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December 14, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
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; **SUNOCO PARTNERS MARKETING & TERMINALS, L.P./ENERGY TRANSFER'S REPLY BRIEF (PUBLIC VERSION)**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is Sunoco Partners Marketing & Terminals, L.P./Energy Transfer's ("SPMT") Reply Brief (Public Version) in the above-captioned matter. Please note that the Highly Confidential version of SPMT's Reply Brief will be filed under separate cover.

Should you have any questions or comments, please feel free to contact me directly.

Very truly yours,

/s/ Kevin J. McKeon

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KJM/das
Enclosures
cc: Honorable Angela T. Jones (via email angeljones@pa.gov)
Honorable Charles E. Rainey, Jr. (via email crainey@pa.gov)
Per Certificate of Service (letter and certificate of service only)

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the Surrebuttal Testimony of Sunoco Partners Marketing & Terminals, L.P./Energy Transfer in the manner and upon the persons listed below:

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Dated: December 14, 2020

PUBLIC VERSION

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 the acquisition by Aqua of the wastewater system assets of the Delaware County Regional Water Quality Control Authority	:	Docket No. A-2019-3015173

REPLY BRIEF OF SUNOCO PARTNERS MARKETING & TERMINALS, L.P.

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[SPMT is not re-addressing this topic in this Reply Brief]

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[SPMT is not re-addressing this topic in this Reply Brief]

IV. SUMMARY OF REPLY ARGUMENT

This Reply Brief is submitted on behalf of Sunoco Partners Marketing & Terminals, L.P. (SPMT) to address three key failings in Aqua's Application that compel its denial under Sections 1102 and 1103 of the Public Utility Code. Aqua must prove substantial affirmative public benefits, *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825, 828 (Pa. 1972) (*City of York*); it has not. Aqua must show that any negative rate impact "is outweighed by the other positive factors." *McCloskey v. Pennsylvania Public Utility Commission*, 195 A.3d 1055, 1067 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*); it has not. Aqua must demonstrate that a grant of its Application is "necessary or proper for the service, accommodation, convenience, or safety of the public," 66 Pa. C.S. § 1103(a), taking into account the significant adverse impact such a grant would have on the ability of DELCORA's customers to comply with applicable environmental requirements; it has not. To be sure, the Application is also plagued by many other material detriments that will fall on parties other than Aqua and hangs on the thread of

hoped-for but as-yet unreceived approvals from other fora, as addressed in SPMT's Main Brief, and in the testimony and briefing of the numerous other parties who oppose a grant of the Application. For all of these reasons, Your Honors and the Commission should deny Aqua's Application.

As to alleged benefits, Aqua has offered platitudes about efficiencies that theoretically accrue to operations of greater size and scale, but has provided no proof beyond the hope that its acquisition of the much larger DELCORA wastewater system will produce benefits for Aqua that DELCORA already enjoys without Aqua's ownership.

As to rate impacts, the present record establishes that rates will rise precipitously under Aqua's ownership of DELCORA's wastewater system, and that the rate stabilization Trust that DELCORA proposes to fund to offset those increases will provide little or no rate relief. The DELCORA system's revenue requirement under Aqua ownership will be ***at least $36 to $44 million per year more than under DELCORA's ownership*** – money that will need to come from the DELCORA system customers. *See infra*, Section V.4.B (i). DELCORA and Aqua have double counted funds that must be paid out of the Trust before the Trust could provide rate relief, and failed to account for DELCORA's nonwaivable obligation under Presidential Executive Order 12803 (E.O.12803) to apply the proceeds of the transaction to other purposes before any of the money from the sale can find its way into the Trust. Assuming the Trust is not dead on arrival because of legal challenges to its creation, it will never be funded at the levels claimed.

As to DELCORA's customers' **[Begin HC]** [redacted]

[redacted]

[End HC]

V. ARGUMENT

A. Section 1329

[SPMT is not re-addressing this topic in this Reply Brief]

1. Introduction

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B. Section 1102/1103 Standards – Public Interest

1. Section 1102/1103 - Legal Principles

[SPMT is not re-addressing this topic in this reply brief]

2. Fitness

[SPMT is not addressing this topic in this reply brief]

3. Affirmative Public Benefits

Aqua must "not only show that no harm will come from the transaction" but also that "substantial affirmative benefits" will flow from it. *McCloskey*, 195 A.3d at 1064, *citing City of York*, 295 A.2d at 828. Aqua has failed to do so. As set forth in the "Alleged Benefit vs. Reality" table in SPMT's Main Brief at 14-18, the transaction provides no net "substantial affirmative benefits." The analysis summarized in that table is fully supported in the other substantive sections of SPMT's Main Brief and in this Reply Brief. Aqua's efforts in its Main Brief to salvage alleged benefits from the wreckage of its botched Application, and to demonstrate that those alleged benefits provide any meaningful offset to the steep rate increases and other permanent harms that will be foisted on DELCORA system customers under Aqua ownership, fall flat. The Trust corpus that Aqua and DELCORA tout as the transaction's primary benefit will be exhausted before the civil litigation over the Trust's right to exist is even concluded – the Trust cannot stabilize Aqua's rates with funds it will not have.

The proffered reason for the acquisition – DELCORA's need to manage the challenge of environmental regulation by leaning on the resources and environmental expertise of Aqua – has been discredited on this record. The evidence shows that it actually is easier and less costly for DELCORA - a well-managed, solvent public entity that is much larger than Aqua's modestly sized wastewater business – to fund compliance with the environmental laws than it is for a private entity such as Aqua. *See infra* Section V.B.5 (ii) (discussing the combined sewer overflow (CSO) issue). Apart from different regulatory obligations that apply to a publicly owned treatment works (POTW) than a private wastewater treatment system, DELCORA's funding advantage is both empirical and easy to understand—Aqua is subject to state and federal taxes and has less access to grants and less expensive financing via bonds than DELCORA enjoys. The evidence also reveals

[Begin HC] [redacted]

[redacted] **[End HC]**

This Application has tested the limits of the regionalization rationale for wastewater system acquisitions. Regionalization is a salutary concept in the abstract and as applied to many other acquisitions of small struggling wastewater systems. But it cannot hold the weight of Aqua's planned absorption of the much larger DELCORA system that is financially healthy, well managed, and able to continue to provide quality service to its customers at rates far lower than Aqua's for decades to come. The Commission should be leery of Aqua's attempt to utilize the Commission's considerable power to "fix" the DELCORA wastewater system that, as shown by a wealth of evidence from multiple parties, shows no semblance of being broken. There are no "substantial affirmative benefits" to be had from a grant of this Application.

4. Public Interest

a. Common Pleas Litigation

[SPMT is not re-addressing this topic in this reply brief]

b. Rate Stabilization Trust[1]

[1] SPMT has addressed the "impact on rates" issue as part of the discussion of the proposed rate stabilization trust because Aqua concedes that the primary benefit of the transaction is the possibility that the rate stabilization trust will be able to offset the steep increase in rates that DELCORA's customers will suffer under Aqua ownership. Aqua Statement No. 2 at 13:16-17 (listing trust as first among transaction benefits); *see* Aqua Statement No. 5 at 11:12-14 (Trust is the "primary benefit" of the transaction). Aqua in its Main Brief separates the two issues,

In deciding whether this transaction results in a "substantial public benefit," the Commission must address its impact on rates. *McCloskey*, 195 A.3d at 1066 ("Because *City of York* requires the impact on rates to be considered, the Commission must address that impact when deciding whether there is substantial public benefit."). It is undisputed that the revenue requirement for the DELCORA system will increase significantly under Aqua ownership. SPMT Main Br. at 20-23; Aqua Main Br. at 33 (Table). The Commission must decide whether this negative impact "is outweighed by the other positive factors." *McCloskey*, 195 A.3d at 1067. It is not.

SPMT has established that the increased revenue requirement will significantly increase the rates that DELCORA system customers will pay. SMPT has also established that the main benefit or offsetting "positive factor" that Aqua relies on – the Trust – is illusory. SPMT Main Br. at 19-28. Nothing in Aqua's Main Brief provides the basis for a contrary conclusion.

(i) Aqua rates will be significantly higher than DELCORA's, with no discernable benefit from Aqua ownership.

A public utility's revenue requirement drives its rates, and it is undisputed that Aqua's acquisition of DELCORA will significantly increase the DELCORA system's revenue requirement. Sharp increases in DELCORA system rates will follow. This is so for four reasons.

First, the table that Mr. Packer included in his rebuttal testimony to attempt to refute this inconvenient truth, and that Aqua now has reproduced in its Main Brief at 33, actually confirms the fact. The table compares (i) the future revenue requirements for DELCORA on a stand-alone "no sale" basis, assuming planned capital infrastructure investments, as projected by County Witness Faryniarz (Column A), SPMT Witness Woods (Column A.1), and Aqua Witness Pileggi

addressing the impact on rates as part of the affirmative benefits discussion in Section V.B.3, and the rate stabilization trust as part of the public interest discussion in Section V.B.4.b. SPMT addresses the issues together, in both its Main Brief and in this Reply Brief, as part of the rate stabilization trust issue.

(Column B), with (ii) Aqua's projections of future revenue requirements under a "sale to Aqua" scenario (Columns C and D). The year to focus on here is 2029, which Mr. Packer assumed would be the first full year after the Trust is exhausted.[2] Without even considering the fact, discussed below, that the Pileggi projection (Column B) grossly overstates DELCORA'S stand-alone revenue requirement, Mr. Packer's own table demonstrates that under Aqua ownership the revenue requirement for the DELCORA system will exceed the annual revenue that DELCORA would require absent Aqua ownership by more than $10.4 million (Column B - C = E). The excerpt from the table shown below displays Mr. Packer's comparison for the year 2029:

Aqua Revenue Requirement Comparison for DELCORA System[3]

	A	A.1	B	C	D	E	F
Year	Faryniarz DELCORA No sale	Woods DELCORA No sale	Pileggi DELCORA No sale	Packer DELCORA Sale w/Trust	Packer DELCORA Sale w/Trust + Assumed 10% cost spread	Difference B-C	Difference B-D
2029	$113,460,959	$105,865,754	$139,125,496	$149,533,281	$134,579,952	($10,407,785)	$4,545,543

While acknowledging the $10.4 million greater revenue requirement under Aqua ownership (displayed in Column E), Aqua is asking DELCORA customers and the Commission to ignore it and join Mr. Packer in hoping that beginning in 2029, Aqua's wastewater customers outside of the DELCORA service area will pick up the tab for about 10% ($15 million each year) of the cost to serve DELCORA system customers (Column D). This will result, Aqua claims, in a $4.5 million savings for DELCORA customers under Aqua ownership (Column F). *See* Aqua Main Br. at 33-34. The problem is that Aqua's "10% cost spread" concept in Column D is wholly

[2] SPMT disputes the claim that the Trust corpus will last until 2028; it will be exhausted by 2024, assuming it can be funded at all after DELCORA applies the proceeds of the sale first to satisfy the payout obligations under E.O. 12803. SPMT Main Br. at 23-28.
[3] Excerpted from Aqua Main Br. at 33 (year 2029).

unsupported speculation. As Mr. Woods explained in detail in his surrebuttal testimony, the cost shifting Aqua promises is at best a two-way street, and the far greater likelihood given Aqua's aggressive growth through acquisition strategy, coupled with its aggressive investment in new and replacement infrastructure in areas it already serves, is that in 2029 or before, significant additional costs will be shifted onto DELCORA system customers from other Aqua wastewater systems, not the reverse.[4] SPMT Statement No. 2-SR at 6:13-11:2. It will be DELCORA system customers who will be picking up the tab for Aqua's expansion. *Id*. Mr. Woods' point thus refutes the core principle of Aqua's "don't worry about rate increases" narrative. Aqua offered no rejoinder regarding this point.

Second, the record demonstrates that the Pileggi projection of the DELCORA "no sale" revenue requirement (Column B of Aqua's table) cannot be trusted. Aqua and DELCORA "stacked the deck" before playing out the comparison of revenue requirement projections. Column B assumes (unrealistically and imprudently), that DELCORA will fund the very large capital investments it needs to make in order to redirect its Eastern Region flow from the Philadelphia Water Department to DELCORA's expanded WRTP by 2028 out of cash (*i.e*., current rates), instead of spreading the considerable cost of these long-lived assets over generations of ratepayers through the issuance of low-cost municipal bonds. County Witness Faryniarz highlighted this unrealistic assumption that is outcome-determinative of Column B's overstated "no sale" revenue requirement projections in his surrebuttal testimony. Delaware County Statement No. 1-SR at 10:14-11:2 and at 13:1-14:5. *See* County Main Br. at 39-40. But on this critical point as well, Aqua

[4] Indeed, if OSBA were to get its way, DELCORA system customers would begin picking up costs from other Aqua wastewater service areas as soon as possible, without even taking into consideration the growing revenue requirement associated with Aqua's ongoing expansion plans. OSBA Witness Kalcic correctly notes that under rate equalization principles, rates charged by DELCORA for typical residential service would need to increase by 89% to match existing Aqua Wastewater Zone 1 rates (SPMT Statement No. 2-SR at 11:4-12:17).

offered no rejoinder. The takeaway is that Aqua and DELCORA have been outed in their attempt to manipulate the numbers to increase DELCORA's "no sale" revenue requirement in order to make the sale to Aqua (Columns C and D), and the very high rate increases the sale will bring compared to continued DELCORA ownership, appear more reasonable, when in fact it is not. Aqua and DELCORA's bootstrap argument must be rejected.

Third, Mr. Woods' revenue requirement projections for DELCORA (Column A.1), by contrast, are reasonable. Mr. Packer, for his part, conceded that Mr. Woods' calculations quantifying the respective revenue requirements for DELCORA and Aqua and the resulting rate increases on Schedules HJW-2, 3 and 4 "appear to be accurate." (Aqua Statement No. 2-R at 52:21-53:1). Although DELCORA Witness Pileggi criticized Mr. Woods' Column A.1 projections on grounds that he used an inflation rate that was too low (Aqua Statement No. 6-R at 8:1-2), and that he neglected to include expenses DELCORA will incur associated with the Philadelphia Water Department's Long Term Control Plan, *id*. at 3:11-12,[5] Mr. Woods explained in surrebuttal that neither the inflation rate he chose nor the addition of Philadelphia LTCP expenses would affect his results because both require parallel adjustments to DELCORA and Aqua projections, such that the relative difference in "no sale" vs. "sale" projections would remain the same. SPMT Statement No. 2-SR at 15:20–16:14; 13:4-15:18. Once again, Aqua offered no rejoinder on this point.

Viewing Mr. Packer's rate table in light of these record facts, the conclusion to be drawn is that if the Commission allows Aqua to acquire DELCORA, the most likely revenue requirement effect on the DELCORA system can be found by ignoring the DELCORA projection (Column B) and instead comparing the projections of Mr. Faryniarz ($113,460,959) or

[5] Mr. Woods did not include this expense in his original calculation because Aqua neglected to include it in its projected capital improvement plan. SPMT Statement No. 2-SR at 13:18–14:6.

Mr. Woods ($105,865,754) for 2029 (Column A or A.1) with Aqua's projection ($134,579,952) (Column C).

Fourth, if the Application is approved, the consequence of points one through three above will be that DELCORA customers will be penalized with a revenue requirement ***that is at least $36 to $44 million per year more than it would be under continued DELCORA ownership***. There is no doubt that the increase in revenue requirement will translate to higher rates for existing DELCORA customers. The money must come from someplace. It is the pockets of DELCORA's customers that will be picked clean. The Commission must address that impact. *McCloskey*, 195 A.3d at 1066. The alleged benefits of the transaction, which are negligible if not negative, do not come close to outweighing its ruinous rate impact on DELCORA customers. *Id*. at 1067.

(ii) DELCORA customers will not get a benefit from the Trust

As explained in SPMT's Main Brief at 23-28, DELCORA's proposed rate stabilization Trust, the transaction's alleged "primary benefit," Aqua Statement No. 5 at 11:12-14, will not be sufficiently funded to last beyond 2024 (that is, half the time period originally projected) because of double counting problems that Aqua and DELCORA have chosen to ignore. Worse, there is no reason to believe that the Trust will be funded at all, because of repayment obligations under E.O. 12803 that Aqua has just learned about during this proceeding and has apparently chosen to ignore. Moreover, the Trust may not come to fruition at all if the County's lawsuit to declare it illegal is successful. Even if the Trust is permitted to exist with whatever meager balance it would have, it will exist beyond the Commission's jurisdiction, not as a rate stabilization fund under Aqua's (and thus the Commission's) control. It thus is difficult to conclude that the Trust provides any positive counterbalance to the significant detriment that Aqua's large rate increases will bring.

Aqua and DELCORA did little in their rebuttal testimony to explain how they intend to

overcome these fundamental problems, and offered nothing in rejoinder testimony. They are equally unresponsive in their Main Briefs. SPMT Witness Woods calculated in his surrebuttal testimony that the Trust would run out of funds by 2024 rather than 2028. SPMT Statement No. 2SR at 18:22-19:5. Neither DELCORA nor Aqua disputed this conclusion when they had the opportunity to do so in rejoinder testimony. Similarly, Mr. Woods pointed out in both his direct testimony and his surrebuttal testimony that E.O. 12803 mandates the distribution of DELCORA's proceeds from the proposed sale to pay back to local governments the "unadjusted dollar amount" of the property that those local governments contributed to DELCORA, and then to repay the federal government the full amount of grants less accumulated depreciation;[6] only then can any of the proceeds of the sale go to other recipients. The Trust would be the very last in line for whatever funds might remain. SPMT Statement No. 2 at 47:7-48:3; SPMT Statement No. 2SR at 23:5-13.

Addressing the issue in its Main Brief, Aqua characterizes all of E.O. 12803's requirements, including this mandated distribution of proceeds requirement, as requirements that the United States Environmental Protection Agency (EPA) and the Office of Management and Budget (OMB) may and will "waive." Aqua Main Br. at 54 ("Aqua understands Mr. Woods' concerns about the possible application and impact of the EO (particularly in connection with the amount of funds in the DELCORA Customer Trust)."). But there is nothing in the language of E.O.12803 that implies much less actually states that the provision requiring refunding to local governments of contributions that they made is anything other than mandatory and nonwaivable.

[6] E.O. 12803 makes a clear distinction between the amount to be repaid to local governments, which shall "recoup in full the unadjusted dollar amount of their portions of total project costs" and the amount to be repaid to the federal government, which shall "recoup in full the amount of Federal grant awards…less the applicable share of accumulated depreciation." SPMT Statement No. 2, Appendix C, Section 3 (c). The repayment amount to all of DELCORA's local government contributors is not to be reduced to reflect accumulated depreciation – in other words, local governments must be repaid the full undepreciated original cost value.

Section 3 (c) of E.O.12803 provides:

> Sec. 3. Privatization Initiative. To the extent permitted by law, the head of each executive department and agency shall undertake the following actions:
> ….
> (c) Approve State and local governments' requests to privatize infrastructure assets, consistent with the criteria in section 4 of this order and, where necessary, grant exceptions to the disposition requirements of the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" common rule, or other relevant rules or regulations, for infrastructure assets; **provided that the transfer price shall be distributed, as paid, in the following manner: (i) State and local governments shall first recoup in full the unadjusted dollar amount of their portion of total project costs (including any transaction and fix-up costs they incur) associated with the infrastructure asset involved;** (ii) if proceeds remain, then the Federal Government shall recoup in full the amount of Federal grant awards associated with the infrastructure asset, less the applicable share of accumulated depreciation on such asset (calculated using the Internal Revenue Service accelerated depreciation schedule for the categories of assets in question); and (iii) finally, the State and local governments shall keep any remaining proceeds.

SPMT Statement No. 2, Appendix C, Section 3 (c).

In other words, E.O.12803 allows EPA and OMB to approve the privatization of federally funded infrastructure assets, but expressly conditions that grant of authority on distribution of the funds paid in the manner prescribed. The "provided that" language in Section 3 (c) of E.O.12803 that immediately precedes the mandatory "shall be distributed" directive that controls the order of distribution admits of no other interpretation.

Backed into a corner on this issue, Aqua now has agreed to accept, as a condition of approval of the Application, a "waiver" by EPA and OMB of the requirements under E.O.12803. Aqua Main Br. at 54 ("And, because Aqua and DELCORA are far more optimistic than Sunoco about obtaining the necessary waiver of the EO from all parties (including, if necessary, the OMB), Aqua is prepared to accept in this proceeding a condition of Commission approval of the

Application that the appropriate waiver or other resolution of the EO is obtained/completed before closing of the Proposed Transaction."). This concession is the minimum necessary in light of the required EPA and OMB approvals, but even if EPA and OMB are amenable to permitting DELCORA's no-bid sale of its assets at their agreed price, neither has the power to dispense with the mandatory requirements governing how proceeds from the transaction are to be distributed. Implementation of those distribution requirements almost certainly will make it impossible for DELCORA to fund the Trust in the purported amount that Aqua has suggested of $200 million,[7] and likely will prevent DELCORA from funding the Trust at all. If the Trust cannot be funded because the transaction proceeds are used to pay back DELCORA's contributing municipalities, the transaction's "primary benefit" will disappear.

In an attempt to shift responsibility for its failure to address and resolve the significant E.O. 12803 issues, Aqua blusters that, although it agrees that E.O.12803 applies to this transaction, there are "few details on the process to be used by the EPA to administer the EO" so "many if not all of Mr. Woods' concerns are speculative at best." Aqua Main Br. at 53. The burden of proof, however, falls in precisely the opposite direction. Aqua agrees (if grudgingly), that E.O.12803 applies. Because it applies, it was and is up to Aqua to address the Executive Order's requirements and resolve any and all of the transaction-related issues that E.O.12803 implicates. To the extent it has not done so – and it is obvious Aqua has done nothing at all to date – Aqua has failed to

[7] DELCORA never quantified the starting balance of the Trust in testimony. Nor does the $200 million figure appear in Aqua's sworn Application or its testimony; the $200 million figure appears first in DELCORA's response to OCA-III-10 and is only cited for the first time in Aqua's Main Brief, without any verification or attribution. The Aqua revenue requirement reflecting the alleged benefit of the Trust did not rely on any Trust starting balance; instead, Mr. Packer's estimated annual revenue requirement for Aqua with the Trust "benefit" reflected (Column C of Page 33 in Aqua's Main Brief) merely is a 3% annual increase in the 2020 starting amount of $70,978,127 for the years 2021 through 2027. The assertion that the Trust will provide a benefit through 2028 is entirely lacking a foundation.

carry its burden to show that the transaction as proposed is even possible. With respect to the specific issue of funding the Trust that Aqua touts as the transaction's primary benefit, Aqua must prove that the money earmarked to fund the Trust is actually available to do so. Otherwise, the alleged "primary benefit" is not real. Aqua has failed to carry that burden because the plain language of E.O. 12803 requires that funds DELCORA says it plans to place in the Trust must be used first for multiple other purposes. DELCORA cannot spend the same dollar twice, and Aqua cannot claim a benefit from DELCORA's plans to do so. Under the circumstances, it is Aqua's burden to show that the funds will be available to be placed in the Trust, not SPMT's burden to show that they will not be available. Put differently, given the requirements of E.O.12803, it is Aqua that is "speculating" that the Trust will be funded as claimed. The record evidence weighs heavily on the side of a conclusion that Aqua has not carried its burden to demonstrate that the Trust will provide any benefit whatsoever.

c. Other

[SPMT is not re-addressing this topic in this reply brief]

(i) Diminution of favorable federal funding for Pennsylvania POTWs
(ii) Loss of favorable funding for DELCORA customers
(iii)No competitive bidding

5. Environmental Aspects of the Proposed Transaction

[**Begin HC**] [redacted]

[redacted] **[End HC]**

Aqua has taken a similar "hope for the best" posture in its plan to assume DELCORA's obligations under the federal Consent Decree designed to remediate DELCORA's combined sewer overflows, inexplicably confident that no additional and very costly (to DELCORA system ratepayers) obligations will be imposed because of the DELCORA system's loss of POTW status when the CSO regulator assets transfer to Aqua. If only Aqua were going to suffer the consequences of closing a transaction before all the regulatory pieces are in place, it would be bad enough; but the serious regulatory and financial risks that Aqua is triggering fall most heavily on others – SPMT together with all of DELCORA's other customers. The Commission has the power to prevent this, and it should.

These issues are two among many other reasons that the Commission should simply deny Aqua's Application. **[Begin HC]** [redacted] **[End HC]** and until Aqua has received federal district court approval to assume DELCORA's existing obligations (and no others) under the Consent Decree affecting CSO remediation measures.

(i) ***[Begin HC]*** [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [**End HC**]

(ii) Aqua may face far higher costs to remediate CSOs than DELCORA would, which would be passed on to customers

A separate environmental issue and detriment that will be needlessly triggered by the transfer of DELCORA's wastewater system assets to a private entity such as Aqua is the remediation program that addresses combined sewer overflows. SPMT Main Br. at 41-43 and n. 19 (discussing ramifications of CSOs). As SPMT Witness Woods explained, once Aqua owns the DELCORA system, EPA and DEP, perhaps at the behest of third parties, may require that Aqua employ "best available technology" to combat the CSO problem, resulting in, for example, the enormous expense of physically separating the stormwater sewer system and the sanitary

sewer systems. *Id*.; SPMT Statement No. 2 at 41:14-42:15. Mr. Woods explained that the potential significant additional CSO remediation costs that could be imposed on DELCORA system customers under Aqua ownership is another reason why the transaction should be disapproved. *Id*. Assuming that the Commission nonetheless grants the Application, he reasoned, DELCORA's 26 Combined Sewer Overflow Regulators should remain under DELCORA ownership, thus avoiding the problem. SPMT Statement No. 2R at 32:1-8.

Aqua's complete testimonial response on this issue came from Mr. Bubel, who offered only the hope that Aqua would be "substituted for DELCORA" under the 2015 federal district court Consent Decree with EPA and DEP, and thereby be permitted to fulfill DELCORA's CSO obligations, rather than new and much more costly obligations using best available technology that could be imposed on a private entity such as Aqua. Aqua Statement No. 4R at 5:19-7:20. Mr. Bubel, consistent with Aqua's wholly unsupported narrative that environmental regulators will not care about esoteric legal distinctions between POTWs and private wastewater systems so long as the private owner does not alter the POTW's operations,[13] stated confidently that "Aqua does not expect that its acquisition of the DELCORA system will lead to the imposition of CSO obligations greater than those that would be imposed on DELCORA." *Id*. at 18-20. In surrebuttal, however, Mr. Woods reiterated his concern that EPA will be required under the Clean Water Act to insist that Aqua as a private owner implement best available technology to remediate CSOs. As he explained:

[13] Aqua's cavalier approach to critical regulatory distinctions systemically infects the Application. While Aqua may wish to equate private and public ownership of wastewater treatments systems, this is simply not the framework that is reflected in key environmental regulatory requirements. Whether a wastewater treatment system is owned by a public entity or a private entity matters greatly in terms of the environmental requirements that apply even if Aqua may wish otherwise.

Q. DELCORA'S PUBLICLY OWNED TREATMENT WORKS ("POTW") STATUS FOR THE DELCORA WESTERN REGION WASTEWATER TREATMENT PLANT WILL BE LOST UPON THE TRANSFER OF THE ASSETS TO AQUA. HOW WILL THAT LOSS OF POTW STATUS AFFECT THE COMBINED SEWER OVERFLOW PROGRAM?

A. As Mr. Bubel asserts in his Rebuttal Testimony (Aqua Statement No. 4-R, Bubel, Page 7, Lines 14-17), the parties to the Consent Decree (EPA, DEP, DELCORA and Aqua) can jointly petition the United States District Court to substitute Aqua for DELCORA under the Decree and obligate Aqua to implement the Long Term Control Plan. However, it is my understanding that **the Clean Water Act does not permit EPA to implement the Combined Sewer Overflow requirements where private combined point source discharges are concerned but instead must impose Best Available Technology requirements on these discharges. I would anticipate that this is an issue that could take an extended period of time to resolve.**

SPMT Statement No. 2R at 28:1-14 (emphasis added).

Although Aqua offered no rejoinder on this issue, and in fact never addressed in any testimony the POTW versus private wastewater provider issue in the context of CSO remediation that Mr. Woods has raised, it argues in its Main Brief at 49-51 that Mr. Woods' points are "speculative" and "meritless." In support, Aqua cites (without explaining or even attempting to place into context) an unresponsive and inapposite reference to DEP's water quality regulations. *Id*. at 50 n. 124. As the record stands, Mr. Woods testimony is unrebutted. Here again, it is Aqua's attempt to downplay a significant obstacle that is "speculative," based as it is on the "hope" that EPA and DEP will agree to modify the Consent Decree so as to allow Aqua to assume only those CSO remediation obligations that apply to DELCORA, that no third party will protest the modification on the grounds that Aqua should be required to comply with the best available technology requirement, and that the district court will allow the modification. As with so many other key approvals that Aqua must have from entities other than the Commission that it

has not yet obtained, there are a number of "ifs" that remain here. Aqua, in its rush to secure Commission approval, has provided the Commission with many more questions than answers about whether approval of this transaction is in the public interest.

6. Conclusion – Public Interest and Benefit

The Application should be denied because it is not in the public interest, for all of the reasons stated herein and in SPMT's Main Brief. There are no tangible benefits to Aqua's acquisition of DELCORA; those that Aqua alleges are benefits that DELCORA and DELCORA's customers already enjoy under existing DELCORA ownership. A grant of the Application will only disadvantage DELCORA's customers and Aqua's other customers through higher rates that are not offset by other benefits.

[**Begin HC**] [redacted] [**End HC**] Transfer to Aqua of the 26 CSO outfall regulators likewise may result in a dramatic increase in Aqua's revenue requirements and thus a dramatic increase in DELCORA customer system rates and the rates of all other Aqua customers. Aqua's approach to both of these problems amounts to senseless risk-taking at the expense of others – namely, DELCORA's customers. Even absent the potential substantial rate increases associated with environmental obligations that could be placed on Aqua but not DELCORA, the revenue requirements associated with the DELCORA wastewater system, and thus the rates charged to DELCORA's customers, will increase unnecessarily and dramatically under Aqua's private ownership of DELCORA's

system. The proposed rate stabilization Trust, if it survives at all, is likely to be only minimally funded, and will be beyond the control of both Aqua and the Commission.

In short, the Application is inherently and fundamentally flawed. Aqua seeks the Commission's approval despite the absence of numerous as-yet unapplied for approvals. Aqua does not even have a valid transfer price for the Commission to consider, and will not until Aqua and DELCORA seek approval of the sale of DELCORA's wastewater system from EPA and OMB, which they did not even know was required and have yet to do. The Application should be denied. If the Commission does not deny the Application outright, the Commission should condition approval as explained in the following section.

C. Recommended Conditions

In the event the Commission does not deny the Application outright, SPMT requests that the Commission condition the grant of the Application and the certificates under Sections 1102 and 1103 of the Public Utility Code so as to require DELCORA to retain ownership of the WRTP to preserve its POTW status and to retain ownership of the 26 CSO regulators, [**Begin HC**] [redacted] [**End HC**] These conditions, set forth in SPMT's Main Brief and repeated here for convenience, also will preserve the contractual commitments that DELCORA has made to SPMT:

I. The Commission should condition approval of the Application on DELCORA retaining ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators; to accomplish this under the terms of the Asset Purchase Agreement, these DELCORA assets could be designated as Non-Assignable Assets in the context of Section 2.06 of the Asset Purchase

Agreement, except that the designation would be permanent rather than transitional;

II. The Commission should condition approval of the Application on removing the value of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from Aqua's post-acquisition rate base, as these assets will be retained by DELCORA; and

III. The Commission should condition approval of the Application on DELCORA retaining SPMT as a DELCORA customer under the existing contract between the parties, consistent with Section 2.06 of the Asset Purchase Agreement.

As a minimum alternative to proposed Conditions I-III, the Commission should condition approval of the Application on implementing Conditions I-III on a transitional basis, such that:

A. DELCORA may not transfer ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators to Aqua until Aqua is able to demonstrate to the Commission's satisfaction that under Aqua ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators, [**Begin HC**] [redacted] [**End HC**]

B. Aqua may not include the value of DELCORA's Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators in its rate base until the Commission has approved the transfer of those assets from DELCORA to Aqua

consistent with the provisions of Section A of these alternative proposed conditions; and

C. Service to SPMT shall continue under SPMT's contract with DELCORA until the effective date of rates in Aqua's first rate case following the transfer of ownership of the Western Region Wastewater Treatment Plant and the 26 Combined Sewer Overflow Regulators from DELCORA to Aqua consistent with the provisions of Section A of these alternative proposed conditions.

D. Section 507 Approvals

[*SPMT is not addressing this topic in this reply brief*]

1. Legal Principles

2. Municipal Protestants' Contracts

a. Introduction
b. Edgmont Township's Contract
c. Lower Chichester Township's Contract
d. Southwest Delaware County Municipal Authority's Contract
e. Trainer Borough's Contract
f. Upland Borough's Contract

3. Contracts Other Than Municipal Protestants' Contract

E. Other Approvals, Certificates, Registrations and Relief, If Any, Under the Code

SPMT has a contract with DELCORA that extends through 2025. Application Exhibit. F129. DELCORA may have the right to assign it to Aqua, but Aqua has no right to breach the contract once assigned. Subjecting SPMT to a new rate regime would be a breach of the contract.

VI. CONCLUSION WITH REQUESTED RELIEF

The Application should be denied. The transaction provides no benefits, let alone substantial affirmative public benefits. Instead, the transaction actively causes harm, by needlessly

increasing rates with no corresponding benefit [**Begin HC**] [redacted] [**End HC**] The transaction also is subject to so many contingencies and other required approvals not yet obtained or even applied for that neither the transfer price nor the ultimate contours of what the Commission has been asked to approve are known or knowable.

If the Application is not denied outright, the Commission must impose conditions that address these issues. In particular, the Commission should require DELCORA to retain ownership on a permanent basis of the WRTP and the 26 CSO regulators [**Begin HC**] [redacted] [**End HC**] Alternatively, the Commission should impose the same conditions on a transitional basis until the necessary permits are issued, the appeal period for challenging such permits has passed and any appeals exhausted.

Respectfully submitted,

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