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August 8, 2022

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

VIA ELECTRONIC FILING

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

Dear Secretary Chiavetta:

Attached for filing with the Pennsylvania Public Utility Commission in the above-referenced proceeding is the Prehearing Memorandum of the County of Delaware.

Sincerely,

McNEES WALLACE & NURICK LLC

By 

Adeolu A. Bakare

Counsel to the County of Delaware, Pennsylvania

c: Administrative Law Judge F. Joseph Brady
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, inter alia, approval of the acquisition of	:	Docket No. A-2019-3015173
The wastewater system assets of the	:	
Delaware County Regional Water Quality	:	
Control Authority	:	

**PREHEARING MEMORANDUM OF
THE COUNTY OF DELAWARE, PENNSYLVANIA**

As requested by Administrative Law Judge (“ALJ”) F. Joseph Brady in the Prehearing Conference Remand Order dated July 29, 2022 (“Prehearing Remand Order”), the County of Delaware, Pennsylvania (the “County”) hereby submits this Prehearing Memorandum to provide the County’s perspective on the seven issues raised by ALJ Brady.

I. INTRODUCTION

The County believes the proper scope of this remand proceeding should be *de novo* review of an Amended Application. The Commission’s March 30, 2021, Order vacated the entirety of the prior Recommended Decision and remanded the case to the presiding ALJ “for such further proceedings as may be appropriate in light of the new developments in the case” before issuing a new Recommended Decision on Remand.¹ It is premature to set the procedural schedule before the ALJ and parties know what Aqua Pennsylvania Wastewater, Inc. (“Aqua”) believes to be the scope of the “new developments.”

¹ March 30, 2021 Order at p. 15.

The County contends that the extra-record evidence from the prior proceeding coupled with the passage of time since Aqua filed the Application requires Aqua to amend its Application. Therefore, the County believes that the first step in the remand proceeding should be for Aqua to file an amended application. The amended application should contain the new exhibits and update the financial information and testimony in the previously submitted supporting testimony and exhibits. The County prefers that Aqua do so voluntarily. However, Section 5.93 of the Commission’s regulations permits “Directed Amendments.”²

II. ALJ BRADY’S SEVEN AREAS OF DISCUSSION

1. Identification and status of any ongoing litigation related to this case

The County, Aqua, and Delaware County Regional Water Quality Control Authority (“DELCORA”) are parties in two ongoing proceedings that are directly related to this case. The first case is County of Delaware v. DELCORA et al, CV-2020-003185 (the “Common Pleas Action”) in which the County is the plaintiff. DELCORA, the Trust, and the Trustee are defendants. Aqua, Darby Creek Joint Authority, and Southern Delaware County Authority are intervenors. The second case is the County’s petition for review of the Commission’s Order in this proceeding entered on March 30, 2021, docketed at the Commonwealth Court at 455 CD 2021 (the “Pending Appeal”). In the Pending Appeal, the County and the Commission are the petitioner and respondent, respectively. Aqua and DELCORA intervened in support of the Commission.

² 52 Pa. Code § 5.93.

Status of the Common Pleas Litigation

The County submitted its fourth Status Report to the ALJ and parties on April 11, 2022.³

Between April 11, 2022 and August 8, 2022 the following occurred:

- May 6, 2022. Common Pleas received and docketed the Certificate of Remittal/Remand of Record from the Commonwealth Court.
- May 18, 2022. Michael P. Clarke, Samantha L. Newell, and Patrick F. Seymour entered their appearances for DELCORA.
- June 1, 2022. Counsel for Aqua sent a letter to Judge Dozor. The letter proposed that each of the parties could submit a proposed order that the “party believes accurately accomplishes the directive and intent of the Commonwealth Court’s March 3, 2022 Order.”
- June 2, 2022. Judge Dozor sent a letter to all counsel requesting the submission of proposed orders by July 7, 2022.
- June 8, 2022. Counsel for Aqua submitted a proposed order and a revised proposed order to Judge Dozor.
- July 7, 2022. The County submitted its proposed order by letter to Judge Dozor.
- July 7, 2022. DELCORA submitted a letter to Judge Dozor in lieu of a proposed order.
- Between June 8, 2022 and July 12, 2022 Counsel for the County and Aqua each submitted additional letters to Judge Dozor. On July 26, 2022, Judge Dozor issued an Order scheduling oral argument on the proposed orders for September 7, 2022, at 9 am.
- The County anticipates the next milestone to occur when Judge Dozor’s enters his Order on Remand.

Status of the Pending Appeal.

The County submitted its fourth Status Report to the ALJ and the parties on April 11, 2022.⁴ Between April 11, 2022 and August 8, 2022 the following occurred:

³ See <https://www.puc.pa.gov/pcdocs/1740200.pdf>.

⁴ See <https://www.puc.pa.gov/pcdocs/1740200.pdf>.

- April 20, 2022. The Commonwealth Court issued a notice of tentative argument session date of June 21, 2022.
- April 28, 2022. The Commonwealth Court issued a notice that the June argument session will be held in Harrisburg.
- May 18, 2022. The Commonwealth Court scheduled oral argument for June 23, 2022.
- June 15, 2022. The Commonwealth Court issued an Order cancelling oral argument and stated, “this matter will be decided on the briefs previously filed.”

The County anticipates the next milestone to be the issuance of an Opinion and Order by the Commonwealth Court adjudicating the Pending Appeal.

2. Need for additional direct and rebuttal testimony.

The County respectfully suggests that Your Honor set deadlines by phases to ensure that certain procedural and evidentiary issues that arose after the close of the record in the first hearing are resolved prior to engagement by the parties with respect to discovery, testimony, and briefing. Initially, Your Honor should address the issues regarding the various settlements entered in late 2020 and 2021, especially given most of those settlements were submitted to the Commission after the evidentiary record in the first hearing closed and parties were not afforded an opportunity address those settlements.

Such matters are clearly ancillary to the County’s Pending Appeal. Therefore, addressing those issues does not implicate any jurisdictional issues under Rule 1701 of the Rules of Appellate Procedure. *See* Pa.R.A.P. 1701(b)(1) (“Take such action as may be necessary to ... and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding”) (emphasis added) and Pa.R.A.P 1701(c).

The procedural and substantive aspects of the Pending Appeal relate to a separate threshold issue, the completeness of the Application with regard the presence or absence of a

Commission-jurisdictional Rate Stabilization Plan. With regard to this issue, we note that both the Commission and Aqua stated in their briefs to the Commonwealth Court that the Commission has not decided whether Aqua's original rate stabilization proposal is or is not jurisdictional to the Commission:

- "As discussed supra, the March 30 Remand Order did not make any decision on the merits of Aqua's Application, nor did it make any final determinations related to Section 1329." PUC Brief at 29-30.
- "Accordingly, the Commission has yet to make the requisite factual finding under Section 1329(d)(1)(v) as to whether a rate stabilization plan is applicable to the acquisition." PUC Brief at 31-32.
- "On remand, Delco is free to argue that the first RD was correct and the Aqua Application should be denied as incomplete, and to assert similar arguments when the Commission conducts its *de novo* review of the second ALJ RD." Aqua Brief at 22.

However, the County is concerned that, if the remand proceeding addresses Aqua's proposed rate stabilization plan changes before the Pending Appeal is adjudicated, Rule 1701 will become an issue. Accordingly, it may be prudent to defer consideration of Aqua's proposed rate stabilization modifications until after the Commonwealth Court adjudicates the Pending Appeal.

Notwithstanding the Rule 1701 concerns, as discussed above the County believes the scope of this remand proceeding should be a *de novo* review of an Amended Application. More than 18 months have passed since this case was initially litigated in 2020-2021. The status of DELCORA's operations, employees, vendor agreements, and capital plans are currently unknown. DELCORA's capital improvements in 2020, 2021, and 2022 are unknown. When Aqua filed the Application, its 2022 rate case was a future projection. Now, the Commission has entered its Final Order in Aqua's 2022 rate case at Docket No. R-2021-3027385, approving wastewater rate increases well in excess of the 2020 projections. For all of these reasons, the Application and supporting testimony must be updated to reflect the current factual and financial

status of Aqua and DELCORA's respective organizations. Upon review of Aqua's revised Application, revised testimony, and updated discovery, the other parties will need to update and revise their testimony and be afforded a sufficient opportunity to conduct discovery.

Due to this passage of time, as well as the additional extra-record evidence, Aqua's Application is incomplete and must be made complete before the litigation schedule is determined. The parties cannot proceed with establishing a comprehensive litigation schedule until Aqua updates its Application to confirm the scope of the "new developments."

3. Need for additional witnesses.

The County anticipates sponsoring new testimony from previously identified witnesses:

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The County also reserves the right to add or otherwise modify its proposed witness list.

4. Scheduling deadlines for additional briefs and reply briefs.

For the reasons set forth in the section addressing the need for additional testimony, the County does not believe a briefing schedule can be established at this time.

5. Need for additional public input hearings.

The County anticipates additional public input hearings will be necessary pending review of the updated Application, testimony and evidence.

6. Scheduling new evidentiary hearings.

Given the extra record evidence submitted after the close of the first hearings, the passage of time, changes in financial status of DELCORA and Aqua, and the new rates established in

Aqua's most recent rate case, the County believes that additional evidentiary hearings are necessary.

7. Any other appropriate matter.

In determining the procedural schedule for this proceeding, the ALJ should consider the efforts of the Applicant to prepare the ALJ and parties for these remand proceedings. Aqua filed its Petition for Interlocutory Review of the Stay Order on April 27, 2021 and requested the Commission to reverse the Stay Order. The County filed the Pending Appeal on April 29, 2021. The Pending Appeal brought this matter within the scope of Rule 1701 of the Pennsylvania Rules of Appellate Procedure.⁵ On May 7, 2021, the County filed its Answer in Opposition to Aqua's Petition. On page 6, in footnote 4, the County stated:

[Citation omitted] 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.

(emphasis added).

On May 12, 2021, the Commission waived the 30-day consideration period for Aqua's Petition.

On March 25, 2022, Aqua sent a letter to the Commission regarding the Commonwealth Court's decision in the County's appeal at 148 CD 2021, known as the Common Pleas Appeal. Aqua's letter to the Commission concluded with this paragraph:

In summary, Aqua requests that the Commission: 1) take official and judicial notice of (and accept as a public document) the Commonwealth Court's Opinion resolving the County's appeal in its favor, 2) decide the Petition

⁵ Pa.R.A.P. 1701.

requesting termination of the Stay Order as expeditiously as possible, and 3) direct the ALJ to complete the record of the PUC Proceeding on remand and certify the record with a specific date with supplemental briefing directly to the Commission for final decision.⁶

The Commission entered its Order ending the Stay on July 26, 2022 (“July 2022 Order”). Other than terminating the stay, the July 2022 Order does not support any of Aqua’s requests in its March 25, 2022 letter.

Despite doing nothing to advance this case until March 25, 2022, Aqua now seeks to advance the remand proceeding at breakneck speed, having discussed with the parties a proposed schedule seeking to close the record on the remand proceeding by October 11, 2022, a mere two months from the Prehearing Conference. Conversely, Aqua has, to the County’s knowledge, done little to engage the parties outside of formal PUC proceedings in order to provide critical updates or informal Q&A opportunities during the stay period.

For example, one of the County’s objections to the stipulations generally – and to SDCMA’s proposed stipulation in particular – was that Aqua should have filed the related service agreements as amendments to Aqua’s Application. The County’s February 19, 2021 Objections noted that Aqua and SDCMA refused to provide the new agreement to the County.⁷ The March 30, 2021 Order reopened the record to consider new evidence. The record was open until Your Honor issued the Stay Order on April 16, 2021. The record reopened on July 26, 2022. However, Aqua did not file the new service agreements at any time while the record has been open nor has Aqua formally or informally provided the new agreements to the parties as supplemental discovery. Since July 27, 2022, Aqua has still failed to file the new service agreements.

⁶ Aqua Letter, dated March 25, 2022 at p. 3.

⁷ See Objections of the County of Delaware to the Joint Stipulation of Aqua, DELCORA and Southwest Delaware County Municipal Authority, filed in this Docket on Feb. 19, 2021 at pp 2-4.

On March 30, 2021, Aqua knew the new agreements would become part of the reopened record. However, for over 18 months Aqua has not provided the new agreements to the County or any other party despite knowing that they would have to file them of record. Your Honor should not force the parties into an overly compressed procedural schedule to remedy Aqua's lack of foresight and initiative.

The County respectfully suggests that Your Honor proceed prudently with the remand proceeding. In light of Aqua's claimed waiver of the statutory consideration period, the remand proceeding does not have a governing statutory deadline (even though the legal effect of statutory deadline in Section 1329 is an issue in the Pending Appeal). While the Commonwealth Court may provide more guidance on Section 1329, in the July 2022 Order the Commission rejected Aqua's requests for an expedited schedule and certification of the record to the Commission. Accordingly, the County suggests the Commission intended the remand proceeding to follow the normal course and pace of administrative litigation.

CONCLUSION

For the foregoing reasons, the County of Delaware recommends that Your Honor first determine that Aqua should file an amended application in order for the remand proceeding to begin. If Aqua is unwilling to begin the remand proceeding by filing an amended application, Your Honor could require Aqua to do so pursuant to Section 5.93 of the Commission's regulations, 52 Pa. Code § 5.93.

Only when the parties know what is in the amended application, can the remand proceedings turn to substantive issues. It is premature to set the complete procedural schedule at this time.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

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Dated: August 8, 2022

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).

VIA E-MAIL

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Dated this 8th day of August, 2022, in Harrisburg, Pennsylvania