

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

Public Meeting held July 14, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman, Dissenting Statement  
John F. Coleman, Jr., Vice Chairman  
Ralph V. Yanora

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

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Interlocutory Review of Order Staying Proceeding and Answer to Material Question (Petition) filed on April 27, 2021, by Aqua Pennsylvania Wastewater, Inc. (Aqua or Company). On that same day, the Delaware County Regional Water Quality Control Authority (DELCORA) filed a letter stating that it was joining and supported Aqua's Petition. On May 7, 2021, Aqua, DELCORA and Upland Borough (Upland) each filed Briefs in Support of the Petition. Also, on May 7, 2021, the Commission's Bureau of Investigation and Enforcement (I&E), the County of Delaware (County) and Sunoco Partners Marketing and Terminals, L.P./Energy Transfer (SPMT) each filed Briefs in Opposition to the Petition.

The Petitioner seeks interlocutory review and an answer in the affirmative by the Commission to the Material Question, summarized as follows:

Should the Commission reverse the Stay Order because it is inconsistent with the March 30 Order and direct the OALJ [Office of Administrative Law Judge] to promptly schedule hearings and briefing in the remanded proceeding, thereby allowing (i) the Parties the opportunity to present appropriate evidence as deemed necessary so as to permit a full evaluation of the Application pursuant to Sections 102, 129 and 07 of the Code, and (ii) the presiding officer to prepare a Recommended Decision on Remand evaluating and recommending the disposition of the Application.

Aqua Petition at 2.

For the reasons discussed more fully below, we shall consider the Petition, answer the Material Question in the affirmative, and, thereby, lift the stay of proceedings in accordance with this Opinion and Order. *See* 52 Pa. Code § 5.303(a)(2) (pertaining to Commission action on petition for interlocutory review and answer).<sup>1</sup>

## **I. 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

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<sup>1</sup> We note that interlocutory review of an ALJ's discretionary ruling concerning a stay of proceedings and receipt of evidence is generally disfavored and typically would not be warranted, however, under the unique circumstances of this case, we find that review is warranted.

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 Office of Small Business Advocate (OSBA) filed a Notice of Appearance and Intervention. On April 2, 2020, the Office of Consumer Advocate (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.<sup>2</sup> 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

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<sup>2</sup> Subsequently, on August 31, 2020, the County filed a Protest to the Application.

filing of the Application; (2) to amend its Application to include certain supplemental materials; and (3) to ensure verification of the supplemental materials.

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

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

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

County Reconsideration Petition at 1-2.

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

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

By Secretarial Letter dated July 14, 2020, the Commission notified the Parties that the docket was inactive but, if Aqua satisfied all of the conditions in the *June 2020 Secretarial Letter* and the docket became active as a result of that satisfaction,

the County Reconsideration Petition, and any responsive filings, would be accepted into the docket and assigned for formal action and disposition.

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

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

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

By Secretarial Letter dated July 27, 2020, the Commission acknowledged receipt of the Company’s completion of the requirements and conditions of filing and accepted Aqua’s Application for consideration. By Hearing Notice dated July 27, 2020, the OALJ scheduled an Initial Call-in Telephonic Prehearing Conference for September 2, 2020, before ALJ Angela 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).<sup>3</sup>

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 –*

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<sup>3</sup> 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.

*Ratification Order*, Docket No. M-2020-3019262 (Order adopted March 26, 2020) (*Ratification Order*).

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

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

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

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

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

Subsequently, on August 31, 2020, the Commission issued an Opinion and Order in which the Commission declined to answer the material question posed by the Interlocutory Petition filed by the County (*August 31, 2020 Order*). 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 hearings, testimony and exhibits were entered into the record and cross-examination was conducted.

By notice dated November 18, 2020, ALJ F. Joseph 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.<sup>4</sup>

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

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<sup>4</sup> Subsequently, on January 29, 2021, the County appealed the Court of Common Pleas' decision to Commonwealth Court at Docket No. 148 CD 2021.

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. 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.

On January 28, 2021, Kimberly-Clark filed a Notice of Withdrawal of its Protest. 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.

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. 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), attaching an appendix 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 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).<sup>5</sup> On March 9, 2021, Lower Chichester Township filed a letter in response to the Objections to the Lower Chichester Stipulation (Lower Chichester Letter).<sup>6</sup>

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 filings. Extension Letter at 2.

On March 10, 2021, Aqua filed an Answer to the Objections to the Edgmont Stipulation and an Answer to the Objections to the Lower Chichester Stipulation. On March 11, 2021, DELCORA filed an Answer to the Objections to the

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<sup>5</sup> The County indicated that it does not object to the withdrawal of the Protests of Edgmont and Lower Chichester but argued, 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 filed Objections are substantially similar to the arguments contained in the County's Objections to the SWDCMA Stipulation.

<sup>6</sup> In its letter, Lower Chichester stated 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 asserted 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.

Edgmont Stipulation and an Answer to the Objections to the Lower Chichester Stipulation.<sup>7</sup>

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

On March 30, 2021, the Commission issued its Opinion and Order (*March 30 Order*) which vacated the Recommended Decision and remanded the matter to OALJ for such further proceedings as deemed necessary and the issuance of a Recommended Decision on Remand.

On April 16, 2021, the ALJ issued an Order Staying the Proceedings (*Stay Order*). In the *Stay Order* the ALJ stated, “In this matter, the County lawsuit is currently pending before the Commonwealth Court. The issues in the County lawsuit are the legality, enforceability, and integrity of the APA between DELCORA and Aqua, the enforcement of the County Ordinance 2020-04, and the funding of the Rate Stabilization Fund Trust between DELCORA and Aqua. All of these issues are also threshold issues

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<sup>7</sup> In each of its filings, DELCORA stated 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.

in this Application.”<sup>8</sup> The ALJ stayed the matter pending a final unappealable decision in the County lawsuit.<sup>9</sup>

As previously noted, on April 27, 2021, Aqua filed its Petition for Interlocutory Review Of Order Staying Proceeding and Answer to Material Question, seeking a lift of the stay of proceeding, alleging the ALJ’s *Stay Order* was inconsistent

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<sup>8</sup> The County filed a lawsuit against DELCORA, *et al* in the Delaware County Court of Common Pleas (Court of Common Pleas) in the matter of *County of Delaware, Pennsylvania 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 v. Darby Creek Joint Authority, Southern Delaware County Authority, and Aqua Pennsylvania Wastewater, Inc.* On December 28, 2020, the Court of Common Pleas issued a final order of the Court of Common Pleas of Delaware which was entered following a bench trial and disposed of all claims filed by the County and counterclaims filed by DELCORA and Aqua and ruled in favor of DELCORA et al. Subsequently, on January 21, 2021, the County filed an appeal in Commonwealth Court at Docket No. 148 CD 2021.

<sup>9</sup> On March 3, 2022, the Commonwealth Court issued a decision (*March 3 Decision*) in which the court held that in sum, Section 5622(a) of the Municipal Authorities Act, 53 Pa. C.S. § 5622(a), provides the County with the authority to enact Ordinance No. 2020-4 (Ordinance) and the Ordinance complies with the requisites necessary for the County to demand the termination of DELCORA and the conveyance of DELCORA’s assets and obligations to the County. Based on the stated reasons set forth in the decision, it concluded that the trial court erred in denying the County’s request for a writ of mandamus and in granting injunctive relief in favor of DELCORA and Aqua. Therefore, the court reversed the trial court’s order and remanded the matter to the trial court for the entry of an order consistent with the Commonwealth Court’s opinion.

The Ordinance referred to in the court’s order is the ordinance that the County published and passed on May 19, 2020, at a special Zoom [video conference] meeting on June 3, 2020. On June 3, 2020, the County approved and enacted the Ordinance, 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. *See March 3 Decision* at 8.

with the Commission's *March 30 Order*. Also on that date, DELCORA filed a letter in support of the Petition.

On May 7, 2021, Aqua, DELCORA, Upland all filed Briefs in Support of the Petition. On the same day, I&E, SPMT and the County filed Briefs in Opposition. The OCA filed a letter stating that it would not be filing a Brief in this matter.<sup>10</sup>

### **III. Discussion**

#### **A. Legal Standards**

As a preliminary matter, we note that any issue we do not specifically delineate 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).

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

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<sup>10</sup> Additional filings subsequent to the *March 30 Order* have been filed. Specifically, on June 2, 2022, the City of Chester filed a Petition to Intervene and on June 21, 2022, Aqua filed its Answer to the Petition.

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); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *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) (*PGW USECP*) at 3.

Under case law construing Section 5.302(a), the “compelling reasons” for interlocutory review are the reasons establishing that such review is *necessary* to either prevent substantial prejudice or to expedite the conduct of the proceeding. In other

words, a petition under Section 5.302(a) must allege compelling reasons why any alleged prejudice flowing therefrom could not be rectified during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

The Commission stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. Such a showing may be made by a petitioner by establishing 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).

Therefore, for a Section 5.302(a) petition for interlocutory review to be properly before the Commission for consideration, the pertinent consideration is whether the asserted reasons establish that interlocutory review is *necessary* under the circumstances. Based on the Commission's determination whether interlocutory review is necessary to either prevent the alleged substantial prejudice or expedite the proceedings, the Commission will then either: (1) continue, revoke or grant a stay of the proceedings, if necessary; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or (4) answer the question. 52 Pa. Code § 5.303(a)(1)-(4).

As noted, generally, the preferred approach is to permit proceedings to move forward in the normal course 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. *See PGW USECP* at 3.

Because this matter is currently pending on appeal before the Commonwealth Court, it is necessary to consider whether our assertion of jurisdiction to address the Petition is appropriate under the Pennsylvania Rules of Appellate Procedure (Pa. R.A. P.). Pa. R.A.P. 1701 states as follows:

**Rule 1701. Effect of Appeal Generally.**

(a) *General rule.*—Except as otherwise prescribed by these rules, 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.

(b) *Authority of a trial court or other government unit after appeal.*—After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:

(1) Take such action as may be necessary to preserve the *status quo*, correct formal errors in papers relating to the matter, cause the record to be transcribed, approved, filed, and transmitted, grant leave to appeal *in forma pauperis*, grant *supersedeas*, and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.

....

(6) Proceed further in any matter in which a non-appealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order.

Therefore, the language of Rule 1701 establishes the 1701(a) general rule, that an agency is deprived of jurisdiction to act further, unless a 1701(b) exception to the general rule applies under the circumstances. Pa. R.A.P. 1701.

## **B. Positions of the Parties**

### **1. The Petitioner's and Supporting Parties' Positions by Argument**

#### **a. Aqua**

Aqua states that a stay of the proceeding is not warranted in this case.

Aqua contends that not all of the criteria for staying a proceeding set forth in *Pa. PUC v Process Gas Consumers Group*, 502 Pa. 545, 467 A. 2d 805 (1983) are satisfied. Specifically, Aqua argues, *inter alia*: (1) the Commission has already determined that the public interest will be furthered by reopening the record and remanding the matter; and (2) that although the *Stay Order* did not apply the traditional criteria – the public interest in this matter does not support a stay but rather supports a reopening of the records and moving the proceeding forward. Aqua Brief at 6-7.

Aqua argues that the *Stay Order* is inconsistent with the language and the intent of the *March 30 Order* because, although the Commission was aware that the County lawsuit was pending on appeal to the Commonwealth Court when it issued its *March 30 Order* it still reopened the record and remanded the proceeding. The Commission did not stay the proceeding. Aqua Brief at 4. Furthermore, the parallel Commonwealth Court proceeding does not provide a basis for staying and delaying a proceeding as set forth in the *Stay Order*. In addition, the *Stay Order* prejudices the interests of the Parties by indefinitely delaying their due process opportunities afforded by the *March 30 Order*. *Id.* at 5. Removing the stay would prevent substantial prejudice. *Id.*

**b. DELCORA**

DELCORA also argues that a stay of the proceeding is not warranted in this case.

DELCORA, like Aqua, contends that the Commission heard and rejected a petition for stay submitted by the County requesting the exact same relief with the exact same reasons. DELCORA argues that under the law of the case doctrine, a court involved in the later phases of litigated proceeding should not reopen questions decided by another judge of the same court or by a higher court. Departure from the doctrine is only permitted in exceptional circumstances such as when 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. The doctrine also applies to administrative agencies and is similarly bound to follow the directives of an appellate court on remand. DELCORA Brief 5-6.

DELCORA also argues, like Aqua, that the *Stay Order* is inconsistent with the *March 30 Order*'s language and intent. DELCORA contends that the *Stay Order* does not comply with the *March 30 Order* because the Commission could have stayed the matter pending disposition of the proceeding in the Court of Common Pleas but did not do so. DELCORA Brief at 7. Furthermore, the outstanding issues that are to be addressed on remand can be addressed and if approval is appropriate, it can easily be conditioned on the appeal of the Common Pleas Action. *Id.*

Finally, DELCORA contends that a stay would establish dangerous precedent and embolden litigation designed solely to impede the business of the Commission and undermine its jurisdiction. DELCORA argues that the Commission must consider the dangerous precedent if a stay is granted in deference to the Court of

Commons Pleas case. DELCORA states that if the Commission would stay all proceedings in favor of the County's improper conduct it would set a precedent that all a party would need to do to block a transaction and delay a proceeding is to file litigation in another court. DELCORA Brief at 8-9. DELCORA also argues, *inter alia*, that a stay would constitute an attack on the Commission's own jurisdiction by giving deference to a parallel proceeding that does not infringe on matters within the scope of the Commission's jurisdiction since staying the proceeding would effectively be subjugating its own jurisdiction in deference to that of the trial court. *Id.* at 9

**c. Upland Borough**

Upland argues that since the *March 30 Order* was to take evidence associated with the Upland Joint Stipulation and other events that occurred after the close of the record it should be permitted to participate in the proceeding on remand solely for the purpose of any matters related to review of its Joint Stipulation and filed its Brief so that the review of the Joint Stipulation can proceed in a timely manner.

Also, Upland argues that the Commission denied a request for a stay in its *March 30 Order* noting that it did not satisfy the criteria of *Process Gas* because the Commission lacked the expertise to assess the likelihood of success on the merits in a civil case. Upland Brief at 2-4. Upland continues that the ALJ issued the *Stay Order* since he apparently was not aware that the Commission already had denied a stay request. *Id.*

Upland argues that in its *August 31, 2020 Order* the Commission denied the County's petition for interlocutory review requesting a stay of the proceeding until the civil lawsuit was resolved. Upland Brief at 2. The Commission denied the request on the grounds that the conclusion that key components of the Application are ending and first

require resolution in the Common Pleas Action was speculative at the posture of the proceeding at that time. *Id.*

Upland also argues that the Commission found no precedent for applying the doctrine of primary jurisdiction<sup>11</sup> in reverse against an administrative agency. *Id.* at 3.

In addition, Upland requests that, although it has formally withdrawn from the proceedings, it should be permitted to participate in the remand proceeding solely for the purpose of any matters related to the review of its Joint Stipulation. Furthermore, Upland filed its Brief so that the review of its Joint Stipulation can proceed in a timely manner.

## **2. Position of the Opposing Parties by Argument**

### **a. I&E**

I&E argues, *inter alia*, that Aqua's request fails to meet the standard because the relief it seeks by forcing the Parties and the ALJ to continue to litigate the Application when disposal of all issues remains impossible would substantially prejudice the Parties and cannot possibly expedite the proceeding.

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<sup>11</sup> In its *August 31, 2020 Order*, the Commission noted that the *Process Gas* standards did not apply because the Commission lacked the expertise to assess the likelihood of success on the merits in a civil case. Therefore, there was no basis for staying the proceeding pending a ruling in a civil action unless there was some form of "reverse" doctrine of primary jurisdiction. The Commission found no precedent to apply the doctrine in reverse therefore held that primary jurisdiction could not and did not apply in reverse in this matter. *August 31, 2020 Order* at 32-33.

I&E contends that the Commission should dismiss Aqua's Petition as improper since the premise of the material question is inconsistent with the Commission's full evaluation directive for remand. I&E argues that the language of the *March 30 Order* confirms that the order required that the Parties be afforded an opportunity to fully evaluate the Application and that the ALJ evaluate and recommend the disposition of the entire Application. I&E Brief at 7. I&E contends that Aqua has a flawed premise in the material question. Specifically, I&E contends that the *Stay Order* is inconsistent with the Commission's directive since the *Stay Order* must be imposed to enable a full evaluation and record as well as a disposition of Aqua's case as prescribed by the Commission. *Id.* I&E argues that the Commission should dismiss the Petition because it is improper. *Id.*

In addition, I&E contends that the *Stay Order* is consistent with the *March 30 Order*'s directive to provide a full disposition of Aqua's Application and is supported by the record. Specifically, I&E argues that the record supports ALJ Brady's determination that the County's pending litigation may well render all, or a significant portion of Aqua's Application moot or unenforceable. I&E Brief at 8. The record in this case illustrates that the County's pending litigation implicates and may invalidate DELCORA's authority to sell the system, the legality and enforceability of the APA and/or the DELCORA Trust. *Id.* Therefore, I&E submits that any one of these outstanding issues would be an adequate basis for staying the proceeding. I&E Brief at 8. I&E contends that forcing the Parties and the ALJ to litigate the Application without resolution would result in the ALJ being obligated to render a recommendation without knowing if the sale could move forward or what portions of the APA are enforceable. *Id.* at 9. I&E argues that such a result is not in the public interest and is contrary to a just, speedy and inexpensive determination the ALJ is required to facilitate.

Finally, I&E argues that the *Stay Order* is consistent with Section 1.2(a) of the Commission's Regulations. I&E argues that the ALJ correctly found that staying the

proceeding was necessary according to the Commission's Regulations that must be construed to secure the just, speedy and inexpensive determination of every action or proceeding. I&E Brief at 9. The ALJ noted that staying the matter until the outcome of the County litigation will ensure the avoidance of duplicative litigation that may result from the Application being rendered moot or substantially altered by the County lawsuit. I&E stated that continuing the litigation of the Application would cause the Parties, ALJ and the Commission to continue to waste resources and could result in an unjust outcome. Furthermore, I&E states that the Petition fails to consider the cost and risk it attempts to impose upon ratepayers and asks the Commission to ignore the prospect that DELCORA may *not be authorized* to sell its system, that ratepayers may be forced to continue to fund wasteful litigation, noting that a \$276.5 million ratemaking rate base determination hangs in the balance. *Id.* at 10.

**b. County of Delaware**

The County also argues that Aqua failed to meet the burden of satisfying the requirements for interlocutory review. In particular, the County states, *inter alia*, that Aqua and DELCORA fail to cite any language in the *March 30 Order* to support its contention that the *Stay Order* is inconsistent with the clear language on intent of the *March 30 Order*; that the proceeding must be expedited; and that the presiding officer is balancing the need to prevent unnecessary and costly litigation; that Aqua has failed to show extraordinary circumstances or compelling reasons for interlocutory review. County Brief at 7-10.

The County contends that Aqua's request for an indefinite extension of the statutory deadline confirms that Aqua is not prejudiced by the *Stay Order*. The County argues that Aqua's allegations of "substantial prejudice" lack merit. Aqua's request to lift the stay to allow for expedited proceedings contradicts its March 10, 2021 request to the Commission to indefinitely extend the statutory deadline for the Commission to

render a decision by issuing a final order in the matter. The County contends that Aqua waived its opportunity to challenge the *March 30 Order*'s directives to the ALJ regarding the scope of the remand and the related procedures associated with it. In voluntarily extending the Section 1329 deadline, Aqua assumed the risk that the proceeding could be substantially delayed. Thus, Aqua is not prejudiced by the *Stay Order*. *Id.* at 10-12.

**c. SPMT**

SPMT also contends that the *Stay Order* is consistent with the *March 30 Order*. SPMT argues that the *March 30 Order* accurately identifies the fact that many issues relating to Aqua's Application are not adequately developed in the existing evidentiary record. SPMT Brief at 7. SPMT argues that the matter will be ripe for disposition and can be addressed when the County's civil lawsuit is finally resolved on the issue of whether DELCORA has the legal authority to sell its assets to Aqua and/or structure the Trust as it has. Alternatively, if it is determined that DELCORA lacks the authority to enter into the proposed transaction with Aqua, then the Parties will not have litigated the remand proceeding in vain. *Id.* at 8.

SPMT also argues that the *Stay Order* was necessary to conserve the Parties' resources. *Id.* SPMT also contends that the settlement of the Municipal Protestants lawsuits is also problematic since Aqua paid those municipalities for their collection systems that they sold to DELCORA to achieve those settlements and with Aqua deducting the payment amounts from the transfer price Aqua paid DELCORA. Consequently, this will affect the entire Application by affecting the question of whether the transaction is in the public interest but also the Section 1329 rate base determination. *Id.*

Finally, SPMT argues that under Pa. R.A.P. 1701(a) the Commission is divested of jurisdiction since the County has appealed the *March 30 Order* to

Commonwealth Court. SPMT Brief at 12-13. Therefore, the Commission may not proceed with the matter on remand while the case is on appeal. *Id.*

### **C. Disposition**

Upon review, as discussed more fully *infra.*, based upon our conclusion that the proceeding before the Commission may resume despite a pending appeal from the Commission's *March 30 Order*, where the order appealed from is an unappealable interlocutory order, pursuant to Pa. R.A. P. 1701 (b) (6), we shall assert jurisdiction for the purpose of addressing the present Petition, grant interlocutory review and we shall answer the material question in the affirmative. Consequently, the *Stay Order* issued by the ALJ shall be lifted, and the matter will proceed before the OALJ.

At the outset, we shall address the Commission's jurisdiction to address the present Petition. As referenced in the history of the proceeding, an appeal was taken to Commonwealth Court from our *March 30 Order*. Subsequently, the Commonwealth Court issued an order which affirmatively indicates the court's acceptance of jurisdiction over the appeal and acknowledged the existence of a stay of the proceedings before the Commission. *See* 455 CD 2021. Therefore, as a preliminary matter, we must address the basis for our assertion of jurisdiction to address the present Petition, consistent with the Rules of Appellate Procedure, governing authority of the agency to proceed following an appeal. *See* Pa. R.A.P. 1701.

Generally, under Pa. R.A.P. 1701, once an appeal is taken, the matter before a governmental unit may no longer proceed. Specifically, Rule 1701 states, "Except as otherwise prescribed by these rules, 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. However, the rule also provides for some exceptions to that general rule. The pertinent exception here is Rule 1701(b)(6),

which states that after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may proceed further in any matter in which a non-appealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order. Pa. R.A.P. 1701(b)(6).

Upon review of the filings, and consistent with the Commission's present position before the Commonwealth Court,<sup>12</sup> we conclude that the Commission's *March 30 Order* is a non-appealable interlocutory order, the effect of which was to remand the matter to the OALJ for further proceedings. Accordingly, under Pa. R.A.P. 1701(b)(6), the Commission retains jurisdiction over its March 30 Order and may proceed further in the matter of the Petition.<sup>13</sup>

Turning to the Material Question in the Petition, Aqua asserts that the Commission should reverse the ALJ Stay Order and direct the proceedings to resume. In addressing this issue, we note that it has been over a year since the Petition was filed. During that time, on March 3, 2022, the Commonwealth Court issued an order disposing of the Delaware County lawsuit concerning this matter at Docket No. 148 CD 2021; no Party sought review on appeal and the decision is now final. The Parties to this proceeding have offered conflicting interpretations on whether the Commonwealth Court order acts to lift the pending stay.

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<sup>12</sup> We note that the Commission's position before Commonwealth Court is that the *March 30 Order* is a non-appealable interlocutory order. See Pa. PUC's Brief filed on February 2, 2022, in *The County of Delaware, Pennsylvania v. Pa. PUC*, Docket No. 455 CD 2021.

<sup>13</sup> The Commission has previously relied on Pa. R.A.P. 1701(b)(6) to act on filings while a Petition for review was pending in Commonwealth Court. *Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, Docket No. A-2010-2153371 (Order entered December 5, 2011).

The Commission held in its *March 30 Order* that it would be in the public interest to give the parties the opportunity to present additional evidence that was not in the public record. The Commission was well aware of the ongoing litigation in other forums when it issued its *March 30 Order*. Aqua asserts that lifting the stay will allow the Commission to reopen the record and receive evidence that permits a full evaluation of its Application. As the remand is interlocutory in nature, a continued stay is not necessary to protect the “substantial rights” of any party.<sup>14</sup> The Commission does have the “duty” to carry out all the provisions of the Code and regulate the conduct of all utilities in the Commonwealth of Pennsylvania.<sup>15</sup> While judicial economy is sometimes a valid basis for a stay, this consideration should not be the primary factor in placing an indefinite hold on a proceeding, particularly where the stay is due to actions in other forums whose schedule is not subject to the provisions of the Code. To the extent that rulings in other forums have some impact on this proceeding, the Commission will afford all parties notice and opportunity to be heard. For these reasons, we find that the OALJ should be directed to promptly schedule hearings and briefing in the remanded proceeding and address any other pending matters at the instant docket.

#### **IV. Conclusion**

Based on our review of the Petition, the positions of the Parties, and the applicable law, we find that we shall assert jurisdiction of the Petition, and, upon review of the Material Question, we shall answer the question in the affirmative;

**THEREFORE,**

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<sup>14</sup> 66 Pa. C.S. § 331(e).

<sup>15</sup> 66 Pa. C.S. § 501(a), (b). In this vein, we note that the ALJ’s *Stay Order* has prevented the Commission from timely addressing petitions to intervene in the instant proceeding.

**IT IS ORDERED:**

1. The Petition for Interlocutory Review of Order Staying Proceeding and Answer to Material Question filed on April 27, 2021, by Aqua Pennsylvania Wastewater, Inc. is granted and that the material question is answered in the affirmative to extent that the Stay of the Proceedings directed on April 16, 2021 by the Office of Administrative Law Judge in this matter is lifted and the Office of Administrative Law Judge shall promptly schedule hearings, briefing, and address other pending matters in the remanded proceeding.

**BY THE COMMISSION**

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

(SEAL)

ORDER ADOPTED: July 14, 2022

ORDER ENTERED: July 26, 2022