**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania :

Wastewater, Inc. Pursuant to Sections :

1102, 1329 and 507 of the Public Utility :

Code for Approval of its Acquisition of : A-2019-3015173

the Wastewater System Assets of the :

Delaware County Regional Water :

Quality Control Authority :

**INTERIM ORDER GRANTING JOINT MOTION FOR STAY**

Abbreviated History

This matter concerns the Application of Aqua Pennsylvania Wastewater, Inc. (Aqua or Company) filed on March 3, 2020, pursuant to Sections 1102, 1329 and 507 of the Public Utility Code (Code), 66 Pa. C.S. §§ 1102, 1329 and 507 (Application). In its Application, Aqua requested the issuance of an Order and Certificates of Public Convenience for the: (1) approval of the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority (DELCORA) situated within all or part of 49 municipalities within portions of Chester and Delaware Counties, Pennsylvania; (2) approval of the right of Aqua to begin to offer, render, furnish and supply wastewater service to the public in portions of Delaware County and Chester County, Pennsylvania; and (3) assignments of 163 municipal contracts, between Aqua and DELCORA, pursuant to Section 507 of the Code, approval of the Asset Purchase Agreement (APA), and approval of the terms of a Memorandum of Understanding (MOU) it has entered with DELCORA. In its Application, Aqua also requested, pursuant to Section 1329(c)(2), the approval of the Pennsylvania Public Utility Commission (Commission) of a ratemaking rate base value of the assets to be acquired by Aqua in the amount of $276,500,000. 66 Pa. C.S. § 1329(c)(2).

Currently, the active parties of record are Aqua, DELCORA, the County of Delaware, Pennsylvania (Delaware County), the Bureau of Investigation and Enforcement (I&E), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), and Energy Transfer Marketing and Terminals L.P. (Energy Transfer) f/k/a Sunoco Partners Marketing and Terminals or SPMT.

On or about May 14, 2020, Delaware 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") that was ultimately appealed to the Commonwealth Court of Pennsylvania.

 On January 12, 2021, a Recommended Decision was issued that recommended the denial of the Application because of Aqua’s failure to meet its burden of proof.

On March 3, 2022, the Commonwealth Court of Pennsylvania issued a final Order on the Delaware County Complaint against DELCORA.

On March 30, 2021, the Commission issued its Opinion and Order (March 30 Order) which vacated the Recommended Decision and remanded the matter to OALJ for such further proceedings as deemed necessary and the issuance of a Recommended Decision on Remand.

On April 16, 2021, I issued an Order Staying the Proceedings.

On April 27, 2021, Aqua filed its Petition for Interlocutory Review of Order Staying Proceeding and Answer to Material Question, seeking a lift of the stay of proceeding.

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

On October 20, 2022, I issued an Interim Order setting forth, *inter alia*, the following schedule:

**Subject Date**

Direct Testimony August 22, 2022

Supplemental Direct Testimony October 21, 2022

Telephonic Public Input Hearings November 17, 2022; 1pm and 6pm

Non-Company Direct Testimony November 18, 2022

Rebuttal Testimony December 16, 2022

Surrebuttal Testimony January 13, 2023

Written Joinder February 8, 2023

Hearings February 14-15, 2023

Close of Record February 15, 2023

Main Briefs Due March 13, 2023

Reply Briefs Due March 24, 2023

On January 18, 2023, DELCORA filed a Complaint for Declaratory Judgment with the Delaware County Court of Common Pleas (the "DELCORA Complaint") naming both Delaware County and Aqua as Defendants.

On January 26, 2023, Delaware County, I&E, the OCA, and the OSBA (collectively “Joint Movants”) filed a Joint Motion for Stay pursuant to DELCORA’s Complaint.

On February 2, 2023, Energy Transfer filed an Answer in Support of the Joint Motion for Stay and Aqua filed an Answer in Opposition to the Joint Motion for Stay.

DELCORA did not file an Answer to the Joint Motion for Stay.

On February 3, 2023, the Receiver for the City of Chester filed with the Bankruptcy Court for the Eastern District of Pennsylvania a Motion of Debtor Pursuant to Section 362 of the Bankruptcy Code for Entry of an Order Enforcing the Automatic Stay of Proceeding Pending Before the Pennsylvania Public Utilities [sic] Commission ("Motion to Enforce Stay”).

Discussion

In this case, Aqua’s Application seeks Commission approval to acquire all of DELCORA’s assets consistent with the APA pursuant to Sections 1102 and 1329 of the Code as well as approval of the APA with DELCORA pursuant to Section 507 of the Code. Aqua also requested approval to apply disbursements from the DELCORA Rate Stabilization Trust Agreement ("Trust") to customers acquired from DELCORA through Aqua's billing process.

On January 18, 2023, DELCORA filed a Complaint for Declaratory Judgment with the Delaware County Court of Common Pleas naming Delaware 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.

Joint Movants’ Position

The Joint Movants state that DELCORA’s Complaint asks the Delaware County Court of Common Pleas to determine DELCORA's ability to lawfully proceed with the APA and whether DELCORA can continue to exist as a municipal authority after dissolution for purposes of operating a trust fund. The Joint Movants argue that concerns raised in DELCORA’s Complaint regarding the legal and factual basis for proceeding with the Application would unduly prejudice them absent an opportunity to address those concerns through further discovery, testimony, and hearings. They further argue that the current procedural schedule does not provide a meaningful opportunity for discovery and testimony on these new developments.

The Joint Movants also argue that the matters raised by the DELCORA Complaint are not tangential, but critical to and inextricably tied to the facts underlying these Application proceedings. The Joint Movants pointed out that the Commission recognized in its July 26, 2022 Order Lifting Stay that while judicial economy did not warrant a further stay of proceedings at that point in time, 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." July 26, 2022 Commission Order Lifting Stay. Accordingly, the Joint Movants argue that the development of DELCORA’s 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 DELCORA and/or the resolution of DELCORA's Complaint.

 The Joint Movants conclude that 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 (DELCORA) has determined that its ability to consummate the underlying transaction is now a legal question that must be resolved by Declaratory Judgment in another court.

Energy Transfer’s Position

In support of the Joint Motion for Stay, Energy Transfer asserts that 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. Energy Transfer argues that where contract terms remain unsettled, a contract cannot be determined to be in the public interest.

Like the Joint Movants, Energy Transfer argues the DELCORA Complaint injects uncertainty and hypothetical scenarios into Aqua’s Application that 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. Energy Transfer argues that this uncertainty will not be dispelled until a final unappealable judicial declaration is issued. Further, Energy Transfer asserts that the DELCORA Complaint involves 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.

Energy Transfer argues that 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. Energy Transfer also points out that the DELCORA Complaint pleads that the APA may already be terminated pursuant to Section 14.01 of the APA, while also questioning whether it can legally exist solely as a trust, which is a key term of the transaction.

Energy Transfer also points out that 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).

Accordingly, Energy Transfer concludes that a stay is necessary for judicial efficiency, and also for fundamental fairness and expense to parties funded by the public. Energy Transfer argues that DELCORA’s funds, in particular, should not continue to be expended on this litigation given the fact that the DELCORA Complaint pleads expenditure of those funds may be illegal. Energy Transfer requests that the proceeding 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.

Aqua’s Position

In Its Answer, Aqua argues that in the instant proceeding before the Commission, the parties have already been afforded an extensive opportunity to address every aspect of the proposed transaction, including details of potential ratemaking and at some point, the litigation process should end, particularly in a case involving Section 1329 of the Code where the General Assembly has indicated its preference for such proceedings to be completed in six-months.

The remainder of Aqua’s Answer consists of, and is based upon, Aqua’s own interpretation of the Commonwealth Court’s March 3, 2022, Decision and its effects and consequences on the APA and Trust. Aqua argues that based on *its* interpretation of the Commonwealth Court decision, DELCORA’s Complaint has no impact on this current Application proceeding because it is without merit. Herein lies the critical issue that I will address in my disposition below.

Bankruptcy Petition

On February 3, 2023, the Receiver for the City of Chester filed with the Bankruptcy Court for the Eastern District of Pennsylvania a Motion of Debtor Pursuant to Section 362 of the Bankruptcy Code For Entry of an Order Enforcing the Automatic Stay of Proceeding Pending Before the Pennsylvania Public Utilities [sic] Commission (Motion to Enforce Stay).[[1]](#footnote-1)

The Motion to Enforce Stay seeks for the Bankruptcy Court to enforce the automatic stay that accompanies the Receiver’s bankruptcy filing pursuant to 11 U.S.C. §§ 362(a)(3) and 901, to stay this Application proceeding before the Commission. In the bankruptcy proceeding, the City of Chester asserts that it has an unresolved reversionary interest in the same DELCORA assets which Aqua proposes to acquire in this Application proceeding.

The Motion proposes that all responses be filed by February 17, 2023 and that a hearing on the motion be scheduled on February 27, 2023 before the presiding bankruptcy judge.

Disposition

Section 5.483(a) of the Commission’s regulations provides Presiding Officers the authority to regulate the course of a proceeding. 52 Pa.Code § 5.483(a). Section 1.2 provides that the Commission’s rules shall be “liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding.” 52 Pa.Code § 1.2(a).

First and foremost, a bankruptcy petition filed under either Sections 301, 302 or 303 of the United States Bankruptcy Code will operate as a stay, applicable to all entities, of any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate See 11 U.S.C.S. §362(a)(3). As a result, this matter before the Commission may be stayed by operation of federal law pending resolution of the City of Chester’s bankruptcy petition. Thus, at the very least, it would be imprudent to continue with this Application proceeding until the Bankruptcy Court has ruled on the City of Chester’s Motion for Stay.

Second, it must be recognized what gave rise to the current Joint Motion for Stay in this Application proceeding. The seller of assets at issue, DELCORA, filed a Complaint in the Court of Common Pleas against the buyer of those assets, Aqua, seeking declaratory judgement regarding the very contracts, the APA and Trust, being used to convey those assets in this Application proceeding. I do not see how it is possible to determine if a contract is in the public interest if the two principals of the contract, the Seller and Buyer, do not even agree on what that contract says or means.

Moreover, based on DELCORA’s Complaint *against* Aqua, it is clear the two essential parties to the Application proceeding have a difference of opinion on the meaning of the Commonwealth Court’s Opinion and its effect on the very APA and Trust that the Commission is being tasked with determining are in the public interest or not. The Commission is not the proper forum to decide whose interpretation is correct. Not granting a stay would be akin to choosing Aqua’s interpretation over DELCORA’s interpretation, which I will not do.

In fact, a clear demonstration of the uncertainty created by DELCORA’s Complaint can be found in Aqua’s Answer itself. First, Aqua states “the basic structure of the Transaction has *not* been impacted at all by [DELCORA’s Complaint].” Aqua Answer at ¶ 9 (emphasis original). However, Aqua later directly contradicts this argument by stating “it is impossible to leap to any conclusion about the impact of [DELCORA’s Complaint] on this proceeding, especially since the Complaint case has just been initiated.” Aqua Answer at ¶ 30. One cannot make a conclusion about the impact of the Complaint and then say it is impossible to make any conclusions about the impact of the Complaint.

The APA and Trust need to be settled and agreed among both buyer and seller. That way, all other interested parties will have a fair opportunity to evaluate the Application and argue their positions. Only then will the Commission be able to examine all the evidence and make a recommendation whether the Application is in the public interest. It would be unfair to all parties to move forward before Aqua and DELCORA are in agreement first. As was stated previously, “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.

Finally, throughout these proceedings and in its Answer, Aqua continues to mention that the General Assembly has indicated its preference for Section 1329 proceedings to be completed in six-months. While this is generally true, I believe the General Assembly envisioned the parties working together when it created the six-month time frame. In fact, Section 1329 begins: “*Upon agreement by both the acquiring public utility or entity and the selling utility*, the following procedure shall be used…” 66 Pa.C.S. § 1329(a)(emphasis added). Here, as discussed above, there clearly is *disagreement* between the acquiring and selling utilities. The six-month time frame contained in Section 1329 was meant to be used as a tool to facilitate agreements between parties, not as a weapon to force an agreement upon parties.

Based on the foregoing, the Joint Motion for Stay shall be granted. It would be unfair to compel the parties, the Commission, and impacted ratepayers to expense significant costs and resources to continue to litigate this case when: (1) there is an outstanding motion for stay in Federal Bankruptcy Court; and (2) the seller has determined that its ability to consummate the underlying transaction is now a legal question that must be resolved by declaratory judgment in the Court of Common Pleas. Therefore, pursuant to the ordering paragraphs below, the Application will be stayed pending final unappealable decisions by: (1) the Bankruptcy Court for the Eastern District of Pennsylvania on the Motion to Enforce Stay; and (2) the Delaware County Court of Common Pleas on DELCORA’s Complaint for Declaratory Judgement.

THEREFORE;

IT IS ORDERED:

1. That the Application of Aqua Pennsylvania Wastewater, Inc. at Docket No. A-2019-3015173, is stayed pending a final unappealable decision in the Bankruptcy Court for the Eastern District of Pennsylvania on the Motion to Enforce Stay (Case No. 22-13032).
2. That the Application of Aqua Pennsylvania Wastewater, Inc. at Docket No. A-2019-3015173 is also stayed pending a final unappealable decision in the Delaware County Court of Common Pleas on DELCORA’s Complaint for Declaratory Judgement.
3. That the hearings scheduled for February 14-15, 2023 are cancelled.
4. That the Joint Movants, Energy Transfer, Aqua, and DELCORA shall file and serve written status reports with the presiding officer, parties of record, and the Commission’s Secretary every ninety (90) days from the date of this order until the stay has been lifted.

Date: February 6, 2023 /s/

 F. Joseph Brady

 Administrative Law Judge

**A-2019-3015173 - APPLICATION OF AQUA PENNSYLVANIA WASTEWATER INC PURSUANT TO SECTIONS 507,1102 AND 1329 OF THE PUBLIC UTILITY CODE
FOR APPROVAL OF ITS ACQUISITION OF THE WASTEWATER SYSTEM ASSETS
OF THE DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL AUTHORITY**

**Revised: January 6, 2023**

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1. *See In re: City of Chester, Pennsylvania*, Case No. 22-13032 (U.S. Bankruptcy Ct. for the Eastern Dist. Of PA.) [↑](#footnote-ref-1)