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February 2, 2023

VIA E-FILING

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

Re: Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102, 1329 and 507 of the Public Utility Code for approval of the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority; Docket No. A-2019-3015173; **ENERGY TRANSFER MARKETING & TERMINALS, L.P.'S (F/K/A SUNOCO PARTNERS MARKETING AND TERMINALS L.P.) ANSWER IN SUPPORT OF JOINT MOTION FOR STAY**

Dear Secretary Chiavetta:

Attached for filing with the Commission is Energy Transfer Marketing & Terminals, L.P.'s (f/k/a Sunoco Partners Marketing and Terminals L.P.) Answer in Support of Joint Motion for Stay in the above-referenced proceedings.

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

/s/ Whitney E. Snyder

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*Counsel for Energy Transfer Marketing & Terminals,
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WES/das
Enclosure

cc: Honorable F. Joseph Brady (fbrady@pa.gov)
Pamela McNeal (pmcneal@pa.gov)
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, inter alia, approval of the acquisition | : | |
| of the wastewater system assets of the | : | Docket No. A-2019-3015173 |
| Delaware County Regional Water Quality | : | |
| Control Authority | : | |
| | : | |

ENERGY TRANSFER MARKETING AND TERMINALS L.P.
ANSWER IN SUPPORT OF JOINT MOTION FOR STAY

Energy Transfer Marketing and Terminals L.P. (“Energy Transfer”) f/k/a Sunoco Partners Marketing and Terminals or SPMT, files this Answer in Support of the 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 (“Joint Movants”) for Stay of the Section 1329 Application of Aqua Pennsylvania Wastewater, Inc. (“Aqua”) for the Acquisition of Delaware County Regional Water Quality Control Authorities Wastewater System Assets (“DELCORA” or “Seller”) (“Joint Motion to Stay”) filed January 18, 2023.

I. INTRODUCTION

1. DELCORA’s Complaint for a Declaratory Order (“DELCORA Complaint”)¹ asks the Delaware County Court of Common Pleas to decide two questions imperative to, and a prerequisite of, moving forward with this Application proceeding – whether the Seller can carry out the asset purchase agreement (“APA”) that Aqua seeks to have approved; and whether the

¹ Joint Motion Appendix A.

Trust that Aqua has touted as the key benefit in the transaction can exist. These are legal questions the Commission lacks jurisdiction to resolve, but without resolution impede if not foreclose the Commission's ability to decide this case because these questions have transformed the Application into an unripe, uncertain, hypothetical scenario that neither the parties nor the Commission should waste further resources on at this time until those questions are finally decided.

2. As the Commission adroitly recognized in a previous acquisition case, it will refuse to waste its time, that of the parties, and the significant legal expenses of all: ***“Time should not be spent litigating hypothetical scenarios that are not yet ripe for review,”***² particularly where, as here, parties are entering for the second time the most resource intensive phases of litigation – hearing, briefing, decision, and exceptions. In step with that ruling, Your Honor should grant the Joint Motion and stay the proceeding.

II. ANSWER IN SUPPORT

A. The procedural history and Aqua's actions in this proceeding present a pattern of everchanging uncertainties, unripe proposals, and hypotheticals that parties have already been forced to litigate once. The parties and this Commission should not have to expend time and resources now on the most resource intensive phases of litigation (hearing, briefing, reply briefing, exceptions, and replies) where yet more uncertainties and unripe prerequisites to the transaction are now present that go to the basis of whether there exists a closable transaction that can or will occur. This proceeding -should be stayed immediately until Aqua and DELCORA can prove, as opposed to hypothesize, a matter that can be effectuated.

3. Aqua's Application here seeks the Commission's approval to acquire all of DELCORA's assets consistent with the APA pursuant to Sections 1102 and 1329 of the Public

² *NRG et al v. Duquesne Light Co.*, Docket No. C-2013-2390562 (Order entered May 7, 2015) (citing *Application of Exelon Corporation et al. for Certificates of Public Convenience*, 2009 WL 1912486, Docket Nos. A-2009-2093057 *et al.* (Order entered Jun. 25, 2009) (“*Application of Exelon*”) (Attached as Appendix A) (emphasis added)).

Utility Code (“Code”), approval of the APA with DELCORA pursuant to Section 507 of the Code, and approval of assignment to Aqua of various contracts between DELCORA and the municipalities that it serves pursuant to Section 507 of the Code. *See generally* Application.

4. From the beginning of this proceeding, Aqua has been asking the Commission to approve the APA and assignment of municipal contracts both of which contain uncertain and unresolved contractual terms. As Your Honor previously recognized, where contract terms remain unsettled, a contract cannot be determined to be in the public interest:

Pursuant to Section 507, essentially all the affirmative public benefits offered by Aqua in this transaction are dependent on the Commission’s approvals of the APA and assignment of contracts between various municipalities. As stated before, DELCORA’s authority to enter the APA and/or convey the system property it purports to convey and/or assign all the contracts it purports to assign is being litigated on multiple fronts. The ultimate results of that litigation may be that the alleged benefits of Aqua’s Application never materialize or change substantially, which in turn would alter our recommendation. The simple fact of the matter is we cannot recommend that a contract between two parties is in the public interest if the terms of the contract remain unsettled.

January 11, 2021 Recommended Decision at 22.

5. So too regarding uncertainty of municipal contracts for which Aqua failed to obtain agreement for assignment and lawsuits resulting therefrom.

[T]he ongoing Municipal lawsuits mean it is still uncertain what facilities/assets Aqua will be acquiring in this transaction. Without certainty of the facilities Aqua will acquire at closing, awarding a service territory may result in Aqua being obligated to serve areas where it would not have sufficient facilities to provide service and the creation of a competitive condition between Aqua and the entity that may own and/or operate the facilities Aqua is unable to obtain. As a result, the Municipal lawsuits prevent us from being able to issue any recommendation regarding whether this proposed Application is in the public interest.

January 11, 2021 Recommended Decision at 20.

6. So too regarding uncertainty surrounding the Trust, which Aqua has touted, if not exaggerated to the point of lacking credibility, as the key benefit of this transaction. When Your Honor recognized the Trust as a rate stabilization plan that was not attached as required to the Application for Commission approval, the lack of a rate stabilization plan was an issue that needed to be resolved before a public interest determination could be made. *See January 11, 2021 Recommended Decision* at 22, 26.

7. Ultimately, Your Honor held these uncertainties were fatal to approval of the transaction:

In this case, Aqua would have the Commission issue what is tantamount to a *hypothetical recommendation*, which we will not recommend. Between the *ongoing litigation and lack of a rate stabilization plan attachment*, there are simply too many outstanding issues that need to be resolved in order for the Commission to be able to analyze this Application and make an informed recommendation as to whether it is in the public interest. Accordingly, we recommend the Application be denied.

January 11, 2021 Recommended Decision at 26 (emphasis added).

8. After the Recommended Decision was issued, and recognizing the fatal uncertainties associated with the APA and the transaction, Aqua sought to glue the pieces of the transaction back together in a different form that resembles a teetering house of cards, which required additional evidentiary hearings. Specifically, Aqua submitted settlements with some municipalities with reversionary interests and changed significant aspects of the Trust. The Commission then rejected that extra-record solution and remanded. *March 2021 Remand Order* at 9-10 (municipal settlements), 14 (“Aqua in its Exception No. 5 and DELCORA in its Exception No. 2 indicate that they are withdrawing the request to include the customer assistance payments from the Trust on the Company’s bills, e.g., the bill discount proposal. Instead, they are now proposing an alternate approach of mailing checks directly to customers and offering information

sharing procedures to implement its new proposal. *See* Aqua Exc. at 22-23; DELCORA Exc. at 17-20. However, it is axiomatic that extra-record material included in Exceptions, but never introduced into the record of a proceeding, cannot form the basis of a Commission decision.”).

9. Thus, when the Commission reviewed the Recommended Decision, it was faced with a record that lacked evidence of the changed transaction and remanded the proceeding for further evidence on these issues. *March 2021 Remand Order* at 14-15.

10. The Commission expressly recognized and agreed with Your Honor’s concerns regarding hypotheticals when remanding the proceeding:

We acknowledge the ALJs’ prior concerns about the outstanding issues present at the close of the evidentiary record and the concerns about issuing what would be tantamount to a hypothetical recommendation. *See* R.D. at 26. By directing the reopening of the record and remanding the proceeding, we are affording the Parties the opportunity to present appropriate evidence as deemed necessary in light of the recent developments so as to permit a full evaluation of the Application pursuant to Sections 1102, 1329, and 507 of the Code.

March 2021 Remand Order at n.7 (emphasis added).

11. On Remand, Your Honor *sua sponte* issued a stay of proceedings pending the outcome of the County lawsuit on appeal in the Commonwealth Court concerning the legality, enforceability, and integrity of the APA and funding of the Rate Stabilization Fund Trust, stating: “if it is determined that the APA is illegal and unenforceable, the entire Application becomes moot.” *April 16, 2021 Stay Order* at 2.

12. On April 27, 2021, Aqua filed for interlocutory review of the stay.

13. *The Commission did not act for over a year*; it waited to lift the stay until July 26 2022, *after* the County’s lawsuit for which the stay was issued was finally decided. July 26, 2022 Order Lifting Stay at 27. The Commission held: ***“To the extent that rulings in other forum have some impact on this proceeding, the Commission will afford all parties notice and opportunity to be heard.”*** July 26, 2022 Order Lifting Stay at 28 (emphasis added).

14. On remand, Aqua continued to advocate for accelerating and limiting of the issues in this remand proceeding,³ all the while having failed to resolve with certainty the same issues creating hypothetical circumstances prior to the remand. The uncontroverted evidence on remand so far shows:

- Approximately five municipal contracts with reversionary interests remain unresolved,⁴ leaving uncertain and hypothetical which assets Aqua will be able to acquire and thus the rate base value of the system; this includes challenges by the City of Chester, which has filed a Complaint that remains outstanding against DELCORA regarding its reversionary interest⁵ and also filed for bankruptcy.⁶ The reversionary assets account for a significant amount of the customers to be purchased in this transaction and thus a substantial value of the property to be acquired.⁷
- The prior trustee has resigned and initiated a legal proceeding for appointment of a new trustee.⁸

³ Aqua August 8, 2022 Prehearing Conference Memo at 4-7.

⁴ See Aqua Response to SPMT-AQUA-V-8 marked as SPMT Exhibit HJ-1RDT at 4-5.

⁵ See *Complaint of Michael Doweary, the Receiver for the City of Chester* dated August 17, 2022, marked as SPMT Exhibit HJ-1RDT at 57-81.

⁶ Bankruptcy Filing Notice *In re: City of Chester* marked as I&E Exhibit 1-RT Schedule 6.

⁷ Mr. Woods estimates the value of the potentially reverting systems to be approximately \$106.6 million. Aqua witness Mr. Walker values these assets \$60-\$75 million. SPMT St. No. 2-RSRT at 15.

⁸ Aqua St. No. 5-RRT, R. Willert Remand Rebuttal at 7:1-5.

15. Now, after surrebuttal has been submitted, which was the last opportunity for non-Applicant parties to present affirmative evidence under the current procedural schedule, the DELCORA Complaint injects yet more uncertainty and hypothetical scenarios. This uncertainty cannot be characterized as tangential but goes to the core of the proposed transaction – whether the Seller has the legal right to consummate the material transactions of the Application, including the right to sell assets, and the right to establish a Trust. The uncertainty will not be dispelled until a final unappealable judicial declaration is issued. These are the key provisions of the Application and APA, and a Commission decision made absent a final judicial determination regarding DELCORA’s rights and duties would have to navigate a complex decision tree of hypothetical scenarios, forcing parties to litigate situations that may never come to fruition *for yet a second time*.

B. The Commission has ruled that parties have a right to be heard regarding impacts of other litigation on this proceeding and that parties should not be forced to litigate hypothetical scenarios. To accommodate both these rulings, a stay is appropriate so as not to further waste resources of the parties, including public entities such as DELCORA, and the Commission.

16. The Commission guaranteed the parties the right to present evidence on the impacts of litigation in other forums on the proceeding, the Application, and the APA. *July 2022 Order Lifting Stay* at 28 (“To the extent that rulings in other forums have some impact on this proceeding, the Commission will afford all parties notice and opportunity to be heard.”); *March 2021 Remand Order* at n.7. (“By directing the reopening of the record and remanding the proceeding, we are affording the Parties the opportunity to present appropriate evidence as deemed necessary in light of the recent developments so as to permit a full evaluation of the Application pursuant to Sections 1102, 1329, and 507 of the Code.”).

17. DELCORA, the Seller, has now initiated a Declaratory Complaint proceeding in another forum and as discussed at length above, without rulings on the declarations DELCORA seeks, the material terms of the APA and the Trust are now hypothetical.

18. The Commission has recognized Your Honor's concerns with producing a ruling based on hypothetical scenarios in this proceeding. *March 30, 2021 Remand Order* at n. 7 ("We acknowledge the ALJs' prior concerns about the outstanding issues present at the close of the evidentiary record and the concerns about issuing what would be tantamount to a hypothetical recommendation.").

19. The Commission has ruled in similar circumstances that where, as here, a utility is seeking permission to acquire assets pursuant to a transaction but the terms of the proposed transaction are unknown and speculative, Commission action of the application cannot move forward. Specifically, in *Application of Exelon*, Exelon sought Commission approval to acquire utilities through either of two scenarios, one of those scenarios being through an agreement whose terms were unknown. The Commission stated: "We do not believe the Parties and the ALJ should be required to spend scarce public and private resources litigating hypothetical scenarios." *Id.* The Commission held that the uncertain, hypothetical scenario the Applicant proposed would not be part of the proceeding. *Id.*

20. Here, the DELCORA Complaint shows the entire APA is now hypothetical because DELCORA needs the courts to rule on whether it can legally carry out the material terms of the APA. DELCORA Complaint at ¶ 28. DELCORA further pleads that the APA may already be terminated pursuant to Section 14.01 of the APA. DELCORA Complaint at ¶ 49. DELCORA also questions whether it can legally exist solely as a trust, which is a key term of the transaction. *See* DELCORA Complaint at ¶ 28.

21. A stay should be issued until these key questions are finally resolved by the courts so that the parties in this proceeding are not forced to litigate hypothetical scenarios due to the unknown circumstances surrounding the APA and DELCORA's rights and duties.

22. Moreover, the DELCORA Complaint seeks a ruling on whether DELCORA can take the most basic steps essential to the transaction and therefore PUC approval, such as expending funds for the PUC litigation (attorney and witness fees). *See, e.g.,* DELCORA Complaint at ¶¶ 51, 54-55.

23. DELCORA further pleads that it "faces unreasonable expenses due to ongoing litigation and incredibl[e] [sic] difficulty when facing both termination, sale, and the need to continue operations." DELCORA Complaint at ¶ 60.

24. Thus, a stay is not necessary merely for judicial efficiency, but also for fundamental fairness and expense to parties funded by the public. This litigation has already resulted in great expense of public funds. DELCORA's funds in particular should not continue to be expended on this litigation particularly because the DELCORA Complaint pleads expenditure of those funds may be illegal. The proceeding should be stayed until the status of DELCORA and its rights and duties with respect to the APA and the Trust are ruled upon by the Delaware County Court of Common Pleas.

CONCLUSION

WHEREFORE, Energy Transfer respectfully requests Your Honor grant the Joint Motion to Stay and issue an Order staying the proceedings until a final unappealable order is issued in the declaratory judgment action DELCORA has filed in the Delaware County Court of Common Pleas. In the alternative, the Commission should 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.

Respectfully submitted,

/s/ Whitney E. Snyder

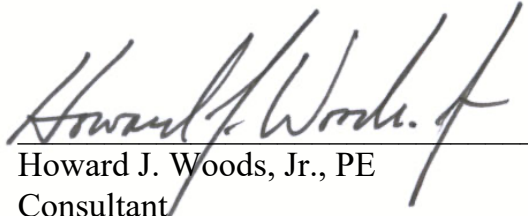
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Dated: February 2, 2023

*Attorneys for
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VERIFICATION

I, Howard J. Woods, Jr., PE of Howard J. Woods Jr. & Associates, L.L.C., on behalf of Energy Transfer Marketing and Terminals, hereby state that the facts set forth in the foregoing documents are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing in this matter. This verification is made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

A handwritten signature in dark ink, appearing to read "Howard J. Woods, Jr.", written over a horizontal line.

Howard J. Woods, Jr., PE
Consultant
General Manager
Howard J. Woods Jr. & Associates, L.L.C.

Dated: 2 February 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the persons listed below in accordance with the requirements of § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ONLY

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