



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

August 8, 2022

Via Electronic Filing

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

Re: 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
Docket No. A-2019-3015173

I&E Prehearing Memorandum for Remand of Proceeding

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Bureau of Investigation and Enforcement's (I&E) **Prehearing Memorandum for Remand of Proceeding** for the above-referenced proceeding.

Copies are being served on parties of record per the attached Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Respectfully,

A handwritten signature in black ink, appearing to read 'Gina L. Miller', is written over a light gray circular background.

Gina L. Miller

Prosecutor

Bureau of Investigation and Enforcement

PA Attorney ID No. 313863

(717) 787-8754

ginmiller@pa.gov

Erika L. McLain

Prosecutor

Bureau of Investigation and Enforcement

PA Attorney ID No. 320526

(717) 783-6170

ermclain@pa.gov

GLM/jfm
Enclosures

cc: Administrative Law Judge F. Joseph Brady (*via email*)
Pamela McNeal, Legal Assistant (*via email*)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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	:	Docket No.: A-2019-3015173
Wastewater System Assets of the Delaware	:	
County Regional Water Quality Control	:	
Authority	:	

**PREHEARING MEMORANDUM OF
THE BUREAU OF INVESTIGATION AND ENFORCEMENT
FOR REMAND OF CASE**

TO ADMINISTRATIVE LAW JUDGE F. JOSEPH BRADY:

In accordance with the Initial Prehearing Conference on Remand Order (“Remand Order”) dated July 29, 2022, the Bureau of Investigation and Enforcement (“I&E”) hereby submits this Prehearing Memorandum. The I&E prosecutors assigned to this proceeding are Gina L. Miller and Erika L. McLain. Ms. Miller and Ms. McLain may be contacted as follows:

By Mail: Gina L. Miller
 Erika L. McLain
 Pennsylvania Public Utility Commission
 Commonwealth Keystone Building
 400 North Street
 Harrisburg, PA 17120

By E-mail: ginmiller@pa.gov
 ermclain@pa.gov

Telephone: (717) 787-8754

I. BACKGROUND

For purposes of brevity, and in order to avoid a full recitation of the protracted litigation involved in this case, I&E incorporates the “Abbreviated Procedural History” section of Administrative Law Judge Brady’s (“ALJ Brady”) Remand Order. By way of supplemental background information, I&E notes that it was over two years ago, on March 3, 2020, when Aqua Pennsylvania Wastewater, Inc. filed with the Pennsylvania Public Utility Commission ("Commission") its Application pursuant to Sections 1102 and 1329 of the Public Utility Code ("Code"), for (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) an order approving the acquisition that includes the ratemaking rate base of the DELCORA wastewater system assets pursuant to Section 1329(c)(2) of the Code; and (4) assignments of Contracts, between Aqua and DELCORA, pursuant to Section 507 of the Code.

While this case was filed over two years ago, the Asset Purchase Agreement (“APA”) that underlies Aqua’s Application will be three years old on September 17, 2022.¹ While the passage of time may have served to impact the accuracy and timeliness of data filed in this case, as well as the accuracy of the assumptions and

¹ Aqua’s Application, ¶5.

inventory that underly the fair market valuations of the DELCORA property, it has not served to diminish I&E's well-founded concerns that Aqua's Application is materially inaccurate. On the contrary, the passage of time has exposed a new inaccurate representation set forth in Aqua's Application: Aqua's Application demonstrates yet another material misrepresentation.

More specifically, while Aqua's March 3, 2020 Application asks the Commission to approve assignment of a contract between the City of Chester and DELCORA dated February 12, 1973,² Aqua now admits that the City of Chester has asserted a reversionary interest under the contract and that "a list of assets" that are "covered by the claimed reversionary interest" has been requested but not received.³ To that end, it appears that not only is the City of Chester contract at issue unripe for the purported assignment, but also that assets valued under the fair market value appraisals in this case may not be transferrable. In short, the passage of time has not remedied, but has instead compounded, the simple fact that Aqua still appears unable to actually acquire all of the assets it asks the Commission to require ratepayers to buy for \$276.5 million.

A telephonic Prehearing Conference is now scheduled for Tuesday, August 9, 2022, at 1:00 p.m., before ALJ Brady. In accordance with the Prehearing Conference Order issued by ALJ Brady on July 29, 2022, I&E now respectfully submits this prehearing memorandum.

² Aqua's Application, Exhibit F119.

³ Answer of Aqua in opposition to the Petition to Intervene of Michael Doweary, the Receiver for the City of Chester, Pennsylvania, pp. 5-6, ¶ 17-20.

II. IDENTIFICATION AND STATUS OF ONGOING LITIGATION

Although I&E is without sufficient information to know whether the listing below represents all existing litigation related to this case, it represents the best available information that I&E has at this time.

Venue	Case	Status
Commonwealth Court of Pennsylvania	455 CD 2021 The County of Delaware v. Pennsylvania Public Utility Commission I&E understands that the Commission's grant of Aqua's request to waive the 180 day statutory timeline is under appeal and that the outcome could have a direct impact on this case.	I&E understands that this case has been submitted on Briefs and that a decision is pending. No known timeframe for resolution can be established.
Delaware County Court of Common Pleas	Docket No. CV-2020-003185 This was previously on appeal 148 C.D. 2021 until remanded by the Commonwealth Court of Pennsylvania. I&E understands that the trial court now has jurisdiction on remand, but that the Commonwealth Court held that the termination/dissolution of DELCORA was made by a valid and enforceable Ordinance.	Unknown.
Unknown	Pending/Potential action by Receiver of City of Chester I&E notes that the Receiver of the City of Chester was appointed Memorandum and Order of the Commonwealth Court of Pennsylvania at Docket No. 336 M.D. 2020, but it is unclear to I&E whether/when the Receiver has or will take legal action to preserve assets	Unknown.

III. NEED FOR ADDITIONAL DIRECT AND REBUTTAL TESTIMONY

I&E is aware that Aqua may wish to offer additional testimony in support of its case. However, as I&E is unaware of the scope and content of issues that Aqua will address, I&E has significant concerns about agreeing to any process that would potentially limit its ability to protect the public interest as obligated. To that end, I&E respectfully requests that if Aqua is permitted to offer additional testimony in support of its Application, either the scope of the issues it may address must be limited and clearly enumerated before a schedule is developed or that Your Honor consider convening a second prehearing conference after Aqua submits its additional testimony so that impacted parties and Your Honor can make informed decisions about the procedural schedule that may be needed.

IV. NEED FOR ADDITIONAL WITNESSES

At this time, and for the reasons identified above regarding additional testimony, I&E is uncertain whether it will need to secure additional witnesses for this case. At this time, I&E intends to offer expert witness Lisa Gumby who testified in the underlying case; however, I&E reserves the right to call additional witnesses if that is deemed necessary to protect the public interest.

V. SCHEDULING DEADLINES

I&E must defer any scheduling discussion until it has more facts available about the scope of issues permitted for remand. Regardless, I&E notes that no statutory time limit currently exists in this case; therefore, I&E respectfully requests that any schedule developed provide sufficient time to enable the parties to develop the full and accurate record required by the Commission. Clear designation of remand issues, and resolution of litigation that will impact viability of the transaction and the underlying valuations are of paramount importance

to protecting the public interest; therefore, they must be factored into any scheduling deadlines.

VI. NEED FOR ADDITIONAL PUBLIC INPUT HEARINGS

I&E will defer to other parties on this issue, including the Office of Consumer Advocate, who may have information about public interest in Aqua's Application at this time. I&E would support public input hearings if the parties and Your Honor believe sufficient interest exists and/or the hearings are warranted. If public input hearings are deemed necessary in this proceeding I&E requests that they be held electronically or telephonically.

VII. SCHEDULING OF FURTHER EVIDENTIARY HEARINGS

I&E incorporates its comments above regarding scheduling deadlines and again asserts that clear designation of remand issues and resolution of litigation that will impact the viability of the transaction and the underlying valuations must be considered before I&E can formulate a position on the need for hearings. Additionally, the accuracy and timeliness of Aqua's Application and underlying appraisals must also be determined and considered.

VIII. OTHER APPROPRIATE MATTERS

1. Scope of Issues on Remand

I&E avers that the listing of issues below should be addressed in the remand portion of this case:⁴

- a. The accuracy of Aqua's Application filed on March 3, 2020, including the underlying Engineering Assessment (and the inventory it contained) and the fair market value assessments offered in this case.

⁴ I&E reserves the right to supplement this list if new information informs its position and/or if any other party raises issues that I&E has not had an opportunity to consider.

- b. The status of DELCORA as a municipal authority and its position on the transaction.
- c. Whether DELCORA has present title and/or authority to transfer all assets, inventory, and contracts that Aqua is seeking permission to acquire in this case.
- d. Clear designation of and explanation of Aqua's operative proposal to offset acquired customers' rates through a Rate Stabilization Fund/Trust that a third-party will administer. This should include, but not be limited to the following: information about which customers are eligible to receive funding, how they will receive it, who/what entity will administer the funding, whether a 3rd party will have access to jurisdictional customers' billing info, and the process that acquired customers would use to address issues with receipt of funds.
- e. The amount of money that will fund the Rate Stabilization Fund/Trust that will allegedly be used to offset acquired customers' rates. I&E notes that Aqua has continually averred that the Rate Stabilization Fund/Trust is a critical public benefit; therefore, in order to evaluate that allegation and to enable the affirmative public benefit analysis, including consideration of rate impact required in this case, the amount must be provided to the parties. In the past, Aqua alleged that DELCORA would place approximately \$200 million into the Trust;⁵ therefore, an update to this claim is appropriate now.

2. Discovery

On pages 3-4 of the Prehearing Conference Order dated August 3, 2020, ALJ Jones ordered an enumerated list of modifications to the Commission's regulations related to the discovery process. While I&E supports the continuation of those modifications, I&E also understands that they were in place, in part, due to the expedited schedule that existed in 2020. To that end, I&E would be open to discussing other parties' proposals on discovery modifications as long as an expedited schedule is no longer in place. However, I&E is aware that Aqua may

⁵ Aqua Main Brief, Public Version, p. 4; Aqua St. No. 2, p. 13.

intend to propose limitations on the scope and timing of discovery and I&E strongly opposes any limits imposed upon the discovery process that could arbitrarily limit parties' ability to develop the record.

3. Settlement

I&E intends to participate in any settlement discussions and is willing to work with the parties in an attempt to reach a resolution of any or all issues as appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'G. L. Miller', written in a cursive style.

Gina L. Miller
Prosecutor
PA Attorney ID No. 313863

Erika L. McLain
Prosecutor
PA Attorney ID No. 320526

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
ginmiller@pa.gov
ermclain@pa.gov

Dated: August 8, 2022

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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	:	Docket No.: A-2019-3015173
System Assets of the Delaware County	:	
Regional Water Quality Control Authority	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Prehearing Memorandum for Remand of Proceeding** dated August 8, 2022, in the manner and upon the persons listed below.

Served via Electronic Mail Only

Hon. F. Joseph Brady
Pamela McNeal, Legal Assistant
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
801 Market Street
Philadelphia, PA 19107

Samantha L. Newell, Esq.
Patrick R. Seymour, Esq.
Michael P. Clarke, Esq.
Rudolph Clarke, LLC
Seven Neshaminy Interplex, Suite 200
Trevose, PA 19053
snewell@rudolphclarke.com
pseymour@rudolphclarke.com
mclarke@rudolphclarke.com
Counsel for DELCORA

Alexander R. Stahl, Esq.
Aqua Pennsylvania, Inc.
762 West Lancaster Avenue
Bryn Mawr, PA 19010
astahl@aquaamerica.com

Adeolu A. Bakare, Esq.
Robert F. Young, Esq.
Kenneth R. Stark, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
abakare@mcneeslaw.com
ryoung@mcneeslaw.com
kstark@mcneeslaw.com
Counsel for Delaware County

Christine Maloni Hoover, Esq.
Erin L. Gannon, Esq.
Harrison W. Breitman, Esq.
Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101
OCADelcora@paoca.org

Steven C. Gray, Esq.
Office of Small Business Advocate
555 Walnut Street
1st Floor
Harrisburg, PA 17101
sgray@pa.gov

Kenneth D. Kynett, Esq.
Charles G. Miller, Esq.
Petrikin, Wellman, Damico, Brown &
Petrosa
William Penn Building
109 Chesley Drive
Media, PA 19063
kdk@petrikin.com
cgm@petrikin.com
Counsel for
Edgmont Township, Delaware County

Thomas J. Sniscak, Esq.
Kevin J. McKeon, Esq.
Whitney E. Snyder, Esq.
Melissa A. Chapaska, Esq.
Phillip D. Demanchick, Esq.
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
tjsniscak@hmslegal.com
kjmckeon@hmslegal.com
wesnyder@hmslegal.com
machapaska@hmslegal.com
pdemanchick@hmslegal.com
Counsel for Sunoco Partners Marketing &
Terminals, L.P./ Energy Transfer

Justin G. Weber, Esq.
Troutman Pepper Hamilton Sanders LLP
100 Market Street, Ste 200
P.O. Box 1181
Harrisburg, PA 17108-1181
justin.weber@troutman.com
Counsel for Kimberly-Clark Corp. &
Kimberly-Clark Pennsylvania, LLC

Jason T. Ketelsen, Esq.
Troutman Pepper Hamilton Sanders LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
jason.ketelsen@troutman.com
Counsel for Kimberly-Clark Corp. &
Kimberly-Clark Pennsylvania, LLC

Marc D. Machlin, Esq.
Troutman Pepper Hamilton Sanders LLP
2000 K Street, NW, Suite 600
Washington DC 20006
marc.machlin@troutman.com
Counsel for Kimberly-Clark Corp. &
Kimberly-Clark Pennsylvania, LLC

John F. Povilaitis, Esq.
Alan M. Seltzer, Esq.
Buchanan Ingersol & Rooney, PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
john.povilaitis@bipc.com
alan.seltzer@bipc.com
Counsel for
Aqua Pennsylvania Wastewater, Inc.

Robert W. Scott, Esq.
Robert W. Scott PC
205 North Monroe Street
P.O. Box 468
Media, PA 19063
rscott@robertwscottpc.com
Counsel for Borough of Ambler

Brian Kalcic
Excel Consulting
225 S. Meramec Ave.
Suite 720T
St. Louis, MO 63105
excel.consulting@sbcglobal.net
Consultant for OSBA

Ralph C. Smith
Larkin & Associates, PLLC
15728 Farmington Road
Livonia, MI 48154
OCADelcora@paoca.org
Consultant for OCA

Cynthia Pantages
C&L Rental Properties, LLC
30 S. Lake Drive
P.O. Box 516
Lake Harmony, PA 18624
cyndipantages@gmail.com

Ross Schmucki
218 Rutgers Avenue
Swarthmore, PA 19081
rschmucki@gmail.com

Edward Clark, Jr.
Treasure Lake Property Owners
Association
13 Treasure Lake
Dubois, PA 15801
gm@treasurelake.us

Patricia Kozel
15 Hazzard Run Road
Lake Harmony, PA 18624
pattyk6@icloud.com
Complainant

Lawrence and Susan Potts
11 Chestnut Street
P.O. Box 522
Lake Harmony, PA 18624
susie01213@aol.com
Complainants

Joseph L. Vullo, Esquire
Burke Vullo Reilly Roberts
1460 Wyoming Avenue
Forty Fort, PA 18704
jlvullo@bvnfaw.com
*Counsel for Southwest Delaware County
Municipal Authority, Edgmont Twp.,
Lower Chichester Twp. & Upland Boro*

John McLaughlin, Esq.
Tiffany R. Allen, Esq.
Benjamin Patchen, Esq.
Campbell Durrant, P.C.
One Belmont Avenue, Suite 300
Bala Cynwyd, PA 19004
jmclaughlin@cdblawn.com
tallen@cdblawn.com
bpachen@cdblawn.com
*Counsel for
Receiver for the City of Chester*

Peter Ginoplus
P.O. Box 197
Lake Harmony, PA 18624
pete@kidderfax.com



Gina L. Miller
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 313863
(717) 7878754
ginmiller@pa.gov