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May 7, 2021

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> 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 please find for filing with the Pennsylvania Public Utility Commission the Brief of the County of Delaware in Opposition to the Petition of Aqua Pennsylvania Wastewater, Inc. for Interlocutory Review of Order Staying Proceeding in the above-referenced matter.

As shown by the attached Certificate of Service, all parties to these proceedings 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.

Sincerely,

McNEES WALLACE & NURICK LLC

By 

Kenneth R. Stark

Counsel to the County of Delaware, Pennsylvania

Enclosure

c: The Honorable Joseph Brady (via email only)  
Office of Special Assistants (via email only)  
Certificate of Service (via email only)

## 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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Certificate of Service

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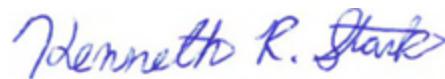
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Dated this 7<sup>th</sup> day of May, 2021, in Harrisburg, Pennsylvania

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**BRIEF OF THE COUNTY OF DELAWARE IN OPPOSITION TO THE PETITION OF  
AQUA PENNSYLVANIA WASTEWATER, INC. FOR INTERLOCUTORY REVIEW OF  
ORDER STAYING PROCEEDING**

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**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	:	

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**BRIEF OF THE COUNTY OF DELAWARE IN OPPOSITION TO THE PETITION OF  
AQUA PENNSYLVANIA WASTEWATER, INC. FOR INTERLOCUTORY REVIEW OF  
ORDER STAYING PROCEEDING**

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NOW COMES the County of Delaware, Pennsylvania (the “County”), by and through counsel, pursuant to 52 Pa. Code §§ 5.43, 5.302, who files this Brief in Opposition to the Petition of Aqua Pennsylvania Wastewater, Inc. (“Aqua”) for Interlocutory Review of Order Staying Proceeding. Aqua has not only failed to meet its high burden to demonstrate extraordinary circumstances or compelling reasons for interlocutory review, Aqua’s request to lift the stay is inconsistent with Aqua’s earlier request to the Pennsylvania Public Utility Commission (“Commission”) to indefinitely extend the statutory deadline by which the Commission must issue a final order in this proceeding. Neither Aqua nor any other party is prejudiced by the Stay Order. Accordingly, the Commission should deny Aqua’s Petition and decline to review and answer the material question.

**I. INTRODUCTION AND RELEVANT BACKGROUND**

On March 3, 2020, Aqua, a PUC-jurisdictional public utility, filed an application pursuant to Sections 1102, 1329, and 507 of the Public Utility Code, 66 Pa. C.S. §§ 1102, 1329, and 507, seeking approval to acquire the Wastewater System Assets of the Delaware County Regional

Water Quality Control Authority (“DELCORA”). Thereafter, the parties participated in extensive litigation, including discovery, motions, multiple rounds of testimony, hearings, and briefing.

On January 12, 2021, Administrative Law Judges (“ALJs”) Angela T. Jones and F. Joseph Brady issued a Recommended Decision recommending denial of Aqua’s Application because Aqua failed to meet its burden of proof to demonstrate that its Application is in the public interest and provides substantial affirmative public benefits. The Recommended Decision prompted Exceptions and Reply Exceptions from the parties.

On March 10, 2021, Aqua filed a letter with the Commission “to advise the Commission that Aqua hereby voluntarily extends the six-month statutory consideration period for this proceeding.”<sup>1</sup> On March 19, 2021, the County filed a letter with the Commission to voice its opposition to Aqua’s purported authority to voluntarily and indefinitely waive the statutory consideration period enacted by the Pennsylvania General Assembly in Section 1329(d) of the Public Utility Code, 66 Pa. C.S. § 1329(d)(2).

On March 30, 2021, the Commission issued an order (“March 30 Order”) reopening the record and remanding the matter “for further proceedings as necessary.”<sup>2</sup> The March 30 Order found that “it is not necessary to rule on the Exceptions at this time” in light of Aqua’s letter voluntarily waiving the statutory deadline in the proceeding.<sup>3</sup>

On April 16, 2021, presiding ALJ F. Joseph Brady issued an order staying the proceeding (“the Stay Order”) pending a final unappealable decision in the civil litigation between the County and DELCORA, pending before the Commonwealth Court at Docket No. 148 CD 2021. The presiding ALJ also directed the County to file and submit written status update reports detailing

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<sup>1</sup> Aqua March 10, 2021 Letter at 1.

<sup>2</sup> March 30 Order at 15.

<sup>3</sup> March 30 Order at 13.



the procedural status and litigation schedule for the matter at Docket No. 148 CD 2021 with the presiding ALJ, the parties, and the Commission every 90 days.

On April 27, 2021, Aqua filed a Petition for Interlocutory Review of the Stay Order and request for the Commission to review and answer the following material question in the affirmative:

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

On April 27, 2021, DELCORA filed a one-page letter with the Commission contending that the Stay Order is inconsistent with the March 30 Order and should be reversed.

On April 29, 2021, the County filed a Petition for Allowance of Appeal of the March 30 Order with the Commonwealth Court.<sup>4</sup>

## **II. ARGUMENT**

Pursuant to Section 5.303 of the Commission's regulations, 52 Pa. Code § 5.303, the Commission may take one of the following actions in response to a request 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.

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<sup>4</sup> See *County of Delaware, Pa. v. Pa. PUC*, No. 455 C.D. 2021 (Pa. Cmwlth. Ct.) (Petition for Review filed Apr. 29, 2021). Pursuant to Rule 1701(a) of the Pennsylvania Rules of Appellate Procedure "after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter." Pa.R.A.P. 1701(a). The County is filing this Brief in the event the Commission determines that it may act on Aqua's Petition for Interlocutory Review under an exception to the general rule. See Pa.R.A.P. 1701(b). Additionally, the County's arguments in this Brief should not be construed as concurrence with the remand directive in the March 30 Order, but solely a response to Aqua's claim that the presiding ALJ lacks authority to issue a stay of proceedings upon such remand.

- (3) Decline to answer the question.
- (4) Answer the question.

Here, the Commission should either decline to answer the question or determine that the petition was improper and return the matter to the presiding officer because Aqua has failed to meet its burden to demonstrate necessity or compelling reasons for interlocutory review.

**A. Aqua Has Failed to Meet Its Burden to Satisfy the Requirements for Interlocutory Review and Answer to a Material Question**

Petitions for interlocutory review are generally not favored.<sup>5</sup> The Commission does not routinely grant petitions for interlocutory review unless the petitioner meets its burden to demonstrate extraordinary circumstances or compelling reasons.<sup>6</sup> As the petitioner, Aqua carries the burden to demonstrate its request for relief should be granted.<sup>7</sup> Aqua has failed to meet that burden.

As to the high bar governing interlocutory review, Section 5.302(a) in the Commission's regulations require that the petitioner demonstrate "the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding."<sup>8</sup> Critically, the Commission will review "whether interlocutory review is necessary in order to

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<sup>5</sup> *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021, 2009 Pa. PUC LEXIS 2238 at \*3 (Order entered October 23, 2009); *Respond Power, LLC et al. v. West Penn Power Co.*, Docket No. C-2017-2576287 *et al.* 2017 Pa. PUC LEXIS 142 at \*15 (2017) (Order entered July 13, 2017)

<sup>6</sup> *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.*, 2014 WL 3763971 (Pa.P.U.C.) (2014) (citing *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538, 1985 Pa. PUC LEXIS 46 (1985)). In *Knights*, the Commission explained that a Petition is improper if it fails to comply with Commission rules or, "more seriously, ...fail[s] to allege any necessity or compelling reasons for interlocutory review." *Knights*, 1985 Pa. PUC LEXIS 46 at \*5.

<sup>7</sup> 66 Pa. C.S. § 332 (a).

<sup>8</sup> 52 Pa. Code § 5.302(a).

prevent substantial prejudice - that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process.”<sup>9</sup>

1. The Stay Order Does Not Contravene the March 30 Order

Aqua contends that the Stay Order is “inconsistent with the clear language and intent of the March 30 Order.”<sup>10</sup> In its one-page letter in support, DELCORA contends that the “Stay Order is inconsistent with the clear language and intent of the March 30, 2021 Order and should be reversed as a result.”<sup>11</sup> However, Aqua and DELCORA both fail to cite to any language in the March 30 Order evincing such clear language and intent.

Aqua further argues that the March 30 Order “intended to expedite the conduct of the proceeding.”<sup>12</sup> However, Aqua fails to cite to any language in the March 30 Order that provides such clear intent that the proceedings must be expedited. The March 30 Order does not direct the Office of Administrative Law Judge to expedite proceedings. On the contrary, the March 30 Order broadly remands the matter to the presiding ALJ “for further proceedings as necessary.”<sup>13</sup> The March 30 Order does not prohibit the presiding ALJ from exercising his judgment to issue a stay in light of the outstanding civil litigation between DELCORA and the County. Instead, the March 30 Order remands the case for “further proceedings *as may be appropriate*” and “any further

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<sup>9</sup> *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.*, 1999 Pa. PUC LEXIS 56 at \*10 (Order entered June 10, 1999) (citing *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. P.U.C. v. C.S. Water and Sewer Associates*, 74 Pa. PUC 716 (1991), and *In re: Knights Limousine Service, Inc.*, 59 Pa. PUC 538 (1985)); *see also* *Petition of Peoples Natural Gas Company LLC for Approval of Its Energy Efficiency and Conservation Plan*, Docket No. M-2017-2640306 (Order entered June 14, 2018), *Pa. PUC v. Phila Gas Works*, Docket Nos. P-2009-2097639 (Order entered April 15, 2010).

<sup>10</sup> Aqua Petition at ¶ 5.

<sup>11</sup> DELCORA Letter at 1 (filed Apr. 27, 2021).

<sup>12</sup> Aqua Petition at ¶ 9.

<sup>13</sup> March 30 Order at 15.

proceedings *as deemed necessary*.”<sup>14</sup> The plain language of the March 30 Order indicates that the presiding ALJ will have discretion to conduct the proceedings as appropriate and as deemed necessary. The presiding ALJ found it appropriate and deemed it necessary to stay the proceedings pending the outcome of the civil litigation. Moreover, the stay furthers the directive in the March 30 Order where the Commission specifically highlighted the County Appeal Notice Petition filed on January 29, 2021, stating: “[t]his submission indicates that outstanding litigation remains which may need to be considered when evaluating this Application.”<sup>15</sup>

Unless otherwise directed by the Commission, a presiding judge enjoys discretion to oversee the proceeding and issue procedural determinations.<sup>16</sup> In response to a request to shorten the procedural timeline in a proceeding, the Commission has concluded that it “will not, however, interfere with the ALJ’s discretion to make procedural determinations...”<sup>17</sup> If the Commission desired to restrain the presiding ALJ’s discretion, expedite the proceedings, or otherwise tailor the scope of the remand, the Commission would have detailed such procedures and orders in the March 30 Order. It did not. To the contrary, the Commission tasked the ALJ with preparing a record consistent with its Order recognizing that outside litigation may impact its consideration of the Application.<sup>18</sup> As a result, the presiding ALJ enjoys discretionary authority to oversee the proceeding.<sup>19</sup>

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<sup>14</sup> March 30 Order at 15, 16, Ordering Paragraph 2 (emphasis added). In the Discussion Section of the March 30 Order and in the Ordering Paragraphs of the March 30 Order, the Commission does not state that the proceedings should be expedited or otherwise accelerated.

<sup>15</sup> Stay Order at 3 (quoting March 30 Order at 15).

<sup>16</sup> 52 Pa. Code § 5.484 (a presiding officer may not perform any duties inconsistent with acts or rules of the Commission).

<sup>17</sup> *West Goshen Township; v. Sunoco Pipeline, L.P.*, Docket No. C-2017-2589346, at \*27 (Order entered March 15, 2018).

<sup>18</sup> *Supra*, note 15.

<sup>19</sup> See 52 Pa. Code § 5.483(a) (granting the presiding officer broad authority to “regulate the course of the proceeding”).

Importantly, the presiding ALJ in the Stay Order has sought frequent updates on the civil litigation through the Stay Order's directive that the County submit written status update reports every 90 days detailing the procedural status of the civil litigation. The presiding ALJ is balancing the need to prevent unnecessary and costly litigation at the PUC while the civil litigation is pending with the need to stay informed on the status of the civil litigation in order to lift the stay at the earliest practical time. The actual owner of the system at the time of the contemplated transfer will not be determined until the civil litigation is resolved. Accordingly, the Stay Order balances the interests of the parties, is consistent with the March 30 Order, and constitutes a reasonable exercise of the discretion afforded to the presiding ALJ.

2. Aqua Fails to Demonstrate Extraordinary Circumstances or Compelling Reasons for Interlocutory Review.

Aqua fails to identify extraordinary circumstances or compelling reasons for interlocutory review. Aqua alleges that the Stay Order “delays the due process opportunity specifically afforded the Parties by virtue of the March 30 Order, thus prejudicing their respective interests.”<sup>20</sup> However, Aqua fails to explain how certain parties' interests are prejudiced. Aqua does not specify those parties nor their interests. Moreover, the Stay Order does not impair or prevent any due process rights of the parties. Parties will have an opportunity to be heard and to place their positions on the record when the Stay Order is lifted. The Stay Order does not seek to close the record or otherwise truncate any rights of the parties to submit testimony and briefing in the remanded proceeding. Accordingly, Aqua fails to explain how “interlocutory review is necessary in order to prevent substantial prejudice - that

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<sup>20</sup> Aqua Petition at ¶ 8.

is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process.”<sup>21</sup>

**B. Aqua’s Prior Request for an Indefinite Extension in the Statutory Review Deadline Confirms Aqua Is Not Prejudiced by the Stay Order.**

In light of its prior conduct in this proceeding, Aqua’s allegations of “substantial prejudice” lack merit.<sup>22</sup> Specifically, Aqua’s request to lift the stay to allow for expedited proceedings contradicts Aqua’s March 10, 2021 request to the Commission to indefinitely extend the statutory deadline by which the Commission must issue a final order in this proceeding. Critically, Aqua’s request to extend the statutory deadline was open-ended and indefinite; Aqua did not seek a limited extension by 60 or 90 days. In issuing the March 30 Order, the Commission accepted Aqua’s voluntary extension of the statutory deadline and, as a result, “found it is not necessary to rule on the Exceptions at this time.”<sup>23</sup> The County opposed Aqua’s request. As a result, Aqua must accept the March 30 Order as an adjudication of Aqua’s request for an indefinite extension in the statutory deadline. Aqua did not seek reconsideration of the March 30 Order or otherwise appeal or challenge the March 30 Order seeking further definition of the scope of the Commission’s remand. Accordingly, Aqua has waived its opportunity to challenge the March 30 Order’s directives to the Presiding Officer regarding the scope of the remand and associated procedures of that remand.<sup>24</sup>

The parties should not have to repeatedly disengage from and then reengage in litigation based solely on the conveniences of the Section 1329 applicant. In voluntarily requesting that the Commission indefinitely extend the Section 1329 deadline, Aqua knowingly undertook the risk that

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<sup>21</sup> *Joint Application of Bell Atlantic Corp.*, Docket No. A-310200F0002, 1999 Pa. PUC LEXIS 56 at \*10.

<sup>22</sup> See Aqua Petition at ¶¶ 7-8.

<sup>23</sup> See March 30 Order at 15.

<sup>24</sup> See *Wheeling & Lake Erie Ry. Co. v. PUC*, 778 A.2d 785, 795 (Pa. Cmwlth. 2001) (“Where an appellant has failed to raise an issue before the agency, the issue is waived and cannot be considered on appeal.”).


the proceeding could be substantially delayed. Accordingly, Aqua's prior request for an indefinite extension in the statutory review deadline confirms Aqua is not prejudiced by the Stay Order.

### **III. CONCLUSION**

For the foregoing reasons, the County of Delaware respectfully requests the Commission deny the Petition of Aqua Pennsylvania Wastewater, Inc. for Interlocutory Review of Order Staying Proceeding and decline to answer the material question.

Respectfully submitted,

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Dated: May 7, 2021