COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

February 1, 2021

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

Re: 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
Docket No. A-2019-3015173
I&E Reply Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Reply Exceptions of the Bureau of Investigation and Enforcement (I&E)** for the above-captioned proceeding.

Copies are being served on parties of record per the attached Certificate of Service. *Due to the temporary closing of the PUC's offices, I&E is only providing electronic service.* Should you have any questions, please do not hesitate to contact me.

Respectfully,

Gina L. Miller
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 313863
(717) 787-8754
ginmiller@pa.gov

Erika L. McLain
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 320526
(717) 783-6170
ermclain@pa.gov

GLM/ELM/ac
Enclosures

cc: Hon. Angela T. Jones, Office of Administrative Law Judge *(via email only)*
Hon. F. Joseph Brady, Office of Administrative Law Judge *(via email only)*
Pamela McNeal, Legal Assistant, Office of Administrative Law Judge *(via email only)*
Office of Special Assistants *(via email only – RA-OSA@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 Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority	:	Docket No. A-2019-3015173

REPLY EXCEPTIONS
OF THE
BUREAU OF INVESTIGATION & ENFORCEMENT

Gina L. Miller
Prosecutor
PA Attorney ID No. 313863

Erika L. McLain
Prosecutor
PA Attorney ID No. 320526

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17120

Dated: February 1, 2021

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I. INTRODUCTION

A. Summary of I&E's Reply Exceptions

The materially inaccurate Asset Purchase Agreement ("APA") and Application that Aqua Pennsylvania Wastewater, Inc. ("Aqua") asks the Pennsylvania Public Utility Commission ("Commission) to approve in this case properly warranted the rejection recommended by the Administrative Law Judges.[1] To be sure, the protracted, complex procedural history, as well as the time and costs that parties and ALJs expended to litigate this defective case exemplify a need to ensure that Section 1329 applicants submit complete and accurate applications. In this case, the facts demonstrate that Aqua asked the Commission to approve an application for Aqua to purchase, for $276.5 million,[2] Delaware County Regional Water Quality Control Authority ("DELCORA")'s system assets, when DELCORA did not actually have the authority to sell certain critical assets or to assign significant contracts as represented in the APA. The existing record of this case demonstrates that the impact of the APA misrepresentations is significant in that DELCORA lacks the ability to transfer the contract rights necessary to serve 2,600 retail customers, which represents approximately one-sixth of its retail customer base.[3]

At the time of these Reply Exceptions, over one year and four months after Aqua and DELCORA entered the APA on September 17, 2019,[4] Aqua and DELCORA still cannot establish that DELCORA has the authority to sell all the property that Aqua is asking the

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1 As explained in I&E's Response to Aqua Exception No. 7, while I&E recommended conditional approval of Aqua's Application, I&E agrees that the record evidence supports the ALJs' inability to recommend approval.

2 This is the highest value Section 1329 Application that has been before the Commission.

3 Municipal Protestants Main Brief, p. 21. As I&E explains below, recent extra-record filings suggest that two of the five Municipal Protestants have resolved their disputes with DELCORA, but even if true, no quantification of the impact of their alleged resolution is now possible.

4 Aqua's Application, ¶5.

Commission to permit it to purchase. The record also establishes that DELCORA does not have the authority to assign all identified contracts to Aqua as set forth in the APA. I&E submits that it ought to be a floor-level expectation for any buyer seeking regulatory approval to ensure that the seller has the legal right to convey property that the buyer seeks permission to purchase. Unfortunately, this case demonstrates the hardship, uncertainty, and waste of resources that result from an applicant's failure to do its due diligence. On this basis, I&E respectfully requests that the Commission consider revising the listing of Section 1329 requirements. Specifically, I&E suggests that the Commission add a requirement that the Applicant provide a certification from the Seller that it has clear legal authority to transfer (1) all assets/inventory to be sold and (2) all the contracts it purports to assign.

Aside from, and more important than the waste of administrative resources, I&E submits that the public interest requires more than allowing ratepayers to assume the risk of Aqua's apparent lack of due diligence. Using the record before them, the ALJs correctly determined that no public interest analysis of Aqua's Application could be performed and that no credible Section 1329 ratemaking rate base value could be substantiated.[5] I&E submits that ALJs' determination is well-supported by record evidence and it will protect Aqua's ratepayers from the inaccuracy and uncertainty of Aqua's Application and the impact of pending litigation. The Commission should ensure that the ratepayers stay protected against it too by adopting the ALJs' recommended decision without modification.

Finally, the Commission should reject Aqua and DELCORA's extra-record attempt to circumvent the ALJs' determination that its proposed Bill Discount violated Section 1303 of

[5] RD at 2.

the Code's mandate that utilities charge tariffed rates.[6] For the first time, by route of its Exceptions, Aqua now attempts to withdraw its Bill Discount proposal and replace with an "Information Sharing" proposal.[7] Without waiver of its position that Aqua's new proposal is procedurally inappropriate and therefore does not warrant consideration, the few details I&E can glean from Aqua and DELCORA's less than two-page description of the proposal[8] already raise a host of questions and a significant legal concern. As I&E will demonstrate in its fifth Reply Exception, the Information Sharing proposal is both procedurally inappropriate and legally unsound, and either of those two grounds are on their own sufficient to warrant its rejection.

B. Procedural History

On March 3, 2020, Aqua filed with the Commission its Application pursuant to Sections 1102, 1329, and 507 of the Public Utility Code ("Code"), for approval of the following requests: (1) approval of the acquisition by Aqua of the wastewater system assets of 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; (3) an order approving the acquisition that includes the ratemaking rate base of the DELCORA wastewater system assets pursuant to Section 1329 of the Code; and (4) assignments of 163 municipal contracts, between Aqua and DELCORA,

6 RD at 24-25.
7 Aqua's Exceptions, (Public Version), pp. 22-23.
8 Aqua Exceptions, (Public Version) pp. 22-23; DECLORA Exceptions, pp. 18-19.

pursuant to Section 507 of the Code,[9] approval of the APA, and approval the terms of a Memorandum of Understanding ("MOU") it has entered with DELCORA.[10]

The Bureau of Investigation and Enforcement ("I&E") filed a Notice of Appearance in this proceeding on April 2, 2020. I&E serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters and enforcing compliance with the Code.[11] I&E's participation in this proceeding is warranted because its outcome will produce a direct and immediate ratemaking determination and because, absent imposition of the conditions I&E recommends, Aqua's Application violates the Code.

On March 26, 2020, the Office of Small Business Advocate ("OSBA") filed a Notice of Appearance and Intervention. The Office of Consumer Advocate ("OCA") filed a Protest and Notice of Appearance on April 2, 2020. Petitions to Intervene were filed by the County of Delaware, Pennsylvania ("Delaware County") on May 18, 2020 and Delaware County Regional Water Quality Control Authority ("DELCORA"), on June 25, 2020. Additionally, Protests were filed by the following parties: Southwest Delaware County Municipal Authority ("SWDCMA"),[12] Edward Clark, Jr. on behalf of Treasure Lake Property Owners Association,[13] Ross Schmucki,[14] Upland Borough,[15] Lower Chichester Township,[16] Cynthia

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9 Aqua Application, pp. 20-21.
10 Id. at 20.
11 66 Pa. C.S. §§ 101 *et seq.,* and Commission regulations, 52 Pa. Code §§ 1.1 *et seq. See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).
12 Filed on July 17, 2020.
13 Filed on July 30, 2020.
14 Filed on July 31, 2020.
15 Filed on August 7, 2020.
16 Filed on August 7, 2020.

Pantages on behalf of C&L Rental Properties,[17] Trainer Borough,[18] Edgmont Township,[19] Sunoco Partners Marketing and Terminals L.P./Energy Transfer ("Sunoco"),[20] Kimberly-Clark Pennsylvania, LLC and Kimberly-Clark, Corporation ("Kimberly Clark").[21]

On May 14, 2020, Delaware County filed a complaint against DELCORA and the DELCORA Rate Stabilization Trust in the Delaware County Court of Common Pleas, docked at CV-2020-003185 ("Delaware County's lawsuit").[22] Shortly after, Delaware County amended its lawsuit to enforce an ordinance that would dissolve DELCORA,[23] and Aqua intervened in the Delaware County lawsuit seeking to protect its interests in its APA with DELCORA.[24]

On June 11, 2020, while the Delaware County lawsuit was pending, the Commission issued a Secretarial Letter indicating that Aqua's Application had been conditionally accepted pending the filing of requisite documents and individualized notification of the proposed acquisition to all affected customers. On June 23, 2020 Delaware County filed a Petition for Reconsideration of the Commission staff determination of the conditional acceptance. Aqua filed its Answer to Delaware County's Petition for Reconsideration on July 9, 2020. A Secretarial Letter was issued on July 14, 2020 stating that the docket was inactive and that the Delaware County Petition for Reconsideration would be accepted when

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17 Filed on August 11, 2020.
18 Filed on August 17, 2020.
19 Filed on August 21, 2020, it should be noted that Edgmont Township filed a Petition to Intervene on June 15, 2020 but withdrew its Petition to Intervene on August 21, 2020.
20 Filed on August 28, 2020.
21 Filed on August 31, 2020.
22 *County of Delaware, Pennsylvania's Petition for a Stay of the above-referenced Section 1329 Application for Aqua's Acquisition of the Delaware County Regional Water Quality Authority's Wastewater System Assets* ("Delaware County's Petition"), A-2019-3015173, ¶16.
23 Id. at 18.
24 Id. at 19-25.

the docket became active. On July 15, 2020, Delaware County amended its Petition incorporating its previous Petition and adding new and additional information.

The Commission issued a Secretarial Letter accepting Aqua's Application as complete on July 27, 2020 and the matter was assigned to the Office of Administrative Law Judge ("OALJ"). Administrative Law Judge Angela Jones ("ALJ Jones") was subsequently assigned to this proceeding[25] and she issued an Order on August 3, 2020 establishing September 2, 2020 as the date for a Prehearing Conference.

On August 4, 2020, Aqua filed its Answer to the Amended Petition for Reconsideration of Delaware County. On August 7, 2020, Delaware County filed a Petition to Stay the instant proceeding until January 31, 2021 and a request for Commission review of a material question. I&E filed a letter in support of the Delaware County Petition to Stay on August 13, 2020. The OCA filed a brief in support of the Delaware County Petition to Stay on August 14, 2020. Aqua and DELCORA filed briefs in opposition of the Petition to Stay. On August 24, 2020, Delaware County filed a Reply Brief to the Aqua and DELCORA briefs in opposition. On August 27, 2020, Aqua and DELCORA filed Answers in opposition to the Delaware County Petition to Stay.

On August 14, 2020, the OCA filed an Expedited Motion to Extend the Statutory deadline by 60 days or to March 26, 2021 pursuant to Governor Wolf's Emergency Order. ALJ Jones issued an Order on August 18, 2020 directing the parties to respond to the Motion by August 24, 2020. On August 24, 2020, Aqua and DELCORA filed Answers in Opposition and Delaware County and the OSBA filed Answers in Support of the OCA's Expedited Motion.

[25] On November 18, 2020, ALJ. Joseph Brady was added to preside alongside ALJ Jones in this case.

On August 27, 2020, the Commission issued an Opinion and Order denying Delaware County's Amended Petition of Reconsideration. On August 31, 2020, the Commission issued an Opinion and Order declining to answer the material question and therefore denying the Petition for Stay of the proceeding. On August 31, 2020, Chief ALJ Charles Rainey issued an Order granting the OCA's Motion for Extension.

A telephonic Prehearing Conference took place on September 2, 2020. During the hearing, the parties and ALJ Jones adopted a litigation schedule and identified other procedures necessary for the conduct of this case. On September 4, 2020, ALJ Jones issued Order #2, which, inter alia, set forth the following schedule for this case:

Public Input Hearings	Sept. 16, 2020
Protestant Direct Testimony	Sept. 29, 2020
Rebuttal Testimony	Oct. 20, 2020
Surrebuttal Testimony	Nov. 2, 2020
Evidentiary Hearings	Nov. 9&10, 2020
Main Briefs	Dec. 1, 2020
Reply Briefs	Dec. 14, 2020

I&E notes that it served direct, rebuttal, and surrebuttal testimony identified in Appendix A of I&E's Main Brief in accordance with the above-referenced deadlines. Additionally, I&E's counsel attended both public input hearings held via a web-based platform on at 1:00 p.m. and 6:00 p.m. on September 16, 2020.

On September 4, 2020, Aqua filed its Petition for Reconsideration of Chief ALJ Rainey's Extension Order. Answers in opposition to Aqua's Petition for Reconsideration were filed by the OSBA[26] and the OCA.[27] The Commission denied Aqua's Petition for Reconsideration via Opinion and Order issued on October 8, 2020.

[26] Filed on September 20, 2020.
[27] Filed on September 22, 2020.

On September 25, 2020, Edgmont Township, Lower Chichester Township, SWDCMA, Trainer Borough, and Upland Borough (collectively "Municipal Protestants") filed a Motion for Summary Judgment. On October 15, 2020 Aqua and DELCORA filed Answers in Opposition to the Motion for Summary Judgment. On the same day, Delaware County filed an Answer in Support of the Motion. On October 16, 2020, I&E filed a Letter addressing Aqua's Answer to the Motion. On October 30, 2020, ALJ Jones issued an Order denying the Municipal Protestant's Motion for Summary Judgment.

On November 3, 2020, I&E contacted Aqua's and DELCORA's counsel to discuss settlement of all or part of this case. Although Aqua and DELCORA's counsel had one brief discussion with I&E thereafter, neither a full nor partial settlement of any of I&E's outstanding issues could be achieved.

On November 3-6, 2020, several of the Municipal Protestants filed lawsuits against DELCORA and the DELCORA Rate Stabilization Trust in Delaware County Court of Common Pleas for breach of contract and to assert certain property interests that conflict with DELCORA's representations in the APA. These lawsuits, (collectively the "Municipal lawsuits") are comprised of the following individual actions: (1) SWDCMA v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007469l;[28] (2) Lower Chichester Township v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007552;[29] and Upland Borough v. DELCORA and the DELCORA Rate Stabilization Trust, Docket No. CV-2020-007596.[30]

[28] Municipal Protestants' Main Brief, p. 14, footnote 7.
[29] Municipal Protestants' Main Brief, pp. 13-14, footnote 6.
[30] Municipal Protestants' Main Brief, p. 15, foot note 9.

On November 9-10, 2020, ALJ Jones conducted evidentiary hearings via web-based platform, with telephonic access available. At the hearing, testimony and exhibits were entered into the record and cross examination was conducted. I&E entered the documents identified in the RD into the evidentiary record.[31] Pursuant to the procedural schedule and in accordance with Commission regulations at Section §§ 5.501- 5.502, the following parties submitted Main Briefs and Reply Briefs on December 1, 2020 and December 14, 2020, respectively: I&E, Aqua, DELCORA, OCA, OSBA, Sunoco, Kimberly-Clark, Delaware County, and the Municipal Protestants.

On December 21, 2020, the ALJs issued an Order closing the record, which indicated that the record in this case closed after the parties' submission of Reply Briefs on December 14, 2020.[32]

On December 28, 2020, Aqua filed a letter indicating that the Delaware County lawsuit had been resolved in DELCORA's favor and requesting that the ALJs take "Official Notice" of the outcome, including the incorporated decision, in accordance with 52 Pa. Code §5.408.[33] On January 8, 2021, Trainer Borough filed a Joint Stipulation it entered into with Aqua and DELCORA in order to "resolve their differences"[34] as well as a Notice of Withdrawal of its Protest in this case. I&E notes that the Trainer Borough did not seek to open the record of this case to admit the Stipulation[35] or seek any procedurally appropriate avenue of approval to admit the documents into the record.

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31 RD at 10; Hearing TR. at 498-501.

32 RD at 12, footnote 10.

33 Aqua Letter of December 28, 2020, Docket No. A-2019-3015173.

34 Joint Stipulation of Aqua Pennsylvania Wastewater, Inc., Trainer Borough and Delaware County Regional Water Quality Control Authority.

35 The Commission's regulations at 52 Code § 5.571 provide that "at any time after the record is closed but before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence."

On January 11, 2021, the ALJs issued their Recommended Decision ("RD") in this case, and it was served upon all parties on January 12, 2021 alongside a Secretarial Letter establishing a ten-day response period for Exceptions to the RD and, a seven-day period for Reply Exceptions, and reminding parties of the regulatory page limit of 40 pages for Exceptions[36] and 25 pages for Reply Exceptions.[37] Upon receipt of the Secretarial Letter, Aqua sought parties' consent to request enlargement of only Aqua's page limit for Exceptions from 40 pages to 80 pages. After several days of negotiations, parties consented to Aqua requesting enlargement of its page limit to 80 pages, provided that Aqua also request (1) a page extension from 25 pages to 50 pages for all parties' Reply Exceptions and (2) a time extension of three days for all parties' Reply Exceptions. Aqua agreed to these terms, it requested approval of them from the Commission's Office of Special Assistants ("OSA") on January 15, and its request was granted on the same date.[38]

On January 22, 2021, Aqua. DELCORA, and Sunoco filed timely Exceptions to the RD. On January 27, 2021, Upland Borough filed a Joint Stipulation it entered with Aqua and DELCORA to "resolve their differences"[39] as well as a Notice of Withdrawal of its Protest in this case. Like Trainer Borough, Upland Borough did not seek to open the record of this case to admit the Stipulation or seek any other procedurally appropriate avenue of approval to admit the documents into the record.

On February 1, 2021, I&E filed these timely Reply Exceptions. For the reasons explained below, I&E did not except to the RD. Additionally, in these Reply Exceptions, I&E has not addressed Sunoco's Exceptions simply because I&E is respecting the agreed-

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[36] 52 Pa. Code §§5.533.
[37] 52 Pa, Code §§5.535.
[38] Aqua failed to honor the commitments it made, as its Exceptions exceeded 80 pages.
[39] Joint Stipulation of Aqua Pennsylvania Wastewater, Inc., Upland Borough and Delaware County Regional Water Quality Control Authority.

upon page limits; nevertheless, I&E avers that Sunoco's Exceptions provide an independent and valid basis for denial of Aqua's Application. However, as demonstrated below, Aqua and DELCORA's combined Exceptions lack merit and they should be dismissed.

C. The ALJs' Recommended Decision

The ALJs' RD recommended that the Commission deny Aqua's Application because Aqua failed to meet its burden of proof for three reasons. These reasons are as follows:

> (1) Aqua failed to establish a record upon which the Commission can make a determination that the proposed acquisition promotes the service, accommodation, convenience and safety of the public in some substantial way;
>
> (2) The outstanding issues surrounding DELCORA's legal ability to transfer assets subject to the Asset Purchase Agreement (APA) significantly prevent a reliable determination of the appropriate ratemaking rate base, integral to the 1329 proceeding; and
>
> (3) Aqua failed to include its rate stabilization plan as an attachment to the Application.[40]

Aside from the third basis for denial of Aqua's Application referencing a rate stabilization plan, all of the ALJs' determinations adopted I&E's positions in this case. With regard to the rate stabilization basis of denial, I&E did not except because although its position was that Aqua's Bill Discount was not a rate stabilization plan, but simply an impermissible contractual agreement to circumvent Aqua's tariffed rates, the ALJs also made the critical determination that the agreement conflicted with Section 1303's tariffed rate requirement.[41] Therefore, despite I&E's conflicting position on Aqua's alleged rate

[40] RD at 2.
[41] RD at 25.

stabilization plan, the crux of its argument was adopted by the ALJs, eliminating the need for exceptions.

II. REPLY EXCEPTIONS

1. **Reply to Aqua Exception No. 1:** The ALJs correctly determined that Aqua failed to satisfy its burden of proof, warranting denial of its Application.[42]

In its first exception, while Aqua correctly cites to certain legal principles and standards that are applicable to its request for a Certificate of Public Convenience,[43] it fails to allege any record facts to support a basis for exception. Although Aqua points to Exceptions 2-10 to support its general allegation that met its burden of proof,[44] this exception provides no reason or independent support to warrant exception. Because the Commission's regulations require that "supporting reasons for the exceptions shall follow each specific exception"[45] I&E submits that Aqua's first exception fails adhere to this standard and therefore does not warrant consideration. In any case, a substantive reply to this groundless exception is not possible, and I&E submits that the Commission should dismiss Aqua's first Exception.

[42] RD at 2.
[43] Aqua Exceptions, (Public Version), pp. 10-11.
[44] Id. at 11.
[45] 52 Pa. Code § 5.533(b).

2. <u>Reply to Aqua Exception No. 2 and DELCORA Exception No. 1</u>: The ALJs correctly determined that ongoing litigation prevents the Commission from determining whether the Application would affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way and promote the public interest.[46]

A. Aqua and DELCORA's Exceptions Fail to Overcome Record Evidence

In this case, the record evidence demonstrates that ongoing litigation, which implicates municipal property and contract rights that DELCORA materially misrepresented in the APA by falsely claiming that there are no non-assignable assets,[47] have compromised the validity of the APA,[48] the accuracy of the UVEs valuation of the DELCORA system,[49] and the purported public benefit of the Trust.[50] Despite the undeniable need to protect the public interest by resolving these issues before approving Aqua's Application, Aqua and DELCORA now functionally claim that the ALJs should have overlooked all of the uncertainty, misrepresented property rights, and materially inaccurate APA, and just merely assumed the risk of approving Aqua's Application.[51] In this vein, Aqua and DELCORA appear to be arguing that the ALJs were obligated to approve Aqua's Application without ever knowing whether the sale could move forward or what assets could be transferred.

In an apparent attempt to assuage any concerns that the Commission may have about assuming the risk of the uncertain impact of pending litigation's impact upon the transaction, Aqua and DELCORA now claim that they are in active settlement discussions

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46 RD at 2, 19, and 26.
47 I&E Main Brief at 44-49; I&E Reply Brief, pp. 28-30.
48 Id.; I&E Reply Brief, pp. 24-28.
49 I&E Main Brief, pp. 47-52; I&E Reply Brief, pp. 30-31.
50 I&E Main Brief at 17; I&E Reply Brief at 10.
51 Aqua Exceptions, (Public Version), pp. 11-12; DELCORA Exceptions, pp. 5-9.

with several of the Municipal Protestants and that they are "hopeful" for a resolution.[52] I&E submits that more than hope is necessary to ensure that DELCORA has the authority to act as a seller of all of the property it purports to sell to Aqua. Absent resolution of the multiple lawsuits and questions surrounding DELCORA's authority to transact and to convey all the assets and contracts as purported in the APA, the ALJs correctly denied Aqua's Application.

B. Issues Regarding Record Evidence

At the outset, I&E must acknowledge that Aqua's Exceptions correctly identify an issue regarding I&E's prior references to certain exhibits that were ultimately not admitted into the record.[53] Upon review of Aqua's argument, I&E agrees with Aqua that it made an error in referencing Municipal Protestants' Exhibits 11-13 ("unadmitted exhibits"). To be sure, the hearing transcript in this case demonstrates that while existence of the three municipal lawsuits that serve as subject matter of these exhibits was discussed during the hearing, and the exhibits were distributed to parties in contemplation of them serving as cross-examination exhibits,[54] the exhibits themselves were not ultimately admitted into the record.[55] The error arose from the mistaken belief that the exhibits were admitted; therefore I&E must agree that the reference to those exhibits was improper.

However, while I&E concedes and regrets this error, I&E avers that both its own and the resulting ALJs' references,[56] to the unadmitted exhibits is in no way material to

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52 Aqua Exceptions, (Public Version), p. 12; DELCORA Exceptions, p. 11.
53 Aqua Exceptions, (Public Version), p. 11, footnote 15.
54 Tr. at 437, lines 8-16; Tr. At 469, lines 11-23.
55 Tr. at 516.
56 Aqua Exception, (Public Version), p. 11, footnote 15.

the ALJs' well-reasoned determination. Instead, the underlying municipal lawsuits that are the exhibits at issue were independently referenced in other portions of the record in this case[57] to which neither Aqua nor DELCORA have objected or identified in their Exceptions.[58] Accordingly, even without I&E's references to the unadmitted exhibits, which flowed through into the RD, the existence of the lawsuits that comprise them independently exists. Therefore, while regrettable, I&E's erroneous reference to the unadmitted exhibits is not a material error and the same information those exhibits contain is available elsewhere within the record.

Finally, while Aqua's identification of the unadmitted exhibit issue is appropriate, it simultaneously also relies on unadmitted evidence for its Exceptions, but without any independent record support. Specifically, both Aqua and DELCORA now ask the Commission to rely on unadmitted evidence in the form of an extra-record Stipulation they allege to have entered with Trainer Borough,[59] and alleged extra-record settlement conversations with other Municipal Protestants[60] to support the proposition that they will be able to cure the defects of the APA by way of reaching accords.[61] In proffering these extra-record claims, both Aqua and DELCORA's conduct is *almost* synonymous with the conduct of which they complain. However, it is not completely synonymous because Aqua and DELCORA's arguments have no support inside the record, which

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57 Tr. at 437, lines 8-16; Tr. At 469, lines 11-23; Municipal Protestants' Main Brief, pp. 13-15.

58 I&E also recognizes that neither Aqua nor DELCORA have excepted based on references to the unadmitted exhibits; nonetheless, I&E believes that acknowledgment of its error and identification of the pertinent information elsewhere in the record is appropriate.

59 Aqua Exceptions, (Public Version), p. 17; DELCORA Exceptions, p. 10.

60 Aqua Exceptions, (Public Version), pp. 11-12; DELCORA Exceptions, pp. 11-12.

61 Nor does Aqua have any record support for its new proposal regarding distribution of any available DELCORA Trust proceeds, which it is inappropriately offering for the first time in its Exceptions; however, I&E will address that issue in its response to Aqua's fifth exception.

closed on December 14, 2020.[62] Therefore, there is no evidentiary basis for Aqua and DELCORA to claim that a resolution of all the municipal litigation is forthcoming. However, as demonstrated by the above-references and through I&E's replies to Aqua Exceptions 3, 7-8, and 10, the record establishes that the pending litigation's outcome could materially alter DELCORA's ability to honor its APA commitments, resulting in Aqua (and thereby, its ratepayers) receiving less property than it is paying for, and/or compromise the validity of the UVEs' appraisal. The possibility and uncertainty of any of these outcomes is a viable basis for the ALJs' determination, but the convergence of all of them leaves no room for doubt. Accordingly, Aqua's second exception is without merit and it should be denied.

3. **Reply to Aqua Exception No. 3*:*** The RD did not need to address the proposed treatment of certain pre-existing service contracts between DELCORA and the Municipal Protestants because the record established that DELCORA lacked authority to transfer all the contracts as purported.

At the outset, I&E cannot understand the merit of Aqua's apparent claim that the ALJs erred by failing to address Aqua's "actual proposal"[63] to address the Municipal Protestants' contractual issues. From its Exceptions, Aqua's argument here appears to be predicated on a claim that the APA "generally presupposes" that "all required consents and agreements necessary to assign the subject contract from DELCORA to Aqua will have been obtained."[64] Aqua does not cite to any APA provision that supports this general presupposition, and it has not been meaningfully raised or

[62] RD at 12, footnote 10.
[63] Aqua Exceptions, (Public Version), p. 13.
[64] Aqua Exceptions, (Public Version), p. 14.

evaluated in the record for this case; accordingly, the ALJs did not err by failing to consider it. Nonetheless, if the APA does contain such a provision, then it directly comports with I&E's recommendation that the transaction not be permitted to close until Aqua and DELCORA provide the Commission with a guarantee that pending litigation will not result in any change to the terms of the APA for which Aqua seeks approval in this case.[65] With this in mind, either Aqua's argument is factually inaccurate or it needlessly forced I&E and the ALJs to spend considerable time and resources to litigate the need for a condition that Aqua apparently purports to be willing to accept. In either unfortunate case, the ALJs are not responsible for failing to address Aqua's "general presupposition."

The other allegation that Aqua attempts to make here is that the ALJs failed to consider that Section 2.06 of the APA provides an effective mechanism for it to use to address non-assignable assets.[66] Despite Aqua's claims, Aqua's attempted reliance on Section 2.06 to cure the APA's defects related to the non-assignable assets has been proven to be ineffective. The APA term that Aqua and DELCORA rely upon, Section 2.06, *Certain Transfers; Assignment of Contracts*, appears in pertinent part below:[67]

> (a) Notwithstanding anything to the contrary in this Agreement, and subject to the provisions of this Section 2.06(a), Section 2.06(b) and Section 12.01(c), to the extent that the sale, transfer, assignment, conveyance and delivery, or attempted sale, transfer, assignment, conveyance and delivery, to Buyer of any Assigned Contract or other Acquired Asset would result in a violation of Law, or would require the consent, authorization, approval or waiver of any Person (other than the Parties), including any Governmental Authority,

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65 I&E Main Brief, p. 19.

66 Aqua Exceptions (Public Version), p. 15.

67 Aqua's Application, Exhibit B-1, Section 2.06 (a)-(b). I&E notes that portions of these terms were not included because they were too voluminous and were not necessary to summarize Aqua and DELCORA's positions.

> and such consent, authorization, approval or waiver shall not have been obtained prior to the Closing, this Agreement shall not constitute a sale, transfer, assignment, conveyance and delivery, or an attempted sale, transfer, assignment, conveyance, and delivery, thereof (any such Acquired Asset, a "Nonassignable Asset"). . . .
>
> (b) Until such time as a Nonassignable Asset is transferred to Buyer pursuant to this Article II, Buyer and the Seller shall cooperate in any commercially reasonable and economically feasible arrangements (such as leasing/subleasing, licensing/sublicensing or contracting/subcontracting) to provide to the Parties the economic and, to the extent permitted under Law, operational equivalent of the transfer of such Nonassignable Asset to Buyer at the Closing and the performance by Buyer of its obligations with respect thereto, and so long as the Seller transfers and turns over all economic and beneficial rights with respect to each such Nonassignable Asset, Buyer shall, to the extent permitted under Law and the terms of any applicable contract that constitutes a Nonassignable Asset, as agent or subcontractor for the Seller, pay, perform and discharge the liabilities and obligations of the Seller thereunder from and after the Closing Date, but only to the extent that such liabilities and obligations would constitute Assumed Liabilities if the applicable consent or approval had been obtained on or prior to the Closing Date and such Nonassignable Asset had been assigned to Buyer at Closing. . . .

According to Aqua, by applying Section 2.06, if the consent it needs to assign any service agreement is required but cannot be obtained, then DELCORA will continue to be the legal owner of those assets after closing. In that case, Aqua would become the economic/beneficial owner of the "Nonassignable Assets" and Aqua would provide service to these customers as an agent/subcontractor of DELCORA.[68]

[68] Aqua Exceptions, (Public Version), p. 15.

Despite Aqua's claims of shelter via Section 2.06, both Aqua and DELCORA have admitted that aside from contracts, there are also property rights held by the Municipal Protestants that DELCORA does not have the present authority to transfer. Specifically, Aqua admitted both that "Edgmont has a right of first refusal to purchase certain DELCORA assets serving it if DELCORA sells the facilities" and that "Trainer and Upland each have a reversionary interest in the system serving them if DELCORA fails to operate the system."[69] Aqua indicates that it is continuing to work with the Municipal Protestants to resolve their concerns and to facilitate assignment of the contracts and assets;[70] however, it concedes that if a resolution cannot be reached, the property interests cannot be transferred.[71]

Here, the record proves that Section 2.06 cannot cure the material defects of the APA by permitting Aqua to acquire less than DELCORA promised to sell. Both Aqua and DELCORA admit that the Municipal Protestants hold valid property interests that DELCORA cannot convey without consent,[72] and the record does not reflect that any consent has been granted. Accordingly, the fact that the ALJs did not determine that Section 2.06 could salvage the material defects of the APA is a credit to their analysis, instead of a valid ground for excepting to the RD, as Aqua baselessly claims. Aqua's third exception is meritless and it should be denied.

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69 Id. at. 68.

70 Aqua Exceptions, (Public Version), p. 15. Again, I&E notes that Aqua now claims that has resolved Trainer Borough's Protest; however, the resolution is not of record. I&E also notes the extra-record existence of Upland Borough's Joint Stipulation. However, even if the Trainer Borough and Upland assets become assignable, Edgmont Township, Lower Chichester Township and SWDCMA's property/contractual rights remain at issue.

71 Aqua Main Brief (Public Version), pp. 68-69.

72 Id; DELCORA Main Brief at 22.

4. **Reply to Aqua Exception No. 4:** The RD could not have determined the Order of the Delaware County Court of Common Pleas at No. CV-2020-003185, issued December 28, 2020, removes that litigation as an impediment to the Proposed Transaction because the appeal period still existed.[73]

In its Exceptions, Aqua alleges that the ALJs' RD failed to determine that an Order of the Delaware County Court issued on December 28, 2020 removes litigation by the County against DELCORA and the Trust as an impediment to the Transaction.[74] For purposes of context, the ALJs' RD identified the Delaware County lawsuit against DELCORA as pending litigation that sought to dissolve DELCORA and that challenged the Trust arrangement that DELCORA touted as a significant benefit of this transaction.[75] I&E's Main and Reply Briefs explain the potential and significant impact of the pending suit upon this transaction, including invalidation of DELCORA's status as a Section 1329 Seller.[76] While I&E agrees with Aqua that the Delaware County Court Order of December 28, 2020 was issued in DELCORA's favor, Aqua ignores the fact that when the ALJs issued their RD on January 11, 2021, Delaware County was still within the applicable appellate timeframe of the decision. Aqua also ignores the fact that Delaware County reserved the right to assert its appellate rights and to notify the Commission if it appealed the decision.[77] I&E will defer to Delaware County as to whether it has filed an appeal; nevertheless, without the appeal period running before the

[73] RD at 2, 19.
[74] Aqua Exceptions, (Public Version), p. 18.
[75] RD at 19.
[76] I&E Main Brief at 40-44; I&E Reply Brief at 18-21.
[77] Delaware County Letter of December 31, 2020 advising ALJs that an appeal period was applicable and advising that it would provide notice of its appeal, if applicable.

RD was issued, the ALJs could never have determined the Delaware County litigation concluded in any final resolution.

Because the ALJs could not determine the finality of the Delaware County Court Order, it would have been wholly inappropriate for them to determine that the litigation was no longer an impediment to the transaction. No requisite public interest or public benefit analysis is possible while the Delaware County litigation remains unresolved, because the guarantees DELCORA makes in the APA may be directly and materially impacted by any of those lawsuits.[78] Accordingly, the ALJs recognition of the Delaware County litigation as an impediment to the transaction was wholly appropriate and consistent with protecting the public interest.

Finally, Aqua could have eliminated this wasteful and time-consuming predicament for all parties, the ALJs, and the Commission by (1) either resolving its issues with Delaware County prior to submitting its Application; or (2) by agreeing to hold the case in abeyance pending the final, unappealable outcome of the litigation. Instead of choosing to get its house in order, Aqua elected to thrust the uncertainty onto the parties, the ALJs and the Commission to grapple with; accordingly, the result was the impossibility for the ALJs to know when a final, unappealable outcome would result and how it would impact the transaction. In essence, Aqua's Exception demanded that the ALJs and the Commission assume the risk of Delaware County's appeal. Aqua's position demands that the ALJs put the public interest at risk, which is absurd. Accordingly, Aqua's Exception regarding the

[78] I&E Reply Brief, p. 21.

ALJs failure to recognize the Delaware County Court Order of December 28, 2020 as determinative is without merit and it should be rejected.

5. <u>Reply to Aqua Exception No. 5 and DELCORA Exception No. 2:</u> Aqua did not support a rate stabilization plan and its extra-record Information Sharing Proposal has the same defects as its withdrawn Bill Discount Proposal.[79]

In their RD, the ALJs determined that one independent basis for denying Aqua's Application was that Aqua's proposed Bill Discount operated as a de facto rate stabilization plan, but Aqua failed to attach the rate stabilization plan to its Application as required.[80] For purposes of context, a "rate stabilization" plan as defined by Section 1329 is "[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case."[81] The ALJs also agreed with I&E's position that Aqua's Bill Discount violated Section 1303 of the Code by producing an impermissible deviation from Aqua's tariffed rates;[82] however, they did not list this violation as one of the three bases for denying the Application.[83] Both Aqua and DELCORA except to the RD by arguing that they did not propose a de facto rate stabilization plan by proposing its of-record Bill Discount to facilitate distribution of any available DELCORA Trust proceeds.[84]

A. The De Facto Rate Stabilization Plan Determination

At the outset, I&E acknowledges that it does agree with Aqua and DELCORA that their of-record Bill Discount proposal was not a rate stabilization plan. Significantly, Aqua

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79 RD at 22-26 and 29

80 RD at 2, pp. 22-26; Conclusions of Law Nos. 15, 16.

81 66 Pa. C.S. § 1329(g).

82 RD at 24-25.

83 Nevertheless, I&E avers that the ALJs determination that the Bill Discount arrangement violated the law would be sufficient to strike it from Aqua's Application, if not outright deny it.

84 Aqua Exceptions, (Public Version), pp. 20-22; DELCORA Exceptions, pp. 12-16.

and DELCORA's Bill Discount proposal was contractually-based by way of an "Information Sharing" Memorandum of Understanding ("MOU"), whereby Aqua committed to use proceeds from the DELCORA Rate Stabilization Trust ("Trust") to reflect a billing discount on DELCORA customer bills after the effective date of new rates resulting from Aqua's next base rate case.[85] Aqua proposed to reflect the Bill Discount by applying a line item to directly discount the DELCORA customer bills from tariffed rates.[86] Aqua and DELCORA denied that the Bill Discount was a rate stabilization plan, and instead claimed that they were only asking the Commission to approve the MOU-based Bill Discount "as an administrative request," and only "if required" and "to the extent necessary."[87]

To be sure, Aqua has expressly and continuously disclaimed any proposal of a rate stabilization plan in this case, despite the fact that its billing arrangement is being implemented to facilitate the goal of having DELCORA customers' rates be set such that "customer rate increases are stabilized at an annual increase of 3% for 8-12 years after the transaction closes."[88] As summarized in I&E's Main Brief, throughout this case and in response to multiple pleadings, Aqua has continually denied that it proposed a rate stabilization plan.[89] Having recognized these denials, I&E did not find them determinative; however, the determinative fact lies in application of 1329(g)'s definition of the rate stabilization plan to Aqua's proposal.

Specifically, Section 1329(g) requirement that rate stabilization plan hold rates constant or phases rates in *over a period of time after the next base rate case* is not met

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85 I&E Main Brief, p. 8; Aqua St. No. 2-R, Ex. E.
86 I&E Ex. No. 1, Sch. 4.
87 Aqua Main Brief, Public Version, p. 40; DELCORA Main Brief, pp. 18-19.
88 Aqua Ex. W1, St. No. 5, p. 10.
89 I&E Main Brief, pp. 38-39.

because the uncertain existence and amount of the funding source available makes the timing determination impossible. Significantly, the Trust is the sole source of funding, and it either may be dissolved through any successful appeal of the Delaware County litigation,[90] or, if it survives pending litigation, its proceeds may be diminished or completely extinguished by other obligations.[91] Accordingly, there is no support for the conclusion that it will be an available source of funding for acquired customers' rate stabilization for any period of time, let alone until after Aqua's next base rate case, which is statutorily required. It is on this statutorily based ground only that I&E agrees with Aqua and DELCORA's position that they have not proposed a de facto rate stabilization plan. Despite that limited agreement, I&E does not endorse either the contractually based Bill Discount that was Aqua's of-record proposal, nor the contrived extra-record Information Sharing proposal that it now makes through Exceptions. Aside from the defects of those proposals, as further explained below, I&E presented a thorough analysis to explain that a statutorily-complaint rate stabilization plan is the only mechanism by which a Section 1329 Applicant may propose rates without offending Section 1303's mandate that utilities are not permitted to charge customers less than tariffed rates.[92]

B. Aqua and DELCORA's Inaccurate Rate Stabilization Claims

Aqua and DELCORA have claimed that even if a rate stabilization plan was required to be attached to Aqua's Application, sufficient evidence exists in the record to support that

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[90] Delaware County Main Brief, p. 28, Brief of the Delaware County Regional Water Quality Control Authority in Opposition to the Petition of the County of Delaware for A Stay, Request for Commission Review and Answer to A Material Question, A-2019-3015173; I&E Main Brief, pp. 40-43.

[91] Sunoco St. No. 2-SR, pp. 16-20 (Public Version).

[92] I&E Main Brief, pp. 36-40.

plan.[93] As I&E witness Gumby explained,[94] when Section 1329 applicants propose to stabilize acquired customers' rates, the Commission requires the applicant to provide supporting information in order for the Commission to properly examine the impact of stabilization.[95] Specifically, the Commission has mandated that if rate stabilization is proposed, the applicant must provide the following: "testimony, schedules, and work papers that establish the basis for the plan and its impact on existing customers who need to cover the revenue requirement that would be shifted to them under the plan."[96] Here, Aqua cannot conclusively provide a basis for the plan or any supporting schedules or workpapers to underlie it because all of those would be predicated on an assumption that the Trust will exist at a certain level, and there is no evidentiary basis to support that assumption. There can be no support for a rate stabilization plan that depends upon such a speculative, and potentially non-existing Trust funding source. Accordingly, Aqua and DELCORA's claims that they have record support for any required rate stabilization plan is inaccurate and it must be rejected.

Finally, I&E also avers that the Commission must reject DELCORA's claims that the Commission's Bureau of Technical Utility Services' ("TUS") acceptance of Aqua's Application equates to a substantive determination that Aqua did not propose a rate stabilization plan.[97] First, the Commission's Final Supplemental Implementation Order for

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93 Aqua Exceptions, (Public Version), pp. 25-26; DELCORA Exceptions, pp. 16-17.
94 I&E St. No. 1-R, p. 4.
95 *Implementation of Section 1329 of the Public Utility Code, Final Implementation Order*, M-2016-2543193, p. 27 (Order entered October 27, 2016).
96 Id.
97 DELCORA Exceptions, p. 16.

Section 1329 proceedings[98] expressly indicates that TUS is not charged with performing a substantive analysis of the information that Aqua provides. Specifically the FSIO explains that "TUS does not review the veracity or substantive qualify of information that an applicant may submit to fulfill the threshold requirements of the Application Filing Checklist."[99] Additionally, aside from the fact that the Commission has expressly disavowed any obligation for TUS to police the accuracy of Aqua's substantive representations, I&E submits that Aqua and DELCORA's attempt to shift any responsibility for the inaccuracy of Aqua's Application onto TUS is, at best, disingenuous. To the extent that any party is unfamiliar with TUS's role in the Section 1329 process, it would be well-suited to familiarize itself with the several implementation orders that the Commission developed to clarify processes, requirements, and responsibilities. In any case, blaming TUS for acceptance is not a viable argument.

C. Aqua's Withdrawn Bill Discount Proposal Violated Section 1303

Although Aqua has now withdrawn its Bill Discount proposal, its exceptions nevertheless attempt to defend the proposal against I&E's litigated position that the proposal violates Section 1303 of the Code.[100] While the proposal that I&E litigated apparently is now no longer operative,[101] I&E will nonetheless summarize the reasons why Aqua's Bill Discount proposal violated the law because, from the limited information available, many of

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98 *Implementation of Section 1329 of the Public Utility Code*, *Final Implementation Order*, M-2016-2543193, Final Supplemental Implementation Order ("FSIO") p. 27 (Order entered February 28, 2019).

99 FSIO at 43.

100 Aqua Exceptions, (Public Version), pp. 23-25.

101 I&E learned of Aqua's intent to withdraw Bill Discount proposal only via Aqua's Exceptions filed at approximately 4 p m. on January 22, 2021.

those reasons appear to translate to Aqua's unsupported, extra-record Information Sharing proposal.

In addressing Aqua's Bill Discount proposal in its Main Brief, I&E explained that it violated Section 1303 of the Code, which provides as follows:

> [n]o public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto.[102]

I&E also explained that Pennsylvania Courts have strictly interpreted Section 1303 as "mean[ing] that public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility."[103] Here, as exemplified by examination of the sample bill Aqua provided,[104] by way of its Bill Discount, Aqua proposed to charge DELCORA customers less than tariffed rates. I&E submitted that permitting Aqua and DELCORA to contract around Section 1303 via a MOU or any other device would render Section 1303 meaningless, an outcome that is wholly inconsistent with the guiding principle of statutory interpretation that the General Assembly does not intend a result that is absurd or unreasonable.[105]

The PAWC/Scranton Acquisition Case[106]

To provide a better understanding of why Aqua's Bill Discount proposal offends the Code, I&E explained a similar rate adjustment issue was the subject of litigation in the

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102 66 Pa. C.S. § 1303.
103 *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044, 1050 (Pa. Cmwlth. 2002) quoting *Pennsylvania Public Utility Commission*, 663 A.2d 281, 284 (Pa. Cmwlth. 1995).
104 Id.
105 66 Pa. C.S. § 1922.
106 I&E Main Brief, pp. 24-29.

Pennsylvania American Water Company ("PAWC") acquisition of the Scranton Sewer Authority ("SSA") wastewater system.[107] Although the PAWC/SSA acquisition case was not filed under Section 1329, PAWC's Asset Purchase Agreement with SSA included a provision for a Variance Adjustment, a potential adjustment to the $195 million purchase price ten years following the Closing of this transaction. If, over this ten-year period, there was a positive difference between the annual revenues in the Authority's former service area and a 1.9% compound annual growth rate (CAGR) in annual revenues, PAWC would have had to pay the difference to SSA in accordance with the following APA provision:

> Within thirty (30) days of final resolution of the calculation of the Variance Adjustment, Seller shall notify Buyer whether the adjustment to the Purchase Price in the amount of the Variance Adjustment shall be paid directly to Seller or distributed to Buyer's then-current wastewater customers in the Service Area**…..If Seller elects distribution of the adjustment of the Purchase Price for the Variance Adjustment to Buyer's then-current wastewater customers in the Service Area, Buyer shall at its sole cost and expense, subject to PaPUC approval and applicable Law, timely implement procedures and protocols reasonably acceptable to Seller and then make a one-time equal, flat-rate distribution to all customers then being served by Buyer in the Service Area their proportionate share of the Variance adjustment as mutually agreed by Buyer and Seller…. In the event the PaPUC fails to allow Buyer to timely implement procedures and protocols and make distributions to customers in the Service Area as aforesaid,** Buyer shall pay the Variance Adjustment as an adjustment to the Purchase Price directly to Seller within thirty (30) days of the final resolution of the calculation of the Variance Adjustment**…[and] Buyer shall also timely pay Seller the reasonable costs of (i) hiring a third-party administer and pay**

[107] Joint Application of Pennsylvania-American Water Company and the Sewer Authority of the City of Scranton for Approval of (1) the transfer, by sale, of substantially all of the Sewer Authority of the City of Scranton's Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania ("Scranton Acquisition Case"), Docket No. A-2016-2537209 (Recommended Decision Entered August 17, 2016).

> **the Variance Adjustment to wastewater customers in the Service Area and (ii) establishing the processes and protocols to make such payment as described herein**.[108]

By way of the above provision of PAWC and SSA's asset purchase agreement, PAWC agreed that, if SSA so desired, it would pay the Variance Adjustment directly to ratepayers in the former SSA territory. However, in contemplation of the fact that the Commission may not approve of this term, as an alternative, PAWC agreed to distribute the Variance Adjustment to the SSA and to pay for a third-party to administer and pay the Variance Adjustment to those customers. I&E argued that both the direct and indirect payment provisions offend Section 1303 of the Code and should not be approved.[109]

Specifically, I&E argued that if PAWC directly paid the Variance Adjustment to customers in the former SSA territory, the payment would operate as a de facto rate refund to SSA customers. Those customers would be paying Commission approved tariff rates for ten years. However, upon receipt of the Variance Adjustment payment, the SSA customers would have ultimately paid less for utility service than prescribed under PAWC's tariff which is prohibited by the Public Utility Code. While the PAWC/ Scranton Asset Purchase Agreement provided an alternative route for PAWC's distribution to customers in the former SSA territory by way of PAWC's agreement to distribute the Variance Adjustment to the SSA and to pay for a third-party to administer the Variance Adjustment to those same customers, it too offended Section 1303. Although not a direct disbursement, the alternate arrangement still violates Section 1303 which prohibits a public utility from "directly or

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[108] Scranton Acquisition Case, Docket No. A-2016-2537209, APA at 58, ¶707(e) (emphasis added).
[109] Scranton Acquisition Case, Docket No. A-2016-2537209, I&E Main Brief, pp. 15-17, 19-21.

indirectly, by any device whatsoever" from charging a greater or less rate for service than what is specified in its tariff.[110]

Ultimately, the PAWC/SSA Variance Adjustment was litigated, and Administrative Law Judges David A. Salapa and Steven K. Haas adopted I&E's position that the proposed Variance Adjustment violated Section 1303. A review of the ALJs' recommended decision indicates that they determined that regardless of whether variance adjustments were paid to impacted customers by a third-party administrator or paid by PAWC directly to customers, the attempted use of sale proceeds to provide a buffer against future rate increases constituted de facto refunds that would impermissibly lead to customers paying less than tariffed rates because SSA customers would receive a price break regardless of whether it was paid by PAWC or a third-party.[111]

I&E noted Aqua's Bill Discount presented a much more immediate and direct violation of Section 1303 than the Variance Adjustment proposal that the ALJs rejected in the PAWC/SSA acquisition case. Significantly, Aqua did not propose to apply sales proceeds to acquired customers after they have paid tariffed rates for ten years. Instead, vis a vis its MOU with DELCORA, Aqua proposed to directly discount acquired customers' rates from Aqua's applicable tariffed rates via a line item, as soon as DELCORA customers are subject to an approved Aqua base rate increase. Additionally, Aqua's Bill Discount guaranteed a deviation from acquired customers paying tariffed rates as soon as, and for and as long as, the arrangement remains in place. Therefore, I&E submitted that Aqua's proposal

[110] Id. at pp. 20-21.

[111] Scranton Acquisition Case, Docket No. A-2016-2537209, Recommended Decision, p. 39 (August 17, 2016). I&E notes that in response to the ALJs' determination, PAWC elected to withdraw its Variance Adjustment; therefore, it was not an issue reviewed by the Commission.

extended far beyond what the ALJs have already determined was an impermissible violation of Section 1303 in the PAWC/Scranton acquisition case and it warranted denial in this case too.

Finally, as explained in I&E's Reply Brief,[112] I&E recognized that in the PAWC/SSA acquisition case, where PAWC attempted to use the Variance Adjustment as a vehicle to stabilize acquired customers' rates, PAWC did not have the rate stabilization option available. Instead, as a non-Section 1329 Applicant, PAWC did not have an opportunity to propose a rate stabilization plan in order to avoid offending Section 1303. Here, as a Section 1329 Applicant, the General Assembly has provided Aqua with an express opportunity to do what PAWC could not do, propose a rate stabilization plan, but Aqua declined it in favor of needlessly contracting around the Code. However, as established by legal precedent,[113] municipalities cannot contract around the Code's tariffed rate mandate. Additionally, recent Commission precedent clarifies that a jurisdictional utility like Aqua cannot attempt to circumvent the Code by making separate arrangements through an agreement with a municipal authority.[114] Therefore, applying the facts of Aqua's proposal to the applicable law, the ALJs appropriately determined that Aqua's Bill Discount violated Section 1303.[115]

D. Aqua's Extra-Record Proposal to Facilitate DELCORA Trust Payments

In the same musical-chairs type of dysfunction that Aqua has continually imposed upon this proceeding, Aqua now attempts to replace its Bill Discount proposal with an

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[112] I&E Reply Brief, p. 14.

[113] I&E Reply Brief at 16-17, citing *PPL Electric Utilities Corporation v. City of Lancaster*, 214 A.3d 639 (Pa., 2019).

[114] I&E Reply Brief at 17, citing *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority – Stage 1*, M-2018-2640802 et al, p. 59 (Opinion and Order, March 26, 2020).

[115] RD at 25-26.

"Information Sharing" proposal, which has been introduced for the first time in Exceptions.[116] At the outset, I&E avers that Aqua's Information Sharing proposal is, on its face, untimely, unsupported, and procedurally inappropriate. First, no party has had an opportunity to conduct any discovery regarding the proposal, or to develop any testimony regarding it because it simply did not exist until January 22, 2021.[117] Because there is no record to support it, there are no facts available for the Commission to consider in any evaluation of the Information Sharing Proposal. Therefore, the proposal is not properly before the Commission and any consideration of it now would be to the detriment of due process for all parties.

Without waiver if its position that Aqua's new proposal is procedurally inappropriate and therefore does not warrant consideration, the few details I&E can glean from Aqua and DELCORA's less than two-page description of the proposal[118] already raise a host of questions and a significant legal concern. For purposes of context, Aqua appears to be proposing that the DELCORA Trust will now mail a check to customers directly, and that Aqua and DELCORA will still need to provide it with the applicable customer name, address, bill calculation, and amount billed to DELCORA.[119] Accordingly, Aqua must still have a role in providing the customer information so that the Trust can identify who should receive the checks, while also "maintain[ing] DELCORA's commitment to limit increases in their Aqua rates to no more than 3% per year for so long as proceeds remain in the Trust."

116 Aqua's Exceptions, (Public Version), pp. 22-23.
117 This date is more than a month after the record closed on December 14, 2020.
118 Aqua Exceptions, (Public Version), pp. 22-23; DECLORA Exceptions, pp. 18-19.
119 Aqua Exceptions (Public Version), p. 23.

To facilitate this arrangement, and as pertinent to I&E's concerns, Aqua and DELCORA's plan includes the following:

> 1) developing a process to ensure confidentiality of the customer information needed to direct mail checks including the limited nature of the data being provided (name, address and amount billed) and including restrictions for who has access to the data, what purpose such data can be collected and to whom that data can be transferred;
>
> 2) file quarterly reports containing sufficient documentation that the total returned to DELCORA customers equates to DELCORA's commitment in this proceeding related to the 3%;
>
> 3) develop a process for updating customers who have access to the Trust and when they may no longer;

First, from a logistical perspective, the above terms raise important questions. These questions include, but are not limited to the following: (1) Exactly what bill data will Aqua be providing to the Trust; (2) Who is eligible to receive the payments and how will eligibility be determined; (3) If funding is available to cover only a portion of eligible customers, how will the funding be prioritized and who will make that determination; (4) Does Aqua propose to bill only Trust recipients for the administrative costs it incurs to facilitate the unsubstantiated cost of this "Information Sharing" arrangement; and (5) If customers do not pay their bills, will they still get Trust payments?

I&E notes that the above questions are just those that it has had time to identify since January 22, 2021. I&E's preliminary questions do not represent the universe of questions that should be answered in an appropriate and thorough investigation of the proposal. Regardless, the questions serve to exemplify the types of concerns that will not be addressed if Aqua's proposal is approved through the extra-record Exception phase of this case.

Finally, from a legal perspective, based upon the limited information available, it appears that Aqua's proposal to provide customer information to the Trust to facilitate stabilization payments would still operate as a violation of Section 1303's tariffed-rate provision, albeit indirectly. Again, referring to the PAWC/SSA acquisition case described in greater detail above, the Information Sharing proposal is synonymous with PAWC's impermissible agreement to distribute its Variance Adjustment to the SSA and to pay for a third-party to administer the Variance Adjustment to customers. As was the case in PAWC/SSA, although Aqua is no longer proposing a direct role in fund disbursement, its indirect role in facilitating the payments still violates Section 1303 which prohibits a public utility from "directly or indirectly, by any device whatsoever" from charging a greater or less rate for service than what is specified in its tariff.[120]

Aqua misses the point. By providing the ratepayers' information to the Trust, and by virtue of the Trust payment being entirely predicated on Aqua's rates, the Information Sharing proposal still results in the recipient paying less than tariffed rates. The statutory violation is not cured by having a third-party Trust mail the actual payment, it just operates as an indirect violation instead of a direct violation. To demonstrate this, consider the hypothetical scenario of acquired DELCORA customers who may leave Aqua's service territory while the Trust is still intact. The Trust would no longer mail those former customer payments because Aqua would not be sending their information to the Trust anymore. The receipt of the check is entirely based on the recipient's obligation to pay Aqua's rates, which clearly illustrates the fact that the receipt of any Trust checks is

[120] Scranton Acquisition Case, Docket No. A-2016-2537209, I&E Main Brief, pp. 20-21.

predicated upon ensuring that DELCORA customers pay less than Aqua's full rates. Accordingly, this deviation from tariffed rates is determinative, not whether a check is mailed instead of a bill credit applied. Therefore, the Commission should reject Aqua's Exception No. 5 because it is both procedurally inappropriate and legally unsound, and either of those two grounds are on their own sufficient to warrant rejection.

6. <u>Reply to Aqua Exception No. 6 and DELCORA Exception No. 3</u>: Aqua failed to establish a record upon which the Commission can decide that the Proposed Transaction promotes the service, accommodation, convenience, and safety of the public in some substantial way.[121]

Despite Aqua's claims to the contrary, the ALJs' determinations are well-established in the record. In their RD, the ALJs correctly recognized that several lawsuits pending against DELCORA made it impossible to determine what facilities/assets Aqua would be acquiring in this case, and called into question Aqua's ability to fulfill its service obligations where it may not have sufficient facilities.[122] As I&E explained in its above responses to Aqua's second and third exceptions, which it now incorporates here, the record is clear that non-assignable assets exist, which were misrepresented in Aqua's APA and which will materially impact the transaction. It is axiomatic that if the record is clear that DELCORA cannot transfer all the assets Aqua is paying to acquire, then the transaction is not in the public interest. As the ALJs correctly noted, the non-assignable assets at issue through the municipal litigation may raise issues with Aqua fulfilling its service obligations,[123] and Aqua has not dispelled this concern. Instead, Aqua claims that the litigation, which I&E avers exposes the

[121] RD at 2.
[122] RD at 20.
[123] Id.

deficiencies and material misrepresentations in Aqua's APA, has no impact upon the alleged public benefits of the transaction.

To be sure, Aqua's Exceptions outline "the many public benefits" it alleges will result from the transaction.[124] In this case, I&E did not challenge the potential benefits other than the Trust, but it noted that all the affirmative public benefits alleged were contingent on the outcome of pending litigation. Significantly, the alleged benefits in this case are grounded in the commitments made in the APA, so their existence depended upon both DECLORA's authority to enter the APA as a bona fide seller, and its ability to convey the system property it purports to convey and to assign all of the contracts it purports to assign.[125] Because DELCORA's authority to act as a seller, its ability to convey all of the system property, and its authority to assign certain contracts was the subject of multiple fronts of litigation that existed when the ALJs issued their RD, they had no ability to gauge whether all of the alleged benefits of Aqua's Application could actually ever materialize. Aqua's argument that the ALJs failed to determine that its Application transaction promotes the service, accommodation, convenience, and safety of the public in some substantial way completely ignores that such a determination hinges upon whether DELCORA actually has the authority to make and honor the commitments enshrined in the APA. Because of the pending litigation, the ALJs could not make that threshold determination; therefore, Aqua's meritless argument that the ALJs failed to consider benefits that may not materialize is not a valid basis for exception.

[124] Aqua Exceptions, (Public Version), pp. 27-40.
[125] I&E Main Brief at 16.

7. <u>Reply to Aqua Exception No. 7</u>*:* It was not required that the ALJs recommend any conditional approval of Aqua's Application where they properly determined that Aqua failed to meet its burden of proof and no public interest determination could be made.

On yet another invalid basis, Aqua excepts to the failure of the RD to recommend approval of the Application with conditions. At the outset, Aqua has not provided any authority to support its apparent claim that the ALJs were required to recommend approval its Application with conditions because no such requirement exists. Instead, the law is clear that the ability to recommend approval with conditions is discretionary, and not mandatory. As I&E explained in its Main Brief, to ensure that a transaction is in the public interest, the Commission *may* impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.[126] In this case, the ALJs determined that Aqua failed to meet its burden of proof and therefore there was no need for them to evaluate the merits of each of the many conditions recommended by each party.

Although I&E avers that Aqua's seventh exception is baseless because it fails to identify a requirement for the unfounded basis of the ALJs' alleged error, I&E also notes that it recommended that any acceptance of Aqua's Application be conditioned upon several terms that Aqua rejected. Initially, I&E recommended that approval be conditioned on the following three terms:[127]

> (1) Aqua should provide a separate cost of service study for the DELCORA system that segregates the City of Chester and further segregates the City of Chester by sanitary and stormwater costs, identifies the plant in service costs at the time the DELCORA system was purchased, identifies the cost of any plant retirements, and identifies the cost of any plant investment.

[126] I&E Main Brief at 18, quoting 66 Pa. C.S. § 1103(a).
[127] I&E St. No. 1, pp. 25-26; I&E Main Brief, pp. 18-19.

(2) To the extent that it relies upon Aqua issuing acquired customers bills that are lower than the applicable tariffed rates, Aqua and DELCORA's proposal for an irrevocable trust should be rejected.

(3) Closing of the proposed transaction should not be permitted to occur until Aqua and DELCORA provide the Commission with a guarantee that the pending litigation in Delaware County Court, or in any other venue, will not change (1) DELCORA's status as a bona fide seller and (2) will not result in any change to the terms of the APA for which Aqua seeks approval in this case.

As correctly indicated in Aqua's Exceptions, I&E reached a resolution regarding the first of I&E's conditions, the cost of service study recommendation.[128] However, no resolution was reached regarding I&E's second condition relating to the Bill Discount proposal, nor of I&E's third condition relating to Aqua and DELCORA's need to guarantee that pending litigation would not compromise DELCORA's ability to sell or the terms of the APA. Now, apparently by way of its fifth exception, Aqua has withdrawn the Bill Discount proposal after the RD was issued, in favor of a new unsupported, extra-record Information Sharing Proposal that raises a host of questions and legal concerns. To the extent possible, I&E has addressed the defects of Aqua's extra-record Information Sharing proposal in its response to Aqua's fifth exception.

Notably, the third condition that I&E recommended regarding DELCORA and Aqua's need to guarantee that DELCORA had the authority to sell the assets in the APA and to fulfill the commitments of the APA, may have presented Aqua with an opportunity to salvage its Application. To be sure, the need for those conditions was well-supported in

[128] Aqua Exceptions, (Public Version), p. 44.

I&E's case.[129] Unfortunately, Aqua and DELCORA rejected, and Aqua still rejects[130] the opportunity to provide the Commission with assurance that pending litigation will not alter the transaction. Considering the buyer and seller's unwillingness to assure the viability of the transaction in the wake of several lawsuits challenging the APA commitments, the ALJs correctly determined that the uncertainty and the unresolved existence of non-assignable assets was a fatal flaw to any approval of the Application.[131] The record clearly supports the ALJs' conclusion, and the fact that Aqua and DELCORA opposed I&E's condition that may have prevented it is not now a valid basis for exception.

8. **Reply to Aqua Exception No. 8:** The ALJs correctly determined that DELCORA's legal inability to transfer certain assets compromised the validity of the UVE appraisals and thereby prevented a reliable determination of the ratemaking rate base.[132]

In its eighth Exception, Aqua attempts to dispute the potential, significant, and material impact of that missing property and contract rights that underlie the Municipal lawsuits upon the UVEs fair market appraisals of the DELCORA system.[133] As part of its argument, Aqua argues that Trainer Borough has withdrawn its protest and that it is pursuing resolution of the other municipal protests.[134] Despite Aqua's argument, the record supports the ALJs' determination that the property and contract rights at issue in the Municipal lawsuits[135] are material and that the UVEs valued the DELCORA system using an inventory that assumed DELCORA could transfer those rights to Aqua.

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129 I&E St. No. 1, pp. 9-10; I&E St. No. 1-SR, p. 11; I&E Main Brief at 40-52; I&E Reply Brief at 18-31.
130 Aqua Exceptions, (Public Version) at 42-43.
131 RD at 20-21.
132 RD, page 2, and Discussion - Section E) and (2) Conclusion of Law 11.
133 Aqua Exceptions, (Public Version), p. 49.
134 Id.
135 I&E notes that there is no of-record resolution to all the Municipal lawsuits.

First, the record in this case reveals that multiple municipalities within the DELCORA "system" have asserted property and contractual rights that DELCORA now impermissibly attempts to convey to Aqua. These rights include the following:

- Edgmont Township has an existing contract with DELCORA that identified specific terms of the finance, design, construction, installation, ownership, operation, maintenance and repair duties and responsibilities for the Crum Creek Sewer District System, which DELCORA purports to convey. The Edgmont contract included a buyback provision that a buy-back provision in case DELCORA ever did decide to sell or stop operating the system, plus a requirement that Edgmont would have to consent to any assignment of the contract. Edgmont has not consented to any assignment.[136]

- Lower Chichester Township has an existing contract with DELCORA that defines parameters for DELCORA will 'bill the township for service, what costs can be billed to the township, operation of the treatment plant, industrial pretreatment, obtaining grant funding, and so on." Lower Chichester Township has not consented to any assignment of its contract.[137]

- Upland Borough has an existing contract for DELCORA to service and maintain the Upland Borough wastewater/sewer system, and the agreement provides, among other things, that in the even that DELCORA does not continue to operate the wastewater system, the system in Upland will be turned back over to Upland. Upland Borough has not consented to any assignment of its contract.[138]

- Trainer Borough has an existing contract with DELCORA, which, inter alia, provides for DELCORA's operation of the Trainer Borough system and which provides that the customers of DELCORA located in Trainer Borough shall bear none of the costs of the collection of sewage outside the service area of Trainer Borough. Also, the contract provides that if DELCORA fails to operate the wastewater system, then certain assets will revert to Trainer's ownership, unless Trainer declines to take

[136] Edgmont St. No. 1, pp. 3-5.
[137] Lower Chichester St. No. 1, pp. 3-5.
[138] Upland St. No. 1, pp. 1-3. I&E understands from Upland's extra-record Stipulation that this issue may have been resolved, but the resolution is not of record and any impact it may have cannot be evaluated outside of the record. The "moving target" nature of Aqua's Application precludes any further analysis.

ownership in which case the Trainer system reverts to the County of Delaware or any other agency, as may be dictated by law. Trainer Borough has not consented to any assignment of its contract.[139]

- Southwest Delaware County Municipal Authority ("SWDCMA") has an existing contract with DELCORA that memorializes the rates SWDCMA agreed to pay DELCORA. The rate agreement was reached recognition of SWDCMA's contribution of 60%, or approximately $12 million of the costs of the Chester Ridley Creek Pump Station which was necessary to were built to connect SWDCMA, a neighboring authority, and another township to the DELCORA system. SWDCMA has not consented to any assignment of its contract.[140]

I&E notes that the APA does not accurately recognize the above property interests retained by Edgmont Township, Upland Borough and Trainer Borough. Instead, the APA ignores those property interests by failing to identify them as excluded assets in Schedule 2.02(g) when, in fact, they cannot be conveyed without the permission of Upland Borough and Trainer Borough. Additionally, by way of Section 4.15 of the APA, "Assigned Contracts," DELCORA purports to transfer the above-mentioned contracts of Edgmont Township, Lower Chichester Township, Upland Borough, Trainer Borough, and SWDCMA without their requisite permission for such assignment.

The inaccuracy of the APA extends beyond the contract itself because it directly impacts the accuracy of the UVEs' valuations in this case. DELCORA's contested ability to sell property of Edgmont Township, Upland Borough, and Trainer Borough because the engineering report that underlies the fair market valuations of each of the UVEs in this case

[139] Municipal Protestant Exhibits, Exhibit 2, pp. 12-13. I&E understands from Aqua's Exceptions that this issue may have been resolved, but the resolution is not of record and any impact it may have cannot be evaluated outside of the record. The "moving target" nature of Aqua's Application precludes any further analysis.

[140] SWDCMA St. No. 1, pp. 1-5.

assumes that the property of those entities is owned by DELCORA. To demonstrate this point, Section 4.06 of the Engineering Assessment as follows:

> 4.06 COLLECTION SYSTEM
>
> DELCORA owns all or part of the collection systems in the following service areas: City of Chester, Chester Township, Borough of Marcus Hook, Borough of Rose Valley, **Upland Borough**, Parkside Borough, **Trainer Borough**, **Edgmont Township**, Pocopson Township, and Springhill Farms (Chadds Ford Township). The collection system consists of gravity piping and laterals within the right of way. A map of the collection system can be found in Appendix A, Figure Al. Collection system related cost data can be found in Section 8 for the gravity mains, manholes and force mains under account codes 361.21, 361.23, and 360.21 respectively.[141]

The Engineering Assessment's assumption of DELCORA's ownership of the Upland Borough, Trainer Borough, and Edgmont Township's assets has real valuation consequences if inaccurate. The valuation consequences arise because every faulty assumption made in the report carried forward to the UVEs' appraisals. No party has refuted this fact, and the record fully supports this conclusion. Specifically, DELCORA's UVE, Dylan W. D'Ascendis of Scott Madden, Inc. relied upon the Engineering Assessment's description of assets for his original cost calculation, and he relied upon the conclusion that DELCORA owns the collection system assets of Upland Borough, Trainer Borough, and Edgmont Township's.[142] Additionally, Aqua's UVE, Harold Walker, III of Gannett Fleming Valuation and Rate Consultants, LLC indicated that Gannett Fleming relied upon the Pennoni Engineering Assessment to calculate the original cost and related accrued depreciation of the DELCORA

[141] Aqua Application, Exhibit D, Pennoni & Associates, Engineering Assessment and Original Cost of DELCORA Sewerage Facilities, Section 4.06 (emphasis added).

[142] Aqua Application, Exhibit R, pp. 4-6.

system as of December 31, 2019[143] and that he also relied upon it for the identification of DELCORA assets and their condition.[144]

Because the UVEs' appraisals were predicated, at least in part, on the assumption that DELCORA's transferrable assets included the collection system assets of Upland Borough, Trainer Borough, and Edgmont Township, if DELCORA does not own or cannot transfer those assets, the valuations are flawed, unreliable, and they must be rejected. Neither Aqua nor DELCORA have refuted the inaccuracy of the Engineering Assessment, as Aqua only attempts to excuse them by arguing that the assessment is "put together and the subsequent valuation is done in a point of time" and that if precision is required, "it is hard to see a path forward for any approval."[145] I&E avers that the Commission must reject Aqua's absurd argument that it is too administratively difficult for the Engineering Assessment to be accurate. To be sure, Section 1329 explicitly requires that both the buyer and seller engage the services of the same licensed engineer to assess the tangible assets of the selling utility,[146] and there is no exception for foregoing accuracy in the name of convenience. While it may be inconvenient to ensure that the seller actually owns the property it is purporting to sell, the notion that Aqua's ratepayers should be subject to paying for property that DELCORA cannot sell because Aqua believes the burden of accuracy is too onerous is insulting and it must be rejected.

Aside from its claims of administrative burden, Aqua's arguments also belie the material impact of the non-assignable assets. Significantly, while both Aqua and DELCORA

143 Aqua Application, Ex. Q, p. 27.
144 Id. at p. 3.
145 Aqua Exceptions, (Public Version) at 51.
146 66 Pa. C.S. § 1329(a)(4).

argue that UVEs D'Ascendis and Walker testified the above-mentioned property rights would not be impactful to their valuations,[147] their claims are directly contradicted in the record. First, both Aqua and DELCORA ignore UVE Walker's testimony that his valuation would likely be different had he known about the existence of non-assignable assets. During the evidentiary hearings in this case, Mr. Walker testified that "the APA essentially determines the rules or the basis of which and how you go about a fair market value determination."[148] Mr. Walker then testified that his appraisal adopted the APA's representation that all the contracts, customers, and assets of the DELCORA system would be transferred to Aqua at closing.[149] Significantly, when asked whether his valuation of the DELCORA system would be different if the APA was inaccurate and that there are, in fact, non-assignable assets, Mr. Walker indicated that he would likely reach a different conclusion if that were the case.[150] I&E submits that this alone is enough to support the ALJs' determination that the validity of the UVEs' appraisals were compromised and could not support a ratemaking rate base value for this case; however, more support exists.

Aside from UVE Walker's recognition that the existence of non-assignable assets and contract would likely change his valuation, and that he relied on the APA's accuracy, the record also establishes these facts. Specifically, Municipal Protestants have disproven DELCORA's claim that the value of the non-transferrable assets and contracts they hold are negligible because the revenues and customer bases tied to these assets are significant and

147 Aqua Exceptions, (Public Version), p. 50; DELCORA Exceptions, pp. 7-8.
148 Hearing Tr. (Public Version) at 388, ln. 7-9.
149 Id. at 388, ln 10 through 389, ln. 1.
150 Id. at 390, ln 20 through 391, ln. 15.

impactful.[151] More specifically, in 2019, DELCORA's total revenues from providing wastewater service were approximately $59,818,000, and the Municipal Protestants collectively provided $5,453,000, or approximately 9.1%, of DELCORA's total service revenues.[152] Additionally, the Municipal Protestants have demonstrated that DELCORA lacks the ability to transfer the contract rights necessary to serve 2,600 retail customers in Edgmont Township, Upland Borough, and Trainer Borough, which represents approximately one-sixth (1/6) of DELCORA's retail customer base.[153] Therefore, I&E submits that Aqua and DELCORA's attempt to argue that the uncertain impact of the Municipal litigation that implicates these property interests is of no valuation consequence to the transaction is unsupported and contradicted by the record. Instead, the ALJs' determination DELCORA's legal inability to transfer certain assets compromised the validity of the UVE appraisals is well-supported by the record and Aqua's Exception should be denied.

9. **Reply to Aqua Exception No. 10:** The ALJs correctly determined that Aqua failed to establish a record upon which the Commission can make a determination of reasonableness, legality, or validity of both the APA and municipal contracts alleged to be currently held by DELCORA.[154]

Despite Aqua's claims to the contrary, the ALJs correctly determined that Aqua failed to establish a record establish a record upon which the Commission can make a determination of reasonableness, legality, or validity of both the APA and Aqua's request to assume enumerated municipal contracts alleged to be currently held by DELCORA. In

[151] I&E acknowledges that the alleged resolution of Trainer and Upland Borough's Protests may impact these figures, but the record is closed and the facts and impact of the alleged resolutions are therefore unquantifiable. The interests of Edgmont, Lower Chichester, and SWDCMA appear to still exist, and there is no indication that these parties consented to transfer of their property and/or contractual rights to Aqua.

[152] Municipal Protestants' Main Brief. at 6.

[153] Id. at 21.

[154] RD at 22, Conclusion of Law 12.

support of its exception, Aqua argues that the Delaware County lawsuit has concluded in its favor and is no longer an impediment to warrant the Commission's rejection of the APA.[155] Aqua's other argument is "of the 163 contracts to be assigned by DELCORA to Aqua only four are at issue."[156] As I&E will explain below, neither of these claims provides a viable basis for exception.

First, it is unclear whether the Delaware County lawsuit has been resolved with any finality, because Delaware County still had appellate rights that extended beyond the date of Aqua's Exceptions. Accordingly, Delaware County may have pursued an appeal of the trial court's decision, and if that proves to be the case, all the legal issues I&E has identified surrounding DELCORA's qualification as a Section 1329 Seller,[157] as well as the existence of the DELCORA Trust,[158] will remain unresolved. I&E will defer to Delaware County to advise of whether it has pursued an appeal, which Aqua's Exceptions have not contemplated. However, even if Delaware County has not filed an appeal, a final resolution of the Delaware County suit in DELCORA's favor is not determinative because it will not resolve the issues I&E has identified in above replies regarding the inaccuracy of the APA, DELCORA's material misrepresentations regarding the non-assignable assets, and the valuation issues that result from DELCORA's misrepresentation regarding non-assignable assets. Without the resolution of such issues, legal and validity issues will persist to substantiate the denial of APA as contemplated by Section 507.[159]

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155 Aqua Exceptions, (Public Version), p. 79.
156 Id.
157 I&E Main Brief, pp. 40-44; I&E Reply Brief, pp. 18-19.
158 I&E Main Brief, p. 17.
159 "Section 507" (66 Pa. C.S. § 507) affords the Commission an opportunity to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of contracts, and the record here clearly demonstrates legal and validity issues exist with respect to the APA.

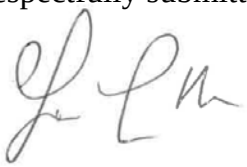
Finally, although Aqua makes much of the alleged fact that only four of the 163 contracts to be assigned by DELCORA are at issue, it is the material impact of these agreements that is determinative, not the quantity. As Aqua refers to these contracts as being held by "the Municipal Protestants," and it alleges a resolution of the Trainer Borough contract, I&E deduces that the four contracts are those held by Edgmont Township, Upland Borough, Lower Chichester Township, and the Southwest Delaware County Municipal Authority. Each of these four contracts is summarized in I&E's above reply to Exception 8, and they are incorporated here. While the Municipal lawsuits remain unresolved and the underlying municipalities continue to hold non-assignable contracts and property interests, the APA's failure to accurately list them as non-assignable assets is a material defect that precludes any determination that the APA is legal or valid. Accordingly, the ALJs properly determined that Section 507 approval of the APA and Municipal Protestants' contracts was not appropriate. I&E submits that Aqua's failure to recognize the appropriate standard imposed by Section 507 is not a viable basis for exception. On this basis, the Commission should deny Aqua's final Exception.

III. CONCLUSION

For the reasons stated herein, the Bureau of Investigation & Enforcement respectfully requests that the Commission deny the combined Exceptions of both Aqua and DELCORA and adopt the Recommended Decision of the Administrative Law Judges without modification. Additionally, because this case clearly demonstrates the hardship, waste of resources, administrative difficulty, and public interest implication that result from a Section 1329 Applicant's failure to ensure that the Seller has legal authority to transfer the assets it proposes to purchase, I&E requests that the Commission consider revising the listing of

Section 1329 requirements. Specifically, I&E suggests that the Commission add a requirement that the Applicant provide a certification from the Seller that it has clear legal authority to transfer (1) all assets/inventory to be sold and (2) all the contracts it purports to assign.

Respectfully submitted,



Gina L. Miller
Prosecutor
PA Attorney ID No. 313863

Erika L. McLain
Prosecutor
PA Attorney ID No. 320526

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17120
(717) 787-8754

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 Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority	:	Docket No.: A -2019-3015173

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Reply Exceptions** dated February 1, 2021, in the manner and upon the persons listed below:

Served via Electronic Mail Only

Thomas T. Niesen, Esq.
Thomas Niesen & Thomas. LLC
212 Locust Street, Suite 302
Harrisburg, PA 17101
tniesen@tntlawfirm.com
Counsel for
Aqua Pennsylvania Wastewater, Inc.

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

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

Adeolu A. Bakare, Esq.
Robert F. Young, Esq.
Kenneth R. Stark, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
abakare@mcneeslaw.com
ryoung@mcneeslaw.com
kstark@mcneeslaw.com
Counsel for Delaware County

Thomas Wyatt. Esq.
Matthew S. Olesh, Esq.
Obermayer Rebmann Maxwell & Hippel LLP
Centre Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
thomas.wyatt@obermayer.com
matthew.olesh@oberymayer.com
Counsel for Delaware County Regional Water Quality Control Authority

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

Steven C. Gray, Esq.
Office of Small Business Advocate
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
sgray@pa.gov

Kenneth D. Kynett, Esq.
Charles G. Miller, Esq.
Petrikin, Wellman, Damico, Brown & Petrosa
William Penn Building
109 Chesley Drive
Media, PA 19063
kdk@petrikin.com
cgm@petrikin.com
Counsel for
Edgmont Township, Delaware County

Scott J. Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815-2036
scott.j.rubin@gmail.com
Counsel for Southwest Delaware County Municipal Authority, Lower Chichester Twp, Upland Borough, Edgmont Twp. & Trainer Borough

Robert W. Scott, Esq.
Robert W. Scott PC
205 North Monroe Street
P.O. Box 468
Media, PA 19063
rscott@robertwscottpc.com
Counsel for Borough of Ambler

Thomas J. Sniscak, Esq.
Kevin J. McKeon, Esq.
Whitney E. Snyder, Esq.
Melissa A. Chapaska, Esq.
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
tjsniscak@hmslegal.com
kjmckeon@hmslegal.com
wesnyder@hmslegal.com
machapaska@hmslegal.com
Counsel for Sunoco Partners Marketing & Terminals, L.P./ Energy Transfer

Michelle M. Skjoldal Esq.
Justin G. Weber, Esq.
Troutman Pepper Hamilton Sanders LLP
100 Market Street, Ste 200
P.O. Box 1181
Harrisburg, PA 17108-1181
michelle.skjoldal@troutman.com
justin.weber@troutman.com
Counsel for Kimberly-Clark Corp. & Kimberly-Clark Pennsylvania, LLC

Jason T. Ketelsen, Esq.
Troutman Pepper Hamilton Sanders LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
jason.ketelsen@troutman.com
Counsel for Kimberly-Clark Corp. & Kimberly-Clark Pennsylvania, LLC

Marc D. Machlin, Esq.
Troutman Pepper Hamilton Sanders LLP
2000 K Street, NW, Suite 600
Washington DC 20006
marc.machlin@troutman.com
Counsel for Kimberly-Clark Corp. & Kimberly-Clark Pennsylvania, LLC

Brian Kalcic
Excel Consulting
225 S. Meramec Ave.
Suite 720T
St. Louis, MO 63105
excel.consulting@sbcglobal.net
Consultant for OSBA

Ralph C. Smith
Larkin & Associates, PLLC
15728 Farmington Road
Livonia, MI 48154
OCADelcora@paoca.org
Consultant for OCA

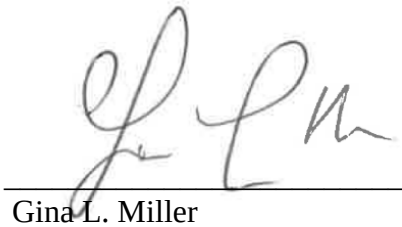
Cynthia Pantages
C&L Rental Properties, LLC
30 S. Lake Drive
P.O. Box 516
Lake Harmony, PA 1862456t
cyndipantages@gmail.com

Ross Schmucki
218 Rutgers Avenue
Swarthmore, PA 19081
rschmucki@gmail.com

Edward Clark, Jr.
Treasure Lake Property Owners Association
13 Treasure Lake
Dubois, PA 15801
gm@treasurelake.us

Patricia Kozel
15 Hazzard Run Road
Lake Harmony, PA 18624
pattyk6@icloud.com
Complainant

Lawrence and Susan Potts
11 Chestnut Street
P.O. Box 522
Lake Harmony, PA 18624
susie01213@aol.com
Complainants



Gina L. Miller
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 313863