**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 : A-2019-3015173

the Wastewater System Assets of the :

Delaware County Regional Water :

Quality Control Authority :

**INTERIM ORDER**

**DENYING PETITION TO INTERVENE**

**FILED BY THE RECEIVER FOR THE CITY OF CHESTER**

Abbreviated Procedural History

This matter concerns the Application of Aqua Pennsylvania Wastewater, Inc. (Aqua or Company) 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 requested 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 the Delaware County Regional Water Quality Control Authority (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 approval of the Pennsylvania Public Utility Commission (Commission) 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. 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 25, 2020, DELCORA filed a Petition to Intervene.

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

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.

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.

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 2020-007469l; (2) Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020¬007552; 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, I 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 and a Joint Stipulation of Aqua, DELCORA, and Trainer Borough for settlement.

In our Recommended Decision issued on January 12, 2021, ALJ Jones and I 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). On March 9, 2021, Lower Chichester Township filed a letter in response to the Objections to the Lower Chichester Stipulation (Lower Chichester Letter).

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 Edgmont Stipulation and an Answer to the Objections to the Lower Chichester Stipulation.

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, I issued an Order Staying the Proceedings.

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.

On June 2, 2022, a Petition to Intervene, along with a Notice to Plead, was filed by Michael Doweary, the Receiver for the City of Chester (Petitioner). The Petitioner avers, *inter alia*, that the City of Chester (City) has a reversionary interest in the City’s sewer system and related property which prevents the transfer of those assets and the approval of any transfer or acquisition of those assets until the City consents.

On June 21, 2022, Aqua filed an Answer in Opposition to the Petition to Intervene of Michael Doweary, the Receiver for the City of Chester. Aqua argues, *inter alia*, that the Receiver gives no reasonable explanation for its delay in filing the Petition to Intervene and it is too late to intervene at this stage of the proceeding.

On July 26, 2022, the Commission entered an Opinion and Order granting the Petition for Interlocutory Review of Order Staying Proceeding and Answer to Material Question, lifting the stay, and directing the Office of Administrative Law Judge to promptly schedule hearings, briefing, and address other pending matters in the remanded proceeding.

A Prehearing Conference on Remand is set for August 9, 2022.

The Petition to Intervene of Michael Doweary, the Receiver for the City of Chester, is procedurally ready to be ruled upon.

Discussion

Petitions to intervene are controlled by Sections 5.71 – 5.76 of the Commission's Regulations, which provide a detailed explanation of the timing and method of intervention in formal Commission proceedings. 52 Pa. Code §§ 5.71 – 5.76. Particularly instructive here, Section 5.74(c) provides: “Except with regard to statutory advocates under subsection (b)(4), intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.”

Further, even if the request to intervene is not dismissed strictly on procedural grounds, four standards have been developed which must be met before untimely intervention is allowed:

1. The petitioner has a reasonable excuse for missing the protest due date;
2. The proceeding is contested at the time of the filing of a petition for intervention;
3. The grant of intervention will not delay the orderly progress of the case; and
4. The grant of intervention will not broaden significantly the issues or shift the burden of proof.

*Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*, Docket Nos. A-212285F0096, 230073F0004 (Opinion and Order entered May 9, 2002)(*Joint Application of PAWC*). All four of these standards must be met before late intervention will be permitted. *Id.*

 In this case, the Petitioner fails the first standard and does not offer evidence of any “extraordinary circumstances,” thus there is no need to go any further. In the Petition, the Petitioner concludes: “Considering the timing of the Receiver’s appointment, and the late notice to the Receiver of this action, there is a reasonable excuse for missing the protest due date, and the submission of this late filing.” However, the Petitioner fails to give any reason *why* he waited so long to take any action in this proceeding. The Petitioner states that he learned of Aqua’s Application after the August 31, 2020, deadline, but does not provide a specific date of when he learned of the Application, nor any reason explaining the delay in learning of the Application. This lack of explanation is similar to the facts in the aforementioned *Joint Application of PAWC*. In that case, the petitioner simply stated that the reason for the late filing was the “CEO did not receive notice…until Friday, March 15, 2002.” *Id.*, Initial Decision at p. 6. The ALJ went on to explain:

Were this kind of unexplained statement to be found sufficient, the whole purpose of providing public notice and establishing a date by which action must be taken in the Pennsylvania Bulletin would be thwarted. It would be enough to merely avoid reading the public notices in the Pennsylvania Bulletin and then stating that only when an application was brought to your attention through some other means were you required to take action to protect your interests. This is not the law nor should it be. The CEO petition must be denied as failing to include within it due cause as to why it is untimely filed as required by *Re Mercer Gas Company*, 71 PA PUC 19 (1989).

 *Id.*

Furthermore, the Petitioner admits that he was appointed as Receiver for the City on June 22, 2020, which is almost two months *prior* to Notice of the Application being published in the Pennsylvania Bulletin on August 15, 2020, with a deadline of August 31, 2020, for the filing of protests or petitions to intervene. 50 Pa. B. 4220. Since that deadline passed (over 700 days ago), this Application was extensively litigated with the issuance of a Recommended Decision that was ultimately remanded to the ALJ for further proceedings.

I agree with Aqua that “[b]ased on reasonable equitable principles and applicable Commission precedent, this unexplainable delay is sufficient by itself to deny the Petition at this advanced stage of the Application Proceeding.” Answer of Aqua in Opposition to Petition at ¶15. The Petitioner has simply waited too long to Petition to Intervene and failed to present any extraordinary circumstances as to why. *See* *Pa.P.U.C. v. West Penn Power Company*, Docket No. P-000723349, R-00072753, R-00072754, 103 Pa.P.U.C. 354, 2008 WL 4614215 (2008); *see also* 52 Pa. Code § 5.74(c).

 THEREFORE,

 IT IS ORDERED:

That the Petition to Intervene of Michael Doweary, the Receiver for the City of Chester, at Docket No. A-2019-3015173, is denied.

Date: August 3, 2022 /s/

 F. Joseph Brady

 Administrative Law Judge

**A-2019-3015173 - APPLICATION OF AQUA PENNSYLVANIA WASTEWATER INC PURSUANT TO SECTIONS 507,1102 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**

*Revised: July 28, 2022*

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