



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

A-230073F0002

IN REPLY PLEASE
REFER TO OUR FILE

MARCH 12, 2001

A-212285F0071; A-230073F0002
U-00004550 thru U-00004562

VELMA REDMOND VP
SUSAN D SIMMS ESQUIRE
PENNSYLVANIA AMERICAN WATER
800 HERSHEY PARK DRIVE
PO BOX 888
HERSHEY PA 17033-0888

DOCKETED

MAR 14 2001

Application of Pennsylvania-American Water Company...
A-212285F0071

Application of Pennsylvania-American Water Company...
A-230073F0002

Assumption of Pennsylvania Water Company of Thirteen (13)
Agreements between the City of Coatesville Authority and
Various Municipalities
U-00004550/4562

**DOCUMENT
FOLDER**

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted by the Commission in Public Meeting on March 8, 2001 in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

James J. McNulty
Secretary

Enclosure
Certified Mail
FG

See Attached Listing for Additional Parties of Record

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held March 8, 2001

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
Nora Mead Brownell
Aaron Wilson, Jr.
Terrance J. Fitzpatrick, Dissenting

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

A-212285F0071

DOCKETED
MAR 14 2001

**DOCUMENT
HOLDER**

Application of Pennsylvania-American Water Company for Approval of (1) The Transfer, By Sale, of Substantially All of the City's 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, Render or Furnish

A-230073F0002

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

Assumption of Pennsylvania Water Company of Thirteen (13) Agreements Between the City of Coatesville Authority and Various Municipalities

U-00004550
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U-00004562

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration is the Petition for Reconsideration and/or Clarification (Petition) filed by the Philadelphia Suburban Water Company (PSW) on February 28, 2001, relative to our Opinion and Order entered February 13, 2001, in the above-captioned proceedings. Responses to the Petition were filed by the City of Coatesville Authority (CCA) and by Pennsylvania-American Water Company (PAWC) on March 5, 2001. The City of Coatesville (City) filed a letter in lieu of a Response on March 6, 2001. On March 7, 2001, PSW filed a Reply to the New Matter contained in the Responses of CCA and the City. PAWC and the City responded to PSW's Reply on March 7, 2001.

Background

A History of the Proceedings has been extensively set forth in our February 13, 2001 Order. In summary, this matter concerns our consideration and approval of an Asset Purchase Agreement (Agreement) and the grant of related regulatory approvals for the acquisition of the assets of the former municipal-owned water and wastewater system of CCA. The Agreement was entered into between CCA and PAWC.¹

PSW appeared in this proceeding as a Protestant to the Wastewater Application. PAWC and PSW did, however, reach a Stipulation of Partial Settlement

¹ On February 29, 2000, PAWC filed two (2) 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. 66 Pa. C.S. §1102. One (1) Application sought approval of the transaction for the water system and was docketed at No. A-212285F0071 (Water Application). The other Application sought approval of the transaction for the sewer system and was docketed at No. A-230073F0002 (Wastewater Application)(collectively, Applications). Together the Applications spanned a total of thirteen (13) municipalities in two (2) counties. See February 13, 2001 Order.

(Stipulation No. 2, in this matter) under which PAWC restrictively amended its Water Application consistent with the terms therein.

Discussion

A. PSW's Argument and Standard of Review

Our consideration of the instant Petition will be according to the well-settled principles of *Duick v. PG&W*, 56 Pa. PUC 553 (1982) (*Duick*). PSW seeks reconsideration of that part of our February 13, 2001 Order which addressed the First Amendment to the Agreement. Pursuant to this Amendment, as modified by the inclusion of a requirement that PAWC submit an annual tracking report, we found that the payment of a contribution by PAWC to the City's Economic Development fund, equal to a tariffed rate paid by the City for public fire hydrant service, did not violate any provision of the Public Utility Code (Code), or this Commission's regulations. Relying in substantial part on *Philadelphia Suburban Water v. Pa.PUC*, 427 A.2d 1244 (Pa. Cmwlth. 1981), *appeal dismissed* (1981), and considering the overall benefits to PAWC ratepayers and shareholders, we viewed the use of shareholder funds to consummate the instant transaction as a "below the line" item and not improper pursuant to the Code.

The entirety of PSW's Petition is devoted to our approval of the First Amendment to the Agreement pertaining to fire hydrant service. PSW alleges that certain "public policy" issues warrant that we reconsider our prior Order.

PSW argues that the transaction should not be analyzed in a "fragmented" structure. Rather, the transaction can be analyzed by collapsing the individual steps into the final outcome. (Petition, p. 2). It is here that PSW avers that the transaction is "illusory." PSW highlights the use of the word "pay" as contained in the Brief of the

City to suggest that the parties to the transaction have repeatedly rejected the idea that the City would actually pay for public fire hydrant service. (*Id.*)

Also, PSW suggests that there is an equal protection concern that arises from the prior Order. PSW asserts that “[t]here is no analysis of the impact on ratepayers, as individual customers vis-a-vis each other, or the impact on other utilities that may be reluctant to (or can’t afford to, or find it imprudent to) follow the business model being advanced by PAWC of giving back the compensation paid for service under a perpetual guarantee. (Petition, p. 3).

After a detailed factual recitation, PSW cites the following cases that, it contends, stand for the proposition that “free” public utility service is unreasonably discriminatory, *per se*, and against public policy no matter what form the free service takes or how the free service is established. (Petition, p. 8). PSW relies upon *American Aniline Products, Inc. v. City of Lock Haven*, 288 Pa. 420, 135 A.726 (1927) and *Wayne Sewerage Co. v. Fronefield*, 76 Pa. Superior Ct. 491 (1921). PSW further asserts that *Scranton Elect. Co. v. Sch. Dist. of Borough of Avoca*, 155 Pa. Superior Ct. 270, 37 A.2d 725 (1944) was improperly distinguished. (Petition, p. 9). Notably, PSW cites *Leiper v. Baltimore & Phila. Rail. Co.*, 262 Pa. 328, 105 A.55, for the proposition that the Supreme Court focused on the substance of the transaction rather than on its form. (Petition, p. 10). See *West Penn Power Co. v. Nationwide Mutual Ins. Co.*, 209 Pa. Superior Ct. 509, 228 A.2d 218 (1967) and *Bell Tele. Co. v. Pa. PUC*, 417 A.2d 827 (Pa. Cmwlth. 1980) cited at page 11 of PSW Petition.

Finally, with regard to the public interest considerations, PSW avers that the considerations referenced by the Commission in the February 13, 2001 Order relate to approval of the overall transaction. Thus, according to PSW, the “special covenant” to provide “free” service is not required for the parties to consummate the transaction. Furthermore, PSW asserts that approval of the First Amendment creates bad public

policy by "exposing public utilities and their shareholders to demands for free service at shareholder's expense . . ." (Petition, p. 12).

B. CCA Answer

In its Answer, CCA relies upon *Duick* and *University of Pa. v. Pa. PUC*, 410 A.2d 1217 (Pa. Cmwlth. 1984), to reply that this Commission was faced with a choice of actions on the First Amendment to the Agreement and related issues and resolved the same by action fully explained in the record. (Answer, p. 4).

With regard to the public policy concerns, CCA replies that PSW twists two separate public policy considerations. The first consideration regards the charging and receipt of funds pursuant to a utility's filed tariff. The second consideration regards the use of shareholder funds to make contributions to the City's Economic Development Fund. (Answer, p. 5).

CCA criticizes PSW for, apparently, being willing to admit that when taken separately, each concept is consistent with sound policy. However, PSW contends erroneously that when the concepts are collapsed, or combined, they somehow become contrary to public policy. (Answer, p. 5). CCA notes that "[u]nder PSW's theory, any payment of shareholder funds to a customer (for charitable or other purposes) would violate the Public Utility Code." (*Id.*) (Note omitted).

CCA distinguishes *Wayne v. Fronefield* and *American Aniline Products, Inc.* cited *supra*. CCA points out two distinguishing facts in our February 13, 2001 Order that were present in those cases. First, the City will pay the tariffed rate. Second, no other ratepayer will ever pay the cost of PAWC providing fire hydrant service to the City. (Answer, pp. 8-9).

CCA next responds to the equal protection allegations and violation of Sections 1303 and 1304 of the Public Utility Code, 66 Pa. C.S. §§1303;1304, position advanced by PSW. Finally, CCA considers the public interest and public policy issues raised by PSW. (Answer, pp. 12-13).

CCA suggests that all arguments raised by PSW regarding the public interest and public policy were considered and rejected in the February 13, 2001 Order. CCA further observes that there is no detriment to public policy to be gleaned from our prior Order, as the actions taken by PAWC were voluntary on the part of PAWC and its shareholders. (Answer, p. 13).

C. Disposition

On consideration of the Petition, we shall deny it. We conclude that the Petition fails to meet the threshold standards of *Duick*. Initially, we observe that PSW concedes that there is no significant issue with regard to ratepayers that is involved as a result of this Commission's approval of the First Amendment to the Agreement:

The fact that the free service to the City of Coatesville is being paid for by the shareholders of PAWC may resolve the issue of unfairness to ratepayers, as a group, who are not being asked to pay for this shortfall (although some additional costs may be incurred since the utility becomes more "risky" from an investment standpoint since the utility is not collecting all of its revenues). This resolution is further supported by the "annual tracker mechanism" imposed by the

PUC on PAWC, and also explains the decisions in the cases dealing with gain on the sale of land.

(PSW Petition, p. 3).²

Thus, PSW is left to defend the interests of some unspecified class of persons in its objection to the February 13, 2001 Order on “public policy” grounds.

On review of the cases cited, and arguments presented, we conclude that none of the cases cited in the Petition involve the circumstances involved here. *American Aniline* stands for the proposition that a city operating a legalized monopoly in the nature of water, cannot give undue or unreasonable preference or advantage [free service] or make unfair discrimination among customers any more than a private corporation similarly situated. *Fronefield*, as *American Aniline*, further supports the proposition that under circumstances where patrons relied on an easement that purportedly afforded them the right to discharge effluent into a stream without charge, the court held that as to such public service the company and those using its system were governed by the Public Service Company Law and that the rates paid by such users must be fair, just, equal and without discrimination. Therefore, in *Fronefield*, free use of public service by certain favored persons under any form, *i.e.* deed, contract, ordinance, agreement, or otherwise, was upheld.

Further, *Borough of White Haven*, and *Leiper v. Balt. Ry. Co.*, are cases establishing the primacy of this Commission’s (and predecessor agencies) jurisdiction

² We note here that the innuendo of PSW regarding the “risky” perception of PAWC by the investment community is mere conjecture also.

over the rates of public utilities. The primacy of Commission jurisdiction over the rates of public utilities was an issue and consideration which was addressed in our February 13, 2001 Order and resolved in favor of the Applicants.

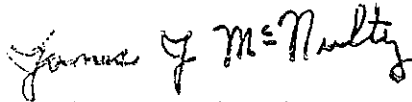
At page 11 of the Petition, PSW asserts that the case cited by the Commission regarding the sale of land is not applicable because it involved only the allocation between the ratepayers and the shareholders. We strongly disagree with PSW. The instant matter is to be distinguished because it involves the treatment of a below-the-line item, after the payment of the lawful tariffed rate.

Conclusion

Based on the foregoing, we find that PSW has not presented any considerations which were overlooked or which otherwise provide a sufficient basis for reconsideration of our February 13, 2001 Order; **THEREFORE,**

IT IS ORDERED: That the Petition for Reconsideration and/or Clarification filed by Philadelphia Suburban Water Company on February 28, 2001, in the above-captioned matter, is denied.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: March 8, 2001

ORDER ENTERED: **MAR 12 2001**

VELMA REDMONT VP
SUSAN D SIMMS ESQUIRE
PENNSYLVANIA AMERICAN WATER
800 HERSHEY PARK DRIVE
PO BOX 888
HERSHEY PA 17033-0888

WILLIAM DAVID SHRADER
PA PUBLIC UTILITY COMMISSION
BUREAU OF FIXED UTILITY SERVICES
PO BOX 3265
HARRISBURG PA 17105

BERNARD A RYAN JR ESQUIRE
CAROL F PENNINGTON ESQUIRE
OFFICE OF SMALL
BUSINESS ADVOCATE
COMMERCE BLDG STE 1102
300 NORTH SECOND STREET
HARRISBURG PA 17101

IRWIN A POPOWSKY ESQUIRE
DIANNE E DUSMAN ESQUIRE
OFFICE OF CONSUMER ADVOCATE
FORUM PLACE
555 WALNUT STREET 5TH FLOOR
HARRISBURG PA 17101-1921

KEVIN MOODY ESQUIRE
DANIEL CLEARFIELD ESQUIRE
WOLF BLOCK SCHORR AND
SOLIS-COHEN LLP
212 LOCUST STREET SUITE 300
HARRISBURG PA 17101

JOHNNIE E SIMMS ESQUIRE
OFFICE OF TRIAL STAFF
PO BOX 3265
KEYSTONE BUILDING 2ND FLOOR
HARRISBURG PA 17105-3265

VINCENT M POMPO SOLICITOR
SADSBURY TOWNSHIP
24 EAST MARKET STREET
BOX 565
WEST CHESTER PA 19381-0565

ERNEST E CAMPOS
803 MERCHANT STREET
PO BOX 495
COATESVILLE PA 19230

WILLIAM H FULTON AICP
PLANNING COMMISSION
GOVT SERVICE CENTER
601 WESTTOWN RD SUITE 270
BOX 2747
WEST CHESTER PA 19380-0990

A W EASTMAN CHAIRMAN
COATESVILLE AREA
PARTNERS FOR PROGRESS
PO BOX 729
COATESVILLE PA 19320

JOHN J GALLAGHER ESQUIRE
LEBOEUF LAMB
GREENE & MACRAE
200 NORTH THIRD STREET 300
PO BOX 12105
HARRISBURG PA 17108-2105

RONALD NAGLE ESQUIRE
KRISTIN S CAMP ESQUIRE
BUCKLEY NAGLE GENTRY
BRION MCGUIRE MORRI
CALN TOWNSHIP
304 NORTH HIGH STREET
WEST CHESTER PA 19380-2688

HELEN J ESBENSHADE ESQUIRE
CONRAD O'BRIEN
GELLMAN & ROHN PC
CITY OF COATESVILLE AUTH
17 WEST GAY ST SUITE 100
WEST CHESTER PA 19380-3090

JOHN S CARNES ESQUIRE
CITY OF COATESVILLE
202 N CHURCH STREET
PO BOX 3449
WEST CHESTER PA 19380

CARL R SHULTZ ESQUIRE
MICHAEL D KLEIN ESQUIRE
LEBOEUF LAMB
GREENE & MACRAE
200 NORTH THIRD STREET 300
PO BOX 12105
HARRISBURG PA 17108-2105

HONORABLE TIM HENNESSEY
26TH LEGISLATIVE DIST
14 EAST SING CAPITOL
HOUSE BOX 202020
HARRISBURG PA 17120-2020

ROGER REIST ESQUIRE
QUARRYVILLE BOROUGH
PO BOX 1552
QUARRYVILLE PA 17608

JOHN MAHONEY ESQUIRE
CRAWFORD WILSON
RYAN & AQUILNICK
EAST FALLOWFIELD TOWNSHIP
220 WEST GAY STREET
WEST CHESTER PA 19380

ALAN JARVIS ESQUIRE
VALLEY TOWNSHIP
744 EAST LINCOLN HIGHWAY
COATESVILLE PA 19320

JAMES NORTON III PRESIDENT
PARKESBURG BOROUGH
329 WEST FIRST AVENUE
PARKESBURG PA 19365

WILLIAM KEEN JR ESQUIRE
WEST SADSBURY TOWNSHIP
1 BONDSVILLE ROAD
DOWNINGTON PA 19335

ALAN P NOVAK SOLICITOR
BOROUGH OF S COATESVILLE
17 WEST GAY ST SUITE 100
WEST CHESTER PA 19380

CRAIG KALMEJIAN SOLICITOR
ATGLEN BOROUGH
PO BOX 565
WEST CHESTER PA 19380

KEEN KEEN & GOOD
WEST CALN TOWNSHIP SOLICITOR
1 BONDSVILLE ROAD
DOWINGTOWN PA 19335

KENELM L SHIRK III SOLICITOR
BART TOWNSHIP
K L SHIRK LAW OFFICES
115 S STATE STREET
EPHRATA PA 17522

WILLIAM W CAMPBELL SOLICITOR
COLERAIN TOWNSHIP
303 WEST 4TH STREET
QUARRYVILLE PA 17566

JANICE L LONGER SOLICITOR
EDEN TOWNSHIP
36 EAST KING STREET
LANCASTER PA 17605

JOHN S HALSTED SOLICITOR
CHESTER COUNTY
PO BOX 2748
2 N HIGH ST SUITE 7
WEST CHESTER PA 19380

JOHN ESPENSHADE SOLICITOR
LANCASTER COUNTY
ONE PENN SQUARE
LANCASTER PA 17602