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May 12, 2010

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building, 2nd Floor
Harrisburg, Pennsylvania 17120

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MAY 12 2010

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**Re: The Municipal Authority of the Borough of West View v. Pennsylvania
American Water Company DOCKET NO. C - 2010 -2153062**

Dear Secretary McNulty,

Enclosed please find an original and nine (9) copies of the EXCEPTIONS of the Municipal Authority of the Borough of West View to the Decision of the Administrative Law Judge, Judge Wayne L. Weismandel, at the above captioned Docket Number.

Very truly yours,



Fred E. Baxter, Jr.

Enclosure original and Nine copies .

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**THE MUNICIPAL AUTHORITY OF THE
BOROUGH OF WEST VIEW**

v.

**PENNSYLVANIA-AMERICAN WATER
COMPANY**

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**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

EXCEPTIONS

AND NOW COMES The Municipal Authority of the Borough of West View files these EXCEPTIONS to the decision rendered by Wayne L. Weisman, Administrative Law Judge, in the above captioned matter, whereof the following is a statement:

The Municipal Authority of the Borough of West View (Authority) takes exception to the decision of the Administrative Law Judge filed in the above captioned matter. There are in two general areas of exception, the first on the issue of standing, and the second on the issue of whether or not Commonwealth Court has ruled that the Rider DRS under consideration by the this Court, pertained to Pennsylvania American Water Company's (PAWC) right to use the rider to retain existing customers or attract "incremental load" for entirely new customers. Additionally, the Authority takes exception to the bias shown by the Administrative Law in excluding the Authority's challenges because it does not fall under the regulation of the Commission.

Standing

The Authority takes exception to the legal and factual conclusions of the Judge regarding standing. As was set forth in the Complaint filed by the Authority, the following uncontested facts were alleged;

“3. Aside from its regular customer base, some of the municipalities and other authorities served are served pursuant to water service agreements negotiated from time to time between the entities.

4. One of the municipalities served by WVWA via a written agreement is Cranberry Township in Butler County, Pennsylvania (Cranberry).

5. One of the authorities served by WVWA via a written agreement is the Adams Township Municipal Authority, also in Butler County, Pennsylvania (Adams Authority).

6. Both Cranberry and the Adams Authority purchase all of their water needs from the WVWA through a negotiated agreement.” (See the Complaint filed)

Further the Complaint alleged the following additional uncontested facts,

15. On August 25, 2009, the Adams Authority responded to a request for a proposal for water service, issued by the Evans City Water and Sewer Authority (Evans City). That response is attached hereto and incorporated herein as Exhibit B.

16. In that response, the Adams Authority offered a rate of \$ 4.25 per thousand gallons for a period of five (5) years, assuming that usage does not exceed 500,000 gallons per day, in which event adjustments would have to be made to cover the costs to the Adams Authority for such excess usage. (See Exhibit B, paragraph 1.)

17. On August 28, 2009 Cranberry Township responded to a request for proposals for water service, issued by the Evans City Water and Sewer Authority (Evans City). See Exhibit C attached hereto and incorporated herein.

18. in that response, Cranberry offered a rate of \$3.85 per thousand gallons, and the expenditure of Evans City of approximately \$20,000. for the cost of an 8 inch meter and meter pit. . (See Exhibit C, Task 1.) (See the Authority Complaint)

Regardless of these uncontested facts, the Judge somehow found that the Authority lacked standing because it did not have “a legally protectible and tangible interest at stake” (Opinion at page 3) It is simply inconceivable that the Court ignored the fact that the Authority has no interest in the affect of the Rider DRS as used in the Evans City proposal. It ignores the uncontested fact that **all** of the water used by Cranberry

Township and the Adams Authority is provided by and purchased from the Authority. Doesn't it stand to reason that if Adams or Cranberry can sell water to Evans City, they will in turn buy more water from the West View Authority? That is clearly more than a passing interest in the outcome for the Authority. The Judge reasons that the fact that West View would not be serving Evans City makes it "too remote a causal connection between the action complained of and the injury to the person challenging it to confer standing". (Opinion page 5) The failure of the Administrative Law Judge to recognize the undisputed fact that the Authority supplies all of the water to Cranberry and the Adams Authority, and the resulting economic impact to the Authority if it can not supply more water is troubling. It simply ignores the law pertaining to standing as set forth in the Authority's brief and Answer. In Lehigh Valley Power Committee v. PUC, 140 Pa. Commw. 543, 593 A.2d 1333, the Commonwealth Court addressed the issue of the necessary elements to achieve standing,

"This court has set forth a three-part test for determining whether a person seeking judicial review of an agency order is entitled to standing:

(1) the party must have a substantial interest which has been adversely affected by the challenged order, meaning that there must be a discernible adverse impact to some interest other than the abstract interest of all citizens in having others comply with the law;

(2) the party's interest must be direct, that is, the harm to its interest must be shown by the matter of which the party complains; and

(3) the party's interest must be immediate and not a remote consequence of an order.

The Lehigh Court offered Middletown Township v. Pennsylvania Public Utility Commission, 85 Pa. Commonwealth Ct. 191, 209-10, 482 A.2d 674, 685 (1984) (quoting William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)) in further support of these standards.

In William Penn Parking Garage v. City of Pittsburgh, *supra*. The Court went on to explain the definition of substantial,

“Thus, the requirement of a "substantial" interest simply means that the individual's interest must have substance -- there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. The requirement that the interest be "pecuniary," which may once have had independent significance, no longer adds anything to the requirement of an interest having substance, as defined above.

And it defined direct as,

“The requirement that an interest be "direct" simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.²² This point is illustrated by two cases decided by the United States Supreme Court, Warth v. Seldin, 422 U.S. 490, 95 S.Ct. [*196] 2197, 45 L.Ed.2d 343 (1975), and Linda R. S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973).”

Then it explained the parameters of pecuniary interest as,

“Similarly, even when the interest is "pecuniary" there is no minimum threshold on its magnitude. Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (poll tax of \$ 1.50); McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (fine of \$ 5 and costs); City of Pittsburgh Milk Marketing Board Appeals, 7 Pa.Cmwlth. 180, 191, 299 A.2d 197, 202 (1973) (milk consumers are "aggrieved" by increase in minimum price of milk amounting to "pennies per quart"); K. Davis, Administrative Law Treatise § 22.09-5 (Supp.1970); but see Scientific Living, Inc. v. Hohensee, 440 Pa. 280, 292-93, 270 A.2d 216, 222-23 (1970); Stewart, The Reformation of American Administrative Law, *supra*, at 1735-36 (suggesting limitations based in part on the "significance" of the interest).”

The interests of the Authority here are substantial, direct and pecuniary. To hold otherwise is absurd.

Bias

Such reasoning by the Judge is troublesome, but understandable given his and the Commission's bias towards entities it governs. The Judge clearly demonstrates this bias in his opinion. The Authority is not governed by the PUC, and because of that, the Judge reasons that the Authority has no standing. He holds that one of the other elements of standing is that it is "limited to situations where the alleged competition is prohibited by a regulatory scheme in which the complaining party and the party being complained against both participate", "While PAWC, a privately owned certified public utility, is subject to the regulatory jurisdiction of the Commission, the Authority is not." (See Opinion page 5). One must imply from that conclusion that if one is not governed by the PUC, one has no standing to challenge the actions of those that are governed by the Commission. That is a preposterous holding. It implies that since the Authority is not governed by the PUC, it can not challenge the sanctioned actions of PUC governed utilities before the Commission. It further supports the belief of the Authority that the Commission does not care about the effect of its actions on utilities it does not govern. One must then reason that if the Commission is of the same view as the Judge, if the Rider DRS rates do not affect utilities under its jurisdiction, then the Authority has no remedy against predatory rates sanctioned by the Commission. Perhaps a direct action filed with the Commonwealth Court is the proper venue. If the PUC will ignore "outsider complaints" then perhaps the courts are the Authority's only avenue for redress.

The Court demonstrates more PUC bias in holding that "Additionally, unlike PAWC, the Authority does not have certificated service territory that limit's the

geographic area in which it may provide service but also provides protection from competition”(Opinion page 5). There is no legislative mandate that grants the PUC the exclusive right to establish service territories for everyone. Further, the Judge is simply incorrect in his assessment of competition prohibitions. The *Pennsylvania Municipality Authorities Act Title 53, Chapter 56 Section 5607 (powers) (limitations) (b) (2)* prohibits authorities from competing with one another. See also *Bristol Township Water Authority v. Lower Bucks County Joint Municipal Authority, 130 Pa. Commw. 240, 567 A.2d 1110.*

It is, however ironic that the Judge, and the PUC thus far, support the legality of the Rider DRS which was designed and justified for the sole purpose of allowing PAWC to compete with others by using a special rate not in conformity with the normal rate component requirements the PUC would otherwise require. And why is this supported by the Commission? So PAWC can offer rates lower than its competition to attract more customers. One must conclude that what is good for the goose is not good for the gander, that is if the gander is not under PUC jurisdiction. And if, as the Judge holds “Any loss of business resulting from competition, where competition is allowed, “does not amount to an injury, irreparable or otherwise.” (see opinion page 5), why is the DRS Rider necessary for PAWC? According to the Judge, a loss under fair rate practices would not be an “injury” to PAWC “irreparable or otherwise”. So why does PAWC need it? The answer is that the PUC has provided a tool for PUC governed water purveyors to compete with other non PUC governed utilities to be able to undercut their rates. And, it refuses to grant standing to any utility not governed by the PUC to challenge this predatory process.

The Legal Effect of the Municipal Authority of the Township of Robinson v. Pennsylvania American Water Company, Docket number C-20030092.

The Judge has indicated that the Commission has already held under its decision in the Municipal Authority of the Township of Robinson v. Pennsylvania American Water Company, Docket number C-20030092, that PAWC can use the DRS Rider to “attract incremental load”. The facts of that case, in which the Authority did not participate, involved PAWC offering its DRS Rider rate to an authority it was already partially serving. That case did not factually deal with attracting “new” customers with which PAWC had no provider - customer relationship. Hence neither the PUC nor the Commonwealth Court had to deal with the issue of using the DRS Rider for attracting new customers. In fact, what PAWC now argues is that there was a clear ruling in the “Robinson” case (supra) dealing with the precise facts now before the Commission. The Authority maintains that ruling was not really clear at all.

On April 24, 2009, the Pennsylvania-American Water Company (PAWC), filed *Tariff Supplement Number 226 to Tariff Water-PA P.U.C. No. 4 (Supplement Number 226)*, with the PUC, to become effective June 23, 2009. Through this Tariff, the PAWC is seeking to implement a substantial 12.5 percent rate increase based upon an overall operating revenue increase of \$58 million dollars per year over the amount of annual revenues at present rates. The rate increase issues were settled by the parties, but not the DRS Rider issue.

The above captioned rate request had attached a “Rider DRS” which sought to

modify the existing Rider DRS 2003 language in a manner that would permit predatory and non-competitive action against the Authority. PAWC later withdrew this request before Judge Fordham, the Administrative Law Judge for the 2009 rate request. The current or existent Rider DRS 2003 applicable language states in relevant part as follows:

“This Rider is available to a customer that: (1) purchases water from PAWC for resale; (2) *enters into a Service Agreement* for a term of not less than 10 years; (3) during the original and any renewal terms of the Service Agreement, agrees to maintain a daily load factor of not less than 0.75; and (4) has a viable competitive alternative to service from PAWC, and intends to select the alternative to the detriment of PAWC , and it’s other customers.”

The Rider DRS” proposed and later withdrawn in the 2009 Tariff request was sought to be modified to read as follows :

“This “Rider” is available to a customer or *a prospective customer* that: (1) purchases water *or intends to purchase water* from PAWC for resale; (2) enters into a Service Agreement for a term of not less than 10 years; (3) during the original and any renewal terms of the Service Agreement, agrees to maintain a daily load factor of not less than 0.75; and (4) has a viable competitive alternative to service from PAWC , and intends to select the alternative to the detriment of PAWC , and it’s other customers.” (Emphasis added)

It is that addition, “**intends to purchase water**”, that changed the complexion of the former case (*Municipal Authority of the Township of Robinson v. Pennsylvania American Water Company, Docket number C-20030092*), to being different to the current Rider DRS 2003 language. When one adds that addition, “intends to purchase water” the holding of the Judge and argument of PAWC becomes less logical. Why, if the Rider DRS 2003 always contemplated “new” customers, not already being served by PAWC in some fashion, would PAWC find it necessary to amend the Rider language?

This was a generic request by PAWC to seek out and entice new customers with this special rate, regardless of a current service relationship.

Reliance on the “Robinson” Commonwealth Court case relies on obiter dictum, not the holding of the case. Obiter dictum is an expression of opinion by the court or judge on a collateral question not directly involved, or mere argument or illustration originating with him, while "judicial dictum" is an expression of opinion on a question directly involved, argued by counsel, and deliberately passed upon by the court, though not necessary to a decision; while neither is binding as a decision, judicial dictum is entitled to much greater weight than the other, and should not be lightly disregarded. The issue of whether the Rider DRS 2003 could be used to attract new customers was not before the Commonwealth Court. Rather that case dealt with the legality of using the Rider DRS 2003 to entice more business as an incentive to a customer already being served in part by PAWC. If it clearly meant to include “new customers“, why would PAWC have sought to amend the Rider DRS 2003 six years later in 2009? The answer is, because there was no clear indication that the Rider DRS 2003 included attracting new customers.

It is denied by the Authority that the Rider and its special rates are sufficient to recover the Production Cost of Water, the fixed costs associated with all new facilities added to serve the customer, and some portion of the fixed costs of PAWC. To the contrary, the Rider allows artificially low water rates, unrelated to the PAWC actual costs and published rates, for the sole purpose of allowing it to compete against water

purveyors who operate according to law on a cost of service basis. To apply this artificially low rate for the purpose of enticing customers away from water purveyors that operate according to law on a true cost of service basis is and should be unlawful and outside of the scope of authority for the Public Utility Commission. Further, it is contrary to the facts ruled on by the Commonwealth Court in “Robinson” (supra)

The Rider DRS is clearly a tool, sanctioned by the PUC, to allow entities under its jurisdiction to unfairly compete with water purveyors not under PUC jurisdiction. It is meant to offer to its utilities the ability to compete on an un-level playing field against water authorities and municipalities and steal their business by using rates that the PUC would otherwise not sanction.

SPECIFIC EXCEPTIONS TO THE TO THE JUDGE'S CONCLUSIONS OF LAW

The Authority hereby takes exceptions to the “Conclusions of Law” in the Initial Decision in the order of its numbered paragraphs as follows:

1. Based on the Court’s conclusion that one of the other elements of standing is that it is “limited to situations where the alleged competition is prohibited by a regulatory scheme in which the complaining party and the party being complained against both participate”, and that “While PAWC, a privately owned certified public utility, is subject to the regulatory jurisdiction of the Commission, the Authority is not.” (See Opinion page 5) it is denied that the Commission has jurisdiction.

2. through 9. The Authority has a substantial, direct, and immediate interest in the application of the Rider DRS to new customers. To hold otherwise is to ignore the facts of this case as set forth in the Complaint.

10. The Rider DRS 2003 does not give PAWC the right to attract new customers.

11. The Authority has standing.

12. The fact that the Authority provides all of the water needs to Cranberry and Adams gives it a direct interest in the application of the Rider DRS, and is evidence of the predatory nature of the Rider.

13. It is denied that anyone complaining to the PUC must be governed by it in order to have standing. In the alternative, if that is true, then the Authority will be compelled to seek its remedy directly before the courts.

14. That the Authority has no standing to complain to the PUC because it is not governed by it is denied. Further, it is evidence of the bias of the Commission in this matter.

15. There is no competition when the Commission sanctions rates unrelated to cost of service considerations. The sole purpose of the Rider DRS is to sanction predatory

rates and eliminate competition from those compelled by law to offer cost related rates.

16. There are a number of facts that need to be considered. It is the Commission that has refused hearings on the issue.

17. Admitted.

18. Denied.

19. The Rider DRS does not so provide.

20. Admitted, but this does not relate to the current controversy. The Authority is not a customer.

21. Denied. There is absolutely no basis to determine these Rider DRS rates are reasonable.

22. Denied for the reasons set forth in these Exceptions and the Complaint, Affidavit and other pleadings and answers that a part of the record of this matter.

23. Denied for the reasons set forth herein.

24. Denied.

25. Denied.

26. Denied

For the reasons set forth herein, the Authority takes Exception to the conclusions and factual assumptions of the Administrative Law Judge in this case.

Respectfully submitted,

A handwritten signature in cursive script that reads "Fred E. Baxter, Jr." with a period at the end.

Fred E. Baxter, Jr.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**THE MUNICIPAL AUTHORITY OF THE
BOROUGH OF WEST VIEW**

v.

**PENNSYLVANIA-AMERICAN WATER
COMPANY**

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DOCKET NO. C-2010-2153062

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document


upon the following, in the manner set forth below:

FED X and Regular Mail

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Dated: May 12, 2010



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