



McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Adeolu A. Bakare
Direct Dial: 717.237.5290
Direct Fax: 717.260.1744
abakare@mcneeslaw.com

January 26, 2023

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 Joint Motion of the County of Delaware, Pennsylvania ("County"), the Bureau of Investigation and Enforcement ("I&E"), the Office of Consumer Advocate ("OCA"), and the Office of Small Business Advocate ("OSBA") for a Stay of the Section 1329 Application of Aqua Pennsylvania Wastewater, Inc. for the Acquisition of Delaware County Regional Water Quality Control Authority's Wastewater System Assets.

The Joint Motion proposes expedited review, with answers requested by January 31, 2023, and issuance of an Order from the presiding ALJ by February 3, 2023, or as soon as reasonably practicable.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adeolu A. Bakare'.

Adeolu A. Bakare
MCNEES WALLACE & NURICK LLC

Counsel to the County of Delaware, Pennsylvania

c: Administrative Law Judge F. Joseph Brady
Certificate of Service

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

Kenneth Kynett, Esq.
Charles G. Miller, Esq.
Petrikin Wellman Damico Brown & Petrosa
The William Penn Building
109 Chesley Drive
Media, PA 19063
kdk@petrikin.com
cgm@petrikin.com
Counsel to Edgmont Township
NO CONFIDENTIAL MATERIALS

Gina L. Miller, Esq.
Erika L. McLain, Esq.
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265
ginmiller@pa.gov
ermclain@pa.gov

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

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

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

Steven Gray, Esq.
Office of Small Business Advocate
300 North Second Street, Suite 1102
Harrisburg, PA 17101
sgray@pa.gov

Samantha L. Newell, Esq.
Patrick F. 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 to Delaware County Regional Water
Quality Control Authority*

Joseph L. Vullo, Esq.
Burke Vullo Reilly Roberts
1460 Wyoming Avenue
Forty Fort, PA 18704
jlvullo@bvrrlaw.com
*Counsel to Southwest Delaware County
Municipal Authority*

Thomas J. Sniscak, Esq.
Whitney E. Snyder, Esq.
Kevin J. McKeon, Esq.
Philip Demanchick, Esq.
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
TJSniscak@hmslegal.com
WESnyder@hmslegal.com
KJMckeon@hmslegal.com
PDDemanchick@hmslegal.com
Counsel to Sunoco Partners Marketing



Adeolu A. Bakare

Counsel to the County of Delaware, Pennsylvania

Dated this 26th day of January, 2023, in Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**JOINT MOTION OF THE COUNTY OF DELAWARE, PENNSYLVANIA,
THE BUREAU OF INVESTIGATION AND ENFORCEMENT,
THE OFFICE OF CONSUMER ADVOCATE, AND
THE OFFICE OF SMALL BUSINESS ADVOCATE
FOR A STAY OF THE SECTION 1329 APPLICATION OF AQUA
PENNSYLVANIA WASTEWATER, INC. FOR THE ACQUISITION OF
DELAWARE COUNTY REGIONAL WATER QUALITY
CONTROL AUTHORITY'S WASTEWATER SYSTEM ASSETS**

BEFORE THE HONORABLE JUDGE F. JOSEPH BRADY

NOW COMES the County of Delaware, Pennsylvania ("County"), the Bureau of Investigation and Enforcement ("I&E"), the Office of Consumer Advocate ("OCA"), and the Office of Small Business Advocate ("OSBA") (collectively "Joint Movants"), by and through counsel, pursuant to 52 Pa. Code § 5.103, file this Motion for Stay respectfully requesting Your Honor stay all substantive proceedings in this docket relating to the Application of Aqua Pennsylvania Wastewater, Inc. ("Aqua" or "Buyer") to acquire the system assets of the Delaware County Regional Water Quality Control Authority ("DELCORA" or "Seller") (the "Application"). On January 18, 2023, DELCORA filed the attached Complaint for Declaratory Judgment with the Delaware County Court of Common Pleas (the "DELCORA Complaint") naming both the County and Aqua as Defendants.¹ The DELCORA Complaint addresses several issues that overlap with

¹ See Appendix A. The attached copy of the DELCORA Complaint omits voluminous exhibits.

and directly impact the current PUC proceedings regarding Aqua's Application to acquire DELCORA, specifically asking the court to determine: (1) whether the County's Ordinance No. 2020-4 ("Ordinance") is a final action prohibiting DELCORA from proceeding under its Asset Purchase Agreement with Aqua; and (2) whether DELCORA possesses the legal authority to create the proposed Trust and continue in existence to administer the Trust.

The Joint Movants respectfully request that Your Honor take any action necessary to render a decision on this Motion in advance of the February 14-15, 2023, Evidentiary Hearings for the above-captioned docket and by February 3, 2023, if possible. To that end, and in light of the fact that all parties received advance notice of this pending Motion on or before January 24, 2023, the Joint Movants respectfully request that Your Honor set forth an expedited answer period with answers to this Motion due on or before January 31, 2023.

In support thereof, the Joint Movants state as follows:

I. BACKGROUND & PROCEDURAL HISTORY

1. On or around March 3, 2020, Aqua filed an Application seeking the approval of the Pennsylvania Public Utilities Commission (the "PUC" or "Commission") to acquire DELCORA and to provide wastewater service to areas served by DELCORA at the above-captioned docket (the "Application").

2. Through the Application, Aqua requested Commission approval of the Asset Purchase Agreement ("APA") between Aqua and the DELCORA pursuant to Section 507 of the Public Utility Code, 66 Pa. C.S. § 507.² Aqua also requested approval to apply disbursements

² Application at ¶ 3.

from the DELCORA Rate Stabilization Trust Agreement ("Trust") to customers acquired from DELCORA through Aqua's billing process.³

3. On or about May 14, 2020, the County filed a Complaint in the Delaware County Court of Common Pleas against DELCORA, asserting that DELCORA's actions had violated the Municipality Authorities Act ("MAA").

4. On March 26, 2020, OSBA filed a Notice of Appearance and Intervention.

5. On April 2, 2020, OCA filed a Protest and Notice of Appearance.

6. Also on April 2, 2020, I&E filed a Notice of Appearance.

7. On May 18, 2020, the County filed a Petition to Intervene in the above-captioned PUC proceeding, and later filed a Protest to Aqua's Application.

8. On or about June 3, 2020, the County passed the aforementioned Ordinance directing the dissolution of DELCORA. The Ordinance directed DELCORA to cooperate with the County in an orderly windup of DELCORA's operations.

9. On January 12, 2021, the ALJ Brady and the late ALJ Angela T. Jones issued a Recommended Decision denying the Application because of Aqua's failure to meet its burden of proof.

10. On March 10, 2021, Aqua filed a letter stating that it is voluntarily waiving 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.

11. On March 30, 2021, the Commission entered an Opinion and Order vacating the Recommended Decision, reopening the record, remanding the proceeding to the OALJ for such

³ See Application at ¶ 36, Exhibit U2 (Testimony of William C. Packer), Appendix B to Packer Testimony (Draft Memorandum of Understanding regarding the Trust).

further proceedings as may be deemed appropriate, and directing the issuance of a Recommended Decision on Remand, consistent with its Opinion and Order.

12. On April 16, 2021, ALJ Brady issued an Order Staying the Proceedings.

13. 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.

14. On March 3, 2022, the Commonwealth Court of Pennsylvania issued an Order finding the Ordinance terminating DELCORA to be valid and enforceable.

15. 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 ("July 26 Order"), 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.

16. On August 9, 2022, and October 12, 2022, ALJ Brady presided over Prehearing Conferences through which the parties established a litigation schedule for the remand proceeding.

17. In-person evidentiary hearing(s) are currently scheduled to take place in the remand proceeding on February 14–15, 2023.

18. On January 18, 2023, DELCORA filed the attached Complaint for Declaratory Judgment with the Delaware County Court of Common Pleas naming the County and Aqua as Defendants. The Complaint asks the court to determine: (1) whether the County's Ordinance is a final action prohibiting DELCORA from proceeding under the APA; and (2) whether DELCORA possesses the legal authority to create the proposed Trust and continue in existence to administer the Trust. These issues overlap with and directly impact the PUC proceedings at the above-captioned docket.

II. LEGAL STANDARD

19. The Joint Movants respectfully submit that due to the Complaint DELCORA has filed in the Court of Common Pleas, the presiding ALJ should, pursuant to his discretionary authority under 52 Pa. Code § 5.483, place a stay on the instant proceeding involving Aqua's Application until there is a final determination on the related matters currently before the Delaware County Court of Common Pleas.

20. When reviewing petitions or motions for stay, the Commission has applied the Pennsylvania Supreme Court's factors and analysis in *Pa. PUC v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). The Joint Movants do not believe the *Process Gas* analysis should be applied to the present facts, but aver that consideration of the *Process Gas* factors also supports a stay of the remand proceeding.

III. DISCUSSION

A. A Stay of the Proceedings is Necessary to Develop a Complete Record on Remand for the Commission

21. On October 12, 2022, ALJ Brady presided over a Prehearing Conference attended by the parties of record on the above-captioned docket. Pursuant to the Commission's July 26, 2022, Order remanding the proceedings on Aqua's Application to OALJ for further hearings and issuance of a Recommended Decision, ALJ Brady established a litigation schedule for further discovery, testimony, and hearings on Aqua's Application. The schedule approved by ALJ Brady is set forth below:

October 21, 2022	Deadline for Aqua and DELCORA to submit any revisions to their filed direct testimony.
November 17, 2022	Telephonic public input hearings (1 pm and 6 pm)
November 18, 2022	Submission of written direct testimony of advocates and intervenors (OCA, OSBA, BIE, Sunoco and the County)

November 30, 2022	Supplemental filings re Public Input Hearings
December 16, 2022	Submission of written rebuttal testimony by Aqua and DELCORA
January 13, 2023	Written surrebuttal testimony of advocates and intervenors
February 8, 2023	Written rejoinder testimony by Aqua/DELCORA
February 14-15, 2023	In-person hearings for oral cross examination ⁴
March 13, 2023	Main Briefs of all parties
March 24, 2023	Reply Briefs of all parties
April 30 , 2023 (or earlier)	Issuance of ALJ's Recommended Decision
June 15, 2023	Target date for PUC Public Meeting

22. Consistent with ALJ Brady's Prehearing Conference and Prehearing Order, parties to the proceeding have proceeded diligently, exchanging hundreds of discovery questions and developing a further evidentiary record through remand Direct, Rebuttal, and Surrebuttal testimony statements. As of the filing of this Motion, Aqua and DELCORA have an opportunity to submit written rejoinder testimony on February 8, 2023, before parties proceed to evidentiary hearings on February 14 and 15, 2023.

23. On January 18, 2023, less than four weeks before the scheduled evidentiary hearings, DELCORA filed a Complaint for Declaratory Judgment with the Delaware County Court of Common Pleas requesting that the Court determine DELCORA's ability to lawfully proceed with the proposed transaction and alleging new facts and legal issues highly pertinent to Aqua's Application. Specifically, DELCORA has argued as follows:

- a. The Ordinance constitutes a final order by the County directing DELCORA not to comply with, enjoin DELCORA from, and prohibit DELCORA from taking any action in furtherance of the Transaction⁵

⁴ The ALJ initially scheduled telephonic hearings, but this initial designation was modified to in-person hearings on January 18, 2023.

⁵ DELCORA Complaint at 6.

- b. The Board therefore seeks this honorable Court's determination regarding the validity of DELCORA continuing to exist as a municipal authority after dissolution for purposes of operating a trust fund.⁶

24. In addition to the above legal arguments, DELCORA's Complaint also presents factual assertions relevant to the ongoing proceedings. These factual assertions include the following:

- a. DELCORA continues to operate as a municipal authority without the ability to operate within the [ordinary] *sic* course of business both under the APA and under the Ordinance.⁷
- b. As DELCORA continues to review issues regarding the Trust, DELCORA's Board of Directors is without statutory or caselaw guidance regarding the existence of the Trust under the MAA.⁸
- c. DELCORA intends the Trust to be a governmental entity, providing all protections offered by the MAA, including governmental immunity.⁹
- d. Univest resigned as Trustee of DELCORA's Rate Stabilization Trust. DELCORA has been unable to find a replacement trustee.¹⁰

25. Prior to this action being filed, DELCORA had maintained it has the legal right to proceed with the Transaction.¹¹ This prior testimony was reaffirmed by DELCORA in the remand proceeding.¹² It is significant that the individual verifying the facts in the DELCORA Complaint is DELCORA's Executive Director, the same individual who previously testified "[i]t is clear that DELCORA has the legal authority to transfer its assets."¹³

26. With DELCORA now raising substantial concerns regarding the legal and factual basis for proceeding with the Application, the parties to the Application docket would be unduly

⁶ *Id.* at 6.

⁷ *Id.* at 12.

⁸ *Id.* at 13.

⁹ *Id.* at 12.

¹⁰ *Id.*

¹¹ See, e.g. Aqua Statement No. 5.

¹² Aqua Statement No. 5-RRT at 2.

¹³ Aqua Statement No. 5 at 5.

prejudiced absent an opportunity to address the claims levied in the DELCORA Complaint through further discovery, testimony and hearings. The current procedural schedule does not provide a meaningful opportunity for discovery and testimony on these new developments.

27. Moreover, the matters raised by the DELCORA Complaint are not tangential, but critical to and inextricably tied to the facts underlying these proceedings on Aqua's Application. The proposed Trust and related rate stabilization payments have been offered as a primary public benefit of the proposed transaction. While the Commission recognized in its July 26 Order that judicial economy did not warrant a further stay of proceedings at that point in time, the present circumstances compel a different result. In the same July 26 Order, the Commission also advised that "[t]o the extent that rulings in other forums have some impact on this proceeding, the Commission will afford all parties notice and opportunities to be heard."¹⁴ The development of the Seller questioning the legal basis for the proposed transaction in state court requires a further stay of the proceedings in order to allow parties an opportunity to be heard on the new facts and legal questions raised by the Seller, as well as the eventual resolution of DELCORA's Complaint.

28. The Commission's regulations must be construed to secure the just, speedy, and inexpensive determination of every action or proceeding.¹⁵ It is antithetical to a just, speedy, and inexpensive resolution to compel parties, the Commission, and impacted ratepayers to expend significant costs and resources to litigate this case a second time when the Seller has determined that its ability to consummate the underlying transaction is now a legal question that must be resolved by Declaratory Judgment.

29. Accordingly, the Joint Movants request that the presiding ALJ exercise his authority under 52 Pa. Code § 5.483 to stay the current remand proceeding pending issuance of a

¹⁴ July 26 Order at 28.

¹⁵ 52 Pa. Code § 1.2(a).

Final Order on the DELCORA Complaint. Alternatively, and at a minimum, the Joint Movants request that the ALJ suspend the procedural schedule for at least 90 days, at which point the ALJ could hold a further prehearing conference for reassessment and appropriate modification of the schedule.

B. If Deemed Applicable, Analysis of the *Process Gas* Factors also Supports a Stay of the Remand Proceeding.

30. As discussed above, the Joint Movants do not believe the *Process Gas* analysis is relevant here, where the requested stay falls within the ALJ's and the Commission's powers to regulate an Application proceeding no longer subject to any statutory deadline.¹⁶ To the extent the ALJ determines otherwise, the Joint Movants alternatively aver that consideration of the *Process Gas* factors also supports a stay of the remand proceeding.

31. Pursuant to *Process Gas*, the Commission will grant a petition or motion for stay when:

- a. The petitioner makes a strong showing that he is likely to prevail on the merits;
- b. The petitioner has shown that without the requested relief, he will suffer irreparable injury;
- c. The issuance of a stay will not substantially harm other interested parties in the proceedings; and
- d. The issuance of a stay will not adversely affect the public interest.¹⁷

32. In this case, the Joint Movants request a stay due to the pending DELCORA Complaint. Admittedly, assessment of DELCORA's likelihood of success is complicated based on the novelty of the questions presented to the court and the fact-based nature of the claims related

¹⁶ 467 A.2d 805 (Pa. 1983).

¹⁷ *Petition of Cypress Creek Renewables, LLC for a Stay or Supersedeas of the Commission's Final Implementation Order Entered May 3, 2018*, 2018 Pa. PUC LEXIS 286, Docket No. M-2017-2631527 (Order entered Aug. 2, 2018) (citing *Process Gas Consumers Group*, 467 A.2d at 809-809).

to the APA, the County's Ordinance, and the Trust. However, DELCORA avers in the Complaint that it believes the act of filing the Complaint may expose it to substantial risk of litigation.¹⁸ It stands to reason that after expressing prior confidence in its ability to proceed with the proposed transaction, DELCORA would not reverse course and accept the risk of litigation with the buyer absent a strong likelihood of success on the merits of its claims that it cannot proceed in furtherance of the proposed transaction.

33. The potential for irreparable injury is even more clear. As the only incorporating municipality of DELCORA, the County has clear legal rights and a vested interest in the legality of DELCORA's obligations under the APA and the Trust. I&E, OCA and OSBA are also parties of record with vested interests in the proceeding. If the Joint Movants are forced to continue with hearings in the remand proceeding while the DELCORA Complaint remains pending, each party will suffer irreparable injury because the evidentiary record for this exceedingly complex proceeding would exclude consideration and examination of the claims made therein. As noted in the July 26 Order concerning the prior stay, "Aqua asserts that lifting the stay will allow the Commission to reopen the record and receive evidence that permits a full evaluation of the Application."¹⁹ The parties and the Commission cannot conduct the intended full evaluation if the legal basis and facts central to the selling party's ability to meet the terms of the APA and administer the Trust consistent with the Application remain subject to ongoing litigation brought by the Seller against the Buyer and the County.

34. Finally, issuance of a stay will not substantially harm other parties or adversely impact the public interest. As the ALJ and Commission are aware, Aqua voluntarily waived the 6-month review period generally applicable to Commission review of fair market value

¹⁸ DELCORA Complaint at 11.

¹⁹ July 26 Order at 28.

transactions under Section 1329 of the Public Utility Code. With regard to any concerns that a stay may impact the potential transaction, the APA specifically establishes that the Outside Date for Closing on the transaction shall be 60 days following the unappealable resolution of any litigation concerning the transaction, including applicable PUC proceedings.²⁰ Accordingly, the transacting parties would not be unduly prejudiced because the APA contemplates Closing to occur *after* any necessary litigated proceedings have concluded.

35. As for the public interest, judicial economy and administrative efficiency support the issuance of a stay. Waiting for resolution of DELCORA's Complaint will enable the parties to present the Commission with a comprehensive record on Aqua's Application without uncertainty regarding the pending legal claims challenging the legality of seller commitments offered in the Application. Accordingly, the issuance of a stay serves the public interest.

36. Pursuant to the *Process Gas* analysis, the Joint Movants request that the presiding ALJ exercise his authority under 52 Pa. Code § 5.483 to stay the current remand proceeding pending issuance of a Final Order on the DELCORA Complaint. Alternatively, and at minimum, the Joint Movants request that the ALJ suspend the procedural schedule for at least 90 days, at which point parties can convene for a further prehearing conference for reassessment and appropriate modification of the schedule.

²⁰ See APA at 8 (defining "Outside Date").

IV. CONCLUSION

WHEREFORE, the Joint Movants respectfully request that Your Honor grant the foregoing Motion for Stay and issue an Order staying the proceedings at PUC Docket No. A-2019-3015173 until the Delaware County Court of Common Pleas enters a Final Order on DELCORA's pending Complaint. If the proceeding is not stayed in its entirety, the Joint Movants respectfully request that Your Honor suspend the procedural schedule for at least 90 days and convene a further prehearing conference at that time to assess the status of the DELCORA Complaint and necessary schedule adjustments.

Additionally, the Joint Movants respectfully request that Your Honor direct that any answers to the Motion be filed by January 31, 2023, with an Order on the Motion issued by February 3, 2023, or as quickly as practicable thereafter in advance of the commencement of scheduled evidentiary hearings on February 14, 2023.

Respectfully submitted,



Adeolu A. Bakare (I.D. No. 208541)
Robert F. Young (I.D. No. 55816)
Kenneth R. Stark (I.D. No. 312945)
McNEES WALLACE & NURICK LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300
abakare@mcneeslaw.com
ryoung@mcneeslaw.com
kstark@mcneeslaw.com

*Counsel to the County of Delaware,
Pennsylvania*

Gina L. Miller (ID No. 313863)
Erika L. McLain (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

*Counsel to the Bureau of Investigation and
Enforcement*

IV. CONCLUSION

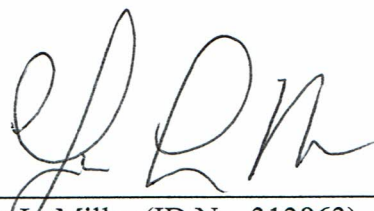
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Additionally, the Joint Movants respectfully request that Your Honor direct that any answers to the Motion be filed by January 31, 2023, with an Order on the Motion issued by February 3, 2023, or as quickly as practicable thereafter in advance of the commencement of scheduled evidentiary hearings on February 14, 2023.

Respectfully submitted,

Adeolu A. Bakare (I.D. No. 208541)
Robert F. Young (I.D. No. 55816)
Kenneth R. Stark (I.D. No. 312945)
McNEES WALLACE & NURICK LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300
abakare@mcneeslaw.com
ryoung@mcneeslaw.com
kstark@mcneeslaw.com

*Counsel to the County of Delaware,
Pennsylvania*



Gina L. Miller (ID No. 313863)
Erika L. McLain (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

*Counsel to the Bureau of Investigation and
Enforcement*



Christine Maloni Hoover (I.D. No. 50026)
Erin L. Gannon (I.D. No. 83487)
Harrison W. Breitman (I.D. No. 320580)
Office of Consumer Advocate
555 Walnut Street, Forum Place, 5th Floor
Harrisburg PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)
CHoover@paoca.org
EGannon@paoca.org
HBreitman@paoca.org

Counsel to the Office of Consumer Advocate

Steven C. Gray (I.D. No. 77538)
Office of Small Business Advocate
555 Walnut Street
Forum Place 1st Floor
Harrisburg, PA 17101
(717) 783-2525
(717) 783-2831 (fax)
sgray@pa.gov

*Counsel to the Office of Small Business
Advocate*

Dated: January 26, 2023

Christine Maloni Hoover (I.D. No. 50026
Erin L. Gannon (I.D. No. 83487)
Harrison W. Breitman (I.D. No. 320580)
Office of Consumer Advocate
555 Walnut Street, Forum Place, 5th Floor
Harrisburg PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)
CHoover@paoca.org
EGannon@paoca.org
HBreitman@paoca.org\

Counsel to the Office of Consumer Advocate

/s/ Steven C. Gray

Steven C. Gray (I.D. No. 77538)
Office of Small Business Advocate
555 Walnut Street
Forum Place 1st Floor
Harrisburg, PA 17101
(717) 783-2525
(717) 783-2831 (fax)
sgray@pa.gov

*Counsel to the Office of Small Business
Advocate*

Dated: January 26, 2023

Michael P. Clarke
I.D. No. 63378
Samantha L. Newell
I.D. No. 329712
Patrick F. Seymour
I.D. No. 307773
Rudolph Clarke, LLC
7 Neshaminy Interplex, Ste 200
Trevose, PA 19053
215-633-1890

Attorneys for Plaintiff

DELAWARE COUNTY REGIONAL WATER	:	IN THE COURT OF COMMON PLEAS
QUALITY CONTROL AUTHORITY	:	DELAWARE COUNTY,
PENNSYLVANIA	:	
Plaintiff	:	
v.	:	No.
COUNTY OF DELAWARE,	:	
PENNSYLVANIA	:	DECLARATORY JUDGEMENT
Defendant	:	
v.	:	
AQUA PENNSYLVANIA WASTE WATER, INC.	:	
Defendant	:	

COMPLAINT FOR DECLARATORY JUDGMENT

The Delaware County Regional Water Quality Control Authority, by and through its undersigned attorneys, files this Action for Declaratory Judgment against the County of Delaware and Aqua Pennsylvania Waste Water, Inc. seeking declaratory relief , and asserts as follows:

I. The Parties

1. The Delaware County Regional Water Quality Control Authority, (hereinafter “DELCORA”) is a municipal authority created under the Municipal Authorities Act of 1945 (now codified in the Municipal Authorities Act, 53 Pa.C.S. §5601 et seq., the “Authorities Act”) with administrative offices located at 100 East Fifth Street, Chester, Pennsylvania 19042.

2. The County of Delaware (hereinafter “County”) is a political subdivision of the Commonwealth of Pennsylvania with administrative offices located at Government Center, 226A, 201 W. Front Street, Media, Pennsylvania 19063.

3. Aqua Pennsylvania Waste Water Inc., (hereinafter “Aqua”) is a for-profit provider of wastewater utility service in Pennsylvania.

II. Facts and Procedural History

4. The facts regarding this transaction have been briefed at length in numerous other filings, news articles, and public forums. Therefore, the facts here shall be as concise as possible.

5. In 2019, DELCORA, facing possible financial concerns, engaged in discussions to sell its assets to Aqua.

6. Following negotiations, DELCORA and Aqua entered into an Asset Purchase Agreement dated September 17, 2019 and later amended on February 24, 2020 (collectively, the “APA”). The APA is attached hereto, incorporated herein by reference and marked as Exhibit A.

7. Under the APA, DELCORA agreed to sell and Aqua agreed to purchase substantially all of DELCORA’s assets. See Exhibit A.

8. The APA contains standard contract terms, which include those drafted to ensure that DELCORA and Aqua will work collaboratively to finalize the sale contemplated by the APA. See Exhibit A.

9. Under the APA, DELCORA is required to act reasonably in good faith to timely effectuate the purposes of the agreement and the consummation of the transaction. *See* Exhibit A, Sections 9.02; 10.03.

10. The APA further provides that the Agreement may be terminated, upon notice, if “any Governmental Authority issues an order, decree or ruling or taken any other action, in each case permanently restraining, enjoining or otherwise prohibiting the material transactions contemplated by this Agreement and such order, decree, ruling or other action becomes final and non-appealable; provided, however, that the Party seeking termination pursuant to this clause (b) is not in breach in any material respect of any of its representations, warranties, covenants, or agreements contained in this Agreement...” *See* Exhibit A, Section 14.01(b)

11. In addition to the APA, DELCORA entered into a Trust Agreement with Univest Bank and Trust Co., with the intention that sale proceeds would be placed into the trust and used to benefit the ratepayers. This Trust is known as the “DELCORA Rate Stabilization Trust.”

12. As a result of the proposed sale, Aqua filed an application seeking approval from the Pennsylvania Public Utility Commission (“PUC”).

13. On or about May 14, 2020, the County filed a complaint against DELCORA for numerous alleged violations of the Municipal Authorities Act (“MAA”). A copy of the May 14, 2020 Complaint is attached hereto, incorporated herein by reference and marked as Exhibit B.

14. The filing of the May 14, 2020 Complaint started an intensive series of litigation, resulting in numerous complaints, petitions, and injunctions.

15. On or about June 3, 2020, the County passed Ordinance 2020-4, directing and ordering the termination of DELCORA and authorizing all actions necessary to effectuate the

same ("Ordinance"). A copy of the Ordinance is attached hereto, incorporated herein by reference and marked as Exhibit C.

16. The Ordinance directs DECLORA to cooperate with the County in an orderly windup of DELCORA's operations. See Exhibit C.

17. The Honorable Barry C. Dozor of the Delaware County Court of Common Pleas issued an order on December 28, 2020 regarding numerous questions of law, which was appealed immediately by the County. The County appealed five questions of law. A copy of Judge Dozor's December 28, 2020 Order is attached hereto, incorporated herein by reference and marked as Exhibit D.

18. On or about March 3, 2022, the Commonwealth Court issued an order finding the County Ordinance terminating DELCORA to be valid and enforceable, yet remained silent on the other issues brought on appeal. A copy of the Commonwealth Court's March 3, 2022 Opinion is attached hereto, incorporated herein by reference and marked as Exhibit E.

19. Judge Dozor issued a final order on remand regarding all matters decided on the original May 14, 2020 order and subsequent filings on September 8, 2022. A copy of Judge Dozor's September 8, 2022 Order is attached hereto, incorporated herein by reference and marked as Exhibit F.

20. On or about November 3, 2022, the County appealed Judge Dozor's September 8, 2022 Order to the Commonwealth Court.

21. DELCORA, in the PUC proceedings, has been required to provide testimony regarding the sale.

22. On November 18, 2022, the County provided testimony by Dr. Monica Taylor, President of Delaware County Council regarding the status of the Ordinance terminating DELCORA. A copy of Dr. Taylor's testimony is attached hereto, incorporated herein by reference and marked as Exhibit G.

23. In her November 18, 2022 testimony, Dr. Monica Taylor stated:

"Because the civil litigation regarding the County Ordinance terminating DELCORA is still pending, I am advised by counsel that there remains substantial uncertainty concerning the Asset Purchase Agreement between Aqua WW and DELCORA.... Beyond the litigation involving the County's ordinance, the Receiver for the City of Chester has also filed suit against DELCORA.... [r]egardless of the outcome of these disputes, the County believes it would be imprudent to proceed with the termination process at this time."

24. In addition to Dr. Monica Taylor's testimony, on or about November 23, 2022, Aqua itself served Interrogatories on the County asking Dr. Monica Taylor, "With respect to page 6, lines 4-5 of your testimony, identify, describe and provide your understanding of the support or basis for the County having a right to consent or authorize the proposed transaction. Please explain and provide all Documents in support of your answer." A copy of Aqua's Interrogatories is attached hereto, incorporated herein by reference and marked as Exhibit H.

25. There are growing questions regarding the DELCORA Rate Stabilization Trust at the PUC proceedings.

26. DELCORA continues to receive questions regarding: (1) the amount of money that will be available to fund the trust and (2) the process of how the trust proceeds shall be used.

COUNT I
DECLARATORY JUDGMENT

DELCORA Is Entitled to Seek Declaratory Relief Under the Declaratory Judgments Act

27. Paragraphs 1 through 26 of the Complaint are incorporated herein by reference as if set forth in full.

28. DELCORA seeks Declaratory Judgment to settle two (2) matters of uncertainty and actual controversy which, if clarified, may substantially resolve the dispute between the Parties:

(A) Whether the County Ordinance is a final action prohibiting DELCORA from carrying out the material transactions of the APA; **and**

(B) In the event that DELCORA retains the ability to close on the transaction, whether DELCORA is permitted under the MAA to solely exist as a trust and maintain the protections of a municipal entity while serving as a trust.

29. Under Section 7533 of the Declaratory Judgments Act (the “Act”), **“Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.”** 42 Pa. C.S.A. § 7533 (emphasis added).

30. Pursuant to Section 7533 of the Act, DELCORA is eligible to seek declaratory relief regarding the questions arising under the County Ordinance, the APA and the MAA and as they relate to DELCORA's legal rights, status, relations and obligations to the County and Aqua.

31. "An action brought under the Declaratory Judgments Act must allege an interest by the party seeking relief which is direct, substantial and present, and must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one's legal rights." *Bowen v. Mount Joy Twp.*, 165 Pa. Cmwlth. 101, 108, 644 A.2d 818, 821 (1994).

32. "Where... the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and **indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.**" *Mid-Ctr. Cnty. Auth. v. Boggs Twp.*, 34 Pa. Cmwlth. 494, 500 (1978) (emphasis added).

33. DELCORA seeks to avoid unnecessary future litigation concerning the seeds of controversy and/or actual controversy that are present in this matter, which has already been the subject of numerous suits and protracted litigation.

34. DELCORA maintains that it cannot proceed with either the sale or the termination of the Authority in good faith without Court determination of numerous questions brought in this Complaint.

A. The County Ordinance is a Final, Non-Appealable Governmental Order

35. DELCORA is a municipal authority incorporated by the County and subject to the Municipality Authorities Act.

36. Dr. Monica Taylor, on behalf of the County, provided clear testimony indicating that the County will seek to enforce the ordinance when she stated, “[t]o the extent Mr. Packer’s language implies that the County has been delinquent in its implementation of the Ordinance, his language is inaccurate.”

37. The County has the ability under the MAA to dissolve DELCORA, thereby forcing its termination. 53 Pa. C.S. 5619.

38. As the Commonwealth Court held in the Chester Water Authority Trust case, “section 5622(a) of the MAA continues to vest a municipality... with the power to acquire and dispose of the assets of an authority ...” *In Re Chester Water Auth. Tr.*, 263 A.3d 689, 703 (Pa. Commw. Ct. 2021), *appeal granted sub nom., In re Chester Water Auth. Tr.*, 276 A.3d 203 (Pa. 2022).

39. County Ordinance 2020-4 terminates DELCORA and lists directives the Authority must take regarding dissolution. See Exhibit C.

40. Section 2.01 of the Ordinance states, “The Authority shall immediately terminate and cease any activity that is not consistent with the County’s directives contained herein and as required to effectuate its termination.”

41. The Ordinance also states in Section 3,

“The Authority is hereby **prohibited from taking any action or expending any money in connection with any action that is inconsistent with its termination.** The Authority shall not engage in **any conduct or expend any money, directly or indirectly, for any purpose of than accomplishing the directives and objectives of the County as set forth in this ordinance. Any**

expenditure of funds by the Authority that is contrary to the Directives and objectives of the County as set forth in this Ordinance shall be a violation of the restrictions on the expenditure of funds of the Authority under the Authorities Act, 53 Pa.C.S. §5612 and a violation of the specification of projects to be undertaken by the Authority under the Authorities Act, 53 Pa.C.S. §5607.” (Emphasis added).

42. Section 4.02 of the APA states “The Seller has all requisite power and authority to own, lease and operate the Acquired Assets and the System and has the power and authority to enter into this Agreement and to do all acts and things and execute and deliver all other documents as are required hereunder to be done, observed or performed by it in accordance with the terms hereof.” See Exhibit A.

43. However, in numerous conversations with Aqua, DELCORA has been repeatedly advised of its ongoing obligation to comply with, support, and assist in the closing of the Aqua-DELCORA transaction.

44. Indeed, Delaware County Court of Common Pleas Judge Barry Dozor observed in his December 28, 2020 Order that the Ordinance, “interferes [with] and implodes DELCORA’s ability and contractual obligations to perform contractual obligations to effectuate the sale...” See Exhibit D.

45. Until now, any judicial review of the Ordinance and the APA has been focused on the validity of each, rather than the impact that one may have on the other.

46. The Commonwealth Court and Common Pleas Court, while declaring the Ordinance valid, did not address the question of whether it is possible for DELCORA to fully

comply with the County Ordinance while also fully complying with any and all contractual obligations to Aqua simultaneously.

47. The Commonwealth Court and Common Pleas Courts both also failed to address **which obligation supersedes the other**. Resolution of this issue is required in order for DELCORA to proceed in fulfilling its obligation(s) to either party.

48. Absent resolution of this issue, DELCORA is required to proceed in the face of near-certain additional litigation from Aqua, the County, or both, requiring significant expenditure of public funds that may not otherwise be required.

49. Finally, both courts failed to view the Ordinance in relation to Section 14.01 of the APA which provides for termination of the Agreement in the event that “any Governmental Authority issues an order, decree, or ruling or taken any other action, in each case permanently restraining, enjoining or otherwise prohibiting the material transactions contemplated by this agreement and such order, decree, ruling or other actions becomes final and non-appealable.” See Exhibit A, Section 14.01.

50. The Ordinance plainly states that DELCORA is “prohibited from taking any action or expending any money in connection with any action that is inconsistent with its termination.”

51. Simply by fulfilling basic contractual obligations to Aqua, DELCORA is required to take actions and expend monies to support daily operations that are inconsistent with its termination, forcing DELCORA to continuously risk legal action.

52. Simply by filing this action, DELCORA faces potential litigation due to the APA cooperation clause. DELCORA is also currently unable to seek legal clarification without facing legal liability. DELCORA certainly cannot continue operating as it is in constant legal uncertainty.

53. “The Declaratory Judgments Act is remedial in nature and intended to provide relief from uncertainty and establish various legal relationships.” *Curtis v. Cleland*, 552 A.2d 316, (Pa. Commw. Ct. 1988).

54. DELCORA remains entirely uncertain which obligations DELCORA is required to fulfill and honor.

55. DELCORA is currently obligated under the APA with Aqua to continue to support and comply with any necessary steps to close this transaction, however, DELCORA, since incorporated by the County, must also comply with any official and valid County directives, including dissolution, if ordered pursuant to Section 5619 of the MAA. See Exhibit A, Section 9.02; 53 Pa.C.S. §5619.

56. DELCORA also remains uncertain whether this Ordinance is a final order or directive by the County, since the appeal period regarding the validity of the ordinance has passed.

57. DELCORA remains the only entity practically able to carry out the material transactions of the APA and to perform any “wind down” requirements as part of the termination of the Authority under the ordinance

58. “[I]mpossibility ... means not only strict impossibility but impracticability because of extreme and **unreasonable difficulty, expense, or loss involved.**” *Ellwood City Forge Corp. v. Fort Worth Heat Treating Co.*, 431 Pa. Super. 240, 249, (1994).

59. DELCORA continues to operate as a municipal authority without the ability to operate within the ordinance course of business both under the APA and under the Ordinance.

60. DELCORA continues to face unreasonable expenses due to ongoing litigation and incredibly difficulty when facing both termination, sale, and the need to continue operations.

61. Therefore, a Declaratory Judgment regarding this question is essential to DELCORA to avoid inevitable litigation.

62. The Ordinance constitutes a final order by the County directing DELCORA not to comply with, enjoin DELCORA from, and prohibit DELCORA from taking any action in furtherance of the Transaction.

B. The Municipality Authorities Act Does Not Clearly Allow For Trusts

63. DELCORA is subject to the MAA.

64. DELCORA, in anticipation of closing, secured a trustee, Univest, to receive and manage the sale proceeds, which are to be paid to DELCORA ratepayers as a rate stabilization. This Trust is known as the DELCORA Rate Stabilization Trust ("Trust").

65. Due to continuous litigation, and the three year period during which the Trust has remained unfunded, Univest, the Trustee, has resigned.

66. As a result of the resignation of Univest, DELCORA has been unable to find a replacement trustee, resulting in Univest petitioning the Orphans Court in Delaware County to find a replacement.

67. As DELCORA continues to review issues regarding the Trust, DELCORA's Board of Directors is without statutory or caselaw guidance regarding the existence of the Trust under the MAA.

68. Statutory interpretation is a question of law over which the standard of review is *de novo*, and the scope of review plenary. *See Commonwealth v. Kingston*, 143 A.3d 917, 921, (Pa. 2016).

69. "Only if a statute is unclear may a court embark upon the task of ascertaining the intent of the legislature by reviewing the necessity of the act, the object to be attained, circumstances under which it was enacted and the mischief to be remedied." *Coretsky v. Commissioners of Butler Twp.*, 555 A.2d 72, 74 (Pa. 1989).

70. The MAA outlines the specific purposes and contemplated projects of duly incorporated municipal authorities in Pennsylvania. 53 Pa. C.S. §5607.

71. Section 5607 of the MAA states, "Every authority ... shall be for the purposes of financing working capital; acquiring, holding, constructing, financing, improving, maintaining and operating, owning or leasing, either in the capacity of lessor or lessee, projects of the following kind and character and providing financing for insurance reserves..." 53 Pa.C.S. §5607.

72. Section 5619(b) regarding the conveyance of property after termination of an authority further states, "When an authority has finally paid and discharged all bonds issued and outstanding and the interest due on them and settled all other outstanding claims against it, the authority may convey all its property to the municipality or municipalities or, if the property is public school property, then to the school district for which the property was financed, and terminate its existence." 53 Pa.C.S. §5619(b).

73. The MAA does not expressly prohibit, enjoin, or ban an authority from participating in projects outside the contemplated scope. However, the statute is seemingly clear that the powers of an authority are enumerated within the plain language of statute. Section 5607(d) provides a list of the powers that authorities may exercise, which must be necessary or convenient for the carrying out of the purposes set forth in Section 5607.

74. The MAA does not expressly require that DELCORA turn over all sale proceeds to the County.

75. The MAA does not set forth a clear legal procedure regarding the proceeds of the sale.

76. DELCORA will cease to exist as a wastewater municipal authority after the closing of the sale under the APA or the enforcement of the Ordinance.

77. The County has asserted in numerous filings that DELCORA may not continue to operate as a trust under the MAA.

78. DELCORA has believed in the past that the Board could continue to exist post-dissolution of DELCORA, for the sole purpose and function of assisting with the administration of any remaining Trust funds.

79. The DELCORA Articles of Incorporation have been amended to allow for the Trust, yet the MAA remains unclear whether the Trust is a permitted project under the MAA.

80. Under the MAA, DELCORA, once dissolved, will not be able to exercise any power necessary for the carrying out of the purposes. For example, DELCORA cannot finance projects, make bylaws, appoint officers, or collect rates.

81. DELCORA intends the Trust to be a governmental entity, providing all protections offered by the MAA, including governmental immunity.

82. The Board therefore seeks this honorable Court's determination regarding the validity of DELCORA continuing to exist as a municipal authority after dissolution for purposes of operating a trust fund.

WHEREFORE, DELCORA respectfully requests that this Honorable Court grant the declaratory relief, including judicial determinations, as requested herein as well as any other relief the Court deems just and appropriate.

Respectfully submitted,

Dated: 1/18/2023

BY:

A handwritten signature in black ink, appearing to read "Michael P. Clarke", is written over a horizontal line.

Michael P. Clarke

VERIFICATION

The undersigned, Robert J. Willert, hereby states that he is the Executive Director of the Board of Directors of the Delaware County Regional Water Quality Control Authority ("DELCORA"), that he is authorized to make this Verification on behalf of DELCORA, and that the facts set forth in the foregoing Complaint for Declaratory Judgment are true and correct to the best of his information, knowledge and belief.

The undersigned understands that false statements herein are made subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.

Date: 1/18/2023