fure, Office of Small Business Advocate efure@pa.gov
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Erika McLain, PUC Bureau of Investigation and Enforcement ermclain@pa.gov
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Kenneth Stark, McNees, Wallace and Nurick, LLC kstark@mcneeslaw.com
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Scott Rubin, Southwest Delaware County Municipal Authority scott.j.rubin@gmail.com

COUNTY OF DELAWARE
PENNSYLVANIA
ORDINANCE NO. 2020-4

AN ORDINANCE OF THE COUNTY OF DELAWARE, COMMONWEALTH OF PENNSYLVANIA, TERMINATING THE DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL AUTHORITY, APPROVING THE CERTIFICATE OF TERMINATION OF THE AUTHORITY, AND AUTHORIZING ALL ACTIONS NECESSARY TO EFFECTUATE THE SAME.

WHEREAS, the County of Delaware (the "County"), Commonwealth of Pennsylvania (the "Commonwealth") is a political subdivision of the Commonwealth; and

WHEREAS, prior to 1976, the County was governed by a Board of County Commissioners (the "Board of Commissioners") of the County; and

WHEREAS, in May 1975, the residents of the County approved a Home Rule Charter plan (the "Home Rule Charter"); and

WHEREAS, pursuant to the Home Rule Charter and effective as of January 1976, the County has been governed by a County Council (the "County Council") of the County; and

WHEREAS, the County, pursuant to a resolution adopted on October 20, 1971 by the Board of Commissioners, has heretofore incorporated the Delaware County Regional Water Quality Control Authority (the "Authority") pursuant to the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended and supplemented, and as subsequently codified as the Municipality Authorities Act, Act of Jun. 19, 2001, P.L. 287, 53 Pa.C.S. §5601 *et seq.* (the "Authorities Act"); and

WHEREAS, the County, as the municipality which incorporated the Authority, has the power to terminate the Authority in accordance with the Authorities Act; and

WHEREAS, the County acting through its County Council desires to enact this Ordinance to terminate the Authority in accordance with the Authorities Act and effectuate the transfer of all its property to the County and the assumption of all its liabilities by the County.

NOW THEREFORE, PURSUANT TO THE AUTHORITY CONTAINED IN THE COUNTY HOME RULE CHARTER AND THE PENNSYLVANIA MUNICIPALITIES AUTHORITIES ACT, THE COUNTY COUNCIL OF THE COUNTY OF DELAWARE DOES HEREBY ENACT AND ORDAIN AS FOLLOWS:

Section 1. The County Council hereby directs and orders that the Authority be terminated.

Section 2. The Authority is directed and ordered to take all actions necessary to effectuate its termination, including, but not limited to, the following:

2.01. The Authority shall immediately terminate and cease any activity that is not consistent with the County's directives contained herein and as required to effectuate its termination.

2.02. The Authority shall cooperate with the County in an orderly windup of its activities, and take all steps necessary to effectuate the transfer of all of its assets, funds and other property, including, as applicable, any regulatory permits, to the County, and the assumption of all of its liabilities by the County. The Authority shall continue to operate its system in the normal course during this windup.

2.03. The Authority shall satisfy any outstanding debts and obligations of the Authority and settle all other claims which may be outstanding against it; provided, however, that the Authority shall seek approval of the County Council prior to satisfying any such outstanding debts, obligations and claims, and shall cooperate with the County in the execution of any agreements, instruments, certificates, and other documents determined by the County to be necessary or appropriate to effectuate the satisfaction of any outstanding debts and obligations of the Authority.

2.04. The Authority shall approve, execute and deliver to the County on or prior to June 18, 2020 a Certificate of Termination, in the form attached hereto as **Exhibit A** (the "Certificate"), so that the County, as required by the Authorities Act, 53 Pa.C.S. §5619, may as and when appropriate file the executed Certificate with the necessary governmental authorities.

2.05. The Authority shall take all actions necessary to remove any impediments to its termination in accordance with the Authorities Act, subject, however to the prior approval of such actions by the County Council.

Section 3. The Authority hereby is prohibited from taking any action or expending any money in connection with any action that is inconsistent with its termination. The Authority shall not engage in any conduct or expend any money, directly or indirectly, for any purpose other than accomplishing the directives and objectives of the County as set forth in this Ordinance. Any expenditure of funds by the Authority that is contrary to the directives and objectives of the County as set forth in this Ordinance shall be a violation of the restrictions on the expenditure of funds of the Authority under the Authorities Act, 53 Pa.C.S. §5612 and a violation of the specification of projects to be undertaken by the Authority under the Authorities Act, 53 Pa.C.S. §5607(c).

Section 4. The County Council hereby approves the Certificate in the form attached hereto as **Exhibit A**.

Section 5. Upon enactment of this Ordinance and compliance with all executory provisions herein, the proper officers of the County Council are hereby authorized to file the Certificate in the Office of the Secretary of the Commonwealth of Pennsylvania.

Section 6. Upon receipt of the Certificate, the Secretary of the Commonwealth shall note the termination of existence of the Authority on the Authority's record of incorporation and return the Certificate with approval to the County Council. Upon receipt thereof, the proper

officers of the County Council are hereby authorized to record the Certificate in the Office of the Recorder of Deeds of Delaware County.

Section 7. Upon recordation of the Certificate with the Delaware County Recorder of Deeds, all property of the Authority shall pass to the County, the County shall assume any remaining liabilities of the Authority, and the Authority will be effectively terminated.

Section 8. The County Council, its Chair and Vice Chair, and the Chief Clerk are all, individually and collectively, authorized to take any further action necessary to effectuate the termination of the Authority, the removal of any impediments to such termination, the satisfaction of any outstanding debts and obligations of the Authority (whether by assumption of such debts and obligations by the County or through the incurrence by the County in accordance with applicable law of indebtedness, the proceeds of which shall be used to satisfy such debts and obligations), the transfer of the Authority's funds and assets to the County, and the assumption of any liabilities of the Authority.

Section 9. All funds, assets and other property required by this Ordinance to be turned over by Authority to the County shall be held and utilized by the County in a manner consistent with applicable laws.

Section 10. All ordinances, parts of ordinances, resolutions or parts of resolutions inconsistent herewith be and the same are hereby rescinded, cancelled and annulled.

Section 11. If any sentence, clause, section or part of this Ordinance is found to be unconstitutional, illegal or invalid, for any reason, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this Ordinance. It is hereby declared to be the legislative intent of the County Council that this Ordinance was enacted to terminate the Authority and should be interpreted to effectuate such intent.

Section 12. This Ordinance shall take effect on the earliest date permitted by law.

[Remainder of Page Intentionally Left Blank; Signatures Follow]

ENACTED AND ORDAINED by County Council of the County of Delaware,
Pennsylvania, this 3rd day of June, 2020.

BY: DELAWARE COUNTY COUNCIL



Brian P. Zidek, Chair

ATTEST:



Anne M. Coogan
Chief Clerk

CERTIFICATE OF CHIEF CLERK

I, the undersigned, the Chief Clerk of the County of Delaware ("County") Commonwealth of Pennsylvania, hereby certify that the foregoing and attached is a true copy of the Ordinance which was duly enacted at a meeting of the County Council (the "County Council") of the County held on June 3, 2020, at which a quorum was present and acting throughout, after due notice to the members of the County Council and to the public and which was at all time open to the public; that the same was duly recorded in the County Council's Ordinance Book and that a summary thereof was published as required by law in a newspaper of general circulation in the County Council. I further certify that the total number of members of the County Council is five and that the vote upon said Ordinance was called and duly recorded upon the minutes of the County Council and that the members of the County Council voted in the manner following:

	<u>Yes</u>	<u>No</u>	<u>Abstain</u>	<u>Absent</u>
Brian P. Zidek, Chair	<u>X</u>	_____	_____	_____
Dr. Monica Taylor, Vice Chair	<u>X</u>	_____	_____	_____
Kevin M. Madden	<u>X</u>	_____	_____	_____
Elaine Paul Schaefer	_____	_____	<u>X</u>	_____
Christine A. Reuther	<u>X</u>	_____	_____	_____

WITNESS my hand and seal of the County Council of the County of Delaware this 3rd day of June, 2020.

Anne M. Coogan
Chief Clerk

[SEAL]

EXHIBIT A
CERTIFICATE OF TERMINATION
OF THE
DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL
AUTHORITY

THIS CERTIFICATE ("Certificate") is made this ____ day of June, 2020, by the Delaware County Regional Water Quality Control Authority ("Authority").

WHEREAS, pursuant to Ordinance No. 2020-4 of the County Council ("County Council") of the County of Delaware, Commonwealth of Pennsylvania (the "County"), the Authority was directed to take all actions necessary to effectuate its termination;

WHEREAS, pursuant to the Municipalities Authorities Act, 53 Pa.C.S. §5619, the Authority hereby submits this Certificate, requesting and advising that the County Council terminate the Authority's existence; and

WHEREAS, pursuant to the Municipalities Authorities Act, 53 Pa.C.S. §5619, the County Council is authorized to approve this Certificate by Ordinance.

NOW THEREFORE, the Authority, intending to be legally bound hereby, certifies as follows:

1. The Authority hereby submits this Certificate requesting its termination pursuant to Ordinance No. 2020-4 of the County and the Municipalities Authorities Act, 53 Pa.C.S. §5619.
2. The County Council is authorized to terminate the existence of the Authority based on the prior action of the County Board of Commissioners to create the Authority in 1971.
3. The Chair and Secretary of the Authority are hereby authorized to take all actions necessary to carry out the purposes of this Certificate and to effectuate the dissolution of the Authority.

IN WITNESS WHEREOF, the undersigned officers of the Authority, having been authorized by the Board of the Authority, have hereunto set their hands and seals the day and year first written above.

ATTEST:

DELAWARE COUNTY REGIONAL
WATER QUALITY CONTROL
AUTHORITY

(Assistant) Secretary

By: _____
(Vice) Chair

**PPIN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,
PENNSYLVANIA
CIVIL DIVISION**

COUNTY OF DELAWARE, PENNSYLVANIA	:	
Plaintiff	:	
v.	:	NO: CV- 2020-003185
	:	
DELAWARE COUNTY REGIONAL	:	
WATER QUALITY CONTROL AUTHORITY,	:	
et al.	:	
Defendants	:	

Carol Steinour Young, Esquire, Dana Chilson, Esquire, Thomas Markey, Esquire, William F. Martin, Esquire, Carl Ewald, Esquire,
for the Plaintiff

Nicholas Poduslenko, Esquire, Matthew S. Olesh, Esquire, Thomas S. Wyatt, Esquire,
for Defendant, DELCORA

Joel Frank, Esquire, Michael Puppio, Esquire,
for Intervenor/Defendant, Aqua Pennsylvania Wastewater

Andrew Reilly, Esquire, Jacquelyn Goffney, Esquire,
for Intervenor/Defendant, Southern Delaware County Authority

William Malone, Esquire,
for Intervenor/Defendant, Darby Creek Joint Authority

ORDER GRANTING PETITION TO INTERVENE BY AQUA

AND NOW, this 2 day of July 2020, upon consideration of the Petition to Intervene filed by Aqua on June 15, 2020, the Answer and New Matter filed by Delaware County on June 25, 2020 and as Amended¹ on June 30, 2020, and Aqua's Reply to the New Matter filed on June 30, 2020, as well as the Oral Argument heard on June 30, 2020, it is hereby **ORDERED AND DECREED** that the Petition to Intervene is

¹ This Court notes that the docket also reflects an Answer filed by the County on June 29, 2020; however, a review of this document reveals that is nearly identical to the Amended Answer filed on June 30, 2020 with the exception the a date of June 29, 2020 by the signature of Plaintiff's Counsel and the later's caption reads "Amended" and the former does not.

GRANTED as this Court determines that Aqua has a real financial interest, referred to as a third party beneficiary of the DELCORA Trust Agreement and that Aqua is integral to this case as DELCORA and Aqua entered into an Asset Purchase Agreement on September 17, 2019 (amended on February 24, 2020). This Court also notes that there is a plethora of references to Aqua by the County in both their Complaint and their Amended Complaint against DELCORA. The Court finds that impact of this case on the agreement between Aqua and DELCORA will be direct, significant and real. This Court interprets 231 Pa Code Section/ Pa.R.C.P. 2327(4) to find that the rule permits that interventions *shall* be permitted where a party requesting said intervention *may* be affected; therefore, this Court determines that the intervention by Aqua is necessary and required. Aqua shall therefore timely comply with the Rules of Civil Procedure and respond to the Amended Complaint filed by Plaintiffs in this case.

BY THE COURT:



Barry C. Dörz, J.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
COVER SHEET - NOTICE OF FILING OF MOTION OR PETITION UNDER
LOCAL RULES OF CIVIL PROCEDURE

CASE CAPTION:
County of Delaware, Pennsylvania v. Delaware County
Regional Water Control Authority and Univest Bank and Trust Co.

CIVIL CASE NO. 2020-003185

NATURE OF MATTER FILED: *(please check one)*

- | | | |
|--|---|--|
| <input checked="" type="checkbox"/> Petition Pursuant to Rule 206.1 | <input type="checkbox"/> Response to Petition | <input type="checkbox"/> Motion for Judgment on the Pleadings Pursuant to Rule 1034(a) |
| <input type="checkbox"/> Motion Pursuant to Rule 208.1 | <input type="checkbox"/> Response to Motion | <input type="checkbox"/> Summary Judgment Pursuant to Rule 1035.2 |
| <input type="checkbox"/> Family Law Petition/Motion Pursuant to Rule 206.8 | | |

**FILING PARTY IS RESPONSIBLE FOR SERVICE OF THE RULE RETURNABLE
DATE OR HEARING DATE UPON ALL PARTIES**

A motion or petition was filed in the above captioned matter on the 22 day of July, 2020, which:

- ☒ Requires you, Respondent, to file an Answer within twenty (20) days of the above date to this notice, or risk the entry of an Order in favor of the Petitioner. Answers must be filed and time stamped by the Office of Judicial Support by 4:30 PM on the following date August 11, 2020.

☐ Requires all parties, to appear at a hearing/conference on the ____ day of _____, _____, at ____ in Courtroom ____, Delaware County Courthouse, Media, Pennsylvania. At this hearing/conference you must be prepared to present all testimony and/or argument, and must ensure that your witnesses will be present.

☐ Was timely answered, thus requiring the scheduling of the following hearing in the above captioned matter on: _____, _____ at 10:00 AM in Courtroom ____.

At this hearing, all parties must be prepared to present all testimony and/or argument and **must ensure that their witnesses will be present.**

☐ Qualifies as an Uncontested Motion or Petition, and as such requires neither an answer from the Respondent nor the scheduling of a hearing in this matter.

☐ Has been assigned to Judge _____.

FOR OFFICE USE ONLY

Mailing date: _____

Processed by: _____

**IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA**

COUNTY OF DELAWARE,	:	No. CV-2020-003185
<i>Plaintiff</i>	:	
v.	:	
DELAWARE COUNTY REGIONAL	:	
WATER CONTROL AUTHORITY and	:	
DELCORA RATE STABILIZATION FUND	:	
TRUST AGREEMENT BETWEEN	:	
DELAWARE COUNTY REGIONAL	:	
WATER CONTROL AUTHORITY, AS	:	
SETTLOR, AND UNIVEST BANK AND	:	
TRUST CO., AS TRUSTEE	:	
<i>Defendants</i>	:	
and	:	
AQUA PENNSYLVANIA WASTEWATER,	:	
INC.	:	
<i>Intervenor</i>	:	

ORDER

AND NOW, this ____ day of _____, 2020, upon consideration of the Petition for Preliminary Injunctive Relief filed by Intervenor Aqua Pennsylvania Wastewater, Inc. (“Aqua”), and the response(s) thereto, if any, it is hereby

ORDERED that the Petition is **GRANTED**; and it is further

HELD that Aqua has satisfied the prerequisites to entitlement to preliminary injunctive relief; and it is further

ORDERED that the County is hereby enjoined and restrained from terminating the Delaware County Regional Water Control Authority (“Delcora”) prior to closing on the Aqua/Delcora Asset Purchase Agreement; and it is further

ORDERED that the County is hereby enjoined and restrained from interfering in any way with Aqua’s existing contractual relationship with Delcora; and it is further

ORDERED that Aqua shall post a bond in the amount of \$100.00 within five days of the date that this Order is entered on the docket.

BY THE COURT:

, J.

LAMB McERLANE PC

Joel L. Frank - #46601
John J. Cunningham, IV - #70975
Scot R. Withers - #84309
24 E. Market Street – Box 565
West Chester, PA 19381-0565

RAFFAELE & PUPPIO, LLP

Michael V. Puppio, Jr. - #62320
19 West Third Street
Media, PA 19063

*Counsel for Intervenor,
Aqua Pennsylvania Wastewater, Inc.*

**IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA**

COUNTY OF DELAWARE,	:	No. CV-2020-003185
<i>Plaintiff</i>	:	
v.	:	
DELAWARE COUNTY REGIONAL	:	
WATER CONTROL AUTHORITY and	:	
DELCORA RATE STABILIZATION FUND	:	
TRUST AGREEMENT BETWEEN	:	
DELAWARE COUNTY REGIONAL	:	
WATER CONTROL AUTHORITY, AS	:	
SETTLOR, AND UNIVEST BANK AND	:	
TRUST CO., AS TRUSTEE	:	
<i>Defendants</i>	:	
and	:	
AQUA PENNSYLVANIA WASTEWATER,	:	
INC.	:	
<i>Intervenor</i>	:	

**INTERVENOR AQUA PENNSYLVANIA WASTEWATER, INC.'S
PETITION FOR PRELIMINARY INJUNCTIVE RELIEF**

Intervenor, Aqua Pennsylvania Wastewater, Inc. (“Aqua”), by and through its undersigned counsel, hereby files this Motion for Preliminary Injunctive Relief.

1. Delaware County Regional Water Control Authority (“Delcora”) is a municipal authority formed by the County pursuant to the Municipal Authorities Act of 1945 (now codified

in the Municipal Authorities Act, 53 Pa.C.S. §§ 5601 et seq. (the “MAA”)) in 1971, for the purpose of collecting, conveying and treating wastewater generated by residents and businesses located in the County.¹

2. Aqua is a provider of wastewater utility service in Pennsylvania.

3. In 2019, when faced with dramatically increasing estimated capital costs that would substantially increase rates that would have to be charged to its customers, Delcora engaged in discussions with Aqua for the purchase of Delcora’s system.

4. Following negotiations between them, as well as multiple open houses and public meetings wherein the potential acquisition was discussed, Delcora and Aqua entered into an Asset Purchase Agreement (“APA”) on September 17, 2019 (amended on February 24, 2020).

5. The APA is structured in such a way as to protect Delcora’s customers by capping all rate increasers for customers at 3% per year.

6. Through a separate Delcora Trust Agreement, Delcora agreed to place the proceeds of the sale (after paying down Delcora’s obligations) into an independently managed irrevocable trust for the benefit of Delcora’s customers, with Univest Bank and Trust Co. serving as trustee (“Univest”).

7. Aqua is identified as a third party beneficiary under the Delcora Trust Agreement.

8. As a municipal authority that is governed by the MAA, Delcora has all of the rights, powers and duties that are set forth in the MAA, including the right and power to sell its system to an investor owned utility such as Aqua.

¹ Delcora also provides services to certain residents and businesses in Chester County.

9. The APA was properly authorized and properly entered into by Delcora in full compliance with law and the MAA, and constitutes a binding, enforceable agreement and contractual obligation of Delcora.

10. The APA is fundamentally based upon Delcora having the knowledge required to make the representations and warranties upon which Aqua relied in agreeing to the APA and establishing the terms thereof, including the purchase price.

11. The APA contains multiple provisions which in effect mandate that Delcora proceed to closing on the sale to Aqua prior to any dissolution of Delcora by the County, which provisions can only be satisfied by Delcora prior to closing, and not the County, as evidenced by the following summary of relevant provisions of the APA:

Representations & Warranties	
Article IV, intro language	Seller (Delcora) makes its representations and warranties “[a]s a material inducement to Buyer (Aqua) to enter into this Agreement and to consummate the transactions contemplated by this Agreement....”
4.06	Seller must be able to confirm that there are no undisclosed liabilities for the system as of Closing.
4.09	The APA involves hundreds of distinct interests in real property and the ongoing searches may reveal many more. Seller is required to confirm at Closing that Aqua is getting all of Seller’s real property interests. Only Delcora will have knowledge regarding whether the real property disclosure schedule (Schedule 4.09) remains accurate and complete.
4.13	Delcora’s environmental representations and warranties are critical to the APA. The County, if it was permitted to dissolve Delcora prior to Closing, will be unable to determine whether the representations and warranties remain true and correct at Closing. Moreover, Aqua agreed to allow Delcora to make several representations and warranties subject to Delcora’s knowledge of the conditions covered in those specific representations and warranties (4.13 (a), (b), (d), (f), (g) and (h)), which the County would be unable to make.
4.14	The transaction requires that Seller’s permits be transferred. However, there is no indication that the County is prepared or would be permitted to assume the DEP permits that are required to operate this system.

4.15	The transaction requires the assignment of approximately 200 service contracts, many of which require the consent of the counterparty(ies). Several of the consents have been secured. Many of those required concessions and assurances by Delcora and/or Aqua. All consents secured thus far were based upon the understanding that the provision of service would be transferred from Delcora to Aqua. The County is in no position to honor some of the obligations that were made.
4.17(b)	This section provides assurance that the assets Aqua agreed to buy are sufficient to run the system. The County would be unable to make this representation at Closing.
9.03	This section requires that the Seller update representations and warranties within 3 days of becoming aware of information that implicates a disclosure, which Delcora alone would know.
12.02	Seller must certify at Closing that the representations and warranties made as of the date the parties signed the APA (9/17/19) remain true and correct as of the date of Closing. The County is not in a position to make that Closing certification. As a result, the Closing itself would be jeopardized or Aqua would be forced to decide whether to terminate or accept a substantially diluted closing certification, given the County's lack of knowledge of the issues set forth in the representations and warranties.
Other Provisions	
7.06	The section makes Closing contingent upon PUC approval. Given the existence of customers outside of Delaware County, the County would need to secure a 1 st PUC approval to take Delcora's assets back, then the subsequent sale to Aqua would require a 2 nd PUC approval, which could nullify the pending application to approve the sale directly from Delcora to Aqua and could threaten the outside closing date.
9.01	This section requires the Seller to operate the system in the ordinary course between signing and closing. The County has no ability to do so.
Article VIII- Indemnity	
8.01 / 8.02	Seller's representations and warranties survive Closing for a full year, which means the County would be at risk of an indemnity claim for that full amount of time, in a situation where the County assumed obligations for representations and warranties that the County knows little to nothing about.
8.05(c)	Subject to certain carve-outs, Aqua agreed to cap Delcora's post-closing indemnity obligation for failed representations and warranties at 5% of the purchase price. If Aqua had known that it would have to go to closing with a seller that has no knowledge of the system, Aqua never would have agreed to cap its post-closing indemnity right at 5% of the purchase price.

15.09	The County's intended action with Delcora would qualify as an assignment of Delcora's rights and obligations under the APA, thereby requiring Aqua's consent.
15.11	The parties have a right of specific performance under this Agreement.

12. The County is itself incapable of operating Delcora, even for a short period of time, if Delcora was terminated before closing on the sale to Aqua.

13. The County has no history or experience managing, operating or controlling a sewer system and, as a result, is not qualified to safely provide service to Delcora's customers as required by the Public Utility Commission ("PUC").

14. The County has not been authorized by the PUC to provide public sewer service to Delcora's customers and does not have the appropriate permits required by the PUC to safely perform Delcora's obligations.

15. The County's inexperience in operating sewer systems puts the safety of all customers at risk and jeopardizes the quality and operation of the sewer system's assets – many of which are capital assets and equipment which need routine maintenance and capital improvements to continue to operate properly.

16. The County does not employ enough qualified or trained employees or support staff to perform operations, maintenance, billing or administrative functions necessary to operate Delcora.

17. The APA is subject to PUC approval, which is the subject of an application filed by Aqua that is pending before the PUC at Docket No. A-2019-3015173 ("PUC Application").

18. On May 14, 2020, the County filed a Complaint against Delcora asserting four separate causes of action.

19. On May 18, 2020, the County sought to intervene in the PUC Application proceeding, stating “the Application is not in the public interest”, that “the County intends to file a formal protest . . . detailing the scope of issues and adverse impacts resulting from the Application,” and that the County “is also particularly interested in exploring broader public interest issue related to the APA”.

20. On June 3, 2020, the County passed Ordinance No. 2020-4 (the “Ordinance”).

21. On June 11, 2020, the PUC conditionally accepted the PUC Application.

22. On June 15, 2020, the County filed an Amended Complaint asserting five separate causes of action.

23. Count I of the Amended Complaint asserts a claim for alleged violation by Delcora of its own Articles of Incorporation, and requests a judgment finding that Delcora’s adoption of the funding mechanism set forth in the Trust is a violation of the Articles of Incorporation.

24. Counts II, III and IV of the Amended Complaint assert claims for various alleged statutory violations, and the relief requested includes an order terminating the Trust and preventing funding of the Trust.

25. Count V of the Amended Complaint requests a Writ of Mandamus compelling Delcora to comply with the Ordinance.

26. The Ordinance provides *inter alia* that “County Council hereby directs and orders that [Delcora] be terminated.” (Ordinance, Section 1).

27. Although the Amended Complaint and the Ordinance do not expressly or directly purport to challenge the enforceability of the APA, the practical effect of the relief requested in the Amended Complaint and the Ordinance constitutes an attack on the APA if in fact the County is permitted to terminate Delcora prior to closing on the APA.

28. The County's attempt to intervene in the PUC Application proceeding constitutes a direct attack on the APA.

29. Moreover, in recent weeks, members of County Council have made public statements both formally and informally reflecting the County's intent to prevent the sale of Delcora's system to Aqua.

30. On June 3, 2020, during a Delaware County Council public meeting, Council Chairman Brian Zidek stated: "I am against the sale of Delcora to Aqua." Other County Council members voiced a similar sentiment.

31. By letter dated July 16, 2020, from Delaware County Council addressed to "Local Leaders", County Council stated: "County Council has filed a lawsuit to block this sale by DELCORA, because it is not in the long-term interests of the County and its taxpayers and rate payers."

32. Any effort to scuttle the APA or the sale of Delcora's system to Aqua, or any effort to dissolve Delcora prior to closing on the APA, would be a blatant violation of the MAA, the law and Aqua's contractual rights.

Request for Injunctive Relief

33. The County should be enjoined and restrained from terminating Delcora prior to the closing on the Aqua/Delcora APA, and enjoined and restrained from interfering in any way with Aqua's existing contractual relationship with Delcora.

34. The requested injunction is necessary to prevent irreparable harm that cannot be adequately compensated by damages. Although Aqua does not contest the County's general right to terminate Delcora, any such termination cannot occur prior to closing on the Asset Purchase Agreement because the County will be unable to make the representations and warranties that were

fundamental to the Asset Purchase Agreement. Because the County – through its then-existing County Council – and Delcora have already determined that the Asset Purchase Agreement would be in the public interest (in consideration of all of the factors identified in Delcora’s Petition for Injunctive Relief), irreparable harm would occur to Aqua, Delcora and Delcora’s ratepayers in the event that the requested injunctive relief is not granted.

35. Termination of Delcora prior to closing would immediately result in multiple violations of state and federal law. These violations constitute per se irreparable harm, warranting an injunction. *See Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Cmwlth. 2016) (“the violation of an express statutory provision constitutes per se irreparable harm”); *Wolk v. Sch. Dist. of Lower Merion*, 2020 Pa. Cmwlth. LEXIS 209, at *30 (Pa. Cmwlth. 2020) (“For purposes of injunctive relief, statutory violations constitute irreparable harm per se.”); *Pennsylvania Pub. Util. Comm’n v. Israel*, 52 A.2d 317, 322 (Pa. 1947) (“When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.”). Pennsylvania law is clear that the loss of sewage disposal services “is a harm that cannot be compensated with monetary damages.” *Cosner v. United Penn Bank*, 517 A.2d 1337, 1341 (Pa. Super. 1986); *see also Strasburg Assocs. v. West Bradford Twp.*, 24 Pa. D. & C.3d 465, 473 (C.P. Chester County 1981) (holding that preventing treatment of sewage would have caused irreparable harm when it would have caused pollution of stream and where “the disposal of solid waste generated in all of Chester County would have been seriously impeded and adversely affected, giving rise to an immediate hazard of unknown proportion.”).

36. Greater injury would result from refusing the injunctive relief than from granting it, because the termination of Delcora prior to closing would render the County unable to make the

required representations and warranties and may scuttle a transaction that has already been found by all parties to be in the public's interest.

37. The injunction will restore the parties to the status quo that existed at the time the Asset Purchase Agreement was executed by the parties, and prior to the County's attempt to terminate Delcora prior to closing on the Asset Purchase Agreement. Delcora would continue providing its customers with uninterrupted, safe wastewater conveyance and treatment service through closing, at which point Aqua would take over and provide the same.

38. Aqua has a clear right to relief and is likely to prevail on the merits, because Aqua has a fully binding and enforceable agreement to acquire Delcora's system, which requires the representations and warranties that can only be made by Delcora.

39. The injunction is reasonably suited to abate the offending activity, as it does not seek to challenge the County's ability to terminate Delcora – it only seeks to preserve the Asset Purchase Agreement by requiring that closing occur prior to termination of Delcora.

40. The injunction will not adversely affect the public interest, because the Asset Purchase Agreement has already been found by the County – through its then-existing County Council – to be in the public interest for all of the reasons set forth in Delcora's Petition for Injunctive Relief.

WHEREFORE, Aqua respectfully requests that this Honorable Court enter an Order, in the form attached hereto, granting the relief set forth therein.

Respectfully submitted,

LAMB McERLANE PC

Date: July 22, 2020

By: /s/ Joel L. Frank
Joel L. Frank
Attorney I.D. No. 46601
John J. Cunningham, IV
Attorney I.D. No. 70975
Scot R. Withers
Attorney I.D. No. 84309

RAFFAELE & PUPPIO, LLP

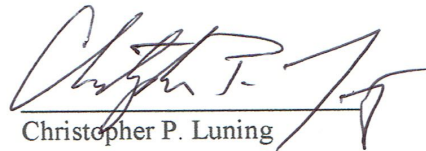
Michael V. Puppio, Jr.
Attorney I.D. No. 62320

*Counsel for Intervenor,
Aqua Pennsylvania Wastewater, Inc.*

VERIFICATION

I, Christopher P. Luning, verify and affirm that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief. I understand that the statements are subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

Date: _____


Christopher P. Luning

PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

LAMB McERLANE PC

Date: July 22, 2020

By: /s/ Joel L. Frank
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Attorney I.D. No. 70975
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Aqua Pennsylvania Wastewater, Inc.*

**IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA**

COUNTY OF DELAWARE,	:	No. CV-2020-003185
<i>Plaintiff</i>	:	
v.	:	
DELAWARE COUNTY REGIONAL	:	
WATER CONTROL AUTHORITY and	:	
DELCORA RATE STABILIZATION FUND	:	
TRUST AGREEMENT BETWEEN	:	
DELAWARE COUNTY REGIONAL	:	
WATER CONTROL AUTHORITY, AS	:	
SETTLOR, AND UNIVEST BANK AND	:	
TRUST CO., AS TRUSTEE	:	
<i>Defendants</i>	:	
and	:	
AQUA PENNSYLVANIA WASTEWATER,	:	
INC.	:	
<i>Intervenor</i>	:	

CERTIFICATE OF SERVICE

This is to certify that in this case complete copies of the foregoing have been served upon the following person(s), by the following means and on the date(s) stated:

<u>Name</u>	<u>Means of Service</u>	<u>Date of Service</u>
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Via Electronic Mail

July 22, 2020

LAMB McERLANE PC

Date: July 22, 2020

By: /s/ Joel L. Frank
Joel L. Frank
Attorney I.D. No. 46601

VERIFICATION

I, Adeolu A. Bakare, Counsel to the County of Delaware, Pennsylvania, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

August 7, 2020



Signature