

MEMORANDUM

TO: Vijay Kapoor
FROM: Tiffany Allen, Esq.
DATE: February 28, 2022
RE: **P-PACOMM-3791**
DELCORA/Aqua Agreement

Dear Mr Kapoor:

You asked us to provide a summary of the litigation surrounding DELCORA and its potential impact on Chester. DELCORA operates wastewater collection systems that serve 8 municipalities. The issue we believe that Representative Lawrence was trying to raise was whether the City of Chester's assets that originally had been transferred to DELCORA in 1973 would revert back to the City upon a sale to Aqua and therefore could potentially be monetized.

Upon review of the Agreement of Sale, it appears that on February 12, 1973, the City of Chester, Chester Sewer authority and DECLORA entered into an agreement for the sale of the City's sewer system and related property, which includes but is not limited to all sewer mains, force mains, collection systems and the like.

Under paragraph 5.1 of the contract, DELCORA agreed not to "enter into by or on behalf of Seller any contract or commitment relating to the sewer properties..." or "mortgage, pledge or subject to lien or other incumbrance or dispose of any of the sewer properties." Similarly, in paragraph 15.7, parties agree that if the "buyer ceases to operate the system being purchased by it here under, then the fixed assets and the real property, other than the treatment plant and those facilities in the collection system described section 2(d) shall revert to seller's ownership rather than to the county of Delaware or any other agency." It appears that Section 2 (d) refers to the portion of the sewer infrastructure that leads outside the City, however, this interpretation of section 2(d) will have to be confirmed with DELCORA.

It is unknown at this time if DELCORA has sale agreements with each municipality similar to its agreement with the City.

The Agreement of Sale between Chester and DELCORA was amended in 1986; however, none of those modifications deal with the reversion of the assets and real property to the city should DELCORA no longer operate the system.

In 2019, DELCORA approved a \$276 million sale of the sewer collection systems to Aqua. The asset purchase agreement was entered by the parties on September 17, 2019, and amended on February 24, 2020. Under the terms of the agreement, the parties agreed to cap all the rate increases for the customers at 3% per year. To offset the potential rate increase, DELCORA agreed to create a trust known as the rate stabilization fund trust to subsidize any potential rate increase that would otherwise pass to the consumer. Although the agreements between DELCORA and Aqua seem to comply with the Municipal Authorities Act, there is no indication in the documents reviewed that either party considered DELCORA's sale agreement with Chester. However, as noted by the trial court, many of the representation and warranties outlined in the agreement between DELCORA and Aqua require representation from the DELCORA that there are no undisclosed liabilities for the system and that Aqua is receiving all DELCORA's property interests. It is likely that the reversion provision will impede the sale unless Aqua purchases the City's infrastructure.

The sale of the sewer collection system is still pending as the Delaware County Council attempted to dissolve DELCORA by passage of an ordinance in May 2020. The ordinance was subject to litigation in the Delaware County Court of Common Pleas. On December 28, 2020, Judge Dozor issued an order finding that the County ordinance was not valid or enforceable as it did not comply with the requirements of the Municipal Authorities Act, including the requirement that the County assume all obligations incurred by DELCORA prior to the termination of the authority. The trial court's final order is the subject of the County's appeal currently pending with the Commonwealth Court.

Although the trial found that the asset purchase agreement between DELCORA and Aqua is a valid contract, the court also recognized that the finalization of the agreement is subject to the Pennsylvania Utility Commission's approval. Aqua has filed an application with the PUC which is currently pending.

At this time, neither the Receiver nor City officials are involved in the litigation between DELCORA and the County. However, the Receiver is analyzing the impact of both the litigation in the Commonwealth Court and the pending application filed with the PUC by Aqua.

During the pendency of the Commonwealth Court appeal, the City and the Receiver will consider reaching out to all involved parties to better understand the impact of the sale, and whether the City has any valid claim to the fixed assets of the System should DELCORA proceed with the sale. The Receiver is exploring the City's options which includes requesting a valuation of the City's sewer infrastructure to present to Aqua for purchase or lease. At this time, however, it is not clear whether these assets would actually revert back to the City's ownership.