COMMONWEALTH OF PENNSYLVANIA

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February 19, 2003

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

DOCUMENT

ORIGINAL

Re: Cindy Parks
v.
Pennsylvania-American Water Company
Docket No. C-00015377

Richard T. Minutello
v.
Pennsylvania-American Water Company
Docket No. C-20028177

Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket No. C-20028361

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Reply Brief of the Office of Consumer Advocate in the above-captioned proceeding. Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

Dianne E. Dusman
Senior Assistant Consumer Advocate

Enclosures
cc: Hon. Larry Gesoff, ALJ (via Federal Express)
All parties of record
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Cindy Parks, Richard Minutello, and Irwin A. Popowsky, Consumer Advocate	:	
v.	:	Docket Nos. C-00015337, C-20028177 and C-20028361
Pennsylvania-American Water Company	:	

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REPLY BRIEF OF THE
OFFICE OF CONSUMER ADVOCATE

DOCUMENT

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I. INTRODUCTION

The Complainants have met their burden of proving that the community of Mount Pleasant Township needs access to public water and that the Pennsylvania-American Water Company ("PAWC") should be directed to provide it. PAWC has not effectively rebutted the material facts presented nor has it offered any legal argument or principle that would support dismissal of the three Formal Complaints that seek public water utility service to Mount Pleasant Township.

PAWC has failed to meet its obligation as a regulated public utility to extend service where needed within its franchise service territory despite the substantial statutory and case law that requires PAWC to meet the overwhelming and compelling public needs of the residents of Mount Pleasant Township. Throughout this proceeding, PAWC has failed to recognize the public need and burden that residents of Mount Pleasant Township face daily with regard to their water supply. PAWC did not once cite in its Main Brief to any portion of the two hundred and thirty-six pages of transcript developed during the two hearings held in the Mount Pleasant Township Volunteer Fire Hall. Instead, PAWC's Main Brief serves only to disregard the real issue: its continued failure to meet its obligation to service. PAWC's interpretation of the Public Utility Commission ("PUC" or "Commission") main extension regulations and the Company's main extension tariffs cannot be reconciled with the Commission's express intent that the main extension formula set a minimum not a maximum level of investment.

PAWC callously disregards the needs of a community thirsting for water that has to rely on a "bucket brigade" to put out fires in the absence of public hydrants. Mount Pleasant Township residents have considerable water quality problems, have insufficient quantity of

water, despite drastic conservation methods, and suffer severe economic detriment as a result of their lack of access to PAWC's mains. PAWC has failed to acknowledge the poor living conditions endured by many of the 1,250 families within Mount Pleasant Township. This equates to more than 3,000 fellow Pennsylvanians who limit toilet flushes and showers, spend exorbitant amounts of money for hauled water, cannot enjoy simple pleasures such as flower gardens and pets due to water shortages and, worst of all, some of whom have watched firefighters run out of water while fire engulfs and destroys their property.

The Office of Consumer Advocate ("OCA") has determined a reasonable manner in which PAWC should supply service to a significant portion of Mount Pleasant Township that would be economic under the Company's tariff rules and should be provided without customers being required to contribute to the construction costs. The OCA has extensively investigated this matter by surveying the residents of Mount Pleasant Township, attending multiple public meetings, sending mailings and being available to respond to the questions and concerns of the residents. The OCA has conservatively estimated the number of customers who would become customers of PAWC and determined a project footprint that would meet the needs of most of the Mount Pleasant Township residents without the Company incurring financial harm. Furthermore, given many residents' reasonable reliance to their detriment on PAWC's assertions that they would extend their mains into Mount Pleasant Township, the OCA submits that the Company should be required to extend their mains as articulated in OCA Exhibits TLF-1A and TLF-2A.

PAWC's arguments in its Main Brief are without merit and should be rejected outright. PAWC's myopic view of this matter should not remain an obstacle to the residents of Mount

Pleasant Township receiving the public water and fire service they desperately need.

The OCA submits this Reply Brief to address certain arguments raised by PAWC in its Main Brief. Many of the points raised in this Reply Brief have already been addressed in more detail in the OCA's Main Brief. In order to avoid rearguing all such points, the OCA will frequently reference the relevant sections of the OCA Main Brief.

II. REPLY ARGUMENT

A. Introduction.

In filing the Formal Complaint and participating in this consolidated complaint proceeding, the OCA is fulfilling its statutory duty to represent consumers whose interests are affected by the actions of this utility. 71 P.S. §309-1, *et seq*. The OCA has not, either in pleadings or through its evidence, collaterally attacked the PUC regulation by arguing that it is *prima facie* unreasonable as applied in all circumstances. The OCA is litigating the instant case and the instant case only. The OCA has argued, however, as applied in the instant matter, the PUC regulation and PAWC tariff:

1. Must be read in light of the plain language of Section 1501 of the Public Utility Code, 66 Pa.C.S. §1501, as interpreted by the appellate courts (OCA M.B. at 9-13);

2. Establish a minimum not a maximum level of investment by the utility for main extension projects, clearly leaving open the possibility that contributions by customers need not be mandated (OCA M.B. at 15-19).

3. Must be applied in a manner that is fair to the present applicants, taking into account factual changes since the promulgation of the regulation and inconsistencies between the regulation and the tariff (OCA M.B. at 31-47).

The regulation and the tariff as applied by PAWC would result in the residents of Mount Pleasant Township, which is within PAWC's franchise service territory, never receiving the service that they desperately need and PAWC never having to meet its obligation to serve the residents and businesses in this portion of its franchise service territory. This result would certainly not be lawful, pursuant to decades of public utility law relevant to a regulated utility's "obligation to serve" both in profitable areas and those that may not be immediately profitable.

Assuming *arguendo* that the OCA's primary positions are rejected, the PUC should exercise its power to order PAWC to extend service, the language of the regulation and tariff notwithstanding, to further its primary objective which is first and foremost to protect the interests of the public. Case law and Commission precedent support the proposition that a utility can be required by the Commission to do more than the utility believes applicable regulations and its tariff require. OCA M.B. at 13-15.

B. The OCA's Positions Are Not Inconsistent With Prior PUC Orders Relevant To the Main Extension Tariff And Regulation.

Lacking the ability to rebut the evidence of substantial public need or to otherwise meaningfully justify its actions, PAWC portrays this matter as some sort of ongoing "feud" with the OCA. The Company argues that the OCA "stubbornly refuses" to accept what is fact, *i.e.*, that the Commission rejected its position twice, once in the course of a Formal Complaint case filed against PAWC's first "break-even" analysis tariff filing and a second time in promulgating the main extension regulation itself. PAWC Brief at 2, 5-9. According to the Company, the OCA has now sought out an opportunity in the Parks Formal Complaint proceeding to, once again, try on a "case-by-case basis" to convince the Commission that the regulation is wrong and

the OCA is right. *See id.*

These representations are far from accurate. The OCA has not proposed in the context of this Formal Complaint case a wholesale revision to this utility's policies and practices in the course of its day-to-day business with applicants for service. The PUC has spoken on this general issue through the rulemaking and through its Order deciding Popowsky v. Pennsylvania-American Water Co., Docket No. R-943155C0001 (June 9, 1997), 1997 Pa.PUC LEXIS 143. But there are four things worth noting in response to the Company's critique of the OCA's approach.

First, the OCA filed a Petition for Review at the Commonwealth Court from the Final Order promulgating the rulemaking. In its Order quashing the appeal, the Commonwealth Court determined that a final order promulgating a regulation does not fall within the meaning of "adjudication" pursuant to the Administrative Law, 2 Pa. C.S. §101, which reads as follows:

> Any final order, decree, decision, determination, or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

The Court went on to comment as follows:

> We do not view the promulgation of the regulations herein as a determination or ruling by the PUC which affects either party's property rights. Most specifically, there is no appeal from a regulation unless the regulation itself is self-executing because there is no harm done to the litigant. . . . There has been no specific harm alleged here.

Popowsky v. Pa. P.U.C., Docket No. 2983 C.S. 1996 (Sept. 8, 1997)(attached hereto in Appendix A). Thus, the Commonwealth Court clearly left open the possibility that the regulation could be challenged as applied to a particular main extension case.

Second, PAWC espoused a position in the OCA's 1997 Complaint proceeding which

supports a "case-by-case" analysis in main extension controversies. In its Final Order, the Commission accepted the ALJ's Recommended Decision as "amply supported by substantial and competent evidence of record" and denied the OCA's Exceptions. Order at 11 (Order attached in Appendix A).[1] One of the questions presented in the case that was answered by the ALJ follows:

> Should CIAC Be Waived For Verified Health Emergencies?. . .
>
> In its main brief, the OTS argued that an exception should be made to require PAWC to provide a main extension without CIAC to serve applicants whose existing wells have become polluted to the point where the wells are not useful for any domestic purpose . . .
>
> The Company responded by noting that the Commission had considered such contingencies in the rule making process and had promulgated the final regulation without the requested exception. **PAWC asserted that, if a wide-spread problem should occur, it should be considered on a case-by-case basis.** . . .

R.D. at 22 (references omitted; emphasis added)(attached in Appendix A). The ALJ agreed with the Company and rejected the OTS proposal. *Id.* Thus, even PAWC recognized in the context of that proceeding that case-by-case determinations in unusual circumstances may still need to be made, despite the promulgation of the regulation and a generally applicable tariff.

Third, PAWC quotes the Commission's Order stating that the purpose of the rulemaking was "to create a fair, reasonable and predictable economic standard to address this regulatory problem that will eliminate uncertainty and *greatly reduce litigation* in this area." 27 Pa. Bull. 799 at 801 (emphasis added). Thus, the Commission recognized that however an economic standard may be stated, litigation may still be necessary in unusual cases, such as the instant case.

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[1] This Final Order was also appealed, but was dismissed as moot, because by the time the appeal was scheduled for argument, the tariff rule had been modified and the Court determined that there was no issue "capable of repetition yet evading review." Popowsky v. Pa. P.U.C., Docket No. 1829 C.D. 1997, Order of March 9, 1998 (attached in Appendix A).

Currently, the OCA is aware of five complaint cases that are pending before the PUC pertaining to main extension disputes. In the early 1990's, before the regulation, dozens of cases were filed. This indicates that the regulation has, to some extent, accomplished its purpose - but controversies such as the instant case that require resolution through the Commission's complaint process will never be totally eliminated.

Finally, evidence of record demonstrates that PAWC has received a total of $76,399,000 in "Contributions in Aid of Construction" as of its September 30, 2002 Earnings Disclosure Report. OCA Cross-Ex. Exh. 1, Sch. A, l. 14. From the sheer magnitude of the CIAC collected we can infer that, as a general rule, PAWC has calculated CIAC, has demanded that amount and has received it from many applicants for service. The OCA has not challenged every application of the PAWC tariff rule; indeed, sometimes CIAC may be called for, as Ms. Kraus noted. Tr. 422-423. The OCA has participated in this proceeding, however, to seek a resolution where an impasse has been reached, in part, due to the way in which the Company applies its tariff rule. Ample precedent, including appellate decisions and Commission orders, support a litigant's right to challenge a regulation or tariff, as applied in a particular case.

Nevertheless, the OCA would agree that if the Commission were to find that PAWC's position in this egregious case is somehow permitted or required by the regulation, then the OCA contends that the regulations must be found to be violative of Pennsylvania statutory and appellate case law and cannot continue to stand.

C. The Company's Insistence That CIAC Must Be Paid Is Contrary To The Commission's Express Intent.

The OCA does not disagree with the Company's representation of the main extension formula, as set forth in its Brief. PAWC Brief at 19-20. The Company's statement, however, that the $6,200 the formula yields is the total PAWC may be required to invest is simply wrong. PAWC completely ignores the language expressing the clear intent of the Commission that the formula within the regulation is to result in a minimum not a maximum level of investment. OCA M.B. at 16-19. The Commission expressly rejected the comments of the Independent Regulatory Review Commission staff that would have required that customers pay anything in excess of the Company's minimum investment. Re Line Extension, 27 Pa. Bull 799 at 802.

The fact that PAWC has ignored this language of the Commission's Order is not surprising because that language completely undercuts the Company's continued insistence that applicants for service *must* pay anything in excess of $6,200 in every case.[2] The OCA would also note that PAWC's comparison of the $6,200 per customer to PAWC's investment in existing facilities to serve its existing customers ($2,309) should be rejected out of hand. PAWC Brief at 20, fn.10. It should be obvious that the investment in existing facilities is represented by dollars every year since as far back as 1872[3] and thus represents investment per customer over a period of time in excess of one hundred thirty (130) years. The $2,309 average investment per customer

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[2] PAWC also appears to ignore the statement by Ms. Kraus to the effect that the formula in the regulation establishes a minimum, not a maximum level of investment, which was offered by Ms. Kraus as a reason why the Commission did not necessarily fail to accept the OCA's fundamental position in the rulemaking. PAWC Brief at 8, *referencing* Tr. 417.

[3] PAWC's Annual Depreciation Study submitted to the Commission December 4, 2002, shows *e.g.* $68,177 invested in Dunsmore #7 in 1872 (Page III-211); $337,380.02 invested in the Elmhurst Reservoir in 1889 (III-205); and $120,073 invested in the Williams Bridge Reservoir in 1892 (III-209).

is thus tantamount to an average of dollar values over that period. That figure is not comparable to the $6,200 that results from the formula which consists only of 2003 dollars.

PAWC's argument that the OCA's "exception" to the general rule as PAWC sees it would consume the rule is alarmist and unfounded. PAWC Brief at 9. The fact that PAWC collects nearly $76 million in CIAC each year puts this whole issue in perspective. Formal Complaints are filed due to main extension disputes in very few cases. The OCA intervenes in only a few of the filed cases. The suggestion that if an "exception" is made in this case the same exception would have to be made in every case, whether litigation ensues or not, is meritless.

D. Reply To PAWC Legal Argument.

1. Introduction.

PAWC begins its argument by referring to Paragraph 6 of the ALJ's Prehearing Order which states that the Complainants must show by a preponderance of the evidence that the Respondent has violated the Public Utility Code or a regulation or an Order of this Commission." PAWC continues that "none of the Complainants even allege that PAWC 'has violated the Public Utility Code or a regulation or an Order of this Commission.'" PAWC Brief at 27. While the Formal Complaints filed by the *pro se* complainants may not make a specific reference to Section 1501 of the Code, the OCA's Formal Complaint most certainly does so. Formal Complaint at ¶3.D. As Section 1501 is the Public Utility Code section that underlies the Commission regulations, the OCA has repeatedly argued that PAWC is also in violation of the Commission's regulations. This portion of the Company's argument is totally unfounded.

2. Complainants Have Met The Burden Of Showing That The PAWC Tariff Is Unreasonable As Applied.

The OCA agrees with the Company that commission-approved tariff provisions are *prima facie* reasonable. PAWC Brief at 28. Through the substantial evidence of the residents of Mount Pleasant Township and the OCA's expert witnesses, however, the Formal Complainants have met the burden of showing that the tariff is unreasonable as applied in this case. Through selective quotations from some appellate cases, PAWC suggests that there is no Commission authority for a "tariff waiver." PAWC Brief at 29. As any public utility lawyer is aware, company petitions to the Commission for permission to vary from the terms of a regulation or a tariff are routine. The notion that the Commission has the power and authority to approve tariffs, but not to authorize variance from them is contradicted by references to such instances in some of the very cases that PAWC cites. For example, in Pennsylvania Electric Co. v. Pa. P.U.C., 663 A.2d 81 (Pa. Commw. 1995), the Court "discern[ed] limited recognition, under Pennsylvania case law, of the Commission's power to grant a waiver under certain circumstances." *Id.* at 284. The Court went on to state as follows:

> Although we did not specifically discuss waiver in Brockway, we noted that "it is well-established that in the absence of an exception by the Commission, a public utility may not charge any rate for services, other than that lawfully tariffed."

Id. According to Black's Law Dictionary, the phrase "*prima facie*" means "at first sight; on the first appearance; on the face of it; . . . presumably"[4] and the Company's tariff is just that: *prima facie* reasonable. As the cases cited by the OCA state, tariff rules are not inflexible guides for adjudicating consumer complaints and are always subject to a complainant's right to show that

[4] BLACK'S LAW DICTIONARY, Fifth Edition at 1071.

the rule is unreasonable in its application to a particular situation. OCA M.B. at 14-15. The Company's argument that it cannot be required, even by Commission Order, to vary from the terms of its tariff is patently unsupportable.[5]

3. The PUC Has The Power To Waive Regulations, In Whole or In Part.

The OCA can also agree with the Company's argument that regulations promulgated pursuant to 66 Pa.C.S. §501(b) have the "force and effect" of law. PAWC Brief at 29-30. Its argument that the Commission cannot permit a utility to vary from the terms of a regulation, however, is as weak as its argument that it cannot waive a tariff provision. Requests for waivers or exceptions to Commission regulations are such a routine part of utility practice that the Rules of Administrative Practice and Procedure have a specific provision addressing them. 52 Pa. Code §1.91 (entitled "Applications for waiver of formal requirements"). The Commission Order promulgating the regulation at issue, in fact, recognized that waivers can be requested and granted, when it stated as follows:

> . . . [A] mandatory customer contribution amount would serve no useful purpose since it would create a situation where a utility which desires to fund more of a given line extension than is contemplated by the formula must *come before the Commission and ask for a waiver of the rule*. . . . [C]hanging the minimum requirement to a hard and fast rule would mean that companies wishing to be more generous *would have to seek a waiver of the rule* and in our judgment, make this regulation unnecessarily burdensome and inflexible. . .

Re Line Extensions, 27 Pa. Bull. 799 at 802 (emphasis added). Thus, in the course of promulgating the rule that PAWC seeks strict adherence to, the Commission itself recognized

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[5] The Company's staunch insistence that it must adhere strictly to the letter of its tariff is also contradicted by the testimony of its own witness, Mr. Diskin, who admitted that the Company's actions concerning bona fide applicants, refunds, and overhead costs are not always consistent with it's tariff, even without a specific Commission order permitting the Company to waive or vary from certain terms. *See* Tr. 345-349.

that waivers of the rules might be sought. The only utility order that PAWC cites (PAWC Brief at 30-31) was one in which the Commission opted to issue a policy statement rather than a regulation; thus, the statement concerning regulations is nothing but dictum.[6] Again, the power of the Commission to promulgate rules would necessarily imply the power to permit variations from them in compelling circumstances, such as the instant case.

Moreover, even the Company's own witness admitted under cross-examination by the OCA that PAWC's tariff is, in certain respects, at variance with the specific provisions of the regulations and there has been no specific PUC Order approving these variations.[7] *See, e.g.* Tr. 338-339 (regulation does not permit the use of the "weighted long-term debt costs as determined in the company's last approved general rate increase"); Tr. 341 (regulation uses the phrase "may be required" while the tariff mandates payment); Tr. 345 (definition of bona fide applicant for service differs); Tr. 346-347 (regulation does not mention overhead costs, while tariff states that overhead costs shall be included). As noted by Mr. Diskin, each of those three factors, *i.e.*, use of a higher debt cost, higher expense amount and lower number of customers, would drive a higher CIAC amount. The Company simply wants to have it both ways; in other words, to vary from the precise language of the regulation when to do so works to its financial benefit -- but to

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[6] *See* PAWC Brief at 30-31, citing Statement of Policy on Expanded Interconnection For Intrastate Special Access, Docket No. M-00920376 (February 11, 1993), 1993 PaPUC LEXIS 5.

[7] While PAWC may attempt to rely upon the fact that these changes were submitted as part of a rate filing and approved along with other rate and rule changes (Tr. 341), no base rate order ever specifically addressed whether such variations from the definition in the regulations were appropriate. In the only rate order that ever addressed the main extension regulations at all, the Commission agreed with the Company that the OCA's issues relative to the legality of the main extension rules were"better placed in the pending rulemaking proceeding" and that "the rate investigation is designed to establish, if any, new rates, and not to revise the rates that are already in place." Pa. P.U.C. v. Pennsylvania-American Water Company, 82 PaPUC 381, 430 (1994).

adhere to it staunchly when it would not.

4. The OCA's Position Would Not Necessarily Require Departures From The Provisions of the Commission's Regulations Which Are Subject to Interpretation.

PAWC proclaims that the OCA's position "is built upon an entire matrix of proposed modifications that run counter to the letter and the spirit of the Commission's line extension regulations." PAWC Brief at 32. As noted earlier in this Reply Brief, the OCA proposes no such modifications. The OCA submits, to the contrary, that its proposals are far more in line with what the Commission's intent when it promulgated the regulations than is PAWC's application of it to the Mount Pleasant Township applicants.

It is worth repeating that the Commission expressly intended the regulation to establish a minimum, not a maximum Company investment per customer - a point that PAWC cannot explain away. OCA M.B. at 16-18. It is also worth asking, however, whether the Mount Pleasant Township project is really the type of project that the PUC intended its regulation and resulting tariffs to apply to at all. As argued in Main Brief, the "match" between the Mount Pleasant Township project and the legislative objectives in passing the PennVest statute is so close, it simply cannot be disregarded. OCA M.B. at 43-44, *citing* 35 P.S. §751.2. Service to Mount Pleasant Township through funding by PennVest would more economically serve the area which has been adversely affected economically for many years by substandard water and inadequate supply. Even PAWC witness Lucas suggested that the Company views potential PennVest projects differently than those to which the main extension tariff is ordinarily applied. Tr. 48-49. Yet, PAWC inexplicably refuses to "tap" this source of public taxpayer-supplied

funding -- which for a single year totaled approximately $1.1 billion for water projects[8]-- in order to install the infrastructure which would bring an end to the needless suffering of the Mount Pleasant Township residents and enhance public safety by providing public fire hydrant service.

This is not a case of a single customer who builds a mountain top home and then demands service from the nearest water utility. This is an entire community in the midst of the PAWC service territory – indeed surrounded by communities that receive PAWC service – that is desperate for water service. A fair interpretation and application of the Commission's regulation, as set forth by the OCA, would permit this community to receive public water service without CIAC.

5. The Only Probative Value Of Record Concerning The Appropriate Number of Customers To Use For Purposes Of Applying The Main Extension Formula Is That Offered By The Complainants.

In its Main Brief, PAWC consistently argues that the number of customers who will actually take service from the project is not known, PAWC M.B. at 18, and, therefore, the project should not be done. PAWC further argues that the OCA's extrapolation of its survey results to produce a more accurate number of customers for the entire project footprint has no statistical basis or empirical evidence. *Id.* at 19. As such, PAWC argues, the OCA's customer count does not fit squarely within the Commission regulation's definition of Bona Fide Service Applicant. *Id.* PAWC, therefore, refuses to extend its mains into Mount Pleasant Township as the OCA has recommended in this proceeding. PAWC's arguments are without merit and should be rejected.

As detailed in the OCA's Main Brief, the OCA's customer number is based on an extensive investigation that included, *inter alia*, field inspections, a survey sent to every Mount

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[8] Tr. 414-415; OCA Exh. 2S (excerpt of the PennVest 2001-2002 Annual Report).

Pleasant Township resident, a more focused follow-up survey, attendance at multiple public meetings, providing residents with access to a toll-free number to ask questions and additional mailings. OCA M.B. at 34. Yet, PAWC did nothing to determine *its* estimate of the number of residents that would become customers if the project were constructed as the OCA recommends. PAWC only attacks the OCA's figures as "speculative." In fact, PAWC witness Lucas testified that the Company does not send out surveys, provide publicity or make available a toll-free number to determine a specific customer number when there is no mandatory tap-in ordinance that definitively determines how many people will become customers. Tr. 291-293. Furthermore, Mr. Lucas testified that, in some instances, the Company "may not ever have a complete definite number" of customers in advance. Tr. 288. Nor is Mr. Lucas aware of any Commission regulation that requires knowing the exact number of customers in advance. Tr. 288.

PAWC should not be allowed to attack the customer number the OCA has provided in this case after conducting an extensive investigation to determine those numbers when the Company has taken no action on its own to determine the number nor has it identified any requirement that a specific number is required. This is particularly true in light of Mr. Lucas' admission that 600 households would be served within a project footprint that is smaller than the project the OCA recommends be constructed, as a start. As Mr. Lucas testified:

Q. Was that project footprint that was being discussed at that time smaller than what is currently being proposed by the OCA in this proceeding?

A. Yes.

Q. Would as many as 600 customers have fit into that project footprint that was being discussed at that time?

A. I don't recall the exact number that was in that project footprint at that particular point in time. I'm guessing it wasn't quite 600, but it was somewhere in that area.

Q. Would you accept subject to check that at least on two occasions that evening you said that there could be 600 people in the project footprint?

A. Yes.

Tr. 301-302; *see also* OCA M.B. at 36-37. As such, PAWC should not now be allowed to refute the OCA's customer number which indicates that there will be 568 customers within the larger project footprint currently being proposed.

PAWC also attacks the OCA's reasonable extrapolation of the survey results to more accurately determine a total customer number. The extrapolation made by Ms. Kraus was reasonable and statistically sound to determine a total number of residents who would become customers throughout the entire project footprint in light of the high percentage of responses received. As Ms. Kraus testified, "based on this large percentage of responses (76%), it is reasonable to project that the small portion of customers from whom no responses were received would have responded 'yes' or 'no' at the same percentage as those who did respond." OCA M.B. at 36, *quoting*, OCA St. 2A at 5. PAWC argues that "it would appear that a party's failure to respond to the OCA's Questionnaire is more likely evidence of his or her lack of interest in obtaining a public water supply," yet the Company provides no evidentiary support for such a statement.

Ms. Kraus' extrapolation is based on sound statistical principles. The OCA's survey is a valid study of a significant portion of a specific group with the object of drawing conclusions

about the larger group. The survey is no different than surveys or polls done during political elections, except that those results are based on a minute percentage of eligible voters and these results are based on a 76% response rate. As Ms. Kraus testified, her extrapolation is confirmed by the above-quoted testimony of PAWC witness Lucas who accepted subject to check during cross-examination that a smaller project footprint could have as many as 600 potential customers. OCA M.B. at 37; *citing*, Tr. 301-302. Therefore, the OCA's extrapolation of such a high percentage of survey responses is statistically sound and forms a reasonable basis upon which the OCA's recommendations in this proceeding can be based. In fact, given the history of this matter in Mount Pleasant Township, the total customer number will increase if PAWC is required to extend its mains as the OCA recommends, as many residents may not be aware of the details of the OCA's recommendation or would want to become customers once they realize the project will go forward.[9]

PAWC also relies on the definition of Bona Fide Service Applicant in Section 65.21 of the Commission's regulations to argue that the OCA's customer number is unreliable because the exact names and locations of the customers cannot be attached to each of the proposed customers. PAWC M.B. at 19. This argument is also without merit and should be rejected, as the OCA provided a list to PAWC of the specific customer names and addresses that comprise the customer number during discovery. While the OCA recognizes that an exact match was not provided for each and every one of the 568 customers, the OCA's responses to discovery did

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[9] As such, PAWC's assertion in its Main Brief that it is a "virtual certainty" that the actual customer count is less than the OCA assumes, PAWC M.B. at 10, is wholly without merit and should be rejected. It is far more likely that the OCA's customer count is under-stated. This is also confirmed by PAWC's recognition that additional customers may decide to attach directly to the mains after the project is completed. PAWC M.B. at 21.

provide such a match for a substantial majority of those customers and noted that the other remaining customer names and information were not available.

PAWC's argument based on the definition of Bona Fide Service Applicant in the Commission's regulations should also be rejected because of the significant potential for growth in the Mount Pleasant Township area in the future. For example, State Senator J. Barry Stout testified that the area is "poised for growth in the foreseeable future." Tr. 83-84. Senator Stout further testified:

> If there is infrastructure in place, this growth will occur. This would be a win-win situation for both the American Water Company and for the residents. I strongly urge both parties revisit, renegotiate and resolve the differences for the best of all concerned.
>
> A number of people probably saw yesterday's Pittsburgh newspaper that announced that the so-called Findlay connector, the southern beltway, is going to be under construction next year. This is just a few miles north of [Mount Pleasant Township].
>
> It will connect the airport down to Route 22 near the interchange of Route 22, and the proposed line that bring the -- connects to the southern belt to the Mon-Fayette Expressway which would be a beltway around the south of Pittsburgh, and its going to have a major economic growth and development of this portion of Washington County, and there is going to be an unmet need to have water available to the residents of this area.

Tr. 84.

State Representative Victor Lescovitz also testified to the potential for economic growth in the region. Tr. 57; *see also*, Bevec Exh. No. 1 ("Washington County continues to develop and grow"). Township Supervisor Larry Grimm testified that "it's no secret that the growth is coming from Pittsburgh in this direction." Tr. 118; *see also*, Township Exh. No. 1 (Crosscreek Region Comprehensive Plan). Many residents of Mount Pleasant Township also noted the

potential for future growth that exists in Mount Pleasant Township. Tr. 233.

Finally, the OCA notes that our customer number does not include everyone in Mount Pleasant Township who responded to our survey that they need access to public water. The OCA customer number is limited to those people who responded as such *and* are in the project footprint articulated in TLF Exh. 1A and 2A. The OCA regrets that it was not able to propose a project footprint that would make public water accessible to everyone in Mount Pleasant Township who needs its. For this reason as well, however, its number is an understatement of the customers who would ultimately want service in the Township. Therefore, the OCA's customer number is conservative, reasonable and a valid starting point based on the entire investigation in this case.

PAWC has provided no legitimate reason to dispute the use of the OCA's customer number for purposes of the "break-even" analysis. Therefore, the OCA's customer number should be accepted in this matter and PAWC should be required to extend its mains into Mount Pleasant Township as the OCA recommends in this proceeding.

6. The OCA's Proposal to Substitute The PennVest Rate For The Weighted Long Term Debt Cost Determined In The Last Base Rate Proceeding Is Consistent With The Language Of The Regulation.

As discussed in Main Brief, the language within the regulation concerning "debt cost" is somewhat ambiguous. OCA M.B. at 45-46. Clearly, the phrase "additional annual cost of debt associated with financing the line based upon the current debt ratio and weighted long-term debt cost for that utility" (52 Pa. Code §65.1) cannot rationally be applied to the situation where low-interest taxpayer-supplied funds are used to construct infrastructure. The definition, first written in 1993 when the regulation was initially proposed, could not have been intended to apply to

such a scenario because, as Ms. Kraus testified, "[a]t the time the Commission approved the regulations related to main extensions, PennVest loans had not been sought by PAWC for mains projects . . .." OCA St. 2A at 15; Tr. 413.

There are a number of indications that in promulgating the regulation, the PUC focused on the additional costs that would be incurred to the utility in the period prior to inclusion of the new plant in rate base as of the conclusion of the next base rate proceeding. Clearly, at that juncture, the costs of the plant would be included in rates and shared by the customers overall. OCA St. 1S at 8. Thus, the Commission intended the formula to include the additional or incremental costs associated with the specific line required to serve the new customers. For example, "annual line extension costs" are defined as those "*additional* annual operating and maintenance costs, debt costs and depreciation charges associated with the construction, operation and maintenance of the line extension." As has been noted, the definition of "debt cost" uses the phrase "*additional* annual cost of debt *associated with the line* based upon the *current* debt ratio and weighted long-term debt cost rate." Likewise, depreciation charges are also to be the *additional* depreciation costs associated with the specific line extension. 52 Pa. Code §65.1. The regulation is geared toward the use of the incremental costs to the company of constructing the line in the period before it can be placed in rate base.[10]

This is partially why the Company's argument that the weighted average PennVest

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[10] PAWC argues that its position on the cost of debt is "consistent with the Commission's overall approach of using 'reasonably-developed company averages" in the investment formula. . . " citing 27 Pa. Bull. 801 (Note 3). Really, Note 3 reads as follows: "implementation of this economic test may require the use of reasonably-developed company averages and/or expense allocation; in other words, we will not require companies to determine customer-specific operating and maintenance expenses." Thus, the Commission clearly did not rule out using a specific debt cost associated with a specific line as the OCA proposes in the instant case.

interest rate over the life of the loan would have to be used must be rejected. The introductory PennVest rate applies for the first five years and then increases for years 6 through 20, as PAWC describes. PAWC Brief at 37. For the last decade and a half, PAWC has filed for base rate increase cases no less frequently than every two years. Long before the increase in the PennVest interest rate in year 6, it is likely that the plant would be in rate base, the PennVest funding would be included in capital structure, and PAWC would be earning a return on the new plant. OCA St. 2S at 8.

There is no "sleight of hand" in the OCA's position. It is based upon the language of the Commission regulation, is straightforward and fair to the customers and would work no detriment on PAWC. PAWC's alarmist assertions that "the financial consequences . . would grow geometrically" (PAWC Brief at 39) are simply unsubstantiated.

Mr. Diskin's assertions that the ratemaking process would have to be modified are equally unsubstantiated, as fully set forth in the OCA's Main Brief. OCA M.B. at 45-50. The Company's arguments based upon that testimony do not hold up, either. PAWC argues that "[b]ecause the low PennVest interest rates 'targeted' to specific projects would have to be removed from the weighted average debt cost calculated for all other projects, the non-PennVest funded projects would carry a correspondingly higher debt component . . . " PAWC Brief at 40. This simply cannot be the case because, currently, the Company uses the weighted average cost of debt as of the last rate case – such that the debt cost it uses for all other projects would remain the same and would not reflect new PennVest funding. It should also be noted that even if PAWC began to use its *current* long-term debt cost which is what the regulation actually specifies, the impact of adding new PennVest debt would be minuscule if even noticeable. As

the evidence shows, of $1.5 billion of total capitalization, PennVest debt accounts for only about $35 million, a little over 2%, as of Sept. 30, 2002. OCA Cross-Ex. Exh. 1, Sch. E and 6 (Sch. Of Debt).

PAWC's assertions that OCA is attempting to somehow profiteer by using the low-interest funds twice (PAWC Brief at 41) is absurd. If the PennVest rate is not used for purposes of calculating CIAC yet PennVest does fund the project, PAWC is the profiteer. Neither the applicants for service nor the existing ratepayers would benefit from this low-interest taxpayer funding until the conclusion of the next base rate proceeding. All that Mr. Diskin's Exhibits 3.3 and 3.4 show is that when the cost of capital (due to the inclusion of the lower-cost PennVest loan) is less, the overall return is less than it would otherwise be. To say that because the Company then "under recovers" because of the OCA's "double-dip" (PAWC Brief at 43) is ridiculous. To make this argument, PAWC has impeached the testimony of its own witness Diskin, who agreed that PennVest funding benefits everyone and, when PennVest funds projects like Mount Pleasant Township, there are no losers. Tr. 355, 357. When Mr. Diskin stated that he could not identify a single dollar that PAWC would not collect that it is entitled to collect under the OCA's proposal, he revealed without doubt the illusory nature of the Company's argument.

Ms. Kraus' point about the long-term effect of PennVest-funded projects bears repeating. As she noted, the plant funded by PennVest will be included in the Company's rate base for many years after the PennVest loan is fully repaid. OCA St. 1S at 9-10. After that point, all else constant, PAWC will be earning a return on that property at a higher overall rate of return for another seventy-two years. *Id.* This is not an "under-recovery" scenario, short-term or long-

term. Moreover, neither the Company in brief nor any Company witness has explained why, if PAWC is so concerned about constructing plant that would not be in rate base until the conclusion of the next case, it would not use its PennVest surcharge tariff to collect the debt service payments dollar-for-dollar over the life of the loan, rather than opt for delayed rate base treatment. OCA M.B. at 50.

7. PAWC's Argument That Mount Pleasant Township Rejected A Public-Private Partnership Is Without Merit Because A Public-Private Partnership Was Never Proposed To Mount Pleasant Township Officials.

In its Main Brief, PAWC argues that Mount Pleasant Township has rejected a "public-private partnership" that would facilitate the introduction of water service. PAWC M.B. at 44-49. PAWC also argues that "to a very large extent, these [main extension] requests are resolved amicably and fairly by a public-private partnership between the Company and the municipal and/or county government involved." *Id.* at 45. PAWC further argues that the regional water problems facing Pennsylvania are "too large, and the burdens – financial and otherwise – are too great to be shouldered entirely by water utilities." *Id.* PAWC claims that it is not unreasonable to expect a municipality to share some of the burden of bringing water service to its residents either by adopting a mandatory tap-in ordinance or underwriting a specific number of customers. *Id.* at 45-47.

PAWC adds that Mount Pleasant Township's "unwillingness to share any part of the burden of solving its regional water supply problem has a telling effect in this case." *Id.* at 47. However, PAWC's assertions on this matter are patently unsubstantiated. There is no evidence in this record that supports in any manner any efforts by the Company to develop such a "partnership" with the Township officials. There is not one iota of evidence in the record that

indicates that such an attempt was made by the Company. To the contrary, PAWC made public statements that the project would be done without such participation. *See*, OCA M.B. at 52-55. As such, PAWC's arguments that a "public-private partnership" should be used to provide water service to Mount Pleasant Township is yet another attempt to rationalize the Company's continued failure to meet its obligation to serve.

It was PAWC, not the Township, that made the assertions before 250 Mount Pleasant Township residents that the Company was going to extend its mains to meet the substantial and compelling public needs; the residents reasonably relied upon to their detriment. OCA M.B. at 50-58. Therefore, it should be PAWC, and not the Township, that should be required to construct the mains as it asserted. What PAWC here calls a "public-private partnership" is no more than the Company's continued insistence that it will not pay more than management maintains it is required to pay under its interpretation of its main extension tariff. A true "partnership" would require some element of compromise from the Company to make up the difference between what the minimum is that PAWC is already required to pay under the regulations and what PAWC estimates to be the cost of the project. Here, however, PAWC refuses to pay a single dollar more than what it insists is the maximum it is required to pay, contrary to the Commission's express intent when it promulgated the regulations.

PAWC ignores the fact that it is the utility, not the Township, that has the obligation to serve customers under the law. The OCA has provided extensive legal authority supporting the concept that PAWC, as a public utility, has an obligation to extend service where needed within its franchise territory. OCA M.B. at 9-18. Existing statutory and case law requires PAWC to extend its mains into Mount Pleasant Township as recommended by the OCA in this proceeding

to meet the substantial and compelling public needs of the residents. Such requirements exist even when such extensions may not be immediately profitable. Moreover, even if PAWC had proposed a "public-private partnership" to Township officials, such a partnership is not necessary because the OCA has demonstrated that the project is "economic" pursuant to the Commission's regulations.

Yet another "red herring" is the Company's argument that the municipality should contribute to the construction costs because the municipality "may have contributed to the regional water supply problems and, in the end, will reap substantial benefits from a public water supply." PAWC M.B. at 45. A review of PAWC's support for this assertion reveals that it claims three things contributed to the regional water supply problem: malfunctioning septic systems, the rural nature of the area and the history of underground coal mining. *Id.* at 45; *citing*, PAWC St. 1.1 at 11. None of these reasons support denying the residents of Mount Pleasant Township access to public water or unnecessarily burdening them with the costs of construction. Furthermore, none of these reasons relate to the drought conditions that have dried up the wells, and other conditions, that have forced residents to haul in water and undergo drastic conservation measures.[11] No support in the case law or Commission orders exists for the premise that the cause of a deteriorated water supply, even if the utility could prove that cause (which it certainly has not on this record) should impact a utility's obligation to serve or the amount of investment that is justified.

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[11] PAWC also terms as a "public-private partnership" a Township's adopting a mandatory tap-in ordinance or underwriting a specific number of residents becoming customers. *Id.* at 46-47. There is substantial evidence of record that indicates a mandatory tap-in ordinance or underwriting a specific number of residents becoming customers is not possible. Gallagher St. 1-S at 2-4; Tr. 60-61, 104, 190-191.

PAWC further argues that residents should take out a home equity loan to pay the customer contribution they are requesting. PAWC M.B. at 48. It is not logistically or practically feasible for nearly 600 customers of varying incomes and levels of creditworthiness who have already been economically burdened for years by the lack of water to do so. Also, this would not constitute a "public-private partnership." The Commission's rules that require PAWC to discuss alternative funding sources with applicants when applying the main extension formula does not envision this being done for groups of nearly 600 customers, as in this proceeding.

As such, the OCA submits that PAWC's argument that the Township rejected a "public-private partnership" that would facilitate the introduction of water service has no basis in fact, is without merit and should be rejected. PAWC should be required to extend its mains in to Mount Pleasant Township as the OCA recommends in this proceeding, particularly in light of the substantial and compelling public need that is present and the financing options that will result in no financial harm to the Company.

8. Mr. Fought's Proposed Project Scope And Plant Is Appropriate For CIAC Purposes.

a. Introduction.

PAWC argues that the OCA has understated the cost of the project needed to meet the needs of Mount Pleasant Township. PAWC Brief at 49-59. The OCA has, however, fully set forth its position in Main Brief, demonstrating that pursuant to "least -cost" principles and other PUC precedent, it is simply not reasonable to include the cost of a storage tank and the cost of twelve-inch mains to serve a group of less than 600 customers. OCA M.B. at 37-41. PAWC's estimated cost is thus overstated by over $1 million.

The cases cited by PAWC are unpersuasive and, in some instances, plainly unsupportive of its argument. In Barna v. Western Pennsylvania Water Co., 53 PaPUC 500 (1979), the Complainant had signed an extension deposit agreement through which he agreed to cover the cost of a six-inch main that had been constructed before he filed his complaint. He later sought a refund based upon the fact that another customer had sought service and that it would have been less expensive for him to receive service via a right of way in a different direction. The fact that no agreements are yet in place in the instant case - much less actually carried out -- is clearly a distinguishing factor. In Radoff v. The Langhorne Spring Water Co., 47 PaPUC 690 (1976) ("Radoff"), the record seems to have raised more questions than were answered and no final decision was reached; the selected quote that PAWC relies on from that case is nothing more than *dictum*. *See* PAWC Brief at 51. The respondent's offer to extend service to the Complainant with an advance of $2,500 - $2,800 had been based upon the estimated cost of an 8-inch 643-foot distribution line. *Id.* at 70. The Commission therein stated:

> . . .[A]ccording to a statement offered by respondent's counsel for the record, respondent, as of the date of the hearing, was furnishing water service to a certain customer from its distribution main facilities which apparently had been extended approximately 400 feet towards complainant's premises. The record fails to disclose under what terms and conditions respondent extended water service to this customer, or the reason, under the circumstances, for respondent's main extension proposal to complainant based on a main extension of 643 feet. Without such information on the record the Commission is unable to make a final finding and determination in this matter.

The Commission made no order on the merits; rather, the order was for further hearings only. *Id.* at 72. The case stands for nothing more than the principle that decisions should not be made on incomplete evidentiary records.

In addition, in Petition of Blair, Docket No. P-860184 (Jan. 14, 1987)("Blair"), the

Commission ordered a six-inch main to be installed rather than the one-inch private service line the petitioners sought, based upon the Company's tariff disallowing construction of private residential service lines. PAWC Brief at 52. Again, for another reason, this case does not govern the outcome of the instant case. The OCA is not proposing to substitute its expert's judgment for that of Company management; rather, the OCA is challenging the appropriateness of using an estimate which includes plant sized larger than is necessary to serve the applicants for purposes of the "break-even" analysis. This principle was recognized but not applied by the ALJ in Township of Collier v. PAWC, Docket No. C-00934978, Initial Decision, August 18, 1995, *citing* Joseph Erdos v. Western Pennsylvania Water Co., Docket No. C-00861021 (Mar. 17, 1987)(requiring the utility to install an 8-inch main consistent with its policy, but to calculate the customer contribution as if a 6-inch main had been installed) at 21-22. The Blair case decides a different issue than is presented in the instant case, as was also true in Flaherty v. Western Pennsylvania Water Co., Docket No. C-850157 (Nov. 13, 1985)("Flaherty"). In both Flaherty and Hershey Church of the Nazarene v. Keystone Water Co., Docket No. C-844227 (May 13, 1985), the Complainants had the alternative to drill a well in lieu of public water service – also, clearly not an option for the residents of Mount Pleasant Township, many of whom testified that even drilling their wells deeper had proved a futile effort.

No established cost allocation principle would justify imposing the cost of serving future customers, even in part, on the present applicants for service. As discussed below, the Company has offered no valid engineering standard that supports its argument that the tank and twelve-inch mains throughout the OCA's proposed project footprint are required to provide the customers safe and adequate service pursuant to Section 1501 of the Public Utility Code, 66 Pa.C.S. §1501.

b. The Evidence Supports That A Storage Tank Is Not Necessary To Provide Reasonable and Adequate Service to Mount Pleasant Township.

As noted above, contrary to PAWC's assertions that there is no legal or factual basis for excluding the cost of the tank from this project, several cases support excluding unnecessary plant from the base estimate used for calculating any customer contribution. OCA M.B. at 38-43, citing Polson v. Citizens Water Company of Washington, Pa, 41 PaPUC 594 at 595 (1964); Gabauer v. Western Pennsylvania Water Co., 67 PaPUC 448 (1988); *see also* Erdos v Western Pennsylvania Water Co., Docket No. C-00861021 (March 17, 1987). As also discussed above, the cases PAWC cites do not support its position that it should be able to include the cost of all plant, even where sized to serve many more customers than those currently needing service in Mount Pleasant, in the base cost of construction used in the "break-even" analysis.

The evidence referenced by PAWC do not support this position either. PAWC Brief at 53. The fact that Mr. Fought testified that a tank would be "desirable" and that there are valid reasons why it could be installed is not inconsistent with his position that the costs of such a tank should not be included for purposes of calculating the "break-even" point. PAWC's argument that Mr. Fought is motivated only to make the project "fit" within the main extension rules is unfounded. The OCA and its witnesses are motivated to see that PAWC's main extension rules are applied in a reasonable and equitable manner.

Despite PAWC's assertion that Mr. Fought had no "credible response" to Mr. Hankey's testimony about the need for the tank, he pointed out in surrebuttal that the Company's position, would indicate such a need for the currently-served Chartiers customers as well. OCA St. 1S at 6. He also pointed out that a discovery response provided in the initial phase of the case, before

the tank was included in the Company's proposed project, PAWC witness Lucas stated that the "Washington system [without the tank] has sufficient distribution storage to meet fire flows and other contingencies." *Id.* at App. A. The Company also argues that the tank is needed to avoid air pressure and "water hammer" that could occur following main breaks and refilling of the lines. PAWC Brief at 55. Mr. Fought pointed out that such problems can be avoided without a tank:

> A properly designed Combination Air Valve (having all of the operating features of both an Air and Vacuum Valve and an Air Release Valve) located near the entrance to the tank site would handle air problems in a manner similar to a tank. Any other places needing air valves would need the valves with or without the installation of the water storage tank.

OCA St. 1S at 6. While PAWC dismisses this testimony as a "terse assertion" not accompanied by any empirical evidence, risk assessment or identification of existing facilities" (PAWC Brief at 55), the Company omits to state that Mr. Fought's expert opinion on this point was not challenged by any Company witness nor on cross-examination.

PAWC argues that "the applicable legal standard . . .does not require a utility to design facilities with no margin for safety." PAWC Brief at 56-57. If PAWC is contending that the DEP design standards include "no margin for safety," there is a far broader problem to address throughout the Commonwealth, because these are the applicable design standards for all public water systems (not just for public utilities). Even without Mr. Fought's surrebuttal testimony, Mr. Hankey's answers on cross-examination disprove PAWC's argument. Mr. Hankey put any dispute on this point to rest when he testified that the Gretna Booster Station already installed to serve the 233 Chartiers customers has the capacity sufficient to provide a fire flow of 750 gallons per minute and peak hourly demand for both sets of customers (Chartiers and Mount Pleasant).

Tr. 329-330. The 750 gallons per minute fire flow standard, Mr. Hankey later testified, is the "accepted Company standard" – not a regulatory or ISO standard which is 500 gallons per minute. Tr. 330-331. The "instantaneous demand" that Mr. Hankey, which he defined as "something that occurs for a short period of time that is a large draw on a system" does not appear in any regulation setting design criteria for water systems, as he admitted. Tr. 327-328. In other words, the system currently in place is *more than adequate* to serve the needs of both Chartiers and Mount Pleasant pursuant to all regulatory and ISO standards; yet, PAWC continues to insist that storage tank at a cost of $850,000 must be included to provide adequate service. PAWC St. 1.1 at 4. If PAWC chooses to set its design criteria higher than those set forth in relevant regulations and ISO standards, nothing prohibits it from doing so – so long as investments are prudent. If would be inequitable, however, to permit the Company to charge applicants for service for such items.

c. The Cost of Eight-Inch Mains Should Be Used To Determine Whether CIAC Should Be Permitted Because They Would Be Sufficient To Provide Adequate Service Under Regulatory Design Criteria.

Again, PAWC begins its argument against the OCA's adjustment to the cost of construction due to oversized mains based upon what "PAWC's design criteria" call for. PAWC Brief at 57. As has been pointed out above, the OCA is not contending that PAWC may not establish design criteria that require more than those established by the DEP; however, if they voluntarily do so, the additional expense should not be on the applicants for service.

As for the main size, PAWC contends that "there is no valid basis for using the minimum flow requirement," as testified by Mr. Fought. PAWC Brief at 57. The valid basis lies in what is

considers 500 gpm to be adequate where houses are more than 100 feet apart. *Id.* Mr. Hankey testified to this point on cross-examination by the OCA. Tr. 331. He further testified that in the areas that Mr. Fought recommended eight-inch mains would be sufficient, the houses are spaced over one hundred feet apart, except for one possible area on Fort Cherry Road. Tr. 331-332.

PAWC also argues that when sizing mains, the PUC expects the Company to take into account the prospect of future growth. PAWC Brief at 58-59, *citing* Collier Township v. Pennsylvania-American Water Co., Docket No. C-00934978 (March 18, 1996). It is paradoxical that PAWC would reference the testimony about future growth, taking that into account for the purpose of sizing mains for the projects, but give the same probative evidence no weight when assessing an appropriate customer number to use.

Moreover, PAWC's argument that the holding of DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374, 453 A.2d 595 (1982) has some relevance to this discussion is meritless. The case stands for the principle that customers may sue utilities in "trespass and assumpsit" in Common Pleas Court for negligence in maintaining hydrants without first referring the matter to the PUC pursuant to the primary jurisdiction doctrine. *Id.* at 376-377. The rationale for this holding was that such a controversy was not one in which "the general reasonableness, adequacy or sufficiency of the public utility's service" was called into question. *Id.* at 378. Rather, the issue was one of whether the utility employees who had worked on the hydrant were negligent, a question within the "prescan authority" of the courts.[12] The case did not hold that "a public utility may be held liable for direct and consequential fire damage causally related to insufficient

[12] In a concurring opinion, Justice Roberts even suggested that by approving a "limitation of liability" tariff, the PUC had already resolved the negligence claim. *Id.* at 379.

flows and pressures in its mains,"as PAWC asserts. PAWC Brief at 58.

In summary, PAWC's arguments relative to the cost of plant necessary to serve the OCA's proposed project footprint should be rejected. The base construction cost used to determine CIAC should be reduced by $1,067,350, from $6,290,499 to $5,223,149.

III. CONCLUSION

For all of the foregoing reasons and those set forth in the OCA Main Brief, the Formal Complaints should be sustained and PAWC should be required to provide service to Mount Pleasant Township, as proposed by the OCA in this proceeding.

Respectfully submitted,

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Dated: February 19, 2003
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SECRETARY'S BUREAU

Cindy Parks, *et al.*

v.

Pennsylvania-American Water Company

Docket No. C-00015337, *et al.*

Appendix A

Unpublished Orders and Decisions

Cindy Parks, *et al.*

v.

Pennsylvania-American Water Company

Docket No. C-00015337, *et al.*

Recommended Decision

Docket No. R-00943155C0001

Popowsky v. PAWC

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

ISSUED: January 24, 1997

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CONSUMER ADVOCATE

IN REPLY PLEASE
REFER TO OUR FILE
R-00943155C0001

VELMA REDMOND ESQUIRE
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HERSHEY PA 17033-0333

Irwin A. Popowsky, Consumer Advocate v. Pennsylvania-American Water Company

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Recommended Decision of Administrative Law Judge Louis G. Cocheres. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, within ten (10) days of the date that the exceptions are due.

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 clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)". Any reference to specific sections of the Administrative Law Judge's Recommended Decision shall include the page number(s) of the cited section of the decision.

Very truly yours,

law
Encls.
Certified Mail
Receipt Requested

John G. Alford
Secretary

cc: ALJ COCHERES/ OFFICE OF ALJ/ OSA/ BFUS-TARIFF/ OTS/ OCA/ LAW/ PIO/ CEEP/ AUDITS/ OUR FILE/ NEW FILE/ CHAIRMAN/ COMMISSIONERS / BFUS.
See attached list
for additional
parties of record.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Irwin A. Popowsky Consumer Advocate	:	Docket No. R-00943155C0001
v.	:	
Pennsylvania-American Water Company	:	

RECOMMENDED DECISION

Before
Louis G. Cocheres
Administrative Law Judge

HISTORY OF THE PROCEEDING

On July 6, 1994, Pennsylvania-American Water Company (PAWC or Company) filed Supplement No. 28 to Tariff Water-Pa. P.U.C. No. 1 (Supplement 28) to become effective on September 4, 1994.[1] In Supplement 28, the Company proposed changes to Rule 27 of its tariff, which set forth the terms and conditions for the installation of main extensions to serve new customers. These revisions were designed to conform PAWC's Rule 27 to the terms of proposed regulations that the Public Utility Commission (Commission) had issued on July 1, 1994. Proposed Rulemaking Re Line Extensions -- 52 Pa. Code Chapter 66, Order, entered July 1, 1994, Docket No. L-930089. (July 1 Order) See, PAWC Ex. E. The principal change proposed in Supplement 28 was to increase the

[1]The Initial Brief of Pennsylvania-American Water Company provided a detailed procedural history which I have edited and adopted.

Company's investment in main extensions from approximately $1,400 to $10,800 for each bona fide applicant for water service.

On August 18, 1994, the Office of Consumer Advocate (OCA) filed a complaint against Supplement 28, which alleged that the Company's proposed Rule 27 violated legal standards articulated in the Commission's Policy Statement concerning main extensions issued on August 20, 1992. 52 Pa. Code §69.171. Specifically, the OCA averred that the proposed Rule 27 would permit PAWC "to request contributions from prospective residential customers in many more instances than would occur were [the Company] held to the standard of 'material financial hardship' or 'undue burden' on existing customers." OCA Complaint, ¶6 at p. 3. On August 30, 1994, PAWC filed an answer that denied the material averments of the OCA's complaint.

On September 2, 1994, the Commission entered an Order permitting Supplement 28[2] to become effective on September 4, 1994, subject to the OCA's complaint. Accordingly, the Commission

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[2] When Supplement 28 was filed, the Company's base rate proceeding at Docket No. R-00932670 was pending before the Commission. In that case, the Company had proposed an entirely new tariff, which had been suspended by the operation of Section 1308 (d) of the Public Utility Code. On July 26, 1994, the Commission entered an Order in the Company's rate case approving the proposed tariff subject to modifications in the base rates initially set forth therein. Therefore, upon approval of PAWC's compliance filing, the Company's Tariff Water-Pa. P.U.C. No. 1 was superseded by its Tariff Water-Pa. P.U.C. No. 4. (The intervening numbers 2 and 3 had been used for other purposes.) As a consequence, Supplement 28 was redesignated Supplement No. 4 to PAWC's Tariff Water-Pa. P.U.C. No. 4, and that reference currently appears on the relevant pages of the Company's existing tariff. See PAWC St. 1, Ex. A.

assigned the OCA's complaint to the Office of Administrative Law Judge.

On September 28, 1994, the Office of Small Business Advocate (OSBA) filed a notice of intervention. On October 14, 1994, the Office of Trial Staff (OTS) filed a notice of appearance.

Prehearing conferences were held before the undersigned on October 19 and December 22, 1994 and on March 25, 1995. On April 4, 1995, I issued a Prehearing Order that approved an agreement among the parties to hold the proceeding in abeyance until the Commission issued a final order in Proposed Rulemaking Re Line Extensions -- 52 Pa. Code Chapter 66, at Docket No. L-00930089. I further directed the OCA to provide notice, within 15 days of the entry of such an order, as to whether it intended to continue the litigation of this case.

On December 28, 1995, the Commission entered an Order adopting final regulations on main extensions by water utilities. Final Regulations Re: Line Extensions -- 52 Pa. Code §§ 65.21, 65.22, Order, entered December 28, 1995, at Docket No. L-00930089. (December 28 Order) See, PAWC Ex. F. By letter dated January 4, 1996, the OCA notified me and the parties of its decision to continue litigating this case and proposed that a telephonic conference be held to discuss scheduling matters. Telephonic conferences were held on February 9 and 15, 1996. Following those discussions, on February 21, 1996, I issued Prehearing Order No. 2, assigning the burden of proof to the Company and establishing a litigation schedule. Pursuant to that schedule, direct testimony

was served by PAWC and the OCA on March 27 and April 24, 1996, respectively, and the Company's rebuttal testimony was served on May 3, 1996.

On April 27, 1996, this Commission gave notice that the final regulations were being withdrawn from review by the Independent Regulatory Review Commission. 26 *Pa. Bulletin* 2061 (1996).

An evidentiary hearing was held in Harrisburg on May 10, 1996, at which witnesses for the Company and the OCA were presented and cross-examined. PAWC, OCA and OTS filed main and reply briefs.

By letter dated June 14, 1996, PAWC submitted the Pennsylvania-American Water Company's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996. By letter dated June 20, 1996, the OCA submitted the Office Of Consumer Advocate's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996. By letter dated June 28, 1996, the OTS submitted the Office Of Trial Staff's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996.

On October 28, 1996, this Commission returned the revised final regulations to the review process. On November 21, 1996, the Independent Regulatory Review Commission approved the revised regulations in final form. At the time of writing this decision, the revised regulations had not been approved by the Office of Attorney General nor had they been published in the *Pennsylvania Bulletin*. Thus, they had not become effective.

ISSUES

A. Legal Standards

Before discussing the issues, arguments and merits of the parties' positions, a few comments are necessary to focus the context of this case: Although the tariff at issue in this case was put forth as an interim measure to comply with a proposed regulation, the central legal issue is not whether the tariff meets the standard set forth in the proposed regulation. The answer to that question is obvious and irrelevant. The answer is "yes" the tariff is designed to meet most[3] of the proposed regulation standards. However, since a "proposed" regulation technically does not exist as a legal requirement, it is of little importance that the tariff complies with a non-binding proposal.

Using the same format as the previous analysis, it is equally unimportant that the tariff be measured against the standard in the revised final regulation which was recently approved by the Independent Regulatory Review Commission. The reasons for not making that comparison include: First, the tariff was designed to be interim and not intended to comply with the final rule. Second, the final regulation has not yet completed the regulatory review process and, consequently, is not yet in effect. Accordingly, I conclude that, if the Supplement does not meet the

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[3]The Company used an "overall depreciation rate" in its calculation. The proposed regulation called for "annual book depreciation expenses associated with the line extension." Obviously, the tariff does not match this portion of the proposal. However, as I noted, this discrepancy is not particularly important to the critical legal issue in the case.

about-to-be-adopted standard, no negative inference should be drawn.

All of which brings this Commission and the parties to the central issue of this case which is: Does Supplement 28 meet the legal standards for assessing costs of main extensions to prospective customers? The parties provide the Commission with a complete range of positions: In the proverbial nutshell, the OCA argues that Supplement 28 is not generous enough to prospective applicants. The Company argues that the supplement is reasonable. The OTS argues that the supplement is too generous to those same prospective customers. Oddly enough, all three[4] cite the same cases as the controlling precedents.

The parties recognize, and the Commission[5] and I agree, that the leading cases are Sherman v. Public Service Commission, 90 Pa. Superior Ct. 523 (1927) and Ridley Township v. Pennsylvania Public Utility Commission, 172 Pa. Superior Ct. 472, 94 A.2d 168

[4]The OSBA monitored this proceeding. It did not actively participate in the litigation or briefing stages of this case.

[5]See, Proposed Rulemaking Re line Extensions -- 52 Pa. Code Chapter 66, Order, entered July 1, 1994, at Docket No. L-930089 (Slip Op. at 3) and Final Rulemaking Re Line Extensions -- 52 Pa. Code §§65.21, 65.22, Order, entered December 28, 1995, at Docket No. L-930089 (Slip Op. at 1). PAWC Ex. E and F.

(1953).[6] In Sherman the Court set forth the following oft quoted guidance:

> We are not to be understood as holding that the extension of service of a public utility is dependent on the profit which may reasonably be expected therefrom; in proper cases such extension may be ordered though the immediate result of the expansion may entail financial loss to the company; but the company should not be subjected to unreasonable expenditures, nor the consuming public be unduly burdened, because of the over development or premature development of scattered sections of the city in advance of its normal growth, when there is no rational expectation of the event justifying the expenditure.

Id. at 526-527. The Court rendered this guidance after affirming the Public Service Commission's dismissal of a complaint by Scranton city residents who were refused free main extensions to a poorly developed section of the City in difficult terrain.

In Ridley, the Court reversed this Commission's decision to require residents of the Township to participate in the cost of extending mains to their homes which were minutes from center city Philadelphia and which were on the edge of suburban development. After coming to its conclusion, the Court offered this additional reasoning:

> Ordinarily, it is not the business of the citizen or consumer to construct any part of a utility's system. There are, doubtless,

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[6]The OCA very clearly argued that the operative legal standard is contained in the Ridley decision. However, given the OCA's effort to discuss and distinguish the Sherman case from its position and given the Ridley Court's affirmation of the Sherman decision, the OCA would (in my opinion) be hard pressed to deny (at a minimum) Sherman's historical significance. See, OCA R.B., pp. 3-4, 7, 13, 16.

> instances where, under special circumstances, warranted by the evidence, the Commission may, in the exercise of its administrative discretion, withhold exercise of its power unless patrons offer to participate in the cost of construction. [Citation omitted.] But no inflexible rule can be laid down; participation in construction costs cannot be exacted indiscriminately; and it cannot be required upon a mere showing that an extension will not immediately produce an adequate profit. The action of the Commission must rest upon evidence which shows that, without the contribution or loan of the consumers, the cost of construction would materially handicap the utility in securing a fair return on all its operations. [Citation omitted.] Such proof, as already indicated, is lacking.
>
> The obligation imposed upon the Commission to exercise its powers and discretion reasonably applies as well to patrons and the public as to the utilities. The Commission operates on a two-way street. 'The primary object of the publice [sic] service laws is not to establish a monopoly or to guarantee the security of investment in public service corporations, but first and at all times to serve the interests of the public'. [Citation omitted].

Id. at 478-479, A.2d at 171. (Emphasis in the original.) The Court continued by both affirming its commitment to the guidance set forth in Sherman, quoted above, and rejecting the utility's reliance on that guidance as a justification for the Commission's decision. Id. at 479-480, A.2d at 171-172.

Finally, all parties agree that the operative language of the above quoted cases should be applied in conjunction with requirements of the Public Utility Code. More specifically, Section 1501 states:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall

> make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

Public Utility Code, 66 Pa. C.S. §1501.

Beyond this point, finding agreement among the parties became much more difficult.

B. Does The Tariff Meet The Legal Standard?

1. Parties' Positions

The OCA's primary position is that Section 1501 of the Public Utility Code (66 Pa. C.S. §1501) generally requires all utilities to provide main extensions as part of their obligations to serve. According to the OCA, the Superior Court established two exceptions to the general rule: The prospective customer may be required to contribute to the cost of the project, (1) if the project causes a "material financial hardship" to the utility **OR** (2) if the project creates an "undue burden" upon the existing customers. Ridley.

Using this guidance, the OCA witness assembled data from the Company records. The witness used PAWC actual expenditures and projections derived from the application of Rule 27 to make a variety of calculations. Her calculations were made both on an individual project and total (all main extensions) project basis. Based upon her testimony, the OCA concluded that no matter how the comparison was made to Company rate base and revenues, no material financial hardship or undue burden could exist for PAWC. OCA M. B., pp. 7-9, 15-19. OCA R.B., pp. 3-4.

The OTS was at the opposite end of the spectrum. Again, using the same Company data, the OTS noted that, while the tariff was in effect, PAWC completed 293 extension projects to serve 3,139 customers at a total investment of $21.8 million. The OTS continued that the Company investment would continue to grow as long as the tariff stayed in effect. Based on the Company witness' testimony to the effect that the Company would seek to recover this investment from ratepayers and that it would add $3.1 million to the revenue requirement, the OTS concluded that the costs incurred under the current tariff were uneconomic from the perspective of the existing ratepayers. OTS M.B., pp. 15-16.

Since the OTS believed the Company tariff was too generous, the OTS could not agree with the OCA position. The OTS argued that the OCA misread both Section 1501 and Ridley and that the OCA failed to include the Sherman case in its analysis. OTS M.B., pp. 22-26. The OTS contended that the OCA position was too generous to prospective customers because it was based on too vague a standard ("material financial hardship" or "undue burden"). Thus, it was impossible to quantify the impact of the OCA proposal on existing ratepayers. OTS R.B., pp. 9-10. Instead, the OTS consistently argued that PAWC should revise its tariff to comply with the proposed final regulations promulgated by the Commission in its December 28 Order.

The Company agreed with the OTS to the extent that it criticized the OCA for misreading Section 1501 and Ridley and for

failing to include the Sherman case in the OCA position. Co. M.B., pp 21-26. Co. R.B., pp. 4-6.

PAWC disputed the conclusion which OCA drew from its analysis of Company data. The Company emphasized that the Commission should not ignore the cumulative effect of its annual investment in main extension projects. Co. R.B. 8-9. PAWC argued that it met the "material financial hardship" and "undue burden" tests. Co. R.B. 9-11. The Company also asserted that Rule 27 really imposed a rate which should be evaluated pursuant to the Commission ratemaking authority. The Company continued that the OCA had erroneously attempted to apply Section 1501 limitations to a rate setting problem. PAWC advocated that the problem should be resolved by balancing the interests of the Company, its ratepayers and bona fide applicants. Co. R.B., pp. 6-8.

2. Analysis

One of the most difficult problems associated with deciding this case is the task of applying the law to the facts. After careful and repeated review of the cases cited by the parties, I believe I have gained some insight into the reason this subject is so controversial: To say that the Courts have been less than clear on the subject of the assessment of costs for main extensions would be a keen understatement of the obvious. Indeed, my review of the cases led me to a genuine reluctance to further muddy the waters with yet another opinion on the subject. Unfortunately, that conclusion could only serve to further postpone the end of this case.

Accordingly, I have determined to approach the law by briefly reviewing the few, but obvious, guidelines which have been outlined by the Courts. First, I believe the Public Utility Code (66 Pa. C.S. §1501) and the Ridley decision set forth the general rule that the utility is required to extend its lines at its own cost within its service territory. Ridley at 478-479, A.2d 171. Second, the Sherman and Ridley decisions make it clear that this Commission cannot require customer participation in the costs of a main extension project based solely on the lack of immediate profitability for the utility. Sherman at 526-527. Ridley at 479, A.2d at 171. Third, the customers would suffer an undue burden, if the utility were required to install main extensions into poorly developed areas where there was no foreseeable prospect of net income from the project. Sherman at 526-527. Fourth, a utility should not be required to extend service without contribution when the cost of the extension project would prevent the company from realizing a fair return. Ridley at 479, A.2d at 171. Fifth and finally, if the extension is for the purpose of providing specialized or enhanced service for one customer or for providing service to the developer of a planned (and as yet unconstructed) community), then the single customer or the developer must pay for the extension.[7] Lynch v. Pennsylvania Public Utility Commission, 140 Pa. Commonwealth Ct. 599, 594 A.2d 816 (1991); appeal denied, 529 Pa. 670, 605 A.2d 335 (1992). Colonial Products Company v.

[7]The fifth guideline has no application in this proceeding.

Pennsylvania Public Utility Commission, 188 Pa. Superior Ct. 163, 146 A.2d 657 (1958).

Having reviewed these guidelines, I concluded that at best they provide the outer parameters for deciding the crucial legal issue in this case: Can PAWC use (and ultimately the Commission allow) a fixed formula to determine whether a given extension project falls within the two exceptions to the general rule that a utility must extend its facilities at its own cost within its service territory? My answer is "yes" and is based upon the discretionary powers granted the Commission by one of the guidelines. More specifically, the Courts have not defined exactly what constitutes an "undue burden" on existing ratepayers. The Courts have provided some examples, e.g. extending utility facilities into undeveloped areas which are unlikely to be developed. Sherman. I conclude that the Courts have permitted the Commission some latitude in formulating methodologies which recognize when an "undue burden" occurs.

The Company tariff contains three elements, to wit: (1) Average Annual Revenue, (2) Operation and Maintenance Expense and (3) Overall Depreciation Rate. PAWC Ex. A, original pp. 72-73. While all three factors relate to the profitability of the project, it is the depreciation element which establishes the relationship between the cost and the profitability of the project over the useful life of the facility. In other words, the calculation is

one methodology[8] which is designed to show whether the project will result in a net loss. Any project which will be a net loss to the Company over the expected life of the facility is, at a minimum, an undue burden on current customers. Having concluded that the tariff formula meets one of the requirements set forth in the case law, I can recommend that the Commission adopt it and dismiss that portion of the OCA complaint.

The OCA argument that the tariff is not generous enough is misdirected. The OCA repeatedly emphasizes that PAWC is so large that no single extension project nor cumulative annual total of extension projects will cause such a financial loss as to deprive the Company of a fair rate of return. I agree, but it doesn't matter. The exceptions are independent of each other. My finding that the formula mathematically defines one form of undue burden on the customers is sufficient to uphold its validity.

The OTS argument that the tariff is too generous is also flawed. The primary focus of the OTS position is that the Commission's December 28 Order adopts regulations which have a less generous formula and which is binding on the Company because it is conclusive on the parties affected thereby (citing Section 316 of the Public Utility Code). 66 Pa. C.S. §316. The OTS continues that the Company should immediately amend the tariff to conform to the final version of the regulations.

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[8]I emphasize at this point that this finding does not preclude a conclusion that other methodologies also fall within the guidelines.

As noted earlier, the OTS has missed two points: First, the OTS should recognize that the aggregation of utility financed, main extension projects contribute to higher revenue requirements in rate cases no matter what formula or methodology is used. The only real question, in the context of this case, is where to draw the line between those projects which unduly burden ratepayers and those which do not. The Commission has the discretion within some limits to draw that line, not only wherever it desires, but to vary its location, as well. In this instance, there is nothing illegal per se about where the line is drawn in Supplement 28. The formula for cost sharing set forth in the tariff is within the Commission's zone of discretion. The fact that the Commission is about to implement new regulations which will require a different formula does not make the current tariff wrong. The fact that the OTS (and the OCA) has a different opinion about when prospective applicants should be required to participate does not demonstrate that the tariff is illegal either.

Second, the Company has always represented that it would conform its tariff to whatever became the final regulation. Unfortunately for the OTS, there is no final regulation because the ordering paragraphs of the December 28 Order recognize that the Commission does not have the final word in the process. More specifically, the Order directs:

> 3. That the Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.

> 4. That the Secretary shall submit this order and Annex A to the Governor's Budget office for review of fiscal impact.
>
> 5. That the Secretary shall submit this order and Annex A for formal review by the designated standing committees of both houses of the General Assembly, and for formal review and approval by the Independent Regulatory Review Commission.
>
> 6. That the Secretary shall deposit this order and Annex A with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin.
>
> 7. That these regulations shall become effective upon publication in the Pennsylvania Bulletin.
>
> 8. That the public utilities affected by these line extension regulations shall file appropriate compliance tariffs within 45 days of the regulation's publication date.

Slip Op. at 18-19. Indeed, the OTS argument overlooks several key features of the ordering paragraphs. Paragraphs 3 through 7 outline a series of steps which must first be performed before the regulations become effective. Then, paragraph 8 specifically directs the affected utilities to file compliance tariffs within 45 days after the publication date. Thus, the OTS insistence on requiring the Company to immediately comply with the final regulations (which are not yet effective) conflicts with the stated intention of the Commission. Under the circumstances, the OTS cannot rely on Section 316 to require PAWC to change its tariff now. 66 Pa. C.S. §316.

C. Was The Tariff Reasonably Applied?

1. Parties' Positions

The OCA argued that the application of the tariff resulted in unreasonable service. It based this conclusion on the fact that PAWC actually requested some applicants to make CIACs for main extension projects while Supplement 28 was in effect and that some of the requests for CIACs resulted in formal and informal complaints to this Commission. The OCA concluded its argument as follows:

> On the other hand, it is clear that the current tariff rule has prevented numerous persons in need of service from obtaining service, because CIAC has been requested. The OCA submits that any line extension rule which requires CIAC from applicants for water utility service is unreasonable service, in contravention of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501. Turonis v. Pennsylvania Gas & Water - Water Division, Docket No. F-00210387, Opinion and Order of June 20, 1994 at 7.
>
> In the instances that the OCA is aware of, however, several applicants have had to endure hardships due to the lack of potable water to their homes due to unreasonable CIAC requests. See, OCA St 1 at 6-9. Some have ultimately succeeded in obtaining service without CIAC, but doing so has required no small amount of time, energy and expense engaged in complaint proceedings before this Commission.
>
> For all of the above reasons, the application of this interim tariff rule has resulted in deprivations or delays in provision of water utility service, in violation of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501. Because the tariff has resulted in relatively few requests for CIAC as far as we know, eliminating the formula from the tariff will likely make no material difference and will reduce the number

> of complaints filed with the Commission concerning high CIAC requests.

OCA M.B., p. 22. (Footnote omitted.)

The OCA also made a similar argument about increased complaints to the Commission, if the OTS position was adopted. It added that implementing a tariff to conform to the final rule in the December 28 Order (the OTS position) would run contrary to the goal of universal service. OCA M.B., pp. 25-26.

The OTS responded by pointing out that administrative convenience (the alleged increase/decrease of Commission complaints) was not supported by the record and could not be used to justify the OCA position. OTS R.B., p. 11.

2. Analysis

Even if I assume that always requiring the utility to make free main line extensions would stop or severely restrict the filing of complaints,[9] I cannot agree the OCA position. As tempting as it would be to make my job and the Commission's easier by adopting a policy which would severely restrict the number of main extension complaints, the OTS is correct when it argued that administrative convenience is not a valid reason for adopting the OCA position.

This result would be particularly egregious because it would be inconsistent with the law. The OCA argument appears to be advocating a totally free main extension policy with no recognition of the two Court imposed exceptions. Further, the Turonis case

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[9]If the utility never required CIAC from the customers, they would not have a reason to complain.

does not provide the support the OCA ascribes. The relevant portions of page 7 of the Turonis case states:

> This complaint brings into question the propriety of PG&W's tariff provisions appertaining to computation of customer contributions in aid of construction for water main extensions.
>
> We find that PG&W's tariff fails to comply with this Commission's Policy Statement regarding to customer contributions in aid of construction. Said policy statement, reported at 52 Pennsylvania Code §69.171, requires fixed utilities to effectuate, without customer contributions, main extensions to primary residential customers, except in those cases where a given extension of facilities would materially handicap the utility in securing a fair return on its investment, or unless the line extension would place an undue burden on utility customers as a result of rate increases. Under all other circumstances, any utility line extension rule which requires a contribution in aid of construction is viewed by this Commission [as] an unreasonable utility service, violative of Section 1501 of the Public Utility Code. The Commission's said Policy Statement is set forth below:

Slip Op. at 7. Clearly, the Commission recognized that two exceptions to the general rule exist. The OCA apparently does not.

I also reject the evidence offered by the OCA to the effect that PAWC rendered inadequate service by initially refusing service to prospective customers who then filed complaints with the Commission. While I am not pleased that the Company was not sufficiently creative in its thinking to find a way to render service, I do not find that the initial denials of service constitute inadequate service nor do they establish a pattern which demonstrates service inadequacy. My conclusion is enhanced by

evidence of record which established that the Company incurred $21.8 million in main extension costs while these other complaints were pending. PAWC St. No. 1, p. 5. PAWC Ex. C. Section 1501 of the Public Utility Code does not require perfect or free service; it requires adequate service. The fact that a few or some prospective customers were required to resort to existing administrative process to force the Company to rethink its position does not amount to inadequate service.

D. Was The Special Services Provision Improperly Applied?

1. Parties' Positions

The OCA noted that in one instance the Company had applied the definition of "Special Utility Service" from the tariff to request CIAC for the installation of a booster pump. The booster pump would have served nineteen applicants for service in a community where the well system was failing. PAWC initially did not allow a credit for the maximum amount allowable for main extension projects. After the applicants filed a complaint with the Commission, the case was settled. Based on the delay experienced by the applicants (*i.e.*, in receiving a potable water supply from PAWC), the OCA argued that the definition of special service should be modified to include the costs of special service in the cost of a main extension project. OCA M.B., pp. 24-25. OCA R.B., pp. 13-14.

The Company argued that the "Special Utility Service" provision was consistent with both the proposed and final regulations promulgated by the Commission. In addition, PAWC

asserted that the provision was justified by the Court's decision in Colonial Products which was also recognized in the Commission's Policy Statement (52 Pa. Code §69.171). Co. M.B., pp. 33-34.

2. Analysis

Basically, I agree with the Company. Both of the Commission Orders in the rulemaking docket recognize that "special utility service" does not fall within the definition of a main extension project. July 1 Order, at 11. PAWC Ex. E. December 28 Order, at 10-11. PAWC Ex. F. Although there was no reference in the Policy Statement to Colonial Products, I do agree that the case is an example of special utility service which formed the basis for the Commission's inclusion of the definition in the proposed and final regulations. I hasten to add that the Company's tariff is enhanced by an interesting similarity to the definition of "special utility service" contained in the final Commission regulation. I find the similarity noteworthy because the tariff language chronologically preceded the language of the final regulation. Compare, PAWC Ex. A, Original Page 74 to December 28 Order, Annex A, §65.1 Definitions. PAWC Ex. F.

I do not agree that the request for CIAC for a booster pump was an improper application of the tariff definition. Initially, I note that the installation of a booster pump is specifically contained in the special service section of the tariff. Thus, any applicant for service should expect a potential problem when this issue arises. Second, I find it difficult to draw any conclusion from a case that settled. Finally, I repeat my

conclusion that simply because the applicants were forced to resort to administrative process to force the Company to rethink its position does not necessarily mean that PAWC was improperly applying the tariff or rendering inadequate service.

E. Should CIAC Be Waived For Verified Health Emergencies?

1. Parties' Positions

In its main brief, the OTS argued that an exception should be made to require PAWC to provide a main extension without CIAC to serve applicants whose existing wells have become polluted to the point where the wells are not useful for any domestic purpose. OTS M.B., pp. 29-30.

The Company responded by noting that the Commission had considered such contingencies in the rule making process and had promulgated the final regulation without the requested exception. PAWC asserted that, if a wide-spread problem should occur, it should be considered on a case-by-case basis. PAWC R.B., p. 14.

The OCA noted that, in requesting this exception, the OTS was being inconsistent with its litigation position. OCA R.B., p. 16 n 8.

2. Analysis

Even though I cannot find any reference to consideration of this view by the Commission in either of its Orders (July 1 or December 28), I agree with the Company conclusion. While the OTS proposal is an interesting social program, there is no indication that the Commission or the Courts have ever considered such a requirement. Essentially, the OTS suggestion would make the

utility the supplier of last resort without regard to cost. Unfortunately, disregarding cost is precisely opposite of the guidance set forth by the Courts. Sherman. Ridley. In those cases, the Court recognized that there are some financial limits. The OTS proposed policy would not make the same distinction. Under these circumstances, I cannot endorse the proposal.

ORDER

NOW THEREFORE, IT IS RECOMMENDED:

1. That the Complaint of the Irwin A. Popowsky, Consumer Advocate, at Docket No. R-00943155C0001 is hereby dismissed, and the record marked closed.

2. The Pennsylvania-American Water Company's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996 are hereby approved and attached to the Recommended Decision.

3. The Office Of Consumer Advocate's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996 are hereby approved and attached to the Recommended Decision.

4. The Office Of Trial Staff's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996 are hereby approved and attached to the Recommended Decision.

Louis G. Cocheres

LOUIS G. COCHERES
Administrative Law Judge

DATE: January 15, 1997

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RECEIVED
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PA PUBLIC UTILITY COMMISSION

June 14, 1996

HAND DELIVERY
John G. Alford, Secretary
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket No. R-00943155C001

Dear Secretary Alford:

Enclosed for filing in the above-captioned matter please find an original and two copies of Pennsylvania-American Water Company's Proposed Corrections To The Transcript Of The Hearing Held on May 10, 1996. As evidenced by the enclosed Certificate of Service, copies of the Proposed Corrections have been served upon the parties of record and the Administrative Law Judge.

Very truly yours,

Anthony C. DeCusatis

ACD/lms
cc: Parties Of Record

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Irwin A. Popowsky, Consumer Advocate Complainant	:	
v.	:	Docket No. R-00943155C001
Pennsylvania-American Water Company Respondent	:	

PENNSYLVANIA-AMERICAN WATER COMPANY'S
PROPOSED CORRECTIONS TO THE
TRANSCRIPT OF THE HEARING
HELD ON MAY 10, 1996

ERRATA SHEET

PAGE	LINE	READS	SHOULD READ
96	25	as to that that	as to whether that
100	12	talking about that	talking about what
108	20	overheads. That	overheads that
117	11-12	between three and four	between four and five
119	20	dot division	do the division
119	22	customer of on	customer on
144	7	be up limited	be unlimited
158	15	Secondly,	Thirdly,
170	14	preferred equity	preferred, equity
171	11	previously I'd	briefly I'd
171	17	equity preferred	equity, preferred
171	21	not formulated in	not the formulae in
171	22	The company but	The Company, but
171	24	equity cost	equity costs
171	25	taxes and	taxes. And,
172	2	responded that was	responded that that was
172	3	correct as to	correct or as to
172	15	closed	close
176	2-3	a couple question	a couple of questions
176	13	offered that	offered as

PAGE	LINE	READS	SHOULD READ
177	9	you indicate thus	you indicate: "Thus
177	12	minimal	minimal."
178	12	requirement? Are	requirement? A. Are
178	15	A. Well,	Q. Well,
181	22-23	to issues	to: "Issues
181	23	its staff.	its staff."
183	19	view of proposed	view of the proposed
184	21	specifically add a	specifically quote a
184	22	states that as	states that: "As
185	3	extensions.	extensions."
188	11	What fact	What facts
191	3	single requests	single request
198	11	to two refund	to refunds
207	10	Paliato	Paliotta
207	16	concerns to	concerns as to
208	8	formal complaint but	formal complaint. But
213	15	under the materials and policy statement	under the Commission's policy statement
213	23	Kuhns Paliato case.	Koonse and Paliotta cases.
213	24	Mr. Rima.	Mrs. Richards.
214	7-8	facts and specific cases	facts in specific cases
215	4	Kuhns Paliato case,	Koonse-Paliotta case,

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Irwin A. Popowsky, Consumer Advocate Complainant	:	
v.	:	Docket No. R-00943155C001
Pennsylvania-American Water Company Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of June, 1996, served a true copy of Pennsylvania-American Water Company's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996, upon the persons set forth below, in accordance with the requirements of 52 Pa. Code § 1.54:

HAND DELIVERY

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Office of Trial Staff
Pennsylvania Public Utility Commission
Pitnick Building, 3rd Floor
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Asst. Small Business Advocate
Office of Small Business Advocate
Commerce Building, Suite 1102
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Harrisburg, PA 17101
Harrisburg, PA 17101

Honorable Louis G. Cocheres
Administrative Law Judge
Pennsylvania Public Utility Commission
North Office Bldg, Rm G-08-A
Commonwealth Avenue and North Street
Harrisburg, PA 17105-3265

Anthony C. DeCusatis
Attorney For Pennsylvania-American Water Company

COMMONWEALTH OF PENNSYLVANIA

RECEIVED

JUN 20

HARRISBURG DALS
PA PUBLIC UTILITY COMMISSI

OFFICE OF CONSUMER ADVOCATE
1425 Strawberry Square
Harrisburg, Pennsylvania 17120

IRWIN A. POPOWSKY
Consumer Advocate

(717) 783-5048

June 20, 1996

John G. Alford, Secretary
PA Public Utility Commission
Room G-23, North Office Bldg.
Harrisburg, PA 17105

Re: PA Public Utility Commission v. Pennsylvania American Water Co.
Docket No. R-00943155

Dear Secretary Alford:

Enclosed please find for filing an original and three (3) copies of the Office of Consumer Advocate's Proposed Transcript Corrections in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

Dianne E. Dusman

Dianne E. Dusman
Assistant Consumer Advocate

Enclosures

cc: All Parties of Record
Honorable Louis G. Cocheres

CERTIFICATE OF SERVICE

Re: Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket No. R-00943155C0001

I hereby certify that I have this day served a true copy of the foregoing document, Office of Consumer Advocate's Proposed Transcript Corrections, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 20th day of June, 1996.

SERVICE IN PERSON, 6/20/96

Kandace Melillo, Esq.
PA Public Utility Commission
Office of Trial Staff
P. O. Box 3265
Harrisburg, PA 17105

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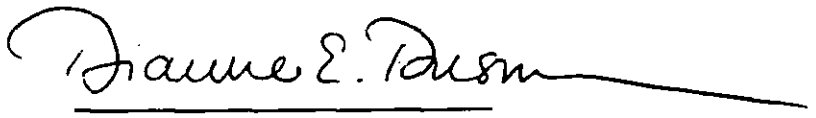

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Counsel for
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1425 Strawberry Square
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16531

RECEIVED
HARRISBURG DATE
PA PUBLIC UTILITY COMMISSION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Irwin A. Popowsky, Consumer Advocate, Complainant,	:	
	:	Docket No.
v.	:	R-00943155C001
	:	
Pennsylvania-American Water Company, Respondent.	:	

THE OFFICE OF CONSUMER ADVOCATE'S PROPOSED CORRECTIONS TO THE TRANSCRIPT OF THE HEARING HELD ON MAY 10, 1996

Pursuant to Sections 5.253(a) and (b) of the Pennsylvania Public Utility Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.253(a), (b), the Office of Consumer Advocate moves for the adoption of the following corrections to the May 10, 1996 hearing transcripts as set forth below.

PAGE	LINE	READS	SHOULD READ
89	11	...who provides the cost for...	...who provides the no cost...
89	15	...won't that person pay through future rates of return and on...	...won't that person pay, through future rates, a return of and on...
89	20	...his initial investment but is also...	...his initial investment, but is also...
89	22	...not serve them.	...not serve him.
91	1-2	...as it's defined within the Commission's reg...	..., as it's defined within the Commission's reg,...
91	17	...costs as defined in the reg...	...costs, as defined in the reg,...

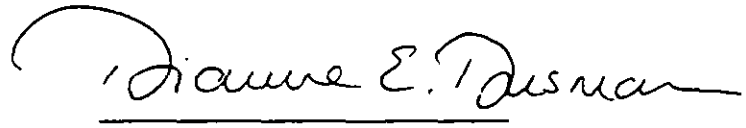
92	20	Does not.	It does not.
92	21	...30 years...	...30 years'...
93	23	...only (and justify only) mains only in that scenario and not...	...only in that scenario and not...
97	2-3	For the moment for purposes of these questions, we are just looking at the fixed costs because isn't it correct that as time goes on, increased O&M. . .	For the moment, for purposes of these questions, we are just looking at the fixed costs; because isn't it correct that, as time goes on, increased O&M . . .
98	21	...serve them at a given time.	...serve them at a given time?
99	1-2	...new service territories that's one of the benefits...	...new service territories, one of the benefits...
100	6	..., they pay everybody, depreciation on	...they pay depreciation on...
100	21	Therefore, the cost construction...	Therefore, if the cost of construction...
105	6	...important.that we move on. Again, in your rebuttal testimony, 1-R...	...important that we move on. BY MS. DUSMAN: Q Again, in your rebuttal testimony, 1-R, . . .
105	19-20	...either the company regulations...	...either of the Commission's regulations...
105	21	Not as I said...	No, as I said...
111	19	...and today?	...and today.
116	12-13	...there is a, if a difference...	...there is a difference...
118	20-22	...different; a different number of employees, different number of labor. People because they had to pay more, might...	...different; a different number of applicants, different amount of labor. People, because they would have had to pay more, might...
119	20	If you simply dot division...	If you simply do division...

129	8	I don't hear the question.	I didn't hear the question.
140	10	...I wasn't able to look.	...I wasn't able to locate it.
141	24	...I recognize was remanded	...I recognize was rescinded
143	17	...was what...	...was "what...
143	18	...expense from the equation...	...expense from the equation?"
143	19	...assuming that...	...assume that...
143	21	...expense, that is the project cost...	...expense, that is, the project cost...
145	14	...the life of the main.	...the life of the main?
150	2	...hearing exhibits simply supplement...	...Hearing Exhibit 1 simply supplements...
151	17	...required to file...	...required to follow...
159	18-19	...in discovery that you will listen to the --other requests...	...in discovery, to show that other requests...
159	21	...don't understand whether the...	...don't understand what the...
168	22	The beginning of the period?	From the beginning of the period?
169	1	...0.99565 percent.	...0.99565 percent?
169	12-13	...calculations in the company's investment in pipeline issues include...	...calculations as to the company's investment in mains which include...
171	1	... interest, depreciation, O&M and 1307.	interest depreciation, and O&M.
173	24	...debt., if...	...debt. If...
174	16-18	...extensions under the circumstances that we have been talking about here, does not result in material financial hardship in the company change at all?	...extensions, under the circumstances that we have been talking about here, does not result in material financial hardship in the company, change at all?
175	9	...end quote. Doesn't this,...	...end quote. Given this,...

178	14	...than a base rate case overall?	...in a base rate case overall?
181	14	...its rule 279 became...	...its Rule 27 became...
198	8	...Tariff Rule 237...	...Tariff Rule 27...
199	3	...I have...	...I haven't...
204	8	...the component?	...the composite?
204	25	..., in fact, relaying upon...	..., in fact, relying upon...
205	10	...would want me to did that...	...would want me to do that...
206	11	...and resulted in...	...and that the tariff resulted in...
207	10	...Paliato...	...Paliotta...
208	19-21	...early on file with the Commission is approving the tariff subject to our complaint...	...early on, after the Commission had approved the tariff subject to our complaint,...
209	4	...other investigation but our complaint...	...other investigation, but our complaint...
209	9	...faced with contributions, requests...	...faced with requests for...
209	14	When the appropriate standard...	Yes. When the appropriate standard...
209	15	...been met and that's...	...been met. That's...
209	16	...as it's applied many...	...as it's applied. Many...
210	11-12	...that application, that this service...	...that the application of this tariff...
211	13	Tariff...	The tariff...
211	14	...Section 101...	...Section 1301...
211	16	...that to request any line extension rule...	...that any line extension rule...
213	25	...Mr. Schmidt.	...Mrs. Schmidt.
217	19	...been made in...	...been made and...

222	14	...service. Effectively...	...service, effectively...
224	19	...be service date...	...be the service date...

Respectfully submitted,



Dianne E. Dusman
Assistant Consumer Advocate

Counsel for:
Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048

Dated: June 20, 1996
37363

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

IN REPLY PLEASE
REFER TO OUR FILE

June 28, 1996

JOHN G ALFORD SECRETARY
PA PUBLIC UTILITY COMMISSION
P O BOX 3265
HARRISBURG PA 17105-3265

Re: Irwin A. Popowsky, Consumer Advocate v.
Pennsylvania-American Water Company
Docket No. R-00943155C0001

Dear Secretary Alford:

Attached please find the original and three copies of the **Office of Trial Staff's Proposed Corrections To The Transcript Of The Hearing Held On May 10, 1996.**

Sincerely,

Kandace F. Melillo

Kandace F. Melillo
Prosecutor
Office of Trial Staff

KFM:sjh

cc: Honorable Louis Cocheres
Parties of Record

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Irwin A. Popowsky, Consumer Advocate	:	
v.	:	Docket No. R-00943155C0001
Pennsylvania-American Water Company	:	

THE OFFICE OF TRIAL STAFF'S
PROPOSED CORRECTIONS TO THE
TRANSCRIPT OF THE HEARING
HELD ON MAY 10, 1996

Pursuant to 52 Pa. Code Sections 5.252(a) and (b) of the Pennsylvania Public Utility Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code §5.252(a) and (b), the Office of Trial Staff (OTS) moves for the correction of the transcript of May 10, 1996, in the above-captioned proceeding, as set forth below:

Page	Line	Reads	Should Read
117	8	for $4,000	and $4,000
117	9	1994 order?	1995 order?
117	15	$21.3 million	$28.3 million
122	15	for the	for in the
130	3	or a millionaire	or a billionaire

130	14	would have	who would have
142	6	The position	Our position
154	23	language	rules
219	25	don't one the	don't want the

WHEREFORE, the Office of Trial Staff respectfully requests that the preceding proposed transcript corrections be granted.

Respectfully submitted,

Kandace F. Melillo

Kandace F. Melillo
Prosecutor
Office of Trial Staff

Pa. P.U.C.
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-1976

Dated: June 28, 1996

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Irwin A. Popowsky, Consumer Advocate	:	
	:	
v.	:	**Docket No. R-00943155**
	:	
Pennsylvania American Water Company	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing, a Main Brief from the Office of Trial Staff dated June 28, 1996, either personally, by first class mail or by fax upon the persons addressed below:

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Honorable Louis G. Cocheres
Administrative Law Judge
PA Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Kandace F. Melillo

Kandace F. Melillo
Prosecutor
Office of Trial Staff

Dated: June 28, 1996
R-00943155

Cindy Parks, *et al.*

v.

Pennsylvania-American Water Company

Docket No. C-00015337, *et al.*

PUC Order

Docket No. R-00943155C0001

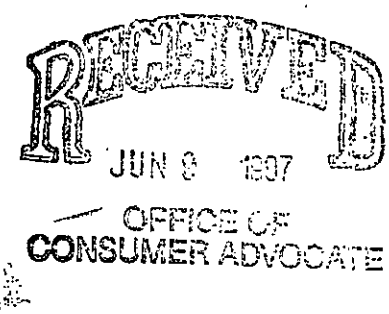
Popowsky v. PAWC

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Public Meeting held June 5, 1997

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
John Hanger
David W. Rolka
Nora Mead Brownell



Irwin A. Popowsky, Consumer Advocate R-00943155C0001

v.

Pennsylvania-American Water Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed on February 13, 1997, by the Office of Consumer Advocate (OCA) to the Recommended Decision of Administrative Law Judge (ALJ) Louis G. Cocheres, which was issued on January 24, 1997, relative to the above-captioned proceeding. Reply Exceptions were filed by the Office of Trial Staff (OTS) on February 24, 1997, and by Pennsylvania American Water Company (PAWC or the Company) on February 24, 1997.

History of the Proceedings

On July 6, 1994, PAWC filed Supplement No. 28 to Tariff Water-Pa. P.U.C. No. 1 to become effective on September 4, 1994. In Supplement No. 28, the Company proposed changes to Rule 27 of its tariff, which set forth the terms and conditions for the installation of main extensions to serve new customers.[1] The principal change proposed in Supplement No. 28 was to increase the Company's investment in main extensions from approximately $1,400 to $10,800 for each bona fide applicant for water service.

On August 18, 1994, the OCA filed a Complaint against Supplement No. 28, which alleged that the Company's proposed Rule 27 violated legal standards articulated in the Commission's Policy Statement concerning main extensions issued on August 20, 1992. Section 69.171 of our Regulations, 52 Pa. Code §69.171. Specifically, the OCA averred that the proposed Rule 27 would permit PAWC "to request contributions from prospective residential customers in many more instances than would occur were [the Company] held to the standard of "material financial hardship" or "undue burden" on existing customers."

On August 30, 1994, PAWC filed an Answer that denied the material averments of the OCA's Complaint.

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[1] These revisions were designed to conform PAWC's Rule 27 to the terms of proposed regulations that the Commission had issued on July 1, 1994. Proposed Rulemaking Re Line Extensions - 52 Pa. Code Chapter 66, Order, entered July 1, 1994, Docket No. L-930089. (July 1 Order).

On September 2, 1994, the Commission entered an Order permitting Supplement No. 28[2] to become effective on September 4, 1994, subject to the OCA's complaint. Accordingly, the Commission assigned the OCA's Complaint to the Office of Administrative Law Judge.

On September 28, 1994, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention. On October 14, 1994, the OTS filed a Notice of Appearance.

Prehearing Conferences were held before ALJ Cocheres. On April 4, 1995, ALJ Cocheres issued a Prehearing Order that approved an agreement among the parties to hold the proceeding in abeyance until the Commission issued a final order in Proposed Rulemaking Re Line Extensions -- 52 Pa. Code Chapter 66, at Docket No. L-00930089. The ALJ further directed the OCA to provide notice, within fifteen (15) days of the entry of such order, as to whether it intended to continue the litigation of this case.

On December 28, 1995, the Commission entered an Order adopting final regulations on main extensions by water util-

---

[2] When Supplement No. 28 was filed, the Company's base rate proceeding at Docket No. R-00932670 was pending before the Commission. In that case, the Company had proposed an entirely new tariff, which had been suspended by the operation of Section 1308(d) of the Public Utility Code. On July 26, 1994, the Commission entered an Order in the Company's rate case approving the proposed tariff subject to modifications in the base rates initially set forth therein. Therefore, upon approval of PAWC's compliance filing, the Company's Tariff Water- Pa. PUC No. 1 was superseded by its Tariff Water- Pa. PUC No. 4. As a consequence, Supplement No. 28 was redesignated Supplement No. 4 to PAWC's Tariff Water- Pa. PUC No. 4, and that reference currently appears on the relevant pages of the Company's existing tariff. (PAWC St. 1, Ex. A).

ities.[3] By Letter dated January 4, 1996, the OCA notified the ALJ and the parties of its decision to continue litigating this case and proposed that a telephonic conference be held to discuss scheduling matters. Telephonic conferences were held on February 9 and 15, 1996. Following those discussions, on February 21, 1996, the ALJ issued Prehearing Order No. 2, assigning the burden of proof to the Company and establishing a litigation schedule.

On April 27, 1996, the Commission gave notice that the final regulations were being withdrawn from review by the Independent Regulatory Review Commission. 26 Pa. Bulletin 2016 (1996). An evidentiary hearing was held in Harrisburg on May 10, 1996, at which witnesses for the Company and the OCA were presented and cross-examined. PAWC, the OCA and the OTS filed Main and Reply Briefs.[4]

On October 28, 1996, the Commission returned the revised final regulations to the review process. On November 21, 1996, the Independent Regulatory Review Commission approved the revised regulations in final form. The necessary approvals were obtained by November 21, 1996, and the final regulations were published in the Pennsylvania Bulletin on February 15, 1997, 27 Pa. Bull. 799[5], effective upon publication.

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[3] Final Regulations Re: Line Extensions -- 52 Pa. Code §§65.21, 65.22, Order, entered December 28, 1995, at Docket No. L-00930089. (December 28 Order) See (PAWC Ex. F).

[4] PAWC, the OCA, and the OTS also submitted Proposed Corrections to the Transcript of the Hearing Held on May 10, 1996.

[5] The OCA has appealed the Revised Final Order to the Commonwealth Court, where it is seeking pre-enforcement review of the regulations.

Discussion

We note initially that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. University of Pennsylvania v. Pennsylvania Public Utility Commission, 86 Pa. 410, 485 A.2d 1217, 1222 (1984). Any Exception or argument which is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

The OCA's three Exceptions can be summarized as follows:

1. The OCA excepts to the ALJ's conclusion that the main extension tariff in question is consistent with the Public Utility Code, and therefore lawful. (R.D., pp. 9-14).

2. The OCA excepts to the ALJ's conclusion that requiring CIAC of residential applicants who need service where no material hardship to the Company or undue burden to present customers would otherwise occur is not unreasonable service. (R.D., pp. 17-19).

3. The OCA excepts to the Recommended Decision in that it fails to address whether PAWC proved Supplement No. 28 to its tariff lawful, just and reasonable pursuant to the Public Utility Code. (R.D., passim).

In its Exceptions Nos. 1 and 3, the OCA presents essentially the same argument, i.e., that the Company's proposed Rule 27 does not conform to the legal standards concerning main extensions. The OCA argues that since the proposed Rule 27 does not conform to these standards, the Company is not providing "reasonable service," as required by Section 1501 of the Public

Utility Code, 66 Pa. C.S. §1501. Accordingly, Exceptions Nos. 1 and 3 will be discussed jointly, since they are interrelated.

We note that the leading cases in the area of line extension are Ridley Township v. Pa. PUC, 172 Pa. Super. 472, 94 A.2d 168 (1953) (Ridley) and Sherman v. Public Service Commission, 90 Pa. Superior Ct. 523 (1927) (Sherman). In Sherman the Court set forth the following guidance:

> We are not to be understood as holding that the extension of service of a public utility is dependent on the profit which may reasonably be expected therefrom; in proper cases such extension may be ordered though the immediate result of the expansion may entail financial loss to the company; but the company should not be subjected to unreasonable expenditures, nor the consuming public be unduly burdened, because of the over development or premature development of scattered sections of the city in advance of its normal growth, when there is no rational expectation of the event justifying the expenditure. (Id. at 526-527).

The Court rendered the foregoing guidance after affirming the Public Service Commission's dismissal of a complaint by Scranton City residents who were refused free main extensions to a poorly developed section of the City in difficult terrain.

In Ridley, the Court reversed the Commission's decision to require residents of the Township to participate in the cost of extending mains to their homes, which were minutes from center city Philadelphia, and which were on the edge of suburban development. After coming to its conclusion, the Court offered this additional reasoning:

> Ordinarily, it is not the business of citizen or consumer to construct any part of a utility's system. There are, doubtless, in-

> stances where, under special circumstances, warranted by the evidence, the Commission may, in the exercise of its administrative discretion, withhold exercise of its power unless patrons offer to participate in the cost of construction....But no inflexible rule can be laid down; participation in construction costs cannot be exacted indiscriminately, and it cannot be required upon a mere showing that an extension will not immediately produce an adequate profit. The action of the Commission must rest upon evidence which shows that, without the contribution or loan of the consumers, the cost of construction would materially handicap the utility in securing a fair return on all its operations. (Id. at 478-79, 94 A.2d at 171).

The Court continued by both affirming its commitment to the guidance set forth in Sherman, supra, and rejecting the utility's reliance on that guidance as a justification for the Commission's decision.

Also, we believe that the operative language of the above-quoted cases should be applied in conjunction with the requirements of Section 1501 of the Public Utility Code, 66 Pa. C.S. §1501, which provides as follows:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

In the history of these types of proceedings, we have been clothed with considerable discretion in the application of the criteria enunciated in Sherman-Ridley standard (or the

"material handicap" and "undue burden" standard).[6] Indeed, the application of this standard was considered a policy matter within the purview of this Commission.[7] In making this determination, the Commission was required to balance the interests of the service applicant, the utility, and the utility's existing customers.

We note in this regard that, although the OCA claims that PAWC has not established that a "material handicap" to the utility or an "undue burden" on the consuming public would result, were PAWC to fund the entire cost for line extensions, the OCA has not offered any workable criteria for defining a "material handicap" or "undue burden." The OCA's witness, Ms. Kraus, agreed that a diminution in a utility's equity return might qualify as a "material handicap," but she was not prepared to offer an opinion as to how much of a diminution would satisfy that test. (Tr., p. 193).

---

[6] Indeed, the purpose of the Commission's Order initiating the proposed rulemaking on line extensions was to develop "practical subsidiary standards" for the actual application of the "broad legal boundaries" established by the appellate courts. Proposed Rulemaking Re Line Extensions -- 52 Pa. Code Chapter 66, Docket No. L-930089 (July 1, 1994) (Order, p. 2). As we have noted supra, the Commission has now adopted final regulations with regard to line extensions. The final regulations were published in the Pennsylvania Bulletin on February 15, 1997, at 27 Pa.B. 799, and were effective on that date. However, it is appropriate that the instant proceeding be decided under the Sherman-Ridley standards that were in effect at the time of the filing of the instant Complaint.

[7] What we refer to as the Sherman-Ridley standard was codified under the Commission's (former) Policy Statement at 52 Pa. Code Section 69.171. The Sherman-Ridley standard is also sometimes referred to as "the common law of line extensions." As stated supra, it was to eliminate the uncertainty which had arisen in the application of this standard that the Commission initiated the main extension rulemaking proceeding. The OCA's position in this proceeding is essentially a restatement of the Sherman-Ridley standard.

We decline to adopt an interpretation of the Sherman-Ridley standard whereby, due to PAWC's size, the standard would mandate that PAWC could never require an applicant's contribution, and that no limit would be set to PAWC's required investment for line extensions to each applicant. The spirit of the Sherman-Ridley standard clearly mandates that some consideration be given to the economics of the requested main extension.

The OCA asserts that the mandatory language of Section 1501 of the Public Utility Code, supra, should be read to preclude utilities from obtaining advances or contributions for extending their mains except in those instances where the Sherman-Ridley standard has been met. We would note in this regard that Section 1501 is silent on the issue of the compensation that a utility may use for the use of its facilities. Section 1501 deals with standards of service, not just and reasonable compensation.

Based on our review of the record, in light of judicial precedent and our Regulations, we consider the ALJ's finding that PAWC's main extension tariff is in accord with the Public Utility Code to be supported by substantial, competent, and probative evidence in the record. Accordingly, the OCA's Exceptions Nos. 1 and 3, are denied.

In its Exception No. 2, the OCA argues that the ALJ erred when he required CIAC ("contributions in aid of construction) of residential applicants where no material hardship to the Company or undue burden to present customers would occur. The OCA cites the Commission Order in Turonis v. Pennsylvania Gas and Water - Water Division, Docket No. F-00210387, Order entered June 20, 1994 (Turonis) for the proposition that any line extension rule which requires CIAC from applicants is

unreasonable service, in contravention of Section 1501 of the Public Utility Code, 66 Pa. C.S. §1501.

The OCA in its Exception appears to be advocating the position that the Company should provide totally free main extensions, with no recognition given to the two Court-imposed exceptions (material handicap and undue burden) which we have discussed supra. As we have stated, we decline to accept this interpretation of the law. In addition, our reading of the Turonis decision does not reveal the support for the OCA position which the OCA ascribes to it. We believe that it will be instructive to quote the observations of the Court as found on page 7 of the decision, wherein it stated as follows:

> This complaint brings into question the propriety of PG&W's tariff provisions appertaining to computation of customer contributions in aid of construction for water main extensions.
>
> We find that PG&W's tariff fails to comply with this Commission's Policy Statement regarding customer contributions in aid of construction. Said policy statement, reported at 52 Pennsylvania Code §69.171, requires fixed utilities to effectuate, without customer contributions, main extensions to primary residential customers, except in those cases where a given extension of facilities would materially handicap the utility in securing a fair return on its investment, or unless the line extension would place an undue burden on utility customers as a result of rate increases. Under all other circumstances, any utility line extension rule which requires a contribution in aid of construction is viewed by this Commission [as] an unreasonable utility service, violative of Section 1501 of the Public Utility Code. (Slip Op., at 7).

Additionally, we find that the Court's holding in the Turonis case, supra, is consistent with our Policy Statement that a

utility shall bear the cost of capitalizing the investment necessary to extend service and facilities consistent with the common law governing the propriety of a utility requesting CIAC prior to extending service and facilities to an applicant. Accordingly, the OCA's Exception No. 2 is denied.

Conclusion

We have carefully reviewed the record as developed in this proceeding including the ALJ's Recommended Decision and the Exceptions filed thereto. Premised on our review, we conclude that the ALJ's Recommended Decision is amply supported by substantial and competent evidence in the record. We further conclude that the OCA's Exceptions are not meritorious and, therefore, will be denied; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by the Office of Consumer Advocate on February 13, 1997, to the Recommended Decision of Administrative Law Judge Louis G. Cocheres, be, and hereby are, denied.

2. That the Recommended Decision of Administrative Law Judge Louis G. Cocheres, be, and hereby is, adopted to the extent that it is consistent with this Opinion and Order.

3. That the Complaint of Irwin A. Popowsky, Consumer Advocate, docketed at R-00943155C0001 be, and hereby is, dismissed, and the record marked closed.

BY THE COMMISSION,

John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: June 5, 1997

ORDER ENTERED: JUN 09 1997

Cindy Parks, *et al.*

v.

Pennsylvania-American Water Company

Docket No. C-00015337, *et al.*

Commonwealth Court Order

No. 2983 C.D. 1996

Popowsky v. PUC

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IRWIN A. POPOWSKY, CONSUMER ADVOCATE, Petitioner	:	
v.	:	No. 2983 C.D. 1996
	:	ARGUED: September 8, 1997
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent	:	

OCT 7
OFFICE OF
CONSUMER ADVOCATE

BEFORE: HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION BY
SENIOR JUDGE NARICK

FILED: October 6, 1997

The issue before this Court is whether Irwin A. Popowsky, Pennsylvania Office of the Consumer Advocate (OCA) properly challenges the Pennsylvania Public Utility Commission's (PUC or Commission) exercise of its authority granted under 66 Pa. C.S. §1501 to establish regulations governing the conditions under which public utilities shall be required to render service when it adopted certain regulations in 1996.

The OCA appeals from the PUC's revised order entitled Final Rulemaking Re: Line Extension--52 Pa. Code §§65.21-65.22 (Revised Final Order) which adopted regulations regarding line extensions by water utilities (Final Regulations). We quash the appeal.

The adoption of the Final Regulations was the culmination of a process that began in 1992, when the PUC issued a policy

statement containing its proposed interpretation of Pennsylvania law concerning the circumstances under which utilities may request contributions or advances for constructing facilities to accommodate applicants for new service. At the time the 1992 policy statement was adopted, most water utilities' tariffs stated that mainlines would be extended to serve new customers on the basis of the "thirty-five foot rule," which had been in effect for many years. Under the thirty-five foot rule, a utility would fund the installation of thirty-five feet of mainline for each bona fide service applicant. The cost of any facilities required to serve the prospective customer in excess of thirty-five feet of mainline, had to be advanced by the applicant.[1]

The 1992 policy statement prompted the filing of complaints by numerous prospective applicants for service. As a consequence, on December 8, 1993, the PUC entered an order initiating proposed rulemaking to eliminate the uncertainty which has arisen under the Policy Statement.

On July 1, 1994, the PUC issued proposed regulations which set forth an economic test for determining the maximum amount a utility should be required to invest to extend its mainlines at the behest of a bona fide applicant. Specifically, the maximum investment would be determined by reference to the annual

---

[1]Customers who made such advances were entitled to receive a refund for each additional customer who connected directly to the applicant-funded mainline extension during the next ten to fifteen years.

depreciation expense that would be covered by the anticipated average annual revenue to be received from the prospective customer, less variable operating and maintenance expenses incurred to serve the customer. The approach requires a substantially greater utility investment per applicant than provided by the thirty-five foot rule.[2]

The Final Regulations differed from the proposed regulations in three material respects: 1) they apply only to water utilities; 2) the economic test was modified; and 3) that if an advance is required, the utility must refund a portion of the advance to the applicant for each customer added. The PUC entered the Revised Final Order on October 7, 1996.[3]

On November 5, 1996, the OCA filed a petition for review with this Court of the Revised Final Order which implemented the regulations in which it alleged that the regulations were not consistent with the decisions of Pennsylvania appellate courts concerning mainline extensions.[4]

While the OCA has appealed from a final order, the truth is that it is challenging the PUC's regulations and thus, we must

---

[2]The PUC issued its final-form regulations by order entered December 28, 1995. In this order, the PUC explicitly rescinded its 1992 policy statement.

[3]The final regulations became effective on February 15, 1997, upon publication in the Pennsylvania Bulletin.

[4]The Pennsylvania-American Water Company (PAWC) and the National Association of Water Companies-Pennsylvania Chapter have been granted intervention in this appeal.

sua sponte raise the question of whether this appeal is proper at all.

The PUC is an agency whose adjudications are subject to this Court's appellate review. However, we must determine whether the promulgation of the regulations at issue here is an adjudication within the meaning of section 101 of the Administrative Law, 2 Pa. C.S. §101 which states, in pertinent part, that an "adjudication" is:

> Any final order, decree, decision, determination, or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

We do not view the promulgation of the regulations herein as a determination or ruling by the PUC which affects either party's property rights. Most specifically, there is no appeal from a regulation unless the regulation itself is self-executing because there is no harm done to the litigant. Neshaminy Water Resources Authority v. Department of Environmental Resources, 511 Pa. 334, 513 A.2d 979 (1986) (explaining Arsenal Coal Co. v. Department of Environmental Resources, 505 Pa. 198, 477 A.2d 1333 (1984)). There has been no specific harm alleged here.

In Insurance Co. of North American v. Insurance Department, 327 A.2d 411 (Pa. Cmwlth. 1974), we stated:

> No right of appeal is provided under the Administrative Agency Law from the mere

> promulgation of a regulation. Given the admitted general applicability and future effect of the instant regulations, it is clear that both fall within the definition of "regulation" under Section 2(e), and accordingly no right of appeal to this Court lies under Section 41 of the Administrative Agency Law at this time. Nor does the failure of the Administrative Agency Law to either grant or negate a right of appeal from the promulgation of an administration regulation give this Court jurisdiction of an appeal by way of broad certiorari.

Id. at 414. See also Concerned Citizens of Chestnuthill Township v. Department of Environmental Resources, 632 A.2d 1 (Pa. Cmwlth. 1993). Therefore, we hold that this Court lacks jurisdiction to hear the appeal of the OCA because it was challenging the PUC's regulation, which is not an order appealable to this Court.

Accordingly, we quash the appeal of the Office of the Consumer Advocate.

EMIL E. NARICK, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IRWIN A. POPOWSKY, CONSUMER ADVOCATE, Petitioner	:	
v.	:	No. 2983 C.D. 1996
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent	:	

O R D E R

AND NOW, this 6th day of October , 1997, the appeal of Irwin A. Popowsky, Consumer Advocate in the above-captioned matter is hereby quashed.

CERTIFIED FROM THE RECORD
AND ORDER EXIT

OCT 6 1997

Deputy Prothonotary - Chief Clerk

EMIL E. NARICK, Senior Judge

Cindy Parks, *et al.*

v.

Pennsylvania-American Water Company

Docket No. C-00015337, *et al.*

Commonwealth Court Order

No. 1829 C.D. 1997

Popowsky v. PUC

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IRWIN A. POPOWSKY, CONSUMER ADVOCATE, Petitioner	:	
v.	:	
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent	:	NO. 1829 C.D. 1997

FILED
CONSUMER ADVOCATE

ORDER

AND NOW, this 6th day of March, 1998, it appearing that the Pennsylvania Public Utility Commission has approved a final rulemaking regarding main line extensions; that these newly promulgated regulations utilize a different economic analysis than the one contained in the previous proposed regulations; that the terms and conditions for the installation of main line extensions to serve new customers that governed and controlled the 1994 PA-American tariff have changed; that the 1994 PA-American tariff and proposed regulations regarding main line extensions that the Pennsylvania Office of Consumer Advocate requested this Court to review are superceded and no longer in effect; that there exists no issue of significant dimension, or any issue capable of repetition yet evading review, the Pennsylvania Public Utility Commission's motion to quash is granted as this appeal is moot.

BERNARD L. McGINLEY, Judge

REMOVED FROM THE RECORD
AND ORDER EXIT

MAR - 9 1998

Deputy Prothonotary - Chief Clerk

CERTIFICATE OF SERVICE

Re: Cindy Parks
v.
Pennsylvania-American Water Company
Docket No. C-00015377

Richard T. Minutello
v.
Pennsylvania-American Water Company
Docket No. C-20028177

Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket No. C-20028361

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Reply Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 19th day of February, 2003.

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ORIGINAL

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FEB 19 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

February 10, 2003

VIA OVERNIGHT EXPRESS DELIVERY
James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

DOCUMENT

Re: **Cindy Parks, Richard Minutello, and Office of Consumer Advocate v. Pennsylvania-American Water Company**
Docket Nos. C-00015377, C-20028177 and C-20028361

Dear Secretary McNulty:

Enclosed for filing are an original and nine copies of the Initial Brief of Pennsylvania-American Water Company, which are accompanied by a bound volume containing the unreported authorities cited in the Company's Brief. Pursuant to 52 Pa. Code §1.11(a)(2), the enclosed Brief shall be deemed filed on February 10, 2003, which is the date shown on the express delivery receipt attached to the delivery envelope. As evidenced by the enclosed Certificate of Service, copies of the Company's Brief have been served upon the presiding Administrative Law Judge and upon the parties to this case. An additional copy of this letter is enclosed, which we ask be date stamped and returned to us in the stamped, self-addressed envelope provided.

Very truly yours,

Anthony C. DeCusatis

ACD
Enclosure

cc: Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CINDY PARKS,	:	**DOCKET NO. C-00015337**
RICHARD MINUTELLO, AND	:	**DOCKET NO. C-20028177**
IRWIN A. POPOWSKY, CONSUMER ADVOCATE	:	**DOCKET NO. C-20028361**
v.	:	
PENNSYLVANIA-AMERICAN WATER COMPANY	:	

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FEB 19 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Reply Brief of *Pennsylvania-American Water Company* upon the persons and in the manner set forth below, in accordance with the requirements of 52 Pa. Code § 1.54:

VIA E-MAIL AND OVERNIGHT DELIVERY
Honorable Larry Gesoff
Administrative Law Judge
Pennsylvania Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

VIA E-MAIL AND OVERNIGHT DELIVERY
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VIA OVERNIGHT DELIVERY
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VIA OVERNIGHT DELIVERY
Richard T. Minutello
110 Pleasant Road
McDonald, PA 15057

Dated: February 19, 2003

Anthony C. DeCusatis
Morgan, Lewis & Bockius, LLP
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Philadelphia, PA 19103

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CINDY PARKS,	:	DOCKET NO. C-00015337
RICHARD MINUTELLO, AND	:	DOCKET NO. C-20028177
IRWIN A. POPOWSKY, CONSUMER ADVOCATE	:	DOCKET NO. C-20028361
v.	:	
PENNSYLVANIA-AMERICAN WATER COMPANY	:	

DOCKETED
FEB 21 2003

RECEIVED
FEB 19 2003
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

REPLY BRIEF OF RESPONDENT

PENNSYLVANIA-AMERICAN WATER COMPANY

Before Administrative Law Judge
Larry Gesoff

DOCUMENT

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DATE: February 19, 2003

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I. INTRODUCTION

Pennsylvania-American Water Company ("PAWC" or the "Company") files this Reply Brief in response to the Main Brief of the Office of Consumer Advocate ("OCA"). To a very large extent, the issues discussed in the OCA's Main Brief have been fully addressed in the Company' Initial Brief filed on February 10, 2003, and an extensive reanalysis of each subject is, therefore, not necessary. However, the OCA presented at least one entirely new claim in its Main Brief, which must be addressed herein. In addition, the OCA's Main Brief contains a number of misstatements of law and mischaracterizations of the evidence. While it is not possible to identify all such errors, the more significant ones that have a direct bearing on the major issues in this case are discussed below.

Two of the most disturbing areas of the OCA's Main Brief are its discussion of the Company's 1989 rate case (OCA Brief, pp. 50-52) and the contract claim for "promissory estoppel" asserted by the OCA on behalf of some of the residents of Mount Pleasant Township (OCA Brief, pp. 50-59). As to the former, the holding in the relevant portion of the Commission's Order flatly contradicts the proposition for which the case is cited by the OCA. *Pa. P.U.C. v. Pennsylvania-American Water Company*, 71 Pa. P.U.C. 210, 235-37 (1989). As to the latter, there are a number of fatal defects.

"Promissory estoppel" is a principle of contract law, not utility or regulatory law, and the one PUC case cited by the OCA (Main Brief, p. 54) does not even address it. Even if the Mount Pleasant residents had a colorable claim – which they do not -- it would amount to a civil cause of action, which the Commission lacks jurisdiction to adjudicate. And, the remedy would be a monetary award for any actual, provable

damages, not a court decree that PAWC install water distribution facilities that are not justified by the terms of the Commission's regulations. Additionally, the allegations of "detrimental reliance" discussed in the OCA's Brief (pp. 57-58) are not borne out by the record. For example, of the eight people whose testimony the OCA cited, none said they attended the March 21, 2002 public meeting and five affirmatively stated that they had not. Finally, the "promissory estoppel" claim was presented for the first time in the OCA's brief – a tactic of which the Commission has long disapproved. The OCA's witnesses did not discuss this claim,[1] nor did the OCA otherwise put PAWC on notice of its intention to proceed in this fashion during the course of the case, which would have influenced the evidence PAWC presented. Indeed, PAWC would have demonstrated that none of the attendees should have left the March 21 meeting with the belief that the installation of mains in Mount Pleasant was a "done deal" because counsel for the OCA told them at the outset that the matter had not been settled, the case was still "open" and the parties were simply "trying to settle."

II. ARGUMENT

A. The OCA's Attempt To Interpret The Line Extension Regulation Out Of Existence Is Clearly Wrong And Underscores The OCA's Continuing Refusal To Acknowledge The Legitimacy Of The Commission's Rulemaking Authority

Of the sixty pages in its Main Brief, the OCA devotes a little over three to the Commission's line extension regulation (52 Pa. Code §65.21 *et seq*). In that short span,

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[1] Mr. Lucas' testimony explained that the March 21 meeting did not announce a settlement of the case (PAWC St. 1.1, pp. 11-12). Mr. Lucas' description was not disputed on the record notwithstanding the fact that OCA witness Fought also attended the meeting and submitted rebuttal testimony in response to a number of other parts of Mr. Lucas' testimony (*see* OCA St. 1S).

the OCA brushes the regulation aside by contending that it cannot really resolve disputed main extension requests because, in the OCA's view, the regulation "is intended to determine the minimum company investment, not a maximum" (OCA Main Brief, p. 16). This argument rests on a single word – "may" – in Section 65.21(1):

> If the annual revenue from the line extension will not equal or exceed the utility's annual line extension costs, a bona fide service applicant *may* be required to provide a customer advance to the utility's cost of construction for the line extension. (Emphasis added.)

The Commission explained its use of the word "may" in its Order adopting the regulation and made it abundantly clear that it expects utilities to fund only the portion of main extensions that are economically justified under the formula set forth in the regulation (27 *Pa. Bull.* at 802). Had it done otherwise, it would have run afoul of the principle the Independent Regulatory Review Commission ("IRRC") insisted be honored by the regulation (27 *Pa. Bull.* at 801):

> Accordingly, the application of this regulation should ensure, as recommended by the IRRC, that utilities will "fund all line extensions that are appropriate for the level of service to be purchased by the new customer without requiring the utilities and their existing customers to incur the costs of unreasonable line extensions." IRRC Comments, p.2.

In short, the Commission's regulation establishes the amount a utility can be required by law to invest in a main extension for a Bona Fide Service Applicant. While the Commission did not impose a *per se* prohibition on a utility investing more, it certainly did not authorize or empower complainants to insist on any higher level of investment. Indeed, had it been otherwise, the Commission could not have achieved its goal of creating "a fair, reasonable and predictable economic standard to address this

regulatory problem that will eliminate uncertainty and greatly reduce the litigation in this area" (27 *Pa. Bull.* at 800).

The OCA's interpretation would turn the regulation on its head, by always requiring utilities to make the maximum investment that is economically justified while leaving them in perpetual jeopardy for claims that they should fund everything above that level (Tr. 418). That is not what the Commission held nor what the IRRC recommended. Furthermore, the OCA's approach is an invitation to the kind of burdensome case-by-case litigation the Commission intended to eliminate when it embarked on a three-year rulemaking effort and adopted a regulation to deal with main extension requests.

The OCA also argues that whenever the Commission by regulation establishes a "minimum," it is always free to raise the bar at a later date (OCA Main Brief, pp. 14-15). In support of this argument, the OCA cited cases involving customer complaints of low water pressure where the PUC required the utility to take corrective action even though the pressure in the utility's mains was not below the "minimum" prescribed by the Commission's regulation at 52 Pa. Code §65.6(a). *E.g., Donelgewicz v. Oneida Water Company*, Docket No. C-00924012 (December 5, 1994). Those cases are not analogous because the regulation the Commission was applying expressly states: "The authority of the Commission to require service improvements incorporating standards other than those set forth in this subsection when, after investigation, it determines that such improvements are necessary is not hereby restricted." Clearly, that was a much different regulation from the one involved in this case. All of the other cases relied upon by the OCA deal with variations on a utility tariff rule, not wholesale departures from the most fundamental elements of a duly enacted Commission regulation.

The OCA's attempt to "interpret" the line extension regulation out of existence belies its far more fundamental disagreement with the PUC's entire rulemaking effort. That disagreement was laid out in detail in the OCA's Comments to the Commission during the rulemaking proceeding (*see* PAWC Initial Brief, pp. 5-9) and has resurfaced in the OCA's Main Brief (pp. 6-7 and 9-13) in this case. The OCA wants to look behind the Commission's regulation and, in so doing, purportedly finds an overarching legal requirement for utilities to fully fund main extensions on terms far more liberal than the "fair, reasonable and predictable economic standard" that grew out of the Commission's rulemaking (OCA Main Brief, pp. 6-13). Simply stated, the OCA refuses to acknowledge the legitimacy of the Commission's regulation and is attempting to re-litigate the very same issues the Commission put to rest in its October 7, 1996 final Order.

The cornerstone of the OCA's argument is the 1952 Superior Court decision in *Ridley Township v. Pa. P.U.C.*, 172 Pa. Super. 472, 94 A.2d 168 (1952).[2] That argument simply rehashes the OCA's presentation to the PUC in the prior rulemaking proceeding. Unmentioned by the OCA is the PUC's dismissal of the OCA's tortured interpretation of *Ridley Township* and the Commission's explicit finding that the final regulation is

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[2] The statutory antecedent for the OCA's argument is Section 1501 of the Public Utility Code (66 Pa. C.S. §1501), which the OCA quotes, in part, at page 9 of its Brief. Unfortunately, the OCA truncated the quotation and left out the following critical language: "Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service." This language evinces a clear legislative intent that, as the Commission found and determined, "a public utility's duty to provide line extensions is not unlimited . . ." (27 *Pa. Bull.* at 800).

consistent with, and in furtherance of, the legal principles established by Pennsylvania's appellate courts (27 *Pa. Bull.* at 801):

> The basis of this customer contribution [determined in accordance with the regulation] is that, absent a reasonable contribution to the line extension's construction costs, the utility would experience a negative (less than zero) equity return on the line extension. Indeed, it appears to us that a line extension that yields a negative equity return, representing an economic loss on the transaction, is one that begins to "materially handicap the utility in securing a fair return on all of its operations," *Ridley*, 172 Pa. Superior Ct. at 497, 94 A.2d at 171, as well as one that unfairly asks existing customers to subsidize the costs of serving a new customer.

Finally, the OCA purports to find two inconsistencies between the Company's Tariff Rule 27 and the Commission's line extension regulation (OCA Main Brief, pp. 17-18). The OCA faults the Company for not including the Distribution System Improvement Charge ("DSIC") in the revenue portion of the formula to calculate Company-required investment. The DSIC changes over time; when the $6,200 Company-investment figure was calculated, the DSIC was zero. Since then, it increased to .73%, which, if included in the revenue portion of the formula, would increase the Company-required investment from $6,200 to $6,260 (PAWC St. 3.1, p. 15).

The OCA also claims Tariff Rule 27 is inconsistent with the Commission's regulation because the rule states that the construction cost of a main extension will include "a reasonable allowance for overhead costs," although the Commission's regulation does not mention "overhead costs." In fact, the regulation does not address how the construction cost of a main should be determined because that subject is entirely outside the scope of the regulation. The OCA simply manufactured an inconsistency

where none exists.[3] And, because the Company installs main extensions with outside contractors, no material amount of "overhead" is included in the cost of main extensions charged to Bona Fide Service Applicants, in any event (Tr. 346-47).

The biggest error in the OCA's "inconsistency" argument is conceptual, not factual. Here and in other parts of its brief, the OCA suggest that if any "inconsistency" were discovered between Tariff Rule 27 and the Commission's regulation, the Commission would be justified in departing from the most fundamental terms of both. That argument simply does not make sense. Even if some "inconsistency" were found and the Commission deemed it to be material, the appropriate way to proceed would be to correct the inconsistency, not throw out the tariff rule and the regulation on which it is based.

B. The OCA Misstated Both The Facts And The Holding In The Company's 1989 Rate Case

In PAWC's 1989 rate case, the OCA proposed an adjustment to remove from the Company's rate base a portion of its investment in a 24-inch diameter main installed in Robinson Run Road on the grounds that the main had "excess capacity." In support of its proposed adjustment, the OCA argued that a 16-inch diameter main would have been adequate to meet the needs of PAWC's then-existing customers, but the Company installed the larger main to accommodate future growth, which included customers that

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[3] "Construction costs" are mentioned only once in the regulation (Section 65.21(1)) and are not defined. Under the Uniform System of Accounts for Class A Water Utilities (p. 20, Accounting Rule 19), which water utilities in Pennsylvania are required by regulation (52 Pa. Code §65.16(a)) to follow, the "cost of construction" includes both "direct" and "overhead" costs.

might be added in Cross Creek, Independence and Mount Pleasant Townships. *Pa. P.U.C. v. Pennsylvania-American Water Company*, 71 Pa. P.U.C. 210, 236-37 (1989). The Company opposed the OCA's proposed adjustment and explained that the entire capacity of the 24-inch main was needed to serve the Company's existing customers in Smith Township and to provide needed fire flow capacity for Gladden Heights. The Company strenuously denied that the 24-inch main had been installed to serve future demand in any other areas. *Id.* at 235-36. The Commission accepted the Company's explanation, rejected the OCA's proposed adjustment and found that the 24-inch main did not have "excess capacity:"

> We have reviewed and closely examined all of the arguments and contentions of the parties. It is our considered opinion, and we so find, that the 24-inch Robinson Road main does not have excess capacity and, accordingly, that it is currently used and useful, in its entirety. Therefore, we reject the OCA's proposed adjustment and its Exception.

Astonishingly, the OCA's Main Brief (pp. 50-52) represents as fact the proposition that the main in Robinson Run Road was installed to serve Mount Pleasant Township. However, it is clear from the face of the PUC's Order that what the OCA represents as fact was merely an OCA contention, which the Commission expressly rejected. Unfortunately, the OCA did not show Mr. Diskin a copy of the Commission's Order when he was asked to accept "subject to check" that "the 24-inch mains, that the company put in rate base in 1989 were justified in part by the need to serve people in Hickory, PA." (Tr. 362; OCA Main Brief, p. 51).[4] Had they done so, it would have been

[4] The Village of Hickory is not even mentioned in the Commission's Order.

clear that the proposition Mr. Diskin was being asked to accept was contrary to the Commission's findings and conclusions in that case.[5]

C. There Is No Basis In Law Or Fact For The OCA's "Promissory Estoppel" Argument

The OCA contends that PAWC's participation in the March 21, 2002 public meeting in Mount Pleasant Township was construed by some in attendance as a promise to construct water mains in the Township at the Company's sole cost and, therefore, under the doctrine of "promissory" or "equitable" estoppel, the Commission must enforce the implied "contract" that arose between the Company and the attendees (OCA Main Brief, pp. 52-59). This argument has no basis in fact or law, as will be explained below. Furthermore, the OCA's argument is highly improper on an even more fundamental level.

As Mr. Lucas explained (PAWC St. 1.1, p. 12), he attended the March 21 meeting "at the invitation and urging of the Mount Pleasant Township Authority and the OCA." At the time, the parties were exploring the possibility of settlement and, when asked to attend the public meeting, the Company initially opposed the idea for fear that its participation would be misconstrued by the public as evidence that a "settlement" had already been achieved. The Company was reassured that would not happen because

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[5] This matter surfaced for the first time when the OCA sprang it on Mr. Diskin during cross-examination. Had the issue been broached in the OCA's testimony, as it should have been, there would have been no need to ask Mr. Diskin to accept anything "subject to check," and he would have had a fair opportunity to review the Commission's Order.

appropriate caveats would be given at the outset.[6] As Mr. Lucas also explained, the purpose for his appearance was to describe a tentative project "footprint" (Tr. 300-301) that the parties where then discussing and "get, firsthand, feedback from the public about where, relative to a preliminarily defined project footprint, there were property owners that desire water service" (PAWC St. 1.1, p. 12). After the meeting, the OCA revised its proposed "footprint" based on public input and asked the Company to design the facilities necessary to accommodate those changes.

Under the circumstances explained above, it is fundamentally unfair for the OCA to offer the Company's participation in the March 21 meeting as grounds for a finding in favor of the Complainants. That unfairness is made worse because: (1) the OCA did not discuss the background and "ground rules" for the appearance of PAWC personnel at the March 21 meeting; and (2) the promissory estoppel claim was raised for the first time in the OCA's brief, thus foreclosing PAWC's opportunity to present additional evidence to show why the OCA's claim is unjustified and improper. Had this opportunity been presented, the Company would have shown that, as promised to PAWC, OCA counsel explained – accurately – to those in attendance that a final settlement had not been achieved and the case was still "open." Hence, there was no reasonable basis for anyone to believe that PAWC would install mains in the Township at its sole cost.

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[6] The Company's counsel could not attend the meeting, which compounded PAWC's concerns about letting its non-legal personnel make a public presentation. The Company relied upon the OCA to accurately portray the legal status of the proceeding when the OCA's counsel addressed the group.

1. The OCA's Promissory Estoppel Argument Is An Attempt To Assert A Contract Claim That The Commission Does Not Have Jurisdiction To Decide

Promissory estoppel is a doctrine of contract law embodied in the *Restatement of Contracts* (Section 90), which Pennsylvania appellate courts have adopted. *Corbin On Contracts* §8.12 at p. 173 (2001). In broad summary, that doctrine, where applicable, will create rights, enforceable at law, even in the absence of "consideration" or other contract formalities, if a party relies, to its detriment, upon the words or actions of another and: (1) the speaker/actor knew, or should have known, that others would rely on its words/actions at issue; and (2) such reliance was reasonable under all of the circumstances. Because promissory estoppel is fundamentally an equitable doctrine, its purpose is to assure that the party who relied upon the words or deeds of another is made whole for actual harm caused thereby. Hence, the end result should be a monetary award for provable damages actually caused by such reliance.

By its "promissory estoppel" argument, the OCA attempts to assert a contract claim on behalf of those residents of Mount Pleasant Township who said they believed PAWC had promised to install a public water supply in the Township at no cost to them. It is axiomatic that the Commission does not have the jurisdiction, power or authority to adjudicate or enforce contract claims, and the Commission, rightly, has refused to do so.[7]

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[7] In *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 9, 383 A.2d 791, 794 (1977) the Pennsylvania Supreme Court held: "[T]he statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of a contract by a public utility." This principle has long been endorsed by Pennsylvania's appellate courts. *Reading & Southwestern Street Railway Co. v. Pa. P.U.C.*, 168 Pa. Super. 61, 77 A.2d 102 (1950) ("The Public Utility Commission has no jurisdiction to adjudicate purely private rights.") *Accord Application of Metropolitan Edison Company for Approval of* (continued).

Thus, even if some residents of the Township could make out a claim based on "promissory estoppel," those claims could be raised only in a civil court, not before the Commission. This is also evident from the cases cited by the OCA, all of which, save one, were contract claims adjudicated in civil courts (*see* OCA Main Brief, pp. 52-57). The one PUC case cited does not even involve the doctrine of promissory or equitable estoppel invoked by the OCA. In *Re Equitable Gas Company*, 68 Pa. P.U.C. 574, 596 (1988), the Commission said that Equitable could not rely upon the four-year statute of limitations in 66 Pa. C.S. §1312 to avoid refunds for improper payments to affiliates where: (1) it had not filed the relevant affiliated interest agreements with the Commission as required by Chapter 21 of the Public Utility Code; (2) it had not disclosed the payments in prior base rate cases, where it had an obligation to do so; and (3) had Equitable done either (1) or (2), its improper payments would have been revealed before the statute of limitations had run. Obviously, that was far different from the facts of this case.

Restructuring Plan Under Section 2806 of the Public Utility Code, Docket No. R-00974008 (June 30, 1998) 1998 Pa. PUC LEXIS 160 (p. 45) (Assignability of electric service contracts "is not within the scope of this Commission's jurisdiction and would be a function of any assignment conditions in the contracts."); *Designer Homes, Inc. v. Pa. Power & Light Company*, Docket No. C-932892 (May 18, 1993) 1993 Pa. PUC LEXIS 30 (In dismissing a complaint alleging a utility overcharged for moving its poles at the landowner's request, the Commission held that it "does not have jurisdiction over private contract disputes between a utility and another person."); *Kintzel v. Pa. Power & Light Co.*, 54 Pa. P.U.C. 491 (1980) (Dispute between utility and customer/landowner "[I]s purely a contractual matter between respondent and complainant over which this commission has no jurisdiction. Complainant's remedy, if any, is properly before the court of common pleas, not this commission.")

Furthermore, importing the contract doctrine of promissory or equitable estoppel to the regulatory setting would be contrary to the legal principles on which public utility regulation is based. A utility is required to adhere to the terms of its tariff (66 Pa. C.S. §1303), and both the Commission and the utilities it regulates are required to adhere to the terms of duly enacted regulations (*see* PAWC Initial Brief, pp. 28-31). Giving customers or Bona Fide Service Applicants a legally enforceable right to require a utility to act in a manner inconsistent with its own tariff or applicable PUC regulations because of alleged representations or promises by the utility's employees would replace the existing, legislatively prescribed system of regulation with a web of private, bi-lateral contracts. Pennsylvania's appellate courts have repeatedly held that those kinds of private contracts are contrary to the basic principles set out in the Public Utility Code. *Philadelphia Suburban Water Company v. Pa. P.U.C.*, 808 A.2d 1044, 1054 (Pa. Cmwlth. 2002) (Quoting with approval *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97 (1915): "Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.").

Finally, even where the doctrine of promissory estoppel is found to apply, the remedy is to make the injured party whole for any actual damages suffered by its reasonable reliance on the representations of another. Here, that remedy would <u>not</u> be a judicial decree that PAWC install water mains in a manner inconsistent with its tariff and the Commission's line extension regulation. Rather, it would be limited to any actual damages that the complainants could prove were caused by their reasonable reliance, i.e., the "detriment" that resulted from their "detrimental reliance." A review of the transcript references cited by the OCA shows that, contrary to its characterization of the record,

there is scant evidence of any such "detrimental reliance."

2. The OCA's Characterization Of Testimony From The September 9 Hearing Is Incomplete And Inaccurate

At pages 57-58 of its Main Brief, the OCA offers the testimony of eight witnesses at the September 9, 2002 public hearing that allegedly evince their "detrimental reliance" upon statements made at the March 21 public meeting. However, the transcript does not support the OCA's allegations, as explained below:

OCA Main Brief (p. 57) (Vickie Bonzo). In response to questions from the ALJ, Ms. Bonzo admitted that the absence of a public water supply was not the only reason for the delay in completing her house (Tr. 75). Moreover, Ms. Bonzo did not even attend the March 21 meeting, and whatever information she came by was based on what she was told by others (Tr. 76, lines 1-4). She also testified that she believed "there would be public water" because property near hers was a "watershed," which she inferred was evidence of the existence of a public water supply (Tr. 76, lines 5-10).

OCA Main Brief (p. 57) (Richard Walsh). Mr. Walsh did not attend the March 21 meeting. When he visited Mount Pleasant Township he saw signs posted along the road proclaiming "We Want Water" (Tr. 222). He expressed concern about the signs, and the seller: "went into verbally explaining it's supposedly down the road, whether it be six months or nine months. Sometime in the near future, within that year's time frame. I was under the impression we would be getting it" (Tr. 223). Mr. Walsh did not check with the Company either before or after purchasing his home, and there is no evidence that he would have refrained from making the purchase absent the seller's representations.

OCA Main Brief (p. 57) (Dean Schlebusch). Mr. Schlebusch testified that: "My wife and I, over the past year, have been looking for property up in Hickory . . ." (Tr. 223). (Emphasis added.) Obviously, if Mr. Schlebusch and his wife decided to buy property in Hickory as early as September 2001, as he testified, their decision was not influenced by any statements made at the March 21, 2002 public meeting. Like Mr. Walsh, Mr. Schlebusch's beliefs were based on representations by the seller that "water was coming" (Tr. 223). Mr. Schlebusch did not check with the Company before or after purchasing the property. Moreover, the property he purchased is not developed ("I don't live in Hickory yet . . .") (Tr. 224) and, therefore, he is not presently a Bona Fide Service Applicant. It is not known whether Mr. Schlebusch is one of the 568 survey respondents the OCA wants to count as a "potential customer."

OCA Main Brief (p. 57) (Deona Miller). In 1999, the company owned by Ms. Miller and her family bought 80 acres of land in Mount Pleasant Township as a real estate investment (Tr. 108-109) with the knowledge that public water was not available and development likely would not be economic if they had to pay for all of the necessary infrastructure (water, sewers and roads) (Tr. 109, lines 1-4 and 110, lines 11-16). She did not attend the March 21 meeting, and her belief that "water was coming" was based upon what she was told by "friends" (Tr. 109). Ms. Miller did not check with the Company. Contrary to the OCA's assertion that "she had engineers come to the property to develop a subdivision plan," Ms. Miller's testimony is quite different: "Based on that, I talked to two engineers. I had them both come out to the property in the interest of giving me a preliminary outline for a subdivision." Later, however, she said: "The day before I had the second engineer come out, I found out that the water company had backed out of the

proposal" (Tr. 110). Obviously, she summoned the second engineer with full knowledge that what her "friends" told her was not correct. Moreover, Ms. Miller did not testify that her company's subdivision plans had to be discarded. The company still plans to subdivide, but into smaller lots, because that will be more profitable under the circumstances (Tr. 111). Moreover, the absence of public sewers and roads is as much – or more – of an obstacle than the absence of a public water supply (Tr. 110).[8] Additionally, since Ms. Miller's company holds the property for subdivision, it is not a Bona Fide Service Applicant. It is not known whether Ms. Miller or her company are included among the 568 landowners the OCA contends are "potential customers."

OCA Main Brief (p. 58) (Dawn Hauber). Like Ms. Miller, Ms. Hauber is a co-owner of a large tract of land ("60-plus acres") that she and her co-owners would like to subdivide and develop (Tr. 231-32). Ms. Hauber is not a resident of Mount Pleasant Township (Tr. 231) and did not attend the March 21 meeting ("While I personally did not attend the March meeting . . . I did read about it in the newspaper . . .") (Tr. 232). The OCA asserts that Ms. Hauber "hired a surveyor to have the land perked and a subdivision plan made. Tr. 232. Now she does not know if she can ever use that plan because it was

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[8] Under the Municipalities Planning Code (53 P.S. §10507-A) and the Municipal Authorities Act (53 P.S. §306(t)), landowners are required to pay the full cost of extending water and sewer mains to serve their properties as well a "tap-in" fee that covers the cost of other facilities that will be used by the landowner. These statutes do not provide for any credits or refunds regardless of how many additional customers attach to the customer-funded main. The same statutes also make the developer of real estate responsible for the cost of other vital infrastructure (e.g., storm sewers, road, curbs). Ms. Miller was obviously resigned to the fact that her real estate development company would have to pay for roads and sewers, but hoped to get a different and far better deal from the Company for the installation of water mains.

based on the water line plan PAWC submitted. Tr. 232." Here is what Ms. Hauber actually said:

> We would have subdivided the farm regardless of whether there had been a water deal or not. However, the anticipation of the development of water has affected the way in which the property has been subdivided.
>
> Since the March meeting, we have hired a surveyor, gone through several plans of ways in which to subdivide the property and are presently in the process of perking the property – into probably smaller parcels than we may have if we had not thought water was going to be here.

There is no evidence of any subdivision plans having been discarded or becoming unusable. Moreover, the "perking" did not even take place until well after Ms. Hauber knew that the free installation of mains was not in the offing. And, because the property is part of a subdivision plan, Ms. Hauber and her co-owners are not Bona Fide Service Applicants. It is not known whether Ms. Hauber and her co-owners are among the 568 "potential customers" estimated by the OCA.

OCA Main Brief (p. 58) (James White). Contrary to what the OCA's Main Brief implies, Mr. White did not testify that he built an addition on his house in reliance upon a belief that "PAWC would be extending their mains in to Mount Pleasant Township." Mr. White complained that the deck he installed "now covers my well," although it was not clear what particular problem that created. *See* Tr. 215. More importantly, Mr. White did not say he attended the March 21 meeting, and he clearly did not check with the Company before undertaking his construction.

OCA Main Brief (p. 58) (Donald Miller). Mr. Miller apparently "refrained" from buying a water softener because he believed a public water system was coming to

the Township: "I have been toying with the idea of getting a water softener over the winter . . ." (Tr. 264). However, Mr. Miller did not suffer any damages from that restraint, nor did he allege any. To the contrary, Mr. Miller seemed simply to be making the same point as other witnesses, namely, that the introduction of a public water system will allow homeowners to avoid current and on-going expenditures for private water supply and treatment systems. Mr. Miller did not state that he attended the March 21 meeting or otherwise explain how he developed the belief that mains would definitely be installed at no cost to him.

OCA Main Brief (p. 58) (Edwind B. Swartz, Jr.). The OCA states that "Edwin Swartz put off repairs to his cisterns (*sic.*) because he heard water was coming Tr. 125." While Mr. Swartz did testify that he "put off repairs to my cistern, a cost of about $1,500," it is difficult to perceive how that translates into damages for which the Company should be held responsible. Indeed, Mr. Swartz did not allege any. He did testify, however, that the installation of public water supply would have a substantial, beneficial effect on the market value of his home (Tr. 125). Mr. Swartz did not state he attended the March 21 meeting, and his testimony implies he "heard water was coming" by other means.

As the OCA acknowledged (OCA Main Brief, pp. 54-55), many residents' belief that a public water system would be installed in the Township came from a handbill-type newsletter that circulates locally in Hickory. That being the case, it is difficult to understand how residents' misperceptions can be laid at the Company's doorstep. In the same vein, the Company cannot be faulted for misperceptions that landowners developed because they obtained their information at second or third hand.

In summary, the evidence upon which the OCA relies does not establish any "detrimental reliance" nor any "damages" that resulted therefrom.

3. The OCA's Promissory Estoppel Claim Was Raised Belatedly And Improperly In The OCA's Brief

The OCA's promissory estoppel claim was raised for the first time in its brief. That claim was not discussed in either the supplemental direct or rebuttal testimony of Mr. Fought or Ms. Kraus. In his supplemental direct testimony, Mr. Lucas explained that the March 21 meeting did not announce a "settlement" of the then-pending litigation and was held to help define the "footprint" of a proposed project (PAWC St. 1.1, p. 12). If the OCA intended to dispute these contentions, it should have done so in the testimony of its witnesses. Mr. Fought also attended the March 21 meeting and, although he addressed other portions of Mr. Lucas' testimony, did not dispute Mr. Lucas' characterization of the March 21 meeting.[2]

The Commission has long held that it is improper to raise entirely new claims for the first time in a party's brief. *Pa. P.U.C. v. Pennsylvania Power & Light Company.*, 57 Pa. P.U.C. 559, 596-97 (1983) ("[I]t is highly inappropriate for a party to propose a completely new adjustment for the first time in its brief."); *Pa. P.U.C. v. Philadelphia Electric Company*, 57 Pa. P.U.C. 260, 270 (1983); *Pa. P.U.C. v. Philadelphia Electric*

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[2] If Mr. Fought did not agree with Mr. Lucas' characterization of the March 21 meeting but kept silent anyway, then the Company was clearly "sandbagged" by the OCA's litigation strategy. However, on balance, the stronger inference is simply that the OCA and Mr. Fought, in fact, agree with Mr. Lucas' characterization. And, because Mr. Lucas' testimony accurately depicted the actual legal status of the case as of March 21, there is really no basis for disagreement.

Company, 56 Pa. P.U.C. 191, 236 (1982) ("The ALJ has rejected this proposal on the basis that this issue was first brought up in CEPA's brief . . . . We adopt the recommendation of the ALJ."). Pennsylvania's appellate courts have also affirmed this principle. *Allegheny Center Associates v. Pa. P.U.C.*, 131 Pa. Cmwlth. 352, 570 A.2d 149, 153 (1990) (A utility "cannot be called upon to account for every action absent prior notice that such action is to be challenged.") *Accord Duquesne Light Co. v. Pa. P.U.C.*, 96 Pa. Cmwlth. 169, 507 A.2d 433, 437 (1986) (Due process violated by failing to provide utility with adequate notice and opportunity to present evidence before determining an issue.)

The OCA's delay is particularly prejudicial because its promissory estoppel argument is highly fact-sensitive. By raising the argument for the first time in its brief, the OCA foreclosed any opportunity for PAWC to present evidence on this issue. As previously explained, PAWC would have been prepared to show that attendees at the March 21 meeting were advised by counsel for the OCA that the case was still "open" and had not been "settled." Indeed, that was the actual status of the case, and OCA's counsel, as the only attorney present at the March 21 meeting, had an affirmative duty to tell those in attendance where the case stood from a legal standpoint. In light of that fact, none of those in attendance should have left the meeting with a reasonable expectation that the construction of a public water supply in Mount Pleasant Township solely at PAWC's cost was a "done deal."

D. A Utility's Required Contribution Should Not Be Based On An "Estimate" Of "Potential Customers" And, In Any Event, There Is No Factual Basis For The Excessive Estimate Offered By The OCA

As the OCA's Main Brief (pp. 36-38) makes clear, its contention that the

proposed main installations are "economic" is based on an estimate of 568 "potential customers" that purportedly would take service after the project is completed. As explained in the Company's Initial Brief (pp. 32-36), the use of an "estimate" of "potential customers" is entirely contrary to the concept of a "Bona Fide Service Applicant" upon which the Commission's line extension regulation and the Company's Tariff Rule 27 are based. The most disconcerting aspect of the OCA's argument, however, is its attempt to attribute its estimate to the Company (OCA Main Brief, pp. 36-37). The Company made no such estimate and has not validated either the use of an estimate or the specific figure the OCA interpolated from its survey. Additionally, the OCA has inaccurately characterized Mr. Lucas's testimony (OCA Main Brief, p. 37; Tr. 301-302). As the transcript makes clear, all Mr. Lucas "agreed to" was that "as many as 600 customers" would have "fit into that project footprint that was being discussed at that time." He never said that was the Company's "estimate." There is no evidence that 600 applicants will attach to the Company's mains or that all of them are Bona Fide Service Applicants, in any event –facts the OCA has consistently failed to address.

E. The OCA's Proposal To "Unbundle" The Debt Issuances In A Utility's Weighted Cost Of Long-Term Debt In Order To "Target" Specific Interest Rates To Specific Main Extension Projects Is Contrary To the Letter And Spirit Of The Commission's Regulation

The OCA contends that the debt cost rate to be used in the revenue-justified investment formula of the Commission's line extension regulation should be the "cost of debt associated with the particular project" (OCA Main Brief, p. 45). The OCA purports to find support for its position in the Commission's use of the word "additional" in the definition of "debt costs" (52 Pa. Code §65.1):

> *Debt costs* -- The utility's additional annual cost of debt associated with financing the line extension investment based on the current debt ratio and weighted long-term debt cost rate for that utility or that of a comparable jurisdictional water utility.

The error in the OCA argument is apparent. The word "additional" simply indicates that the "debt cost" is the added expense the utility will incur for the investment in the main extension, i.e., the debt cost is to be determined by applying the debt cost rate to the utility's investment in the main extension. More importantly, the regulation defines the debt cost rate ("the current debt ratio and weighted long-term debt cost rate"). The use of the term "weighted" makes clear that the Commission intended the debt cost rate to be calculated based on all of the utility's outstanding long-term debt. If one specific debt issue were to be used to determine the cost of debt, there would be nothing to "weight."[10] If the Commission intended to require the cost rate of a specific debt issue to be used in the formula, it would have said so. It did not.

More importantly, the OCA never comes to grips with the implications of its proposal. Not all main extensions could possibly be funded by PennVest loans. For those main extensions that are conventionally financed, i.e., most of them, the OCA's proposal would require a utility to "unbundle" its overall debt cost rate to find the specific debt issue deemed to have financed a particular main extension. Because long-

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[10] Each long-term debt issuance in a utility's capital structure is "weighted" based on the principal balance of the issue relative to the total principal balance of all of the utility's long-term debt. This is a standard presentation in utility rate cases.

term debt is issued periodically at different interest rates,[11] the debt cost rate and the resulting revenue-justified investment could change markedly based upon when a Bona Fide Service Applicant requests service. The result - particularly when interest rates are volatile - would be dramatically disparate treatment of Bona Fide Service Applicants.

There are a number of other errors and misstatements in the OCA's discussion of this issue. Only the more significant ones will be addressed. First, the OCA contends that using the PennVest loan rate of "1.08%" in the Commission's formula yields a per customer investment of $12,971 and "[t]he Company has not disputed this calculation" (OCA Main Brief, p. 46). The PennVest interest rate is not 1.08%. Even the "tickler" rate that applies only in the first five years is higher than that (1.387%), and the rate jumps to 2.774% for the remaining 15 years of the term. If Ms. Kraus' calculation is based on an interest rate as low as 1.08%, then the calculation is clearly wrong. Furthermore, the OCA is also wrong to assert that the Company "has not disputed this calculation." Mr. Diskin's direct testimony (PAWC St. 3.0, p. 5) explained the errors in Ms. Kraus' calculation. Specifically, she significantly understated the PennVest interest cost by using only the introductory rate and ignoring the higher rate that kicks in after year five. This was fully explained in the Company's Initial Brief (pp. 9-10 and 37).

The OCA tries to refute Mr. Diskin's calculations, which quantify the income deficiency that would result from Ms. Kraus' proposal, by contending that the Company somehow receives a windfall because the term of the PennVest loan is 20 years but the

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[11] The prevailing interest rate environment, the term of the bonds and the various covenants and conditions the utility may be willing to accept are some of the factors that influence the interest rate of a particular debt issue.

average service life used to depreciate the main extension is 92 years: "Thus while the loan would be repaid in twenty-years, the Company would continue to earn a return on the net balance of the plant for another seventy-two years" (OCA Main Brief, p. 50). However, Ms. Kraus and the OCA ignored - or refuse to acknowledge - an important point. Because the facilities at issue will be depreciated over an average service life of 92 years, the Company will not obtain a return of its invested capital for at least that length of time. In the meantime, the principal of the PennVest loan must be repaid over its 20-year term. Because the return of capital (depreciation) is insufficient to repay the loan, the difference must be made up with investor-supplied capital. As a result, it is only appropriate that the balance of the original cost of the main extension not recovered through depreciation should remain in the Company's rate base. There is no undeserved benefit to the Company from all of this and, therefore, it does not make up for the underrecovery that would occur under Ms. Kraus' proposal.

The OCA also contends that the Company has failed to demonstrate how it is "short-changed" by using a PennVest interest rate to calculate revenue justified investment while also including the same PennVest debt in the Company's weighted cost of debt in a subsequent rate case (OCA Main Brief, pp. 49-50). The calculations that show how that underrecovery would occur and quantify the amount of the underrecovery are set out in PAWC Exhibit Nos. 3.3 to 3.6. Neither the OCA, in its brief, nor Ms. Kraus, in her rebuttal testimony, have identified any errors in what those exhibits show. To the contrary, Ms. Kraus conceded, as she must, that "the return on the PennVest-funded rate base would not be fully recovered over the term of the loan" (OCA Main Brief, p. 49; OCA St. 1S, pp. 9-10). Ms. Kraus argued that the underrecovery can be

ignored because the PennVest funded main extensions will remain in the Company's rate base after the 20-year PennVest loan is repaid. As explained above, that argument is based on a demonstrable fallacy.

F. The Installation Of A Tank And 12-Inch Diameter Mains In Certain Critical Areas Is Reasonable And In Full Compliance With The Applicable Legal Standard

For the reasons explained in PAWC's Initial Brief (pp. 49-52), the "least-cost" standard proposed by the OCA is contrary to law and inconsistent with sound waterworks principles and practices. The OCA did not address the leading cases or the well-established Commission precedent in this area. The one case the OCA discussed (*Polson v. Citizens Water Company of Washington, PA.*, 41 Pa. P.U.C. 594 (1964)) is notable because the Commission was willing to permit a special exception only because of the unique facts of that case, i.e., because there was no possibility that the customer-requested main would be extended further, there was no reason to size the main as if additional customers would be served beyond the terminus of that main. The same rationale supported the holding in *Gabauer v. Western Pennsylvania Water Company*, 67 Pa. P.U.C. 448 (1988). Clearly, nothing similar to *Polson* is presented by the facts in this case. To the contrary, OCA has offered the possibility of addition growth in Mount Pleasant Township as a justification (albeit a legally insufficient one) for the Company to invest more than the Commission's formula requires. And, unlike *Polson*, in this case, the OCA's own witness acknowledged that a reasonable basis exists for the Company's decision to install a storage tank in Mount Pleasant Township (*see* PAWC Initial Brief, p. 53; Tr. 398-99). There is no legal support for the OCA's proposed "least-cost" standard.

At page 42 of its Main Brief, the OCA characterized the testimony of PAWC witness Hankey as follows:

> On cross-examination by the OCA, PAWC witness Hankey acknowledged that the 750 gallons per minute level is the "accepted company standard for new pipeline." Tr. 331. In other words, it is only the Company's internally adopted standard that would require 750 gallons per minute – not DEP or ISO.

The colloquy between the OCA's counsel and Mr. Hankey was, in reality, much different from what the OCA describes (Tr. 331):

> Q. But according to your testimony and a discovery response, 750 gallons per minute is the "accepted company standard for new pipelines"; is that correct?
>
> A. That's correct.
>
> Q. So that's just a company standard. That doesn't appear in any ISO material or DEP material to your knowledge, does it?
>
> A. It's an ISO standard for homes, single family dwellings, I believe, spaced between 35 feet to 100 feet apart. (Emphasis added.)

Contrary to the OCA's representation, the design criterion used by Mr. Hankey is a well-accepted ISO standard and not "only the Company's internally adopted standard." That design criterion is appropriate for Mount Pleasant Township, particularly in light of the businesses and other large, flammable structures throughout the area (Tr. 332, 389-90). Interestingly, one of the areas where Mr. Fought contends that 12-inch mains are not needed, because a 500 gallon per minute fire flow should be sufficient, is on Hornhead Road (OCA St. 1A, p. 4). Yet, that is the same area where the Obenour farm is located, which was the site of a large barn fire depicted in Obenour Exhibit No. 1 (Tr. 146-48).

The 500 gallon per minute standard is the minimally sufficient fire flow that must exist before DEP will even permit a hydrant to be placed on a main (Tr. 391 and 400; PAWC Initial Brief, pp. 57-58), and ISO considers it appropriate only for areas with single family homes spaced far apart (Tr. 331-32). There is no evidence that such a standard is appropriate in those areas, like Hornhead Road, where Mr. Fought wants to substitute 8-inch for 12-inch mains and the latter are needed to produce the ISO endorsed flow rate of 750 gallons per minute.

III. CONCLUSION

For all of the reasons set forth above and in PAWC's Initial Brief, the Pennsylvania Public Utility Commission should deny and dismiss, with prejudice, the Complaints of Cindy Parks, Richard T. Minutello and the Office of Consumer Advocate and should further find and conclude that the Complainants' service requests should be fulfilled only in accordance with the terms of the Company's Tariff Rule 27 and the Commission's line extension regulation.

Respectfully submitted,

Anthony C. DeCusatis
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2921

Susan Simms Marsh
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

DATED: February 19, 2003

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF CONSUMER ADVOCATE
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IRWIN A. POPOWSKY
Consumer Advocate

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ORIGINAL

February 19, 2003

DOCKETED
FEB 21 2003
DOCUMENT

PA PUC
SECRETARY'S BUREAU
03 FEB 19 PM 3:52

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

Re: Cindy Parks, Richard Minutello, and Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket Nos. C-00015377, C-20028177 and C-20028361

Dear Secretary McNulty:

On behalf of Formal Complainant Richard Minutello, the Office of Consumer Advocate hereby files this letter as his Reply Brief in the above-referenced matter. As per below, a copy of this letter is being provided to Administrative Law Judge Gesoff and all parties of record. Please contact me if you should have any questions or comments about his filing.

Very truly yours,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosures
cc: Hon. Larry Gesoff, ALJ (via Federal Express)
All parties of record
72775.wpd:1/JHC/smm

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RICHARD & ROBIN MINUTELLO
110 PLEASANT RD
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PHONE 724.356.2789

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SECRETARY'S BUREAU

February 18, 2003

Administrative Law Judge Larry Gesoff
Pennsylvania Public Utility Commission
11th Floor State Office Building
300 Liberty Avenue
Pittsburgh PA 15222

Dear ALJ Gesoff:

Once again I would like to express some thoughts on the brief submitted to you by Ms. Marsh and Mr. DeCusatis on behalf of the Pennsylvania-American Water Company.

Among the first items challenged by PAWC is a number-the number 568. They continually quote this number time and time again as being, in their view, a number that cannot be substantiated as the correct total of customers that they would serve. This number was obtained and provided by the OCA.

I can find no evidence, written or otherwise, that the Pennsylvania-American Water Company, in any way, *ever* actively sought out potential customers. No, the fact is that this for-profit company has used public tax money, via the OCA, to drum up customers. Then they have the nerve to complain that the number is too low.

The cable guys have been around, trying to get me to change my service from the satellite dish I now use. Once I did subscribe to cable-TV, but we did not like the service and changed to a DSS system. Now both the cable and the telephone company actively solicit my business.

PAWC does not seem to want to adopt this obvious business plan, because they really don't have to, do they? We'll all still be here 20 years from now...waiting for clean water, and they will still be the only game in town because this is *their* territory.

A survey did go out and some people responded while others did not. This is only natural. For example, how many late tax filers, for example, are there each year at tax time?

Your honor, the promise of "city water" has been floating around here for a long time. When I first moved in, everybody I ever talked to gave me a slightly different story about plans for water service. Some stories were 10 years old.

Then we were informed to attend a March 21st 2002 public meeting. At that meeting we would be given the details concerning the water lines that were to be installed in Mt. Pleasant. I may have missed it, but I can't find any mention of this meeting in the PAWC brief.

At that meeting, in no uncertain terms, Mr. Lucas informed the residents that water lines would be installed. He had a map of the proposed footprint. He said that there would be a fee of $30 only to connect to the main line. He also informed the audience that the company would seek Penn Vest money, and that they have never been turned down for such financing. Construction was to begin in the fall. I was there and that is what he said.

I was also not in the original footprint, and could not believe that PAWC would come down my road, service all and turn off 900 feet away from my house. They would then service the homes on the street above mine. One house is 300ft away. My family is also a high demand user.

I asked Mr. Lucas how this could happen and he told me to see Mr. Cheskis about inclusion into the footprint. At this point Mr. Cheskis was surrounded by residents clamoring for inclusion. The point here is that the PAWC again, passed the buck to the OCA to find their customers for them, and once the details were known, more residents wanted to sign up. In reality the number of 568 homes is far greater because even now, there are residents that are just finding out about the possibility of a water line passing by their home, and want to be included.

If there is doubt about the number of homes it is because PAWC has purposely neglected to seek a true number. The proper question is, "if a water line passed in front of your home and you could connect, without paying thousands of dollars for a line fee, would you do so?" PAWC has never sought the answer to that question because the answer will screw up their fuzzy math.

Next they used the "blame the township" argument. PAWC cites a lack of responsibility by the township as an excuse. So that means I can't get any water service? PAWC is basically telling us that, yes they admit the water situation is terrible, but you folks really brought this on yourselves. But, we'll bail you out....for a price. I'm no expert, but I haven't read anywhere in the volumes of documents, this case has generated, that perceived fault exonerates this utility from service in the best interest of the public.

Then there is my favorite PAWC justification that I call the Mr. Ed defense. On page 23, the last paragraph alludes to animals being kept on the property here in Hooterville. Oops, I mean Mt Pleasant Township. Mr. DeCusatis uses the word rural so often he has me thinking of someplace else.

Anyway, since this topic is just below the sewage issue on the page, I think that he's playing fast and loose with the facts here. We would have better water if it wasn't for all those cows, seems to be the rational I guess. Of the dozen or so homes on my street nobody has any livestock, although I do confess to two cats.

The fact is that homes with livestock are in the vast minority in this township and a quick drive on Washington and Dire streets, and the village of Westland to name a few, will support this statement.

Now comes the confusing part, at least to me. PAWC, in its brief, (p35) tells us all that they should not have to invest money in what they deem to be a speculative investment. (It kind

of makes it seem that we're asking them to pan for gold in the Yukon.) However, earlier (p24) they describe all the benefits we will have if water comes my area. They cite growth, rising property value, increased tax base among other advantages. However, conspicuously absent was the amount that PAWC would reap. I assume that they will be charging for the water we and the future residents will use. They, of course, will profit too.

On page 58-59, on the topic on the main line sizes, PAWC admits that they are sizing lines for future growth. Why size bigger lines in if, as they would lead you to believe, this is a "rural" area that will stay stagnant, and where no one is going to connect anyway. The answer is that they know this will not be the case and are sizing lines accordingly.

In fact I was surprised to learn that apparently PAWC is also in the banking business. On page 48 they have the financing terms available for those who can't afford to pay for PAWC's lines. They won't borrow but they're ready to lend!

Finally, the argument by PAWC that finding favorably on our behalf will send, "exactly the wrong message to other municipalities throughout the Commonwealth that are looking for ways to address regional water supply issues" is a poor rational for non existent service.

The bottom line here Judge Gesoff this that we all know that tonight some child is drinking dreadful water. The residents testified to it. The OCA has been saying this over and over. And the poor water quality and quantity is admitted to even in PAWC's brief.

These kid's parents are doing the best that they can, but they can't come up with a couple of thousand dollars to help PAWC look good to the stockholders on this project. The tax base here is low since the mines shut down. Many residents simply cannot afford a customer contribution at this time.

Thank you for taking the time to read these thoughts.

Sincerely,

Richard T. Minutello

CERTIFICATE OF SERVICE

Re: Cindy Parks
v.
Pennsylvania-American Water Company
Docket No. C-00015377

Richard T. Minutello
v.
Pennsylvania-American Water Company
Docket No. C-20028177

Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket No. C-20028361

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Letter regarding Richard Minutello's Reply Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 19th day of February, 2003.

SERVICE BY FEDERAL EXPRESS

Anthony Decusatis, Esq.
Morgan, Lewis & Bockius
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Philadelphia, PA 19103-2921

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Robert M. Ross, President
Susan Simms Marsh, Esq.
Pennsylvania-American Water Company
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Hershey, PA 17033

Cindy Parks
447 Fort Cherry Road
McDonald, PA 15057

Richard T. Minutello
110 Pleasant Road
McDonald, PA 15057

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SECRETARY'S BUREAU

Dianne E. Dusman
Senior Assistant Consumer Advocate
Joel H. Cheskis
Assistant Consumer Advocate

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DOCKETED
MAY 22 2003

May 18, 2003

Dear Commissioners:

On page 89 the order of Judge Gesoff, item number two, is short and to the point. "That Complaint of Richard T. Minutello against Pennsylvania-American Water Company, at Docket No. C-20028177, is dismissed. Therefore, members of the Public Utility Commission I will also be short and to the point.

Someone making the rules dealing with water service appears to be asleep at the switch. This is embarrassing for our state. As for Judge Gesoff, I'm shocked that your ALG, who appeared to show such compassion during the local hearings, could completely miss the point. Judge Gesoff *heard* us but he was not *listening*. I realize that the ALJ has rule against me, and my comments could be dismissed as "sour grapes". However, I have tried to consider both sides objectively, but I still can't seem to overcome some issues.

DOCUMENT

Who really controls the tap?

I would like to begin by pointing out that neither Pennsylvanians nor other Americans own the Pennsylvania-American water company. This company is owned by RWE, a German international conglomerate. You can imagine the surprise and anger in my community when I inform my neighbors of this fact. Especially post 9/11. Yes, the folks who own the sole rights to supply us with "city" water are Germans. But you already know that because *you* were the ones who approved it.

I would like to refer to a letter addressed to Commissioner Thomas from State Representative Phyllis Mundy, dated June 4th, 2002. In this letter Representative Mundy opposes the sale of PAWC for several reasons having to do with the public interest. She writes, "Also, I am extremely skeptical about the ability of a foreign company providing responsive and thorough service to it's customers in Northeastern Pennsylvania." As you read on you will learn how correct she is.

Since PAWC has been granted a monopoly, there is no other water company we can turn to. They claim to be "the water company of choice" What choice? Please supply me with the name of the other water company my community and I can turn to for service. You can't because there isn't any.

In case you missed it, here is how they do business. The RWE strategies statement, as found on the PAWC web page is as follows:

Strategies:

Own, acquire, and invest in regulated water and wastewater utilities that demonstrate **the ability to consistently earn rates of return that exceed the cost of capital investments.**

Deliver **profitable** water, wastewater, and other water resource management service to communities and industries.

Deliver water, wastewater, and water resource products and facilities needed or desired to customers, communities and industries in a manner that **enhances shareholder value**.

The bold print is as it appears on their page. They put it in bold type - I did not.

I expect a company to be able to make a profit. I have no problem with that. PAWC averages about a 16% return on investment, based on filings located on your web page. The problem with the numbers game is that you can manipulate them to prove any point you want to make. I'm not an accountant, but I'm pretty sure I'm correct, based on form 400 for the year 2001.

However is seems that RWE will not service areas unless there is an *immediate* profit for them. This is their stated strategy. If they can't make a back the money it cost them to install lines in one year, customers have to "contribute". Why then doesn't the customer participate in future profits, derived from the water lines they partnered in paying for? Why can't we depreciate these lines on our taxes too? Where are our shares of stock in the company? It comes down to forced investment, and for that to be permitted is unconscionable.

Is it really possible for a large water company to lose money under your rules? I checked around, and found could not find a substantial water company that didn't make money, or went out of business. Even poorly run companies are sold to these "water giants" at many times their worth, thus rewarding bad management at retirement time.

These are the rules your office made, and that they operate under. I don't think that this is very favorable to the public interest. At what point do you think the interest of the public, should come before RWE's stockholders dividends? In Mt. Pleasant Township that time is now.

You can lead a judge to water, but you can't make him think.

In section III of Judge Gesoff's initial decision you read Findings of Fact. There are twenty pages, and over 65 paragraphs that reflect just a small sample of everyday life in my community.

- There are children who drink the ground water and suffer from various infections and sore throats. This is a fact.

- People who cannot flush the toilet every time they go to the bathroom. This is a fact.

- Homes and barns that were left to burn to the ground because water was not available. This is a fact.

- Rainwater from gutters is use to supplement poor water of contaminated wells. This is a fact.

- People who can't sell homes or buy homes in the area, because banks would not approve financing for a home without water. This is a fact.

- People that have to ration showers, baths, and laundry use due to a lack of water. This is a fact.

- Residents that have already paid thousands for various ways to squeeze every last drop of water that they can get. Not to mention the cost that we have to pay to buy, and/or have potable water delivered. This is a fact.

And on and on it goes. PAWC has never disputed these "third world conditions". In fact Judge Gesoff in his summary clearly finds that the water is unsafe, limited and that, "there is a deleterious economic effect on the community" (page 6).

He also however, goes on to say that these horrific conditions does not translate into," ....a duty on the part of PAWC to extent its service without customer contributions".

It's a nice "catch 22". We don't get water unless we pay about $2500 per family, but most of the families can't afford it.

Entered in evidence, is a profile of Mt. Pleasant Township. The average resident makes only $12,000 a year. Combined family income is about $30,000 per year. Over 60% of the kids in my school district qualify for lunch subsidies in school.

How are these residents going to pay over $2500, your judge thinks is fair, to help out the stockholders of RWE ? But that's just for starters. The ALJ never included or mentions the costs we will have to pay, to also dig, run and then bury the waterline from our homes to the street. Also not include is the cost to connect this line to the house plumbing system. This cost per resident to finally get water out of their faucet is far above $2500.

I looks good on paper.

Again I will quote from the published business philosophy of PAWC.

"So as to protect public health and safety, enhance the quality of life, and promote economic prosperity".

They wrote it, but as you can clearly see RWE doesn't practice what they preach. And shame on you for letting them get away with statements like that. They have acted exactly opposite in this case.

And the winning number is.....

Judge Gesoff believes that since a number of residents did not actively support a water plan over a decade ago (1989), the number of residents actually desiring service is questionable. He's guessing at my expense. (Page 52) Times have changed.

Is it not also reasonable to assume that a person in their 50's, now over 13 years later in their 60's, would want water if they found that they can't sell their home at retirement time? I'm guessing yes, and my guess is as good as Judge Gesoff's. (Actually, I'm not guessing-reread the Finding of Fact section of the judge's decision.)

This brings me to the issue of just how many people really do want water? The judge ruled that, incredibly there were no bona fide service applicants. Members of the Commission I ask you, doesn't something seem to be amiss? Of all the people that came forward in two hearings, and of the 250 that attended the public meeting, nobody bothered to fill out the paperwork? C'mon now, here is what really happened.

PAWC deliberately steered the residents wanting service to the OCA. They did it over and over. Furthermore, PAWC never went anywhere in my area, in an effort to talk to the various residents of my community, for the purpose of seeking possible customers. Again, it was up to the OCA to "round up the customers". Other utilities continually try to solicit possible customers, cable for instance; various power companies too. PAWC is strangely silent.

Unlike most business facing competition, it was in RWE/PAWC's favor, to deliberately keep the number of possible customer low in this case. Every customer they solicit, and that applies for their service hurts their, "rural area/few homes argument in this case.

Bona Fide Customers

On March 21st 2002 there was a town meeting where Jay Lucas, representing PAWC addressed the assembled residents. Over 250 attended. While he spoke he led us to believe that we would be soon receiving service. He referred to a map with water main lines on it. He gave a probable timetable for construction, and how the project would be financed. He told us there would be a tap-in fee of $30 only.

I have worked in television news for over 19 years, and have participated in thousands of stories. I was there. I heard what he had to say. He said those things. He led us to believe that water was coming to my community.

RWE's purchase of AWC was approved by the PUC, and then suddenly our "deal" fell through. How about that timing!

Judge Gesoff would like you to disregard what Mr. Lucas said (page 84). He says that there was only a possibility of a settlement, and that a lawyer was not present for Mr. Lucas. For the sake of argument, let's assume this is correct. It was all a misunderstanding. Over 100 people got it wrong.

Well, here is *my* story. At the March 21st 2001 meeting, I was *not* included in the original footprint. PAWC's plan called for the main line to turn about 900 ft from my home, and pass on the road behind my house.

Following the meeting, I directly asked Mr. Lucas why I was not included. He indicated that my home was too far away to be worth the trouble. I then asked why he, or a representative of PAWC had not come visited my home to find out what type of water user my family of four would be. I received no answer.

I also asked why he did not consider having my home connected from behind my house, since the water line would pass there, and the run was shorter. Also, since I would have to pay for the line from my home to the street, this would be an easy way to pick up another customer at little expense to PAWC.

Mr.Lucas did not answer, but directed me to Mr. Cheskis from the OCA. He also directed many others to the OCA. At that meeting Mr. Lucas never made any attempt to inform anyone to fill out any PAWC paperwork. I was told to put in writing that I wanted to be included, and to give that information to the OCA. Others were told the same thing. I was specifically told that it was premature to apply until the main line runs were finalized

On March 26, I wrote a letter that included pictures, to Mr. Cheskis. The second sentence reads, "At the meeting, as you are aware, Jay Lucas from PAWC designated you as the contact person for those of us with questions or concerns".

A copy of my letter was also sent to Mr. Lucas at PAWC. I have yet to hear from Mr. Lucas, PAWC, or RWE. I'm still waiting.

Judge Gesoff is wrong. At least one person did apply for water in writing. Me. The simple fact is PAWC intentionally steered those seeking water away from them. They then forced a state agency, operating with public tax money, to have to round up customers for them. Now they have the audacity to first challenge the number of customers, and second claim there are no bona fide customers. Their indifference has served them well.

Go to their web page and try to find a link to apply for service. There isn't one.

Conclusion.

In every step during this hearing I have testified and written letters which have been entered into the record. Nothing I have stated to you now, should come as a surprise to Judge Gesoff. He has heard this before. Therefore I am dismayed that he has provided RWE a very wide exemption, from their responsibility to provide ample, safe, clean water to the residents of my area. Mt. Pleasant Township is a dry well, currently surrounded by PAWC/RWE. They service areas immediately on all sides of my area.
They have also willingly stalled service because they want two items:

- Mandatory tap in.
- Unaffordable customer subsidy for *their* lines.

If our local government or the state mandates the above, then RWE would be more than willing to supply us. This issue has always been about how many and how much.

I ask you to now to step up and set an example. Please act in the best interest of the public. There *is* a dire need. That fact has never been disputed. Even your ALJ understood that. PAWC/RWE has an obligation. If they are going to act as a monopoly, then send them the message that they must service the rural areas, as well as the more profitable urban ones, if they want to do business here.

In my township a child will drink foul water and get sick. Another might die in a fire that, due to lack of water, can't be put out. I ask you, how can you put a price on decency?

Sincerely,

Richard T. Minutello

COMMONWEALTH OF PENNSYLVANIA

ORIGINAL

OFFICE OF CONSUMER ADVOCATE
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923

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Consumer Advocate

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May 20, 2003

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DOCUMENT

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

Re: Cindy Parks, Richard Minutello, and Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket Nos. C-00015377, C-20028177 and C-20028361

Dear Secretary McNulty:

On behalf of Formal Complainant Richard Minutello, the Office of Consumer Advocate hereby files this letter as his Exceptions in the above-referenced matter. As per below, a copy of this letter is being provided to Administrative Law Judge Gesoff and all parties of record. Please contact me if you should have any questions or comments about his filing.

Very truly yours,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosures
cc: Hon. Larry Gesoff, ALJ (via Federal Express)
All parties of record
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RJP

51

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF CONSUMER ADVOCATE
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ORIGINAL

May 20, 2003

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

DOCUMENT

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SECRETARY'S BUREAU

Re: Cindy Parks
v.
Pennsylvania-American Water Company
Docket No. C-00015377

Richard T. Minutello
v.
Pennsylvania-American Water Company
Docket No. C-20028177

Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket No. C-20028361

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Exceptions of the Office of Consumer Advocate in the above-captioned proceeding. Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

Dianne E. Dusman
Senior Assistant Consumer Advocate

Enclosures
cc: Hon. Larry Gesoff, ALJ (via Federal Express)
All parties of record
64253.wpd:1/DED/snm

RJP

45

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Cindy Parks, Richard Minutello, and Irwin A. Popowsky, Consumer Advocate	:	
	:	C-00015377
v.	:	Docket Nos. C-00015337, C-20028177 and C-20028361
Pennsylvania-American Water Company	:	

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EXCEPTIONS OF THE
OFFICE OF CONSUMER ADVOCATE

DOCKETED
MAY 22 2003

Dianne E. Dusman
Senior Assistant Consumer Advocate

Joel H. Cheskis
Assistant Consumer Advocate

For:
Irwin A. Popowsky
Consumer Advocate

DOCUMENT

Office of Attorney General
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

DATED: May 20, 2003
72768.wpd;1/DED/smm

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Cindy Parks, Richard Minutello, and Irwin A. Popowsky, Consumer Advocate	:	
v.	:	Docket Nos. C-00015337, C-20028177 and C-20028361
Pennsylvania-American Water Company	:	

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SECRETARY'S BUREAU

EXCEPTIONS OF THE OFFICE OF CONSUMER ADVOCATE

Dianne E. Dusman
Senior Assistant Consumer Advocate

Joel H. Cheskis
Assistant Consumer Advocate

For:
Irwin A. Popowsky
Consumer Advocate

Office of Attorney General
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DATED: May 20, 2003
72768.wpd;1/DED/smm

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

ADMINISTRATIVE DECISIONS

STATUTES

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I. INTRODUCTION

On April 30, 2003, the Pennsylvania Public Utility Commission ("Commission") served the Initial Decision of Administrative Law Judge Larry Gesoff regarding the Formal Complaints of Cindy Parks, Richard T. Minutello and the Office of Consumer Advocate ("OCA") against the Pennsylvania-American Water Company ("PAWC"). The Complainants sought the extension of PAWC's distribution system into Mount Pleasant Township, Washington County because, among other things, the Township has experienced well water contamination and other problems affecting the supply of potable water to the Township.

The Initial Decision recommends dismissal of all three complaints. In part, the recommendation is based upon the conclusion that the application of the Commission's main extension regulations and PAWC's tariff is not possible in this case, because no one submitted an application for service to PAWC and, as such, there is no "Bona Fide Applicant for Service" pursuant to the main extension regulations. 52 Pa. Code §65.1. The ALJ further rejected each of the OCA's positions in support of PAWC constructing the main extension. In response to the Initial Decision, the OCA files these Exceptions.

The ALJ correctly found that the Complainants have demonstrated a clear need for public water service in Mount Pleasant Township, but failed to find that PAWC, as the monopoly service provider, has an obligation to provide service to the Township to meet the established public need for such service. The ALJ thus incorrectly applied Section 1501 of the Public Utility Code and the main extension regulations promulgated pursuant to that Section, which require the Company to construct the mains necessary to serve Mount Pleasant Township, as the OCA has recommended.

II. SUMMARY OF EXCEPTIONS

The ALJ correctly found that the Complainants have demonstrated a clear need for public water service in Mount Pleasant Township. I.D. at 1-26, 38-39 (Findings of Fact Nos. 1-65). Among other things, the ALJ found that: the water is not potable and creates health problems; water must be severely rationed; water must be purchased by the bottle and cistern load; the lack of water adversely affects fire protection; and the need for public water has had a deleterious economic effect on the residents, businesses, owners of land and schools of Mount Pleasant Township. *Id.* Moreover, Mount Pleasant Township lies directly within PAWC's service territory. The ALJ found that PAWC has distribution systems located approximately 2.8 miles east, 1.7 miles south, 3.3 miles north and 7.3 miles west of Hickory. *Id.* at 26 (Finding of Fact No. 66). Considering these findings together, the OCA submits that the Commission must conclude that PAWC is obligated, as a public utility, to extend service to the Township. The Company's interpretation of the Commission's regulations and PAWC's tariff, as adopted by the ALJ, would virtually nullify Section 1501 of the Public Utility Code which requires extensions of service for the safety, convenience and accommodation of the public.

The Initial Decision should not be accepted, given the availability of public funds through the Pennsylvania Infrastructure Investment Authority Act, 35 P.S. §751.1, *et seq.* ("Pennvest"), which provides financing for the express purpose of resolving inadequate water supply problems such as those throughout Mount Pleasant Township. This funding would enable the project to be constructed without contributions from customers and with no financial harm to the Company. In fact, PAWC witness Paul Diskin testified that the use of Pennvest funding in areas such as Mount Pleasant Township "benefits everyone." Tr. 357.

Furthermore, the health and safety of more than 3,000 affected residents should not continue to be jeopardized because the ALJ has erroneously concluded that there are no "Bona Fide Applicants for Service," as no written applications for service were submitted to PAWC. The record substantiates the Township residents' and businesses' overwhelming demand for water service, which justifies rejection of a conclusion based on such a technicality. The record evidence also demonstrates that the construction of this extension as the OCA has proposed will be profitable, pursuant to the "break-even" analysis. To accept the ALJ's recommendation would wrongly perpetuate long-standing and well-established health and safety problems due to the lack of a potable water supply. As such, the Commission should not accept the Initial Decision because such action would run contrary to the letter and spirit of Section 1501. *See* Ridley Township v. Pa.P.U.C., 172 Pa. Super. 472, 94 A.2d 168 (1952).

The ALJ's Findings of Fact graphically illustrate a situation of water-borne illness, lack of sanitation and loss of property due to inadequate fire protection that is more descriptive of an undeveloped nation than a small town within 25 minutes of Pennsylvania's second largest city. If the Commission were to determine that PAWC is not required to construct this project under the Company's main extension tariff as the OCA has proposed, the Commission must find that the compelling demonstration of public need requires an exception to the tariff and Commission regulations. In doing so, the Commission would be upholding its fundamental obligation to protect the public. Every day that the Township lacks access to public water is another day that the citizens' health, safety and welfare are unnecessarily jeopardized.

III. EXCEPTIONS

OCA Exception No. 1 — The ALJ Erred In Failing To Require PAWC To Extend Its Mains Where There Is A Compelling Public Need For Such Service. (I.D. at 28-39; OCA M.B. at 9-19).

A. Introduction.

In the Initial Decision, the ALJ accurately made sixty-five Findings of Fact which demonstrate a clear need for public water service in Mount Pleasant Township. I.D. at 7-26. The ALJ further noted that PAWC does not contest the need for public water evident in this case. I.D. at 38. The ALJ also correctly noted that the Township lies within PAWC's service territory with distribution facilities as close as 1.7 miles away. I.D. at 26. However, the ALJ failed to conclude that these facts support an order directing PAWC to extend its distribution system to Mount Pleasant Township residents to fulfill its fundamental obligation to serve as a public utility.

Instead, the ALJ determined that Section 1501 of the Public Utility Code, 66 Pa.C.S. §1501, does not require PAWC to serve the public, even where a compelling need has been shown. I.D. at 29. The ALJ states that Section 1501 requires public utilities to provide "reasonable service" to the public and that a public utility's duty to provide line extensions is not unlimited. *Id.* The ALJ notes that Pennsylvania case law "will not obligate the public utility to make the line extensions *for which there is no public need* or to make line extensions which are uneconomic or unreasonable." *Id.* (citations omitted; emphasis added). This description of the law is accurate, but the ALJ has concluded, and the Company did not dispute, that *there is a public need.* Moreover, the project needed to serve the majority of the Township is neither uneconomic nor unreasonable. Therefore, the ALJ clearly misapplied the law to the facts of this case.

B. PAWC Is A Regulated Public Utility And Has An Obligation To Serve Where There Is Public Need.

The ALJ took a very narrow, and ultimately incorrect, view of Section 1501 as it applies to this proceeding. Acceptance of the Initial Decision would ensure that the substantial public need in Mount Pleasant Township would remain unmet. Section 1501 specifically articulates the requirements of utilities to make extensions of their systems necessary for the "accommodation, convenience and safety of its patrons, employees ***and the public***." 66 Pa.C.S. §1501 (emphasis added). A public utility has an obligation to meet a public need. This is supported by decades of jurisprudence developed by the federal and state appellate courts as well as by this Commission. OCA M.B. at 9-10, *citing*, Milwaukee Elec. Ry. Co. v. Milwaukee, 252 U.S. 100, 105 (1920)(a railway company cannot escape its obligation to serve the public simply because a particular area of its franchise contract was not profitable).

However, the ALJ determined that PAWC is not obligated to provide service even where substantial and compelling need is undisputed, as is the case in this proceeding. I.D. at 38. The instant case is directly analogous to Ridley Township v. Pa.P.U.C., 172 Pa. Super. 472, 94 A.2d 168 (1952) and is unlike Colonial Products v. Pa.P.U.C., 188 Pa. Super. 163, 146 A.2d 657 (1958) and Lynch v. Pa.P.U.C., 594 A.2d 816 (1991), which the ALJ incorrectly relied upon.

In Ridley, twelve property owners sought a line extension in a town that was already served in part by the water Company. Similarly, PAWC's facilities in this proceeding are already only 1.7 miles from Mount Pleasant Township. Finding of Fact No. 66. In Ridley, the Township also requested the installation of fire hydrants. In Mount Pleasant Township, there is extensive testimony of the need for greater public fire protection. Finding of Fact Nos. 4, 5, 10, 14, 19, 22,

28, 29, 31, 38-40, 55. In Ridley, the evidence showed that the line extension requested would entail the expenditure of less than one-fourth of one per cent of the Company's current and accrued assets. In Mount Pleasant Township, as discussed further below, service to the Township would require an expenditure of one tenth of one percent of the Company's gross revenues. OCA St-2A at 16. In Ridley, the Superior Court reversed the Commission's decision not to require the extension and ordered the extension be built. ALJ Gesoff, however, failed to determine that Ridley is the controlling precedent for this proceeding.

The Ridley decision should govern the application of Section 1501 to the facts of this case. Therein, the Superior Court specifically articulated a public utility's obligation to serve where there is a public need regardless of whether a portion of the territory, when looked at in isolation, would not be profitable to the utility. The Superior Court stated that, based upon the mandate of Section 1501, a utility may not select and serve only presently profitable territory covered by its franchise. Ridley at 171. The Court stated:

> A public utility cannot collect the cream in its territory and reject the skimmed milk. A public service corporation may not 'pick and choose' only presently profitable territory covered by its franchise. ***If a portion of the territory served is not profitable, but the entire service produces a fair return on the investment, the utility may still be required to serve the unprofitable portion, if the rendering of such service does not result in an unreasonable burden on its other service.*** . . . Although the Company does not enjoy a monopoly in the Township it is obliged to render service within a reasonable distance from its distribution system, and if it takes only the profitable business no other water company will enter the area to pick up the unprofitable business which it declines. No other company will become 'a snapperup of unconsidered trifles.'

Id. at 171 (citations omitted; emphasis added).

The Superior Court in Ridley continued that the action of the Commission must "rest upon evidence which shows that, without the contribution or loan of the consumers, the cost of

construction would materially handicap the utility in securing a fair return on all its operations." *Id.* The Superior Court added that "[t]he primary object of the public service laws is not to establish a monopoly or to guarantee the security of investment in public service corporations, *but first and at all times to serve the interests of the public.*" *Id.* (emphasis in original), *see also*, Hoffman v. Public Service Comm'n, 99 Pa. Super 417, 429 (1943). Finally, the Court concluded that "these people are entitled to fire protection and domestic water service without subsidizing a large and prosperous utility." *Id.* at 172.

Ridley is the controlling precedent for this case. The ALJ, as discussed further below, relied on cases that are clearly distinguishable from the facts of this matter. The Commission should reject the ALJ's application of Section 1501 and sustain the complaints.

C. The ALJ Applied The Wrong Precedent To The Facts Of This Proceeding.

To arrive at his recommendation, the ALJ relied on the decisions in Colonial Products and Lynch, *supra*. I.D. at 29-30. Both of these cases are clearly distinguishable from the instant case because they involve line extensions *to an individual customer*. In Lynch, the complainant owned a lot that he wanted to develop and Colonial Products involved a lumber yard that needed water for fire protection. Neither case involved an entire Township, that is, *over 3,000 people*, who are in desperate need of public water. As such, this case is not a mere main extension case; rather, it concerns a public utility's obligation to serve an entire community within its service territory. When viewed in that light, the OCA submits that PAWC must be required to extend service to this community as the OCA proposed in this proceeding.

Yet, even if the Commission determined that Colonial Products and Lynch are applicable to this proceeding, the OCA submits that the facts of this proceeding satisfy the standards

expressed in those cases as well. For example, the ALJ noted that, in Colonial Products, "a utility rendering reasonably adequate service should not be subjected to *unreasonable* expenditures, or the consuming public *unduly burdened* because of the unusual or extraordinary demands of one customer." I.D. at 29 (emphasis added). Requiring PAWC to extend its mains into Mount Pleasant Township would not create an unreasonable expenditure for the Company. OCA M.B. at 32-51. Furthermore, the extension would not unduly burden the consuming public because, as the OCA has shown, the proposed a project would affect current rates by no more than 0.10%. In fact, the OCA has shown that PAWC would benefit from the Company extending its mains into Mount Pleasant Township. OCA M.B. at 43-50. Therefore, the standard articulated in Colonial Products, if relevant to this case, has been satisfied.

In Lynch, the ALJ noted that, in order to obtain a line extension, "the applicant must show (1) that there is a 'public necessity for the service requested' and (2) that the extension will result in 'a return of investment for the utility'." I.D. at 30. The OCA submits that the complaints in this proceeding satisfy this test as well. Again, the substantial public need is undisputed. Furthermore, the OCA's proposal allows for the extension to be performed while providing PAWC a return on their investment for the utility. PAWC witness Paul Diskin recognized during cross-examination that if Pennvest funds were procured to finance the extension of PAWC's lines into Mount Pleasant Township, it "benefits everyone" and there are "no losers." Tr. 357, 359. Therefore, if the Commission determines that the standards in Colonial Products and Lynch are relevant to this proceeding, the OCA submits that the complainants have satisfied them.

The ALJ also discusses Shenango Township v. Pa.P.U.C., 686 A.2d 910 (Pa. Cmwlth. 1996), in his Initial Decision in support of the proposition that "if the OCA can show that the application of PAWC's [main extension tariff] is unreasonable in its application to the extension of service to Mount Pleasant Township, the Commission has the power to waive its line extension regulations. The OCA's burden of showing this, however, is a heavy one." I.D. at 40. As discussed further below, this case is also not applicable to the instant proceeding; however, if it were deemed to be, the OCA submits that Complainants have met even a "heavy" burden of showing that the regulations and the tariff should be waived in this instance. An overwhelming amount of evidence has been offered to justify a waiver of the main extension regulations under the circumstances.

The cases which the ALJ relies upon in his Initial Decision are distinguishable from the facts of this proceeding. Yet, should the Commission determine that the cases are relevant, the complainants have shown that they have satisfied the standards expressed in those cases, because a public need exists, over 3,000 people are affected and PAWC will earn a return on its investment for this extension.

D. PAWC Will Benefit Financially Over Time By Constructing This Project Because Of The Tremendous Future Growth That Will Occur Throughout The Township.

In his Initial Decision, the ALJ discusses the "break-even analysis" and "floor or ceiling" issues related to the Commission's main extension regulations and PAWC's tariffs. I.D. at 41-43. The ALJ concludes that the line extension regulation formula sets a maximum a utility must contribute to an extension project, unless it voluntarily contributes more. I.D. at 43. This conclusion is directly contrary to the express intent of the Commission when it finalized the

regulations. OCA M.B. at 16-18. If the Commission were to approve this erroneous conclusion, the practice of "cream-skimming" would be forever legitimized, because a utility would never have to provide service unless and until it could predict that a particular project would produce a profit. Acceptance of this conclusion would also unnecessarily restrict the Commission's authority to order extensions of service pursuant to Chapter 15 of the Public Utility Code. No basis exists for the conclusion that utilities need only spend more per customer where they "voluntarily" choose to do so. Such a result runs directly contrary to the holding of Ridley, as discussed above.

The OCA submits, however, that the Commission does not need to reach this issue, because the record supports the conclusion that the Mount Pleasant Township project, if PAWC pursues "least-cost" financing, would generate sufficient revenues to meet the "break-even" analysis even with only 409 customers, as discussed more fully later in these Exceptions. Moreover, the record supports that PAWC would do better than break even over time because of the tremendous future growth that will occur throughout the Township.

The facts on the record demonstrate that there is tremendous potential for growth and economic development throughout Mount Pleasant Township and that the introduction of access to public water will spur such future growth. Finding of Fact Nos. 9, 19, 34. This growth will occur not only in the project footprint that the OCA has proposed be constructed in this proceeding, but also throughout the Township where future extensions may be able to follow economic development and growth. The record supports a finding that the introduction of public water service to the area would spur growth which would make the proposed project more profitable to PAWC over time. As such, the ALJ erred in failing to consider the tremendous

potential for future growth that would inevitably occur in the Township and that would further ensure that the project would do more than just "break even."

State Senator J. Barry Stout represents Mount Pleasant Township and testified that growth could occur if water is provided. Tr. 83. Senator Stout also noted that a proposed beltway around southern Pittsburgh would run a few miles north of Hickory and could bring major economic growth and development to the area. Tr. 84. Mount Pleasant Township Supervisor Larry Grimm, also a resident of the Township for 28 years, testified that the Township is a natural choice for growth because it is 25 minutes from Pittsburgh, especially with an impending 1,400 acre industrial park being built 12 miles north of Hickory. Tr. 117-118. Furthermore, John Bedillion, a member of the Mount Pleasant Township planning commission testified that it is difficult to plan the future of the township without public water and that the Township has been unable to attract businesses because they do not have public water. Tr. 158-161.

The map containing the project footprint that the OCA has proposed be constructed in this proceeding shows that not every location in the Township would have access to public water even if the complaints in this proceeding were granted. *See*, OCA Exh. TLF-1A (map). Furthermore, a review of the map shows significant undeveloped areas that may also be the site of future growth and economic development, particularly in light of the testimony of the state and local elected officials. Tr. 97, 108-111, 120, 149. In enacting the Pennvest statute, the General Assembly expressly declared that many areas of Pennsylvania have had to limit their growth solely due to lack of proper water supply and sewage disposal. 35 P.S. §751.2(2). The General Assembly also declared that the economic revitalization of the Commonwealth is being stifled by a lack of clean water. 35 P.S. §751.2(5). Furthermore, when considering Pennvest applications

for financial assistance, the administering authority is expressly required to consider the economic well-being and the impact on economic development. 35 P.S. §§751.10(a)(1) and (b)(2). These points support that prospective growth should be considered when analyzing requests for main extension cases.

Even PAWC recognizes the potential for future growth outside of the initial project footprint as they have argued in this proceeding that 12-inch mains are appropriate for use throughout this proposed project. As discussed further below, in response to the OCA adjustment seeking to only include in the determination of the costs of construction the cost of 8-inch mains for purposes of calculating the customer contribution, PAWC argued that 12-inch mains are necessary to accommodate the "material growth" within the Township. PAWC M.B. at 59. PAWC further argued that "as a matter of sound waterworks practice, it is appropriate to consider the potential for increased future demand when sizing new facilities." *Id.* Such growth would be applicable to new customers added within the original existing project footprint and those that are added as part of future extensions to what was originally constructed.

Future growth throughout Mount Pleasant Township further ensures that PAWC's extending its mains into the Township would financially benefit the Company, not cause it harm. Such future growth that is not considered in the Commission's main extension regulations or the Company's tariff should also be considered when determining whether the system expansion is in fact required. However, the ALJ ignored any impact of future growth on the facts of this proceeding.

E. Conclusion.

PAWC is the largest water company in Pennsylvania and part of a multi-billion dollar, international corporation. Mount Pleasant Township is twenty-five minutes from downtown Pittsburgh and just 1.7 miles from PAWC's existing mains. The ALJ's findings of water-borne illness, lack of sanitation and loss of property due to inadequate fire protection are more descriptive of an undeveloped nation than a small town outside of Pittsburgh. If the extensions were financed through Pennvest funds, everyone would benefit. As such, the OCA submits that the ALJ erred in failing to require PAWC to extend its mains within its service territory where there is a compelling public need for such service.

OCA Exception No. 2 — It Is Reasonable To Allow An Exception To The Main Extension Regulations And Require PAWC To Provide Service To Mount Pleasant Township Given The Substantial Evidence Of Record Which Shows A Compelling Public Need For Such Service. (I.D. at 39-40; OCA M.B. at 13-15; OCA R.B. at 11-13).

A. Both The PUC And The Company Have Recognized That Waivers Of Regulatory And Tariff Provisions May Be Granted.

The OCA recognizes the basis for the Commission's main extension regulations, which have been analyzed in detail on this record. The OCA acknowledges the determinations that arise from those regulations as an appropriate screen to use to avoid litigating every request for a main extension. However, a rigid approach to these regulations can produce situations such as the one in this case which are clearly contrary to the public interest and inconsistent with the utility's overriding obligation to serve under the Public Utility Code. In fact, utilities frequently request waivers to Commission regulations and tariff provisions and such requests are often granted. If the Commission determines that PAWC's main extension tariff requires mandatory

customer contributions, which the OCA submits should not be the case, certainly the strong record of public need on the part of an entire community requires an exception to be made from PAWC's tariff so the need can be met.

As the OCA noted in Main Brief, even if the Commission accepts PAWC's interpretation of its tariff, the Commission has the power to require an exception to that tariff. *See* OCA M.B. at 13-15. PAWC itself has recognized in a prior case that a case-by-case analysis is appropriate if a widespread problem involving contamination of natural water supplies should occur. *See* Popowsky v. Pa. P.U.C., 87 PaPUC 255 at 267 (1997)(Popowsky). Similar to the example given in Popowsky, the record here amply demonstrates that the problems with Mount Pleasant Township's private water sources and the need for public water, is widespread. I.D. at 38; *see also*, OCA M.B. at 19-22 (DEP results of well samples). The myriad problems that have led to the public need for water service in the unserved areas of Mount Pleasant Township justify the Commission's consideration of this case as an exception to the Commission main extension regulations and PAWC tariffs. Doing so would be consistent with PAWC's argument in Popowsky and prior Commission orders that, in the context of complaint proceedings, determined whether a Company's application of its tariff rule yields an unreasonable result. Polson v. Citizens Water Co. Of Washington, 41 PaPUC 594 (1964). The appellate courts as well have noted that the Commission has the power to grant waivers of its regulations under certain circumstances. *See, e.g.* Pennsylvania Electric Co. v. Pa. P.U.C., 663 A2d 81 (Pa. Commw. 1995).

In the instant case, PAWC argued against case-by-case review by quoting the Commission's final line extension regulations which state that "the purpose of this rulemaking is

to ...greatly reduce the litigation in this area." *See* PAWC M.B. at 3; Re Line Extensions, 27 Pa. Bull. 800. While this quotation is accurate, there is implied recognition that the main extension regulations would certainly not eliminate all litigation in this area. In using the phrase "greatly reduce" instead of "completely eliminate," the Commission recognized that litigation may still be necessary in special situations such as the instant case, where the regulations yield an average customer contribution which puts service out of reach for the Mount Pleasant Township residents. Similarly, in another complaint proceeding, the Commission has stated that blindly applying a system-wide Company policy without considering the peculiar facts and circumstances of the case would be unreasonable. *See* Erdos v. Western Pa. Water Co., 63 PaPUC 453 (1987).

Furthermore, requests for waivers or exceptions to Commission regulations are such a routine part of utility practice that the Rules of Administrative Practice and Procedure have a specific provision addressing them. 52 Pa. Code §1.91 (entitled "Applications for waiver of formal requirements"); *see also*, OCA M.B. at 13-15. The Commission Order promulgating the regulation at issue, in fact, recognized that waivers can be requested and granted, when it stated as follows:

> . . . [A] *mandatory customer contribution amount would serve no useful purpose* since it would create a situation where a utility which desires to fund more of a given line extension than is contemplated by the formula must *come before the Commission and ask for a waiver of the rule.* . . . [C]hanging the minimum requirement to a hard and fast rule would mean that companies wishing to be more generous *would have to seek a waiver of the rule* and in our judgment, make this regulation unnecessarily burdensome and inflexible. . .

Re Line Extensions, 27 Pa. Bull. 799 at 802 (emphasis added). Thus, in the course of promulgating the rule that PAWC seeks strict adherence to, the Commission itself recognized

both that customer contributions should not be mandatory, as PAWC maintains they are, and that waivers of the rules might be sought if they were. The power of the Commission to promulgate rules would necessarily imply the power to permit variations from them in compelling circumstances, such as the instant case.

B. Assuming Arguendo That Shenango Applies, Complainants Have Met The "Heavy Burden" Of Showing That An Exception To The Regulation And Tariff Provision, If Deemed To Mandate Customer Contributions, Is Warranted.

As noted above, the ALJ also discusses Shenango Township v. Pa.P.U.C., 686 A.2d 910 (Pa. Cmwlth. 1996), in his Initial Decision in support of the proposition that the Complainants have a "heavy burden" to show that the Commission should waive its line extension regulations. I.D. at 40. The OCA submits that the ALJ's "heavy burden" standard is not applicable to this proceeding, in part, because service can be provided in Mount Pleasant Township consistent with the language of the regulation and the tariff. OCA M.B. at 32-51. Shenango is distinguishable, however, because the Township in that case sought to modify a contract for service it had already entered into with PAWC, prior to Commission's Policy Statement on main extensions. Such is clearly not the case here.

Should the Commission determine that Shenango is applicable to this proceeding, the OCA submits that the ALJ erred in concluding that the OCA and other complainants have not met a "very heavy burden of showing that the facts and circumstances present in this proceeding render the application of PAWC's [main extension tariff] unreasonable." I.D. at 40. The OCA respectfully excepts to this conclusion and initially would reference the 236-page transcript of testimony from more than sixty witnesses, including residents, businesses owners and public

officials from the local, county and state level, regarding the compelling substantial need for public water in the Township. Based upon this uncontroverted evidence, the ALJ determined that the Complainants have demonstrated a clear need for public water service. I.D. at 38. The weight of this evidence sustains even a "very heavy burden" of justifying a departure from the regulations and the tariff. In light of the record evidence, PAWC's application of its main extension tariff would continue to deny the people of Mount Pleasant Township access to public water that is desperately needed. Such a result is patently unreasonable.

Furthermore, Shenango requires a showing that "the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable." Shenango. The OCA submits that the facts regarding the need for access to public water in Mount Pleasant Township have changed drastically over the last several years in which members of the community have desperately sought water services. These changes include the continual decrease in quantity of water as well as the continued degradation of water quality, which the ALJ noted in his Findings of Fact. I.D. at 38. In addition, residents of the Township are placed in increased danger of injury and damage to property due to the lack of public fire protection, a fact that the ALJ also found. *Id.* These changes coupled with the continued growth in the Township, the increased health problems and the increased expense and inconvenience that residents have to incur, *Id.*, all satisfy the Shenango standard.

In addition, the OCA would note that when the main extension regulations were promulgated, large water utilities such as PAWC had not sought Pennvest financing for main extension projects such as the one required in the instant case. OCA St. 2S at 15. The fact that this funding is now available for such projects is yet an additional change justifying an exception

from the use of the utility's weighted average cost of debt to determine the break-even level, as discussed more fully in Exception No. 5, *infra*.

The OCA submits that the Complainants have amply met the burden of proof, heavy or not, to show that PAWC's application of its tariff leads to an unreasonable result. The Commission should exercise its established authority to order service to be provided without customer contributions.

OCA Exception No. 3 — The ALJ Erred In Dismissing The Complaints Because No Applications For Service Were Filed, Particularly As Substantial Evidence Of Record Demonstrates That There Is Overwhelming Support Among The Residents For Water Service In Mount Pleasant Township. (I.D. at 43-45, 53).

A. The ALJ Wrongly Applied Cases Involving Developers To The Present Case.

In his Initial Decision, the ALJ concludes that no Bona Fide Applicants for Service exist because no customer filed an application to PAWC for service. I.D. at 53. He further concluded that the Commission's main extension regulations thus do not apply and the complaints must be dismissed. I.D. at 53. The ALJ therefore did not reach the issue of whether substantial customer contributions, if warranted at all, should be waived. The ALJ's application of cases involving developers who seek service from a utility to the instant case to reach these conclusions is plainly wrong. I.D. at 49-50, citing George Hyman Associates, Inc. v. Pennsburg Water Co., 39 PaPUC 622 (1962), *appeal dismissed*, 184 A.2d 414 (1962); Southboro Homes, Inc. v. South Pittsburgh Water Co., 35 PaPUC 685 (1958); Lynch v. Pa. P.U.C., 594 A.2d 816 (Pa Commw. 1991), *appeal denied*, 529 Pa. 670, 605 A.2d 335 (1992)[1]. Such cases arise where homes have not yet

[1] The Lynch case has already been discussed extensively in Exception No. 1, *supra*.

been constructed and, as the ALJ notes, there is no assurance that the extension of facilities will result in compensatory investment. I.D. at 50.

What could not be clearer on this record is that nearly six hundred homes and businesses currently exist in Mount Pleasant Township and are currently occupied by people who need water service, in contrast to the developer situations in the cases cited. Moreover, a reasonable inference can be drawn from the evidence offered by the residents that many have contacted PAWC over the years about obtaining water service and were told not to fill out a written application for service if they could not afford to pay what PAWC required.[2] It is also reasonable to infer that a person would be reluctant to submit such an application without knowing in advance what his or her financial obligation would be, if any; that obligation cannot be determined until a number of potential customers is determined. This is the dilemma that the Commission regulations and the PAWC tariff create for large projects such as Mount Pleasant Township - the amount of the customer contribution, if any, cannot be determined without knowing the number of applicants for service and residents cannot commit to taking service without knowing whether there is a customer contribution and, if so, how much it is. The Commission should not accept the erroneous conclusion of the ALJ that the Formal Complaints should be dismissed simply because no one submitted a written application for service.

As an alternative, the OCA would urge the Commission to issue an order which would require, as a condition precedent to PAWC providing service without customer contributions, the

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[2] The OCA would note that in his Exceptions, Formal Complainant Rick Minutello asserts that he was informed by an employee that it would be "premature" to apply to PAWC for service "before the mains were finalized." Minutello Exceptions at 5. Mr. Minutello also asserts that by writing to PAWC to request that service be extended to his home he, in fact, should be deemed a "bona fide applicant for service." Id. at 5.

submission of no less than four hundred nine (409) written applications within a sixty-day time window. This type of order[3] would surmount the impasse the regulations create by eliminating uncertainty for both the utility and the potential customers and would also avoid inevitable future litigation revolving around the same set of issues.

B. The ALJ's Conclusion That There Are No Bona Fide Applicants For Service Is Not Supported By Substantial Evidence.

The ALJ provides no cite to any evidence in support of the conclusion that there are no Bona Fide Applicants for Service. Nor is there any evidence in the record that supports the conclusion. What is clear on this record, however, is that hundreds of Mount Pleasant Township families would become customers of PAWC if service were made available. Dozens of those residents testified under oath as to their desperate need and desire for such service. The OCA excepts to the ALJ's determination because it is not based on evidence in the record and because it is incorrect. The people of Mount Pleasant Township should not be denied service after decades of attempts and two years of litigation solely because the ALJ believes that no person has completed an application for service. To do so would be nonsensical, because the consequence would be that residents would submit applications, the Company would not serve them because they would be unable to pay what PAWC perceives to be a mandatory customer contribution and they would be back to "square one," *i.e.* forced to file yet another Formal Complaint.

Moreover, the ALJ's belief is unsupported by evidence. It is well settled law that substantial evidence of record must support the decision of the Commission. *See* OCA M.B. at 5,

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[3] The OCA has revised the ordering paragraphs initially submitted with the Main Brief to reflect this proposal. The draft order is attached in Appendix B.

citing, 2 Pa.C.S. §704; *see also*, Yellow Cab Company v. Pa.P.U.C., 105 Pa. Cmwlth. 513, 524 A.2d 1069 (1987). This principle was recently affirmed by the Commission in Peschka v. Equitable Gas Company, 2002 PaPUC LEXIS 9, Docket No. C-00015534 (Order entered June 28, 2002)(attached hereto as Appendix A). In Peschka, the Commission also noted that the term "substantial evidence" means "such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Id.* at 5; *citing*, Norfolk & Western Ry. Co. v. Pa.P.U.C., 489 Pa. 109, 413 A.2d 1037 (1980).

The residents, businesses and firefighters of Mount Pleasant Township have struggled with an insufficient quantity of potable water for decades. Now, after decades of struggles, including two years of litigation before this Commission, the ALJ's recommendation to dismiss the complaints because he believes that no resident ever completed an application should be soundly rejected. Such a conclusion is illogical, particularly in light of the overwhelming evidence of record in this case that PAWC would have approximately 600 customers in Mount Pleasant Township without CIAC. PAWC witness Lucas stated at a public meeting that without CIAC and even without a mandatory tap-in ordinance, PAWC fully expected to serve nearly 600 customers in an even smaller project footprint than the OCA proposed. Tr. 302.

Should the Commission agree that written applications are essential to this adjudication, however, the Commission should allow the complainants an opportunity to remedy this technicality by issuing an order that provides a sixty-day period for the submission of applications. The time and resources already expended by the Commission, the parties and the Township would thus not be wasted and future litigation could also be avoided. In the interim,

the OCA excepts to the Initial Decision for recommending dismissal of the complaints based on this technicality, a result which is unreasonable, unfair and incorrect.

OCA Exception No. 4 — The ALJ Erred In Rejecting The OCA's Customer Number. (I.D. at 46-53; OCA M.B. at 36-38; OCA R.B. at 14-19).

In his Initial Decision, the ALJ concluded that "the OCA has failed to establish by a preponderance of the evidence that its estimate of the number of Bona Fide Service Applicants is reliable." I.D. at 52. The OCA excepts to this determination and submits that the Commission should also find that this is a sufficient number of customers to require PAWC to go forward, in light of statements made by PAWC management that six hundred customers would be served in an area even smaller than that proposed by the OCA. Tr. 302. The OCA agrees with the ALJ, I.D. at 44, regarding the importance of the number of customers who will take service as a variable in cases such as this one. That is why the OCA conducted an extensive investigation into this issue at the outset of this proceeding. As the ALJ correctly noted, the OCA's number of customers is based on "an extensive investigation that included, *inter alia*, field inspections, a survey sent to every Mount Pleasant Township resident, a more focused follow-up survey, attendance at multiple meetings, providing residents with access to a toll-free number to ask questions and additional mailings." I.D. at 50, *citing*, OCA M.B. at 34.

The OCA would also note that it is not necessary to have in advance knowledge of the *exact* number of customers who will connect to the system. PAWC witness Lucas recognized during cross-examination that PAWC has conducted main extensions without "having a complete definite number" of customers in advance. Tr. 288. Furthermore, Mr. Lucas was not aware of any Commission regulation that requires knowing the exact number of customers prior

to PAWC extending its mains. Tr. 288. Therefore, the ALJ's concern that the OCA's customer number is speculative, I.D. at 52, should not be grounds for dismissing the complaints because it is corroborated by the Company's own witness.

The ALJ determined that the OCA's estimate of 568 customers cannot be used because it is based on an extrapolation of responses to a non-binding survey questionnaire and PAWC's estimate of 744 equivalent residential customers cannot be used because it is based on the Township passing a mandatory connection ordinance or underwriting the project, neither of which is likely to occur. I.D. at 44-45. The OCA excepts to this determination because all of the evidence, taken together, amply supports the use of a customer number of 568 to determine whether any customer contribution is required to construct the project as the OCA recommended. With a project of this magnitude, a precise customer number is not possible, even with best efforts.

The OCA submits that its investigation is ample support for a finding that nearly 600 Township residents would take water service if there were no customer contribution required. This was further confirmed by the sworn testimony of nearly sixty Township residents and officials. Even so, the OCA notes that, under the OCA's recommendation in this proceeding, the actual number of customers required to connect to the system to meet the "break-even" point is only 409. Tr. 393. This number of customers will be exceeded, as even PAWC witness Lucas recalled having stated that the Company expected to serve nearly six hundred customers in an even smaller footprint than that ultimately proposed by the OCA. Tr. 302. Only 72% of those who responded positively to the OCA survey would actually have to become customers for PAWC to "break-even" under the OCA's proposal. Clearly, this "margin of error" assures that

PAWC will not risk financial loss if this project goes forward, particularly in light of the future growth that is expected to occur within the project footprint. Tr. 84.

The ALJ also rejects the OCA's reasonable extrapolation of positive responses to those residents who did not respond. I.D. at 51. As indicated in the OCA's Reply Brief, the extrapolation made by Ms. Kraus was reasonable and based on sound statistical principles. OCA R.B. at 16. As Ms. Kraus testified, "based on this large percentage of responses (76%), it is reasonable to project that the small portion of customers from whom no responses were received would have responded 'yes' or 'no' at the same percentage as those who did respond." OCA M.B. at 36-37, *quoting*, OCA St. 2A at 5.

Instead, the ALJ agrees with PAWC's speculative argument that "if 171 individuals did not respond to the Questionnaire it could mean that they were not interested in obtaining water service so there is no basis to assume that 81% of them want a public water system and would become a customer thereof if it were built." I.D. at 51. The OCA's survey is a valid study of a significant portion of a specific group with the objective of drawing conclusions about the larger group. The survey is no different than surveys or polls done during political elections, except that those results are based on a minute percentage of eligible voters and these results are based on a 76% response rate. Again, Ms. Kraus' extrapolation is confirmed by other evidence of record in this proceeding including statements by PAWC witness Lucas, as noted above. An extrapolation, even if it were overstated, demonstrates the potential for higher revenues for PAWC which would "break-even" with only 409 customers, if least-cost financing were procured.

As such, the OCA submits that the ALJ erred in rejecting the OCA's customer number. Again, however, the OCA would appeal to the Commission to issue an order that would bring closure to this problem by allowing a window of time for Mount Pleasant Township residents and businesses to submit applications for service to PAWC. Submission of 409 applications for service could be a condition precedent to PAWC constructing the project without obtaining customer contributions.

OCA Exception No. 5 — The ALJ Erred In Concluding That The PennVest Interest Rate Should Have No Bearing On The Break-Even Analysis. (I.D. at 54-63; OCA M.B. at 43-49; OCA R.B. at 19-22).

A. Introduction.

In the Initial Decision, the ALJ correctly notes that use of the PennVest loan rate of 1.387% for Washington County in the main extension formula would reduce the customer contribution to $0 for the residents of Mount Pleasant Township. I.D. at 54. The ALJ also observes, citing to the Pennvest statute, 35 P.S. §751.2(1)-(3), (5), as follows:

> The fundamental reason for creating Pennvest was to provide financing for projects to protect the health and safety of the citizens of Pennsylvania and to promote economic development. PAWC has taken advantage of this source of funding for many projects throughout its service territory; PAWC witness Lucas acknowledged that PAWC has been "fairly successful" in acquiring such loans for projects and that PAWC intended to seek a Pennvest loan to finance the Mount Pleasant Township project described at the March 2002 meeting with the residents.

I.D. at 55 (footnotes deleted). The ALJ's Findings of Fact are replete with examples of evidence that the health and safety of the Mount Pleasant Township citizens has been jeopardized for many years because of the lack of a safe and adequate water supply. I.D. at 7-26.

Moreover, the fact that growth in Mount Pleasant Township has been stymied by the contaminated and inadequate water supply is also well supported on this record. The ALJ's Findings show that residents have great difficulty selling property; that people are reluctant to buy in the area; that property owners refrain from developing unimproved acreage; and that businesses are reluctant to locate in an area with an unsafe and inadequate water supply. Findings of Fact Nos. 6, 9, 11, 13, 16, 17, 19, 21, 22, 31, 34, 40, 43, 46, 51, 64. All of these factors stifle economic development and will continue to do so without a safe and adequate water supply.

Mount Pleasant Township thus presents the perfect example of an area for which Pennvest funds are intended. Moreover, the Pennvest Annual Report for fiscal year 2001-2002 reflected that upwards of $1.1 billion in loans and grants had been made available for water projects in Pennsylvania. OCA Exh. 2S.

Yet, the ALJ failed to see the reasonableness of substituting the Pennvest interest rate for the weighted average cost of debt in the instant case. For the reasons set forth below, the ALJ's conclusion on this issue should be rejected.

B. PAWC Will Not Under-Recover Costs If The Pennvest Rate Is Used In Lieu Of The Weighted Cost Of Debt.

The ALJ failed to discern the fallacy in the Company's assertion that it would somehow "under-recover" its costs if the OCA's position that the Pennvest rate should be used in lieu of the weighted cost of debt for purposes of this case were accepted. *See* I.D. at 58-63. The ALJ placed undue weight upon PAWC Exhibits 3.3 to 3.6 and wrongly concluded that the OCA had not identified any "errors" in those exhibits. I.D. at 63.

To summarize, PAWC's Exhibit 3.3 shows the debt ratios and cost rates determined in the last case as applied to the Commission-determined rate base in that case. Then Mr. Diskin adds the return from the newly-funded Pennvest assets. PAWC's Exhibit 3.4 shows the calculation of PAWC's total return with the Pennvest-funded rate base included in rate base and the Pennvest loan in capital structure. PAWC St. 3.1 at 12. Mr. Diskin then concludes that, because the calculation on Exhibit 3.4 is less than the calculation on Exhibit 3.3, the difference represents an "under-recovery." *Id.*[4]

The simple fact is that when a lower cost debt is added to the overall capitalization, the overall rate of return goes down and fewer return dollars would be necessary to produce a fair return. This is not an "under-recovery"; it is simply a function of the decreased overall rate of return due to the addition of the lower cost debt issuance -- which in turn justifies fewer return dollars.

The ALJ asserts that the OCA did not explain why PAWC was wrong on this point and thus accepts all of PAWC's reasons for rejecting the use of the Pennvest rate. I.D. at 63. The ALJ is simply incorrect that this point was not addressed. As further set forth below, not only did the OCA witness fully explain the fallacy in the Company's position, this issue was briefed extensively. OCA St. 2S at 9-11; OCA M.B. at 43-50; OCA R.B. at 19-23. The ALJ also failed to consider the availability of the Pennvest surcharge to PAWC and the effect of the DSIC on the main extension issues. The ALJ gave no weight to the admissions made by the PAWC witness

[4] PAWC Exhibits 3.5 and 3.6 show the same calculations as in the first two exhibits, but with the higher Pennvest interest rate of 2.774% effective after the first five years and with the principal reduced by the first five years' payments.

on cross-examination which support the OCA's position that there would be no "under-recovery" by PAWC if its position were accepted. Tr. 351-361. For the reasons set forth below, the Commission should reject the ALJ's conclusion based on an unduly narrow review of the evidentiary record on this issue. The Commission should require the use of the Pennvest loan in the break-even formula for purposes of the instant case.

C. The Overall Rate Impact Upon The Potential Customers Should Be Considered.

The ALJ gave virtually no consideration to the overall rate impact on the potential Mount Pleasant Township customers, who have already, for many years, been burdened with the expenses associated with not having a safe and adequate supply of water. *See* I.D. at 7-26; Findings of Fact Nos. 1 through 65. The OCA would urge the Commission to consider the consequences of accepting PAWC's application of its main extension tariff. First, the Mount Pleasant Township residents would be charged contribution in aid of construction ("CIAC") as if PAWC were using capital obtained on the market to fund the project, even if Pennvest funds are obtained. As the ALJ correctly noted, substituting the Pennvest rate for the weighted cost of debt would reduce CIAC to $0, even with only 409 customers. Then, when the residents are served, they would be paying the current base rates in addition to the DSIC. As Ms. Kraus explained:

> [I]t should be considered that the customers in the Hickory [Mount Pleasant Township] area who connect to the new system will not only pay PAWC's current base rates, but will also pay any DSIC that is in effect. By paying the DSIC surcharge, the Hickory customers will, effectively, be sharing in the costs of improvements to other portions of PAWC's system. Since the implementation of PAWC's current main extension tariff preceded the implementation of the DSIC, these revenues are not considered in the development of a CIAC amount to be paid by prospective customers.

OCA St. 2A at 15-16. Ms. Kraus went on to note that the Mount Pleasant Township customers who would connect to the system would pay 0.73%[5] over the base rates that are considered in PAWC's break-even formula, for improvements to other areas of the system. OCA St. 2A at 16. In comparison, if no CIAC was paid by the Township customers and the "uneconomic" portion of the project cost was placed in rate base, the impact on the total residential revenues would be approximately 0.10%. *Id.* Thus, immediately upon becoming customers, the Township residents would be contributing more on a percentage basis to the overall main replacements throughout PAWC's system than the existing customers would pay on a percentage basis toward the new portion of the system to serve the Township.

Where high levels of CIAC stymie growth of the system, as in the instant case, it is good policy to spread the costs of capital additions over the entire customer base, just as is done when acquired systems demand major expenditures to render service safe and adequate. Moreover, the OCA submits that, as taxpayer funds are available to finance this much-needed project, the benefits of the low-cost financing should flow to the taxpayers in need of service. Due to the availability of such funds, PAWC shareholders need not finance this small portion of its system and, as such, would experience a benefit. Moreover, once the project is constructed and in rate base, the responsibility for paying a return of and on the new portion of the system falls on the shoulders of the entire body of ratepayers. In light of the available funding and PAWC's ability to seek regular base rate increases, this Commission should require PAWC to fulfill its obligation to serve to resolve the health and safety problems of this community within its service territory.

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[5] The DSIC was 0.73% as of September 2002 and generally increases at the beginning of each quarter. OCA St. 2A at 16.

D. PAWC Would Not Be "Short-changed" If The OCA's Position Is Accepted.

Ms. Kraus explains in surrebuttal at length why Mr. Diskin's testimony and exhibits do not illustrate that the Company would be "short-changed" if the Pennvest loan rate were used in lieu of the weighted cost of debt, solely for the purpose of the main extension calculation:

> While it is true that the return on the Pennvest funded rate base would not be fully recovered over the term of the loan, the Company would continue to receive a return on the Pennvest-funded facilities long after the loan is fully repaid. This is true because the Pennvest loan terms, normally twenty years, are generally much shorter than the service lives of the plant items which are financed with this debt. This means that, generally, during the first twenty years of the service life of the property funded with Pennvest loans, while the loan is included in capital structure, the debt ratio is higher and the average cost of debt is lower, resulting in a lower overall rate of return than would be experienced absent the Pennvest debt. However, at the end of the twenty-year period, when the loan is fully repaid, the plant which was funded with the loan is not fully depreciated. Thus, all else equal, the debt ratio decreases, the average cost of debt increases and the overall rate of return increases. This rate of return will be applied to the net balance of the plant funded with that Pennvest loan throughout the rest of its service life. In this case, the mains have a service life of approximately ninety-two years. Thus, while the loan would be repaid in twenty years, the Company would continue to earn a return on the net balance of the plant for another seventy-two years. Overall, the Company is not "short-changed" with respect to the return on its Pennvest funded plant.

OCA St. 2S at 9-10. Thus, OCA witness Kraus fully explained the fallacy in the Company's assertion that it would be "short-changed" in this scenario. The ALJ wrongly took a fragment of Ms. Kraus' statement out of context, *i.e.* that "the return on the Pennvest-funded rate base would not be fully recovered over the term of the loan," as a reason why the Company's position was correct. That statement is actually true of *every* portion of PAWC's Pennvest-funded rate base to date, because, as Ms. Kraus pointed out, the items of plant constructed with Pennvest funds generally have service lives far longer than fifteen or twenty years, the usual term of a Pennvest

loan. This fact has not deterred PAWC from accepting a total, as of September 30, 2002, of $35 million of Pennvest funds, about 2% of its $1.5 billion of total capitalization. OCA R.B. at 22; OCA Cross-Ex. Exh., Sch. E and 6 (Sch. Of Debt). This would not be the case if PAWC were truly "short-changed" when it finances projects through Pennvest. That the return on the rate base would not be fully recovered over the life of the Pennvest loan is *not* a justification for charging the Mount Pleasant Township residents CIAC as if the new plant was financed with funds obtained on the market.

Another factor that the ALJ completely failed to consider is PAWC's option to collect its Pennvest debt service through a surcharge in light of its concern over "under-recovery." In testimony, Ms. Kraus pointed out that the Company could use its Pennvest surcharge tariff to collect the debt service payments, dollar for dollar, over the life of the loan. OCA M.B. at 50; OCA St. 2S at 10; Supp. No. 45 to Tariff Water Pa. P.U.C. No. 4, Fifth Rev. Page 12A. The ALJ does not mention this option, much less consider that it would completely cure any concern, valid or invalid, about adequate recovery of costs associated with Pennvest funding of the Mount Pleasant Township project.

The ALJ also erred by not considering the statements made by PAWC witness Diskin on cross-examination. Mr. Diskin testified that the Company's current weighted cost of debt, 6.65%, is less than the weighted cost of debt as of the last rate case, 7.25%. Tr. 356. Mr. Diskin further testified that the company and its shareholders benefit by using the lowest cost financing available. Tr. 357. He also agreed that when lower cost financing is procured and rates stay the same, more funds are available for return or for investment in the system. Tr. 357. He also stated as follows:

> The Company has no problem with trying to get Pennvest funds to finance projects of this magnitude. We also do not have a problem with the low interest rates that Pennvest offers us. Like you said, it benefits everyone.

Tr. 357. Mr. Diskin further agreed that PAWC's shareholders benefit by accessing Pennvest funds; that current ratepayers would benefit because as of the next rate case, the embedded cost of debt would be lower; that the future Mount Pleasant Township customers would benefit, because they would not have to access higher interest loans to meet an unnecessary CIAC requirement, and that if PAWC were to fund this project with 1% Pennvest funding, there would be no losers. Tr. 358-359. Mr. Diskin could not explain how PAWC would be "short-changed" if the Mount Pleasant Township project were funded by Pennvest and no CIAC was required. Tr. 360-361. Finally, the ALJ also gave no weight to the testimony by Mr. Lucas that where Pennvest financing is available to fund a project, the Company does not even apply its main extension tariff. Tr. 304.[6]

These statements, taken together, cannot be reconciled with the Company's exhibits that purport to show an "under-recovery" of $1.6 million over five years. If this were an accurate portrayal, PAWC would not apply for Pennvest funding as it routinely does. Yet, the ALJ rejected the OCA's position and wrongly concluded that PAWC was correct to calculate CIAC based upon the cost of debt as of the last rate case, rather than the Pennvest loan rate.

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[6] The Company had also made the statement in a pleading submitted on June 28, 2001, its Answer to the OCA's Motion to Consolidate, that it was seeking the most cost-effective way to provide service and to obtain alternative funding sources to cover the costs in excess of the Company's investment, which could include a Pennvest loan. Answer at 6.

E. Conclusion.

The ALJ's conclusion that the use of the Pennvest loan rate in the break-even formula would disrupt the ratemaking formula and would result in PAWC not receiving the return on its property to which it is entitled is unsupported by the evidence of record and should be rejected.

OCA Exception No. 6 — The ALJ Erred In Not Applying Least-Cost Principles When Determining The Cost Of Constructing The Main Extension As The OCA Has Proposed. (I.D. at 64-77; OCA M.B. at 38-43; OCA R.B. at 26-33).

In his Initial Decision, the ALJ agreed with PAWC's assertion that the OCA's "least-cost" proposals are contrary to long-standing Commission precedent. I.D. at 67. This conclusion is also flawed and should be rejected. The OCA's position is based on the well-established cost allocation principle that customers should not be charged more than the cost of providing service to them. The ALJ also wrongly determined that the record supports PAWC's inclusion of a storage tank in the project to provide service to the Township, I.D. at 75, despite OCA witness Fought's testimony that the proposed system could provide adequate domestic and fire service to the proposed customers without the water storage tank. Finally, the ALJ determined that "the record in this proceeding supports PAWC's inclusion of 12-inch mains in the area under question," I.D. at 77, despite Mr. Fought's testimony that 8-inch water mains would be adequate to serve these customers.

The cost of constructing the main extension is a key factor in determining whether a customer contribution is required under the Commission's main extension regulations and PAWC's tariff. The OCA submits that the ALJ's determinations to accept PAWC's estimates

"across the board" for purposes of the main extension formula were incorrect and therefore excepts on this basis.

Initially, it is important to distinguish the difference between the cost of facilities *actually installed* to provide service and the costs used in the main extension formula for this project. The ALJ has not made this important distinction. I.D. at 70. As ALJ Gesoff previously held in Gabauer v. Western Pennsylvania Water Co., 67 PaPUC 448 (1988)(Gabauer), a complainant seeking a main extension should only be charged for the facilities required to provide service *to that customer*. I.D. at 66 (emphasis added). Under Gabauer, PAWC may build larger facilities to allow for the additional capacity needed to provide service to future residents of Mount Pleasant Township; however, the Company can include in the cost of construction only those portions that are necessary to provide service to the current residents and businesses of the Township. Costs which are used to provide enhancements to the overall PAWC system or to accommodate future growth cannot be included in the costs to construct the main extension as the OCA has proposed in this proceeding. The ALJ's determination in this proceeding is directly contrary to the holding in Gabauer, which involved an analogous set of facts, and should be reversed.

In this proceeding, the ALJ also fails to distinguish between "cheapest" and "least-cost" facilities and implies that a project constructed using "least-cost" principles means that PAWC will not be providing a system that meets the standards for adequate, efficient, safe and reasonable service as articulated in Section 1501 of the Public Utility Code. I.D. at 68. The OCA does not seek to have an extension constructed to serve Mount Pleasant Township that will jeopardize the overall integrity of the PAWC system. The integrity of the PAWC system must be maintained while also serving the residents of the Township. However, the additional costs to

construct plant needed to maintain the overall integrity of the PAWC system, while at the same time providing service to the Township, should be charged to all PAWC ratepayers, not just the Township residents.

The case law that the ALJ cites in his Initial Decision can be distinguished to support these concepts. Barna v. Western Pennsylvania Water Co., 53 PaPUC 500 (1979) involved the size of the main *to be installed* and not what size main the customer should be charged for constructing. In Radoff v. The Langhorne Spring Water Co., 47 PaPUC 690 (1976), the Commission discusses the utility's prerogative to "determine the character, size and location of water mains and facilities" but it says nothing about what the customer seeking the main extension is to be *charged* for that installation. The OCA further distinguished these cases from the current set of facts in its Reply Brief. *See*, OCA R.B. at 27-28. Additionally, both Hershey Church of Nazarene v. Keystone Water Co., Docket No. C-844227 (May 13, 1985) and Duane Flaherty v. Western Pennsylvania Water Co., Docket No. C-850157 (November 13, 1985) also involve the *installation* of facilities and not how much the customer seeking the main extension is *charged* for service, as the Initial Decision discusses. It is also notable that the Commission's decision in Gabauer post dates the decisions in Hershey Church, Flaherty and Petition of John M. And Paula D. Blair, Docket No P-0860184 (Jan. 14, 1987) also cited by the ALJ, and is therefore controlling. As such, the ALJ applied the wrong line of precedent to the facts of this case.

PAWC can construct the system it believes will satisfy the standards of Section 1501 for its entire system and, in fact, has an obligation to do so. However, for purposes of calculating customer contributions in this proceeding, if any, PAWC may only include in construction costs to the Township those costs that are required to provide service to residents of the Township.

This is consistent with the ALJ's prior determination in Gabauer and the Commission's holding in Polson v. Citizens Water Co. of Washington, 41 PaPUC 594 (1964).

With regard to the tank, the ALJ agreed with PAWC that the tank was needed to provide service to residents of the Township for three reasons. The ALJ agreed that the tank is essential both for meeting minimum level of service reliability given the distance from PAWC's existing facilities and based solely on the number of customers to be served regardless of the distance to existing facilities. I.D. at 72-74. The ALJ also agreed that the additional tank was needed to meet peak customer demand and fire flow requirements. I.D. at 75. The OCA submits, however, that these determinations were in error and should be reversed.

To begin, PAWC witness Hankey testified that the existing facility already installed to serve the 233 Chartiers customers, the Gretna Booster station, has the capacity to provide a sufficient fire flow for the existing customers and future Mount Pleasant Township customers. Tr. 329-330. While the tank may be a desirable addition to the PAWC system for either the Chartiers or Mount Pleasant Township residents, it is not needed to serve either or both groups. Regarding the peak demand issue, the OCA notes that Mr. Hankey conceded during cross-examination that the DEP Pennsylvania Water Supply Manual makes no reference to "instantaneous demand" but requires only that a system provide for "maximum daily and peak hourly demand". Tr. 327-328. Therefore, the cost of a tank in the Township should not be included when determining the overall cost of PAWC extending service to the Township for purposes of determining whether a customer contribution is necessary.

With regard to the main sizes, the ALJ agreed that 12-inch mains should be used, due to the size and spacing of homes and "particularly in light of the businesses and other large,

flammable structures throughout the area." I.D. at 77. This issue can be clearly decided by an examination of the difference in DEP or ISO[7] standards and PAWC standards for fire protection which are higher. Mr. Hankey testified that the 12-inch mains are necessary to provide a fire flow of 750 gallons per minute, PAWC St. 2.1 at 4, while the DEP's minimum acceptable fire flow for new systems is 500 gallons per minute that can be achieved using 8-inch mains. OCA St. 1S at 4. Again, PAWC can install the mains it believes are appropriate to satisfy its Section 1501 obligations for its entire system, but it is permitted to charge Mount Pleasant Township customers only for the cost of providing service to them. Any other such costs should be borne by all of PAWC's ratepayers.

Therefore, if the cost of construction continues to be an issue in this proceeding, the OCA submits that there is substantial evidence of record to support that the cost of the tank not be included and the cost of 8-inch mains be used. Such adjustments are entirely consistent with least-cost principles and the Gabauer and Polson cases. If PAWC chooses to set its design criteria higher than those set forth in relevant regulations and standards, nothing prohibits it from doing so as long as its investments are prudent. It would be inequitable, however, to permit PAWC to charge these Mount Pleasant Township residents for such items. Therefore, the OCA submits that the ALJ erred in not applying least-cost principles when determining the cost of constructing the main extension as the OCA has proposed.

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[7] "ISO" is the Insurance Services Office which rates communities in terms of their ability to extinguish fires by assessing, among other things, the pressures in public water systems and hydrants.

OCA Exception No. 7 — The ALJ Erred In Failing To Make Findings Of Fact Pertaining To Expert Testimony. (I.D. at 7-26; OCA M.B. App. A at 15-19).

In his Initial Decision, the ALJ made 66 Findings of Fact. I.D. at 7-26. All of these Findings of Fact, with the exception of one, pertain specifically to testimony given at the Mount Pleasant Township Volunteer Fire Department hall on September 9, 2002 by the public. The lone exception is the ALJ's Finding of Fact No. 66 that "Mount Pleasant Township lies within PAWC's service territory. PAWC has distribution systems located approximately 2.8 miles east, 1.7 miles south, 3.3 miles north and 7.3 miles west of Hickory. OCA St. 1 at 3." I.D. at 26. This Finding of Fact is based on the testimony of OCA witness Terry Fought. However, there are many more significant Findings of Facts based upon expert testimony admitted into the record during the December 3, 2002 evidentiary hearings held in Harrisburg that should also have been made by the ALJ. The OCA submits that the ALJ erred in failing to make Findings of Fact based on the expert testimony provided in this proceeding.

The OCA provided in its Main Brief a specific articulation of 34 proposed Findings of Fact based upon expert testimony which the ALJ failed to make in his Initial Decision. The OCA will not articulate each specific Finding of Fact herein, but incorporates by reference pages 15-19 of Appendix A to the OCA's Main Brief. Among the 34 proposed Findings therein are those supported by test results from the Pennsylvania Department of Environmental Protection, the specifics of the "break-even" analysis within the Company's tariff, the details of estimated construction costs, the impact of procuring a Pennvest loan and the OCA's determination of its total customer number. OCA M.B., App. A at 15-19. Yet, the ALJ made no findings regarding these crucial issues. These facts relate directly to the core issues presented and are necessary to a

proper adjudication. The failure to include findings of fact on these many critical issues is yet another basis for the Commission to reject the ALJ's conclusions of law in their entirety.

Therefore, the OCA submits that the ALJ erred in failing to make the many Findings of Fact which are supportable by the expert testimony and exhibits offered into the evidentiary record. This Commission should adopt the OCA's proposed Findings of Facts 79-112, attached to the Main Brief as Appendix A.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, the Office of Consumer Advocate respectfully files these Exceptions to the Initial Decision of Administrative Law Judge Larry Gesoff. The Formal Complaints of Cindy Parks, Richard Minutello and the Office of Consumer Advocate should be sustained and the Pennsylvania-American Water Company should be ordered to extend public water and fire hydrant service to Mount Pleasant Township as the OCA has recommended in this proceeding, without mandatory customer contributions toward construction.

Respectfully submitted,

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Dated: May 20, 2003
00074082.WPD

Cindy Parks, *et al.*

v.

Pennsylvania-American Water Company

Docket No. C-00015337, *et al.*

Appendix A

Margaret Peschka

v.

Equitable Gas Company

Docket No. C-00015534

Opinion and Order

Order Entered: June 28, 2002

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

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CONSUMER ADVOCATE

Public Meeting held June 27, 2002

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick
Kim Pizzingrilli

Margaret Peschka

v. C-00015534

Equitable Gas Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed on March 29, 2002, by Equitable Gas Company (Respondent), relative to the Initial Decision of Administrative Law Judge (ALJ) John H. Corbett, Jr., issued on March 11, 2002, in the above-captioned proceeding. No Reply Exceptions were filed.

History of the Proceeding

On June 7, 2001, Margaret Peschka (Complainant) filed a Formal Complaint against the Respondent. The Complainant alleged that the Respondent allowed water to infiltrate her gas service line causing loss of service on six occasions

and expensive plumbing bills to replace the line. The Complainant sought reimbursement of her expenses.

On July 2, 2001, the Respondent filed an Answer denying the material allegations of the Complaint. After proper notice, evidentiary hearings were held on October 17, 2001, and January 8, 2002, before ALJ Corbett. Both Parties were represented by legal counsel.

An Initial Decision was issued on March 11, 2002, dismissing the Complaint for failure to meet the burden of proof. However, the ALJ concluded that an employee of the Respondent violated the Public Utility Code (Code) and the Regulations of this Commission by submitting a fabricated business record to the Commission's Bureau of Consumer Services (BCS) in response to its investigation of the Complainant's informal complaint. (66 Pa. C.S. §§309, 1501; 52 Pa. Code §56.165). The ALJ further concluded that the improper submission warranted an imposition of the maximum civil penalty of $1,000.00. (66 Pa. C.S. §3301).

As noted above, the Respondent filed Exceptions on March 29, 2002. No Reply Exceptions were filed.

Discussion

We believe that it will be instructive to quote verbatim Finding of Fact No. 37 wherein the ALJ found as follows:

> When it responded to her informal complaint to the Commission's Bureau of Consumer Services ("BCS"), Equitable submitted a pressure test report that Mr. Lundell had written at a later date to substantiate its claim that Ms. Peschka's service line had failed a standard pressure test. Equitable did not submit to the BCS a copy of the actual pressure test report prepared by the technician, who

> performed the pressure test. The information displayed on both documents is similar, except the technician performed the test at 9:00 a.m., whereas the second slip gives the time as 9:30 a.m. The second slip also indicates the house line was not leaking. The technician never applied gas to the house line to determine if the house lines would hold pressure. The second slip also notes in the remarks section that the "piping failed pressure test." The technician performing the test never wrote that statement and never signed the report that Mr. Lundell prepared (N.T. 135-140, 211-215, 244-252, 267-269; Equitable Exhs. 6 & 7, p. 3)

(I.D., p.7).

The gravamen of the Respondent's Exceptions is that the ALJ erred by finding that the Respondent acted inappropriately by transcribing the report at issue, and that the $1,000 sanction imposed was improper. The Respondent first argued that the ALJ's determination that the "technician never applied gas to the house line to determine if the house lines would hold pressure" is "an assumption not based upon any evidence or testimony." (Exc., p. 5). Our review of the record indicates that Bill Seifert, the technician for the Respondent, testified that he did not test the house line to see if it was leaking. (Tr., pp. 138-141). As such, the Respondent's argument fails.

The Respondent next argues that the Commission does not have the authority to adjudicate charges of a violation of the Pennsylvania Crimes Code such as forgery and perjury. We note that the ALJ stated in his Initial Decision that the "[Commission] obviously lacks jurisdiction to enforce the criminal statutes of this Commonwealth." (I.D., p. 17). It was well within the purview of the ALJ, as fact finder, to adjudicate the credibility of the evidence presented.[1] Based on the testimony and documents presented, the ALJ determined that the second report was manipulated to

[1] *Danovitz v. Portnoy,* 399 Pa. 599, 161 A.2d 146 (1960).

buttress the Respondent's position before the Commission in these proceedings. The ALJ then sanctioned the Respondent for its actions under Sections 309 & 3301 of the Code, 66 Pa. C.S. §§ 309 & 3301.[2]

The Respondent is quick to argue areas of law that the Commission is precluded from hearing, but the Respondent fails to consider the duties of the Commission. The Commission does have the exclusive statutory obligation to supervise and regulate all public utilities doing business in the state. (66 Pa. C.S. §501, *In re Petition of Pa. Natural Gas Assoc.*, No. P-900449, 1990 Pa. PUC LEXIS 55, *7). As stated by the ALJ, "that oversight stewardship carries with it the duty to ensure representatives of a public utility comply with [the Commission's] directives for information during investigations into informal and formal complaints concerning the activities of that public utility." (I.D., p. 17). To carry out our duty of protecting the public interest, the Commission must be able to rely on the accuracy of the business records submitted to us by the utility companies.

We cannot allow utility companies "to make," or as the Respondent prefers to label "transcribe" business documents when a complaint is filed.[3] The only way we can perform our duties and dispense with our regulatory oversight, is to have an accurate representation of the facts in any proceeding. We are concerned that the Respondent's

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[2] Section 309 of the Code, provides, in pertinent part, that the Commission may: compel the production of such books, records, papers, and documents as it may deem necessary or proper in, and pertinent to, any proceeding, investigation, or hearing, held or had by it, and to do all necessary and proper things and acts in the lawful exercise of its powers or the performance of its duties. Section 3301 of the Code provides that the maximum sanction for the violation of the Code is $1,000.

[3] Business records must be made at or near the time of the events reflected in the records. (*Ganster v. Western Pennsylvania Water Co.*, 349 Pa. Super. 561, 568, 504 A.2d 186, 189 (1985)). The record must be kept in the regular course of business. (*Id.*, 349 Pa. Super. at 568, 504 A.2d at 190).

employee, Richard Lundell, testified that he merely transcribed the technician's report. Had Mr. Lundell only been transcribing, the reports would have been identical. Instead, additional notes were written on a sheet similar to the one used by the technician, and the technician's original report, although available, was not provided to BCS. (Tr., pp. 211, 228-229, 246-250).

Conclusion

Without further belaboring our concern at the Respondent's actions, we will conclude by stating that the ALJ's imposition of the maximum civil penalty permitted under the Code, 66 Pa. C.S. §3301, was reasonable and appropriate. Based upon our review of the record before us, and for the reasons discussed above, we conclude that the ALJ's decision is amply supported by substantial record evidence. Accordingly, we will deny the Respondent's Exceptions, consistent with the Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed on April 4, 2002, by Equitable Gas Company, relative to the Initial Decision of Administrative Law Judge John H. Corbett, Jr., issued on March 11, 2002, in the above-captioned proceeding, are hereby denied.

2. That the Initial Decision of Administrative Law Judge John H. Corbett, Jr., issued on March 11, 2002, is hereby adopted.

3. That Equitable Gas Company is hereby directed to pay a civil penalty of one thousand dollars ($1,000) pursuant to Sections 3301 and 3315 of the Public Utility

Code, 66 Pa. C.S. §§3301 & 3315, by sending a certified check or money order within twenty (20) days after service of the Commission's Order in this case to:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

BY THE COMMISSION:

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: June 27, 2002

ORDER ENTERED: JUN 28 2002

Cindy Parks, *et al.*

v.

Pennsylvania-American Water Company

Docket No. C-00015337, *et al.*

Appendix B

Proposed Ordering Paragraphs

Proposed Ordering Paragraphs

IT IS HEREBY ORDERED THAT:

1. The Complaints of Cindy Parks, Docket No. C-00015337, Richard T. Minutello, Docket No. C-20028177, and the Office of Consumer Advocate, Docket No. C-20028361, are hereby sustained; and

2. Pennsylvania-American Water Company shall accept applications for service from potential customers in Mount Pleasant Township for a period of sixty days from the date of this Order; and

3. Provided that at least four hundred nine (409) residential-equivalent potential customers who reside within the area to be served as described on the record of this case in OCA Exhibit TLF-1A and TLF-2A submit applications for service to PAWC within sixty days from the date of entry of this Order;

4. It is further Ordered that Pennsylvania-American Water Company shall proceed to provide service to all of the bona fide applicants for service in the areas of Mount Pleasant Township, as set forth in OCA Exhibits TLF-1A and TLF-2A, without customer contributions and without further delay, upon the condition precedent set forth in Ordering Paragraph 3 being fulfilled.

00074315.rtf

CERTIFICATE OF SERVICE

Re: Cindy Parks
v.
Pennsylvania-American Water Company
Docket No. C-00015377

Richard T. Minutello
v.
Pennsylvania-American Water Company
Docket No. C-20028177

Irwin A. Popowsky, Consumer Advocate
v.
Pennsylvania-American Water Company
Docket No. C-20028361

I hereby certify that I have this day served a true copy of the foregoing document, the *Office of Consumer Advocate's Exceptions*, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 20th day of May, 2003.

SERVICE BY ELECTRONIC MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

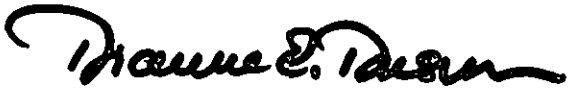
Anthony Decusatis, Esq.
Morgan, Lewis & Bockius
1701 Market Street
Philadelphia, PA 19103-2921

Robert M. Ross, President
Susan Simms Marsh, Esq.
Pennsylvania-American Water Company
800 West Hersheypark Drive
Hershey, PA 17033

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Cindy Parks
447 Fort Cherry Road
McDonald, PA 15057

Richard T. Minutello
110 Pleasant Road
McDonald, PA 15057



Dianne E. Dusman
Senior Assistant Consumer Advocate

Joel H. Cheskis
Assistant Consumer Advocate

Counsel for
Office of Consumer Advocate
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64254.wpd;1/DED/smn

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ORIGINAL

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May 30, 2003

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VIA HAND DELIVERY
James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: **Cindy Parks, Richard Minutello, and Office of Consumer Advocate v. Pennsylvania-American Water Company**
Docket Nos. C-00015377, C-20028177 and C-20028361

Dear Secretary McNulty:

Enclosed for filing are an original and nine copies of Pennsylvania-American Water Company's Reply to Exceptions. As evidenced by the enclosed Certificate of Service, copies of the Company's Reply to Exceptions have been served upon the presiding Administrative Law Judge, the parties of record and the Commission's Office of Special Assistants. An additional copy of this letter and the Reply is enclosed, which we ask be date stamped and returned to us.

Very truly yours,

Anthony C. DeCusatis

ACD
Enclosure

cc: Per Certificate of Service

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ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CINDY PARKS,	:	DOCKET NO. C-00015337
RICHARD MINUTELLO, AND	:	DOCKET NO. C-20028177
IRWIN A. POPOWSKY, CONSUMER ADVOCATE	:	DOCKET NO. C-20028361
v.	:	
PENNSYLVANIA-AMERICAN WATER COMPANY	:	

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REPLY OF RESPONDENT

PENNSYLVANIA-AMERICAN WATER COMPANY

TO EXCEPTIONS

DOCKETED
JUN 02 2003

To The Initial Decision Of
Administrative Law Judge Larry Gesoff

DOCUMENT FOLDER

Susan Simms Marsh
Associate Corporate Counsel
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

Anthony C. DeCusatis
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1701 Market Street
Philadelphia, PA 19103-2921

DATE: May 30, 2003

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COMMISSION CASES

STATUTES, REGULATIONS AND OTHER AUTHORITY

I. INTRODUCTION AND OVERVIEW

On April 30, 2003, Administrative Law Judge Larry Gesoff (the "ALJ") issued his Initial Decision ("Initial Decision" or "I.D.") in this case dismissing the Complaints filed by Cindy Parks, Richard Minutello and the Office of Consumer Advocate ("OCA"). Those Complaints request that the Commission order Pennsylvania-American Water Company ("PAWC" or the "Company") to install approximately 19 miles of mains and associated facilities throughout Mount Pleasant Township at the Company's sole cost, i.e., without customer contributions.

In his Initial Decision, the ALJ found and determined that: (1) the Complaints are governed by the Commission's regulations on line extensions at 52 Pa. Code §§65.1 and 65.21-23; (2) applying the regulations to the facts of this case, the service requested by the Complainants cannot be provided without a customer contribution; and (3) there is no basis in law or fact for granting wholesale exceptions to the Commission's line extension regulations, like those the OCA seeks. Accordingly, the ALJ concluded that the Complainants are not entitled to the relief they request (I.D., p. 88).

On May 20, 2003, the OCA filed Exceptions to the Initial Decision.[1] For the most part, the OCA's Exceptions simply repackage the arguments presented in its Main Brief.

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[1] Mr. Minutello, with the assistance of the OCA, filed a letter expressing his disagreement with the Initial Decision. That letter does not meet the Commission's formal or substantive requirements for Exceptions, and the unfocused rhetoric it contains has little or nothing to do with the merits of this case. Unfortunately, Mr. Minutello's letter (p. 5) contains non-record, hearsay averments presumably directed at one of the ALJ's findings. While this departure from the rules of evidence and administrative procedure may be understandable for a *pro se* litigant, the OCA's deliberate repetition of, and reliance upon, those non-record, hearsay averments in its Exceptions (p. 19, footnote 2) is inexcusable.

As evidenced by the thorough and well-reasoned discussion in the Initial Decision, each of the OCA's arguments was carefully considered and properly rejected by the ALJ. In addition, the OCA's arguments were addressed at length in the Company's Initial and Reply Briefs to the ALJ, which were filed on February 10 and 19, 2003, respectively. In view of the page limitations on Reply Exceptions, the Commission is urged to review the Company's Briefs to get a deeper understanding of how fundamentally wrong the OCA's positions in this case are.

As previously noted, the ALJ correctly determined that this case is governed by the Commission's regulations on line extensions at 52 Pa. Code §§65.1 and 65.21- 65.23. Those regulations were approved by the Commission's Order entered October 7, 1996 at Docket No. L-00930089. Following approval by the Independent Regulatory Review Commission ("IRRC") and the applicable committees of the Pennsylvania House and Senate, the regulations and the Commission's October 7 Order were published at 27 *Pennsylvania Bulletin* 799 *et seq.* (February 15, 1997). The final line extension regulations were three years in the making and reflect the Commission's definitive statement on how requests for main extensions by "Bona Fide Service Applicants" are to be resolved.

That having been said, one could hardly detect from the OCA's Exceptions that the Commission's regulations even exist, let alone that they directly address the issues in this case. Indeed, the regulations get scant consideration in the OCA's Exceptions. They are not even mentioned until page 9, and then only because the OCA, in one sentence, brushes them aside by contending that they cannot really resolve any disputed main extension requests because, in the OCA's view, the regulations set only a "floor," not a

"ceiling," on the amount a utility may be required to invest in a main extension. The ALJ properly rejected this "interpretation" as contrary to both the express terms and the clear intent of the regulations (I.D., pp. 41-43). The only other reference to the regulations appears at page 15 of OCA's Exceptions, where the OCA argues that the Commission should create an "exception" to the regulations when a "public need" has been demonstrated. However, the proposed "exception" would consume the rule, since it is unlikely that Bona Fide Service Applicants would seek main extensions if a "need" for public water service did not exist. In short, there would be nothing left to the regulations if the OCA's approach were adopted. Moreover, the Commission has previously rejected a "need" argument virtually identical to the one advanced by the OCA herein. *Collier Township v. Pennsylvania-American Water Company*, Docket No. C-20016207 (March 18, 1996) (Copies of the Order and Initial Decision are attached as Appendix "A".)

Simply stated, the OCA has embarked on a pattern of burdensome case-by-case litigation[2] that ignores the existence of the regulations and, in so doing, seeks to reopen and relitigate matters that the Commission put to rest in 1996 when it resolved the very same issues the OCA is now trying to resurrect. In fact, the OCA's discussion of prior appellate decisions and, in particular, its claim that the Initial Decision is contrary to the holding in *Ridley Township v. Pa. P.U.C.*, 172 Pa. Super. 472, 94 A.2d 168 (1952) (*see* OCA Exc., pp. 4-9), rehashes arguments that were expressly rejected in the

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[2] The OCA has initiated or intervened in five pending main extension complaint cases involving PAWC where PAWC is following its tariff and the Commission's line extension regulations (Tr. 419-21). It is evident that the OCA intends to litigate every case in which an applicant refuses to pay a customer contribution as required by the Company's Tariff Rule 27 and the Commission's regulations on which that rule is based.

Commission's October 7, 1996 Order. Specifically, the Commission found that the economic standard it adopted for determining the utility-required investment in main extensions is consistent with *Ridley* and satisfies the service obligations Section 1501 imposes on utilities (27 *Pa. Bull.* at 801; PAWC Reply Brief, pp. 5-6).

II. ARGUMENT

A. The OCA's Exceptions Contain Numerous, Serious Misstatements Of The Law And Mischaracterizations Of The Record Evidence

It is not possible to address all of the arguments set forth in the OCA's Exceptions, nor is it necessary to do so in view of the detailed refutation thereof in the Initial Decision and the Company's Initial and Reply Briefs. Consequently, only the major errors and misstatements are addressed in this Reply. In that regard, it should be noted that the OCA's Exceptions are rife with mischaracterizations of both record evidence and legal authorities. Some of these are so serious and so directly bear upon the issues in this case that they must be identified and discussed up front.

OCA Exc. p. 8: The OCA asserts: "Furthermore, the OCA's proposal allows for the extension to be performed while providing PAWC a return on their investment for the utility. PAWC witness Paul Diskin recognized during cross-examination that if Pennvest funds were procured to finance the extension of PAWC's lines into Mount Pleasant Township, it 'benefits everyone' and there are 'no losers.' Tr. 357, 359." Similar assertions are made elsewhere in the OCA's Exceptions (*e.g.*, p. 2). However, the OCA lifted a few words out of a much longer answer in which Mr. Diskin expressed a proposition entirely opposite the "spin" the OCA tried to impart:

> Q. [By counsel for the OCA] Yet apparently, the

> company is not willing to seek PENNVEST funding for this Mt. Pleasant Township project, is it?
>
> A. I don't believe the company has made that statement. The company has no problem with trying to get PENNVEST funds to finance projects of this magnitude. We also do not have a problem with the low interest rates that PENNVEST offers us. Like you said, it benefits everyone. *The problem we have is that the way Ms. Kraus' [the OCA's witness] testimony is stated, she's trying to get the benefit twice for ratepayers, once whenever the calculation is done for the investment for these customers [requesting main extensions], and secondly whenever that project is rolled into a base rate case* (emphasis added).

Contrary to the OCA's truncated quotation, Mr. Diskin never endorsed – in fact, he vigorously opposed – the OCA's proposal to "target" the PennVest borrowing rate to the interest rate component of the revenue-justification formula in the Commission's line extension regulations (*see* PAWC St. 3.1, pp. 10-12; PAWC Initial Brief, pp. 39-44). As the ALJ found (I.D., p. 63), if the PennVest loan rate were used in the manner the OCA proposed, the purported "benefits" would come at the Company's unreimbursed expense. The Company would, in fact, be the loser.

OCA Exc., pp. 11-12. The OCA asserts:

> Even PAWC recognizes the potential for future growth outside of the initial project footprint as they have argued in this proceeding that 12-inch mains are appropriate for use throughout this proposed project. As discussed further below, in response to the OCA adjustment seeking to only include in the determination of the costs of construction the cost of 8-inch mains for purposes of calculating the customer contribution, PAWC argued that 12-inch mains are necessary to accommodate the "material growth" within the Township. PAWC M.B.[Main Brief], at 59.

The OCA seriously misstated PAWC's position. Here is what the Company's

brief actually says:

> *The facilities designed by PAWC are needed to meet the service requirements of existing residents and businesses within the OCA-proposed "footprint."* However, there is no question that any material "growth" within the Township (along the lines predicted by witnesses at the September 9 public hearing), would rapidly exceed the capacity of the 8-inch mains Mr. Fought proposes (emphasis added).

The Company neither anticipated nor predicted any "growth" within Mount Pleasant Township. Rather, as explained in detail in its Initial Brief (pp. 53-59), it sized the requested facilities to meet the current domestic and fire flow needs of existing homes and businesses. The OCA's witness, Mr. Fought, contended that minimally sufficient fire flows might be achieved with only 8-inch mains in certain areas. PAWC explained why his assessment is wrong, and the ALJ adopted PAWC's position (I.D., 75-77). PAWC also pointed out that 8-inch mains in the disputed areas could rapidly become insufficient to meet even domestic usage if any of the "growth" that Township officials hope for were to materialize (PAWC Initial Brief, pp. 57-59). However, PAWC clearly did not rely upon speculation about future "growth" as the basis for sizing the facilities that would have to be installed to meet the Complainants' demands for domestic and fire protection service.

OCA Exc., p. 14. The OCA asserts: "The appellate courts as well have noted that the Commission has the power to grant waivers of its regulations under certain circumstances. *See, e.g.* Pennsylvania Electric Co. v. Pa. P.U.C., 663 A2d 81 (*sic.*) [should be 663 A.2d 281] (Pa. Commw. 1995)." *Pennsylvania Electric Co. v. Pa. P.U.C.* does not say anything remotely like the proposition for which it is cited by the OCA.

First, the case did not even involve a "regulation." Rather, it concerned the Commission's "waiver" of a provision in a utility tariff – obviously, something of lesser legal import than a regulation. Second, the Court reversed the Commission's order[3] because it found the PUC lacked authority to grant a "waiver" of a duly adopted tariff provision except under limited circumstances, i.e., where the waiver has been "mutually negotiated" between the utility and the customer. Third, the Court expressly reaffirmed its prior holding in *Brockway Glass Co. v. Pa. P.U.C.*, 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981) that a tariff provision (like PAWC's Tariff Rule 27 at issue in this case) is legally binding on the utility and its customers. *See* 663 A.2d at 284.

In reality, there is no authority for the OCA's proposition that the Commission is free to grant a "waiver" of a substantive regulation. The authority on this point could not be more clear. *Good v. Wohlgemuth, Secretary of Welfare*, 15 Pa. Cmwlth. 524, 327 A.2d 397 (1974) ("Authorized regulations of an administrative agency have the force and effect of law and bind the agency equally with others.") An agency cannot "ignore or fail to apply its own regulations." *Teledyne Columbia-Summerhill Carnegie v. Unemployment Compensation Board of Review*, 160 Pa. Cmwlth. 17, 23, 634 A.2d 665 (1993). *Accord Statement Of Policy On Expanded Interconnection For Intrastate Special Access*, Docket No. M-00920376 (February 11, 1993), 1993 Pa. PUC LEXIS 5 (pp. 56-57).

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[3] The Court stated, in relevant part: "Accordingly, because we conclude that the Commission's action is neither authorized by statute nor case law, we hold that the Commission exceeded its authority in granting Lewistown a tariff waiver" (663 A.2d at 285).

OCA Exc., p. 15. The OCA asserts: "Furthermore, requests for waivers or exceptions to Commission regulations are such a routine part of utility practice that the Rules of Administrative Practice and Procedure have a specific provision addressing them. 52 Pa. Code §1.91 . . ." Section 1.91 authorizes requests for "waiver of, or exceptions to, any provision of this chapter [Chapter 1] or Chapter 3 or 5 (relating to special provisions; and formal proceedings) or a regulation or requirement with which a document tendered is in conflict or does not conform . . ." As indicated by its title ("Applications for Waiver of Formal Requirements"), Section 1.91 only permits waivers of "*formal* requirements," such as those embodied in Chapters 1, 3 and 5 (e.g., non-conforming documents). Nothing in that section suggests the Commission is empowered to grant, or will entertain, broad "waivers" of, or "exceptions" to, substantive regulations, such as the line extension regulations set forth in Chapter 65.

OCA Exc., p. 23: The OCA asserts: "[E]ven PAWC witness Lucas recalled having stated that *the Company expected to serve* nearly six hundred customers in an even smaller footprint than that ultimately proposed by the OCA. Tr. 302" (emphasis added). Similar statements are attributed to Mr. Lucas elsewhere in the OCA's Exceptions (*e.g.*, pp. 21 and 22). The OCA has taken significant liberties with Mr. Lucas' testimony (Tr. 301-302):

> Q. Would as many as 600 customers *have fit into that project footprint* that was being discussed at that time?
>
> A. I don't recall the exact number that was *in that project footprint* at that particular point in time. I'm guessing it wasn't quite 600, but it was somewhere in that area (emphasis added).

As the transcript makes clear, Mr. Lucas "recalled" that approximately 600 "customers" would have "fit" into the geographic area (the "footprint") demarcated by the OCA. He never made the statement attributed to him by the OCA, namely, that the Company "expected to serve nearly six hundred customers." To the contrary, the Company has consistently said that the OCA's estimate of "potential" customers is mere speculation and is not a reliable indication of the actual customer billing revenue that should be used in the revenue-justified investment formula of the line extension regulations (PAWC Initial Brief, pp. 32-35). In fact, the OCA's own "survey" showed that a significant number of the homeowners within the project "footprint," when asked, did not want public water service even if it were available without a customer contribution (PAWC Initial Brief, p. 18).[4]

OCA Exc. p. 24: The OCA asserts: "As indicated in the OCA's Reply Brief, the extrapolation made by Ms. Kraus was reasonable and based on *sound statistical principles* R.B. at 16" (emphasis added). All one finds at page 16 of the OCA's Reply Brief is another bald assertion that Ms. Kraus' attempt to "extrapolate" positive responses to non-responders was "statistically sound." In neither the OCA's Reply Brief nor in the testimony of Ms. Kraus does one find any statement of, or reference to, any "statistical principles" that could justify such an "extrapolation." No treatises or other authorities were cited. Moreover, Ms. Kraus is not a statistician by education, training, or work

[4] The OCA issued 701 survey questionnaires. It received responses from only 530. Of those that responded, only 430 expressed a desire to connect to a public water supply if they could do so without paying any customer contribution (OCA St. 2A, p. 4). One hundred respondents did not want public water service under any circumstances.

experience, and the OCA did not even attempt to establish a foundation to qualify her as a statistical expert (*see* OCA St. 2, Appendix I). In short, there is absolutely no evidence to support the OCA's claim that its attempted "extrapolation" was based on any "statistical principles" – sound or otherwise.

OCA Exc. p. 25: The OCA asserts: "In the Initial Decision, the ALJ correctly notes that use of the PennVest loan rate of 1.387% for Washington County in the main extension formula would reduce the customer contribution to $0 for the residents of Mount Pleasant Township. I.D. at 54." The OCA wrongly suggests that the ALJ made a finding, when, in fact, he simply summarized the OCA's position. Unmentioned by the OCA is the ALJ's discussion, elsewhere in the Initial Decision, of the reasons why the actual PennVest loan rate is not as low as the 1.387% rate used in the OCA's calculations:

> PAWC notes that the PennVest loan rate assumed by Ms. OCA witness Kraus is the introductory rate applicable to the first five years (1.387%). The rate jumps to 2.774% for years 6 through 20, i.e., 75% of the loan term. *The actual "PennVest loan rate" is not less than 2.427%, which is the weighted interest rate over the entire term of such a loan* (emphasis added).

I.D., p. 56. *See also* I.D., p. 62 ("[T]he rate in the first five years is 1.387%, after which it jumps to 2.774% for the remaining 15 years of the term.")

Contrary to the OCA's assertion, if the actual PennVest interest rate is used in the revenue-justified investment formula,[5] a substantial customer contribution is still required

[5] Of course, it is legally and conceptually wrong to substitute the PennVest loan rate in the line extension formula for all of the reasons accepted by the ALJ in the (continued).

even if one accepts the OCA's estimate that 409 customers would take service from the installed facilities. Using the actual PennVest loan rate in that manner, the Company-required investment is $9,125 per customer, as shown in PAWC's Initial Brief (p. 10). Assuming as many as 409 customers could be assured – and there is no evidence that they could – the required Company investment would total $3,732,125. That is substantially below the cost of the proposed project ($6,290,499) and is also below even the OCA's unrealistically low estimate of $5,303,352.

OCA Exc., p. 23: The OCA asserts: "[U]nder the OCA's recommendation in this proceeding, the actual number of customers required to connect to the system to meet the 'break-even' point is only 409. Tr. 393." Similar statements are made throughout the OCA's Exceptions (*e.g.*, pp. 24-25, 28). Unfortunately, the OCA leaves unmentioned the fact that its "break-even" analysis assumes: (1) a PennVest interest rate of only 1.387%, which is demonstrably incorrect, for the reasons previously explained; and (2) a project cost of only $5,303,352, which the ALJ found be unrealistically low because it omits the cost of a tank and certain 12-inch mains that are necessary to provide the service the OCA and Complainants demand (I.D., pp. 71-77). As explained above, even if 409 customers could be assured – and they cannot – a substantial customer contribution is nonetheless required. In fact, even if the entire 568 customers "extrapolated" by OCA witness Kraus were to materialize, a customer contribution would still be required, as shown by the calculations at pages 38-39 of PAWC's Initial Brief. The OCA's claim that the project it proposes could be "profitable" is contrary to the evidence.

Initial Decision (pp. 56-63) and discussed in the Company's Initial (pp. 37-44) (continued).

OCA Exc., p. 32: The OCA asserts: "Finally, the ALJ also gave no weight to the testimony by Mr. Lucas that where Pennvest financing is available to fund a project, the Company does not even apply its main extension tariff. Tr. 304." The ALJ was right to give no weight to the alleged "testimony" because Mr. Lucas never made the statement attributed to him by the OCA, as the transcript reveals:

> Q. You've indicated in your testimony that PAWC has 550,000 customers; is that correct?
>
> A. Approximately, yes.
>
> Q. Approximately. Do you agree with me that the cost of providing service to Mt. Pleasant Township would be spread throughout all of those customers?
>
> A. I guess it depends on how the project moves forward, whether it's done specifically by us through our normal PUC main extension tariff or whether it's done through a PENNVEST loan.
>
> Q. Would you agree with me that as of the next base rate case, that that cost, either way, either option you just explained, is then spread throughout all of PAWC's customers?
>
> A. I guess so.

OCA Exc., p. 35: The OCA discusses five cases[6] cited by the ALJ wherein the Commission upheld, over challenges by complainants, tariff provisions defining the minimum size or required configuration of facilities to provide water service to applicants

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and Reply (21-25) Briefs.

[6] *Radoff v. The Langhorne Spring Water Company*, 47 Pa. P.U.C. 690 (1976); *Barna v. Western Pennsylvania Water Co.*, 53 Pa. P.U.C. 500 (1979); *Duane Flaherty v. Western Pennsylvania Water Co.*, Docket No. C-850157 (November 13, 1985); *Hershey Church of the Nazarene v. Keystone Water Co.*, Docket No. (continued).

requesting such service. The OCA asserts that, in each case, the Commission permitted the utility to determine the size or location of the facilities to be installed, but did not authorize the utility to compute the customer contribution based on the installed facilities. The cases say exactly the opposite. In fact, in each instance, the Commission resolved a dispute about the amount the applicant had to contribute by finding that the contribution should reflect the costs of the facilities the utility would actually install because those facilities conformed to the specifications of the respective utilities' tariffs. The OCA's characterization of these cases is totally contrary to their express holdings, as even a cursory review of the orders will reveal.[7]

OCA Exc., p. 36: The OCA asserts: "To begin, PAWC witness Hankey testified that the existing facility already installed to serve the 233 Chartiers customers, the Gretna Booster station, has the capacity to provide a sufficient fire flow for the existing customers and future Mount Pleasant Township customers. Tr. 329-330." Here is what Mr. Hankey actually said:

> Q. Is the pumping capacity of the Gretna Booster Station a thousand gallons per minute?
>
> A. Yes.
>
> Q. Is a pump with that capacity sufficient to provide a fire flow of 750 gallons per minute and the peak hourly demand for the 233 Chartiers customers and the 568 Mt.

C-844227 (May 13, 1985); *Petition of John M. and Paula D. Blair*, Docket No. P-860184 (January 14, 1987).

[7] Three of the five cases are not reported. However, they were discussed in the Company's Initial Brief (pp. 49-52). Copies of these and all other unreported decisions discussed herein and in PAWC's briefs were provided in a separate, bound volume that was filed with the Company's Initial Brief.

Pleasant Township customers?

A. *We do not believe so.* The peak hourly demand, although it is a peak demand, but it does not necessarily occur evenly throughout that hour. The peak hourly demand, you may have its highest flow within ten minutes of that hour, but to average the peak hourly demand for that booster, *we do not feel it would provide the water needed for the Chartiers customers and the additional Hickory customers* (emphasis added).

The foregoing list, lengthy as it is, captures only the major misstatements and mischaracterizations in the OCA's Exceptions.

B. The ALJ's Decision To Apply The Line Extension Regulations Is Correct And Is Consistent With Applicable Appellate Authority (OCA Exc. Nos. 1 And 2)

The OCA mounts a four-pronged attack on the Initial Decision. It begins by discussing the Initial Decision as if the Commission's line extension regulations did not exist (OCA Exc., pp. 4-9). In so doing, it harkens back to the Superior Court's 1952 decision in *Ridley Township v. Pa. P.U.C., supra*, and contends that the Initial Decision violates principles allegedly established in that case. Specifically, the OCA alleges that the ALJ should not have applied an economic standard to determine whether a customer contribution is required. However, that entire discussion simply repeats arguments the OCA made in the PUC's rulemaking proceeding, where it also opposed any economic standard along the lines of the one ultimately adopted (*see* PAWC Initial Brief, pp. 5-9). Unmentioned by the OCA is the dismissal of its tortured interpretation of *Ridley* in the October 7, 1996 Order, where the Commission found that the economic standard embodied in the final regulations is consistent with, and in furtherance of, the legal principles established by Pennsylvania's appellate courts (27 *Pa. Bull.* at 801):

> The basis of this customer contribution [determined in accordance with the regulation] is that, absent a reasonable contribution to the line extension's construction costs, the utility would experience a negative (less than zero) equity return on the line extension. Indeed, it appears to us that a line extension that yields a negative equity return, representing an economic loss on the transaction, is one that begins to "materially handicap the utility in securing a fair return on all of its operations," *Ridley*, 172 Pa. Superior Ct. at 497, 94 A.2d at 171, as well as one that unfairly asks existing customers to subsidize the costs of serving a new customer.

Second, the OCA argues that the economic standard established by the line extension regulations simply sets the "minimum" amount a water utility must invest when a Bona Fide Service Applicant requests a main extension, but sets no upper limit on the utility-required investment (OCA Exc. pp. 9-10). That argument contravenes the express language of the October 7, 1996 Order, where the Commission made it clear that it expects utilities to fund only the portion of main extensions that are economically justified under the formula set forth in the regulations (27 *Pa. Bull.* at 802). *See also* I.D., pp. 41-43; PAWC Reply Brief, pp. 2-4. Had the PUC done otherwise, it would have run afoul of the principle the IRRC insisted the regulations honor (27 *Pa. Bull.* at 801):

> Accordingly, the application of this regulation should ensure, as recommended by the IRRC, that utilities will "fund all line extensions that are appropriate for the level of service to be purchased by the new customer without requiring the utilities and their existing customers to incur the costs of unreasonable line extensions." IRRC Comments, p.2.

Third, the OCA contends that, where a "public need" has been demonstrated, the Commission should refrain from applying its regulations or grant a broad "exception" and "waive" the customer contribution the regulations require (OCA Exc. pp. 13-18).

The Commission has previously considered and rejected this argument.

In *Popowsky v. Pennsylvania-American Water Company*, Docket No. R-00943155C001 (June 9, 1997), 1997 Pa. PUC LEXIS 143, the OCA challenged PAWC's Tariff Rule 27, which had been filed to conform with what were, at that time, "proposed" line extension regulations. In that case, a "public need" exception was explicitly rejected:

> In its main brief, the OTS argued that an exception should be made to require PAWC to provide a main extension without CIAC to serve applicants whose existing wells have become polluted to the point where the wells are not useful for any domestic purpose. OTS M.B., pp. 29-30. . . . While the OTS proposal is an interesting social program, there is no indication that the Commission or the Courts have ever considered such a requirement. Essentially, the OTS suggestion would make the utility the provider of last resort without regard to cost. Unfortunately, disregarding cost is precisely opposite of the guidance set forth by the Courts. *Sherman. Ridley.* In those cases the Court recognized that there are some financial limits. The OTS proposed policy would not make the same distinction. Under these circumstances, I cannot endorse the proposal.

Recommended Decision of Administrative Law Judge Louis G. Cocheres (January 15, 1997) affirmed and adopted by the Commission. *Popowsky v. Pennsylvania-American Water Company, supra* ("The OCA in its Exception appears to be advocating the position that the Company should provide totally free main extensions, with no recognition given to the two Court-imposed exceptions (material handicap and undue burden) which we have discussed supra. As we have stated, we decline to accept this interpretation of the law.")

Similarly, in *Collier Township v. Pa. P.U.C., supra*, the complainant presented evidence, including a county health department study, showing that private wells were

contaminated or had insufficient supply. It also presented evidence that the absence of a public water system left Township residents without needed fire protection and hindered economic development. The Commission found that such evidence of public need did not trump the economic standards set forth in its line extension regulations:

> Our review of the record as developed leads us to conclude the Respondent complied with its Commission approved tariff provisions when it requested a customer contribution from the applicants. Further, the law is clear that a public utility is not obligated nor will we compel a public utility to make line extensions which are uneconomic or unreasonable absent customer contributions.

Collier Township v. Pa. P.U.C., supra (pp. 9-10) (*See* Appendix "A," hereto.)

Furthermore, if the OCA's "public need" exception were adopted, the "exception" would consume the rule. As the OCA's witness, Ms. Kraus, admitted, it is unlikely anyone requesting a main extension could qualify as a Bona Fide Service Applicant unless some form of "public need" for water service existed (Tr. 422-23):

> Q. Under what circumstances would a residential property owner requesting water service be a bona fide applicant and yet there would be no public need as you define it?
>
> A. I can imagine there might be a case where it's strictly preference.
>
> Q. Preference?
>
> A. Yes. A residential customer has a perfectly good source, adequate, no contamination, you know, reasonable taste, color, et cetera, and just prefers public water. I suspect there may be a case out there like that. As I said, I probably wouldn't see it.

Under the OCA's proposed approach, the only disputes that could possibly be

resolved by the line extension regulations are those that involve a Bona Fide Service Applicant who "prefers" public water service as an alternative to an existing, acceptable well-water supply. Surely, the Commission did not embark on a three-year rulemaking only to discover that its regulations can resolve only those disputes created by applicants who expressed a "preference" for a public water supply.

Additionally, and contrary to the OCA's contention, the Commission is not authorized to simply "waive" its substantive regulations. As explained in Section II. A., *supra*, and as discussed in greater detail in PAWC's Initial Brief (pp. 29-31), a regulation has the force and effect of law and binds the agency that adopts it to the same extent as the entities the agency regulates. The OCA's arguments to the contrary are wrong. Just as important, the Commission made it clear in its October 7, 1996 Order that the line extension regulations were adopted for the express purpose of supplanting case-by-case adjudication, which experience has shown to be unacceptable (27 *Pa. Bull.* at 800). Yet, the broad "exception" the OCA seeks would make virtually all line extension disputes subject to such burdensome case-by-case litigation.

Fourth and finally, the OCA argues that main extensions which are currently uneconomic might become "profitable" because of future "growth" in Mount Pleasant Township (OCA Exc. pp. 9-12). The OCA did not make this argument in either is Main or Reply Brief, which explains why the ALJ did not address it in his Initial Decision (*see* OCA Exc., pp. 10-11). Of course, the OCA's attempt to float this new, fact-sensitive

argument for the first time in its Exceptions is reason enough to reject it.[8]

Estimates of future growth, even if more concrete than the mere speculation offered by the OCA, cannot justify an otherwise uneconomic main extension (PAWC Initial Brief, pp. 35-36). If that were the case, the utility would be put in the untenable position of bearing the entire risk that the projected growth would actually occur. Furthermore, the OCA's argument overlooks the fact that the line extension regulations and the Company's tariff have a built-in mechanism to compensate applicants if "growth" were to occur. Specifically, the initial contributors get refunds for each additional customer that attaches directly to the customer-funded main extensions. Thus, while the Company does not bear the risks associated with speculative estimates of "potential customers," its tariff assures that the original contributors get the entire benefit of future "growth" even though it was not factored into the initial calculation of utility investment (PAWC Initial Brief, pp. 21, 35-36).

C. The ALJ Properly Rejected The OCA's Attempt To Lock In The Company's Investment Based Upon An "Estimate" Of Possible Applicants (OCA Exc. Nos. 3 and 4)

The OCA has tried to manufacture a scenario, using a substantially modified version of the Commission's revenue-justified investment standard, that would permit it to represent that the requested main extensions could be built without the need for a customer contribution. Several assumptions – which are contrary to both the line extension regulations and the record evidence – were key to the OCA's effort.

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[8] *See* I.D., p. 87, where, in connection with another OCA argument, the ALJ cites authority for the PUC's rejection of arguments belatedly raised for the first time (continued).

As previously mentioned, the OCA assumes that a specific PennVest interest rate can be "targeted" to the interest rate component of the economic justification formula. This is wrong for all of the reasons discussed by the ALJ (I.D., pp. 54-63). The OCA also assumes that the PennVest loan rate is as low as 1.387% when, in fact, it is much higher, as explained in Section II. A., *supra*. Additionally, the OCA needs to made an assumption about the number of Bona Fide Service Applicants that will actually take service from the main extensions after they are installed. Only by assuming a sufficient number of Bona Fide Service Applicants can the OCA drive the calculation of Company-required investment high enough to match the cost of the proposed project.[2] This latter assumption is addressed at pages 43-44 and 47-53 of the Initial Decision, where the ALJ rejected the OCA's attempt to base the calculation of the Company-required investment upon an unsubstantiated "estimate" of Bona Fide Service Applicants (I.D., p. 51):

> Among other things, the Commission's regulation is designed to follow case law which has "recognized that a public utility's duty to provide line extensions is not unlimited and, therefore, will not obligate the public utility to make line extensions for which there is no 'public need', or to make line extensions which are uneconomic or unreasonable.
>
> Using the OCA's estimate of Bona Fide Service Applicants would result in an uneconomic line extension because it would make PAWC assume the financial risk that the potential customers assumed in calculating the Company's investment will actually materialize. This is contrary to the Commission's regulations.

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in a party's brief.

[2] The OCA also tried to drive down the cost of the project by proposing unrealistic, low-ball estimates based upon the installation of facilities with insufficient capacity to provide the domestic and fire protection service the Complainants demand. *See* I.D., pp. 64-77.

As the ALJ properly found, the fundamental error in the OCA's approach is that it calls for the Commission to enter an order now that conclusively determines the amount of Company investment based upon estimates and projections of the number of customers that might, or might not, materialize in the future once the requested main extensions are installed. That is precisely what the ALJ meant when he said: "It is not possible to apply the Commission's main extension regulations without Bona Fide Service Applicants and none have presented themselves to PAWC. The OCA's estimate of 568 is speculative and should not be used" (I.D., p. 53). Bona Fide Service Applicants must represent *specific property owners who will actually become customers upon the installation of the* requested main extension. None of the unnamed individuals that expressed an interest in obtaining water service in response to the OCA's survey, i.e. those that comprise the OCA's "estimate," fit that description.[10]

Contrary to the OCA's assertion (OCA Exc., p. 25), this fundamental flaw cannot be cured by giving the OCA a second opportunity to garner 409 "applications" for service. The determination of revenue-justified investment requires real revenue, which, in turn, requires real customers. For that very reason, the Commission cannot pre-determine the number of customers based on before-the-fact estimates, regardless of whether those estimates are based on a "survey" or the OCA's solicitation of "applications." If that were not the case, then we would be back where we started. The OCA would solicit "applications," demand that the Company's investment be calculated

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[10] Significantly, the OCA's questionnaire asked whether the recipient was interested in getting public water if he or she could do so without any customer contribution (I.D., p. 48). Therefore, the survey says nothing about the number of respondents who would take service if a contribution, in any amount, were required.

on the basis of the number of pieces of paper submitted, and the Company would still bear the entire risk of whether the "applicants" would actually become customers and provide the amount of revenue assumed. One level of speculation would be substituted for another. The line extension regulations were not meant to be applied in this fashion.

Additionally, the "estimate" proposed by the OCA is not a reliable, for all of the reasons stated in the Initial Decision (pp. 50-52), and, therefore, the OCA has not sustained its burden of proof in this case. *See* PAWC Initial Brief, pp. 18-19, 32-35.

Finally, as explained at the beginning of this Section, the number of customers is only one of several assumptions the OCA made to try to raise the Company investment to match the project cost. As discussed in Section II. A. *supra*, even if as many as 409 customers (or 568 for that matter) were used in the revenue justification calculation, the "break-even" level cannot be achieved because the OCA's assumptions as to the applicable interest rate and the project cost are also wrong. Significantly, the ALJ rejected the OCA's position on both of those issues (I.D., pp. 54-63 and 64-77).

D. The ALJ Properly Determined That The Line Extension Regulations Do Not Authorize "Targeting" A PennVest Interest Rate In The Manner The OCA Proposed (OCA Exc. No. 5)

As previously explained, the OCA's "break-even" works only if an assumed PennVest interest rate as low as 1.378% is "targeted" to the interest rate component of the revenue-justification formula in the line extension regulations. The ALJ concluded that such "targeting" is wrong for three reasons. First, it is contrary to the express terms of the line extension regulations, which specifically require the use of the utility's "current debt ratio and weighted long-term debt cost rate" (I.D., pp. 61-62). Second, "targeting"

low cost debt issues to specific main extensions is inherently unfair to Bona Fide Service Applicants who request main extensions that do not qualify for, or do not receive, PennVest funding (I.D., pp. 57 and 63; *see* PAWC Initial Brief, pp. 40-21)). Third, using the PennVest interest rate in the manner the OCA proposed would appropriate the benefit of low-interest PennVest funding twice – once in calculating the Company's required investment in the main extension and a second time in calculating rates for service for the rest of the Company's customers – which would cost PAWC several million dollars over the 20-year life of a PennVest loan (I.D., pp. 58-60, 63).

In its Exceptions (pp. 25-33), the OCA does not dispute – indeed, it does not even address – the first two reasons stated above for the ALJ's decision to reject its proposal. Since it is clear that the OCA's proposal contravenes the Commission's regulations, it should be rejected for that reason alone. As to the ALJ's third reason for rejection, the ALJ is on equally solid ground. As explained in the Initial Decision (pp. 58-60, 62-63), PAWC presented detailed calculations that precisely quantified the unfair "double-dip" the OCA's proposal would effect. The OCA's efforts to evade the consequences of its proposal are meritless, as the ALJ found and as explained in detail in PAWC's Reply Brief (pp. 22-24).

Finally, the OCA's efforts are unavailing, in any case, because it assumes a PennVest interest rate of only 1.378%, when the actual rate is not less than 2.427%. If, despite the legal and conceptual flaws of doing so, the actual PennVest interest rate were "targeted" in the manner the OCA proposed, it would leave the Company investment far short of the project cost whether 409 customers, or even as many as 568 (the OCA's "extrapolation"), were used in the calculation (*see* PAWC Initial Brief, pp. 37-39).

E. The ALJ Properly Rejected The So-Called "Least-Cost" Principles Advocated By The OCA, Which Are Contrary To Law And Would Result In The Installation Of Facilities Inadequate For The Service The Complainants Demand (OCA Exc. No. 6)

The so-called "least-cost" principles advocated by the OCA have no basis in law. Indeed, they are contrary to long-standing Commission precedent, as the ALJ correctly determined (I.D., pp. 67-70). As explained in Section II. A., *supra*, the OCA seriously misstated the holding in the five Commission decisions that, as the ALJ found, are controlling in this case (I.D., pp. 68-70). Furthermore, the evidence, which is set forth in detail in the Initial Decision (pp. 71-77) and PAWC's Initial Brief (pp. 53-59), clearly established the reasonableness of all of the facilities, and their associated costs, that PAWC's engineers determined would be needed to furnish the general and public fire protection service the Complainants demand.[11]

F. The ALJ Made All The Findings Of Fact Necessary To Support His Conclusions Of Law And His Overall Decision (OCA Exc. No. 7)

The OCA makes the wholly unwarranted – and demonstrably incorrect – allegation that the ALJ "erred in failing to make findings of fact pertaining to expert testimony" (OCA Exc., p. 38). Even a cursory review of the Initial Decision shows that the OCA is wrong. In an elevation of form over substance, the OCA takes the ALJ to

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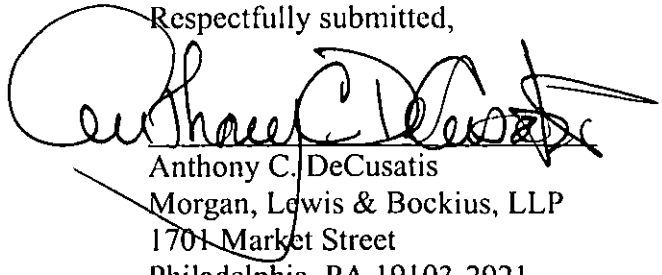
[11] Significantly, the reasonableness of PAWC's decision to install a storage tank is not even in dispute. OCA witness Fought did not contend that the Company's decision to install a tank is unreasonable or that it fails to comport with good waterworks practice. In fact, he conceded that the tank is "desirable" and, when pressed for an explanation, offered several good reasons why a tank should be installed (Tr. 398-99). His opposition to the tank, like his opposition to the installation of 12-inch mains in certain locations, stemmed from his explicit motivation to suppress the cost of the project in order to make it "fit" within the Company-required investment figure calculated by OCA witness Kraus (OCA St. 1A, p. 6; *see* PAWC Initial Brief, p. 53).

task because the numerous, specific findings he made on the very topics where the OCA claims he was derelict are contained in the "discussion" portion of the Initial Decision, rather than in separate numbered paragraphs. There is no requirement that a Judge's findings must all be made in separate, numbered paragraphs. The OCA has cited no authority to support its position because none exists.

III. CONCLUSION

For the reasons set forth above and in PAWC's Initial and Reply Briefs, the Initial Decision of Administrative Law Judge Larry Gesoff should be affirmed, the Complaints of Ms. Parks, Mr. Minutello and the OCA and should be dismissed with prejudice, and the Commission should find that the Complainants' service requests may be fulfilled only in accordance with the terms of the Company's Tariff Rule 27 and the Commission's line extension regulations.

Respectfully submitted,



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DATED: May 30, 2003

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APPENDIX "A"

Final Order and Initial Decision In
Collier Township v. Pennsylvania-American Water Company

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held March 14, 1996

Commissioners Present:

John Quain, Chairman
Lisa Crutchfield, Vice Chairman
John Hanger
David W. Rolka
Robert K. Bloom

Collier Township

v. C-00934978

Pennsylvania-American Water Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration are the Exceptions of Collier Township ("Complainant" or "Township") taken to the Initial Decision of Administrative Law Judge ("ALJ") Robert Meehan issued on August 28, 1995, relative to the above-captioned proceeding.

History of the Proceeding

On April 23, 1993, the Township filed a Formal Complaint against Pennsylvania-American Water Company ("Respondent" or "PAWC") alleging an inadequate water supply in parts of the Township. The Township sought, in its Complaint, an Order directing PAWC to construct the necessary water lines to serve all properties

in the Township not currently provided with public water. The Respondent filed its Answer on June 16, 1993.

Hearings were held on August 11, 1993, October 26, 1993, and November 9, 1993. The record was closed on November 9, 1993. Main and Reply Briefs were filed by the Parties.

By Order issued on April 8, 1994, the ALJ reopened the record to allow the Parties an opportunity to explore possible settlement in light of PAWC's petition filed at Docket No. P-00930717[1] and the ALJ's Initial Decision issued on April 5, 1994, approving a settlement in a main extension complaint proceeding, Kaufman v. Pennsylvania-American Water Company, Docket No. C-00935279[2]. A series of conferences were held, however, a settlement was not reached by the Parties. A final hearing was held on February 1, 1995.

On August 28, 1995, the Initial Decision of ALJ Meehan was issued, dismissing the Complaint for failure to sustain the burden of proof. On September 17, 1995, the Complainant filed the instant Exceptions. PAWC filed Reply Exceptions on October 2, 1995.

Discussion

In his Initial Decision, the ALJ made 62 Findings of Fact which we shall incorporate herein by reference unless expressly or by necessary implication, the ALJ's Findings are modified or reversed by this Opinion and Order. (I.D., pp. 3-12).

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[1] On September 2, 1993, PAWC filed a Petition for Declaratory Order requesting that the Commission declare inter alia that PAWC's proposed tariff supplement was in compliance with the Commission's Policy Statement at 52 Pa. Code §69.171.

[2] The Commission's Order adopting the ALJ's Initial Decision was entered on July 1, 1994.

Based on his evaluation and analysis of the record, ALJ Corbett reached the following Conclusions of Law:

1. The parties to, and subject matter of, this main extension complaint proceeding are properly before the Commission.

2. The Complainant, as the party seeking affirmative relief from the Commission is the party with the burden of proof.

3. The provisions of the Respondent's Tariff Rule 27, pertaining to main extensions for bona fide service applicants (effective September 4, 1994), are lawful, just and reasonable, and are applicable to this proceeding.

4. The Township has failed to prove that the application of Tariff Rule 27, under the facts presented in this case, would subject any of its residents or citizens to an unreasonable prejudice or disadvantage.

5. The complaint should be dismissed.

(I.D., p. 26).

The ALJ recommended that the Complaint be dismissed for the failure of the Township to satisfy the burden of proof.

The Township filed the following Exceptions to the Initial Decision:

1. Exceptions are taken to the failure to make the following additional Findings of Fact that were part of the uncontroverted evidence introduced at the hearings.

Based on his evaluation and analysis of the record, ALJ Corbett reached the following Conclusions of Law:

1. The parties to, and subject matter of, this main extension complaint proceeding are properly before the Commission.

2. The Complainant, as the party seeking affirmative relief from the Commission is the party with the burden of proof.

3. The provisions of the Respondent's Tariff Rule 27, pertaining to main extensions for bona fide service applicants (effective September 4, 1994), are lawful, just and reasonable, and are applicable to this proceeding.

4. The Township has failed to prove that the application of Tariff Rule 27, under the facts presented in this case, would subject any of its residents or citizens to an unreasonable prejudice or disadvantage.

5. The complaint should be dismissed.

(I.D., p. 26).

The ALJ recommended that the Complaint be dismissed for the failure of the Township to satisfy the burden of proof.

The Township filed the following Exceptions to the Initial Decision:

1. Exceptions are taken to the failure to make the following additional Findings of Fact that were part of the uncontroverted evidence introduced at the hearings.

2. Exceptions are taken to the Administrative Law Judge's Findings that are not based upon the record or the law.

3. Exceptions are taken to the failure to give any weight to any of the testimony of the residents of Collier Township when that testimony contradicted anything the PAWC witnesses claimed.

4. Exceptions are taken to material errors by the Administrative Law Judge during the course of the hearing.

Before addressing the foregoing Exceptions, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceeding. University of Pennsylvania v. Pennsylvania Public Utility Commission, 86 Pa. 410, 485 A.2d 1217 (1984). Any Exception or argument not directly addressed by this Commission shall be deemed to have been duly considered and denied.

In its first Exception, the Complainant lists forty-four (44) additional "Findings of Fact" which it proffers should have been stated in the Initial Decision. The Complainant contends that these additional findings of fact were part of the uncontroverted evidence introduced during the hearings.

Our review of the record as developed leads us to conclude that the inclusion of the proposed Findings would not materially affect the outcome of this proceeding. Further, we conclude that the "Findings of Fact" proposed by the Complainant reflect, in some instances, the same facts or information, albeit worded differently, already stated in the ALJ's Findings. (See Complainant's proposed Finding of Fact, Exc., p. 5 and Finding of Fact Nos. 22 & 23, I.D., p. 6). The Complainant has not offered any convincing reasons why its proposed Findings should be added or

replace the ALJ's Findings. Accordingly, we will deny the Complainant's Exception No. 1.

In Exception No. 2, the Complainant argues that the ALJ's Findings are unsupported in the record. The Complainant contends, inter alia, as follows:

> 1. The ALJ improperly shifted the burden of proof to the Township to show why PAWC should meet its statutory duty to provide service rather than requiring PAWC to show why it should not meet its statutory duty.
>
> 2. The ALJ failed to follow Pennsylvania law in determining who should bear the cost of providing water main extensions to the Township.
>
> 3. The ALJ failed to follow the ruling in Ridley Township v. Pennsylvania Public Utility Commission, 172 Pa. Super. 472, 94 A.2d 168 (1953).
>
> 4. The ALJ's decision to require new customers in Collier Township to contribute capital to enable Respondent to provide its facilities to them, as provided for in PAWC's approved tariff, constitutes an unconstitutional taking of the new customer's property.
>
> 5. The ALJ improperly determined that the Respondent's proposed use of 8" and 12" main pipes is reasonable and that Department of Environmental Protection[3] regulations generally prohibit the installation of water mains of less than 6" in diameter.

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[3] This department was formerly known as the Department of Environmental Resources.

In its Reply Exceptions, the Respondent disputes the Complainant's contentions, arguing that the Township, as the party seeking affirmative relief, has the burden of proving by a preponderance of evidence that the Respondent should be required to extend its facilities at its own costs to all Township properties. The Respondent further points out that the Complainant failed to present any evidence that the Respondent's tariff provisions governing main extensions are illegal and unreasonable. The Respondent rejoins that tariff provisions previously approved by the Commission are presumed reasonable and in accord with Section 1501 of the Public Utility Code, 66 Pa. C.S. §1501.

It is well settled that the party seeking affirmative relief from the Commission has the burden of proof. 66 Pa. C.S. §332(a). In this proceeding, the Complainant, as the party requesting that we direct PAWC to install water lines in those parts of Collier Township in which there is no public water supply system, has the burden of proof. To satisfy its burden of proof in the instant proceeding, the Complainant was required to show that PAWC was obligated to extend its facilities to the Township without customer contribution and that the Respondent's refusal to bear the entire cost of the main extensions constituted unreasonable service in violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. §1501. See e.g., Feinstein v. Philadelphia Suburban Water Company, 50 Pa. P.U.C. 300 (1976).

Our review of the record leads us to conclude that the Complainant failed to meet its burden of proof. The Complainant failed to establish by a preponderance of the evidence that the Respondent had a legal obligation to pay more than the utility's contribution as provided for in its tariff. We note the Respondent's Tariff Rule 27 was previously determined by us to be lawful, just and reasonable in Pennsylvania Public Utility Commission & Office of Consumer Advocate v. Pennsylvania-American

Water Company, Docket Nos. R-00943155 & R-00943155C0001 (September 2, 1994).

As a result, it was incumbent upon the Complainant to show that the Respondent's request for customer contribution was inconsistent with Tariff Rule 27. The evidence in the proceeding evinces that the Respondent followed the guidelines of its tariff. Accordingly, we do not find that the application of PAWC's Tariff Rule 27 to Collier Township resulted in violation of the Applicants' constitutional rights. Moreover, its appears that the Township, via service of the proposed tariff on its counsel, had actual notice of its PAWC's tariff filing regarding its main extensions provisions.

Further we disagree with the Complainant's contention that a 3/4" water line would be sufficient and that the ALJ erred in finding that the use of 8" and 12" main pipe was reasonable. The record reveals that both 8" and 12" water mains would provide adequate fire protection and promote the orderly development of the distribution system in the Township. We further find that PAWC's determination of the main size as provided for in its tariff is reasonable, appropriate and in the public interest.

Contrary to the Complainant's contention that the ALJ failed to consider the Ridley decision, our review of the record leads us to conclude that the ALJ's findings are consistent with Pennsylvania case law. It would appear that the Complainant is attempting to use the Ridley decision isolation, without considering the combined precedent value of Sherman v. Public Service Commission, 90 Pa. Superior Ct. 523 (1927) and Colonial Products Co. Pennsylvania Public Utility Commission, 188 Pa. Superior Ct. 163, 94 A.2d 816 (1958). In Pennsylvania, a public utility's duty to provide line extensions is not unlimited and it is not obligated to make line extensions which are uneconomical or

unreasonable. See: Sherman, cited supra; Ridley, cited supra; and Colonial Products, cited supra.

The ALJ's decision is consistent with Pennsylvania case law and supported by substantial evidence in the record.

We hasten to point out that we are the final arbiter of fact in proceedings before this Commission. 66 Pa. C.S. §703. Our review of the record as developed in this proceeding, leads us to conclude the ALJ's Findings of Fact are amply supported by substantial evidence in the record. It is well settled that the proponent of a rule or order has the burden of proof. 66 Pa. C.S. §332(a). We do not find that the ALJ abused his discretion or committed reversible error in the conduct of the evidentiary hearings in this proceeding.

We disagree with the Complainant's contention that a utility has a boundless obligation to provide line extensions without customer contribution. In our Final Order, Final Rulemaking Re Line Extensions, ("Order") Docket No. L-930089 (December 28, 1995), we defined the guidelines regarding utility service extension service. Specifically, we stated that:

> The overall concept behind this regulation, however, remains the same: a public utility's obligation to make a line extensions is not unlimited and, accordingly, it will not be obligated to make line extension that is uneconomic or unreasonable absent an appropriate customer contribution. Pursuant to this regulation, if the economic analysis indicates that annual revenue will equal or exceed the company's operating and maintenance expenses, depreciation and debt costs for the new line, no customer contribution will be

> required.[4] Alternatively, if the annual revenue will cover only a portion of the line's annual costs, a contribution may be required in proportion to the annual costs of the line not covered by the annual revenue.
>
> The basis of this customer contribution is that, absent a reasonable contribution to the line extension's constructions costs, the utility would experience a negative (less than zero), equity return on the line extension. Indeed, it appears to us that a line extension that yields a negative equity return, representing an economic loss on the transaction, is one that begins to "materially handicap the utility in securing a fair return on all of its operations," Ridley, 172 Pa. Superior Ct. at 497, 94 A. 2d at 171, as well as one that unfairly asks existing customers to subsidize the costs of serving a new customer. Accordingly, the application of this regulation should ensure,.., that utilities will "fund all line extensions that are appropriate for the level of service to be purchased by the new customer without requiring the utilities and their existing customers to incur the costs of unreasonable line extensions.

(Order, pp. 6-8)

As result of our rulemaking investigation, cited supra, a utility's duty to make line extensions is promulgated at Section 65.21 of our regulations, which states, in pertinent part, that:

> A utility is required in include in its tariff a rule spelling out the conditions under which the utility will extend its facilities to an applicant. The remainder of the regulation sets out the circumstances under which

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[4] Implementation of this economic test may require the use of reasonably-developed company averages and/or expense allocations; in other words, we will not require companies to determine customer-specific operating and maintenance expenses.

extensions to bona fide service applicants shall be constructed.

Section (a). Where the projected annual revenue from the line extension will equal or exceed the utility's annual line extension costs, as defined above, the extension shall be made without requiring contributions from the applicant.

Section (b). This section sets forth the circumstances under which a utility may require (a utility is not obligated to require) a customer in order to extend a main for service. The utility may require a contribution where the annual revenue from the line extension will not equal or exceed the utility's annual line extension costs. The amount of the pre-tax customer contribution will be determined by multiplying the utility's cost of construction by the percent of annual line extension costs not covered by annual revenue. We believe that this formula will result in the applicant bearing only those costs of his or her line extension which will not pay for itself through annual revenue.

In keeping with our provisions order at Docket No. I-88083[5], we are also providing that the total customer contribution amount may include a gross-up factor to account for applicable income taxes but a utility is not required to do so, unless otherwise directed by the Commission.

In the instant proceeding, the record indicates that it would require the installation of 33,310 feet of 8-inch and 12-inch mains to provide water service to the 48 bona fide applicants, for an estimated cost of $1,385,090. (See Finding of Fact No. 58). Under the terms of the Respondent's tariff provisions, at the time

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[5] Re Contributions in Aid of Construction and Customer Advances, Docket No. I-880083 (Order entered June 14, 1989)(adopting uniform rate making and accounting methods for contributions in aid of construction and customer advances, specific to each utility type.)

of the applications for service, the Respondent would assume the responsibility for $545,760 of the costs of the installation. The terms of the tariff would also require the applicants to contribute, in determined individual amounts depending on the size of the main and length of the extension, the remaining $839,330 plus applicable taxes. (Tr. 4, 293-298[6]; Respondent's Exhibit 12-13). The evidence also reveals that the average annual gross income from a PAWC customer is $312. (Tr. 3; 222). It would appear that the cost of construction of the requested main extensions far exceed the revenues generated from customers bills.

Our review of the record as developed leads us to conclude the Respondent complied with its Commission approved tariff provisions when it requested a customer contribution from the applicants. Further, the law is clear that a public utility is not obligated nor will we compel a public utility to make line extensions which are uneconomic or unreasonable absent customer contributions. Sherman v. Public Service Commission, 90 Pa. Superior Ct. 523 (1927); Ridley Township v. Pennsylvania Public Utility Commission, 172 Pa. Superior Ct. 472, 92 A. 2d 168 (1953); Colonial Products Co. v. Pennsylvania Public Utility Commission, 188 Pa. Superior Ct. 163, 94 A. 2d 816 (1958).

Accordingly, we will deny the Complainant's Exception No. 2.

In Exception No. 3, the Complainant argues that the ALJ erred in failing to consider the testimony of the Township's

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[6] The record of the four hearings in this proceeding was transcribed by two different reporting services resulting in the duplication of some transcript numbers. To avoid confusion, the ALJ assigned the following system to reference the various transcripts: hearing of August 11, 1993 (Tr. 1); the hearing of October 26, 1993 (Tr. 2); the hearing of November 9, 1993 (Tr. 3); and the hearing of February 1, 1995 (Tr. 4). We shall follow the same system in this Opinion and Order as that used by the ALJ.

witnesses which contradicted the Respondent's contentions. The Complainant contends that PAWC's claim, that the cost difference of extending service would be minimally altered by the size of the pipe line installed was refuted in the record. The Complainant further objects to the ALJ's decision to treat the testimony of at least one of its witnesses as irrelevant.

We are reminded that the question of credibility of witnesses falls clearly within the purview of the ALJ. It is well settled,, in this jurisdiction, that in considering the credibility of witnesses, their manner of testifying, their apparent candor, intelligence, personal intent and bias or lack of it, are to be considered in determining what weight shall be given to their testimony. Danovitz v. Portnoy, 399 Pa. 599, 161 A. 2d 146 (1960). In the instant proceeding, it would appear that the ALJ, after evaluating the evidence as presented by the Parties, determined that the Complainant failed to sustain its burden of proof by a preponderance of the evidence. We see no reason to disturb the ALJ's findings. Accordingly, the Complainant's Exception No. 3 is denied.

Finally, in its Fourth Exception, the Complainant objects to the ALJ's finding to exclude certain evidence from the record. The ALJ, in the Complainant's opinion, erred in sustaining the relevancy objection made by the Respondent with respect to evidence offered by the Complainant concerning other suits filed pending the Township. The Complainant further challenges the ALJ's decision to exclude evidence concerning its attempt to build a municipally owned water system.

We note that our Regulations confer upon the ALJ the authority to make rulings regarding evidence offered by the Parties during a proceeding. Specifically, Section 5.403 of our Regulations, 52 Pa. Code §5.403, states, in pertinent part, that:

> (a) The presiding officer shall have all necessary authority to control the receipt of evidence, including the following:
> (1) Ruling on the admissibility of evidence.
> (2) Confining the evidence to the issues in the proceeding and impose, where appropriate:
> (i) Limitations on the number of witnesses to be heard.
> (ii) Limitations of time and scope for direct and cross-examinations.
> (iii) Limitations on the production of further evidence.
> (iv) Other necessary limitations.

In our view, the ALJ made evidentiary rulings which were clearly within the purview of his authority as established by our regulation at 52 Pa. Code §5.403, supra. Moreover, the Complainant has failed to convince us that the ALJ's evidentiary rulings were outside the scope of his authority, that he acted arbitrarily or capriciously or that the inclusion of the evidence would have served to support a different resolution of the instant dispute. Accordingly, we will deny Exception No. 4; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Collier Township filed on September 17, 1995, be, and hereby are, denied.

2. That the Initial Decision of Administrative Law Judge Robert Meehan which was issued on August 28, 1995, be, and hereby is, adopted to the extent that it is consistent with this Opinion and Order.

3. That the Complaint of Collier Township filed on April 23, 1993, at Docket No. C-00934978, be, and hereby is, dismissed.

4. That the record at Docket No. C-00934978, be marked closed.

BY THE COMMISSION,

John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: March 14, 1996

ORDER ENTERED: MAR 18 1996

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Collier Township	:	
	:	Docket No.
v.	:	C-00934978
	:	
Pennsylvania-American Water Company	:	

INITIAL DECISION

Before
Robert P. Meehan
Administrative Law Judge

History Of The Proceeding

On April 23, 1993, Collier Township (Township or Complainant) filed a formal complaint against Pennsylvania-American Water Company (Respondent) alleging an inadequate water supply in parts of the Township, and seeking an order directing the Respondent to construct the necessary water lines to serve all properties in the Township not currently provided with public water service. The Respondent's answer was filed on June 16, 1993.

Hearings were held in this complaint proceeding on August 11, 1993, October 26, 1993, and November 9, 1993. The record was then closed, and main and reply briefs were filed by the parties. However, upon consideration of the Respondent's petition, at Docket No. P-00930717, and my Initial Decision approving the settlement in a main extension complaint proceeding, Kaufman v. Pennsylvania-American Water Company, Docket No. C-00935279, dated April 5,

1994,[1] I issued an Order on April 8, 1994, reopening the record in this proceeding.

A series of conferences were then held to explore the possibility of achieving a settlement in this proceeding, along the lines outlined in the Respondent's petition and/or the Initial Decision in Kaufman. Although a settlement was not achieved, those discussions did result in the identification of the number of the residents of the Complainant, who applied for service from the Respondent, and the distance of each property from the nearest facilities of the Respondent. A final hearing was held on February 1, 1995.

During the hearings in this proceeding, the Complainant presented a total of 14 witnesses, and submitted the following exhibits: 1; 1-A; 1-B; 2; 3; 3-A; 4; 5; 8; 9; 10; 10-A; 11-19; 21; 24; and 27-34, of which all, but Exs. 11, 14, and 30, were admitted. The Respondent presented three (3) witnesses and submitted 13 exhibits, all of which were admitted. In addition to the main and reply briefs previously filed, the parties filed supplemental main briefs following the February 1, 1995 hearing. The Respondent also filed a supplemental reply brief. The record

[1]The Commission's Order approving the settlement in this proceeding was entered on July 1, 1994.

consists of 377 total pages of transcript[2] and the above-referenced admitted exhibits.

Findings of Fact

1. The Complainant is Collier Township, a first-class township under the laws of the Commonwealth, and within Allegheny County. The Complainant's mailing address is 1500 Hilltop Road, Presto, PA 15142 (Complaint, ¶1).

2. The Respondent is Pennsylvania-American Water Company, a public utility subject to regulation by the Commission.

3. The Respondent is the successor to the former Western Pennsylvania Water Company (WPW), and the South Pittsburgh Water Company (Tr-1, 83-84).

4. By letter, dated November 28, 1972, WPW informed the Complainant that it would install water mains and fire hydrants in the Township, at WPW's expense (Tr-1, 139-140; Comp. Ex. 17).

5. It was the understanding that the construction and installation of the mains and hydrants would proceed in four phases (Tr-1, 142-143, 149-153; Comp. Exs. 18-19).

6. The mains and hydrants were installed in Phases I-III. Phase IV has never been completed (Tr-1, 152-155).

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[2]During the course of the hearings, two different reporting services were used to produce the transcript. This resulted in the duplication of some of the transcript page numbers. To avoid confusion, references to the transcript shall be by hearing day number and page number, i.e., the hearing of August 11, 1993, shall be (Tr-1), the hearing of October 26, 1993, shall be (Tr-2), the hearing of November 9, 1993, shall be (Tr-3), and the hearing of February 1, 1995, shall be (Tr-4).

7. By letter, dated September 17, 1977, WPW informed the Complainant that it had no definite plans to install pipes in the remainder of the Township. That letter also informed the Complainant that WPW stood ready to install pipelines in the Township in accordance with its then applicable Main Extension Refundable Deposit Agreement (Tr-1, 159-160; Comp. Ex. 24).

8. The parts of the Township in which the water mains were installed are densely populated. In addition, the Nevillewood Planned Residential Development paid to have the necessary water mains extended to the development (Tr-1, 13-15; Comp. Exs. 1-2).

9. Residents in those parts of the Township in which water mains have not been installed receive water from wells or holding tanks, cisterns, etc. In addition, the Complainant also delivers water to these residents, using a 1,500 gallon tank truck (Tr-1, 17-18, 32-33).

10. The Complainant has been ordered to cease delivering water by the Department of Environmental Resources for violation of that Department's bulk water hauling regulations (Tr-1, 18-19).

11. The lack of fire hydrants in those parts of the Township without water mains presents a public safety concern. Additionally, the wells in those areas are contaminated with bacteria (Tr-1, 19).

12. The lack of a public water system throughout the Township has hindered development in the Township (Tr-1, 19-20).

13. Peter Becarri, Jr., a truck farmer on Steen Hollow Road in the Township, has had difficulty in drilling wells and

maintaining ponds on the farm because the farm has been undermined (Tr-1, 31-33).

14. In 1988 Mr. Becarri received an estimate of $75,000 as the cost of extending the main approximately one-quarter mile to his residence (Tr-1, 35-36).

15. A public water supply system would provide Mr. Becarri with a reliable source of water for irrigation (Tr-1, 38).

16. Theresa Dunn, and her family, purchased a home on Steen Hollow Road in the Township in approximately 1988. They have been unable to re-finance their home because no financial institution will re-finance a home with a cistern (Tr-1, 45-46).

17. The Dunns have a 5,000 gallon concrete tank that collects the rain water. They have also had the Township deliver water to them (Tr-1, 46).

18. Although the Dunns have a filtration system, the water in the cistern is not used for drinking because it has an odor and they are not sure it is safe for drinking. They have bottled water delivered to their home once a month for drinking water (Tr-1, 46-47).

19. They are concerned about fire protection for their home, because there are no fire hydrants near their house (Tr-1, 47).

20. Although the Dunns had been told that there would be a public water supply system for their house when the Phase IV

construction was completed, they had been told by the Respondent that they would have to pay for the main extension (Tr-1, 48-50).

21. Paula Addlespurger lives on Noblestown Road in the Township (Tr-1, 50-51).

22. In 1973, the Addlespurgers' 150 year-old house was destroyed by a fire, because of an inadequate supply of water, and the need for the firemen to obtain water from a nearby creek (Tr-1, 53; Comp. Ex. 3-A).

23. The Addlespurgers did not intend to reside again in an area without a public water supply. They learned about the Phase IV construction of the water system in the Township and saw pipes stacked along Noblestown Road. Believing that there would be a public water system in their area, they began to build a new home on their property (Tr-1, 54; Comp. Ex. 3-A).

24. After they began the construction of their new home, the pipes, which had been stacked along Noblestown Road, were removed (Tr-1, 54-55; Comp. Ex. 3-A).

25. The Addlespurgers have a well, but it is contaminated. They use the water from the well only for washing. They bring in their own bottled water (Tr-1, 58; Comp. Ex. 3-A).

26. Theresa McGuire resides on Baldwin Road in the Township. The McGuires have resided on Baldwin Road for approximately seven years (Tr-1, 58-59).

27. When the McGuires purchased their home, they had difficulty in obtaining homeowners' insurance, because there was no fire hydrant within 500 feet of their property (Tr-1, 59-60).

28. They were finally able to obtain homeowners' insurance, but have to pay a higher premium, because they are considered a high risk (Tr-1, 60).

29. Ms. McGuire has no idea of the distance from their property to the nearest main of the Respondent (Tr-1, 60).

30. Edward Smith has resided on Gregg Station Road in the Township for about 12 years. There is no public water system at his property, but there is public sewage (Tr-1, 63-65).

31. Mr. Smith uses rain water and water delivered by the Township for showering, etc., and obtains bottled water for drinking (Tr-1, 64).

32. Mr. Smith believes the nearest main of the Respondent would be one-quarter of a mile from his property. There are about 10-15 other homes in his area of the Township (Tr-1, 68-69).

33. Mrs. Donald Peduto resides on Scotts Run Road in the Township. Mrs. Peduto stated that their home is approximately 200-300 feet from Noblestown Road, which is the approximate distance to the nearest water main of the Respondent (Tr-1, 70-71).

34. In 1972, Mrs. Peduto saw the water pipes laid past her house to the next house on Scotts Run Road. Later, the pipes were removed (Tr-1, 72).

35. The Pedutos do not have a public water supply. They obtain water from a hand-dug well, but it is contaminated. They also obtain bottled water (Tr-1, 73).

36. In 1972, the Pedutos were informed by the water company that, because they did not reside in either the Rennerdale or Walkers Mill areas of the Township, it would cost them approximately $4,000 to have the main extended to their property (Tr-1, 73).

37. Gertrude Keifner resides alone on Bliss Road in the Township. She has lived in the Township for 73 years. Her water system consists of a cistern that gathers rain water from the roof of her house. This does not supply sufficient water for her needs. She has been drinking the water from the cistern (Tr-1, 75-76).

38. Mrs. Keifner's 81-year old sister resides next door, in a house owned by Mrs. Keifner's son. Her sister has lost two houses to fires in the Township (Tr-1, 77-79).

39. Jane Mitchell resides on Noblestown Road in the Township. The Mitchells do not have a public water supply to their house (Tr-1, 79-80).

40. In August of 1992, Ms. Mitchell and her 21-month old daughter were diagnosed with giardiasis, caused by the contaminated water from their well. They have since hooked up the well to the showers, bathroom and toilet. They also obtain water from a water buffalo provided by the Township, and have been boiling water (Tr-1, 80).

41. In December of 1992, Ms. Mitchell's two children became ill with giardiasis. They disconnected the well, dumped chlorine into it and flushed their house piping. The Township also supplied them with a larger water buffalo (Tr-1, 81).

42. Ms. Mitchell estimates that it is approximately one mile from their house to the nearest main of the Respondent (Tr-1, 82).

43. Mary Jane Tidball resides on Tomey Drive, off of Noblestown Road, in the Township. There are five homes on Tomey Road, with room for further development. The nearest main of the Respondent is approximately 650 feet from her home (Tr-1, 84-85, 86).

44. The Tidballs purchased their home in 1955, at which time there was no public water system in their area. They used a well, which was fine until the Rennerdale Highlands area of the Township was developed. The well is now bad, and the Tidballs purchase bottled water (Tr-1, 86-87).

45. The Township is seeking to have the Respondent extend its service to those areas that were to have been included under Phase IV of the 1972 agreement, as well as to additional areas of the Township that do not have a public water supply system (Tr-1, 89-92).

46. A 1992 Allegheny County Health Department (ACHD) survey of private water systems along Noblestown Road in the Township determined that 77% of all water utilized in that area is contaminated to some degree and does not meet the standards for an approved drinking water source. According to the ACHD, this is a major public health problem that can only be remedied through the installation of a safe public water supply system throughout the area as quickly as possible (Comp. Ex. 29).

47. A facility, such as a restaurant, that serves more than 25 people (customers) a day from a private water system operates what is known as a noncommunity water system. The Roadway Tavern on Noblestown Road in the Township operates such a system (Tr-1, 95).

48. As the operator of a noncommunity water system, the Roadway Tavern is subject to the same obligations as a public water supplier, such as monitoring, testing, reporting and the development of an emergency response plan. The Roadway Tavern obtains its water through a well and chlorinator (Tr-1, 95-97).

49. Any business that would locate in the Township that would cater to the public in supplying food and water to more than 25 people a day, and would not have a public water supply, would have to meet the same requirements as the Roadway Tavern, in addition to initial source testing (Tr-1, 97-98).

50. It is the position of the ACHD, as well as the Pennsylvania Department of Environmental Resources (DER), that cisterns or springs used as a source of water be classified as contaminated (non-potable) water (Tr-1, 98-99; Comp. Ex. 29).

51. In June of 1993, the ACHD informed the Township that its water hauling operations required a bulk water hauling permit from the DER. The fact that various Township residents have agreed that the water being supplied to them by the Township would not be used for human consumption, does not exempt the Township from the permit requirements (Tr-1, 100-101; Comp. Ex. 31).

52. The Respondent has received applications for water service from 70 residents or property owners in the Township. The applications were sent to the Respondent from the Township (Tr-4, 287-288; Resp. Ex. 12).

53. Of the 70 applications received by the Respondent, 10 are for vacant land. Three (3) of the applications involving vacant land will be included in the main extensions to be constructed in accordance with the Respondent's current tariff provisions pertaining to main extensions, at no cost to the property owners (Tr-4, 287-288; Resp. Ex. 12).

54. Two (2) of the 70 applications were from existing customers of the Respondent (Tr-4, 288; Resp. Ex. 12).

55. Subtracting the applications pertaining to vacant land and from existing customers, the Respondent received 58 bona fide applications for water service (Tr-4, 288; Resp. Ex. 12).

56. Two (2) of these 58 bona fide applicants for water service can already connect to an existing facility of the Respondent by installing a service line from their houses to the main in the road (Tr-4, 288-289).

57. Eight (8) of the 58 bona fide applicants for water service, including three (3) of the vacant properties, can be served under the Respondent's current tariff provisions pertaining to main extensions, at no cost to these applicants (Tr-4, 289-290; Resp. Ex. 12).

58. To extend water service to the remaining 48 bona fide applicants will require the installation of a total of 33,310

feet of 8-inch and 12-inch mains. The total estimated cost of construction is $1,385,090. Under its current tariff provisions pertaining to main extensions, the Respondent would bear $545,760 of the total construction costs, and would require the applicants to bear the remaining $839,330, plus the applicable taxes (Tr-4, 293-298; Resp. Exs. 12-13).

59. The estimated costs per individual applicant or customer, exclusive of any amount for taxes, range from a low of $4,590, for 15 applicants on Dorrington, Cluxton, Spring/Hilltop to contribute $68,850 for the cost of 6,300 feet of 8-inch main, to a high of $133,830 for one customer to contribute for the cost of 3,300 feet of 12-inch main on Fort Pitt Road (Resp. Ex. 12).

60. In addition to the 70 applications discussed above, and through the combined efforts of the Township and the Respondent, 7,728 feet of 12-inch main was installed along Noblestown Road to its intersection with Pinkerton Road, and was placed in service in June of 1994 (Tr-4, 296-297).

61. The Respondent had received 31 applications for service from that area, of which 26 customers eventually connected to the main (Tr-4, 297).

62. Fire hydrants have been installed along this 7,728-foot segment of 12-inch main along Noblestown Road (Tr-4, 306).

Discussion

Section 332(a) of the Public Utility Code ("Code"), 66 Pa. C.S. §332(a), provides that the party seeking affirmative

relief from the Commission has the burden of proof. In this proceeding, the Complainant has requested that the Commission direct the Respondent to install water lines throughout those parts of the Township in which there is not a public water supply system. Thus, it is clear that the Complainant is the party seeking affirmative relief from the Commission, and, thus, is the party with the burden of proof.

In Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950), the Pennsylvania Supreme Court held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest degree, than the evidence presented by the other party. The Commission has held that a complainant, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility is responsible or accountable for the problem described in the complaint. Feinstein v. Philadelphia Suburban Water Company, 50 Pa. PUC 300 (1976).

Upon a complainant's submission of evidence sufficient to establish a prima facie case, the burden of going forward with the evidence, sometimes called the burden of persuasion, shifts to the utility. If a utility fails to rebut such evidence, then a complainant would prevail. However, if the utility has placed into the record evidence to rebut that of a complainant, the burden of going forward with the evidence has shifted back to a complainant.

In order to now satisfy the burden of proof, a complainant must now rebut the utility's evidence by a preponderance of the evidence. Although the burden of going forward with the evidence may shift from one party to another during a proceeding, the "burden of proof" never shifts. It always remains on a complainant. Replogle v. Pennsylvania Electric Company, 54 Pa. PUC 528 (1980), and Waldron v. Philadelphia Electric Company, 54 Pa. PUC 98 (1980).

As required by these decisions, the record in this proceeding must be reviewed to determine whether the Complainant has satisfied the burden of proof. If the review indicates that this burden has been satisfied, it must then be determined whether the Respondent has submitted evidence of "co-equal" value or weight to refute the Complainant's evidence. If this has occurred, the burden of proof cannot be deemed to have been satisfied, unless additional evidence has been presented by the Complainant in opposition to Respondent's evidence. Morrissey v. PA Dept. of Highways, 424 Pa. 87, 225 A.2d 895 (1967), and Burleson v. Pa. P.U.C. 66 Pa. Commonwealth Ct. 282, 443 A.2d 1373 (1982), aff'd. 501 Pa. 433, 461 A.2d 1234.

In addition to determining whether the Complainant has satisfied the burden of proof, care must be exercised to insure that the decision of the Commission is supported by substantial evidence in the record. See, e.g., Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. The term "substantial evidence" has been defined by the Pennsylvania Supreme, Superior and Commonwealth Courts as such relevant evidence that a reasonable

mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. P.U.C., 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

In addition to the preceding, consideration must also be given to the provisions of: (a) Section 1303 of the Code, 66 Pa. C.S. §1303, which generally requires a public utility to adhere to its tariff; (b) Section 1501 of the Code, 66 Pa. C.S. §1501, which generally requires a public utility to make such extensions to its service and facilities as shall be reasonably necessary for the accommodation, convenience and safety of its patrons, employees, and the public; (c) the Commission's policy statement on fixed utility line extensions, 52 Pa. Code §69.171, adopted September 18, 1992, effective September 19, 1992; (d) the Commission's July 1, 1994 notice of proposed rulemaking pertaining to line extensions, at Docket No. L-00930089, 24 Pa. B. 5103, et seq., October 8, 1994; (e) the Commission's Order, at Docket Nos. R-00943155 & R-00943155C0001, entered September 2, 1994, approving proposed changes to the Respondent's tariff provisions pertaining to main extensions; and (f) Rule 27 of the Respondent's tariff pertaining to main extensions for bona fide service applicants, effective September 4, 1994.

It is the Township's position that the Respondent has the legal obligation under Section 1501 of the Code, 66 Pa. C.S. §1501, to install the necessary water mains in those parts of the Township which do not have a public water supply system. The Township also argues that, in installing the water mains in Phases I-III at its cost, but in requiring contributions for the cost of further extensions, the Respondent is in violation of Section 1502 of the Code, 66 Pa. C.S. §1502. Additionally, the Township argues that, since it abandoned its efforts to establish a municipal water authority and the construction of a public water supply system within the Township upon reliance of WPW's 1972 notice that it would construct the water system in the Township, at no cost to the Township, the Respondent should now be required to comply with that notice. See, Main Brief of the Township.

Additionally, it is the position of the Township that the Respondent's current tariff provisions pertaining to main extensions can not be applicable to this proceeding because: (a) it was not in effect when this case was commenced; and (b) the Township was not a party to the proceeding which resulted in the Commission's approval of those provisions. The Township further argues that application of the tariff provision in this proceeding would amount to an improper and unconstitutional taking of the property of the residents of the Township because the costs of the main extensions include system improvements to benefit existing customers, as well as all the public, and provide for future growth and expansion of the Respondent's system. Lastly the Township

argues that the estimated costs are excessive and not justified on this record. See, Supplemental Main Brief of the Township.

The Respondent's position is that any present attempt by the Township to enforce the 1972 letter of WPW and now require the Respondent to complete what is known as Phase IV of the water main construction is barred by the statute of limitations in Section 3314 of the Code, 66 Pa. C.S. §3314. It is also the Respondent's position that, assuming the applicability of the Commission's policy statement (52 Pa. Code §69.171), the Township failed to meet its burden of proof so as to invoke that policy statement. However, the Respondent takes the position that the policy statement is not binding because it is neither a rule, regulation or order of the Commission. Further, the Respondent argues that the policy statement, itself, is not in accordance with the common law, in that, under the common law, the Respondent is entitled to request a contribution with respect to the requested main extensions. Lastly, the Respondent argues that, again assuming the applicability of the policy statement, that the requested main extensions, if installed at its cost, would materially handicap it in obtaining a fair return on the investment required to be made for the requested extensions. See, Main Brief of the Respondent.

The Respondent further argues that its current tariff requires bona fide service applicants to enter into a main extension deposit agreement under which such applicants are required to pay the difference between the amount of the Respondent's contribution and the cost of the main extension, plus

applicable interest charges and income taxes. Additionally, the Respondent relies on the Commission's decisions in Aronson v. North Penn Gas Company, Docket No. C-00913749, entered March 22, 1994; McLaine v. Pennsylvania-American Water Company, Docket No. C-00935050, entered December 5, 1994; and Crums Mill Associates, et al. v. Dauphin Consolidated Water Supply Company, Docket No. C-00934810, entered April 4, 1995. See, Supplemental Brief of the Respondent.

In response to the Township's Supplemental Brief, the Respondent argues that it is the tariff in effect at the time applications for service are received, not the one in effect at the time this case was commenced, that is applicable. Further, the Township submitted no evidence that it did not participate in the rate proceeding which resulted in the Commission's approval of the Respondent's current tariff provisions pertaining to main extensions. In any event, the Township was served with a copy of the proposed main extension tariff revisions. Thus, there would be no violation of due process through the application of the Respondent's current tariff provisions on main extensions in this case. As to the Township's argument that the application of the tariff provision would constitute an improper taking of the property of the residents, the Respondent contends that this should have been raised in the Township's Main Brief. Nonetheless, the Respondent argues that the Township's position overlooks Commission precedent on the customer contributions for main extensions. Concerning the Township's argument that the costs of the main

extensions are excessive, the Respondent discounts the evidence presented by the Township on this issue. See, Supplemental Reply Brief of the Respondent.

It is my opinion that the Respondent's Tariff Rule 27, pertaining to main extensions for bona fide service applicants (Resp. Ex. 9), is applicable to this proceeding. The Township's non-participation in PA PUC & Office of Consumer Advocate v. Pennsylvania-American Water Company, Docket Nos. R-00943155 & R-00943155C0001, the proceeding where the Commission, by Order entered September 2, 1994, permitted Rule 27 to become effective on September 4, 1995, cannot prevent the application of the provisions of this Tariff Rule to this proceeding, for, at least, two reasons.

First, the records of the Commission, at Docket No. R-00943155, clearly indicate that a copy of the proposed tariff changes, which are now Tariff Rule 27, was served on counsel for the Township in this proceeding. The threshold inquiry concerning a claim of lack of due process is whether the party making such a claim had knowledge of the pending action and an opportunity to be heard therein. By being served with a copy of the proposed changes, counsel for the Township, and, thus, the Township, had actual knowledge of the Respondent's tariff filing seeking to change its main extension provisions. The Township's counsel in this proceeding is an experienced practitioner before the Commission, having represented parties in both rate and non-rate proceedings. Having received actual knowledge of the tariff filing, the Township had the opportunity to participate in that

proceeding. Due process is satisfied when the opportunity to be heard is provided. It is then the responsibility of the party, to whom that opportunity has been provided, to avail itself of that opportunity. No one can be forced to participate in a proceeding before the Commission. At the same time, no one having an interest in the subject matter of a proceeding can be denied the opportunity to participate. Thus, there can be no violation of any due process of the Township through the application of Tariff Rule 27 to this proceeding.

Second, no party can defeat the application of any tariff change to it by not participating in the rate proceeding, where the tariff change is being considered. If this were true, any person could absolve themselves from having to pay the new tariff rates for the utility services used by simply not participating in the rate case of that utility. Participation or non-participation in a rate proceeding has never been the criterion for determining the effectiveness of a tariff change to any person or entity.

The Commission's Order permitting, what is now, Tariff Rule 27 to become effective, notes that the proposed main extension provisions are but an interim solution to requests for line extensions and that the changes were intended to be in compliance with its Order of July 1, 1994, instituting the proposed rulemaking, at Docket No. L-00930089. In permitting Tariff Rule 27 to become effective on September 4, 1994, the Commission must have determined that the proposed changes were lawful, just and reasonable, if even on an interim basis. However, the Commission

has held that tariff provisions, reasonable on their face, may be applied in an unreasonable manner, considering the facts and circumstances of each case. Joseph Erdos v. Western Pennsylvania Water Company, Docket No. C-00861021, entered March 17, 1987.

In Erdos, the Complainant was constructing a house on the last available lot in a neighborhood, and had been a customer of the Respondent in a home across the street from where the new house was being constructed. There were no water mains in front of the lot on which the new house was being built. The Respondent was requiring a contribution for the extension of an 88-inch main. A property to the east of that lot was served from a 1-1/2-inch main, which branched off of a 6-inch main. Properties to the west of that lot were served from an 8-inch main. The Respondent's future plans called for the installation of an 8-inch main, from the existing 8-inch main west of the Complainant's lot, to the 6-inch main, east of the Complainant's lot, and the elimination of the 1-1/2-inch main.

Noting that: (a) the regulations of both DER and the Commission generally prohibit the installation of water mains of less than six (6) inches in diameter; (b) the only basis for seeking a customer contribution for an 8-inch main was the Respondent's policy to install 8-inch mains, when extensions were requested; (c) the Respondent's future plans to install an 8-inch main past the Complainant's lot to connect two other mains, which would benefit the Respondent and existing customers; and (d) the absence of any evidence that an 8-inch main was necessary to serve

the Complainant, the ALJ determined that the Respondent should install the 8-inch main consistent with its policy, but that the amount of the customer contribution should be calculated as if a 6-inch main had been installed. See, e.g., Keystone Water Company, v. PA PUC, 100 Pa. Commonwealth Ct. 644, 515 A.2d 367 (1986).

In its Opinion and Order Denying the Exception of the Respondent in Erdos, the Commission stated (Slip Opinion, at 12-13):

> The thrust of the Respondent's contention is that a policy which is applied system-wide without exception and applies to all customers, cannot be discriminatory. We disagree. A policy which is uniformly applied, ignoring the facts and circumstances of a particular instance, may be unreasonably discriminatory by ignoring the peculiar facts and circumstances of a particular case. We agree with the ALJ that the blind application of the Company's policy without consideration of the facts and circumstances of this case, and without it being established that those considerations which gave rise to the adoption of the 8" main policy are present here, would result in an unreasonable prejudice or disadvantage.

See also, Duane Flaherty v. Western Pennsylvania Water Company--Washington Division, Docket No. C-00850157, Initial Decision dated September 26, 1995, Order entered November 13, 1995, wherein the ALJ, at page 10 of the Initial Decision, noted that a utility's application of its tariff and internal policies remain subject to a standard of reasonableness.

The Respondent estimates that, to provide service to 48 "bona fide applicants" from the Township, it will be required to install approximately 33,310' of water mains, of which 13,425'

would be 8-inch mains and 19,885' would be 12-inch mains (Resp. Ex. 12, p. 2). The locations of the requested main extensions are described in Resp. Ex. 12, p. 2, and correspond to the map (Resp. Ex. 13), where: (a) the solid black lines represent existing mains of the Respondent; (b) the red lines represent the mains that were to have been installed under Phase IV of WPW's 1972 letter; and (c) the green lines represent the additional mains requested in this proceeding. However, there are two (2) exceptions to the "Phase IV" red color code and five (5) exceptions to the "additional mains" green color code on Resp. Ex. 13.

First, the "Phase IV" main proceeding westerly on Noblestown Road, from a point west of Stonegate Drive, to the intersection with Pinkerton Road and then continuing southerly along Noblestown Road, for a distance of 7,728 feet, has been installed and placed in service in June of 1994 (Tr-4, 296-297; Resp. Ex. 13). Second, Old Noblestown Road, proceeding westerly from the intersection with Noblestown Road, dead-ends just past house number 1032, and does not extend further west to Franklin, as indicated on Comp. Ex. 2 and Resp. Ex. 13. Under "Phase IV, Old Noblestown Road was to have been extended to the west and mains installed along it, but, as there is an alternate means of installing mains to serve Franklin and Gregg Station, the Township is not proposing Old Noblestown Road be extended. See, Transcript of September 26, 1994 Conference, at 71-73.

Further, the requested additional main extensions to provide service to: (a) #3 Scott Way; (b) #11 Miller Drive and lot

#13 Miller Drive; (c) #801 Scotts Run Road; and (d) #s 19, 25, 27 and 28 Tomey Road, and lot #s 2 & 3 Tomey Road, have been installed by the Respondent, pursuant to its Tariff Rule 27, without contribution from any of those applicants or property owners. The Respondent will be installing a main, pursuant to its Tariff Rule 27, at no cost to the applicant or property owner, for 195 Baldwin Road, which will also include the Skvarca property, upon receipt of the State Highway Occupancy Permit (Tr-4, 288-291).

The size of the 8-inch and 12-inch mains to install the extensions to provide service to the remaining 48 "bona fide applicants" is based on "sound engineering practices" by the Respondent, which includes provisions for: (a) adequate fire protection; (b) future growth and expansion; (c) the size of existing mains; and (d) service to existing structures (Tr-4, 293, 312, 320; Resp. Ex. 12). In this proceeding, the Township noted that extensive development has occurred in those parts of the Township in which the mains were installed under Phases I-III, but that the lack of a public water system throughout the Township has hindered development in those parts lacking a public water supply system (Tr-1, 13-15, 19-20; Comp. Exs. 1-2). Clearly, the Township expects that the installation of the water mains under "Phase IV", as well as the additional mains requested in this proceeding, will be an incentive to further development in the Township.

Although it is possible that the main sizes proposed by the Respondent, in this proceeding, may be larger than what would be necessary to serve specific applicant(s) today, it would be

unreasonable to direct the present installation of lesser-sized mains to serve these applicants, and then put the Respondent in the position of having to replace the lesser-sized mains with larger mains to serve future applicants. Further, while lesser-sized mains may be less expensive than the main sizes proposed, and might reduce the amount of the estimated "per customer contribution" (Resp. Ex. 12), that does not make the Respondent's proposed main installations unreasonable. Flaherty, supra., where the ALJ, in his Initial Decision, observed that the issue is not whether a customer's alternative main extension proposal is more reasonable than that proposed by the utility, but whether the utility's proposal complies with the law, the Commission's regulations and its tariff.

The record in this proceeding supports the main sizes proposed by the Respondent to provide service to the 48 "bona fide applicants within the Township. Further, the Respondent's proposed main extensions in this case is in conformity with the Code, the Commission's Order at Docket No. R-00943155, and its Tariff Rule 27. Lastly, the Township presented no evidence that the application of Tariff Rule 27 would subject any of the 48 "bona fide applicants" to an unreasonable prejudice or disadvantage.[3]

[3]Given this disposition of the proceeding, discussion of the other issues raised by the Complainant is unnecessary. However, had those issues been discussed, they would have been resolved in favor of the Respondent and adverse to the Complainant.

Conclusions Of Law

1. The parties to, and subject matter of, this main extension complaint proceeding are properly before the Commission.

2. The Complainant, as the party seeking affirmative relief from the Commission is the party with the burden of proof.

3. The provisions of the Respondent's Tariff Rule 27, pertaining to main extensions for bona fide service applicants (effective September 4, 1994), are lawful, just and reasonable, and are applicable to this proceeding.

4. The Township has failed to prove that the application of Tariff Rule 27, under the facts presented in this case, would subject any of its residents or citizens to an unreasonable prejudice or disadvantage.

5. The complaint should be dismissed.

ORDER

In consideration of the foregoing, IT IS ORDERED THAT: The complaint of Collier Township against Pennsylvania-American Water Company, at Docket No. C-00934978, is dismissed for the failure of the Complainant to satisfy the burden of proof.

Date: August 18, 1995

ROBERT P. MEEHAN
Administrative Law Judge

BTL

DATE: June 2, 2003

SUBJECT: C-00015377; C-20028177; C-20028361

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM: James J. McNulty
Secretary
nvl

CINDY PARKS
RICHARD T. MINUTELLO
IRWIN A. POPOWSKY, CONSUMER ADVOCATE
VS
PENNSYLVANIA-AMERICAN WATER COMPANY

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

OCA ONBEHALF OF RICHARD MINUTELLO
OFFICE OF CONSUMER ADVOCATE

Reply Exceptions have been received from:

PENNSYLVANIA-AMERICAN WATER COMPANY

DOCKETED
JUN 0 4 2003

DOCUMENT
FOLDER

Complainant states she lives in the community of Hickory. They do not have public water and most of the residents want it. This issue has been tied up for over ten years. Her well is and stays contaminated. She has to buy bottled water for her family. There is public water in every are surrounding Hickory. She wants the PUC to give the residents answers on why this is such a complicated issue.

Complainant states PAWC will not service his home. They plan to service all houses around except his. He is very close to proposed water line. He wants added to any litigation involving PAWC and their refusal to service his area.

DOCKETED
NOV 18 2003

Complainant states an investigation has revealed substantial and widespread inadequate potable water conditions. They want PUC to consolidate all similar formal complaints; hold evidentiary hearing; hold public input hearings; require PAWC to serve residents without an additional contribution in aid of construction; and grant such other relief which PUC deems necessary and proper.

DOCUMENT
FOLDER

C-00015377, C-20028177 & C-20028361

PETITION FOR REVIEW filed by Irwin A. Popowsky, Consumer Advocate in Popowsky v. Pennsylvania Public Utility Commission, in the Commonwealth Court of Pennsylvania at Docket No. 1995 C.D. 2003 from an Order entered on August 8, 2003 in the above-captioned appeal.

B-00033937 Filed: September 5, 2003