



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265
ISSUED: JANUARY 23, 2001

IN REPLY PLEASE
REFER TO OUR FILE
A-212285F0071
A-230073F0002

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PO BOX 12105
HARRISBURG PA 17108-2105

DOCUMENT
FOLDER

APPLICATION OF PENNSYLVANIA-AMERICAN WATER COMPANY

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Louis G. Cocheres.

An original and nine (9) copies of signed exceptions to the decision, if any, MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265; a copy in the hands of the Office of Special Assistants, Third Floor; and a copy in the hands of each party of record no later than January 29, 2001 by 12:00 P.M. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions or reply exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, no later than February 2, 2001 by 12:00 P.M. as well as served upon the parties. A certificate of service shall be attached to the filed exceptions.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535, particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should be clearly labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

Any reference to specific sections of the Administrative Law Judge's Initial Decision shall include the page number(s) of the cited section of the decision.

Parties are also requested to provide the Commission's Office of Special Assistants with a copy of exceptions/reply exceptions on a computer disk, 3 1/2" in size, in Microsoft Word 6.0 format. If Word 6.0 is not available, either Wordperfect 5.1 or ASCII format is acceptable.

Very truly yours,

Encls.
Certified Mail
Receipt Requested

James J. McNulty
Secretary

SIMILAR LETTER LIST ATTACHED:

VOLUME 1 OF 2
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pennsylvania-American Water Company :
for Approval of (1) The Transfer, By Sale, of :
Substantially All of the Water Works Property And :
Rights of the City of Coatesville Authority Water System :
to Pennsylvania- American Water Company, and (2) The :
Rights of Pennsylvania-American Water Company to :
Begin to Offer or Furnish Water Service to the Public in :
all of the City of Coatesville, Parkesburg Borough, and :
South Coatesville Borough, Chester County, :
Pennsylvania and Portions of Sadsbury Township, Caln :
Township, East Fallowfield Township, Valley :
Township, Atglen Borough, West Sadsbury Township, :
and West Caln Township, Chester County, Pennsylvania :
and Quarryville Borough, Bart Township, Colerain :
Township, Eden Township and Sadsbury Township, :
Lancaster County, Pennsylvania; and (3) Certain :
Additional Regulatory Approvals :

Docket No. A-212285F0071

Application of Pennsylvania-American Water Company :
for Approval of (1) the Transfer, by Sale, of :
Substantially All of the City of Coatesville Authority's :
Assets, Properties and Rights Related to its Wastewater :
System to Pennsylvania-American Water Company; and :
(2) The Right of Pennsylvania-American Water :
Company to Begin to Offer or Furnish Wastewater :
Service to the Public in the City of Coatesville and :
Parkesburg Borough, Chester County, Pennsylvania and :
Portions of Caln Township, East Fallowfield Township, :
Valley Township, Sadsbury Township, and West :
Sadsbury Township, Chester County, Pennsylvania; and :
(3) Certain Additional Regulatory Approvals :

Docket No. A-230073F0002

DOCKETED
JAN 23 2001

**DOCUMENT
FOLDER**

Assumption of Pennsylvania Water Company Of
Thirteen Agreements between the City of Coatesville
Authority and Various Municipalities

: Docket Nos. U-00004550
: U-00004551
: U-00004552
: U-00004553
: U-00004554
: U-00004555
: U-00004556
: U-00004557
: U-00004558
: U-00004559
: U-00004560
: U-00004561
: U-00004562

INITIAL DECISION

OF

**LOUIS G. COCHERES
ADMINISTRATIVE LAW JUDGE**

JANUARY 19, 2001

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HISTORY OF THE PROCEEDING

On February 15, 2000, the City of Coatesville Authority (CCA or Authority) and the Pennsylvania-American Water Company (PAWC, Company or Applicant) entered into an Asset Purchase Agreement for the Acquisition of the Assets of the Water and Wastewater System of the Authority (Agreement or APA).

On February 29, 2000, PAWC filed two Applications seeking approval from this Commission for the transactions contemplated by the Agreement, including the authorization to begin to render service in the former CCA territory. One Application sought approval of the transaction for the water system and was docketed at No. A-212285F0071. The other Application sought approval of the transaction for the sewer system and was docketed at No. A-230073F0002. Together the Applications spanned a total of thirteen municipalities in two counties.

The Water Application was amended on April 7, 2000, and May 25, 2000. The amendments reduced the requested service territory. The Sewer Application was amended on April 7, 2000. The amendment reduced the requested service territory.

The following entities or individuals filed Protests to the Water Application: the Office of Trial Staff (OTS), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), Philadelphia Suburban Water Company (PSW) and Ernest E. Campos, Sr. (Mr. Campos).

The following entities or individuals filed Protests to the Wastewater Application: the Office of Trial Staff, the Office of Small Business Advocate, Sadsbury Township, Chester County and Ernest E. Campos, Sr.

A Prehearing Conference was held before the undersigned on May 17, 2000. A procedural schedule was established.

On July 26, 2000, Prehearing Order No. 1 was issued. The Order 1) denied Caln Township's Petition to Intervene in the Water Application and granted the intervention in the Sewer Application, 2) gave notice that the Application proceedings would be expanded to include a Section 507 and 508 (66 Pa. C.S. §507 and 508) review of the Agreement, 3) joined the City of Coatesville (City) and CCA as indispensable parties and 4) consolidated the Applications for hearing and decisional purposes.

Hearings were held on September 6 and 7, 2000.

At the conclusion of the September 7, 2000 hearing I informed the parties that the Applications requested a Section 507 review of certain contracts. However, the contracts were not included in the record. I explained that I would not be able to approve those contracts sight unseen. Tr. 527-530. Subsequently, PAWC submitted thirteen agreements for review. 66 Pa. C.S. §507. The agreements were identified, but not included, in the Applications as contracts in which PAWC wanted to assume the obligations of CCA. See, Schedule 1.5.1 of PAWC Ex. Nos. 5 and 6. These contracts were filed on September 11, 2000 at Docket Nos. U-00004550 through U-00004562. By letter dated November 16, 2000, the Company submitted these documents, labeled PAWC Ex. Nos. 9 through 21, for review by the parties and the undersigned at the Application docket numbers.

On October 6, 2000, PAWC, CCA, City, OTS, OCA and OSBA submitted a Stipulation Of Settlement Among Pennsylvania-American Water Company, City Of Coatesville And The City Of Coatesville Authority, The Office Of Trial Staff, The Office

Of Small Business Advocate And The Office Of Consumer Advocate (Stipulation). Attached to the Stipulation was Exhibit 1 which was the First Amendment To The Asset Purchase Agreement For The Acquisition Of The Assets Of The Water System And Wastewater System Of The City Of Coatesville Authority By Pennsylvania-American Water Company, Dated February 15, 2000 (Amendment). PSW and Mr. Campos did not join the Stipulation.

On October 10, 2000, Main Briefs were filed by PAWC, CCA, PSW and Mr. Campos. On October 20, 2000, Reply Briefs were filed by PAWC, CCA, PSW and Mr. Campos.

On October 10, 2000, PAWC filed Pennsylvania-American Water Company's Motion To Move PAWC's Exhibit 8.0 Into The Record. By letter dated October 20, 2000, PSW filed Philadelphia Suburban Water Company's Answer And Objections To Pennsylvania-American Water Company's Motion To Move PAWC'S Exhibit 8.0 Into The Record And Motion For Sanctions. On October 26, 2000, PAWC filed Answer Of Pennsylvania-American Water Company To The Motion For Sanctions Of Philadelphia Suburban Water Company.

On October 26, 2000, PAWC filed the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Reply Brief Of Ernest E. Campos, Sr. On November 4, 2000, Mr. Campos filed Answer To Motion Of Pennsylvania-American Water Company To Strike Portions Of The Reply Brief Of Ernest E. Campos, Sr.

On October 26, 2000, PAWC filed the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company. On November 2, 2000, PSW filed Philadelphia Suburban

Water Company's Answer To Pennsylvania-American Water Company's Motion To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company.

A hearing was scheduled on November 17, 2000, for the purpose of reviewing the contracts at Docket Nos. U-00004550 through U-00004562. At the request of the parties, the hearing was cancelled on November 13, 2000.

On January 4, 2001, PAWC and PSW filed Stipulation Of Partial Settlement Between Pennsylvania-American Water Company And Philadelphia Suburban Water Company (Stipulation No. 2). Mr. Campos did not join Stipulation No. 2

FINDINGS OF FACT

1. PAWC is a certificated public utility providing water service in 298 communities in Pennsylvania. PAWC St. No. 2.0 at 3. It also owns one wastewater system in Pennsylvania. Tr. 119.

2. PAWC is engaged in the business of (a) collecting, treating, storing, supplying, distributing and selling water to the public in various areas of Pennsylvania; and, (b) collecting, treating, transporting and disposing of wastewater and sewage for the public in various areas of Pennsylvania. See, e.g., the Recitals to the Agreement; Tr. 119, 154, 525.

3. The City of Coatesville Authority is a municipal authority that operates under the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, *as amended*, 53 P.S. §§ 301, *et seq.* See, e.g., the Recitals to the Agreement; Tr. 119, 314-315. PAWC St. No. 1.0, Ex. 1.0-B.

4. The Authority is engaged in the business of (a) collecting, treating, storing, supplying, distributing and selling water to the public in various areas of Pennsylvania; and, (b) collecting, treating, transporting and disposing of wastewater and sewage for the public in various areas of Pennsylvania. See, e.g., the Recitals to the Agreement; Tr. 169-170, 176, 202-203, 335-336.

5. The City of Coatesville is a city of the Third Class which operates under the Home Rule and Optional Charter Law, Act of July 15, 1957, P.L. 901, *as amended*, 53 P.S. §§ 41101, *et seq.* See City St. No. 1.0 at 3. See also the Third Class City Code, Act of June 23, 1931, P.L. 932, *as amended*, 53 P.S. §§ 35101, *et seq.*

6. The City of Coatesville is a municipality in Chester County, and was the incorporating municipality for the CCA. PAWC St. No. 1.0, Ex. 1.0-B.

7. The City of Coatesville and the CCA jointly conducted an auction for the sale of the CCA's water works and/or wastewater systems. Coatesville St. No. 1.0, Ex. 1.0-C.

8. As a result, PAWC entered into negotiations with CCA and on December 16, 1999, PAWC and CCA entered into Letters of Intent for the purchase of the water works and wastewater systems. PAWC Ex. No. 5.0, ¶ 10.

9. PAWC and CCA entered into an Asset Purchase Agreement, dated February 15, 2000, by which PAWC agreed to buy both the water works and wastewater systems for a total of \$48,225,000. PAWC Ex. No. 5.0, Ex. B at 2.

10. In anticipation of this Application, PSW filed a Petition for a Declaratory Order on July 23, 1999, at Docket No. P-00991732. The Petition was served on PAWC, CCA, OCA, OSBA and OTS. Declaratory Order at 2. The Petition sought a ruling on,

[W]hether it is a violation of various provisions of the Pennsylvania Public Utility Code for a regulated public utility, as a condition of acquiring a municipal water system, to agree to a requirement, presented as a “non-negotiable” provision which may not be conditioned upon PUC approval, that the utility must provide free fire hydrant service to the municipality in perpetuity.

Declaratory Order at 1. (Footnote omitted.)

11. PAWC has an existing hydrant service tariff in place and that it does not provide for free service.

12. The Asset Purchase Agreement is dated February 15, 2000, which is about three and a half months after the entry date (October 1, 1999) of the Declaratory Order.

13. Because both PAWC and CCA were served with the Petition for Declaratory Order, they were parties to the proceeding.

14. PAWC and CCA received the Declaratory Order which specified that a regulated utility was required to charge its tariffed rates for its services.

15. In spite of this clear direction from the Commission in October 1999, PAWC and CCA entered into the Agreement on February 15, 2000, which specified that the City should receive free hydrant service in perpetuity (Section 3.4(b)).

16. Before any protests were filed, before the instant Applications were filed, before the Asset Purchase Agreement was signed, before this Commission issued a Declaratory Order, before PSW requested a Declaratory Order, before PAWC was the successful bidder, before there were any bidders, and before there was a request-for-proposal, the City and CCA knew the provision of free hydrant service would likely fail Commission scrutiny because free hydrant service would be unlawful under the Public Utility Code. Otherwise, there would be no reason for the City and CCA to attempt to exclude it from the approval process. City St. No. 1 at 5.

17. Under the Agreement, the Authority is not required to separately consummate the water and the wastewater transactions contemplated by the Agreement. See Agreement, ¶ 4.2(f).

18. A fundamental purpose of this sale is to decrease the burden on the City's taxpayers and residents. See City St. No. 1.0 at 2-3.

19. As the City waits for the closing of the sale, the City is losing over \$225,000 a month in interest proceeds. Id.

20. PAWC submitted the Water Works Application on February 29, 2000. PAWC Ex. No. 5.0.

21. PAWC amended the Water Works Application on April 7, 2000 and again on May 25, 2000. PAWC St. No. 1.0, Ex. 1.0-C.

22. Protests to the Water Works Application were filed by the following individuals and entities: (1) OSBA; (2) OCA; (3) OTS; (4) PSW, and (5) Ernest E. Campos, Sr.

23. Caln Township's Petition to Intervene was denied with regard to the Water Works Application. Prehearing Order No. 1, ¶ 9.

24. PAWC submitted the Wastewater Application on February 29, 2000. PAWC Ex. No. 6.0.

25. PAWC amended the Wastewater Application on April 7, 2000. PAWC No. 1.0.

26. Protests to the Wastewater Application were filed by the following individuals and entities: (1) Ernest E. Campos, Sr. and (2) Sadsbury Township, Chester County. Caln Township's Petition to Intervene was granted with regard to the Wastewater Application. Prehearing Order No. 1, ¶ 9.

27. Sadsbury Township and Caln Township withdrew, leaving Mr. Campos as the only Protestant with regard to the Wastewater Application.

28. Section 3.4(b) of the Agreement read, in part, as follows: "The City shall not, at any time, be required to pay charges for public fire hydrants." See Agreement, ¶ 3.4(b).

29. On July 26, 2000, as a part of Pre-Hearing Order No. 1, Administrative Law Judge Louis G. Cocheres determined, inter alia, that the fire hydrant service was a primary issue in the Water Application. See Pre-Hearing Order No. 1 (dated July 26, 2000), Pennsylvania Public Utility Commission Docket Nos. A-212285F0071 and A-230073F0002, at 5-6.

30. In Pre-Hearing Order No. 1 Judge Cocheres ordered, inter alia: "That the [Authority] is hereby joined as an indispensable party and notified that its rights and obligations under the [Agreement] between the Authority and the [PAWC] shall be subject to review and possible modification by the [Commission] pursuant to Sections 507 and 508 (and any other relevant provisions) of the Public Utility Code." See Pre-Hearing Order No. 1, Docket Nos. A-212285F0071 and A-230073F0002, ¶ 2.

31. PAWC projects an initial operating loss of approximately \$600,000 per year on the CCA's systems, based on CCA's current operations. PAWC Ex. No. 5.0, Exhibit N. There are already indications that the \$600,000 estimate may be overstated. Tr. 163. PAWC will attempt to minimize the operating loss by decreasing costs and increasing productivity at CCA's systems. Tr. 160-161.

32. The initial loss from operating CCA's systems will not have an adverse financial impact on PAWC. Tr. 110, 164. Moreover, the loss is expected to be temporary; PAWC ultimately expects to earn a "fair return" on its investment. Tr. 164.

33. PAWC is a wholly-owned subsidiary of American Water Works Company, Inc. PAWC St. No. 3.0 at 3.

34. If the Applications are approved and PAWC acquires the CCA's systems, those systems would have access to the financial resources, expertise, and other assets of the American Water family of companies, including but not limited to the resources of the American Water Capital Corporation and the American Water Works Service Company, Inc. PAWC St. No. 3.0 at 3-4; Tr. 91.

35. If the Applications are approved, PAWC would own, or have sufficient financial resources to obtain, the equipment needed to perform the proposed service. PAWC Ex. No. 5.0, Ex. B, at Section 1.3; PAWC St. No. 3.0 at 3, 4, 6, 7-9, 12-13, and 17-20.

36. If the Applications are approved and PAWC acquires the CCA's systems, those systems will enjoy economies of scale and mass purchasing power that are unavailable to CCA as an independent entity. Tr. 160-61 and 122.

37. As of December 31, 1999, PAWC had a total permanent capitalization of almost \$1.1 billion. Its secured debt securities are rated "A-" by Standard and Poor's and "A3" by Moody's. PAWC St. No. 3.0 at 3-4.

38. PAWC's rates are currently higher than CCA's rates. OTS St. No. 1 at 16.

39. PAWC's purchase price for CCA was based on several studies and numerous tours of the facilities. PAWC St. No. 2.1 at 3-4; Tr. 123. It was also based on an auction process in which another bidder (the Chester Water Authority) bid \$47,825,000 million for the water works and wastewater systems. Tr. 477.

40. PAWC has vast resources (e.g. management and technical expertise) available to perform capital improvements and to operate every aspect of both the CCA water and wastewater systems. PAWC St. 2.0 passim.

41. PAWC's commitment to using the same CCA employees to operate both systems provides the continuity needed for continued good service.

42. There is no evidence of any complaints about current service which is a tribute to the service provided by the CCA staff.

43. There will be a need for capital improvements to the CCA systems in the near future.

44. If these Applications are approved, PAWC will retain the existing regular or full-time staff of CCA. PAWC Ex. No. 5.0, Ex. B at Section 3.4.

45. Mr. Johnston is the Vice President-Business Development for PAWC. PAWC St. 1.0 at 1.

46. Mr. Johnston outlined a four pronged test which PAWC used to define the requested territory. After doing this analysis prior to the filing of the

Applications, the Company would have identified all of the people who could have been excellent witnesses to demonstrate a future need for service. However, PAWC made no effort to bring the actual people into the hearing room.

47. PAWC determined the applied-for territory using the following four step process: (1) it determined the location of CCA's existing facilities; (2) it included territories associated with political subdivision agreements and requests for service; (3) it considered topography, likely areas of future growth, and local land use policies; and (4) it excluded areas served by other municipal systems and certificated areas of public utilities. PAWC St. No. 1.0 at 3-4.

48. Mr. Johnston could not be cross-examined about the intentions and conclusions of the individuals, developers and CCA employees who prepared the documents in PAWC Ex. No. 8.0 that he found in the CCA records.

49. The area currently served by CCA's water system is limited to the properties currently receiving water service from CCA.

50. The area applied-for by PAWC in its Water Application extends beyond the area currently served by CCA's water system.

51. The area currently served by CCA's wastewater system is limited to the properties currently receiving wastewater service from CCA.

52. The area applied-for by PAWC in its Wastewater Application extends beyond the area currently served by CCA's wastewater system.

53. As of December 31, 1999, CCA served approximately 8,088 customers. Tr. 362, 369.

54. Settlement was discussed after the conclusion of the evidentiary hearings.

55. In October 2000, a Stipulation of Settlement (Stipulation) was voluntarily executed by the Authority, the City, PAWC, the OTS, the OCA and the OSBA. See, the Signature Page(s) of the Stipulation.

56. In the Stipulation, the Authority, the City and PAWC stipulated and agreed, inter alia, to amend Section 3.4(b) to read as follows:

To delete Article 3, Section 3.4(b) to the extent it states that "[t]he City shall not at any time, be required to pay charges for public fire hydrants," as shown on the First Amendment attached hereto and made a part hereof and identified as Exhibit 1, and to provide that, upon the effective date of the new tariff rates for public fire hydrant service applicable to the City, PAWC shall issue bills to the City for public fire hydrant service and collect amounts owed in accordance with PAWC's effective tariff. The City shall pay those charges for public fire hydrant service. In each year that the City makes payments to PAWC for public fire service, PAWC shall make a contribution equal in amount to the public fire service payments during that year, to the City's Economic Development Fund. PAWC agrees not to seek recovery of the contribution(s) to the City's Economic Development Fund in any future base rate case.

Stipulation, ¶ 10.

57. The remaining portions of the Agreement (including the remaining portions of Section 3.4(b) of the Agreement) continue in full force and effect. Id. See also, Ex. 1 to the Stipulation.

58. The fact that the source of the money returned is from shareholder funds, and not from ratepayers, does not change the big picture. The result is still the same, i.e. the City is still receiving free hydrant service.

59. Because the Stipulation and Amendment were not conceived and executed until after the close of the record, PSW's first opportunity to object to the terms of the Amendment was in its brief.

60. PSW was a party before Judge Paist in Application of Citizens/Application of Philadelphia Suburban.

61. Counsel for PAWC represented Citizens Utilities Water Company of Pennsylvania in the same case. The lengthy quote, infra, from Judge Paist's decision demonstrates that it is, in part, a review of the same issue which Judge Paist decided as an interim order on September 24, 1999. Slip Op. at 42.

62. PAWC should have known vis-a-vis its counsel that service request data was hearsay prior to the introduction of Mr. Johnston's testimony and exhibit.

63. Not one individual testified that he or she wanted water or sewer services for his or her home from CCA and/or PAWC in the designated service territory.

64. Not one individual testified that he or she wanted water or sewer services for his or her business from CCA and/or PAWC in the designated service territory.

65. Not one individual testified (as a developer) that he or she wanted water or sewer services for his or her housing development, apartment complex, office building, mall, etc., from CCA and/or PAWC in the designated service territory.

66. The words "customers who would shortly be connected" mean those individuals or developers who 1) executed a contract for service(s) with CCA and 2) have ordered the pipes and other hardware and 3) have taken delivery of the pipes and other hardware and 4) have begun the job of installing the pipes and other hardware (i.e. dug the hole).

67. CCA is a dynamic system which continued to expand during the pendency of this proceeding, and any representation of CCA's boundaries on the record would be a stale snapshot.

68. The Commission would be better advised to require PAWC to define its existing customers territory at the only time when the customer base will be static (i.e. the date of closing).

69. I recognized the distinction between the service territory as defined by the existing customers and the second request for additional territory on the record of the Prehearing Conference. At that time, I requested that the Company present its case in such a way as to distinguish between the two. I specifically called PAWC's attention to its obligation to prove need for areas beyond the CCA assets. Tr. 40.

70. Exhibit M-1 was a Water Service Agreement between Valley Township and CCA. It was dated March 1990 and was amended in May 1991. PAWC Ex. 5.0 at Exhibit M-1. Basically, it is a contract for bulk water sales which Valley Township used as a basis to resell water to its residents. It specified that CCA was permitted to continue to serve a few preexisting customers in Valley Township and otherwise excluded CCA's retail water services.

71. Exhibit N-1 was a Sewage Treatment Agreement between Valley Township and CCA. It was dated January 1992. Basically, it provides for Valley to use parts of the CCA sewage collection system as access to CCA's sewage treatment plant. The agreement specifies that the Township will provide a complete collection system for its residents and that CCA is not authorized to provide any sewage collection service to the residents in the Township. PAWC Ex. 6.0 at Exhibit N-1.

72. Subsequent to the completion of the September hearings, PAWC submitted thirteen agreements for a Section 507 review by the Commission. 66 Pa. C.S. §507. These agreements were identified, but not included, in the Applications as contracts in which PAWC wanted to assume the obligations of CCA. See, Schedule 1.5.1 of PAWC Ex. Nos. 5 and 6.

73. These contracts were filed on September 11, 2000 at Docket Nos. U-00004550 through U-00004562. By letter dated November 16, 2000, the Company submitted these documents, labeled PAWC Ex. Nos. 9 through 21, for review by the parties and the undersigned at the Application docket numbers.

74. PAWC Ex. No. 11 is bulk water sales agreement between the Octoraro Water Company and Quarryville Borough, dated May 1957. According to the Assumed Agreements Schedule, CCA purchased the system from Octoraro in 1985. Schedule 1.5.1 of PAWC Ex. Nos. 5 and 6. (There is no other verification of the 1985 date or purchase in the record.)

75. PAWC Ex. No. 12 is a Sewage Treatment Agreement, dated April 1966, among CCA and Caln Township and its Authority to provide the Caln Authority with access to the CCA sewer lines and CCA sewage treatment plant. The Caln Authority is responsible for installing a sewage collection system within Caln Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in Caln Township.

76. PAWC Ex. No. 13 is a Supplemental Agreement among CCA, Caln Township and its Authority, dated September 1968, which provides an indemnification clause for exceeding the flow limits set in the prior agreement (PAWC Ex. 12).

77. PAWC Ex. No. 14 is entitled "Sewage Treatment Agreement #2" among CCA, Caln Township and its Authority, dated 1971, in which CCA agreed to treat additional wastewater flow from the Township.

78. PAWC Ex. No. 15 is a Sewage Treatment Agreement between CCA and West Brandywine Township, dated June 1994, and an Addendum To Sewage Treatment Agreement, dated September 1995, among the same parties. The purpose of the original agreement is to provide West Brandywine Township with access to the CCA sewer lines and CCA sewage treatment plant. West Brandywine Township is responsible for installing a sewage collection system within West Brandywine Township and

delivering the wastes into the CCA system. CCA was not given any authority to serve in West Brandywine Township. The addendum allowed West Brandywine Township to increase the daily wastewater flows into the CCA system.

79. PAWC Ex. No. 16 is a Waste And Wastewater Service Agreement between CCA and West Sadsbury Township, dated March 1998, to allow CCA to provide wastewater disposal services in a limited portion of the Township. The agreement specified that CCA would be permitted to sign up new customers in the specified territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require property owners with septic systems to migrate to the CCA system.

80. PAWC Ex. No. 17 is a Sewage Treatment Agreement between CCA and Sadsbury Township, dated July 1997, and a Protocol and an Addendum To Protocol which were not dated. The purpose of the agreement is to provide Sadsbury Township with access to the CCA sewer lines and CCA sewage treatment plant. Sadsbury Township is responsible for installing a sewage collection system within Sadsbury Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in Sadsbury Township. The purpose of the protocols was to recognize the obligations and financial commitments of the Sadsbury Sewer Corporation in terms of building and paying for parts of the Sadsbury system.

81. PAWC Ex. No. 18 is an agreement between CCA and Parkesburg Borough, dated June 1994, whereby the Borough agreed to transfer its wastewater collection system and sewage treatment plant to CCA and for CCA to construct a sanitary sewer main which would connect the Borough system to the CCA sewage treatment plant. The sewer main was to be constructed at the general expense of the Borough. The Exhibit

also included an Agreement between the same parties, dated September 1998, setting forth additional Borough and CCA financial obligations. And finally, the Exhibit included an Addendum between the same parties, dated September 1998, which clarified the format for the assignment of the CCA obligations to a buyer of the CCA system.

82. PAWC Ex. No. 19 is a Consent and Assignment between Parkesburg Borough and CCA, dated December 1998, whereby the Borough consented to the assignment of the CCA obligations to a buyer of the CCA system.

83. PAWC Ex. No. 20 is a Water And Wastewater Service Agreement between East Fallowfield Township and CCA, dated July 1991, to allow CCA to provide wastewater disposal and water supply services in a limited portion (Water and Sewer District 1) of the Township. The agreement specified that CCA would be permitted to sign up new customers in a limited territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require existing property owners with well and septic systems to migrate to the CCA system. According to the map which was attached to the agreement (Exhibit A), the service area was limited to a small area of the western portion of the Township.

84. PAWC Ex. No. 21 is a Water and Wastewater Service Agreement between East Fallowfield Township and CCA, dated July 1991, to allow CCA to provide wastewater disposal and water supply services in a limited portion (Water and Sewer District 2) of the Township. The agreement specified that CCA would be permitted to sign up new customers in a limited territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require existing property owners with well and septic systems to migrate to the CCA system. According to the map which was attached to the agreement (Exhibit A), the service area was limited to a

small area of the western portion of the Township. PAWC Ex. No. 21 also contained two amendments to the original agreement, dated December 1992 and March 1993. The net effect of these two amendments was to enlarge the area in which CCA was permitted to provide water service to include another development.

85. In East Fallowfield Township CCA has no sewer facilities in the eastern portion of the Township, but the Sewer Application map for the Township shows a requested service territory (shaded) similar to that requested for the Water Application. PAWC St. No. 1.0 at Ex. No. 1.0-A (sewer) and PAWC St. No. 1.1 at Ex. No. 1.1-C (water).

86. In the western portion of East Fallowfield Township the requested service territory for the water service fails to show an area specifically exempted from Water and Sewer District 1 on the map attached to the agreement with the Township. Compare, PAWC St. No. 1.1 at Ex. No. 1.1-C (water) to PAWC Ex. 20 at Ex. A.

87. There is an area requested on the central eastern border of West Sadsbury Township for sewer service. There are no sewer facilities in the area or nearby.

88. That same requested sewer area is overlapped by a requested water area which straddles the West Sadsbury/Sadsbury border. There are no water facilities in the area or nearby.

89. In Caln Township the Sewer Application requested territory in three separate locations. Only one of those locations contained CCA sewer lines. There are no sewer lines in or near the other two.

90. A memo from the City witness to City Council evaluates an early PAWC bid price of \$43,000,000 for the CCA system as a premium 110% of value. The memo continues that any price above \$43,000,000 would be "gravy." Campos X Ex. No. 2 at 1.

91. Given PAWC's currently higher rates, an expected pro forma loss, expected capital improvements and this Commission's preference for a movement to uniform state rates for PAWC, it is highly likely that the CCA customers face a rate hike at the expiration of the rate freeze.

92. There was no evidence that CCA provided less than adequate water and sewer services, that CCA was not responsive to customer complaints, that CCA did not have a regular maintenance program and that CCA was not capable of hiring the needed expertise to efficiently operate its systems.

93. Not all of the contracts identified on Schedule 1.5.1 were submitted by the Applicant for review.

94. On October 10, 2000, PAWC filed Pennsylvania-American Water Company's Motion To Move PAWC's Exhibit 8.0 Into The Record.

95. By letter dated October 20, 2000, PSW filed Philadelphia Suburban Water Company's Answer And Objections To Pennsylvania-American Water Company's Motion To Move PAWC'S Exhibit 8.0 Into The Record And Motion For Sanctions.

96. PAWC reserved only the right to late-file its PAWC Ex. 7 at the September 7 hearing. Tr. 270, 524.

97. PAWC agreed to give PSW the back-up documents (subject to a confidentiality agreement) which formed the basis for Mr. Johnson's testimony about "requests for service" received by CCA. After PSW had the opportunity to examine the data, I granted PSW, not PAWC, the right to file a late-filed exhibit taken from the contents of the response to that data request. Tr. 371-374.

98. Counsels for both PSW and PAWC acknowledged the right had been granted only to PSW. Tr. 374.

99. Proposed PAWC Ex. 8.0 contains the same confidential material which PAWC gave to PSW pursuant to their on-the-record agreement.

100. Since the Motion alleged that Ex. 8.0 supported PAWC's Statement 1.1 and Exhibit 1.1-D, the data was in existence and available to PAWC at the time of hearing.

101. Ex. 8.0 is generally a compilation of the documents submitted by the developers and copies of corresponding CCA main extension agreements to which PSW objected that the contents of Ex. 8.0 are hearsay. 52 Pa. Code §5.402(b).

102. The documents in proposed Ex 8.0 are CCA records and not PAWC business records.

103. Only PSW was granted the right to file a late-filed exhibit based on the back-up material related to Mr. Johnston's testimony and exhibit. In essence, PSW agreed to exchange the right to continued cross-examination for the opportunities to review confidential data and to submit a late-filed exhibit. Tr. 374.

104. PAWC's Motion to admit Ex. 8.0 stated in part as follows:

3. The record in this proceeding was left open specifically to give the parties an opportunity to introduce any or all of the attached documents "if they find something they think is relevant." Tr. at 373. PAWC believes the entire exhibit is relevant evidence, but should be treated as confidential information....

Motion at 1. The first sentence in the paragraph is incorrect. The "they" in the sentence only refers to PSW. The allegation is not well grounded in fact.

105. The proposed exhibit is comprised totally of hearsay documents and inadmissible. The hearsay ruling is entirely consistent with my evaluation on the record of Mr. Johnston's testimony and exhibit to the effect that substantial portions of the "public need" evidence regarding requests for service from out-of-court developers to out-of-court CCA employees was hearsay. Tr. 530-534.

106. The exhibit was not submitted to harass PSW or cause unnecessary delay or needless increased expense.

107. On October 26, 2000, PAWC filed the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Reply Brief Of Ernest E. Campos, Sr.

108. On November 4, 2000, Mr. Campos filed Answer To Motion Of Pennsylvania-American Water Company To Strike Portions Of The Reply Brief Of Ernest E. Campos, Sr.

109. Mr. Campos appeared in this case pro se.

110. On October 26, 2000, PAWC filed the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company.

111. On November 2, 2000, PSW filed Philadelphia Suburban Water Company's Answer To Pennsylvania-American Water Company's Motion To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company.

112. The scope of PSW's Prehearing Memorandum with its references to the Declaratory Order should have been sufficient to apprise PAWC of PSW's position that the free hydrant service clause was illegal.

113. As a participant in the Declaratory Order proceeding, PAWC knew that PSW was concerned with alleged violations of Sections 1303 and 1304, as well.

114. PSW's first opportunity to comment on the legality of the Stipulation and Amendment was in its Briefs.

115. CCA's Main Brief revealed that it opened the door on the issue of the legality of the Stipulation and Amendment. CCA M.B. at 7 and 13.

DISCUSSION

I. PARTIAL SETTLEMENTS

A. FIRE HYDRANT FEES

As noted above, on October 6, 2000, PAWC, CCA, City, OTS, OCA and OSBA submitted a Stipulation Of Settlement Among Pennsylvania-American Water Company, City Of Coatesville And The City Of Coatesville Authority, The Office Of Trial Staff, The Office Of Small Business Advocate And The Office Of Consumer Advocate (Stipulation). Attached to the Stipulation was Exhibit 1 which was the First Amendment To The Asset Purchase Agreement For The Acquisition Of The Assets Of The Water System And Wastewater System Of The City Of Coatesville Authority By Pennsylvania-American Water Company, Dated February 15, 2000. PSW and Mr. Campos did not join the Stipulation.

The most important provisions of the Stipulation stated, as follows:

6. In the certificated service territories granted to PAWC in these proceedings, PAWC shall charge CCA's existing rates until the later of two events: (1) the expiration of three (3) years from closing on the underlying acquisition or (2) the effective date of new tariff rates approved by the PUC in the first PAWC base rate case to conclude by PUC Order following the expiration of the three-year period.

7. Any issues that OTS, OCA, and OSBA have raised in these proceedings regarding rates, cost allocation and cost recovery are preserved in full and may be raised in the PAWC base rate case referred in the paragraph 6 above. Nothing in this Stipulation of Settlement ("Stipulation") shall

be construed as limiting the rights of OTS, OCA, and OSBA, to raise any claim, argument or defense in the PAWC base rate case referred to in Paragraph 6 above.

8. While the PUC does not have direct jurisdiction over the initial implementation of the bidding process of CCA and Coatesville, (a) the PUC at all times retains jurisdiction and authority over the rates and service of PAWC applicable to Coatesville and other municipalities serviced by CCA (i) no matter how such rates and services were determined or mandated in that bidding process or (ii) no matter how such rates and services are addressed in the purchase agreement resulting from that bidding process, and (b) the agreement between PAWC and the CCA cannot abrogate or modify the PUC's jurisdiction and authority in any manner.

9. PAWC agrees that the Waterworks Application is hereby amended to delete Paragraph 25 to the extent it states that "In fulfillment of the contract provision which requires that the City shall not pay public fire hydrant charges, Pennsylvania-American proposes to continue to recover the costs of providing public fire service through customer water rates and not to impose a separate public fire hydrant charge on any municipality within CCA's current service area".

10. PAWC, the City and CCA agree to revise the Asset Purchase Agreement ("APA") as follows:

To delete Article 3, Section 3.4(b) to the extent it states that "[t]he City shall not at any time, be required to pay charges for public fire hydrants," as shown on the First Amendment attached hereto and made a part hereof and identified as Exhibit 1, and to provide that, upon the effective date of the new tariff rates for public fire hydrant service applicable to the City, PAWC shall issue bills to the City for public fire hydrant service and collect amounts owed in

accordance with PAWC's effective tariff. The City shall pay those charges for public fire hydrant service. In each year that the City makes payments to PAWC for public fire service, PAWC shall make a contribution equal in amount to the public fire service payments during that year, to the City's Economic Development Fund. PAWC agrees not to seek recovery of the contribution(s) to the City's Economic Development Fund in any future base rate case.

11. PAWC shall not seek recovery of the contribution(s) to the City's Economic Development Fund, as described in paragraph 10, above, in any future base rate case.

Stipulation ¶¶ 6-11, pp. 4-5.

1. Parties' Positions

a. PAWC

By letter dated October 10, 2000, PAWC submitted a Statement Of Pennsylvania-American Water Company In Support Of Stipulation Of Settlement (Statement). In the Statement, PAWC emphasized that the Stipulation explicitly acknowledged the Commission's jurisdiction over the Applications and continued authority over rates and service as applicable to Coatesville, CCA and the municipalities served by the water and wastewater systems. The Company asserted that the agreement to allow the CCA existing rates to remain in effect for three years was not unusual and should be approved. PAWC highlighted the fact that the Asset Purchase Agreement had been amended to eliminate the section which gave the City free fire hydrant service in

perpetuity. The Amendment preserved the City's intent and substituted the requirement for PAWC to make similar payments to the City's Economic Development Fund, which PAWC described as a worthy cause. At the same time, the Amendment eliminated the concerns about discriminatory rates or cost-shifting among ratepayer classes. Statement, pp. 2-4.

In its Main Brief, PAWC concluded that filing the Stipulation rendered the dispute about the fire hydrant fees moot and resolved the concerns about the legality of the Asset Purchase Agreements. PAWC M.B. at 4 and 7.

In its Reply Brief, PAWC responded to arguments made by PSW and Mr. Campos. With respect to PSW, the Company argued that the Stipulation and Amendment changed the structure of the Asset Purchase Agreement. The clause calling for free hydrant service was replaced with a charge and contribution format. PAWC contended that the Commission gave PAWC, CCA and the City the discretion to structure the contract as they saw fit. The Company asserted that the Commission was required to evaluate the legality of the Amendment in the format presented. PAWC again emphasized that the City was required to pay the fire hydrant charge as billed which was consistent with PAWC's tariffs and the Public Utility Code. The Company continued that the next step of requiring PAWC to make a contribution to the City's Economic Development Fund equal to the amount paid (and which donation was not recoverable from the ratepayers) was not violative of the Code. PAWC asserted that there was no violation of Sections 1303 and 1304 of the Code because the City was required to pay for hydrant service as billed under the tariff. The Company suggested that, even if there was an advantage to the City, there was no disadvantage to any other party. Without a known injury to another party, PAWC argued the provisions were legal. The Company justified this preference

because it believed the City sold the water system under value. Its conclusion was that there was no unreasonable discrimination. PAWC R.B. at 4-10.

In response to Mr. Campos' arguments, the Company pointed out that, due to the Stipulation and Amendment, the original "free hydrant service" issue was no longer before the Commission. PAWC disagreed with the characterization that the required contribution to the Economic Development Fund was an illegal kickback. It discredited the "floodgates" argument by noting that, assuming the structure of the amended Asset Purchase Agreement was legal, there would be nothing wrong with other companies using it. In addition, the Company noted that the Commission retained the discretion to reject a similar, but distinguishable, contract in the future. PAWC rejected Mr. Campos' assertion that the Asset Purchase Agreement was a bad deal which the Commission should end for the benefit of the parties. PAWC R.B. at 17-18, 24.

b. CCA

In its Main Brief, CCA argued that the Stipulation resolved the hydrant issue. It asserted that approval of the Stipulation and Amendment was in the public interest because the required contribution to the Economic Development Fund benefited the taxpayers and residents in an economically depressed area. CCA claimed there was no prejudice to the PAWC customers because the City was required to pay the tariffed rate. CCA contended that there was no rate burden on the PAWC ratepayers because the donation to the City Economic Development Fund would be borne by the shareholders. According to CCA, the Stipulation had no impact on PAWC's service obligations and did not interfere with the rights and remedies of CCA, PAWC and the City. CCA M.B. at 6-9.

In the alternative, CCA argued that, in the event the Stipulation was not approved, the Commission should approve the Asset Purchase Agreement with conditions, and without any modifications to the Asset Purchase Agreement language. CCA continued that the Commission's power to modify the Asset Purchase Agreement was limited. It noted that the Commission must first find that the provisions of the Agreement were contrary to the public interest and the general well being of the Commonwealth. After making such a finding, CCA opined that the Commission would be required to determine replacement provisions. CCA M.B. at 9-12.

CCA then argued that the Amendment was not adverse to the public interest. After noting that the Commission was required to regulate rates and service, CCA again argued that the Amendment did not prejudice the PAWC customers or create any unreasonable preference or discrimination. CCA stressed again that there was no rate impact on the PAWC customers. It pointed out that there was consideration to support the transaction. More specifically, the City "paid" by accepting a lower purchase price and PAWC shareholders "paid" by absorbing the continuing obligation to make contributions to the Economic Development Fund. CCA repeated its position that the Amendment did not impact the services offered by PAWC or its obligation to render those services. CCA M.B. at 12-14.

CCA posited that the Commission's power to provide replacement language was limited by constitutional restraints which required revisions tailored to reasonably protect the public interest. According to CCA, the Commission was limited to statutory restraints which required revisions to conform to the provisions of the Public Utility Code and applicable corporate and municipal laws. CCA also believed that the Commission could not modify a contract in a manner which was contrary to contract law and equity. CCA M.B. at 14-17.

CCA argued that any modification to the Amendment would adversely affect the parties' contractual rights. CCA asserted that changing the Amendment would reduce PAWC's contractual burden and impose a burden on the City which would exacerbate the financial situation for the City's taxpayers and residents. CCA noted that the contracting parties had specified there could be no change to the contract without their mutual assent in writing. Given this provision of the Asset Purchase Agreement, CCA viewed any modification of the Agreement or Amendment to be a unilateral act of the Commission and contrary to the parties' intent. According to CCA, the City and CCA were willing to assume the risk that the Commission would impose conditions of sale on the transaction, but not willing to accept modifications of the Agreement or Amendment which would force them to consummate the sale with fundamental changes to the transaction. CCA continued that modifying the Amendment would reduce the consideration promised to the City and CCA and provide the potential opportunity for them to seek breach of contract damages against PAWC. CCA further contended that the modification of the Amendment would create uncertainty for future contracting parties in mergers and acquisitions because the parties to future contracts could not be assured that mutual promises would be binding. CCA M.B. at 18-23.

CCA concluded by repeating its request that, if changes to the transaction are required, the Commission could do so by imposing conditions rather than using its authority to modify the Agreement. CCA stressed that the public interest could be protected by imposing conditions which would also avoid the need to create replacement provisions or to interfere with the contractual, constitutional, statutory and other rights and remedies of the City, CCA and PAWC. CCA M.B. at 23-24.

In response to arguments made by PSW and Mr. Campos, CCA reviewed briefly the history and ruling made by this Commission in Petition of Philadelphia Suburban Water Company for a Declaratory Order, Order, entered October 1, 1999, at Docket No. P-00991732 (Declaratory Order). CCA disputed the assertion that the Commission had declared the original (free hydrant service) clause unlawful or had delivered a warning on the subject. Instead, CCA argued that the Declaratory Order gave all utilities broad discretion to structure acquisitions and had reserved the Commission's right to approve them. CCA asserted that the Stipulation and Amendment were consistent with the Declaratory Order. CCA R.B. at 4-5.

CCA contended that the Stipulation and Amendment were consistent with Section 1328. That Section limited PAWC to charging 25% or less of its costs for hydrant service. Given the fact that the Amendment required PAWC to charge the CCA rate (\$0.00) during the rate freeze and to charge its tariff rate after the freeze, CCA posited that there was no inconsistency with the statute. CCA R.B. at 5-6.

CCA argued that the Amendment did not violate Section 1303 of the Public Utility Code. It stressed that PAWC would charge the City, and the City would be required to pay, in accordance with the PAWC tariff. CCA rejected the position that the Section would be violated because PAWC would also be required to contribute to the City's Economic Development Fund. It claimed that without permitting the contribution, PAWC and all utilities would be barred from making charitable donations simply because a customer was involved. CCA R.B. at 6-7.

CCA contended that the Stipulation and Amendment did not violate Section 1304 of the Public Utility Code. It emphasized that charging different customers different rates for hydrant service was not an unreasonable preference or advantage and, therefore,

not violative of the Section. It repeated the fact that the Amendment required the City to pay the tariffed rate. CCA claimed that the required contribution by PAWC to the Economic Development Fund was not within the purview of the Section. CCA insisted that the City and CCA as the sellers in the transaction had the right to negotiate the form of consideration they wished to receive in the transaction, e.g. annual contributions to the Development Fund. CCA repeated the fact that, because the contribution would come from the shareholders, there would be no impact on the ratepayers. CCA R.B. at 7-8.

CCA rejected the position offered by PSW and Mr. Campos, that the Commission was precluded from reviewing and/or approving and/or disapproving the Applications, Stipulation and Amendment. CCA R.B. at 8-9.

CCA repeated its position that the Stipulation and the Amendment were reasonable and in the public interest. CCA denied Mr. Campos' allegation that the transaction included a kickback. It contended that there was no evidence to support the allegation. CCA defended the contribution to the Economic Development Fund as having the potential to benefit thousands of individuals by stimulating development in the City. It asserted that the criticisms should be rejected because they unduly restrict the utility's ability to structure the transaction as it saw fit. CCA claimed it was a benefit to the PAWC ratepayers that PAWC was willing to forego collection of the required contribution from its customers. CCA R.B. at 9-11.

CCA disputed the premise from PSW that consideration for the Stipulation and Amendment was inadequate. CCA reviewed the facts that the City and CCA agreed to sell the water assets for \$37,000,000 and certain promises. With respect to the

Stipulation and Amendment, PAWC promised to make the contribution. The other parties to the Stipulation received the promise from PAWC that it would not seek to recover the contribution in a rate case. CCA regarded those promises as adequate consideration. CCA R.B. at 11-12.

CCA next pointed out that the City's taxpayers and residents would benefit from the Stipulation and Amendment. In addition, CCA noted that the Stipulation and Amendment have the potential to benefit others beyond City taxpayers and residents. It claimed that no one suffered any detriment. CCA rejected the suggestions of negative consequences offered by PSW and Mr. Campos. More specifically, CCA discounted the "floodgates" argument which raised the specter of other municipalities making similar requests in the future. It emphasized that utilities have the freedom to structure their offers and agreements to acquire assets as they see fit, including the right to refuse similar provisions in the future. Thus, CCA concluded there was no need for the Commission to impose any limitation on that basis. CCA asserted that PSW and Mr. Campos had exaggerated the facts and ignored the benefits offered by approval of the transaction. CCA R.B. at 12-14.

CCA concluded its brief by repeating its contention that the Water Application, Stipulation and Amendment should be approved in total. According to CCA, outright rejection of the original Application, Stipulation and Amendment was justified only after the Commission first determined the Stipulation and Amendment could not be approved or conditioned to protect the public interest. CCA urged the Commission to reject the positions of PSW and Mr. Campos which advocated disapproval of the Water Application because their positions overlooked the Commission's authority to impose conditions on the transaction and because disapproval would deny the benefits of the transaction to the City's taxpayers and residents. CCA cautioned that the remedy could

not be limited to simply striking the allegedly offensive portions of the Asset Purchase Agreement and the Amendment. It repeated its contention that the Commission must insert reasonable replacement language and its contention that modification of the Stipulation and Amendment would result in an unconstitutional, unreasonable and unneeded repudiation of contract obligations and remedies. CCA R.B. at 15-16.

c. City

By letters dated October 10 and 20, 2000, the City accepted and adopted the Main and Reply Briefs of CCA.

d. PSW

In its Main Brief, PSW argued that the Stipulation and Amendment violated Sections 1303 and 1304 of the Public Utility Code. It asserted that the City made the determination that it, and not the Commission, would set the rates for hydrant service and, after receiving the Commission's Declaratory Order, structured the transaction for that purpose. PSW first noted that the original language of the Asset Purchase Agreement required PAWC to provide free hydrant service in perpetuity. PSW regarded the Stipulation and Amendment as unacceptable because the result was the same, *i.e.* any money paid by the City was required to be returned by PAWC as a contribution. PSW asserted that the Stipulation was a "device" that allowed the City to receive a lower rate than allowed in the statute. PSW did not believe that PAWC could legally charge its ratepayers for contributions to the City's Economic Development Fund

and contended that the PAWC promise not to charge the ratepayers provided no support for the arrangement. In PSW's opinion, there was an unreasonable preference granted because only the City's payments would be returned and because no other municipalities on the CCA system were eligible for such treatment. PSW argued that, granting such favorable treatment to the City, would open the "floodgates" for similar treatment to other municipalities. PSW concluded by first suggesting that the Amendment be modified by striking PAWC's obligation to make the required contribution. However, PSW continued that the evidence indicated the City's willingness to insist on free service even if the Commission modified the Agreement. Accordingly, PSW advocated disapproval of the entire Application. PSW M.B. at 20-23.

In its Reply Brief, PSW challenged the representations made by the CCA Brief about the purchase price of the CCA system. Citing a memo prepared by the City witness, PSW argued that the City knew the PAWC offered exceeded the value of the assets. It used that information to buttress its prior argument that the purchase price was too high and that the City was not entitled to additional compensation for selling the assets below their value. PSW R.B. at 3.

PSW asserted that the Amendment was an indirect way for PAWC to provide free hydrant service to the City. It continued that the Amendment was consistent with the City's goal of receiving free service and that the City, PAWC and CCA had admitted as much. PSW accused PAWC of presenting inconsistent positions, i.e. the Amendment preserved the essence of the Asset Purchase Agreement (free hydrant service) and eliminated that portion of the Agreement which provided free hydrant service in perpetuity. PSW R.B. at 4-5.

PSW noted that the Amendment was unfair to PAWC customers because all other customers, except the City, paid their bills and did not have their money returned. PSW pointed out that the Amendment discriminated against other municipalities as well. According to PSW, the other municipalities served by CCA were initially promised free hydrant service. However, the Amendment made it clear that none of the municipalities, except the City, will receive required contributions from PAWC to their Economic Development Fund. PSW continued that, if the purpose of the Fund was encourage economic development, then the other municipalities should be given the same advantage by PAWC. To remedy this inconsistency, PSW suggested that, if the Water Application was approved by the Commission, a condition ensuring uniform treatment for the other municipalities should be included. PSW R.B. at 6-7.

PSW accused PAWC of creating conflicting obligations (or “compacts”) for itself. PSW specified that PAWC is required to comply with the requirements of the Public Utility Code. Yet, PAWC also entered into the Asset Purchase Agreement which obligated it to provide free service without Commission approval. PSW found it disturbing that the City and CCA, upon being told that the free service clause violated the Code, should threaten PAWC with suit (particularly, because CCA and PAWC were represented by the same law firm). PSW R.B. at 7-8. PSW concluded this portion of its argument with the following:

Sadly, it is becoming increasing[sic] clear which compact is being held sacred. It is not PAWC’s “obligation” to pay money to promote Coatesville’s economic development as the functional equivalent of PAWC’s promise to provide free hydrant service.¹¹ Rather, it is the function of PAWC to comply with the Public Utility Code, as the PUC clearly instructed in its Declaratory Order.¹² Compliance with the Code will not create a chilling impact (CCA/Coatesville M.B. at 22), nor does the Commission lack power to modify the

contract because PAWC agreed to an illegal provision and may get sued for breach of contract (*Id.*), nor does the Commission's authority to enforce its Declaratory Order and establish fire hydrant rates cause problems with the state and federal constitutions, other statutes or the common law (*Id.* at 14-23).

¹¹ CCA/Coatesville M.B. at 18, 23.

¹² Petition of Philadelphia Suburban Water Company for a Declaratory Order Clarifying a Potential Term in a Contract or Agreement between a Public Utility and a Municipal Corporation, Docket No. P-00991732 (Order entered October 1, 1999).

PSW R.B. at 8.

If the Water Application were approved, PSW advocated structuring the Commission decision to prevent PAWC from taking advantage of others. It claimed that PAWC was being taken advantage of by CCA by virtue of paying too high a price for the system and agreeing twice to the grant of free hydrant service. PSW claimed that PAWC took advantage of the Commission by ignoring its jurisdiction and agreeing to place the free hydrant service issue beyond the Commission's reach. PSW claimed that PAWC took advantage of PSW by trying to pre-empt large service territories and ignoring the presiding officer's directions. PSW claimed that PAWC took advantage by submitting an inappropriate motion after the close of the record. PSW claimed that PAWC took advantage of its customers by not giving them the same treatment (i.e. revenue refund) offered to the City. PSW R.B. at 9.

PSW rejected the arguments offered by CCA which suggested limitations on the Commission's authority under Sections 507 and 508. PSW challenged CCA's concept that the Sections 507 and 508 present "impairment of contract" issues in violation of Constitutions, statutes or the common law. PSW took the position that the Asset Purchase

Agreement was not a valid contract until it was first approved by the Commission. PSW contended that there could be no constitutional taking because the City and CCA voluntarily subjected themselves to Commission jurisdiction over contracts for non-tariffed rates. PSW specified that the Declaratory Order put the City and CCA on notice the Agreement would be subject to the Commission's authority. PSW disputed CCA's claim that the presiding officer had recognized that the Agreement could not be modified without adversely affecting the contracting parties' rights. PSW also disagreed with CCA's idea that Section 508 required the Commission to do more than abrogate a contractual provision. PSW R.B. at 10-11.

PSW acknowledged that the Commission could normally impose conditions on the approval of the Application pursuant to Section 1103(a) of the Public Utility Code. However, PSW considered the Asset Purchase Agreement's free hydrant service clause as sufficiently unique as to require scrutiny under Sections 507 and 508. PSW continued that, assuming the Commission were willing to approve a free service arrangement, the Commission should do so in a manner which would be applicable to all utilities, not just PAWC. In the alternative, if the pay back was made applicable to all of PAWC's customers, the Commission should recognize that the situation arose due to PAWC's voluntary actions and avoid imposing the same result on the other utilities. PSW R.B. at 12-13.

e. Campos

Mr. Campos regarded the Declaratory Order as a warning to PAWC (which it disregarded) on the subject of free hydrant service. He challenged the Stipulation and Amendment as requiring PAWC to kickback the City's payments. Mr. Campos contended that the Stipulation and Amendment did not cure the unlawful free service problem and

that approval of the same would set a precedent for similar treatment in the future. Campos M.B. Arguement [sic] – Fitness – Legality, ¶¶ 1-3. (The Campos Main Brief has no page numbers.)

In his Reply Brief, Mr. Campos continued to indicate that the Stipulation required a PAWC kickback which did not resolve the hydrant issue. He disputed the idea that the City taxpayers were in distress and noted that there was no evidence on record on question of how the proceeds of sale would be used. He rejected the CCA suggestion that the Commission should not force a modification on the contracting parties. He believed that the Commission should not forsake its obligation to protect the public interest and should send a clear message to the contracting parties by rejecting the Application. He did not accept the CCA position that the Commission had only limited authority to modify the Amendment. Mr. Campos repeated his position that the Amendment was not in the public interest because it allowed discriminatory and preferential treatment. He urged the Commission to reject the Application. Campos R.B. at 7-9.

Mr. Campos concluded by repeating his conclusion that the Stipulation violated the Public Utility Code. He believed the Stipulation was discriminatory because other municipalities would be surprised when they discovered their hydrant service was no longer free and that they had no input in the decision to make that change. Mr. Campos urged the Commission to reject the Application. Campos R.B. at 11-12.

2. Recommendation

Having reviewed the original language of the Asset Purchase Agreement, the Stipulation and Amendment, I have concluded (1) that the original language of the Asset Purchase Agreement, Article 3, Section 3.4(b) and Article 4, Sections 4.1(g) and 4.2(f)

were and are violations of Sections 507, 1102(a)(3), 1303 and/or 1304 of Public Utility Code and/or the Commission's Declaratory Order and (2) that the revised language offered in the Stipulation and the Amendment continues to be a violation of the same sections and order. Accordingly, I recommend that the Agreement be modified pursuant to the Commission's authority in Section 508 of Public Utility Code and that the Stipulation and Amendment be approved in part and disapproved in part. While the modifications will be clearly set forth below, I emphasize that I have preserved the rights of the contracting parties to withdraw entirely from the Agreement in the event they find the modifications unsatisfactory and wish to withdraw the Applications.

There are three key paragraphs in the original Asset Purchase Agreement which must be reviewed. The first paragraph was Article 3, Section 3.4(b) which stated:

(b) Municipal Service Credit. PAWC shall provide the City [of Coatesville] a one-time Ten Thousand Dollar (\$10,000) credit for future water service.

The City shall not, at any time, be required to pay charges for public fire hydrants.

Agreement at 18. The second two paragraphs were identical. They were Article 4, Section 4.1(g) and Section 4.2(f) which stated:

Regulatory Consents. PAWC shall have obtained the written, final and unappealable approvals, authorizations and consents (including consents for permit transfers) that are required to consummate the transaction contemplated by this Agreement, including, without limitation (i) the approval of the Pennsylvania Public Utility Commission; and, (ii) the

approval of every regulatory agency of federal, state or local government that may be required in the opinion of either PAWC or CCA. Provided, however, that consummation of the transactions contemplated by this Agreement is not conditioned upon the approval by the Pennsylvania Public Utility Commission of the covenants set forth in Subsections (b) to (d), inclusive, of Section 3.4 of this Agreement, Subsections (b) to (c), inclusive, of Section 3.5 of this Agreement, and/or Section 3.6 of this Agreement.

Agreement at 21 and 23. (Emphasis added.)¹

Only Article 3, Section 3.4(b) was revised by the Stipulation and Amendment to read, as follows:

(b) **Municipal Service Credit and Contribution.** PAWC shall provide the City [of Coatesville] a one-time Ten Thousand Dollar (\$10,000) credit for future water service.

Upon the effective date of the new tariff rates for public fire hydrant service applicable to the City, PAWC shall issue bills to the City for public fire hydrant service and collect amounts owed in accordance with PAWC's effective tariff. The City shall pay those charges for public fire service. In each year that the City makes payments for public fire service, PAWC shall make a contribution equal in amount to the public fire service payments during that year, to the City's Economic Development Fund. PAWC agrees not to seek recovery of the contributions to the City's Economic Development Fund in any future base rate case.

¹ Article 5, Section 5.1(d) deals with the termination of the Agreement and contains a nearly identical provision which binds PAWC to the conditions in Sections 3.4(b)-(d), 3.5(b)-(c) and 3.6(b)-(c) without regard to this Commission's approval of the same. Id. at 24.

Amendment at 1. (Bold and underlining in the original.) The contracting parties further agreed that, “All other terms and provisions of the Agreement shall continue in full force and effect.” Id.

I interpret the highlighted portion of Section 4.1(g) (and similar language in other sections) to mean that certain sections of the Agreement are to be effective without regard to this Commission’s approval of those sections. Among those enumerated sections of the Agreement which are to be effective without the Commission’s approval was Section 3.4(b)

I interpret the original language in Section 3.4(b) to express plainly the intention of the parties to guarantee that the City never paid for fire hydrant service. The Water Application also made it clear that none of the municipalities served by the CCA system paid for hydrant service and that PAWC intended to continue that practice for all of them. Further, PAWC proposed “to continue to recover the costs of providing public fire service through customer water rates.” Water Application at 10, ¶25. In other words, all PAWC customers would pay the hydrant rates for those municipalities served by CCA.

As noted above, the original language of Section 3.4(b) was amended. I interpret the amended language to require PAWC to bill the City for hydrant service. The amended language requires the City to pay the charges. The amended language requires PAWC to make a contribution to the City’s Economic Development Fund equal to the amount of the hydrant service payments made by the City annually. The amended language specifies that the contribution to the Fund would not be recoverable in any future base rate case. In other words, the City continues to receive free hydrant service, but only at the expense of the shareholders, not the ratepayers.

Section 507 of the Public Utility Code states, as follows:

§ 507. Contracts between public utilities and municipalities

Except for a contract between a public utility and a municipal corporation to furnish service at the regularly filed and published tariff rates, no contract or agreement between any public utility and any municipal corporation shall be valid unless filed with the commission at least 30 days prior to its effective date. Upon notice to the municipal authorities, and the public utility concerned, the commission may, prior to the effective date of such contract or agreement, institute proceedings to determine the reasonableness, legality or any other matter affecting the validity thereof. Upon the institution of such proceedings, such contract or agreement shall not be effective until the commission grants its approval thereof.

66 Pa. C.S. §507. (Bold in the original. Underlining added.)

Section 1102 of the Public Utility Code states in part, as follows:

(a) General rule.—Upon application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

* * *

(3) For any public utility . . . to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

66 Pa. C.S. §1102. (Bold in the original. Underlining added.)

Section 1303 of the Public Utility Code states in part, as follows:

§ 1303. Adherence to tariffs

No 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.

66 Pa. C.S. 1303. (Bold in the original. Underlining added.) Section 1304 of the Public Utility Code states in part, as follows:

§ 1304. Discrimination in rates

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.

66 Pa. C.S. §1304. (Bold in the original. Underlining added.)

In anticipation of this Application, PSW filed a Petition for a Declaratory Order on July 23, 1999, at Docket No. P-00991732. The Petition was served on PAWC, CCA, OCA, OSBA and OTS. Declaratory Order at 2. The Petition sought a ruling on,

[W]hether it is a violation of various provisions of the Pennsylvania Public Utility Code for a regulated public utility, as a condition of acquiring a municipal water system, to agree to a requirement, presented as a “non-negotiable” provision which may not be conditioned upon PUC approval, that the utility must provide free fire hydrant service to the municipality in perpetuity.

Declaratory Order at 1. (Footnote omitted.) The Commission issued the requested Declaratory Order and ordered, as follows:

2. That a public utility can always structure the provisions of any offer or agreement for the purchase of another system as that utility sees fit, bearing in mind that the Commission must review and approve any acquisition or transfer application for compliance with the relevant provisions of the Public Utility Code. Moreover, the regulated utility must also charge rates that are consistent with its approved tariff rate.

Declaratory Order at 7. (Emphasis added.)

Certain additional facts must be noted. No one disputes that PAWC has an existing hydrant service tariff in place and that it does not provide for free service. The Water and Sewer Applications invoke the Commission’s jurisdiction under Section 507 of the Code for the purpose of reviewing certain agreements (between CCA and nearby municipalities for water and sewer services) for which PAWC was going to assume CCA’s contractual obligations. See e.g. Water Application at 13, ¶38. Given the fact that all protestants raised the free hydrant service issue, I viewed the hydrant issue as primary and pursuant the Sections 507 and 508 of the Code gave the parties notice that a Section 507 review of the Agreement would be conducted. Further, I joined the City and CCA as

indispensable parties with notice that the remedies found in Section 508 could be applicable. Prehearing Order, dated July 26, 2000, at 15-16, ¶¶1-5. And finally, the Asset Purchase Agreement is dated February 15, 2000, which is about three and a half months after the entry date (October 1, 1999) of the Declaratory Order.

At the beginning of this chapter I concluded that Article 4, Sections 4.1(g) and 4.2(f) violated the Declaratory Order. Because both PAWC and CCA were served with the Petition, they were parties to the proceeding. When they received the Declaratory Order, the Commission informed them that, no matter how they structured the transaction, the Agreement would be subject to Commission review and approval. (Note the highlighted language in Declaratory Order, quoted above.) Yet in spite of this clear Commission language, PAWC and CCA specifically inserted the highlighted provisions² of Sections 4.1(g) and 4.2(f) to attempt to circumvent the Commission's approval process.³ Accordingly, I find that the highlighted language of Section 4.1(g), and other similar provisions in the Agreement, violates ordering paragraph 2 of the Declaratory Order by attempting to remove certain portions of the Agreement from the purview of the Commission approval process.

At the beginning of this chapter I concluded that Article 4, Sections 4.1(g) and 4.2(f) violated Section 1102 of the Public Utility Code. 66 Pa. C.S. §1102. As above the quoted and highlighted statutory language indicates, any attempt by a public utility to acquire the utility assets of a municipal corporation cannot occur without the approval of an application by this Commission. 66 Pa. C.S. §1102(a)(3). This case is precisely the

² As noted previously, Section 4.1(g) is not the only part of the Agreement which contains this provision.

kind of application contemplated by this section of the statute. The statute applies to the entire transaction. Yet in spite of this clear statutory language, PAWC and CCA specifically inserted the highlighted provision of Section 4.1(g) to attempt to circumvent the Commission's approval process. Accordingly, I find that the highlighted language of Section 4.1(g), and other similar provisions in the Agreement, violates Section 1102(a)(3) by attempting to remove certain portions of the Agreement from the purview of the Commission approval process.

At the beginning of this chapter I concluded that Article 4, Sections 4.1(g) and 4.2(f) violated Section 507 of the Public Utility Code. 66 Pa. C.S. §507. As above the quoted and highlighted statutory language indicates, after a Section 507 investigation has been instituted, an agreement between a public utility and a municipal corporation cannot become effective until the Commission grants approval. *Id.* As I noted above, I joined the City and CCA as indispensable parties and informed the parties that I was expanding the scope of the proceeding to include review of the Application pursuant to Sections 507 and 508. Prehearing Order, dated July 26, 2000, at 15-16, ¶¶1-5. As part of my analysis of the issue, I stated:

PA-American's position (*i.e.* section 507 should not be applied) was not enhanced by its paragraph 38 of the application which states:

38. Pursuant to Section 1.5 of the Agreement, Pennsylvania-American is assuming the contractual rights, duties, liabilities and obligations of CCA with respect to the contracts, agreements and commitments relating to the

3 Interestingly, after reviewing all of the sections which Section 4.1(g) was intended to shield, only Section 3.4(b) (concerning hydrant service) raised any cause for concern.

water system. The assumed contracts are identified at Schedule 1.5.1 (“Assumed Contracts”), and include a number of water supply agreements with neighboring municipalities. Pennsylvania-American requests approval from the Commission, pursuant to Section 507 of the Public Utility Code (66 Pa. C.S. §507), to assume and comply with the contracts, agreements and commitments relating to the CCA’s water system which are to be assumed by Pennsylvania-American in accordance with the terms of the Agreement.

Application ¶38 at 13. The PSW argued that in this paragraph the Company was requesting a section 507 review of Asset Purchase Agreement because PA-American had tendered no other contracts to the Commission for review. While I find that the PSW was procedurally correct about the receipt of the other contracts, I also find the PSW argument a strain on the words of the paragraph. On the other hand, PA-American is clearly invoking the Commission’s section 507 authority. Under these circumstances, I find the Company’s effort to limit the scope of the section 507 review to be tenuous at best. The Commission is not required to exercise its authority as limited by the request of the applicant. There is some merit to the idea that PA-American may have “opened the door” on the issue.

Id at 6-7. The Agreement was attached to the Application as an exhibit. As quoted above, Paragraph 38 of the Water Application raises the question of whether PAWC initiated the Commission’s Section 507 jurisdiction simply by filing the Application and its exhibits. The fact that I gave notice to the parties that the scope of the proceeding would specifically include a Section 507 investigation makes it unnecessary to answer the question of whether PAWC opened the door. The point is that comparing Sections 4.1(g) and 4.2(f) with the statutory language again demonstrates another problem. Contrary to the contents of Section 4.1(g), the statute specifies that the effectiveness of the whole Agreement is

dependent on Commission approval. Accordingly, I find that the highlighted language of Section 4.1(g), and other similar provisions in the Agreement, violates Section 507 by attempting to exempt certain portions of the Agreement from the purview of the Commission approval process.

Having found that Section 4.1(g), and other similar provisions of the Agreement, violate Sections 507 and 1102(a)(3) of the Public Utility Code and the Commission's Declaratory Order, I concluded that the Section is unjust, unreasonable, inequitable, and/or otherwise contrary to the public interest and general well being of the Commonwealth pursuant to Section 508 of the Public Utility Code. 66 Pa. C.S. §508. The next question becomes what to do about it. CCA argued that, if changes were needed to the transaction, the Commission should exercise its discretion to impose conditions on the contracting parties and not to modify the language of the Agreement. CCA M.B. at 9-24. Unfortunately, I cannot conceive of a condition which would be suitable to remedy an unlawful contract provision. I think the real answer is to modify the Agreement. In fact, the parties to the Stipulation actually touched on the solution, but it was not implemented in the Amendment.

More specifically, the Stipulation recognized that "the agreement between PAWC and the CCA cannot abrogate or modify the PUC's jurisdiction and authority in any manner." Stipulation at 4, ¶8 (quoted at the beginning of this chapter). I believe the most just, reasonable and equitable way to implement this part of the Stipulation is to delete the offending portions of Section 4.1(g), and other similar provisions, from the Agreement. CCA argued that, if the Agreement were modified, the Commission would be required to substitute replacement language. CCA M.B. at 14-17. I disagree. In this instance, the most reasonable remedy is to excise the offending language. The City, PAWC and CCA have already conceded the primacy of the Public Utility Code in the

Stipulation. There is no reason to leave the language in the Agreement. And finally, the removal is in the public interest because it eliminates the possibility that the contracting parties might consider suing each other in the courts of common pleas for breach of this provision and those provisions it supposedly protected from this Commission's review. See e.g. CCA M.B. at 21-22. See also, City St. No. 1.0 at 5-6.

The real purpose of Section 4.1(g) and other similar provisions was not to protect Section 4.1(g) from Commission review, but rather to implement one of the primary "non-negotiable" terms of the Agreement as planned by the City and CCA. That primary non-negotiable term was the provision of free hydrant service to the City in perpetuity. In essence, the City's witness testified that the purpose of selling the CCA assets was to provide "long term tax relief and financial stability to the City residents." City St. No. 1.0 at 4. He continued that paying a hydrant service fee would result in higher taxes for the residents which was contrary to the purpose of the sale. Id. at 3. He explained that this provision was fair because,

[T]he hydrant condition was made non-negotiable and bidders were not permitted to condition their bids on PUC approval of the condition. This was done to be fair to all prospective bidders. There were non-PUC jurisdictional entities involved in the bidding process, such as the Chester Water Authority, which did not have to condition their proposal on the PUC approval of the hydrant condition. The City continues to believe that it would have been unfair to that class of prospective proposers [sic] to allow the PUC jurisdictional class to qualify its bids. All who submitted bids assumed the risk of the hydrant condition not being approved by the PUC.

City St. No. 1.0 at 5. While this logic may initially sound reasonable, read well in a request-for-proposal and govern the bidding process, its major flaw is in the untenable

assumption that, if the successful bidder was a Commission regulated utility, the provision of free hydrant service could be accomplished legally. Indeed, I find the explanation to be an explicit recognition that the provision of free hydrant service to be likely to fail Commission scrutiny. Otherwise, there would be no reason for the City and CCA to attempt to exclude it from the approval process. Thus, I find that in the planning stages of the bidding process for sale of the assets, the City and CCA recognized free hydrant services would be problematic for a regulated utility. Let me re-emphasize the importance of that conclusion: Before any protests were filed, before the instant Applications were filed, before the Asset Purchase Agreement was signed, before this Commission issued a Declaratory Order, before PSW requested a Declaratory Order, before PAWC was the successful bidder, before there were any bidders, and before there was a request-for-proposal, the City and CCA knew the provision of free hydrant service would likely fail Commission scrutiny because free hydrant service would be unlawful under the Public Utility Code.

I began this chapter by announcing my conclusion that Section 3.4(b) violated Sections 1303 and 1304 of the Public Utility Code and the Commission's Declaratory Order. My analyses for the violations of the Declaratory Order are very similar to my review of Section 4.1(g) of the Agreement. Again, PAWC and CCA were served with the PSW Petition for a Declaratory Order. PAWC and CCA received the Declaratory Order which specified, as quoted above, that a regulated utility was required to charge its tariffed rates for its services. In spite of this clear direction from the Commission in October 1999, PAWC and CCA entered into the Agreement on

February 15, 2000 which specified that the City should receive free hydrant service in perpetuity (Section 3.4(b)). As set forth in the original Section 3.4(b), free hydrant service is and was, of course, contrary to PAWC's tariff. Because the concept of free hydrant service contradicts PAWC's tariff, it also violates that portion of the Declaratory Order which required PAWC to charge in accordance with its tariff.

The next question is whether the language in the Amendment sufficiently revised the free hydrant concept to escape the violations. I find that the answer is "No." While the Amendment may now require PAWC to charge and the City to pay in accordance with the tariffed rate, it also requires PAWC to annually contribute an equal amount right back to the City's control. The fact that the source of the money returned is from shareholder funds, and not from ratepayers, does not change the big picture. The result is still the same, *i.e.* the City is still receiving free hydrant service. And free hydrant service continues to contradict PAWC's tariff and the Declaratory Order. Any attempt by PAWC to characterize the changes set forth in the Amendment as a "charge and contribution" format is nothing more than an untenable form over substance argument.

At the beginning of this chapter I concluded that Article 3, Section 3.4(b) violated Section 1303 of the Public Utility Code. 66 Pa. C.S. §1303. As above the quoted and highlighted statutory language indicates, a regulated utility is required to charge its tariffed rates, not more and not less. *Id.* I find the original version of Section 3.4(b) was a direct effort to charge less (*i.e.* free) than the tariffed rate for hydrant service. As such, it violated Section 1303. I also note that the statute specifically proscribes the use of any indirect device to charge less than the tariffed rate. My review of the Amendment with its forced contribution of shareholder funds led me to the conclusion that it was nothing more than an indirect device for the reduction of hydrant fees (*i.e.* free) to the City. Consequently, the Amendment also violates Section 1303.

At the beginning of this chapter I concluded that Article 3, Section 3.4(b) violated Section 1304 of the Public Utility Code. 66 Pa. C.S. §1304. As above the quoted and highlighted statutory language indicates, a regulated utility is not permitted to grant unreasonable preferential treatment to a municipal corporation. *Id.* I find that any contract right which results in the provision of free hydrant service in contradiction to the PAWC tariff and to the Declaratory Order and in violation of Section 1303 of the Public Utility Code is per se unreasonable. In addition, I hasten to point out that denying the same benefit to other municipal corporations inside the CCA service territory and/or inside the PAWC territory establishes a per se unreasonable disadvantage to the other municipalities. In other words, giving free hydrant service only to the City violates Section 1304, as well. Thus, because both the original version of Section 3.4(b) and the Amendment result in free service for the City, they both are unlawful.

Prior to discussing the possible remedies for the problem I have found. There is one argument from PAWC which deserves attention first. PAWC asserted that PSW attempted to insert new issues in this case vis-a-vis PSW's Main Brief. Namely, PAWC did not believe that PSW should be permitted to challenge the Amendment as violative of Sections 1303 and 1304 of the Public Utility Code. PAWC M.B. at 3-4. The argument fails for two reasons: First, the Stipulation and Amendment were not conceived and executed until after the close of the record. In other words, PSW's first opportunity to object to the terms of the Amendment was in its brief. Second (and more importantly), PAWC overlooks the comprehensive nature of a Section 507 review. 66 Pa. C.S. §507. When I initiated a Section 507 proceeding, the investigation subjected the Agreement to a

determination of “the reasonableness, legality or any other matter affecting the validity thereof.” Id. See also, Prehearing Order at 15, ¶1. Under these circumstances, the PSW challenge to the Stipulation and Amendment pursuant to Sections 1303 and 1304 was appropriate.

Having found that Section 3.4(b) of the Agreement violates Sections 1303 and 1304 of the Public Utility Code and the Commission’s Declaratory Order, I concluded that the Section is unjust, unreasonable, inequitable, and/or otherwise contrary to the public interest and general well being of the Commonwealth pursuant to Section 508 of the Public Utility Code. 66 Pa. C.S. §508. The next question becomes what to do about it. CCA argued that, if changes were needed to the transaction, the Commission should exercise its discretion to impose conditions on the contracting parties and not to modify the language of the Agreement. CCA M.B. at 9-24. Unfortunately, I cannot conceive of a condition which would be suitable to remedy an unlawful contract provision. As with Section 4.1(g) above, I think the real answer is to modify the Amendment.

I believe the major problem with the terminology in the Amendment is that it guarantees free hydrant service to the City. Insofar as this judge is concerned, the contracting parties’ intent to require free hydrant service violates two sections of the Public Utility Code and the Declaratory Order. It simply does not matter how the contracting parties structure the transaction. Once the goal is achieved, that provision of the Agreement or the Amendment is unlawful and that part of the transaction is invalid. Accordingly, there can be no other remedy than to delete the offending portion of Section 3.4(b) from the Agreement and the Amendment.

I hasten to add that the Pennsylvania Supreme Court made it clear many years ago that municipalities were liable to pay the tariffed rate for fire hydrant service

notwithstanding any pre-existing contracts with the water company to the contrary. Dormont Borough v. South Pittsburgh Water Company, 322 Pa. 60, 185 A. 263 (1936). That concept (i.e. tariffed rates prevail over prior contracts) has been uniformly applicable to other utility industries, as well. Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, 417 A. 2d 827, 53 Pa. Cmwlth. 241 (1980). Scranton Electric Company v. Avoca Borough School District, 37 A. 2d 725, 155 Pa. Superior Ct. 270 (1944).

As noted above, the free hydrant service requirement violates two sections of the Public Utility Code (66 Pa. C.S. §§1303 and 1304) and the Declaratory Order. In addition, Section 3.4(b) violates two other Sections of the Public Utility Code (66 Pa. C.S. §§507 and 1102(a)(3)) and the Declaratory Order. These legal conclusions coincide with my factual finding that the City and CCA knew it would be unlawful for a regulated utility to provide free hydrant service prior to requesting bids for the CCA assets. Together, these findings undermine the remaining CCA arguments in favor of the Amendment.

CCA tried to justify the free hydrant service by noting that the required equal contribution went to a worthy cause and the funds came from the shareholders, not the ratepayers. CCA M.B at 6-9. Unfortunately, good intentions cannot be used to justify an illegal contract provision. If PAWC wishes to contribute shareholder money to the City's Economic Development Fund, it may do so on a voluntary basis. As for using shareholder money, I find that the source of contribution does not legitimize the result. This Commission is charged with the responsibility of protecting the public interest which includes the shareholders' funds, as well as the ratepayers.

CCA argued that there was consideration to support the provision, i.e. the City anticipated and accepted a lesser value for the assets because the shareholders would

be required to provide to pay for the hydrant service. CCA M.B. at 12-14. The problem with this argument is that no amount of exchanged consideration in the contract can legalize the provision to provide unlawful free service. In fact, the result is just the opposite. Once the contracting parties signed the Agreement containing the unlawful free service provision, there was a failure of consideration. No municipal corporation is empowered to do an illegal act. As noted above, the City and CCA knew a regulated utility would not be legally permitted to provide free hydrant. Thus, entering into the Agreement was an ultra vires act for CCA.

Although I have previously rejected CCA's attempt to impose limitations on the Commission's authority to modify the Agreement language, there are some additional responses required. CCA M.B. at 14-17. The purpose of the Commission's authority under Section 508 is to insure conformity with the Public Utility Code. 66 Pa. C.S. §508. Because this case requires the exercise of that authority, I find that the modifications to the Agreement were needed to conform it to the provisions to state law, not to contradict the law. I hasten to add that the lack of consideration and the unlawful provisions undercut CCA's "unconstitutional taking" argument, too. There can be no "taking," if the items taken resulted from illegal contract provisions. By definition, the "benefits" of an illegal contract provision have no value. Accordingly, I conclude that deleting the offending provisions is well within the purview of the Commission's Section 508 power.

CCA expended considerable effort arguing that modifying the Agreement would adversely affect the contracting parties' rights. CCA posited 1) that changing the Amendment would exacerbate the financial situation for the City taxpayers and residents, 2) that a Commission modification would contradict the contracting parties' intent to change the Agreement only in writing and only after mutual assent, 3) that the City and CCA had been willing to accept the risk the Commission would add conditions to

the sale, but were not willing to accept the risk of modification, 4) that a modification would reduce the consideration flowing to the City and give cause for an actionable breach against PAWC, and 5) that a modification would create uncertainty for future contracting parties in mergers and acquisitions. CCA M.B. at 18-23.

The responses will be provided in seratim. With respect to the financial plight of the City taxpayers and residents, this Commission had no part in creating the existing problem. However, this Commission is responsible for the administration of utility regulation in accordance with the Public Utility Code. Because the City and CCA intentionally included unlawful contract provisions in the transaction, the responsibility for the Commission rejecting those provisions in conformity with state law and consequences caused thereby must be laid at the feet of the City and CCA. They recognized the free hydrant service issues at the start of the process. Their actions caused my rejection (in accordance with the Public Utility Code) of those provisions. If the rejection of those provisions results in an exacerbation of the financial situation, the City and CCA have only themselves to blame.

With respect to the parties' intent to limit changes to those mutually agreed upon and in writing, I find that their intent is secondary to the language of the statute which gives the Commission the "power and authority to vary, reform, or revise" the Agreement. 66 Pa. C. S. §508. (Emphasis added.) In other words, after the Agreement was made subject to investigation pursuant to Sections 507 and 508, the intent of the City and CCA became subservient to the Commission's pervasive power. I hasten to add that I began this chapter by specifically noting that the contracting parties retained their contractual right to withdraw from the Agreement and to withdraw the Applications. While their "assent" to the modifications is not necessary, they do retain the ultimate "take it or leave it" escape clause.

With respect to the City's and CCA's willingness to accept only the risk of the imposition of conditions on the transaction (and not modifications), I find the argument specious. At the risk of being repetitious, the City and CCA knew the free hydrant service issue was problematic at the beginning of the deal. I find it impossible to give any credence, or find any limitation on the Commission's powers, based on their risk avoidance concepts. Their position was not improved by their intent to implement unlawful contract provisions while simultaneously attempting to impose limits on this Commission's approval process.

With respect to their concern over a reduction in their consideration and the potential for suit based on breach of contract, I believe I have already disposed of their concerns over consideration. In addition, I note that their position was not enhanced by their concurrent effort to structure the transaction in such a way as to make the utility liable for breach of contract in the event performance was impossible. Given my rulings above on the multiple violations of the Public Utility Code, I can only conclude that their actions certainly contributed to the substantial potential for impossibility. Indeed, it was the regular and persistent threat of litigation voiced by the City and CCA which led me to recommend deletion of Section 4.1(g) of the Agreement.

With respect to the possibility that a modification would create the potential for future uncertainty in merger and acquisition transactions, I find the argument unpersuasive. The Public Utility Code will not change as a result of this case. All future mergers and acquisitions will be subject to the limitations set forth in the Code. The problem is not that all future merger transactions will unfavorably be impacted by this case. The problem is not that the Commission's exercise of its Section 507 and 508 powers in this case will create uncertainty. 66 Pa. C.S. §§507 and 508. The problem is that the contracting parties in this case made a substantial error in their willingness to include

unlawful free hydrant service and circumvention of the Commission approval process in the Agreement. The fact that these parties crossed the line should not have a chilling effect on the efforts of other merging parties to stay within the Code's boundaries.

There was one argument in the CCA Reply Brief (in response to PSW) which requires further comment. CCA claimed that PAWC had forgone a substantial benefit by agreeing not to collect its contributions to the City's Economic Development Fund from its ratepayers. CCA R.B. at 9-11. In its Main Brief, PSW had pointed out that the "contribution" to the Fund was charitable in nature and not recoverable from the ratepayers. PSW M.B. at 21-22. I agree with PSW. The contribution is charitable in nature and should not be recoverable from the ratepayers. As I noted above, at best these kinds of contributions should be voluntary, as well.

The final task is the review of the remainder of the Stipulation. No party objected to the other terms contained in the Stipulation. Those terms included: 1) a minimum three year rate freeze for the CCA customers, 2) preservation of issues raised by OTS, OCA and OSBA for litigation in a future base rate case, 3) recognition of the primacy of the Commission's jurisdiction and authority over PAWC's rates and service and the Agreement, 4) withdrawal of PAWC's request in the Application to omit charging hydrant service fees to any municipal corporation in the CCA service territory and 5) withdrawal of the interventions and protests of OTS, OCA and OSBA conditioned on the approval of the Stipulation by the Commission. Stipulation at 4-5, ¶¶ 6-9 and 12 respectively.

The three year rate freeze was included in the Agreement. Agreement at 18 and 19, Sections 3.4(a) and 3.5(a), respectively. I find nothing unusual about the provision which allows for a reasonably short transition period before the CCA rate levels are increased to the PAWC levels. I approve of this provision and recommend its adoption.

The postponement of certain issues to a future base rate case is consistent with PAWC's efforts to limit this proceeding to the merits of the Applications without reference to issues which were rate related. While the Company was not able to avoid the hydrant fee issue, no prejudice will result by litigating the lesser important rate issues in future cases. I approve of this provision and recommend its adoption.

The primacy of the Commission's jurisdiction over rates, service and the Agreement has been examined in the discussion of Section 4.1(g). I approve of this provision and recommend its adoption.

With respect to withdrawing the proposition to provide free hydrant service to other CCA municipal customers, I have already ruled that providing free service to the City was unlawful. I find the withdrawal of the proposal for the other municipal customers to be consistent with that ruling. Section 1303 of the Public Utility Code requires PAWC to adhere to its tariffs. 66 Pa. C.S. §1303. Free hydrant service for the other CCA customers would have run afoul of that statute. It would also have been discriminatory in favor of the CCA customers and discriminatory against the remaining PAWC municipal customers. Such discrimination would have violated Section 1304, as well. 66 Pa. C.S. §1304. Accordingly, I approve of this provision and recommend its adoption.

The withdrawal of the public advocates was conditioned on Commission approval of the Stipulation. Given my disapproval of the most important provision of the Stipulation and the Amendment, I find their caution well advised. Accordingly, I approve of this provision and recommend its adoption.

B. SERVICE TERRITORY

On January 4, 2001, PAWC and PSW filed Stipulation Of Partial Settlement Between Pennsylvania-American Water Company And Philadelphia Suburban Water Company (Stipulation No. 2). In Stipulation No. 2, PAWC restrictively amends its Water Application by reducing the service territory requested in Caln Township, West Caln Township and East Fallowfield Township, Chester County. The parties included revised maps and written descriptions of the requested service territories for those Townships. Stipulation No. 2 at 3-4, ¶ 4 and Appendices A and B. In return, PSW agreed not to continue to contest the service territory boundary issues with PAWC. Stipulation No. 2 at 4, ¶ 7.

Having reviewed Stipulation No. 2 and its Appendices and the record, I have concluded that Stipulation No. 2 can be approved insofar as it reduces the requested service territory. I find that approval of Stipulation No. 2 is consistent with the public interest because PAWC failed to carry its burden of proving public need in the now excluded portions of the three Townships. In other words, my review of the record indicates that I would not have granted authority in those portions of the three Townships

which have now been excluded from the scope of the Water Application.⁴ Accordingly, Stipulation No. 2 is approved to the extent it consistent with this Decision.

II. OTHER LITIGATED ISSUES

A. FITNESS

1. Financial Fitness

a. Parties' Positions

(1) PAWC

In its Main Brief, PAWC argued that it had established a prima facie case for its financial fitness. It pointed out that the total purchase price was \$48,225,000 which PAWC intended to finance initially through short-term debt. The short-term debt would be later replaced with permanent capital. The Company emphasized its testimony which presented permanent capitalization of just under \$1.1 billion which consisted of 56.6% long-term debt, 1.5% preferred stock and 41.9% common equity. PAWC explained that it was a wholly owned subsidiary of American Water Works Company, Inc., which was the largest U.S. based investor-owned water company in the United States. (American's total capitalization was more than \$4.1 billion.) PAWC reviewed the testimony which demonstrated that it has access to capital long-term debt and preferred stock. Both were issued in the public and private markets. It continued that it receives infusions of equity

⁴ My reasons for refusing to grant authority in those portions of the Townships, as well as other sections of the requested territory, will be set forth in greater detail in a later chapter of this decision.

from American, as needed. The Company had a \$125 million line of short-term credit from another American subsidiary and a \$200 million medium term credit program. PAWC asserted that it had a history of being able to borrow from PENNVEST and other public finance agencies. It noted that internally the Company generated cash annually as much as \$64.5 million. PAWC continued that overall size of the Company and its affiliates allowed it to generate economies of scale. PAWC M.B. at 10-13.

PAWC admitted that the record reflected an anticipated \$600,000 annual loss on the CCA system. However, it was skeptical of the accuracy of the projection and expected to reduce costs and improve productivity in the CCA system. The Company argued that, given its Statement of Income and Retained Earnings, the projected loss on the CCA system would be relatively small. PAWC viewed the projected loss as temporary and expected to earn a fair return at a later time. The Company did not expect that the anticipated loss would have an adverse impact on its overall financial health. PAWC M.B. at 14-15.

Because PAWC already owned and operated a similar sized wastewater system, it argued that it could achieve economies of scale for those systems as well. The Company asserted that there were similarities between water and wastewater system operations which could be advantageous, too. PAWC M.B. at 15-17.

PAWC rejected Mr. Campos' allegation that the Company failed to perform due diligence in evaluating the CCA system. It emphasized that it relied on more than simply one engineering report. The Company specified that it relied on several reports and system inspections before making its bid of \$48,825,000 for the systems. PAWC M.B. at 17-18.

In its Reply Brief, PAWC responded to arguments from Mr. Campos. With respect to the projected \$600,000 annual operating loss, the Company suggested that, until it was able to take possession of the systems, any attempt at resolution of the issues was premature. PAWC expected to offset part of the loss with some economies of scale and with increased efficiency. The remainder of the losses would be examined after PAWC became the operator. The Company also stressed that financial fitness dealt with the issue of whether an applicant had sufficient financial resources to provide the equipment needed to give reliable service. PAWC asserted that Mr. Campos did not produce any evidence that the projected initial loss would prevent the Company from meeting this test. PAWC repeated its conclusion that its evidence demonstrated it was fiscally sound. PAWC R.B. at 19-20.

(2) Campos

In his Main Brief, Mr. Campos made two assertions, as follows:

1. PAWC has proven that it is overpaying for the CCA systems. (See Campos Exhibit #2, Janssen memo).
2. PAWC intends to lose at least \$600,000 per year in at least the first three years and could not explain how they would recover without forcing more money from the rate payers [sic]. (See Neubauer transcript. p. 152-154).

Campos M.B. Argument [sic] – Fitness – Financially, ¶¶1-2. (The Campos Main Brief has no page numbers.)

In his Reply Brief, Mr. Campos returned to the engineering report issue as it related to putting a value on the systems. He asserted that PAWC thought the Gannet

Fleming study was very important. He noted that the report contained a major error and that it had been paid for by the seller. Mr. Campos also emphasized that the PAWC testimony showed their engineers were not able to determine what, if anything, was needed to improve the systems. He argued that setting a minimum bid price was simply a guide for buyer's use. He acknowledged his involvement with the PSW bid, but reminded the reader that the bid was unsuccessful. He claimed that the structure of the PSW bid offered more economic incentives to the community than did PAWC's bid. Campos R.B. at 5.

b. Recommendation

Having reviewed the record and the parties' briefs, I find that PAWC meets the standards for financial fitness. While I may not agree with all of the financial aspects of this transaction, the financial strength of the Applicant cannot be ignored.

As my findings will reflect, I agree in total with the following presentation from the Company:

PAWC is in sound financial condition. Its financial condition is described in the Statement of Income and Retained Earnings attached to the Applications in this proceeding.³² Its secured debt securities are rated "A-" by Standard and Poor's and "A3" by Moody's.³³ At December 31, 1999, PAWC's total permanent capitalization was almost \$1.1 billion and consisted of 56.6% long-term debt, 1.5% preferred stock and 41.9% common equity.³⁴ It "has the financial strength and expertise to raise the capital necessary to fund the acquisition of the [CCA] water and wastewater assets, and make system improvements as required on an ongoing basis."³⁵

PAWC is part of a family of corporations in sound financial condition. It is "a wholly-owned subsidiary of [American Water Works Company, Inc. ("American Water")],

the largest U.S.-based investor-owned water company in the United States."³⁶ At December 31, 1999, American Water's total capitalization was more than \$4.1 billion, consisting of 58.1% long-term debt, 2.2% preferred stock and 39.7% common equity.³⁷

PAWC has access to substantial capital resources. Its long-term debt and preferred stocks have historically been issued in both the public and private markets.³⁸ It receives additional common equity from American Water as infusions are needed to maintain a reasonable capital structure.³⁹ "For its short-term debt needs, PAWC currently has a committed credit line for \$125 million with American Water Capital Corporation."⁴⁰

PAWC has in place a \$200 million Medium Term Note (MTN) program that can provide significant amounts of long term debt capital, within a very short time frame. Only \$33 million has been issued from that program to date. This means that PAWC alone has access to \$167 million in permanent capital, any portion of which could be issued within a few weeks to fund water and wastewater capital improvements.⁴¹

PAWC was able to obtain \$250 million in a short term credit facility to fund the purchase of the water assets of the former Pennsylvania Gas and Water Company.⁴² PAWC has also been able to borrow money on favorable terms from the Pennsylvania Infrastructure Investment Authority and from the Montgomery County Industrial Development Authority.⁴³

In addition to external financing, the Company also generates cash from such sources as depreciation, deferred taxes and retained earnings.⁴⁴ For the year 2000, cash from those sources will total more than \$64.5 million.⁴⁵

PAWC's size and corporate affiliation permit it to achieve economies of scale, which contributes to the Applicant's financial fitness to operate the systems after closing. For example, "because of its affiliation with [the American Water Works Service Company, Inc.], PAWC is able to enjoy significant economies of scale in the procurement of materials and specialized services (e.g., engineering, water quality)."⁴⁶

³² PAWC Statement No. 5.0, Exhibit G.

³³ PAWC Statement No. 3.0, at 4.

³⁴ Id.

³⁵ Id., at 2.

³⁶ Id., at 3.

³⁷ Id.

³⁸ Id., at 4.

³⁹ Id.

⁴⁰ Id., at 4, corrected at Tr. 91.

⁴¹ PAWC Statement No. 3.0, at 3-4.

⁴² Id., at 4.

⁴³ Id., at 5.

⁴⁴ Id., at 4.

⁴⁵ Id.

⁴⁶ Id., at 2.

PAWC M.B. at 11-13.

As part of its Application, PAWC presented data which demonstrated an anticipated \$600,000 pro forma annual loss from the operation of both systems. While I do not fault Mr. Campos for highlighting his concerns, I agree with the Company that there some doubt about the accuracy of the projection and that the projected loss will have no real impact on the transaction or PAWC's fiscal health. The Company witnesses testified that the Company will seek to bring economies of scale and increased efficiency to boost productivity. I note that the Company did not represent that it could wipe out the loss with these efforts. Indeed, I think it is likely that there will be a short term loss during the three

year transition period. Given that PAWC's rates are generally higher than those currently in place with CCA's management, I believe the migration of the CCA customers to the PAWC tariff rates will unquestionably improve the financial picture for this portion of the system.

Mr. Campos also challenged PAWC's financial fitness to operate the wastewater system. Again, I agree with the Company. The PAWC witness testified that the Company already operates one similar size wastewater system within the Commonwealth. He continued that there are some similarities operationally between water purification and wastewater systems and that there were economies of scale which PAWC and its parent company could use to benefit the wastewater systems. Given the financial strength of PAWC and American Water, I find that Mr. Campos' concerns about the financial fitness on the wastewater issue to be misplaced.

Although the parties combined their arguments about financial fitness with those about the valuation study and purchase price of the systems, my recommendations on those subjects will be set forth in a later portion of the Decision.

2. Technical Fitness

a. Parties' Positions

(1) PAWC

PAWC began its Main Brief by asserting that it had established a prima facie case for technical fitness. According to PAWC, its evidence demonstrated that the Company intended to continue to use the current full and part-time CCA employees to run

the systems. PAWC pointed out that it currently provided water service to 545,388 customers and wastewater service to 4,828 customers spread across 31 of 67 counties in Pennsylvania. The Company summarized its water service data as follows:

In 1999, the total amount of water delivered to PAWC's systems averaged approximately 194 MGD.⁷⁷ PAWC owns and operates 32 surface water filtration plants having a combined operating capacity of approximately 332 MGD for filtering and chemically treating water supplies.⁷⁸ As of December 31, 1999, PAWC owned more than 7,714 miles of water transmission and distribution mains.⁷⁹ It had 230 water distribution towers with a capacity of approximately 179 million gallons.⁸⁰

PAWC also enhances CCA's technical capacity because it employs, or has access to, many experts in various fields:

[PAWC] employs approximately 1,100 people who have expertise in all areas of water works and wastewater utility operations including engineering, water quality, filtration plant operation and maintenance, distribution system operation and maintenance, materials management, risk management, human resources, legal, finance and accounting. Additionally, as a subsidiary of American, the Company has available the resources of American Water Works Service Company, Inc. (the "Service Company"). The Service Company provides access to highly trained professionals with expertise in various specialized areas who work exclusively for American's operating subsidiaries.⁸¹

PAWC also improves CCA's technical capabilities by providing key support functions that currently do not exist in CCA's system. The CCA does not have a DEP-certified water quality lab and must send samples to outside labs. PAWC has

a water quality lab in Norristown that could handle sampling from the CCA's system.⁸² PAWC has 39 laboratories, staffed by 30 water quality specialists, who are assisted by more than 150 analysts/operators working in the water filtration and distribution process.⁸³ Approximately 70% of PAWC's water quality/plant operator personnel have achieved some level of state certification.⁸⁴ PAWC's new Mayfield water quality laboratory is a state-of-the-art facility with sophisticated equipment and a talented, technically skilled professional work force.⁸⁵

PAWC will provide CCA's systems with better customer service capabilities because PAWC has three customer call centers, providing extended week day and weekend customer service hours.⁸⁶ PAWC will also improve maintenance capabilities at the CCA systems because PAWC has a maintenance services department that

. . . is responsible for providing and promoting mechanical, electrical, instrumentation and process control maintenance employed in a strategy of predictive (condition based), preventive (time based), and corrective (repair) maintenance in a combination that yields optimum equipment/process reliability and maximum economic performance.⁸⁷

Through the expertise of the 21 professionals in the maintenance department, "PAWC is able to maintain this preventive maintenance program which reduces operational costs and the possibility of service outages as well as providing rapid response to emergency situations, while ensuring high-water quality."⁸⁸

PAWC also enhances the CCA's existing technical capability because PAWC is part of a family of corporations with extensive expertise in operating water works and wastewater systems. For example, because it is part of the American Water system, PAWC has access to a water quality lab in Belleville, Illinois, which "is one of the most

technologically advanced facilities in the country . . . capable of performing the most advanced types of water analyses for all types of possible contaminants."⁸⁹

Finally, in addition to its tangible resources, PAWC brings a commitment to operate a high quality water works and wastewater operation -- together with a proven ability to do so. PAWC has written policies and procedures for ensuring the quality of its drinking water.⁹⁰ It also voluntarily participates in the U.S. Environmental Protection Agency's Partnership for Safe Water initiative, the goal of which is to provide a new measure of safety to water consumers nationwide.⁹¹ To date, nineteen of PAWC's plants have met the criteria for the EPA's Director's Award, indicating successful completion of Phase III of this program.⁹² PAWC will bring this same commitment, and proven ability to perform, to the operation of CCA's system.

⁷⁷ [PAWC Statement No. 2], at 6.

⁷⁸ Id.

⁷⁹ Id., at 7.

⁸⁰ Id.

⁸¹ Id., at 4.

⁸² Id., at 8.

⁸³ Id., at 17.

⁸⁴ Id., at 18.

⁸⁵ Id.

⁸⁶ Id., at 9.

⁸⁷ Id., at 19.

⁸⁸ Id., at 20.

⁸⁹ Id.

⁹⁰ Id., at 13.

⁹¹ Id.

⁹² Id., at 16.

PAWC M.B. at 19-22.

PAWC dismissed Mr. Campos' concern that the CCA system would not be interconnected with other Company owned systems. PAWC maintained that the lack of

interconnection would have no impact on PAWC's technical fitness. The Company repeated its position that the CCA system would benefit from economies of scale offered by the PAWC and American Water corporate structure. PAWC M.B. at 22-23.

PAWC contended that the fire hydrant service issue was irrelevant to fitness. It disagreed with the position that the concept of providing free hydrant service was unlawful. It asserted that the Stipulation resolved the hydrant service issue. PAWC M.B. at 23-24.

In its Reply Brief, PAWC argued that, contrary to Mr. Campos' assertions, it was not required to show the Company was more technically fit than CCA to operate the systems. PAWC explained that it was required to show it possessed sufficient staff, facilities and operating skills to make the proposed service feasible, profitable and distinct for the public. The Company repeated its position that it would own the facilities and use the same employees to operate them and that it had the ability to enhance the technical capacity of the CCA system using its own resources and affiliates. PAWC acknowledged that the wastewater system would need capital improvements, but would make no commitment to any improvement plan without more information than it currently had. The Company did not regard its reluctance to make commitments to improvements an impediment to approving the Applications. PAWC R.B. at 20-22.

(2) Campos

In his Main Brief, Mr. Campos argued that there was no evidence PAWC could operate the CCA systems more efficiently than CCA. He emphasized the evidence that CCA could make capital improvements cheaper than PAWC. Mr. Campos was dissatisfied with PAWC's failure to explain the improvements it planned to make to the

CCA systems and attributed that shortcoming to the Company's failure to properly perform due diligence. Mr. Campos noted that the memo from the City's witness indicated substantial improvements were needed to the wastewater system. He doubted the savings from economies of scale would offset the expected \$600,000 annual losses plus the interest and principal payments on the purchase price. Mr. Campos asserted that PAWC had relied heavily on the valuation report which had been paid for by CCA. Campos M.B. Argument [sic] – Fitness – Operationally, ¶¶1-5. (The Campos Main Brief has no page numbers.)

In his Reply Brief, Mr. Campos disagreed with the Company that the alleged unlawful free hydrant service issue did not reflect poorly on the PAWC's technical fitness. He thought that PAWC did not care about complying with the law and that the Stipulation demonstrated the Company was more interested in the transaction than the Commission's authority.

b. Recommendation

Having reviewed the record and the briefs, I have concluded that PAWC is technically fit to provide both water and wastewater service in the CCA service territory. As my findings of fact reflect, there is simply no question that PAWC has vast resources (e.g. management and technical expertise) available to perform capital improvements and to operate every aspect of both the CCA water and wastewater systems. The Company has a long history of experience in providing competent water service to over a half million customers in Pennsylvania. While its association with wastewater systems is far more limited, the resources PAWC has at its disposal and the experience it already has accumulated are sufficient to demonstrate its fitness. I hasten to add that its commitment to using the same CCA employees to operate both systems provides the continuity needed

for continued good service. I note that the record is absolutely devoid of any complaints about current service which is a tribute to the service provided by the CCA staff. Under these circumstances, PAWC's technical fitness cannot be reasonably questioned.

Contrary to Mr. Campos arguments, the law does not require PAWC to demonstrate that it could operate the CCA systems more efficiently than CCA. I should also add that there was no requirement that CCA produce a witness at the hearings. Had it not been for the language in the Agreement about hydrant service, there would not necessarily have been a need for CCA to be a party to the proceeding. The focus of the proceeding generally was on the qualifications of PAWC to own and operate the assets of CCA, as well as the demonstrable public need and benefits flowing from the transaction. I agree that the record shows there will be a need for capital improvements to the CCA systems. However, there is no requirement that the Company produce a plan of action as part of the Application process. PAWC acknowledged the need for some improvements to the systems. Absent some compelling problem (and nothing on this record demonstrates such a need), I recommend that the Commission allow the Company to use its judgment to decide its own priorities.

Finally, Mr. Campos' concern about PAWC's reliance on the allegedly erroneous Gannet-Fleming valuation study is not sufficient to discredit the Company's technical fitness. No one disputes that the study was prepared at the request and expense of CCA. PAWC acknowledged that the study was one source of information used to formulate its bid price for the systems. However, the Company also explained that it relied on more than the study to evaluate the systems. More specifically, PAWC argued that its personnel reviewed several reports and inspected the systems on numerous occasions before a bid was submitted. There is record evidence to support this position which I

accept. Even assuming the study was fatally flawed, there is sufficient evidence to support the Company's decision and sufficient reason to avoid drawing an adverse conclusion on the issue of technical fitness.

B. PUBLIC NEED

1. Evidentiary Issues

a. Parties' Positions

(1) PAWC

In accordance with my directions, PAWC began its arguments by addressing two evidentiary questions. The first question concerned agreements for water and/or wastewater services with Valley Township, Sadsbury Township, East Fallowfield Township and West Caln Township. The second concerned evidence of requests for service.

With respect to the agreements, the Company pointed out that two of the agreements, dated 1991 and 1992, were between CCA and Valley Township for water and wastewater services, respectively. The remaining agreements with the other named Townships were dated after the instant Applications were filed.

PAWC argued that the older agreements with Valley Township demonstrated public need because they enabled CCA to start serving portions of Valley Township and that CCA had provided the service. PAWC M.B. at 27. Regarding the other three Townships, PAWC asserted:

The remaining agreements described above constitute evidence of need because the local officials involved would not have entered into these agreements unless they believed there was a need for service in the applied-for areas. They are also relevant evidence because they demonstrate that PAWC's Applications are consistent with local land use policies and plans.

PAWC M.B. at 27-28. (Footnote omitted.) The Company continued that the agreements were not controlling decisions which were binding on the Commission's authority to determine need. PAWC regarded the agreements as "additional" evidence of need which should not be ignored. PAWC M.B. at 28.

With respect to request for service evidence, the Company noted that I challenged PAWC witness Mr. Johnston's testimony as hearsay which could not be used as a basis for a finding of fact without corroboration. PAWC reviewed Mr. Johnston's testimony concerning CCA records of 37 requests for service and contracts for service executed by the CCA. Although Mr. Johnston had testified that a total 2000 customer units were represented by the 37 requests, PAWC conceded that some of the requests predated the finalized CCA actual customer count on December 31, 1999, and that some of the "requested" customer units could be actual customers already. PAWC claimed that the documentation to support his testimony was supplied to PSW pursuant to a Protective Order following the hearings and that same documentation was subject to a Motion to admit it as PAWC Ex. 8.0.⁵ PAWC M.B. at 28-30. The Company then contended as follows:

5 The ruling on the Motion to admit is contained in a subsequent section of this Decision.

Mr. Johnston's testimony was not objected to, nor did any party question whether Mr. Johnston had first-hand knowledge of the facts in question. Mr. Johnston had first-hand knowledge of the requests for service because he reviewed (1) correspondence to the CCA requesting service, (2) correspondence from the CCA granting certain requests for service, and (3) contracts that the CCA entered into in response to requests for service.

This is not a case in which a developer called a CCA employee to request service, and the CCA employee subsequently told Mr. Johnston about that call. Mr. Johnston's testimony is that, based on his review of the documents, he knows that John Doe requested service from CCA; he is not testifying that John Smith told him that John Doe requested service from CCA. There is no hearsay within hearsay here.

PAWC M.B. at 30. (Footnotes omitted.) The Company continued that there was no hearsay issue because Mr. Johnston was testifying based on the truth of his own knowledge. PAWC argued that Mr. Johnston's testimony was about "verbal acts" or offers (and contracts) to connect to the CCA system which were outside of the hearsay rule. The Company explained that it did not offer the testimony to demonstrate the truth of the request and corresponding contract, but rather to show the statements were made and that the testimony represented circumstantial evidence of a need for service. PAWC concluded this portion of its Brief by asserting that the testimony was not hearsay and did not need corroboration. PAWC M.B. at 30-34.

In its Reply Brief, PAWC responded to a hearsay argument from PSW. The Company noted that PSW tried to use testimony about requests to PSW for service as a basis for reducing the service territory requested in the Applications. PAWC asserted that

it was inconsistent for PSW to complain about PAWC using service request evidence if PSW was using the same kind of evidence. The Company repeated its position that the PAWC evidence offered was not hearsay. PAWC R.B. at 13.

(2) PSW

In its Main Brief, PSW argued the evidentiary issue, as follows:

Of course, the problem in this proceeding for PAWC is that the only evidence of public need for water service in the areas beyond the areas currently served by CCA's facilities consists of PAWC's testimony and exhibits of statements allegedly made to CCA by developers and/or individuals supposedly requesting service from CCA. PAWC Statement No 1.1 at 9-10; PAWC Exhibits 1.1-C and 1.1-D; Tr. at 298. Since CCA did not introduce written testimony into the record in this proceeding and no one testified on CCA's behalf at the hearing, PAWC's "public need" testimony consists solely of uncorroborated hearsay evidence, which cannot be the basis for the findings of public need required in this proceeding by Section 1103(a) of the Code. *Anderson v. Com., Dept. of Public Welfare*, 468 A.2d 1167 (Pa.Cmlwth. 1983).

PSW M.B. at 26-27. (Footnote omitted. Italics in the original.)

In its Reply Brief, PSW continued to insist that Johnston's testimony was hearsay. It dismissed the PAWC attempt to change that characterization as convoluted. PSW asserted that, if the service request testimony had not been presented for the truth of its content, then it had no evidentiary value to prove need. PSW noted that no CCA or

other developers or individual witnesses testified about requesting service from CCA. PSW concluded by suggesting that PAWC's failure to produce any witnesses supported an inference negative to the Company position. PSW R.B. at 14-15.

(3) Campos

In his Reply Brief, Mr. Campos characterized the PAWC testimony as hearsay. He explained that a developer would have been happy to verify his/her request for service. Campos R. B. at 6.

b. Recommendation

Recently, Administrative Law Judge (ALJ) Paist ruled on the admissibility of request for service evidence in a water application proceeding in response to a hearsay objection. Her Decision stated:

A. Evidence Not Admitted

As a background to evaluating whether a public need exists for the applicants' proposed water service, I believe it may be helpful to mention some kinds of evidence which were not admitted into the record. Two forms of evidence presented by Citizens were not made part of the record: properly objected to hearsay in the form of alleged service requests and deposition excerpts which were not offered in accordance with 52 Pa. Code §5.364.

1. Service Requests

Suburban moved to strike as hearsay portions of the testimony of, and exhibits¹² sponsored by, Citizens' Vice President and General Manager Brian J. Hassinger concerning

service requests purportedly received by Citizens. I gave the parties an opportunity to submit memoranda of law on whether a fixed utility application can be supported solely with need evidence comprised of service requests —oral or written— about which the applicant testifies rather than with need evidence supplied through the testimony of witnesses who actually want the applicant's proposed service (Tr. 173-76). Citizens and Suburban both supplied memoranda of law.

Citizens did not deny the hearsay nature of Mr. Hassinger's challenged testimony and sponsored exhibits but nevertheless claimed that an applicant may establish a public need for its proposed service by describing requests for service which the applicant has received (Citizens August 26, 1999 Memorandum of Law at 2-6). As support for this assertion, Citizens cited Warminster Township Municipal Authority, 185 Pa. Super. Ct. at 436, 138 A.2d at 243; Application of South Penn Gas Co., A-122900F0003 (opinion and order adopted April 13, 1995, entered May 22, 1995); Application of Interstate Energy Co., A-140200 (opinion and order adopted April 13, 1995, entered May 5, 1995); Re Apollo Gas Co., 81 Pa. P.U.C. 475 (1994); and Re Apollo Gas Co., 72 Pa. P.U.C. 208 (1990). Suburban countered that the Commission has allowed service request evidence only in motor carrier proceedings pursuant to the Commission regulation at 52 Pa. Code §3.382(a)¹³ and that "where the Commission has found a need for service, absent the testimony or appearance of need witnesses, the Commission has required . . . other, competent evidence" (Suburban August 26, 1999 Memorandum of Law at 2).

After considering Citizens' and Suburban's respective memoranda of law and independently researching legal precedent, I arrived at the following conclusions which I articulated in numerous rulings on the record and in written orders such as my 45-page, September 24, 1999 Order on Philadelphia Suburban's Motion to Strike Portions of Testimony of Citizens' Witnesses and Local Hearing Witness Mulligan.

"Hearsay evidence is defined as in-court evidence of an out-of-court declaration, whether oral or written, which is offered to show the truth of the out-of-court assertion." Commonwealth v. Lewis, 424 Pa. Super. Ct. 531, 534, 623 A.2d 355, 357 (1993); *accord* Pennsylvania Rules of Evidence (Pa.R.E.) 801.¹⁴ The Commission has recognized that "the hearsay rule is not a technical rule. The courts consider the hearsay rule to be a fundamental principal [sic] of law which must be followed by an agency at those points in a hearing where facts crucial to the issues are sought to be placed on the record." Cox v. Bell Telephone Co. of Pennsylvania, Inc., F-00214235 (opinion and order adopted January 12, 1995, entered January 19, 1995) at 3; *accord* Franklin Plastics Corp. v. Department of Environmental Resources, 657 A.2d 100, 102 (Pa. Cmwlth Ct. 1995).

Properly objected to hearsay is inadmissible and must be excluded from the record. Anderson v. Department of Public Welfare, 79 Pa. Cmwlth. Ct. 182, 468 A.2d 1167 (1983); Application of Carmen G. Henderson, A-00110088 (opinion and order adopted December 15, 1993, entered January 3, 1994) at 24. If hearsay is not objected to, the hearsay is admissible but cannot form the basis of a fact-finding unless it is corroborated by competent, non-hearsay evidence of record. Walker v. Unemployment Compensation Board of Review, 27 Pa. Cmwlth. Ct. 522, 367 A.2d 366 (1976); Cox at 3; Application of Carmen G. Henderson at 24.

An applicant's own testimonial or documentary evidence (*e.g.*, testimony from the applicant's owner, employees, officers, etc. or exhibits sponsored by the applicant's owner, employees, officers, etc.) about service requests received by the applicant may support a finding of need for the applicant's proposed service. Application of South Penn, slip op. at 11-12 and 16-17; Re Apollo Gas Co., 81 Pa. P.U.C. at 482; Re Apollo Gas Co., 72 Pa. P.U.C. at 211; *see also* Warminster Township Municipal Authority. However, if particular service request evidence —whether testimonial (oral) or documentary (written)— constitutes hearsay, then (1) this evidence is inadmissible and must be

excluded from the record if it is properly objected to as hearsay, Anderson; Application of Carmen G. Henderson, or (2) this evidence, if it is not properly objected to as hearsay, is admissible into the record but cannot form the basis of a fact-finding that the applicant's proposed service is needed unless this evidence is corroborated by competent, non-hearsay evidence of record. Walker; Cox; Application of Carmen G. Henderson.

In general, a question/inquiry/request for information does not contain an assertion which can be offered for its truth and therefore does not involve hearsay. United States v. Detrich, 865 F.2d 17, 20-21 (2d Cir. 1988). Contrary to Citizens' contentions, Mr. Hassinger's challenged testimony and sponsored exhibits embody out-of-court statements—not questions/inquiries/requests for information—which are being offered by Citizens for the alleged truth of the matter asserted in the statements, namely, that certain persons or entities need public utility water service, particularly from Citizens. Consequently, Mr. Hassinger's testimony and sponsored exhibits epitomize hearsay.¹⁵

Based on the foregoing legal analysis, I granted Suburban's motion to strike Mr. Hassinger's testimony and sponsored exhibits regarding service requests which Citizens allegedly received from persons who did not testify at any of the hearings on Citizens' and Suburban's applications.¹⁶

12 The exhibits (all marked collectively for identification as Citizens Exhibit 1.1A which was not admitted into evidence) consisted of letters from developer James D. Nallo; Scott L. Sweigart of Forino Developers Co.; and landowners Charles and Nicholas Phillips.

13 The Commission's regulation on motor carrier service requests delineates criteria which service request evidence must meet to establish the reliability/credibility of the evidence. Where the evidence does not satisfy the regulatory criteria, the evidence may be accorded no weight. Application of Mary Nugent, A-00112996 (opinion and order adopted August 13, 1998, entered August 24, 1998).

14 In ruling on several complicated evidentiary matters in this case, I sought guidance from the newly codified Pennsylvania Rules of Evidence. I explicitly announced that, with the exception of the hearsay rule, the Commission is not bound by these evidentiary rules but may nevertheless rely on them (Tr. 942-43; my 45-page, September 24, 1999 Order on Philadelphia Suburban's Motion to Strike Portions of Testimony of Citizens' Witnesses and Local Hearing Witness Mulligan at 11 n.6). *E.g.*, Re LP Water and Sewer Co., 78 Pa. P.U.C. 1, 9 (1993); *see also* Farrugio's Bristol and Philadelphia Auto Express, Inc. v. St. Johnsbury Trucking Co., 69 Pa. P.U.C. 411 (1989).

15 If Mr. Hassinger's challenged testimony and sponsored exhibits are not being offered by Citizens for the truth of any matter asserted therein, then admitting this testimony and exhibits into evidence will not help Citizens prove a need for public utility service in its requested service territory in Robeson Township.

16 My September 24, 1999 Order on Philadelphia Suburban's Motion to Strike Portions of Testimony of Citizens' Witnesses and Local Hearing Witness Mulligan analyzes, and rejects as inapplicable, various hearsay exceptions averred by Citizens in response to hearsay objections raised by Suburban.

Application of Citizens Utilities Water Company of Pennsylvania and Application of Philadelphia Suburban Water Company, Docket Nos. A-211070F0007 and 5A-212370F0050, Initial Decision, ALJ Paist, dated October 6, 2000 (Slip Op. at 40-44). (Application of Citizens/Application of Philadelphia Suburban.) (Bolding in the original.) I find Judge Paist's recitation of the law to be comprehensive, correct and applicable to the facts of this case. I note that her analysis of the request for service testimony dealt with requests actually received by the utility. However, as I emphasized on the record, Mr. Johnston is a PAWC employee, and his testimony dealt with requests received by CCA. Tr. 531-534. In other words, Judge Paist correctly labeled requests for service received by the utility as hearsay in her case. In my case it means, that, if a CCA employee had

testified about such requests, the data would have been hearsay, excludable and/or not useable as basis for making a finding. In my case, Mr. Johnston's testimony is his report about the hearsay in the CCA files. Under these circumstances, cross-examination of Mr. Johnston about his recollection of the contents (hearsay) of the CCA files does nothing to enhance the credibility of the CCA files and amounts to nothing more than a second level of hearsay. Mr. Johnston could not be cross-examined about the intentions and conclusions of the individuals, developers and CCA employees who prepared the documents that he found in the CCA records. Accordingly, Mr. Johnston's testimony about requests for service and his Exhibit 1.1-D were admitted into the record by virtue of the failure of any party to object, but the testimony and exhibit cannot be and will not be used as the basis for a finding of fact because there is nothing in the record to corroborate the contents thereof. Walker; Cox; Application of Carmen G. Henderson.

As quoted above, Judge Paist pointed out in her Decision (Slip Op. at 43 n. 15) and PSW argued in its Reply Brief (at 14-15), if PAWC did not introduce the service request evidence for the truth of the contents, then it cannot be used to demonstrate public need. Under these circumstances, the Company's alternative argument (to the effect that the evidence was not hearsay because it was not introduced to show the truth of the matter asserted) must also fail. PAWC M.B. at 32-33.

In addition, I note that PSW and counsel for PAWC are not strangers to this issue. PSW was a party before Judge Paist. Counsel for PAWC represented Citizens Utilities Water Company of Pennsylvania in the same case. The lengthy quote from Judge Paist's decision demonstrates that it is, in part, a review of the same issue which Judge Paist decided as an interim order on September 24, 1999. Slip Op. at 42. I conclude from this information that PAWC should have known vis-a-vis its counsel that service request data was hearsay prior to the introduction of Mr. Johnston's testimony and exhibit.

With respect to issues surrounding the introduction of the five contracts from four municipalities, I suggested that the parties address whether the contracts represented an effort to restrict the exercise of this Commission's jurisdiction to define the service territory. Tr. 533-534. Having reviewed the letter agreements from Sadsbury, East Fallowfield and West Caln Townships and the Company's brief, I have concluded that the letter agreements should be treated no differently than a withdrawal of protest. PAWC St. No. 1.0 at Ex. Nos. 1.0-D and 1.0-E and PAWC St. No. 1.1 at Ex. No.1.1-F. I have no problem with the concept of reducing the requested service territories in each of the Townships based on letter agreements from each of the Townships. If the Company was able to prove need beyond the CCA current customer base in those Townships, then the service territory (as defined in restrictive amendment) could be awarded. I will review the issue of whether the letter agreements can be used as evidence of public need in the next section of this Decision.

With respect to the agreements between Valley Township and CCA for water⁶ and sewer⁷ service, dated March 1990 and January 1992, respectively, I have concluded that they are contracts for service to current customers. I find that they are not a

6 PAWC's Main Brief incorrectly identifies the water agreement as "PAWC Statement No. 5.0, Exhibit M-1." PAWC M.B. at 27. In fact, there is no Statement 5.0. PAWC Ex. 5.0 is the Water Application which has Exhibit M-1 (the Valley Township/CCA Water Service Agreement) included. The Water Service Agreement is also identified as PAWC Ex. 9 at Docket No. U-00004550.

7 PAWC's Main Brief incorrectly identifies the sewer agreement as "PAWC Statement No. 6.0, Exhibit N-1." PAWC M.B. at 27. In fact, there is no Statement 6.0. PAWC Ex. 6.0 is the Wastewater Application which has Exhibit N-1 (the Valley Township/CCA Sewer Treatment Agreement) included. The Sewer Treatment Agreement is also identified as PAWC Ex. 10 at Docket No. U-00004551.

limitation on the Commission's authority to set the limits of the requested service territory in these Applications. Indeed, when the agreements and their attached maps are compared to the maps of the water and wastewater systems for Valley Township, the agreements generally (but not completely) coincide with existing facilities in the requested service territories. See, PAWC Ex. Nos. 1.1-C (water maps) and 1.0-A (sewer maps).

2. Proof Of Need

a. Parties' Positions

(1) PAWC

In its Main Brief, PAWC argued that it was required to show need in the area generally and not in every square mile of the requested service territory. The Company asserted that it had established a prima facie case. PAWC pointed to a four step process which it used to identify the service territory. First, it noted the location of the existing CCA facilities. Next, it sought to avoid overlapping its requested territory with any other utility or municipal service territory. Third, PAWC's request included likely and logical areas of expansion and areas where CCA had received requests for service. And last, PAWC considered the topography, likely areas of future growth and land-use policies of the municipalities. PAWC M.B. at 34- 35.

PAWC noted that PSW had no existing authority in Lancaster County and had authority only in portions of Caln, West Caln and East Fallowfield Townships in Chester County. PAWC also noted that its requested territory did not overlap with the PSW territory. PAWC M.B. at 35-36.

The Company emphasized that no party had challenged the service territory delineation for the Wastewater Application. PAWC M.B. at 36.

PAWC then reviewed each of the municipalities which were designated in the Applications. For each municipality, the Company claimed that CCA had extensive facilities in all or a specified area of each one and how the existence of service territories for other utilities or municipalities had reduced the size of the request. For each municipality, PAWC explained whether the CCA had received service requests in that area, whether the Company had a specific agreement with the governing body in favor of the Applications and whether the requested areas were growth areas. The Company asserted that all four factors had been applied to each one. PAWC included the following municipalities from Chester County in its analysis: Caln Township, East Fallowfield Township, West Caln Township, Sadsbury Township, West Sadsbury Township, Valley Township, Atglen Borough, Parkesburg Borough, City of Coatesville, and South Coatesville Borough. PAWC included the following municipalities from Lancaster County in its analysis: Sadsbury Township, Bart Township, Eden Township, Colerain Township and Quarryville Borough. PAWC added that the Lancaster County municipalities were only named in the Water Application. PAWC M.B. at 36-43.

The Company continued that, because no party challenged the requested territories for the Wastewater Application, its related service territory request was unrebuted and should be approved. It argued that PSW had authority in only portions of two municipalities (Caln and East Fallowfield Townships) in Chester County and

challenged the requested territory in a third (West Caln Township).⁸ Other than PSW's challenges, PAWC pointed out that there were no other attempts to rebut its prima facie case. PAWC M.B. at 43-44.

PAWC disputed the need for maps which showed the location of CCA's current customers. The Company asserted that maps were not required, that customer location maps were not maintained by CCA, that maps (and metes and bounds descriptions) showing CCA facility locations had been provided to the parties and that maps showing areas where service had been requested in Caln, West Caln and East Fallowfield Townships were also provided to the parties. PAWC M.B. at 44-46.

The Company complained that PSW had presented testimony which challenged PAWC's service territory request in 12 municipalities, including Caln, West Caln and East Fallowfield Townships. However, PAWC asserted that the PSW evidence offered failed to provide enough information for the Commission and/or PAWC to use to reduce the requested territories. With respect to the three named Townships, the Company contended that it was not limited to current customers only, that PSW failed to substantiate its claims of requests for service in the same areas, that PAWC's proof demonstrated areas in West Caln would be developed and that PAWC had received a request for service north of Route 30 in Caln Township. PAWC M.B. at 46-48.

In its Reply Brief, the Company responded to arguments from Mr. Campos. PAWC first rejected Mr. Campos' position that the Company was required to show CCA

⁸ This Brief and all other briefs were prepared by the parties prior to the submission of the Stipulation Of Partial Settlement Between Pennsylvania-American Water Company And Philadelphia Suburban Water Company on January 4, 2001.

could not operate the systems in the future. PAWC disagreed with the assertion that the City and CCA were required to produce evidence of need because the Company believed it had presented sufficient evidence. PAWC R.B. at 16-17.

(2) PSW

In its Main Brief, PSW argued that for CCA there is no service territory which can be defined with the same precision as the service territory of a regulated utility. PSW pointed out that at the Prehearing Conference the undersigned instructed PAWC to show the areas currently served by CCA, as distinguished from the requested territory. PSW accused the PAWC witness of testifying inconsistently with the representations made by PAWC counsel at the Prehearing Conference. PSW contended that municipal authorities had no defined service territory and that the PAWC witness had acknowledged the distinction between an authority's lack of territorial boundaries and those defined territories for a regulated utility. PSW asserted that PAWC was buying the assets of CCA, not CCA's statutory authorization to serve in any given area. PSW explained that areas where service was provided by CCA's facilities were subject to a presumption of continuing convenience and necessity, but that PAWC was required to prove need for areas beyond current CCA customers. PSW asserted that PAWC had failed to properly define the area in which there were current customers and the area which was additional service territory. PSW noted that many areas for which PAWC had requested authority contained no current CCA facilities and lacked proof of need. PSW suggested that one purpose of the Water Application was to preempt certain areas for PAWC's exclusive benefit. If the Commission did not completely reject the Application, PSW requested that PAWC be required to produce maps which showed the areas currently served by CCA's facilities. PSW M.B. at 23-27.

In its Reply Brief, PSW disagreed with the assertion that PAWC had met its burden of proving public need. PSW was willing to concede there was a presumption based need for continuing service to existing customers. It continued to classify “request for service” testimony as hearsay and noted that PAWC admitted to receiving no requests for service in the applied-for area. PSW discounted agreements with municipalities signed in 1990-1992 as proof of need in 2000 and beyond. PSW also discounted the agreements with Sadsbury, East Fallowfield and West Caln Townships, Chester County, as proof of current need. PSW R.B. at 13-14.

PSW continued to insist that PAWC should submit a map showing the properties currently served by CCA. Contrary to PAWC’s assertion, PSW noted that the agreement between Valley Township and CCA [PAWC Ex. No. 5.0 at Ex. M-1 at Ex. B] provided that information, in part. PSW R.B. at 15-16.

(3) Campos

In his Main Brief, Mr. Campos argued that the Applications should be rejected 1) because the City and CCA did not provide any testimony about need, 2) because the City would receive the purchase proceeds and there was no showing that CCA could not continue to operate the systems in the future and 3) because CCA did not present any witnesses which he interpreted to mean that CCA was unable to show public need. Campos M.B. at Argument [sic] – Public Need ¶¶1-3. (The Campos Main Brief has no page numbers.)

b. Recommendation

Not one individual testified that he or she wanted water or sewer services for his or her home from CCA and/or PAWC in the designated service territory. Not one individual testified that he or she wanted water or sewer services for his or her business from CCA and/or PAWC in the designated service territory. Not one individual testified (as a developer) that he or she wanted water or sewer services for his or her housing development, apartment complex, office building, mall, etc., from CCA and/or PAWC in the designated service territory. Not one, not any.

I regard this failure to produce witnesses who wished to use CCA and/or PAWC services in the near future in the requested service territory as a crucial omission from the Company's case. Insofar as this judge is concerned, PSW was correct. There are really two requested service territories at issue for each Application. The first territory concerns existing customers. The second territory concerns individuals and developers whose homes, businesses or business complexes will be located near existing CCA facilities and who wish to have service in the future. The omission, highlighted above, concerns only the second territory.

Before analyzing the issues raised by the PAWC evidentiary presentation for the second territory, I will rule on the grant of authority for the first territory because it is uncomplicated. There is a presumption of continuing need for service which runs in favor of existing customers. No party has challenged this presumption. Based on the presumption, I find that both Applications should be granted and that PAWC be given the authority to serve existing customers who were or would shortly be connected to the CCA systems on the date of closing.

The words “customers who would shortly be connected” requires some further definition. I mean those individuals or developers who 1) executed a contract for service(s) with CCA and 2) have ordered the pipes and other hardware and 3) have taken delivery of the pipes and other hardware and 4) have begun the job of installing the pipes and other hardware (i.e. dug the hole). I have chosen these conditions because they evidence an easily verifiable commitment to actually doing the physical labor and ultimately completing the project. I have not chosen simple execution of an agreement with CCA as the break point because it does not demonstrate a commitment to completing the proposed project in the near future or the establishment of a need. Note that I have gauged the commitment by the actions of the individual or developer and not CCA. Any CCA funds expended to further the completion of any project must be at risk because CCA was a party to this proceeding and could have produced the requisite evidence (independent of PAWC) to justify a larger grant of authority.

I also considered the risk that an individual or developer would be willing to proceed with a project and would not meet the above listed conditions. That individual or developer would not be able to proceed until a new PAWC application to enlarge its service territory was approved. Under those circumstances, the blame for the delay must be shouldered by PAWC. Had it presented testimony from individuals and developers and demonstrated additional public need, the territory could have been enlarged as part of these Applications.

One final condition must be imposed. PAWC argued that CCA is a dynamic system which continued to expand during the pendency of this proceeding and that any representation of CCA’s boundaries on the record would be a stale snapshot. I agree. Based on the likelihood of stale record information, I find it unnecessary to try to define the boundaries on the date of issuance of the Commission’s Order. Because (as I will

explain below) the only grant of territorial authority will be limited to existing customers who were or would shortly be connected to the CCA systems on the date of closing. I believe the Commission would be better advised to require PAWC to define its existing customers territory at the only time when the customer base will be static (i.e. the date of closing). I will order that the record remain open and PAWC be directed to prepare a map and a metes and bounds description of the new territory (as defined by existing customers) within sixty days of the closing date and to submit those documents to the parties and to the Commission.⁹

Returning to the issue of extending the territory beyond the properties of the existing customers, I find that PAWC failed to establish a prima facie case. My understanding of the presumption (as noted above for the existing customers) is that it ends at the current customers' property lines. My understanding of the Asset Purchase Agreement is that its purpose was to secure the transfer of CCA's physical assets to PAWC in return for a specified purchase price. Accordingly, I regard the request by the Company to go beyond those property lines as simply a second application for the grant of a certificate of public convenience to serve a new territory. In this regard Judge Paist in her Application of Citizens/Application of Philadelphia Suburban case recently set forth the standards which an applicant must meet, as follows:

Under subsection 1102(a)(1)(i) of the Public Utility Code,⁹ a public utility must obtain a Commission-issued certificate of public convenience to begin serving a territory different from the one authorized by its existing certificate(s) of public convenience. Subsection 1103(a) of the Public Utility Code¹⁰ authorizes the Commission to grant a certificate

⁹ Note that I did not require PAWC to reveal its customer names or locations or to identify the actual property parcels. Rather, PAWC must define the exterior dimensions of its territory as defined by the property lines of its existing customers.

of public convenience "only if . . . necessary or proper for the service, accommodation and convenience, or safety of the public." Subsection 1103(a) has been interpreted to require an applicant for a certificate of public convenience to prove (1) a public need for the service proposed by the applicant, (2) the lack or inadequacy of existing service to meet the demonstrated public need, and (3) the applicant's fitness financially and technically to provide the proposed service in a safe, reliable and responsible manner. Mobilfone of Northeastern Pennsylvania v. Pennsylvania Public Utility Commission, 73 Pa. Cmwlth. Ct. 340, 458 A.2d 1030 (1983); Warminster Township Municipal Authority v. Pennsylvania Public Utility Commission, 185 Pa. Super. Ct. 431, 138 A.2d 240 (1958); Metropolitan Edison Co. v. Public Service Commission, 127 Pa. Super. Ct. 11, 191 A.2d 678 (1937); Re Evansburg Water Co., 81 Pa. P.U.C. 152 (1994); Application of Evansburg Water Co., A-210870F0002 (opinion and order adopted March 25, 1993, entered April 9, 1993); Application of South Penn Gas Co., A-122870 and A-123100F0005 (opinion and order adopted August 16, 1990, entered August 24, 1990); Re Audubon Water Co., 69 Pa. P.U.C. 282, 288 (1989).

9 66 Pa. C.S. §1102(a)(1)(i).

10 66 Pa. C.S. §1103(a).

Slip Op. at 38. Again, I agree with her recitation of the law as it is applicable to this case. I recognized the distinction between the service territory as defined by the existing customers and the second request for additional territory on the record of the Prehearing Conference. At that time, I requested that the Company present its case in such a way as to distinguish between the two. I specifically called PAWC's attention to its obligation to prove need for areas beyond the CCA assets. Tr. 40.

There is not a doubt in my mind that the best evidence of public need in a proposed new service territory is the testimony of members of the public who say they

want to use the services offered by the applicant. As noted at the start of this discussion, PAWC chose not to use this method at all. Instead, PAWC chose to present the testimony of Mr. Johnston to describe the methodology the Company used to identify the enlarged territory and to describe public interest in securing service. His efforts fell far short of the standard.

To begin with Mr. Johnston is not just any member of the public. He is the Vice President-Business Development for PAWC. PAWC St. 1.0 at 1. I viewed his employment as an indicia of bias. At the risk of repetition, he proceeded to insert request for service data into the record which I have already ruled was double hearsay and insufficient to use as the basis for a finding of fact.

I have reviewed the record to determine if there was any other evidence of public desire for service beyond the existing customers. Essentially, I found none. Mr. Johnston outlined a four pronged test which PAWC used to define the requested territory. Among those steps was to include territory associated with any political subdivision agreements and requests for service. Another step was to consider the topography, likely areas of future growth and any other land-use policies (based on input from local municipalities). PAWC St. No. 1.0 at 4. After doing this analysis prior to the filing of the Applications, the Company would have identified all of the people who could have been excellent witnesses to demonstrate a future need for service. However, PAWC made no effort to bring the actual people into the hearing room.

PAWC did submit a series of agreements and offered some of them as evidence of need. I examined all of the agreements for some suggestion of need without regard to the purpose suggested by the Company. A brief analysis of each agreement follows:

As noted in this section above, the Company entered into agreements with three municipalities to reduce the requested territory within their boundaries. As I explained earlier, the letter agreements from Sadsbury, East Fallowfield and West Caln Townships should be treated no differently than a withdrawal of protest. PAWC St. No. 1.0 at Ex. Nos. 1.0-D and 1.0-E and PAWC St. No. 1.1 at Ex. No. 1.1-F. Foremost, I find these agreements demonstrate areas where the municipalities do not want service. For the areas which remained both within the requested service territory and the municipal boundaries, I saw no indication of a desire for immediate future service or a commitment to use the proposed service. I would characterize the letter agreements as an acquiescence to the continuation of the Application process. Finally, I must dismiss as unsupported speculation the assertion by PAWC that the agreements “constitute evidence of need because the local officials involved would not have entered into these agreements unless they believed there was a need for service in the applied-for areas.” PAWC M.B. at 27-28. Without testimony from the officials, the record does not reflect their motives or intentions.

PAWC also claimed that the two contracts between Valley Township and CCA were evidence of need as well. PAWC Ex. 5.0 at Exhibit M-1. PAWC Ex. 6.0 at Exhibit N-1. Exhibit M-1 was the Water Service Agreement. It was dated March 1990 and was amended in May 1991. Basically, it is a contract for bulk water sales which Valley Township used as a basis to resell water to its residents. It specified that CCA was permitted to continue to serve a few preexisting customers in Valley Township and otherwise excluded CCA’s retail water services. I cannot conclude that a bulk water sales agreement dated a minimum of ten years ago can be construed as evidence of future need to support the Water Application.

A similar analysis applies to Exhibit N-1 which is the Sewage Treatment Agreement. It was dated January 1992. Basically, it provides for Valley to use parts of the CCA sewage collection system as access to CCA's sewage treatment plant. The agreement specifies that the Township will provide a complete collection system for its residents and that CCA is not authorized to provide any sewage collection service to the residents in the Township. Under these circumstances, I must conclude that CCA has no customers in Valley Township (except the Township itself) and that the requested wastewater service territory in Valley Township fails for lack of proof in the record.

Subsequent to the completion of the September hearings, PAWC submitted thirteen agreements for a Section 507 review by the Commission. 66 Pa. C.S. §507. These agreements were identified, but not included, in the Applications as contracts in which PAWC wanted to assume the obligations of CCA. See, Schedule 1.5.1 of PAWC Ex. Nos. 5 and 6. These contracts were filed on September 11, 2000 at Docket Nos. U-00004550 through U-00004562. By letter dated November 16, 2000, the Company submitted these documents, labeled PAWC Ex. Nos. 9 through 21, for review by the parties and the undersigned at the Application docket numbers. Although they will be reviewed subject to Section 507, my review below is only for the purpose of deciding whether they evidenced some sign of public need in the requested service territory.

PAWC Ex. Nos. 9 and 10 are the same agreements between Valley Township and CCA which were just reviewed above. They offer no evidence on the subject of public need.

PAWC Ex. No. 11 is bulk water sales agreement between the Octoraro Water Company and Quarryville Borough, dated May 1957. According to the Assumed Agreements Schedule, CCA purchased the system from Octoraro in 1985. Schedule 1.5.1

of PAWC Ex. Nos. 5 and 6. (There is no other verification of the 1985 date or purchase in the record.) In any event, agreement offers no evidence of public need other than bulk sales to Quarryville in 1957.

PAWC Ex. No. 12 is a Sewage Treatment Agreement, dated April 1966, among CCA and Caln Township and its Authority to provide the Caln Authority with access to the CCA sewer lines and CCA sewage treatment plant. The Caln Authority is responsible for installing a sewage collection system within Caln Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in Caln Township. The agreement offers no evidence of public need other than for receiving wastewater in bulk from the Township.

PAWC Ex. No. 13 is a Supplemental Agreement among CCA, Caln Township and its Authority, dated September 1968, which provides an indemnification clause for exceeding the flow limits set in the prior agreement (PAWC Ex. 12). The Agreement offers no evidence of public need other than for receiving wastewater in bulk from the Township.

PAWC Ex. No. 14 is entitled "Sewage Treatment Agreement #2" among CCA, Caln Township and its Authority, dated 1971, in which CCA agreed to treat additional wastewater flow from the Township. The Agreement offers no evidence of public need other than for receiving wastewater in bulk from the Township.

PAWC Ex. No. 15 is a Sewage Treatment Agreement between CCA and West Brandywine Township, dated June 1994, and an Addendum To Sewage Treatment Agreement, dated September 1995, among the same parties. The purpose of the original agreement is to provide West Brandywine Township with access to the CCA sewer lines

and CCA sewage treatment plant. West Brandywine Township is responsible for installing a sewage collection system within West Brandywine Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in West Brandywine Township. The addendum allowed West Brandywine Township to increase the daily wastewater flows into the CCA system. The exhibit offers no evidence of public need other than for receiving wastewater in bulk from the Township.

PAWC Ex. No. 16 is a Waste And Wastewater Service Agreement between CCA and West Sadsbury Township, dated March 1998, to allow CCA to provide wastewater disposal services in a limited portion of the Township. The agreement specified that CCA would be permitted to sign up new customers in the specified territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require property owners with septic systems to migrate to the CCA system. The agreement cross-referenced a map of the granted territory which was not attached to Ex. No. 16. Without the map I could not compare the area described in the agreement to requested service territory on the maps in the record. Under these circumstances, I find that the agreement offers no evidence of public need other than for existing customers.

PAWC Ex. No. 17 is a Sewage Treatment Agreement between CCA and Sadsbury Township, dated July 1997, and a Protocol and an Addendum To Protocol which were not dated. The purpose of the agreement is to provide Sadsbury Township with access to the CCA sewer lines and CCA sewage treatment plant. Sadsbury Township is responsible for installing a sewage collection system within Sadsbury Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in

Sadsbury Township. The purpose of the protocols was to recognize the obligations and financial commitments of the Sadsbury Sewer Corporation in terms of building and paying for parts of the Sadsbury system. The exhibit offers no evidence of public need other than for receiving wastewater in bulk from the Township.

PAWC Ex. No. 18 is an agreement between CCA and Parkesburg Borough, dated June 1994, whereby the Borough agreed to transfer its wastewater collection system and sewage treatment plant to CCA and for CCA to construct a sanitary sewer main which would connect the Borough system to the CCA sewage treatment plant. The sewer main was to be constructed at the general expense of the Borough. The Exhibit also included an Agreement between the same parties, dated September 1998, setting forth additional Borough and CCA financial obligations. And finally, the Exhibit included an Addendum between the same parties, dated September 1998, which clarified the format for the assignment of the CCA obligations to a buyer of the CCA system. The exhibit offers no evidence of public need other than for existing customers.

PAWC Ex. No. 19 is a Consent and Assignment between Parkesburg Borough and CCA, dated December 1998, whereby the Borough consented to the assignment of the CCA obligations to a buyer of the CCA system. The exhibit offers no evidence of public need.

PAWC Ex. No. 20 is a Water And Wastewater Service Agreement between East Fallowfield Township and CCA, dated July 1991, to allow CCA to provide wastewater disposal and water supply services in a limited portion (Water and Sewer District 1) of the Township. The agreement specified that CCA would be permitted to sign up new customers in a limited territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require existing

property owners with well and septic systems to migrate to the CCA system. According to the map which was attached to the agreement (Exhibit A), the service area was limited to a small area of the western portion of the Township. I also note that the map showed a smaller area for water service than for wastewater service. The agreement offers no evidence of public need other than for existing customers.

PAWC Ex. No. 21 is a Water and Wastewater Service Agreement between East Fallowfield Township and CCA, dated July 1991, to allow CCA to provide wastewater disposal and water supply services in a limited portion (Water and Sewer District 2) of the Township. The agreement specified that CCA would be permitted to sign up new customers in a limited territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require existing property owners with well and septic systems to migrate to the CCA system. According to the map which was attached to the agreement (Exhibit A), the service area was limited to a small area of the western portion of the Township. PAWC Ex. No. 21 also contained two amendments to the original agreement, dated December 1992 and March 1993. The net effect of these two amendments was to enlarge the area in which CCA was permitted to provide water service to include another development. The agreements in total offer no evidence of public need other than for existing customers.

My last effort at defining the proposed service territories in terms of public need was to examine the various maps submitted by PAWC. Some of the maps showed the location of various CCA pipelines and facilities. PAWC St. No. 1.0 at Ex. No. 1.0-A, PAWC St. No. 1.1 at Ex. No. 1.1-C and PAWC/PSW Partial Settlement at Ex. B. Others showed grants of services areas resulting from the agreements reviewed above. PAWC Ex. Nos. 9-21. My examination reinforced my conclusion that PAWC should only be granted the service territory needed to serve existing customers who were or would shortly

be connected to the CCA systems on the date of closing. A few examples will highlight my reasoning. In East Fallowfield Township CCA has no sewer facilities in the eastern portion of the Township, but the Sewer Application map for the Township shows a requested service territory (shaded) similar to that requested for the Water Application. PAWC St. No. 1.0 at Ex. No. 1.0-A (sewer) and PAWC St. No. 1.1 at Ex. No. 1.1-C (water). In the western portion of East Fallowfield Township the requested service territory for the water service fails to show an area specifically exempted from Water and Sewer District 1 on the map attached to the agreement with the Township. Compare, PAWC St. No. 1.1 at Ex. No. 1.1-C (water) to PAWC Ex. 20 at Ex. A. There is an area requested on the central eastern border of West Sadsbury Township for sewer service. There are no sewer facilities in the area or nearby. That same requested sewer area is overlapped by a requested water area which straddles the West Sadsbury/Sadsbury border. There are no water facilities in the area or nearby. In Caln Township the Sewer Application requested territory in three separate locations. Only one of those locations contained CCA sewer lines. There are no sewer lines in or near the other two. I emphasize that the above are only some of the examples in which the maps undermine the Company premise that it established a prima facie case for public need. I hasten to add that any evidence of public need for one service (e.g. water) is not evidence of need for the other (e.g. sewer). This concept is important because the maps show some areas where the requested service territories overlap, but there are only facilities for one service in the vicinity. Under these circumstances, I have concluded that the Company failed to establish a public need for its services beyond existing customers who were or would shortly be connected to the CCA systems on the date of closing.

Assumption of Pennsylvania Water Company Of
Thirteen Agreements between the City of Coatesville
Authority and Various Municipalities

:	Docket Nos.	U-00004550
:		U-00004551
:		U-00004552
:		U-00004553
:		U-00004554
:		U-00004555
:		U-00004556
:		U-00004557
:		U-00004558
:		U-00004559
:		U-00004560
:		U-00004561
:		U-00004562

INITIAL DECISION

OF

LOUIS G. COCHERES
ADMINISTRATIVE LAW JUDGE

JANUARY 19, 2001

VOLUME 2 OF 2
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pennsylvania-American Water Company :
for Approval of (1) The Transfer, By Sale, of :
Substantially All of the Water Works Property And :
Rights of the City of Coatesville Authority Water System :
to Pennsylvania- American Water Company, and (2) The :
Rights of Pennsylvania-American Water Company to :
Begin to Offer or Furnish Water Service to the Public in :
all of the City of Coatesville, Parkesburg Borough, and :
South Coatesville Borough, Chester County, :
Pennsylvania and Portions of Sadsbury Township, Caln : Docket No. A-212285F0071
Township, East Fallowfield Township, Valley :
Township, Atglen Borough, West Sadsbury Township, :
and West Caln Township, Chester County, Pennsylvania :
and Quarryville Borough, Bart Township, Colerain :
Township, Eden Township and Sadsbury Township, :
Lancaster County, Pennsylvania; and (3) Certain :
Additional Regulatory Approvals :

Application of Pennsylvania-American Water Company :
for Approval of (1) the Transfer, by Sale, of :
Substantially All of the City of Coatesville Authority's :
Assets, Properties and Rights Related to its Wastewater :
System to Pennsylvania-American Water Company; and : Docket No. A-230073F0002
(2) The Right of Pennsylvania-American Water :
Company to Begin to Offer or Furnish Wastewater :
Service to the Public in the City of Coatesville and :
Parkesburg Borough, Chester County, Pennsylvania and :
Portions of Caln Township, East Fallowfield Township, :
Valley Township, Sadsbury Township, and West :
Sadsbury Township, Chester County, Pennsylvania; and :
(3) Certain Additional Regulatory Approvals :

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C. INADEQUACY OF EXISTING SERVICE

I note that no party briefed this issue. Other than a short, passing reference to a PSW argument in the PAWC Main Brief (p. 47), the Company did not mention the subject. I find this omission important. If the Company believed that it established public need, then it should have known vis-a-vis its counsel's participation before Judge Paist that the issue of service inadequacy should have been addressed.

Judge Paist's Decision, quoted above, specifies that, when a need for an applicant's proposed service has been proven, the adequacy of the presently available service should be analyzed. I agree. Given that I have already held that PAWC failed to establish a prima facie case of public need for areas beyond the service of current customers, my first ruling is that there is no need to review the issue. I come to this conclusion because the need to examine service inadequacy only arises after the applicant proves there is a public need.

Recognizing that the Commission may disagree with my evaluation of the public need evidence, I have reviewed the record as presented by the parties. Not surprisingly, I find the evidence on this issue is meager at best and not sufficient to be conclusive. However, that being said, I find that what little evidence there is establishes current service is adequate. I glean this statement from the few agreements between the municipalities and CCA which specifically deny CCA the authority to require current property owners with well and septic systems to join the CCA systems. PAWC Ex. Nos. 16, 20 and 21 (West Sadsbury and East Fallowfield Townships). If service to these property owners was inadequate, the agreements should have specified that CCA could compel them to join the CCA systems. Because these three agreements concern only two of the thirteen municipalities covered by these Applications, I emphasize that the paucity

of evidence in the record really demonstrates that PAWC failed to carry its burden of proof on this issue, as well.

D. PUBLIC INTEREST

1. Parties' Positions

a. PAWC

In its Main Brief, PAWC explained that the grant of a certificate of public convenience (pursuant to Section 1103 of the Public Utility Code) depended on a showing of service to the public's interest. It added that Section 507 of the Public Utility Code required a showing of legality and reasonableness. The Company argued that the submission of the hydrant service settlement made the Section 507 issue moot. PAWC claimed that the Asset Purchase Agreement, as amended, provided a balance to all interests of the parties to the case and to the Agreement. The Company reviewed the City testimony which indicated that the proceeds of sale would be used to reduce taxes and fund projects for its residents. PAWC asserted that the execution of the Agreement by the City and CCA was evidence the transaction was in the public interest. The Company listed the benefits to the CCA customers as including 1) economies of scale, 2) access to PAWC call centers, 3) inclusion in PAWC's maintenance program, 4) access to experts and resources of PAWC's affiliates, 5) uniform Commission regulation, 6) access to the Commission Bureau of Consumer Services, 7) access to the OCA and OSBA, 8) a three year rate freeze and 9) a wider customer base over which to spread system costs. PAWC M.B. at 48-52.

PAWC dismissed Mr. Campos' expressed fear that jobs would be cut as speculation. The Company also disagreed with Mr. Campos' reasons for concluding the Agreement was not in the community's best interest and asserted that the Agreement

complied with the Public Utility Code. PAWC rejected Mr. Campos' concerns that the rates would go up at the end of the three year rate freeze. Contrary to Mr. Campos' contention, the Company contended that it and CCA had provided all public notices required. PAWC explained that the City's desire to retain the current CCA headquarters necessitated a search for a new location to house the CCA system maintenance and administrative functions. The Company admitted its current rates were higher than those of CCA, but believed comparison was difficult because there was no way to know whether the CCA rates would have remained lower in the absence of the Agreement. PAWC disagreed with Mr. Campos' opinions on public utility accounting practices. It emphasized that the Agreement resulted from an arms-length process. PAWC M.B. at 52-56.

In its Reply Brief, PAWC noted that all the public advocates withdrew their opposition to the Applications after signing the hydrant service settlement. The Company continued that only PSW (a competitor) and Mr. Campos (who had backed the PSW bid for the system) continued to oppose the Applications. PAWC denied Mr. Campos' suggestion that the Applications should be rejected because CCA did not submit any evidence. The Company claimed CCA was not required to do so and that PAWC had presented more than sufficient evidence to justify finding the Agreement served the public interest. The Company characterized Mr. Campos' arguments as "inflammatory assertions." PAWC R.B. at 22-23.

b. Campos

In his Main Brief, Mr. Campos explained that CCA failed to provide any testimony. He continued that the Company and CCA did not demonstrate that the sale to PAWC was in the public interest or that PAWC was fit to operate the system in a effective, financially reasonable, legal manner. He reminded the undersigned and the Commission

that the Company initially testified that it would issue bills to, but not expect payment from, the City for hydrant service. Mr. Campos did not believe the hydrant settlement solved the problem. He asserted that the Company wanted to buy the CCA systems at any cost. Mr. Campos thought the Agreement had an illegal provision which was contrary to the Public Utility Code. Campos M.B. Argument [sic] – Public Interest, ¶¶1-3. (The Campos Main Brief has no page numbers.)

2. Recommendation

Viewing this record as a whole does not make it easy to conclude that the grant of the Applications is in the public interest. PAWC listed the benefits of the transaction as including: 1) economies of scale, 2) access to PAWC call centers, 3) inclusion in PAWC's maintenance program, 4) access to experts and resources of PAWC's affiliates, 5) uniform Commission regulation, 6) access to the Commission Bureau of Consumer Services, 7) access to the OCA and OSBA, 8) a three year rate freeze and 9) a wider customer base over which to spread system costs. In addition, the Company added lower taxes and funding for City projects as benefits for City residents only. PAWC M.B. at 48-52. Those were the Company's version of the "positives."

Unfortunately, PAWC failed to provide a list of the "negatives" which serve to provide a more balanced look at the transaction. In this transaction, the Company may have paid too much for the system. A memo from the City witness to City Council evaluates an early PAWC bid price of \$43,000,000 for the CCA system as a premium 110% of value. The memo continues that any price above \$43,000,000 would be "gravy."

Campos X Ex. No. 2 at 1. The purchase price specified in the Asset Purchase Agreement is \$48,225,000.¹⁰

The Company acknowledges that the system is expected to show a \$600,000 pro forma loss annually over the period of the three year rate freeze. The Company has not represented that the “economies of scale” it expects to bring to the CCA system will eliminate the pro forma loss during the rate freeze.

PAWC acknowledged that the wastewater system will need capital improvements in the near future. There was testimony which indicated that CCA could finance a capital improvement plan at a lower cost than PAWC. Currently CCA’s rates are lower than the Company’s. While it may be possible to assume that the CCA rates would go up in the three years absent the sale of its assets, I agree with PAWC that any comparison of future CCA rates (without the asset sale) to future Company rates is speculative. On the other hand, given PAWC’s currently higher rates, an expected pro forma loss, expected capital improvements and this Commission’s preference for a movement to uniform state rates for PAWC, I find it highly likely that the CCA customers will face a rate hike at the expiration of the rate freeze.

In addition, the City knew the free hydrant service clause of the Agreement would violate the Public Utility Code prior to the start of the bidding process. PAWC failed to prove public need for its services beyond the existing customers on the date of closing.

¹⁰ Note that I have not and will not make a finding that the Company has paid too much for the CCA system. The question of whether the price was too high is best litigated in a rate case when PAWC makes a claim in for the assets in rate base.

I am also reluctant to accept the Company's entire list of benefits at face value. Not one individual, business or municipal customer testified that there was anything wrong with the CCA system. In other words, there was no evidence that CCA provided less than adequate water and sewer services, that CCA was not responsive to customer complaints, that CCA did not have a regular maintenance program and that CCA was not capable of hiring the needed expertise to efficiently operate its systems.

With regard to the benefits to the city residents from the proceeds of sale, I find the list interesting, but not dispositive. While the reduction of taxes and a source of project funding is of great importance to the City, PAWC has not provided any legal authority which suggests that these benefits are cognizable under the Public Utility Code as the basis for finding the transaction is in the public interest.

Having presented both sides of the public interest equation, I find the transaction is in the public interest insofar as it enables PAWC to purchase the physical assets and to begin serving existing customers on the date of closing. While it would not be difficult to simply view the Agreement as a transaction between a willing seller and a willing buyer, the list of benefits tips the scale in favor of the transaction when categorized by its generic name -- fitness. As my previous ruling on this issue indicates PAWC has an excellent reputation for being technically and financially fit. There can be no doubt that the CCA customers will not be harmed by substituting PAWC in place of CCA. Indeed, there is every likelihood that PAWC brings with it the ability to improve the already adequate service. The price of potentially improved service will bring a higher cost. However, the stability and peace of mind which comes with that cost should make any increased cost palatable. And finally, I repeat my finding that the projected losses and capital improvements make only a minimal impact on the Company's healthy financial picture. Under these circumstances, I have concluded that the transaction, as limited by my prior rulings, is in the public interest.

III. ASSUMED CONTRACTS

At the conclusion of the September 7, 2000 hearing I informed the parties that the Applications requested a Section 507 review of certain contracts. However, the contracts were not included in the record. I explained that I would not be able to approve those contracts sight unseen. Tr. 527-530. Subsequently, PAWC submitted thirteen agreements for review. 66 Pa. C.S. §507. These agreements were identified, but not included, in the Applications as contracts in which PAWC wanted to assume the obligations of CCA. See, Schedule 1.5.1 of PAWC Ex. Nos. 5 and 6. The contracts were filed on September 11, 2000 at Docket Nos. U-00004550 through U-00004562. By letter dated November 16, 2000, the Company submitted these documents, labeled PAWC Ex. Nos. 9 through 21, for review by the parties and the undersigned at the Application docket numbers.

A hearing was scheduled on November 17, 2000, for the purpose of presenting testimony relevant to the contracts. Because all parties indicated that they had no need to present testimony on those contracts, the hearing was cancelled. Prior to the cancellation of the hearing, Mr. Campos raised some issues about the contracts by letter dated November 7, 2000. In a conference call with Mr. Campos and counsel for PAWC, Mr. Campos agreed to waive the November 17 hearing if I addressed those issues in the context of this Decision. By letter dated November 13, 2000 to all parties, I confirmed the agreement made during the conference call, admitted Mr. Campos November 7 letter to the record and cancelled the November 17 hearing.

Before reviewing the contracts submitted by the Company, I note that I will formally consolidate the docket numbers for the contracts (Docket Nos. U-00004550 through U-00004562) with those of the Applications for hearing and decisional purposes.

On a different subject, I emphasize that not all of the contracts identified on Schedule 1.5.1 were included in the submission. Those listed, but not submitted, contracts will be dealt with at end of this section.

A. VALLEY TOWNSHIP

PAWC Ex. No. 9 was the Water Service Agreement between Valley Township and CCA. It was dated March 1990 and was amended in May 1991. Basically, it is a contract for bulk water sales which Valley Township used as a basis to resell water to its residents. There are a few sections of the original agreement which must be reformed. As Mr. Campos pointed out paragraph 9 (at 5) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. Mr. Campos also raised questions about any billing procedure mandated in the contract. In essence, the Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. The remainder of the agreement can be approved.

PAWC Ex. No. 10 was the Sewage Treatment Agreement between Valley Township and CCA. It was dated January 1992. Basically, it provides for Valley to use parts of the CCA sewage collection system as access to CCA's sewage treatment plant. The agreement specifies that the Township will provide a complete collection system for its residents and that CCA is not authorized to provide any sewage collection service to the residents in the Township. There are a few sections of the original agreement which must be reformed. Article VII, Section 1 (at 19-20) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Article VII, Sections 2-5 and 8 at 20-22. The remainder of the agreement can be approved.

Mr. Campos also raised a final question about proper notice being given to any municipality whose agreement would be reformed pursuant to Sections 507 and 508 of the Public Utility Code. 66 Pa. C.S. §§507 and 508. My review of the Applications revealed that each Application gave notice of the request for a Section 507 review and was served on all of the effected municipalities. See PAWC Ex. No. 5 at 13, ¶38 (water) and No. 6 at 12, ¶37 (sewer). Accordingly, PAWC properly complied with relevant notice provisions. The municipalities were, therefore, required to participate in this case to protect their interests.

B. QUARRYVILLE BOROUGH

PAWC Ex. No. 11 is bulk water sales agreement between the Octoraro Water Company and Quarryville Borough, dated May 1957. According to the Assumed Agreements Schedule, CCA purchased the system from Octoraro in 1985. Schedule 1.5.1 of PAWC Ex. Nos. 5 and 6. (There is no other verification of the 1985 date or purchase in the record.) There are a few sections of the original agreement which must be reformed. Paragraph 5 (at 1) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Paragraph 5 at 1. Paragraph 4 (at 1) conflicts with the Commission's regulations for minimum pressure and must also be deleted. 52 Pa. Code §65.6. The remainder of the agreement can be approved.

C. CALN TOWNSHIP AND AUTHORITY

PAWC Ex. No. 12 is a Sewage Treatment Agreement, dated April 1966, among CCA and Caln Township and its Authority to provide the Caln Authority with

access to the CCA sewer lines and CCA sewage treatment plant. The Caln Authority is responsible for installing a sewage collection system within Caln Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in Caln Township. There is one section of the original agreement which must be reformed. Paragraph 3 (at 3) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Paragraph 3 at 3. The remainder of the agreement can be approved.

PAWC Ex. No. 13 is a Supplemental Agreement among CCA, Caln Township and its Authority, dated September 1968, which provides an indemnification clause for exceeding the flow limits set in the prior agreement (PAWC Ex. 12). The agreement can be approved in its entirety.

PAWC Ex. No. 14 is entitled "Sewage Treatment Agreement #2" among CCA, Caln Township and its Authority, dated 1971, in which CCA agreed to treat additional wastewater flow from the Township. There are two sections of the agreement which must be reformed. Paragraphs 2 and 3 conflicts with the Commission's rate setting authority. Consequently, they must be deleted effective with the closing date of the Asset Purchase Agreement. The remainder of the agreement can be approved.

D. WEST BRANDYWINE TOWNSHIP

PAWC Ex. No. 15 is a Sewage Treatment Agreement between CCA and West Brandywine Township, dated June 1994, and an Addendum To Sewage Treatment Agreement, dated September 1995, among the same parties. The purpose of the original agreement is to provide West Brandywine Township with access to the CCA sewer lines

and CCA sewage treatment plant. West Brandywine Township is responsible for installing a sewage collection system within West Brandywine Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in West Brandywine Township. The addendum allowed West Brandywine Township to increase the daily wastewater flows into the CCA system. There is one article of the original agreement which must be reformed. Article VII (at 11-13) conflicts with the Commission's rate setting authority and tariffed billing procedures, too. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. The remainder of the agreement can be approved.

E. WEST SADBURY TOWNSHIP

PAWC Ex. No. 16 is a Waste And Wastewater Service Agreement between CCA and West Sadsbury Township, dated March 1998, to allow CCA to provide wastewater disposal services in a limited portion of the Township. The agreement specified that CCA would be permitted to sign up new customers in the specified territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require property owners with septic systems to migrate to the CCA system. There is one section of the original agreement which must be reformed. Paragraph 8 (at 6) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Paragraph 14 at 7. The remainder of the agreement can be approved.

F. SADSBURY TOWNSHIP, CHESTER COUNTY

PAWC Ex. No. 17 is a Sewage Treatment Agreement between CCA and Sadsbury Township, dated July 1997, and a Protocol and an Addendum To Protocol which were not dated. The purpose of the agreement is to provide Sadsbury Township with access to the CCA sewer lines and CCA sewage treatment plant. Sadsbury Township is responsible for installing a sewage collection system within Sadsbury Township and delivering the wastes into the CCA system. CCA was not given any authority to serve in Sadsbury Township. The purpose of the protocols was to recognize the obligations and financial commitments of the Sadsbury Sewer Corporation in terms of building and paying for parts of the Sadsbury system. There are a few sections of the original agreement which must be reformed. Article VII, Paragraphs 1, 6, 9 and 10 conflicts with the Commission's rate setting authority. Consequently, they must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Article VII, Paragraphs 3-5 and 8. The remainder of the agreement can be approved.

G. PARKESBURG BOROUGH

PAWC Ex. No. 18 is an agreement between CCA and Parkesburg Borough, dated June 1994, whereby the Borough agreed to transfer its wastewater collection system and sewage treatment plant to CCA and for CCA to construct a sanitary sewer main which would connect the Borough system to the CCA sewage treatment plant. The sewer main was to be constructed at the general expense of the Borough. The Exhibit also included an Agreement between the same parties, dated September 1998, setting forth additional Borough and CCA financial obligations. And finally, the Exhibit included an Addendum between the same parties, dated September 1998, which clarified the format for the assignment of the CCA obligations to a buyer of the CCA system.

There is one section of the original agreement which may need to be reformed. Paragraph 14.03 (at 55) may conflict with the Company's tariff. To the extent there is a conflict, the tariff prevails, and the paragraph must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the original agreement can be approved.

There are a few sections of the September 1998 agreement which may need to be reformed. Paragraphs 5-9 (at 3-6) may conflict with the Company's rate and billing tariffs. To the extent there is a conflict, the tariffs prevail, and the paragraphs must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the September 1998 agreement can be approved.

PAWC Ex. No. 19 is a Consent and Assignment between Parkesburg Borough and CCA, dated December 1998, whereby the Borough consented to the assignment of the CCA obligations to a buyer of the CCA system. The agreement can be approved in its entirety.

H. EAST FALLOWFIELD TOWNSHIP

PAWC Ex. No. 20 is a Water And Wastewater Service Agreement between East Fallowfield Township and CCA, dated July 1991, to allow CCA to provide wastewater disposal and water supply services in a limited portion (Water and Sewer District 1) of the Township. The agreement specified that CCA would be permitted to sign up new customers in a limited territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require existing property owners with well and septic systems to migrate to the CCA system. There are a few sections of the agreement which may need to be reformed. Paragraphs 7A and 9 (at 8-

9) may conflict with the Company's rate and billing tariffs. To the extent there is a conflict, the tariffs prevail, and the paragraphs must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the agreement can be approved.

PAWC Ex. No. 21 is a Water and Wastewater Service Agreement between East Fallowfield Township and CCA, dated July 1991, to allow CCA to provide wastewater disposal and water supply services in a limited portion (Water and Sewer District 2) of the Township. The agreement specified that CCA would be permitted to sign up new customers in a limited territory. The agreement did not indicate that there were any specific customers who required service and did not allow CCA to require existing property owners with well and septic systems to migrate to the CCA system. According to the map which was attached to the agreement (Exhibit A), the service area was limited to a small area of the western portion of the Township. PAWC Ex. No. 21 also contained two amendments to the original agreement, dated December 1992 and March 1993. The net effect of these two amendments was to enlarge the area in which CCA was permitted to provide water service to include another development. There are a few sections of the agreement which may need to be reformed. Paragraphs 7A and 9 (at 7-9) may conflict with the Company's rate and billing tariffs. To the extent there is a conflict, the tariffs prevail, and the paragraphs must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the agreement can be approved.

I. AGREEMENTS NOT SUBMITTED

The above listed of agreements comprise all of the agreements listed on Schedule 1.5.1 which were submitted for review. Unfortunately, the Company listed more agreements in the Schedule than it provided for the record. The Company's request for a Section 507 review of the remaining contracts must fail because PAWC did not provide any evidence which could be used for the basis for a finding. Accordingly, PAWC's

request to assume and comply with the obligations in the following listed contracts, agreements and commitments is denied:

1. Valley Township
 - a. Water conveyance agreement (1992)
 - b. Sewer Conveyance agreement (1992)
2. Caln Township and Caln Authority
 - a. Stipulation from Chester County Court of Common Pleas (1981)
3. East Fallowfield Township
 - a. Water and Wastewater Conveyance and Lease Agreement to CCA For 99 years (1991)
 - b. Water Conveyance Agreement for Mount Carmel Road (1992)
4. United States Veterans Administration Hospital (1938) – Water and Sewer services agreements.
5. Air Liquide America Corporation (1997) – Water main extension and Repayment of main extension costs up to \$40,000 and capacity fees of \$10,000 on a monthly basis for ten years.
6. Metropolitan Communications, Inc. (1990) – Lease of portion of North Hill Water Tank site for radio communications tower.
7. Comcast Metrophone (1998) – Lease of portion of Parkesburg Water Tank site for radio communication facilities.
8. Trilogy Development Company (Strasburg Hunt Subdivision) (Includes reimbursement to developer of capacity fees)
 - a. Water and sewer main extension agreement in Valley Township (1992)
 - b. Water and sewer main extension agreement – change size of portion of water main (1993)

IV. PENDING MOTIONS

A. MOTION TO MOVE PAWC'S EXHIBIT 8.0 INTO THE RECORD AND PSW'S MOTION FOR SANCTIONS

On October 10, 2000, PAWC filed Pennsylvania-American Water Company's Motion To Move PAWC's Exhibit 8.0 Into The Record. The Motion alleged that, pursuant to 52 Pa. Code §5.402(b), PAWC Exhibit 8.0 should be admitted. The Motion further alleged that the Exhibit supported PAWC's Statement 1.1 and Exhibit 1.1-D, that it would be subject to a Protective Order and that the record reflected the opportunity to submit the document. Motion at 1.

By letter dated October 20, 2000, PSW filed Philadelphia Suburban Water Company's Answer And Objections To Pennsylvania-American Water Company's Motion To Move PAWC'S Exhibit 8.0 Into The Record And Motion For Sanctions. In its Answer, PSW alleged 1) that Exhibit 8.0 had not been marked for identification during the hearings, 2) that Exhibit 8.0 was hearsay, 3) that no Protective Order had been issued, 4) that, as agreed at the hearings, a similar document (which had been received in discovery) had been treated in a confidential manner, 5) that the draft Protective Order which accompanied the discovery document was not acceptable to PSW and 6) that only PSW, not PAWC, had been given the opportunity to file a late-filed exhibit related to the discovery documents. Answer at 1-3.

In a section entitled "Objections," PSW alleged 1) that Section 5.402 of the Commission regulations could not be used for the introduction of additional evidence into a closed record, 2) that filing the Motion violated the presiding officer's instructions for post hearing submissions, 3) that the Motion did not meet the requirements of Section

5.571(b) of the Commission regulations, 4) that the documents within Exhibit 8.0 were hearsay and 5) that PAWC and CCA had waived their rights to call witnesses who could have authenticated the Exhibit 8.0 documents. Answer at 3-5.

In the Motion For Sanctions, PSW first quoted Section 1.35(c)(1) of the Commission regulations. PSW then alleged 1) that Section 1.35(c)(2) permitted the imposition of sanctions for document which violated Section 1.35(c)(1), 2) that PAWC's Motion was not well grounded in fact, 3) that PAWC's Motion was not warranted by law or a good faith argument because the presiding officer had informed the Company that Exhibit 8.0 documents were hearsay, 4) that the PAWC Motion had been filed to harass PSW and increase PSW's costs, 5) that PAWC should be sanctioned by awarding PSW attorney fees and expenses and 6) that civil penalties should be imposed.

On October 26, 2000, PAWC filed Answer Of Pennsylvania-American Water Company To The Motion For Sanctions Of Philadelphia Suburban Water Company. In its Answer, PAWC alleged 1) that it would be a denial of due process rights to give only PSW the right to introduce documents concerning requests for service without extending the same rights to the other parties, 2) that PAWC understood the presiding officer to grant any party the right to introduce the Exhibit 8.0 documents into the record, 3) that PAWC's was warranted by existing law or by a good faith argument, 4) that the parties had been unable to agree on the terms of a protective order because PSW insisted on terms already rejected by the presiding officer, 5) that the documents within Exhibit 8.0 were not hearsay, 6) that PAWC's purpose in submitting its Motion was not to harass PSW or to increase PSW's costs and 7) that no sanctions were appropriate.

Having reviewed the Motions, Answers, Objections, transcript and pertinent Commission regulations, I generally agree with PSW. PAWC's Motion To Move Exhibit 8.0 will be denied. In addition, PSW's Motion For Sanctions will be granted in part. Finally, because the parties have been unable to agree on the terms of a protective order, I will include the terms of a protective order within the ordering paragraphs below.

The criticisms of the PAWC Motion as set forth in the PSW Answer, Objections and Motion For Sanctions are correct. PAWC reserved only the right to late-file its PAWC Ex. 7 at the September 7 hearing. Tr. 270, 524. There was no mention of a PAWC Ex. 8.0. PSW also correctly explained the agreement which it and PAWC reached on the record regarding the discovery of the documents which were later to become proposed Ex. 8.0. More specifically, PAWC agreed to give PSW the back-up documents (subject to a confidentiality agreement) which formed the basis for Mr. Johnson's testimony about "requests for service" received by CCA. After PSW had the opportunity to examine the data, I granted PSW, not PAWC, the right to file a late-filed exhibit taken from the contents of the response to that data request. Tr. 371-374. I note that counsels for both PSW and PAWC acknowledged the right had been granted only to PSW. Tr. 374. No one is disputing the fact that proposed PAWC Ex. 8.0 contains the same confidential material which PAWC gave to PSW pursuant to their on-the-record agreement.

Procedurally, PAWC began by following the correct regulation. Section 5.402(b) required the Company to file a written motion to admit proposed Ex. 8.0 after the close of the record. 52 Pa. Code §5.402(b). However, PAWC failed to conform its request to two other related regulations. More specifically, Section 5.431(a) required the Company to show good cause for submitting evidence after the close of the record. 52 Pa.

Code §5.431(a). Section 5.571 requires that any request for reopening the record include an allegation describing the material changes of fact or of law which occurred after the hearings ended. 52 Pa. Code §5.571.

Basically, I find that Section 5.402(b) is applicable to instances where an exhibit was previously identified on the record and where a party failed to move its admission in a timely manner. In those circumstances, admission of the exhibit would be a form of correction to the record and logically subject to objections of the other party(ies). 52 Pa. Code §5.402(b). However, in this situation PAWC did not identify an Ex. 8.0 on the record. As a result, its Motion to admit was subject to review for good cause or a subsequent material change of law or fact. 52 Pa. Code §§5.431(a) and 5.571. The Motion alleged nothing which comes close to those standards. Indeed, since the Motion alleged that Ex. 8.0 supported PAWC's Statement 1.1 and Exhibit 1.1-D, I find that the data was in existence and available to PAWC at the time of hearing. Accordingly, the information cannot be a subsequent material change of law or fact. 52 Pa. Code §5.571(b).

As I explained in a previous section of this decision and on the record (Tr. 531-534), the testimony and exhibit submitted by Mr. Johnston was double hearsay. At the risk of repetition, Mr. Johnston, a PAWC employee, attempted to tell the undersigned and this Commission about requests made by developers to CCA employees. None of the developers were ever brought into the hearing room. No CCA employee appeared as a witness. The developers' requests, verbal or written, to CCA were the first level of hearsay. Whatever means Mr. Johnston used to gather the information from CCA was the second level of hearsay. Since no party objected to the submission of this evidence, it was legally admitted into the record. However, because it is hearsay, it cannot be used as the

basis for a finding of fact. Anderson. Application of Henderson. Ex. 8.0 is generally a compilation of the documents submitted by the developers and copies of corresponding CCA main extension agreements. This time PSW objected in accordance with the regulation that the contents of Ex. 8.0 are hearsay. 52 Pa. Code §5.402(b). I agree. These documents are records from the files of CCA, and they are being offered by PAWC. There are no developers to authenticate the developers' records and no CCA personnel to authenticate the CCA records. These documents are CCA records and not PAWC business records. Again, these documents are double hearsay and not admissible under any exception to the rule. Anderson. Application of Henderson.

I hasten to add that the inadmissibility of requests for service data in a fixed utility application is highlighted by Commission regulations. Section 3.382(a) of the regulations permits such evidence in transportation applications only. 52 Pa. Code §3.382(a). I view Section 3.382(a) as a regulatory exception to the hearsay rule which is not extended to fixed utility applications.

As noted previously, PAWC argued that the failure to allow it to submit proposed Ex. 8.0 into the record would be a violation of PAWC's due process rights. I find the argument without merit. Due process requires two things: notice and a hearing. PAWC had both. It actively participated in all levels of the litigation process. It participated in the prehearing conference and helped to select the September 6 and 7 hearing dates. In conformity with the litigation schedule, it served prepared testimony, attended the hearings and presented its witnesses. In the process of presenting its witness Mr. Johnston, PAWC and PSW entered into an agreement on the record which reduced litigation time and ended cross-examination of the witness. The undersigned set forth the agreement on the record. I explained that PSW agreed to stop cross-examining Mr.

Johnston, to review the request for service data, to handle the data subject to a confidentiality agreement and, at PSW's discretion, to submit an exhibit culled from the data. Tr. 372-373. I then explained PAWC's responsibilities as follows:

And in response, Pennsylvania-American has agreed that it will provide a confidentiality agreement to be signed by Philadelphia Suburban promptly, no later than tomorrow morning, and that it will turn over those documents promptly tomorrow, and that if we use the briefing schedule, that material will be admissible as an addendum to Philadelphia Suburban's main brief.

Tr. 373. (Emphasis added.) Subsequently, both parties acknowledged that I set forth the terms of their agreement correctly. Tr. 374. I find that the record reflects that only PSW was granted the right to file a late-filed exhibit based on the back-up material related to Mr. Johnston's testimony and exhibit. In essence, PSW agreed to exchange the right to continued cross-examination for the opportunities to review confidential data and to submit a late-filed exhibit. PAWC's assertion that this agreement was somehow unfair was disingenuous. The record demonstrates that PAWC had the data at its disposal. If it wished to make it part of the record, it should have done so as part of its case-in-chief. 52 Pa. Code §5.243(e).

Section 1.35(c) states in part, as follows:

(c) *Effect.*

(1) The signature of the person subscribing a document filed with the Commission constitutes a certificate by the individual that:

(iii) The document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, to the best of the person's knowledge, information and belief formed after reasonable inquiry.

(iv) The document is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a document is signed in violation of this subsection, the presiding officer or the Commission, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include striking the document, dismissal of the proceeding or the imposition of civil penalties under section 3301 of the act (relating to civil penalties for violations).

52 Pa. Code §1.35(c). (*Italics in the original.*)

PAWC's Motion to admit Ex. 8.0 stated in part as follows:

3. The record in this proceeding was left open specifically to give the parties an opportunity to introduce any or all of the attached documents "if they find something they think is relevant." Tr. at 373. PAWC believes the entire exhibit is relevant evidence, but should be treated as confidential information....

Motion at 1. The first sentence in the paragraph is incorrect. The “they” in the sentence only refers to PSW. The fact that the “they” designates PSW is highlighted by a shift in focus in a later paragraph (quoted above) on the same page which begins with the words, “And in response, Pennsylvania-American has agreed . . .” Tr. 373. Thus, the allegation is not well grounded in fact. Based on the record and contrary to PAWC’s allegations (See, PAWC Answer to Motion For Sanctions at 2, ¶ 11), I find that PAWC could not reasonably believe that I gave instructions which would allow any party to introduce the documents in proposed Ex. 8.0 into the record. I have already ruled that the due process argument has no merit. Contrary to PAWC’s allegations (See, PAWC Answer to Motion For Sanctions at 2-3, ¶12), the need for continuing protection of confidential data and the fact that the parties were not able to agree on the terms of a Protective Order does not lead to the conclusion that the Motion to admit Ex. 8.0 (which misrepresents the record) was warranted by existing law. I have already ruled that the proposed exhibit is comprised totally of hearsay documents and inadmissible. I hasten to add that the hearsay ruling is entirely consistent with my evaluation on the record of Mr. Johnston’s testimony and exhibit to the effect that substantial portions of the “public need” evidence regarding requests for service from out-of-court developers to out-of-court CCA employees was hearsay. Tr. 530-534. I conclude that the Company should have known what the definition of hearsay was and that it would be applicable to the documents currently labeled Ex. 8.0. Accordingly, I find that PAWC has violated Section 1.35(c)(1)(iii) and that a sanction should be imposed. 52 Pa. Code §1.35(c)(1)-(2).

Before discussing the sanction I note that I have not found a violation of Section 1.35(c)(1)(iv). I don’t believe the exhibit was submitted to harass PSW or cause unnecessary delay or needless increased expense. At best, I regard the PAWC proposed exhibit as an ill-fated attempt to reinforce an obvious weak spot in the PAWC case-in-

chief. Had the Company not misrepresented the record and provided invalid legal arguments to support its position a sanction would not have been required.

The final question concerns the nature of the sanction to be imposed. PSW has requested the award of counsel fees spent to respond to the PAWC Motion and civil penalties pursuant to the Public Utility Code. 66 Pa. C.S. §3301. PSW Motion For Sanctions at 7. While the suggestion of the award of counsel fees is a common remedy in the courts, I find that PSW failed to document the amount in question in any manner. Because I would not consider giving PSW a “blank check” on the PAWC account, I rejected consideration of the entire concept. Given the nature of the misrepresentation and the invalidity of the legal arguments, I find that, in addition to denying the PAWC Motion, a minimal civil penalty of \$100.00 is appropriate. Accordingly, PAWC will be required to pay the penalty within thirty (30) days after entry of the Commission’s Opinion and Order in this case.

B. PAWC MOTION TO STRIKE CAMPOS REPLY BRIEF

On October 26, 2000, PAWC filed the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Reply Brief Of Ernest E. Campos, Sr. (Motion To Strike). The Motion To Strike alleged 1) that the presiding officer instructed the parties not to include extra-record evidence in their briefs and 2) that Mr. Campos’ Reply Brief contained “facts” that are not in the record. Motion To Strike at 1-2. The Motion To Strike then sets forth a list of items which PAWC asserted were outside the record. Motion To Strike at 2-4.

On October 27, 2000, CCA filed the City Of Coatesville Authority Statement In Support Of PAWC’s Motions To Strike (Statement). With respect to Mr.

Campos' Reply Brief, CCA's Statement represented 1) that arguments based on evidence not admitted to the record should be stricken, 2) that the undersigned had directed the parties not to attach extra record evidence to their briefs and 3) that CCA was denied the right to respond or cross-examine the new evidence in Mr. Campos' Reply Brief.

On November 4, 2000, Mr. Campos filed Answer To Motion Of Pennsylvania-American Water Company To Strike Portions Of The Reply Brief Of Ernest E. Campos, Sr. (Answer). The Answer alleged 1) that the parties were advised by the undersigned about the "admission of extra evidence after the close of the record." (Answer at 1), 2) that Mr. Campos did not have those sections of the Public Utility Code, but, if PAWC was correct, it violated the same provisions when the Company submitted the Stipulation (Answer at 1), 3) that "PAWC further complicated things by raising arguments about public policy in their Main Brief" and the parties were allowed to respond (Answer at 1), 4) that the record showed any change to the Asset Purchase Agreement would require votes by the Coatesville City Council and CCA Board (Answer at 2) and 5) that, if PAWC believed he reported those public meeting events improperly, it should petition to reopen the record (Answer at 2). Mr. Campos' Answer continued by admitting to having made all of the statements to which PAWC objected and by presenting explanations for each statement with cross-references to the record and the Stipulation. Answer at 2-4.

I note at the outset that Mr. Campos appeared in this case pro se. He correctly pleaded that I informed him about the problems associated with attempting to add factual statements to the record in his briefs. Tr. 537-539. While I appreciate the candor of the allegations in his Answer, I find that the PAWC Motion must be granted. There is a difference between a Stipulation (which is a pleading) and to referring to events occurring outside the courtroom (which are meant to be used as facts or evidence). The Stipulation is a form of agreement which parties submitted for my review and this Commission's approval. Mr. Campos is permitted to disagree with the terms of the

agreement, but has no right to cross-examine a witness about the contents of the document. On the other hand, Mr. Campos' recitation of the events which occurred after the September 7 hearing amounts to unsworn testimony which he wants to use to supplement the record. As I already explained to him, Mr. Campos should have petitioned to reopen the record if he wanted to add testimony to the record. 52 Pa. Code §5.571. His attempt to explain events which occurred after the September 7 hearing in his briefs deprived the other parties of their right to due process of law by virtue of failing to allow them to cross-examine his testimony. Accordingly, the following portions of his Reply Brief must be stricken:

“There are ulterior motives for these funds that I could not bring out at the hearing.”

Campos Reply Brief at 7.

“Because Coatesville changed what they said they would not, the municipalities have been deceived and possibly outmaneuvered by small town politicians coaxing their neighbors not to file a protest ‘for the good of the City.’”

Id. at 11.

“Most of these municipalities [sic] yearly operating budgets are only a fraction of the City of Coatesville's [sic] budget, (who will be the beneficiary of a windfall), such as Sadsbury Township, Valley Township, West Brandywine Township and so forth. In most cases they will incur fire hydrant fees greater than the portion applicable to Coatesville's equation, geography, density, development etc. considered. They will not benefit from any of sale proceeds.”

Id.

“On October 5, 2000 the Coatesville City council [sic] and the CCA Board of Directors held an [sic] special emergency meeting (public), to vote on approving the Stipulation as now presented to the PUC. Believing that they

are too far into the deal the majority voted to approve the Stipulation.”

Id. at 12.

“At that meeting, PAWC President Ross informed the public that the ‘PUC has finally approved the deal.’ Then legal counsel for the CCA read a prepared report that conveniently left out important information causing the elected officials to believe they should approve the Stipulation. Sitting in the audience, I was shocked but not surprised this happened. Then the elected officials were advised that the results of their process and Application could ‘very well bring further litigation both now and in the future.’ The only account of this are tape recordings made by me and the City of Coatesville.”

Id.

C. PAWC MOTION TO STRIKE PSW BRIEFS

On October 26, 2000, PAWC filed the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company (Motion To Strike). The focus of the Motion To Strike was best summarized in PAWC’s prayer for relief, which stated as follows:

WHEREFORE, PAWC respectfully requests that PSW’s arguments based on Sections 1303 and 1304 of the [Public Utility] Code be stricken from PSW’s Main Brief and Reply Brief and not be considered in any way during these proceedings. Specifically, PAWC respectfully requests that the Presiding Judge and the PUC strike Argument I in PSW’s Main Brief, Arguments 2-5 of PSW’s Reply Brief, all references to those Arguments, and any other references to or arguments based on Sections 1303 and/or 1304, wherever they appear in PSW’s Briefs and Motions.

Motion To Strike at 5.

On October 27, 2000, CCA filed the City Of Coatesville Authority Statement In Support Of PAWC's Motions To Strike (Statement). With respect to PSW's Main and Reply Briefs, the Statement asserted 1) that arguments not raised in the pleadings must be excluded from the case, 2) that on April 28, 2000, the undersigned instructed the parties to list the issues in the case, 3) that PSW's Briefs improperly rely on issues not raised in PSW's pleadings and 4) that PSW offered no excuse for its failure to list the issues and had not amended its pleadings.

On November 2, 2000, PSW filed Philadelphia Suburban Water Company's Answer To Pennsylvania-American Water Company's Motion To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company (Answer). The Answer alleged 1) that its Protest did not specifically list Sections 1303 and 1304 of the Public Utility Code, 2) that the Protest did specify the Water Application was inconsistent with the Declaratory Order, 3) that the Declaratory Order listed PSW's position as alleging violations of Sections 1303 and 1304, 4) that PAWC had answered (and denied) the legal arguments in the petition for Declaratory Order, 5) that PAWC answered the Protest by denying it had violated the Declaratory Order, 6) that PSW's Prehearing Memorandum did not include specific references to Sections 1303 and 1304, but did include language referring to the kinds of violations set forth in those Sections, 7) that PAWC and CCA briefed the legality of the Stipulation and Amendment in terms of the Declaratory Order and the Public Utility Code, 8) that PSW should be permitted to respond to those arguments, 9) that PAWC was on notice from the Protests of the public advocates which raised the issues of compliance with Sections 1303 and 1304, 10) that PSW argued that the original language of the Agreement directly violated those Sections, 11) that PSW argued that the language in the Amendment (which was submitted after the record was closed) also violated these Sections, 12) that PSW's Briefs were the first opportunity after submission of the Stipulation and Amendment to make the arguments, 13) that PAWC was

attempting to limit all criticism of the original Agreement and the Amendment, 14) that PSW was not required to amend its pleadings, 15) that the free hydrant service was not a new issue in the case, 16) that the free hydrant service issue was not a surprise to PAWC and 17) that the Motion To Strike attempted to strike larger sections of the PSW Briefs than was needed. Answer at 1-7.

Having reviewed the Motion To Strike, Answer, PSW's Briefs, Prehearing Memoranda and the record, I agree with PSW. The Motion To Strike portions of PSW's Main and Reply Briefs is denied.

The scope of PSW's Prehearing Memorandum with its references to the Declaratory Order should have been sufficient to apprise PAWC of PSW's position that the free hydrant service clause was illegal. The Memorandum also made clear PSW's position that the free hydrant service clause was illegal because it was discriminatory and did not conform to PAWC's tariff. As a participant in the Declaratory Order proceeding, PAWC knew that PSW was concerned with alleged violations of Sections 1303 and 1304, as well. Notice of that issue should have been reinforced to PAWC by virtue of the specific cross-references to Sections 1303 and 1304 in the Prehearing Memoranda from the public advocates. The language of Sections 1303 and 1304 coincides with the assertions made in PSW's Prehearing Memorandum.

If the contents of the PSW Prehearing Memorandum were not already sufficient, PSW correctly pointed out that the Stipulation and Amendment were not submitted until after the close of the record. In other words, PSW's first opportunity to comment on the legality of the Stipulation and Amendment was in its Briefs. Accordingly, there was nothing improper about specifying that the Amendment, and its historic predecessor (i.e. the original free hydrant service clause), both violated Sections 1303 and 1304 of the Public Utility Code.

Finally, my review of CCA's Main Brief revealed that it opened the door on the issue. CCA argued, in part, as follows:

Prejudice: The Stipulation is not prejudicial to PAWC's customers. Nothing in the Stipulation creates unreasonable preferential (or discriminatory) treatment concerning rates, billing or collection.

* * *

Rate Burden: The Stipulation does not impose any unreasonable rate burdens upon PAWC's customers. As mentioned above, the City "pays" for on-going fire hydrant service at a tariff rate.

CCA Main Brief at 7. (Bolding in the original.) CCA continued, as follows:

Prejudice: The Amended Provision is not prejudicial to PAWC's customers. As discussed above, the Amended Provision does not create any unreasonable preferential (or discriminatory) treatment concerning rates, billing or collection. Moreover, nothing in the Agreement creates any unreasonable preferential (or discriminatory) treatment concerning rates, billing or collection.

Rate Burden: The Amended Provision does not impose any unreasonable rate burdens upon PAWC's customers. As mentioned above, the City "pays" for on-going fire hydrant service at a tariff rate. * * * Since the City has "paid" by accepting a lower purchase price and PAWC's shareholders will absorb the on-going costs of said annual contributions, the Amended Provision does not impose any rate burdens upon PAWC's customers. Additionally, the other provisions of the Agreement do not impose any unreasonable rate burdens upon PAWC's customers.

CCA Main Brief at 13. (Bolding and underlining in the original.) (Footnotes omitted.) I find that the phrasing of these arguments raises issues which fall within the purview of the language of Sections 1303 and 1304. PSW had every right to respond to these argument by referring to those Sections.

Under these circumstances, I find that the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company must be denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. Public Utility Code, 66 Pa. C.S. §§507, 508, 510, 701, 1102.

2. The City of Coatesville is a city of the Third Class which operates under the Home Rule and Optional Charter Law, Act of July 15, 1957, P.L. 901, *as amended*, 53 P.S. §§ 41101, *et seq.* See City St. No. 1.0 at 3. See also the Third Class City Code, Act of June 23, 1931, P.L. 932, *as amended*, 53 P.S. §§ 35101, *et seq.*

3. The City of Coatesville Authority is a municipal authority that operates under the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, *as amended*, 53 P.S. §§ 301, *et seq.* See, e.g., the Recitals to the Agreement; Tr. 119, 314-315.

4. The original language of the Asset Purchase Agreement, Article 3, Section 3.4(b) and Article 4, Sections 4.1(g) and 4.2(f) were and are violations of Sections 507, 1102(a)(3), 1303 and/or 1304 of Public Utility Code and/or the Commission's

Declaratory Order and the revised language offered in the Stipulation and the Amendment continues to be a violation of the same sections and order.

5. Section 4.1(g) (and similar language in other sections) means that certain sections of the Agreement are to be effective without regard to this Commission's approval of those sections. Among those enumerated sections of the Agreement which are to be effective without the Commission's approval was Section 3.4(b)

6. The original language in Section 3.4(b) expressed plainly the intention of the parties to guarantee that the City never paid for fire hydrant service.

7. The original language of Section 3.4(b) was amended. The amended language required PAWC to bill the City for hydrant service. The amended language required the City to pay the charges. The amended language required PAWC to make a contribution to the City's Economic Development Fund equal to the amount of the hydrant service payments made by the City annually. The amended language specified that the contribution to the Fund would not be recoverable in any future base rate case. In other words, the City continued to receive free hydrant service, but only at the expense of the shareholders, not the ratepayers.

8. Section 507 of the Public Utility Code states, as follows:

§ 507. Contracts between public utilities and municipalities

Except for a contract between a public utility and a municipal corporation to furnish service at the regularly filed and published tariff rates, no contract or agreement between any public utility and any municipal corporation shall be valid unless filed with the commission at least 30 days prior to its effective date. Upon notice to the municipal authorities, and the public utility concerned, the commission may, prior to the

effective date of such contract or agreement, institute proceedings to determine the reasonableness, legality or any other matter affecting the validity thereof. Upon the institution of such proceedings, such contract or agreement shall not be effective until the commission grants its approval thereof.

66 Pa. C.S. §507. (Bold in the original. Underlining added.)

9. Section 1102 of the Public Utility Code states in part, as follows:

(a) General rule.—Upon application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

* * *

(3) For any public utility . . . to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

66 Pa. C.S. §1102. (Bold in the original. Underlining added.)

10. Section 1303 of the Public Utility Code states in part, as follows:

§ 1303. Adherence to tariffs

No 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.

66 Pa. C.S. 1303. (Bold in the original. Underlining added.)

11. Section 1304 of the Public Utility Code states in part, as follows:

§ 1304. Discrimination in rates

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.

66 Pa. C.S. §1304. (Bold in the original. Underlining added.)

12. The Commission issued the requested Declaratory Order and ordered, as follows:

2. That a public utility can always structure the provisions of any offer or agreement for the purchase of another system as that utility sees fit, bearing in mind that the Commission must review and approve any acquisition or transfer application for compliance with the relevant provisions of the Public Utility Code. Moreover, the regulated utility must also charge rates that are consistent with its approved tariff rate.

Declaratory Order at 7. (Emphasis added.)

13. The Water and Sewer Applications invoke the Commission's jurisdiction under Section 507 of the Code for the purpose of reviewing certain agreements (between CCA and nearby municipalities for water and sewer services) for which PAWC was going to assume CCA's contractual obligations. See e.g. Water Application at 13, ¶38.

14. The hydrant issue was a primary issue and, pursuant the Sections 507 and 508 of the Code, I gave the parties notice that a Section 507 review of the Agreement would be conducted. Further, the City and CCA were joined as indispensable parties with notice that the remedies found in Section 508 could be applicable. Prehearing Order, dated July 26, 2000, at 15-16, ¶¶1-5.

15. When PAWC and CCA received the Declaratory Order, the Commission informed them that, no matter how they structured the transaction, the Agreement would be subject to Commission review and approval.

16. PAWC and CCA specifically inserted Sections 4.1(g) and 4.2(f) to attempt to circumvent the Commission's approval process.

17. The highlighted language of Section 4.1(g), and other similar provisions in the Agreement, violates ordering paragraph 2 of the Declaratory Order by attempting to remove certain portions of the Agreement from the purview of the Commission approval process.

18. Any attempt by a public utility to acquire the utility assets of a municipal corporation cannot occur without the approval of an application by this Commission. 66 Pa. C.S. §1102(a)(3).

19. Section 4.1(g), and other similar provisions in the Agreement, violates Section 1102(a)(3) by attempting to remove certain portions of the Agreement from the purview of the Commission approval process.

20. After a Section 507 investigation has been instituted, an agreement between a public utility and a municipal corporation cannot become effective until the Commission grants approval. 66 Pa. C.S. §507.

21. Contrary to the contents of Section 4.1(g), the statute specifies that the effectiveness of the whole Agreement is dependent on Commission approval. 66 Pa. C.S. §507.

22. Section 4.1(g), and other similar provisions in the Agreement, violates Section 507 by attempting to exempt certain portions of the Agreement from the purview of the Commission approval process.

23. Section 4.1(g) and other similar provisions of the Agreement violate Sections 507 and 1102(a)(3) of the Public Utility Code and the Commission's Declaratory Order. Therefore, the Section is unjust, unreasonable, inequitable, and/or otherwise contrary to the public interest and general well being of the Commonwealth pursuant to Section 508 of the Public Utility Code. 66 Pa. C.S. §508.

24. The Stipulation recognized that "the agreement between PAWC and the CCA cannot abrogate or modify the PUC's jurisdiction and authority in any manner." Stipulation at 4, ¶8 . Therefore, the most just, reasonable and equitable way to implement this part of the Stipulation is to delete the offending portions of Section 4.1(g), and other similar provisions, from the Agreement.

25. As set forth in the original Section 3.4(b), free hydrant service is and was contrary to PAWC's tariff.

26. As set forth in the original Section 3.4(b), free hydrant service is and was contrary to PAWC's tariff. Because the concept of free hydrant service contradicts PAWC's tariff, it also violates that portion of the Declaratory Order which required PAWC to charge in accordance with its tariff.

27. Any attempt by PAWC to characterize the changes set forth in the Amendment as a "charge and contribution" format is nothing more than an untenable form over substance argument.

28. The original version of Section 3.4(b) was a direct effort to charge less (i.e. free) than the tariffed rate for hydrant service. As such, it violated Section 1303. 66 Pa. C.S. §1303.

29. The Amendment with its forced contribution of shareholder funds was nothing more than an indirect device for the reduction of hydrant fees (i.e. free) to the City. Consequently, the Amendment also violates Section 1303. 66 Pa. C.S. §1303.

30. Any contract right which results in the provision of free hydrant service in contradiction to the PAWC tariff and to the Declaratory Order and in violation of Section 1303 of the Public Utility Code is per se unreasonable.

31. Denying the same benefit to other municipal corporations inside the CCA service territory and/or inside the PAWC territory establishes a per se unreasonable disadvantage to the other municipalities. In other words, giving free hydrant service only to the City violates Section 1304, as well. Thus, because both the original version of Section 3.4(b) and the Amendment result in free service for the City, they both are unlawful.

32. In a Section 507 investigation, an Agreement is subjected to a determination of “the reasonableness, legality or any other matter affecting the validity thereof.” 66 Pa. C.S. §507. See also, Prehearing Order at 15, ¶1.

33. The PSW challenge to the Stipulation and Amendment pursuant to Sections 1303 and 1304 was appropriate.

34. Section 3.4(b) is unjust, unreasonable, inequitable, and/or otherwise contrary to the public interest and general well being of the Commonwealth pursuant to Section 508 of the Public Utility Code. 66 Pa. C.S. §508.

35. The contracting parties’ intent to require free hydrant service violates two sections of the Public Utility Code and the Declaratory Order. It simply does not matter how the contracting parties structure the transaction. Once the goal is achieved, that provision of the Agreement or the Amendment is unlawful and that part of the transaction is invalid. Accordingly, there can be no other remedy than to delete the offending portion of Section 3.4(b) from the Agreement and the Amendment.

36. The Pennsylvania Supreme Court made it clear many years ago that municipalities were liable to pay the tariffed rate for fire hydrant service notwithstanding any pre-existing contracts with the water company to the contrary. Dormont Borough v.

South Pittsburgh Water Company, 322 Pa. 60, 185 A. 263 (1936). That concept (i.e. tariffed rates prevail over prior contracts) has been uniformly applicable to other utility industries, as well. Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, 417 A. 2d 827, 53 Pa. Cmwlth. 241 (1980). Scranton Electric Company v. Avoca Borough School District, 37 A. 2d 725, 155 Pa. Superior Ct. 270 (1944).

37. Good intentions cannot be used to justify an illegal contract provision. If PAWC wishes to contribute shareholder money to the City's Economic Development Fund, it may do so on a voluntary basis.

38. As for using shareholder money to reimburse the City for hydrant service fees, the source of contribution does not legitimize the result. This Commission is charged with the responsibility of protecting the public interest which includes the shareholders' funds, as well as the ratepayers.

39. No amount of exchanged consideration in the contract can legalize the provision to provide unlawful free service.

40. When the contracting parties signed the Agreement containing the unlawful free service provision, there was a failure of consideration.

41. No municipal corporation is empowered to do an illegal act.

42. The lack of consideration and the unlawful provisions undercut CCA's "unconstitutional taking" argument, too. There can be no "taking," if the items taken resulted from illegal contract provisions. By definition, the "benefits" of an illegal contract provision have no value.

43. Regarding the parties' intent to limit changes to those mutually agreed upon and in writing, their intent is secondary to the language of the statute which gives the Commission the "power and authority to vary, reform, or revise" the Agreement. 66 Pa. C. S. §508. (Emphasis added.)

44. Free hydrant service for the other CCA customers only would have run afoul of the Code. 66 Pa. C.S. §1303.

45. Free hydrant service for the other CCA customers would also have been discriminatory in favor of the CCA customers and discriminatory against the remaining PAWC municipal customers. Such discrimination would have violated Section 1304, as well. 66 Pa. C.S. §1304.

46. The Applications, as filed and as amended, are not in the public interest.

47. The Asset Purchase Agreement, as initially executed and as amended, is not in the public interest.

48. Stipulation No. 2 is approved to the extent it consistent with this Decision.

49. PAWC enjoys a presumption of fitness as an existing certificated utility.

50. PAWC has the financial fitness to acquire and operate the CCA's water and wastewater systems.

51. PAWC has the technical fitness to acquire and operate the CCA's water and wastewater systems.

52. There is a presumption of need for water and wastewater service only in the area currently served by CCA's systems, respectively.

53. "Hearsay evidence is defined as in-court evidence of an out-of-court declaration, whether oral or written, which is offered to show the truth of the out-of-court assertion." Commonwealth v. Lewis, 424 Pa. Super. Ct. 531, 534, 623 A.2d 355, 357 (1993); *accord* Pennsylvania Rules of Evidence (Pa.R.E.) 801.

54. The hearsay rule to be a fundamental principal [sic] of law which must be followed by an agency at those points in a hearing where facts crucial to the issues are sought to be placed on the record. Cox v. Bell Telephone Co. of Pennsylvania, Inc., F-00214235 (opinion and order adopted January 12, 1995, entered January 19, 1995) at 3; *accord* Franklin Plastics Corp. v. Department of Environmental Resources, 657 A.2d 100, 102 (Pa. Cmwlth Ct. 1995).

55. Properly objected to hearsay is inadmissible and must be excluded from the record. Anderson v. Department of Public Welfare, 79 Pa. Cmwlth. Ct. 182, 468 A.2d 1167 (1983); Application of Carmen G. Henderson, A-00110088 (opinion and order adopted December 15, 1993, entered January 3, 1994) at 24.

56. If hearsay is not objected to, the hearsay is admissible but cannot form the basis of a fact-finding unless it is corroborated by competent, non-hearsay evidence of record. Walker v. Unemployment Compensation Board of Review, 27 Pa.

Cmwlth. Ct. 522, 367 A.2d 366 (1976); Cox at 3; Application of Carmen G. Henderson at 24.

57. If a CCA employee had testified about service requests, the data would have been hearsay, excludable and/or not useable as basis for making a finding.

58. Mr. Johnston's testimony is his report about the hearsay in the CCA files. Under these circumstances, cross-examination of Mr. Johnston about his recollection of the contents (hearsay) of the CCA files does nothing to enhance the credibility of the CCA files and amounts to nothing more than a second level of hearsay.

59. The testimony and exhibits of PAWC witness Johnston concerning alleged "service requests" received by CCA are hearsay.

60. The hearsay testimony and exhibits of PAWC witness Johnston concerning alleged "service requests" received by CCA are not corroborated by other competent evidence in the record.

61. If PAWC did not introduce the service request evidence for the truth of the contents, then it cannot be used to demonstrate public need.

62. The letter agreements from Sadsbury, East Fallowfield and West Caln Townships should be treated no differently than a withdrawal of protest. PAWC St. No. 1.0 at Ex. Nos. 1.0-D and 1.0-E and PAWC St. No. 1.1 at Ex. No.1.1-F.

63. The agreements between Valley Township and CCA for water and sewer service, dated March 1990 and January 1992, respectively, are contracts for service to current customers.

64. There are really two requested service territories at issue for each Application. The first territory concerns existing customers. The second territory concerns individuals and developers whose homes, businesses or business complexes will be located near existing CCA facilities and who wish to have service in the future.

65. There is a presumption of continuing need for service which runs in favor of existing customers. No party has challenged this presumption. Based on the presumption, both Applications should be granted, and PAWC should be given the authority to serve existing customers who were or would shortly be connected to the CCA systems on the date of closing.

66. With regard to the issue of extending the territory beyond the properties of the existing customers, PAWC failed to establish a prima facie case of public need for either Application.

67. Under subsection 1102(a)(1)(i) of the Public Utility Code, a public utility must obtain a Commission-issued certificate of public convenience to begin serving a territory different from the one authorized by its existing certificate(s) of public convenience.

68. Subsection 1103(a) of the Public Utility Code authorizes the Commission to grant a certificate of public convenience "only if . . . necessary or proper for the service, accommodation and convenience, or safety of the public."

69. Subsection 1103(a) has been interpreted to require an applicant for a certificate of public convenience to prove (1) a public need for the service proposed by the applicant, (2) the lack or inadequacy of existing service to meet the demonstrated public

need, and (3) the applicant's fitness financially and technically to provide the proposed service in a safe, reliable and responsible manner. Mobilfone of Northeastern Pennsylvania v. Pennsylvania Public Utility Commission, 73 Pa. Cmwlth. Ct. 340, 458 A.2d 1030 (1983); Warminster Township Municipal Authority v. Pennsylvania Public Utility Commission, 185 Pa. Super. Ct. 431, 138 A.2d 240 (1958); Metropolitan Edison Co. v. Public Service Commission, 127 Pa. Super. Ct. 11, 191 A.2d 678 (1937); Re Evansburg Water Co., 81 Pa. P.U.C. 152 (1994); Application of Evansburg Water Co., A-210870F0002 (opinion and order adopted March 25, 1993, entered April 9, 1993); Application of South Penn Gas Co., A-122870 and A-123100F0005 (opinion and order adopted August 16, 1990, entered August 24, 1990); Re Audubon Water Co., 69 Pa. P.U.C. 282, 288 (1989).

70. The best evidence of public need in a proposed new service territory is the testimony of members of the public who say they want to use the services offered by the applicant.

71. PAWC chose not to use this method at all. Instead, PAWC chose to present the testimony of Mr. Johnston to describe the methodology the Company used to identify the enlarged territory and to describe public interest in securing service. His efforts fell far short of the standard.

72. Any evidence of public need for one service (e.g. water) is not evidence of need for the other (e.g. sewer).

73. When a need for an applicant's proposed service has been proven, the adequacy of the presently available service should be analyzed.

74. PAWC failed to carry its burden of proving inadequacy of service in the areas beyond CCA's existing customers.

75. The purchase transaction is in the public interest insofar as it enables PAWC to purchase the physical assets and to begin serving existing customers on the date of closing.

76. The docket numbers for the contracts (Docket Nos. U-00004550 through U-00004562) should be formally consolidated with those of the Applications for hearing and decisional purposes.

77. In PAWC Ex. No. 9, Paragraph 9 (at 5) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. The remainder of the agreement can be approved.

78. PAWC Ex. No. 10, Article VII, Section 1 (at 19-20) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Article VII, Sections 2-5 and 8 at 20-22. The remainder of the agreement can be approved.

79. Each Application gave notice of the request for a Section 507 review and was served on all of the effected municipalities. See PAWC Ex. No. 5 at 13, ¶38 (water) and No. 6 at 12, ¶37 (sewer).

80. PAWC Ex. No. 11, Paragraph 5 (at 1) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Paragraph 5 at 1. Paragraph 4 (at 1) conflicts with the Commission's regulations for minimum pressure and must also be deleted. 52 Pa. Code §65.6. The remainder of the agreement can be approved.

81. PAWC Ex. No. 12, Paragraph 3 (at 3) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Paragraph 3 at 3. The remainder of the agreement can be approved.

82. PAWC Ex. No. 13 can be approved in its entirety.

83. PAWC Ex. No. 14, Paragraphs 2 and 3 conflicts with the Commission's rate setting authority. Consequently, they must be deleted effective with the closing date of the Asset Purchase Agreement. The remainder of the agreement can be approved.

84. PAWC Ex. No. 15, Article VII (at 11-13) conflicts with the Commission's rate setting authority and tariffed billing procedures, too. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. The remainder of the agreement can be approved.

85. PAWC Ex. No. 16, Paragraph 8 (at 6) conflicts with the Commission's rate setting authority. Consequently, it must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Paragraph 14 at 7. The remainder of the agreement can be approved.

86. PAWC Ex. No. 17, Article VII, Paragraphs 1, 6, 9 and 10 conflicts with the Commission's rate setting authority. Consequently, they must be deleted effective with the closing date of the Asset Purchase Agreement. The Company tariffed billing procedures will prevail over any conflicting system set forth in the agreement. See, Article VII, Paragraphs 3-5 and 8. The remainder of the agreement can be approved.

87. PAWC Ex. No. 18, Paragraph 14.03 (at 55) of the original agreement may conflict with the Company's tariff. To the extent there is a conflict, the tariff prevails, and the paragraph must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the original agreement can be approved.

88. PAWC Ex. No. 18, Paragraphs 5-9 (at 3-6) of the September 1998 agreement may conflict with the Company's rate and billing tariffs. To the extent there is a conflict, the tariffs prevail, and the paragraphs must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the September 1998 agreement can be approved.

89. PAWC Ex. No. 19 can be approved in its entirety.

90. PAWC Ex. No. 20, Paragraphs 7A and 9 (at 8-9) may conflict with the Company's rate and billing tariffs. To the extent there is a conflict, the tariffs prevail,

and the paragraphs must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the agreement can be approved.

91. PAWC Ex. No. 21, Paragraphs 7A and 9 (at 7-9) may conflict with the Company's rate and billing tariffs. To the extent there is a conflict, the tariffs prevail, and the paragraphs must be modified effective with the closing date of the Asset Purchase Agreement. The remainder of the agreement can be approved.

92. The Company's request for a Section 507 review of the remaining contracts must fail because PAWC did not provide any evidence which could be used for the basis for a finding. Accordingly, PAWC's request to assume and comply with the obligations in the following listed contracts, agreements and commitments is denied:

a. Valley Township

- (1) Water conveyance agreement (1992)
- (2) Sewer conveyance agreement (1992)

b. Caln Township and Caln Authority

- (1) Stipulation from Chester County Court of Common Pleas (1981)

c. East Fallowfield Township

- (1) Water and Wastewater Conveyance and Lease Agreement to CCA For 99 years (1991)
- (2) Water Conveyance Agreement for Mount Carmel Road (1992)

d. United States Veterans Administration Hospital (1938) – Water and Sewer services agreement.

- e. Air Liquide America Corporation (1997) – Water main extension and repayment of main extension costs up to \$40,000 and capacity fees of \$10,000 on a monthly basis for ten years.

- f. Metropolitan Communications, Inc. (1990) – Lease of portion of North Hill Water Tank site for radio communications tower.

- g. Comcast Metrophone (1998) – Lease of portion of Parkesburg Water Tank site for radio communication facilities.

- h. Trilogy Development Company (Strasburg Hunt Subdivision) (Includes reimbursement to developer of capacity fees)
 - (1) Water and sewer main extension agreement in Valley Township (1992)
 - (2) Water and sewer main extension agreement – change size of portion of water main (1993)

93. Because the parties have been unable to agree on the terms of a protective order, a protective order will be included within the ordering paragraphs below.

94. Section 5.402(b) required the Company to file a written motion to admit proposed Ex. 8.0 after the close of the record. 52 Pa. Code §5.402(b).

95. Section 5.431(a) required the Company to show good cause for submitting evidence after the close of the record. 52 Pa. Code §5.431(a).

96. Section 5.571 requires that any request for reopening the record include an allegation describing the material changes of fact or of law which occurred after the hearings ended. 52 Pa. Code §5.571.

97. The information in proposed Ex. 8.0 cannot be a subsequent material change of law or fact. 52 Pa. Code §5.571(b).

98. The documents in proposed Ex 8.0 are CCA records and not PAWC business records. These documents are double hearsay and not admissible under any exception to the rule. Anderson. Application of Henderson.

99. Section 3.382(a) of the regulations permits service request evidence in transportation applications only. 52 Pa. Code §3.382(a). Section 3.382(a) is a regulatory exception to the hearsay rule which is not extended to fixed utility applications.

100. The failure to allow PAWC to submit proposed Ex. 8.0 into the record would not be a violation of PAWC's due process rights.

101. Section 1.35(c) states in part, as follows:

(c) *Effect.*

(1) The signature of the person subscribing a document filed with the Commission constitutes a certificate by the individual that:

* * *

(iii) The document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, to the best of the person's knowledge, information and belief formed after reasonable inquiry.

(iv) The document is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a document is signed in violation of this subsection, the presiding officer or the Commission, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include striking the document, dismissal of the proceeding or the imposition of civil penalties under section 3301 of the act (relating to civil penalties for violations).

52 Pa. Code §1.35(c). (*Italics in the original.*)

102. PAWC could not reasonably believe that I gave instructions which would allow any party to introduce the documents in proposed Ex. 8.0 into the record.

103. The proposed exhibit is comprised totally of hearsay documents and inadmissible. The hearsay ruling is entirely consistent with my evaluation on the record of Mr. Johnston's testimony and exhibit to the effect that substantial portions of the "public need" evidence regarding requests for service from out-of-court developers to out-of-court CCA employees was hearsay. Tr. 530-534.

104. The Company should have known what the definition of hearsay was and that it would be applicable to the documents currently labeled Ex. 8.0. Accordingly, I find that PAWC has violated Section 1.35(c)(1)(iii) and that a sanction should be imposed. 52 Pa. Code §1.35(c)(1)-(2).

105. Given the nature of the misrepresentation and the invalidity of the legal arguments, and, in addition to denying the PAWC Motion, a minimal \$100.00 civil penalty would be appropriate. Accordingly, PAWC will be required to pay the penalty within thirty (30) days after entry of the Commission's Opinion and Order in this case.

106. Mr. Campos should have petitioned to reopen the record if he wanted to add testimony to the record. 52 Pa. Code §5.571.

107. Mr. Campos' attempt to explain events which occurred after the September 7 hearing in his briefs deprived the other parties of their right to due process of law by virtue of failing to allow them to cross-examine his testimony.

108. The following portions of his Reply Brief must be stricken:

“There are ulterior motives for these funds that I could not bring out at the hearing.”

Campos Reply Brief at 7.

“Because Coatesville changed what they said they would not, the municipalities have been deceived and possibly outmaneuvered by small town politicians coaxing their neighbors not to file a protest ‘for the good of the City.’”

Id. at 11.

“Most of these municipalities [sic] yearly operating budgets are only a fraction of the City of Coatesville [sic] budget, (who will be the beneficiary of a windfall), such as Sadsbury Township, Valley Township, West Brandywine Township and so forth. In most cases they will incur fire hydrant fees greater than the portion applicable to Coatesville’s equation, geography, density, development etc. considered. They will not benefit from any of sale proceeds.”

Id.

“On October 5, 2000 the Coatesville City council [sic] and the CCA Board of Directors held an [sic] special emergency meeting (public), to vote on approving the Stipulation as now presented to the PUC. Believing that they are too far into the deal the majority voted to approve the Stipulation.”

Id. at 12.

“At that meeting, PAWC President Ross informed the public that the ‘PUC has finally approved the deal.’ Then legal counsel for the CCA read a prepared report that conveniently left out important information causing the elected officials to believe they should approve the Stipulation. Sitting in the audience, I was shocked but not surprised this happened. Then the elected officials were advised that the

results of their process and Application could 'very well bring further litigation both now and in the future.' The only account of this are tape recordings made by me and the City of Coatesville."

Id.

109. CCA's Main Brief opened the door on the issue of the legality of the Stipulation and Amendment. CCA M.B. at 7 and 13.

110. Pennsylvania-American Water Company's Motion To Move PAWC's Exhibit 8.0 Into The Record should be denied.

111. Philadelphia Suburban Water Company's Motion For Sanctions should be granted.

112. The Motion Of Pennsylvania-American Water Company To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company should be denied.

113. The Stipulation Of Settlement Among Pennsylvania-American Water Company, City Of Coatesville And The City Of Coatesville Authority, The Office Of Trial Staff, The Office Of Small Business Advocate And The Office Of Consumer Advocate, filed October 6, 2000, should be approved in part and disapproved in part in conformity with the Initial Decision.

114. The First Amendment [dated October 5, 2000] To The Asset Purchase Agreement For The Acquisition Of The Assets Of The Water System And

Wastewater System Of The City Of Coatesville Authority By Pennsylvania-American Water Company, Dated February 15, 2000, should be disapproved.

115. The Stipulation Of Partial Settlement Between Pennsylvania-American Water Company And Philadelphia Suburban Water Company, filed January 4, 2001, should be approved insofar as it reduces the requested service territory.

ORDER

NOW THEREFORE, IT IS ORDERED:

PROTECTIVE ORDER

1. This Protective Order is issued pursuant to Sections 5.362 and 5.423 of the Commission's Rules of Practice and Procedure, 52 Pa. Code §§5.362 and 5.423, and shall govern the availability and use in these proceedings of all documents or information produced in response to any data or document request, interrogatory, subpoena, deposition, or order of the Presiding Administrative Law Judge ("Presiding Judge") or Commission that is designated in good faith as "Protected Material" by the producing party. It reflects the manner in which "Protected Materials," as that term is defined herein, are to be treated. This Protective Order is not intended to constitute a final resolution of the merits concerning the confidentiality of any of the Protected Materials, nor of any objection to the propriety or scope of a data request.

2. All materials provided subject to the terms of this Protective Order shall be referred to as "Protected Materials." Protected Materials shall include all documents, portions of documents, and/or information that the Producing Party has

determined in good faith must be protected from public disclosure to avoid the potential of commercial injury to the Producing Party. Protected Materials shall be deemed to include additional copies of, and notes and information derived from, Protected Materials. All Protected Materials shall be made available solely for the purpose of these proceedings. Protected Materials obtained pursuant to this Protective Order shall not be used for any purpose, including without limitation, claims, actions, proceedings other than the proceedings covered by this Protective Order, or negotiations, consulting, or any other use outside of this proceeding. Protected Materials shall not include any information or document contained in the public files of the Commission, any State or Federal agency, or any court, except for such information or document filed under seal. Protected Materials shall not include documents or information that becomes known to a party to this proceeding, other than through production pursuant to a protective order or agreement or through a violation of a protective order or agreement.

3. This Protective Order is intended to prevent disclosure of commercially sensitive information such as prices, usage, customer specific information, commercially sensitive marketing plans or strategies, employee information, and any other commercially sensitive facts or data contained in Protected Materials. This Protective Order is not intended, however, to foreclose general statements or conclusions that, although based on such Protected Materials, do not reveal such details, facts, or data.

4. As used in this Protective Order the terms "Producing Party," "Reviewing Party," and "Authorized Representative" shall mean as follows:

a. "Producing Party" shall indicate the party receiving the request, the response to which is deemed Protected Materials.

b. "Reviewing Party" shall include the party propounding the request, the response to which is deemed Protected Materials, and such other party as the Presiding Judge by order makes a Reviewing Party for purposes of reviewing the Protected Materials and who shall be subject to the provisions of this Protective Order.

c. "Authorized Representative" shall include the Reviewing Party's counsel of record in this proceeding and associated attorneys or paralegals, and outside experts as defined in 52 Pa. Code §5.423(c), including economists, statisticians, accountants, consultants, or other persons employed or retained by a Reviewing Party and directly engaged in this proceeding; provided, however, that unless the Producing Party otherwise agrees, an Authorized Representative may not include any person whose duties include the marketing, sale, or operation of competing utility services, or the supervision of any person with such responsibilities. No Authorized Representative shall make use of or disclose any information designated as Protected Material for any purpose other than as permitted by this Protective Order.

5. Access to Protected Materials by a Reviewing Party is permitted only through a Reviewing Party's Authorized Representatives. An Authorized Representative may not disclose Protected Materials to any other person other than another Authorized Representative, or a person who is qualified to be an Authorized Representative, provided that, if the person to whom disclosure is to be made has not previously executed and delivered a copy of the Certificate of Authorized Representative attached to this Protective Order, then such person shall promptly execute a copy of the Certificate of Authorized Representative attached to this Protective Order and cause it to be promptly delivered to counsel for the Producing Party.

6. Prior to receiving a copy of or inspecting any Protected Materials, each Authorized Representative shall first execute the "Certificate of Authorized

Representative" attached to this Protective Order. Further, each executed certificate must be filed with the Presiding Judge, with a copy delivered to counsel for the Producing Party. Each executed certificate shall identify the Reviewing Party, Authorized Representative, his or her firm or affiliation, title, and the date of execution. In the event that any person to whom such Protected Materials are disclosed ceases to be engaged in these proceedings, access to such materials by such person shall be terminated immediately and such person shall promptly return any Protected Materials in his or her possession or control to another Authorized Representative of the Reviewing Party, and if there is no such Authorized Representative, then such person shall treat such Protected Materials in the manner set forth in Section 18 hereof as if the proceedings covered by this Protective Order had been concluded. Any person who executes the certificate attached to this Protective Order shall continue to be bound by the provisions of this Protective Order even if no longer employed by a Reviewing Party.

7. An Authorized Representative of a Reviewing Party may make further copies of Protected Materials for use solely in the proceedings covered by this Protective Order, provided that such copies are stamped "Protected Materials" pursuant to this Protective Order. An Authorized Representative may make notes or derive other information from the Protected Materials, provided that any such notes or other information shall be treated as Protected Materials subject to this Protective Order.

8. Any document subject to this Protective Order may not be produced in a redacted or elided form, unless such redaction or elision is authorized by either: (i) an order of the Presiding Judge or the Commission upholding a validly asserted claim in accordance with section 12 hereof, or (ii) an agreement between the Producing Party and the Reviewing Party in accordance with section 12 hereof.

9. Protected Materials may be reviewed only during the "Reviewing Period," which shall commence upon issuance of this Protective Order, and continue until the conclusion of these proceedings. As used in this paragraph, "conclusion of these proceedings" refers to the exhaustion of available judicial appeals, or the running of the time for making such appeals, as provided by applicable law.

10. All Protected Materials, as well as the Reviewing Party's and its Authorized Representatives' notes or other information regarding or derived therefrom, are to be treated confidentially by the Reviewing Party and its Authorized Representatives, except as permitted and provided by this Protective Order, and are to be made available to the Reviewing Party and its Authorized Representatives solely for the purposes described in this Protective Order. Protected Materials and information derived therefrom or describing the same shall not be placed in the public or general files of a Reviewing Party except in accordance with the provisions of this Protective Order. A Reviewing Party must take all necessary precautions to ensure that Protected Materials (including handwritten notes and analyses made therefrom) are not viewed or taken by any person other than an Authorized Representative of the Reviewing Party.

11. If a Reviewing Party tenders for filing any written testimony, exhibit, brief or other submission that includes, incorporates, or refers to Protected Materials, all portions thereof referring to such materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "CONTAINS PROTECTED MATERIAL -- DO NOT RELEASE" and shall be filed under seal and served under seal only upon such counsel for Reviewing Parties as are authorized to examine and inspect such material. Counsel for the Producing Party shall provide to all parties who request the same a list of those counsel for Authorized Representatives who are entitled to receive

such material. Counsel are admonished to take reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

12. If any Reviewing Party desires to include, utilize, or refer to any Protected Materials in such a manner that might require disclosure of such material, such party shall first notify counsel for the Producing Party of such desire, identifying with particularity each of the Protected Materials and the proposed manner of their use, and shall provide to counsel for the Producing Party, in a sealed envelope bearing the caption "CONTAINS PROTECTED MATERIALS -- DO NOT RELEASE," copies of the Protected Materials in the form they are intended to be used. If the Producing Party is unwilling to waive objection to disclosure of such Protected Materials, the Producing Party shall provide to the Presiding Judge, not later than five (5) days after the receipt of the Reviewing Party's notification, affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials, and a Master Index of Protected Materials. The affidavit shall set forth facts delineating that the information designated as Protected Materials has been maintained in a confidential manner and the precise nature and justification for the commercial injury that would result from the disclosure of such information. The affidavit shall specify the name and corporate position of the person or persons supplying or preparing or assisting in the preparation of the information designated as Protected Materials and the name and corporate position of the person or persons to whom such information has been communicated. The Producing Party shall provide copies of the affidavits and Master Index of Protected Materials to each Reviewing Party. All objections and arguments related to the Protected Materials shall be conducted In camera closed to all parties except the Producing Party and counsel for the Producing Party and such Reviewing Parties and counsel for Reviewing Parties as are authorized to review such Protected Materials. That portion of the hearing transcript which refers to such Protected Materials shall be sealed and subject to this Protective Order.

13. All Protected Materials filed with the Commission, the Presiding Judge, any court of Pennsylvania, the United States, or any other judicial or administrative body in support of or as part of a motion, pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order. Nothing in this Protective Order prohibits the presiding Administrative Law Judges in this proceeding, the Commissioners or the Commissioners' staff members from reviewing Protected Materials subject to this Protective Order.

14. Materials designated as Protected Materials shall continue to be protected pursuant to this Protective Order unless and until, and only to the extent that, the Presiding Judge or the Commission finds that they are not properly subject to protection within the terms of this Protective Order, and the Producing Party has exhausted its opportunities to appeal such determination. If the Presiding Judge denies protected status to any materials designated as Protected Materials, those materials shall nonetheless be subject to the protection afforded by this Protective Order for 10 days from the date of issuance of such decision by the Presiding Judge. If the Producing Party files an interlocutory appeal or requests that the issue be certified to the Commission, the subject materials shall remain protected until the appeal or certification is concluded. Nothing herein waives the rights of any party to seek additional administrative or judicial remedies after the Presiding Judge's decision or Commission action on appeal thereof.

15. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge, the Commission, or the courts. In addition, the Presiding Judge may change this order upon determination that the change is appropriate in the interests of justice or necessary for the orderly conduct of the proceeding.

16. In the event that the Presiding Judge at any time in the course of these proceedings finds sua sponte that all or part of any document or information does not constitute Protected Materials, such materials shall nevertheless be subject to the terms of this Protective Order for 10 days from the date of issuance of the Presiding Judge's decision or the date of issuance of the first Commission order denying an objection filed within 10 days of the date of the Presiding Judge's order. Neither the Producing Party nor the Reviewing Party waives its rights to seek additional judicial or administrative remedies in the event of the Commission's denial of any objection.

17. All notices, applications, responses or other correspondence shall be made in a manner that protects the materials in issue from unauthorized disclosure.

18. Following the conclusion of these proceedings, as that term is defined in section 9 hereof, all Protected Materials provided by any Producing Party pursuant to this Protective Order and any copies reproduced by any Reviewing Party must be returned to counsel for the appropriate Producing Party or destroyed no later than thirty (30) days following receipt by counsel for the Reviewing Party of a written request from the Producing Party. Counsel for the Reviewing Party must provide to counsel for the Producing Party a verified certification that, to the best of his or her knowledge, information, and belief, all Protected Materials, copies of Protected Materials and originals and copies of notes, memoranda, and other documents regarding or derived from the Protected Materials have been disposed of in accordance with the terms of this Protective Order. Nothing in this section shall prohibit counsel for each Reviewing Party from retaining copies of any briefs, application for rehearing, motion, or other document filed with the Presiding Judge, the Commission, or a court, that refers to Protected Materials. or any internal memoranda that refer to Protected Materials; provided that any such materials retained by counsel shall remain subject to the provisions of this Protective Order.

ORDER ON THE MERITS

19. That Pennsylvania-American Water Company's Motion To Move PAWC's Exhibit 8.0 Into The Record is hereby denied.

20. That Philadelphia Suburban Water Company's Motion For Sanctions is hereby granted.

21. That, in accordance with Section 3301 of the Public Utility Code (66 Pa. C.S. §3301) within thirty (30) days of receipt of the Commission's final Opinion and Order, Pennsylvania-American Water Company shall pay a civil penalty in the amount of One Hundred (\$100.00) Dollars by check or money order for violation of Section 1.35(c) of the Commission regulations (52 Pa. Code §1.35(c)). Said check or money order shall be made payable to:

Pennsylvania Public Utility Commission
Fiscal Office
Commonwealth Keystone Building - North
P.O. Box 3265
Harrisburg, PA. 17120

22. That the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Reply Brief Of Ernest E. Campos, Sr. is hereby granted. The following portion of Mr. Campos Reply Brief are hereby stricken:

"There are ulterior motives for these funds that I could not bring out at the hearing."

“Because Coatesville changed what they said they would not, the municipalities have been deceived and possibly outmaneuvered by small town politicians coaxing their neighbors not to file a protest ‘for the good of the City.’”

Id. at 11.

“Most of these municipalities [sic] yearly operating budgets are only a fraction of the City of Coatesville [sic] budget, (who will be the beneficiary of a windfall), such as Sadsbury Township, Valley Township, West Brandywine Township and so forth. In most cases they will incur fire hydrant fees greater than the portion applicable to Coatesville’s equation, geography, density, development etc. considered. They will not benefit from any of sale proceeds.”

Id.

“On October 5, 2000 the Coatesville City council [sic] and the CCA Board of Directors held an [sic] special emergency meeting (public), to vote on approving the Stipulation as now presented to the PUC. Believing that they are too far into the deal the majority voted to approve the Stipulation.”

Id. at 12.

“At that meeting, PAWC President Ross informed the public that the ‘PUC has finally approved the deal.’ Then legal counsel for the CCA read a prepared report that conveniently left out important information causing the elected officials to believe they should approve the Stipulation. Sitting in the audience, I was shocked but not surprised this happened. Then the elected officials were advised that the

results of their process and Application could 'very well bring further litigation both now and in the future.' The only account of this are tape recordings made by me and the City of Coatesville."

Id.

23. That the Motion Of Pennsylvania-American Water Company To Strike Portions Of The Main Brief And Reply Brief Of Philadelphia Suburban Water Company is hereby denied.

24. That the Stipulation Of Settlement Among Pennsylvania-American Water Company, City Of Coatesville And The City Of Coatesville Authority, The Office Of Trial Staff, The Office Of Small Business Advocate And The Office Of Consumer Advocate, filed October 6, 2000, is hereby approved in part and disapproved in part in conformity with the Initial Decision.

25. That the First Amendment [dated October 5, 2000] To The Asset Purchase Agreement For The Acquisition Of The Assets Of The Water System And Wastewater System Of The City Of Coatesville Authority By Pennsylvania-American Water Company, Dated February 15, 2000, is hereby disapproved.

26. That the Stipulation Of Partial Settlement Between Pennsylvania-American Water Company And Philadelphia Suburban Water Company, filed January 4, 2001, is hereby approved insofar as it reduces the requested service territory.

27. That the requested review of the contracts filed on September 11, 2000, at Docket Nos. U-00004550 through U-00004562 is hereby consolidated with the review of Pennsylvania-American Water Company Applications pending as Docket Nos. A-212285F0071 and A-230073F0002 for hearing and decisional purposes.

28 That PAWC Ex. No. 9, which was the Water Service Agreement between Valley Township and City of Coatesville Authority and which was dated March 1990 and was amended in May 1991, is hereby approved as modified by the Initial Decision.

29. That PAWC Ex. No. 10, which was the Sewage Treatment Agreement between Valley Township and City of Coatesville Authority and which was dated January 1992, is hereby approved as modified by the Initial Decision.

30. That PAWC Ex. No. 11, which was the bulk water sales agreement between the Octoraro Water Company and Quarryville Borough, dated May 1957, is hereby approved as modified by the Initial Decision.

31. That PAWC Ex. No. 12, which was a Sewage Treatment Agreement, dated April 1966, among City of Coatesville Authority and Caln Township and its Authority, is hereby approved as modified by the Initial Decision.

32. That PAWC Ex. No. 13, which was a Supplemental Agreement among City of Coatesville Authority, Caln Township and its Authority, dated September 1968, is hereby approved in its entirety.

33. That PAWC Ex. No. 14, which was entitled "Sewage Treatment Agreement #2" among City of Coatesville Authority, Caln Township and its Authority, dated 1971, is hereby approved as modified by the Initial Decision.

34. That PAWC Ex. No. 15, which was a Sewage Treatment Agreement between City of City of Coatesville Authority and West Brandywine Township, dated

June 1994, and an Addendum To Sewage Treatment Agreement, dated September 1995, is hereby approved as modified by the Initial Decision.

35. That PAWC Ex. No. 16, which was a Waste And Wastewater Service Agreement between City of Coatesville Authority and West Sadsbury Township, dated March 1998, is hereby approved as modified by the Initial Decision.

36. That PAWC Ex. No. 17, which was a Sewage Treatment Agreement between City of Coatesville Authority and Sadsbury Township, dated July 1997, and a Protocol and an Addendum To Protocol which were not dated, is hereby approved as modified by the Initial Decision.

37. That PAWC Ex. No. 18, which was an agreement between City of Coatesville Authority and Parkesburg Borough, dated June 1994, and an Agreement between the same parties, dated September 1998, is hereby approved as modified by the Initial Decision.

38. That PAWC Ex. No. 19, which was a Consent and Assignment between Parkesburg Borough and City of Coatesville Authority, dated December 1998, is hereby approved in its entirety.

39. That PAWC Ex. No. 20, which was a Water And Wastewater Service Agreement between East Fallowfield Township and City of Coatesville Authority, dated July 1991, is hereby approved as modified by the Initial Decision.

40. That PAWC Ex. No. 21, which was a Water and Wastewater Service Agreement between East Fallowfield Township and City of Coatesville Authority, dated

July 1991, and contained two amendments to the original agreement, dated December 1992 and March 1993, is hereby approved as modified by the Initial Decision.

41. That PAWC's request to assume and comply with the obligations in the following listed contracts, agreements and commitments is denied:

a. Valley Township

- (1) Water conveyance agreement (1992)
- (2) Sewer conveyance agreement (1992)

b. Caln Township and Caln Authority

- (1) Stipulation from Chester County Court of Common Pleas (1981)

c. East Fallowfield Township

- (1) Water and Wastewater Conveyance and Lease Agreement to CCA For 99 years (1991)
- (2) Water Conveyance Agreement for Mount Carmel Road (1992)

d. United States Veterans Administration Hospital (1938) – Water and Sewer services agreement.

e. Air Liquide America Corporation (1997) – Water main extension and repayment of main extension costs up to \$40,000 and capacity fees of \$10,000 on a monthly basis for ten years.

f. Metropolitan Communications, Inc. (1990) – Lease of portion of North Hill Water Tank site for radio communications tower.

g. Comcast Metrophone (1998) – Lease of portion of Parkesburg Water Tank site for radio communication facilities.

h. Trilogy Development Company (Strasburg Hunt Subdivision) (Includes reimbursement to developer of capacity fees)

- (1) Water and sewer main extension agreement in Valley Township (1992)
- (2) Water and sewer main extension agreement – change size of portion of water main (1993)

42. That the Application of Pennsylvania-American Water Company for Approval of (1) The Transfer, By Sale, of Substantially All of the Water Works Property And Rights of the City of Coatesville Authority Water System to Pennsylvania- American Water Company, and (2) The Rights of Pennsylvania-American Water Company to Begin to Offer or Furnish Water Service to the Public in all of the City of Coatesville, Parkesburg Borough, and South Coatesville Borough, Chester County, Pennsylvania and Portions of Sadsbury Township, Caln Township, East Fallowfield Township, Valley Township, Atglen Borough, West Sadsbury Township, and West Caln Township, Chester County, Pennsylvania and Quarryville Borough, Bart Township, Colerain Township, Eden Township and Sadsbury Township, Lancaster County, Pennsylvania; and (3) Certain Additional Regulatory Approvals at Docket No. A-212285F0071 is hereby approved in part and denied in part as is set forth in more detail below:

a. That a certificate of public convenience be issued granting the following rights:

(1) The Application of Pennsylvania-American Water Company for Approval of The Transfer, By Sale, of Substantially All of the Water Works Property And Rights of the City of Coatesville Authority Water System to Pennsylvania-

American Water Company, is approved subject to the following modifications to the Asset Purchase Agreement:

(a) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 3, Section 3.4(b), second sentence, which read as follows:

The City shall not, at any time, be required to pay charges for public fire hydrants.

is hereby deleted.

(b) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 3, Section 3.4(b), as revised and set forth in the Stipulation and First Amendment which read as follows:

Upon the effective date of the new tariff rates for public fire hydrant service applicable to the City, PAWC shall issue bills to the City for public fire hydrant service and collect amounts owed in accordance with PAWC's effective tariff. The City shall pay those charges for public fire service. In each year that the City makes payments for public fire service, PAWC shall make a contribution equal in amount to the public fire service payments during that year, to the City's Economic Development Fund. PAWC agrees not to seek recovery of the contributions to the City's Economic Development Fund in any future base rate case.

is hereby deleted (underlined sentences only) in part.

(c) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 4, Sections 4.1(g) and 4.2(f) which read as follows:

Regulatory Consents. PAWC shall have obtained the written, final and unappealable approvals, authorizations and consents (including consents for permit transfers) that are required to consummate the transaction contemplated by this Agreement, including, without limitation (i) the approval of the Pennsylvania Public Utility Commission; and, (ii) the approval of every regulatory agency of federal, state or local government that may be required in the opinion of either PAWC or CCA. Provided, however, that consummation of the transactions contemplated by this Agreement is not conditioned upon the approval by the Pennsylvania Public Utility Commission of the covenants set forth in Subsections (b) to (d), inclusive, of Section 3.4 of this Agreement, Subsections (b) to (c), inclusive, of Section 3.5 of this Agreement, and/or Section 3.6 of this Agreement.

is hereby deleted (underlined last sentence only) in part.

(d) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 5, Section 5.1(d) (and any other provision of the Asset Purchase Agreement which contained language similar to the underlined portion of Article 4, Section 4.1(g)) which read as follows:

(d) by either CCA or PAWC, if the Pennsylvania Public Utility Commission does not approve of any of the following matters: (i) the acquisition by purchase of the Assets of the Systems; (ii) the right of PAWC to offer, render, furnish, or supply water and sewer service to the public in the area(s) served, respectively, by the Water System and the Wastewater System; (iii) the right of PAWC to charge the rates that CCA has in effect at Closing; or, (iv) the right and obligation of PAWC to comply with CCA's contracts and agreements consistent with Section 1.5 of this Agreement, provided, however, that consummation of the transactions contemplated by this Agreement is not conditioned upon the approval of the Pennsylvania Public Utility Commission of the covenants set forth in Subsections (b) to (d), inclusive, of Section 3.4 of this

Agreement, Subsections (b) to (c), inclusive, of Section 3.5 of this Agreement, and/or Section 3.6 of this Agreement;

is hereby deleted (underlined portion only) in part.

(2) That the Application of Pennsylvania-American Water Company for Approval of The Rights of Pennsylvania-American Water Company to Begin to Offer or Furnish Water Service to the Public in all of the City of Coatesville, Parkesburg Borough, and South Coatesville Borough, Chester County, Pennsylvania and Portions of Sadsbury Township, Caln Township, East Fallowfield Township, Valley Township, Atglen Borough, West Sadsbury Township, and West Caln Township, Chester County, Pennsylvania and Quarryville Borough, Bart Township, Colerain Township, Eden Township and Sadsbury Township, Lancaster County, Pennsylvania, is approved subject to the following restrictions:

(a) Pennsylvania-American Water Company's authority to render water service shall be limited to service to existing water customers who were or would shortly be connected to the City of Coatesville Authority systems on the date of closing as set forth in the Initial Decision.

(b) Pennsylvania-American Water Company shall prepare within sixty (60) days of the closing date of the Asset Purchase Agreement a map and a metes and bounds description of the new territory as defined by existing water customers who were or would shortly be connected to the City of Coatesville Authority systems and submit those documents to the parties and to the Commission.

b. In all other respects the remainder of the Application is denied.

43. That the Application of Pennsylvania-American Water Company for Approval of (1) the Transfer, by Sale, of Substantially All of the City of Coatesville Authority's Assets, Properties and Rights Related to its Wastewater System to Pennsylvania-American Water Company; and (2) The Right of Pennsylvania-American Water Company to Begin to Offer or Furnish Wastewater Service to the Public in the City of Coatesville and Parkesburg Borough, Chester County, Pennsylvania and Portions of Caln Township, East Fallowfield Township, Valley Township, Sadsbury Township, and West Sadsbury Township, Chester County, Pennsylvania; and (3) Certain Additional Regulatory Approvals at Docket No. A-230073F0002 is hereby approved in part and denied in part as is set forth in more detail below.

a. That a certificate of public convenience be issued granting the following rights:

(1) The Application of Pennsylvania-American Water Company for Approval of the Transfer, by Sale, of Substantially All of the City of Coatesville Authority's Assets, Properties and Rights Related to its Wastewater System to Pennsylvania-American Water Company, is approved subject to the following modifications to the Asset Purchase Agreement:

(a) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 3, Section 3.4(b), second sentence, which read as follows:

The City shall not, at any time, be required to pay charges for public fire hydrants.

is hereby deleted.

(b) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 3, Section 3.4(b), as revised and set forth in the Stipulation and First Amendment which read as follows:

Upon the effective date of the new tariff rates for public fire hydrant service applicable to the City, PAWC shall issue bills to the City for public fire hydrant service and collect amounts owed in accordance with PAWC's effective tariff. The City shall pay those charges for public fire service. In each year that the City makes payments for public fire service, PAWC shall make a contribution equal in amount to the public fire service payments during that year, to the City's Economic Development Fund. PAWC agrees not to seek recovery of the contributions to the City's Economic Development Fund in any future base rate case.

is hereby deleted (underlined sentences only) in part.

(c) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 4, Sections 4.1(g) and 4.2(f) which read as follows:

Regulatory Consents. PAWC shall have obtained the written, final and unappealable approvals, authorizations and consents (including consents for permit transfers) that are required to consummate the transaction contemplated by this Agreement, including, without limitation (i) the approval of the Pennsylvania Public Utility Commission; and, (ii) the approval of every regulatory agency of federal, state or local government that may be required in the opinion of either PAWC or CCA. Provided, however, that consummation of the transactions contemplated by this Agreement is not conditioned upon the approval by the Pennsylvania Public Utility Commission of the covenants set forth in Subsections (b) to (d), inclusive, of Section 3.4 of this Agreement,

Subsections (b) to (c), inclusive, of Section 3.5 of this Agreement, and/or Section 3.6 of this Agreement.

is hereby deleted (underlined last sentence only) in part.

(d) Pursuant to Sections 507 and 508 of the Public Utility Code (66 Pa. C.S. §§507 and 508) Article 5, Section 5.1(d) (and any other provision of the Asset Purchase Agreement which contained language similar to the underlined portion of Article 4, Section 4.1(g)) which read as follows:

(d) by either CCA or PAWC, if the Pennsylvania Public Utility Commission does not approve of any of the following matters: (i) the acquisition by purchase of the Assets of the Systems; (ii) the right of PAWC to offer, render, furnish, or supply water and sewer service to the public in the area(s) served, respectively, by the Water System and the Wastewater System; (iii) the right of PAWC to charge the rates that CCA has in effect at Closing; or, (iv) the right and obligation of PAWC to comply with CCA's contracts and agreements consistent with Section 1.5 of this Agreement, provided, however, that consummation of the transactions contemplated by this Agreement is not conditioned upon the approval of the Pennsylvania Public Utility Commission of the covenants set forth in Subsections (b) to (d), inclusive, of Section 3.4 of this Agreement, Subsections (b) to (c), inclusive, of Section 3.5 of this Agreement, and/or Section 3.6 of this Agreement;

is hereby deleted (underlined portion only) in part.

(2) The Application of Pennsylvania-American Water Company for Approval of The Right of Pennsylvania-American Water Company to Begin to Offer or Furnish Wastewater Service to the Public in the City of Coatesville and Parkesburg Borough, Chester County, Pennsylvania and Portions of Caln Township, East


Fallowfield Township, Valley Township, Sadsbury Township, and West Sadsbury Township, Chester County, Pennsylvania, is approved subject to the following restrictions:

(a) Pennsylvania-American Water Company's authority to render wastewater service shall be limited to service to existing wastewater customers who were or would shortly be connected to the City of Coatesville Authority systems on the date of closing as set forth in the Initial Decision.

(b) Pennsylvania-American Water Company shall prepare within sixty (60) days of the closing date a map and a metes and bounds description of the new territory as defined by existing wastewater customers who were or would shortly be connected to the City of Coatesville Authority systems and submit those documents to the parties and to the Commission.

b. In all other respects the remainder of the Application is denied.

44. That thirty (30) days after the filing of the maps and metes and bounds descriptions required in the above paragraphs, the record at Docket Nos. A-212285F0071, A-230073F0002 and U-00004550 through U-00004562 be closed.


LOUIS G. COCHERES
Administrative Law Judge

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water Company :
for Approval of (1) The Transfer, By Sale, of :
Substantially All of the Water Works Property And :
Rights of the City of Coatesville Authority Water System :
to Pennsylvania- American Water Company, and (2) The :
Rights of Pennsylvania-American Water Company to :
Begin to Offer or Furnish Water Service to the Public in :
all of the City of Coatesville, Parkesburg Borough, and :
South Coatesville Borough, Chester County, :
Pennsylvania and Portions of Sadsbury Township, Caln : Docket No. A-212285F0071
Township, East Fallowfield Township, Valley Township, :
Atglen Borough, West Sadsbury Township, and West :
Caln Township, Chester County, Pennsylvania and :
Quarryville Borough, Bart Township, Colerain :
Township, Eden Township and Sadsbury Township, :
Lancaster County, Pennsylvania; and (3) Certain :
Additional Regulatory Approvals :

Application of Pennsylvania-American Water Company :
for Approval of (1) the Transfer, by Sale, of Substantially :
All of the City of Coatesville Authority's Assets, :
Properties and Rights Related to its Wastewater System :
to Pennsylvania-American Water Company; and (2) The :
Right of Pennsylvania-American Water Company to :
Begin to Offer or Furnish Wastewater Service to the :
Public in the City of Coatesville and Parkesburg : Docket No. A-230073F0002
Borough, Chester County, Pennsylvania and Portions of :
Caln Township, East Fallowfield Township, Valley :
Township, Sadsbury Township, and West Sadsbury :
Township, Chester County, Pennsylvania; and (3) Certain :
Additional Regulatory Approvals :

CERTIFICATE OF AUTHORIZED REPRESENTATIVE

I hereby certify that I have read and am bound by the terms of the Initial Decision and Protective Order, dated January 19, 2001, in the above captioned case.

Signature: _____ Date: _____

Typed/Printed Name: _____

Title: _____

Business Address: _____

Business Telephone: _____

Party Represented: _____

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