

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of the York Water Company for	:	
Approval of Emergency Interconnect Agreement	:	U-2017-2610587
Between the York Water Company and	:	
Dallastown-Yoe Water Company	:	
 Red Lion Municipal Authority	:	
 v	:	C-2017-2616962
 The York Water Company and	:	
Dallastown-Yoe Water Authority	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision grants approval of a request by a water company and a municipal water authority for an emergency interconnect agreement between the parties. This decision also dismisses a complaint filed by a second municipal water authority that opposes the agreement. The agreement is approved because it is reasonable, consistent with all applicable laws, and in the public interest. The complaint is dismissed because the complainant failed to carry its burden to demonstrate that the agreement should be rejected.

HISTORY OF THE PROCEEDING

On June 16, 2017, the York Water Company (York) filed a request with the Pennsylvania Public Utility Commission (Commission) that a proposed Emergency Interconnect

Agreement between York and the Dallastown-Yoe Water Authority (DYWA) be certified by the Commission consistent with Section 507 of the Public Utility Code. The Commission docketed the request at docket number U-2017-2610587. On July 5, 2017, the Red Lion Municipal Authority (Red Lion) notified the Commission of its opposition to the proposed emergency interconnect agreement. On July 17, 2017, Red Lion filed a formal complaint alleging, among other things, that York violated Section 4.3 of its Commission-approved tariff and that the agreement is in fact an ordinary water purchase agreement. On August 1, 2017, the Commission's Secretary's Bureau docketed the complaint at C-2017-2616962. On August 15, 2017, Red Lion filed a Petition to Intervene into the June 16, 2017 initial filing made by York.

On August 14, 2017, the Commission issued a call-in telephone pre-hearing conference notice establishing an initial call-in telephonic prehearing conference for both matters for Wednesday, September 13, 2017 at 10:00 a.m. and assigning me as the Presiding Officer. In anticipation of the prehearing conference, a prehearing conference order was issued on August 23, 2017 setting forth various rules that would govern the prehearing conference. Pursuant to the prehearing conference order, York, DYWA and Red Lion each filed a prehearing memorandum.

On August 18, 2017, Red Lion filed an amended formal complaint. In its amended complaint, Red Lion averred that the emergency interconnect agreement violates York's tariff that states that York may only provide water service to an authority when the authority has "exhausted all alternatives to obtaining an adequate high-quality source of supply" and only upon application by the authority. Red Lion argued that, instead, the emergency interconnect agreement is an "ordinary bulk water purchase agreement" that allows DYWA to purchase up to 250,000 gallons of water per day. Red Lion also argued that the emergency interconnect agreement violates Section 1501 of the Public Utility Code, noting that the introduction of York's chloramine treated water into the DYWA water supply will, among other things, negatively affect the water chemistry and the stability of the water system of DYWA. Red Lion also stated in the amended complaint that the emergency interconnect agreement is silent regarding how a joint supervisory control and data acquisition (SCADA) system will be established to assure safe and consistent water supply and pressure of the three systems.

On September 7, 2017, York filed an answer and new matter in response to Red Lion's amended complaint. In its answer, York admitted or denied the various averments Red Lion made in its amended complaint. In particular, York denied that the proposed agreement between York and DYWA violates York's tariff. York also averred that the proposed agreement is an emergency interconnect agreement, not a bulk water purchase agreement, and that DYWA is not required to purchase any water under the agreement. York also argued, among other things, that the Commission has no jurisdiction to interpret or enforce the water sales agreement between Red Lion and DYWA. York admitted or denied various other averments made by Red Lion in its amended complaint. In its new matter, which was accompanied by a notice to plead, York incorporated by reference the various averments it made in its answer to Red Lion's amended complaint.

Also on September 7, 2017, York filed preliminary objections in response to the amended complaint. In its preliminary objections, which were also accompanied by a notice to plead, York argued that several issues raised by Red Lion in the amended complaint should be dismissed. First, York argued that the Commission lacks jurisdiction to interpret or enforce the contract agreement between York and DYWA. Second, York argued that the Commission has no jurisdiction over Red Lion's issues with the quality of DYWA's water supply. York argued that Red Lion's arguments about York's water quality and use of chloramines to treat its water are beyond the scope of the Commission's jurisdiction. Third, York argued that Red Lion lacks standing to bring claims of unreasonable service on behalf of DYWA or DYWA's customers. As a result, York requested that the various claims raised in the amended complaint that are the subject of the preliminary objections be dismissed in their entirety.

The initial prehearing conference convened on September 13, 2017, as scheduled. The following counsel were present: Michael Hassell, Esquire and Devin Ryan, Esquire, on behalf of the York Water Company; Margaret Morris, Esquire and Stephanie Kogut, Esquire, on behalf of Red Lion Municipal Authority; and Peter T. Ruth, Esquire, on behalf of Dallastown Yoe Water Authority. During the initial prehearing conference, various procedural matters were discussed. Most notably, a procedural schedule was agreed upon. A scheduling order dated September 14, 2017 was issued memorializing the issues agreed to in the prehearing conference. An evidentiary hearing was scheduled for January 23, 2018.

On September 18, 2017, Red Lion filed an answer to York's preliminary objections. In its answer, Red Lion argued that the amended complaint does not request the Commission to interpret, enforce or adjudicate any claims arising from the water sales agreement between DYWA and Red Lion. Red Lion added that the proposed agreement is a "disguised bulk water agreement" that violates Section 4.3 of York's tariff. Red Lion also argued that York "opened the door to the Commission's review" of the water sales agreement when it was submitted with the application seeking approval of the emergency interconnect agreement. In addition, Red Lion argued that the Commission has concurrent jurisdiction with the Pennsylvania Department of Environmental Protection (DEP) and may consider water supply issues when determining whether a contract is in the public interest. Red Lion argued that, when determining the Commission's jurisdiction, the definition of "service" is to be construed broadly and that the mixing of water from the systems could potentially nullify the disinfectant properties of both supplies. Finally, Red Lion argued that it does not seek to bring an unreasonable service claim on behalf of DYWA or the DYWA customers but that it seeks the development of a complete record so that the Commission can reach a decision regarding the reasonableness and legality of the agreement that considers the totality of the circumstances. Red Lion added that "in a perfect world, the three systems would work together in harmony but that does not take away from the fact that the Commission needs to be made aware of all potential issues, consequences and effects on the public interest resulting from the emergency interconnect agreement."

On September 29, 2017, the parties jointly submitted a petition for a protective order. In the petition, the parties averred that, during the course of the proceeding, it may be necessary for the parties to disclose confidential or proprietary information in filings with the Commission, through discovery responses or through evidence admitted into the record. Such information may include confidential information about the parties' customers, operations and facilities. The parties noted the standards by which protective orders may be issued in Commission proceedings and that the release of non-public information about the parties' customers, operations and facilities could, among other things, cause harm to customers who do not want their information released to the public. The parties also averred that the language proposed in the protective order attached to the motion protects against overly broad

designations of protected information and the limitation of disclosure of proprietary information in the proposed protective order balances the interests of the parties, the public and the Commission.

York's preliminary objections were denied via order dated October 11, 2017. The order determined that, when accepting as true all well pleaded facts, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Red Lion, it is not clear that certain claims in Red Lion's amended complaint should be dismissed but, rather, that the amended complaint raises issues over which the Commission does have jurisdiction. Red Lion's entire amended complaint was allowed to proceed to a hearing.

The parties pre-served written testimony pursuant to the procedural schedule agreed upon at the initial prehearing conference.

On January 23, 2018, the hearing convened as scheduled. During the hearing, four witnesses were presented and subject to cross-examination. In addition, the following documents were admitted into the record:

York Water Company

Statement No. 1 – Hand Direct Testimony with Exhibits JTH-1 through JTH-7

Statement No. 1-R – Hand Rebuttal Testimony with Exhibits JTH-1R through JTH-7R

Statement No. 2 – Snyder Direct Testimony

Statement No. 2-R – Snyder Rebuttal Testimony with Exhibits MS-1R through MS-3R

Statement No. 3 – Stokes Direct Testimony with Exhibits CLS-1 and CLS-2

Statement No. 3-R – Stokes Rebuttal Testimony

Red Lion

Statement No. 1 – Kahwajy Direct Testimony with Exhibit KK-1

Red Lion Cross Examination Exhibit No. 1

Red Lion Exhibit KK-1R

A transcript of 117 pages was created. Following the hearing, a Briefing Order was issued establishing a due date for Main Briefs on February 28, 2018 and Reply Briefs on March 21, 2018 and setting forth various rules governing those briefs.

Pursuant to the Briefing Order, York and Red Lion both filed Main Briefs and Reply Briefs.

The record in this proceeding closed on March 21, 2018 when the Reply Briefs were submitted. This matter is ripe for disposition.

FINDINGS OF FACT

1. On June 16, 2017, York and DYWA filed a request with the Commission for approval of a proposed emergency interconnect agreement pursuant to Section 507 of the Public Utility Code.

2. Joseph Hand is the Chief Operating Officer for York and is responsible for the day-to-day operations of the company, among other things. York St. 1 at 2; Tr. 26.

3. York is seeking approval of an emergency interconnect agreement entered into by the company and DYWA because it is a contract executed by a utility and a municipal corporation. York St. 1 at 4.

4. Under the proposed agreement, York would design, construct, operate and maintain at its sole expense the emergency interconnect and related facilities to serve as an additional source of supply for DYWA's water distribution system. York St. 1 at 4; *see also*, York Exh. JTH-1.

5. York's distribution system is not currently interconnected with DYWA's distribution system. York St. 1 at 4.

6. Pursuant to the agreement, York will build a not less than 12-inch water main extension approximately 600 feet long from York's existing distribution system to a proposed interconnection location. York St. 1 at 5.

7. Pursuant to the agreement, DYWA will construct, at its sole expense, a not less than 6-inch water main extension to the proposed interconnection location. York St. 1 at 5; York St. 3 at 7.

8. Pursuant to the agreement, York will construct a booster station with chemical feed systems, data controls, and backup power to supply water to DYWA. York St. 1 at 5; *see also*, York St. 2, *passim*.

9. Pursuant to the agreement, York will provide up to a maximum of 250,000 gallons per day (gpd) of water to the extent called upon by DYWA but DYWA is not required to take a minimum amount of water. York St. 1 at 5, 7; York St. 1-R at 3-4; Tr. 29-30, 38 (noting 3 million gallons per month).

10. York has enough water supply available to meet its commitment under the emergency interconnect agreement. York St. 1 at 6-7.

11. Under York's currently effective tariff rates and based on the minimum of 3 million gallons per month, DYWA would pay York approximately \$20,731 per month. York St. 1 at 7; *see also*, York Exh. JTH -2; Tr. 59.

12. York estimates that it will incur annual expenses of \$69,596 due to the emergency interconnect, not including a return on investment. York St. 1 at 7; *see also*, York Exh. JTH-3.

13. The estimated cost for the main extension is \$306,049. York St. 1 at 8; *see also*, York Exh. JTH-4.

14. The estimated cost of the booster station is \$420,000. York St. 1 at 8; *see also*, York Exh. JTH-5.

15. DYWA is not making a contribution in aid of construction for the main extension or booster station. York St. 1 at 8; Tr. 62.

16. DYWA currently receives 100% of its water supply from Red Lion. York St. 1 at 9; Tr. 60.

17. The Pennsylvania Department of Environmental Protection (DEP) encourages community water suppliers to maintain more than one source of supply. York St. 1 at 9.

18. York and Red Lion treat their water using different methods because 1) Red Lion adds fluoride but York does not and 2) York uses chloramines to disinfect its water supply but Red Lion uses free chlorine. York St. 1 at 11; York St. 3 at 8; Red Lion St. 1 at 12.

19. York has experience providing sources of supply for seven municipal entities over the past 25 years. York St. 1 at 11-12.

20. Three of the municipalities York provides water supply to have chlorine-treated water but there have never been any issues regarding the blending of supplies. York St. 1 at 12.

21. York Exhibit JTH-1 is the emergency interconnect agreement entered into on May 10, 2017 between York and DYWA. York Exh. JTH-1.

22. York Exhibit JTH-2 summarizes the estimated annual revenue York expects to receive from the emergency interconnect agreement. York Exh. JTH-2.

23. York Exhibit JTH-3 summarizes the estimated annual expenses York expects to incur from the emergency interconnect agreement. York Exh. JTH-3.
24. York Exhibit JTH-4 is an itemization of the estimated cost for the main extension totaling \$306,049. York Exh. JTH-4.
25. York Exhibit JTH-5 is a construction cost estimate for the booster station. York Exh. JTH-5.
26. York Exhibit JTH-6 is a page from the DEP 2006 Public Water Supply Manual that indicates that each community water supplier should maintain more than one source of supply. York Exh. JTH-6.
27. York Exhibit JTH-7 is a power point presentation made by Mr. Hand to the National Association of Water Companies' Pennsylvania Chapter meeting in 2015 concerning best practices and contingency planning. York Exh. JTH-7.
28. Mark Snyder is the Vice President of engineering for York and oversees the analysis, planning, engineering and construction activities for York's capital projects. York St. 2 at 2; Tr. 42.
29. The proposed point of interconnect between York and DYWA will be to DYWA's lower pressure zone. York St. 2 at 5; York St. 2-R at 4; Tr. 47.
30. A pumping station with two pumps to supply the emergency interconnect, check valves, a flow meter and equipment to add supplemental chlorine will also be added. York St. 2 at 5.
31. The proposed main extension will be able to physically supply water in the quantities and at the flow rates set forth in the agreement. York St. 2 at 6-7; York St. 3 at 7.

32. The results of the hydraulic analysis York performed on the emergency interconnect showed, among other things, that the emergency interconnect will not negatively affect the hydraulics of either York's system, DYWA's system or Red Lion's system. York St. 2 at 7-9; York St. 2-R at 3; Tr. 46-47.

33. Communications between the Red Lion and DYWA systems via DYWA's supervisory control and data acquisition (SCADA) system will remain unchanged after the emergency interconnect is complete. York St. 2 at 10.

34. Connie Stokes is the manager of the borough of Dallastown and the DYWA. York St. 3 at 2; Tr. 56.

35. The Dallastown-Yoe Water Authority is a municipal water authority that provides water service to approximately 4,300 households and customers in Dallastown and Yoe Boroughs and York Township, York County, PA. York St. 3 at 2.

36. Between December 4, 2016 and July 11, 2017, Red Lion's water to DYWA Park Street Tanks was below the contractually required 77 feet as of 7:00 a.m. on 45 days. York St. 3 at 4.

37. DYWA customers have sometimes complained of issues with their water, including discoloration, during regularly scheduled monthly DYWA meetings. York St. 3 at 4; *see also*, York Exh. CLS-1.

38. In 2009, there was a system-wide turbidity issue in Red Lion's water system that affected Red Lion and everyone supplied by Red Lion. York St. 3 at 4; Tr. 64.

39. DYWA has determined that it would be in the best interest of DYWA and its customers to have an additional source of water supply. York St. 3 at 5.

40. Ms. Stokes began discussions with York in March 2015 about issues with Red Lion and a potential emergency interconnect. York St. 3 at 6; Tr. 73-74.

41. York and DYWA discussed and revised a draft agreement until the agreement was approved by DYWA on May 10, 2017. York St. 3 at 6.

42. One of the main benefits of DYWA having an emergency interconnect from York is having an alternative source of water in the event Red Lion would be unable to supply DYWA with its contractually obligated minimum amount of water. York St. 3 at 6-7.

43. DYWA determined that there would be no issue with receiving the differently-treated water supplies so long as York and Red Lion comply with their water supply permits and DYWA monitors and controls the two water supplies on its system. York St. 3 at 8.

44. Keith Kahwajy has been the water and sewer superintendent for Red Lion since October 2010 and has worked for Red Lion since September, 1985. Red Lion St. 1 at 1; Tr. 92.

45. Mr. Kahwajy is not a licensed engineer and does not have any college degrees in engineering. Tr. 104.

46. Mr. Kahwajy has no experience in operating, managing or overseeing an emergency interconnect with another system. Tr. 105.

47. Mr. Kahwajy does not have any college degrees in chemistry or water chemistry. Tr. 110.

48. The water sales agreement between Red Lion and DYWA became effective in May, 2013. Red Lion St. 1 at 4; York Exh. CLS-2.

49. York Exhibit CLS-2 is a copy of Section 4.1 of the water sales agreement.
York Exh. CLS-2.

50. Undetected or unrepaired leaks, among other things, within the DYWA system would cause the tank levels in the DYWA system to dip below 77 feet. Red Lion St. 1 at 5.

51. Aside from issues of stratification, where the water temperature of a tank varies depending on where in the tank the temperature is being measured, tank levels would need to drop significantly below 77 feet for there to be a safety concern. Red Lion St. 1 at 7.

52. There has never been an issue resulting from Red Lion's conduct that has resulted in Red Lion being unable to adequately supply water to meet the demands of DYWA's customers. Red Lion St. 1 at 8.

53. DYWA is required to notify Red Lion's staff of any leaks or repairs made to their system so that Mr. Kahwajy can record the information on the daily water usage spreadsheet and use the information in leak detection and for other potential problems in the system. Red Lion St. 1 at 10.

54. Red Lion's current system is not connected to an alternative supply source but if a problem arises with Red Lion's main source of supply, Red Lion has the option to use water from both Beaver Creek and the Susquehanna River. Red Lion St. 1 at 11; Tr. 60, 87.

55. Red Lion's supplemental supplies of water are sufficient to provide all of the water that is contracted between DYWA and Red Lion. Tr. 100.

56. Red Lion Exhibit KK-1 is a copy of the minutes from the meeting held on July 13, 2011 between Red Lion and DYWA. Red Lion Exh. KK-1.

57. Red Lion Exhibit KK-1R is a copy of notes kept at the Red Lion water treatment plant and maintained by the employees of the plant, including when someone calls in. Red Lion Exh. KK-1R; Tr. 96.

58. The notes in Red Lion Exhibit KK-1R indicate that someone from DYWA called on December 18, 2016, March 13, 2017 and March 17, 2017 regarding leaks. Red Lion Exh. KK-1R; Tr. 96-98.

59. The notes in Red Lion Exhibit KK-1R indicate that on January 17, 2017 someone called to indicate that a valve at Red Lion's tank was tweaked. Red Lion Exh. KK-1R; Tr. 99.

60. Constructing an emergency interconnect for a commitment of only 1,000 gpd to DYWA would be uneconomical for York and not in the interest of York's customers. York St. 1-R at 3-4; Tr. 32.

61. The estimated annual revenue York expects to receive pursuant to the emergency interconnect is \$248,772 which will ensure that York garners sufficient revenue to cover the cost and expense of extending and maintaining the emergency interconnect and related facilities. York St. 1-R at 5.

62. York could not have represented that it required DYWA to use 1,000 gpd at the July 13, 2011 joint meeting between Red Lion and DYWA because York had neither made any estimate of the cost of the facilities to interconnect nor had any information as to what DYWA's maximum daily deliveries through the emergency interconnect might be. York St. 1-R at 5-6.

63. DYWA was unwilling to make an upfront capital contribution toward construction of the facilities needed for the emergency interconnect. York St. 1-R at 7; Tr. 35.

64. Chloramine is created through the combination of chlorine and ammonia whereas chlorine has no ammonia. York St. 1-R at 8.

65. There will be no issues with mixing free chlorine and chloramine if York and Red Lion meet the requirements under their respective water supply permits granted by DEP and DYWA properly monitors and controls the two water supplies on its system. York St. 1-R at 9; York St. 3-R at 7.

66. Although there will be some mixing of the two water supplies in DYWA's water distribution system, any mixing would be too minimal to affect the level of disinfectant in the water. York St. 1-R at 9.

67. Mr. Kahwajy has no experience operating, managing, or overseeing a water system receiving differently treated water supplies. York St. 1-R at 10; York Exh. JTH-7R; Tr. 110.

68. It is unlikely that York's provision of up to 250,000 gpd of water through the emergency interconnect would cause Red Lion's water treatment plant to need to shut down. York St. 1-R at 12.

69. York Exhibit JTH-1R is a table summarizing the estimated annual revenues York would expect to earn based upon 1,000 gpd. York Exh. JTH-1R.

70. York Exhibit JTH-2R is a table summarizing the estimated annual expenses York expects to incur based upon 1,000 gpd. York Exh. JTH-2R.

71. York Exhibit JTH-3R is a copy of Red Lion's answer to York interrogatory RLMA-I-6. York Exh. JTH-3R.

72. York Exhibit JTH-4R is a copy of Red Lion's answer to York interrogatory RLMA-I-18. York Exh. JTH-4R.

73. York Exhibit JTH-5R is a copy of Red Lion's answer to York interrogatory RLMA-I-14. York Exh. JTH-5R.

74. York Exhibit JTH-6R is a copy of Red Lion's answer to York interrogatory RLMA-I-13. York Exh. JTH-6R.

75. York Exhibit JTH-7R is a copy of Red Lion's answer to York interrogatory RLMA-I-17. York Exh. JTH-7R.

76. Mr. Kahwajy did not rely on any hydraulic analyses in determining that DYWA's tanks could overflow. York St. 2-R; York Exh. MS-1R; Tr. 105.

77. DYWA has valves that control the flow of water from Red Lion into the Park Street Standpipes in the upper pressure zone and from the Park Street Standpipes into the Denton and Lion's Park Tanks in the lower pressure zone that will automatically prevent the flow of water into the Denton and Lion's Park Tanks once the water level in a tank reaches a defined elevation. York St. 2-R at 4; *see also*, York St. 3-R at 5; Tr. 47.

78. There would be no harm to the Red Lion or DYWA water distribution systems if the upper pressure zone tanks overflowed but only a waste of potable water. York St. 2-R at 5.

79. York Exhibit MS-1R is a copy of Red Lion's answer to York interrogatory RLMA-I-15. York Exh. MS-1R.

80. York Exhibit MS-2R is a copy of Red Lion's answer to York interrogatory RLMA-II-4. York Exh. MS-2R.

81. York Exhibit MS-3R is a copy of Red Lion's answer to York interrogatory RLMA-I-16. York Exh. MS-3R.

82. DYWA experienced six-inch main breaks on December 7, 12 and 13, 2016 and March 20, 2017. York St. 3-R at 4; Tr. 60, 66.

83. Based upon preliminary designs and DYWA's needs, York estimated investing \$700,000 in infrastructure for the emergency interconnect. Tr. 30.

84. The revenue that would come in monthly as a result of the emergency interconnect would cover the O&M expenses for the interconnect and the return on investment. Tr. 31.

85. York will only be providing water to DYWA's lower pressure zone through the emergency interconnect. Tr. 36-37.

86. If there is an issue in the upper pressure zone, the emergency interconnect will not be able to address it. Tr. 49.

87. DYWA will notify York via the automated SCADA system how much water it needs. Tr. 50, 52-53.

88. The decision regarding when an emergency has arisen will be made by DYWA. Tr. 54-55.

89. From an engineering perspective there is no difference between the emergency interconnect and a bulk sales agreement. Tr. 55.

90. DYWA did not exhaust alternatives to obtain an adequate, high-quality source of water before approaching York to purchase water. Tr. 59.

91. DYWA has never provided Red Lion with written notice of a breach of the water sales agreement. Tr. 61.

92. York determined what the minimum requirements of the emergency interconnect would be. Tr. 72.

93. DYWA is prepared to monitor the chlorination of the water supply. Tr. 74.

94. All the water, no matter from what source, goes to the same Red Lion treatment plant. Tr. 84.

95. If Red Lion is notified that there is an issue with a leak and the tanks are low, Red Lion would pump more water into the tanks so long as sufficient pressure is maintained throughout the system. Tr. 100.

96. There have been times where the SCADA system for DYWA was down and DYWA was unable to know the water tank levels. Tr. 101-102.

97. Red Lion's normal lowest daily customer demands are in the range of 1.6 to 1.8 million gallons. Tr. 113.

98. Red Lion Cross-Examination Exhibit No. 1 is a 2015 draft of the proposed emergency interconnect agreement. Red Lion Cr. Exh. No. 1.

DISCUSSION

Legal Standard

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). In this proceeding, York and DYWA indicated that they have entered into an emergency interconnect agreement and requested that the Commission certify the agreement before it can become effective because the agreement is between a public utility and a municipality. York and DYWA, therefore, have the burden of proof in this proceeding.

If a *prima facie* case is established, the burden of going forward with the evidence shifts to the other party. If the other party does not rebut that evidence, the original party will prevail. If the other party rebuts the evidence presented by the original party, the burden of going forward with the evidence shifts back to the original party, who must rebut the other party's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on the original party. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

The initial filing made by York and DYWA commencing this proceeding was made pursuant to Section 507 of the Public Utility Code. This section requires Commission approval of contracts between a public utility and municipal corporations and provides:

§ 507. Contracts between public utilities and municipalities.

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

66 Pa.C.S. § 507. In addition, Section 508 of the Public Utility Code empowers the Commission to revise, reform or vary public utility contracts in certain circumstances. 66 Pa.C.S. § 508.

Finally, the decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is 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. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980) (Norfolk); Erie Resistor

Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Murphy v. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

It is under these legal standards that the filing made by York and DYWA, as well as the complaint filed in response by Red Lion, must be viewed.

Position of the Parties

a. York Water

In this case, York argued that the emergency interconnect agreement between the company and DYWA should be approved because it is reasonable and in the public interest. York M.B. at 10-31. York argued that, through the agreement, the company would only provide water supply to the extent called upon by DYWA and that there is no minimum amount DYWA is required to take under the agreement. Id. at 11. York added, however, that the agreement provides that up to a maximum of 250,000 gallons per day (gpd) could be supplied. Id. DYWA is required to make a monthly minimum payment to York of approximately \$20,731 based on the minimum of 3 million gallons per month.

To meet its obligations under the agreement, York will build a not less than 12-inch water main extension approximately 600 feet long from York's existing distribution system to a proposed interconnection location within its certificated service territory. Id. at 12. Additionally, York will also construct a booster station and obtain the necessary permits from the Department of Environmental Protection (DEP). Id. York estimated that it will incur annual expenses of \$69,596 due to the emergency interconnect and that the estimated cost of the main extension and booster station are \$306,049 and \$420,000, respectively. Id. York explained that DYWA was unable to make an upfront contribution toward the interconnect so the parties negotiated a minimum purchase requirement to ensure that York receives sufficient revenue to cover the capital costs and expenses. Id. at 12-13.

York added that the proposed emergency interconnect will confer substantial benefits to DYWA and its customers by providing an alternative source of supply because DYWA currently has only one source of supply – Red Lion. Id. at 13. York added that if something were to happen that negatively affects Red Lion’s source of supply, treatment works or distribution system, DYWA may be unable to meet the water service demands of its customers. Id. York noted that the DEP encourages community water suppliers to maintain more than one source of supply and that such emergency interconnect is beneficial only if it is in service prior to an incident affecting service. Id. at 14, *citing*, York St. 3 at 5.

With regard to the minimum purchase requirements contained in the emergency interconnect, York argued that the emergency interconnect will meet DYWA’s goals and will have no negative impact on York’s customers. Id. at 15. York noted that, absent revenues sufficient to cover all of the capital costs and expenses associated with the emergency connect, those costs would be borne by York’s other ratepayers. Id. York added that DYWA was unwilling to make an upfront capital contribution toward construction of the necessary facilities for the emergency interconnect and that ultimately the parties agreed on a minimum charge to DYWA that will produce sufficient revenue to cover the capital costs and expenses incurred. Id. at 16. York provided details in its Main Brief in support of its position. Id. at 16-17 (citations omitted).

York then argued in its Main Brief that the emergency interconnect will not cause any negative operational impact on either York’s customers or Red Lion’s system or operations.

With regard to York’s customers, the company argued that its available water supply and its existing and proposed facilities are more than sufficient to meet the requirements under the emergency interconnect. York M.B. at 19. York noted the amount of water it is permitted to withdraw pursuant to its water allocation permit from DEP. Id. York noted that the interconnect will run approximately 600 feet and that a pumping station with two pumps will be installed. Id. at 20-21. York maintains that these facilities will enable the company to meet the flow rate and quantity requirements under the emergency interconnect. Id. at 21-22. With regard to Red Lion’s system or operations, York argued that the emergency interconnect will be

located in DYWA's lower pressure zone whereas Red Lion's interconnects with DYWA are in the upper pressure zone. Id. at 22. York indicated that its Vice President of Engineering has conducted ongoing hydraulic analyses, examining many different operational parameters, to determine that there will be no impact on Red Lion's system. Id.

Finally, in its Main Brief, York argued that the Commission lacks jurisdiction to interpret Red Lion's water sales agreement with DYWA. York noted that, as a "creature of statute, the Commission only has those powers which are expressly conferred upon it by the legislature and those powers which arise by necessary implication." York M.B. at 32 (citation omitted). York added that nothing in the Public Utility Code grants the Commission jurisdiction to interpret and enforce the terms of a water sales contract between two municipal authorities, neither of which is regulated by the Commission. Id. at 33 (citations omitted). York provided additional legal support for its position, among other things, that Red Lion's attempt to have the Commission pass judgment on whether the emergency interconnect is permissible under the terms of Red Lion's Sales Agreement with DYWA as being an issue reserved for courts of common pleas. Id. 33-36.

York concluded its Main Brief by requesting that the proposed emergency interconnect agreement between the company and DYWA be approved and Red Lion's complaint be denied.

b. Red Lion

In contrast, Red Lion argued that the emergency interconnect violates York's tariff, raises unresolved concerns regarding blending two differently treated water supplies and is an ordinary bulk water sales agreement rather than a true emergency interconnect agreement and should be denied.

First, Red Lion argued that York's tariff states that the company may only provide water service to an authority when the authority has exhausted all alternatives to obtaining an adequate high-quality source of supply and only upon application by the authority. Red Lion

M.B. at 6-7; *see also*, Red Lion R.B. at 2-3. Red Lion cites to its cross-examination of the DYWA witness who, it argued, “freely admitted” that DYWA did not explore, let alone exhaust, all alternatives to obtaining an adequate high-quality source of water. *Id.* at 7; *citing*, Tr. 59.

Second, Red Lion argued that the water supplied under the agreement could be without adequate disinfectant and potentially cause public health issues because York uses chloramine to treat and disinfect its water supply prior to distribution to customers and Red Lion uses free chlorine. *Id.* Red Lion argued that chloramine and free chlorine are two chemically distinct compounds that, when mixed, can substantially alter the disinfectant qualities of the chemicals causing them to dissipate altogether. *Id.* Red Lion added that there is no record evidence demonstrating that the two differently treated water supplies will not create a public health issue and that such a determination should be resolved before approval of the emergency interconnect. *Id.* at 8; *see also*, Red Lion R.B. at 5-6.

Third, with regard to Red Lion’s argument that the emergency interconnect is really a bulk water agreement, Red Lion argued that, pursuant to the water sale agreement between Red Lion and DYWA, DYWA agreed to exclusively purchase its water supply from Red Lion with two noted exceptions: 1) Red Lion’s inability to supply water and 2) necessary to maintain an emergency interconnect. *Id.* Red Lion added that the plain language of the emergency interconnect makes it clear that York will be supplying DYWA via an ordinary bulk water purchase agreement. *Id.*; *see also*, Red Lion R.B. at 4. Red Lion argued that there is only a passing reference to an “emergency purchase” and that the emergency interconnect contains a “take or pay” provision that is far above what is actually required to maintain the emergency interconnect. *Id.* at 9; *see also*, Red Lion R.B. at 3.

Red Lion also referenced the fact that the emergency interconnect will only provide water to DYWA’s lower pressure zone and that if there is an emergency in the upper pressure zone, the emergency interconnect cannot address it. *Id.* at 9-10; *see also*, Red Lion R.B. at 4-5, *citing*, Tr. 47-53. Red Lion also relied on its cross-examination of the DYWA witness who said that, from an engineering perspective, there is no difference between other bulk sales agreements and the emergency interconnect. *Id.* at 10, *citing*, Tr. 55. Red Lion concluded that

the Commission should not condone the transparent attempt to circumvent the provisions of the water sales agreement by merely labeling what is a bulk water agreement as an “emergency interconnect.” Id.

c. York response to Red Lion

In both its Main Brief and Reply Brief, York also provided several responses to arguments raised by Red Lion in the proceeding.

In response to Red Lion’s position that the emergency interconnect is not designed to meet all of the water supply needs of DYWA in the event of a complete shut down of Red Lion’s system, York argued that such an instance does not negate the benefits of the emergency interconnect. York M.B. at 14. York noted that DYWA’s decision not to pay or agree to a minimum bill that would serve 100% of DYWA’s normal requirements because of the substantial costs to do so does not negate the benefits of the emergency interconnect because the emergency interconnect would be combined with other emergency measures to reduce customer usage to essential human needs. Id. at 14-15.

York also refuted Red Lion’s argument that DYWA once represented that the minimum amount necessary to maintain the interconnect would be 1,000 gpd. Id. at 17. On that issue, York argued that a minimum bill based on 1,000 gpd is woefully inadequate to cover the expenses for the emergency interconnect because it does not meet the “reasonable return” criteria for an alternative agreement for extension of facilities. Id. York also noted that Red Lion’s entire argument on this issue is solely based on meeting minutes from a joint meeting held in July, 2011 where an unnamed DYWA representative apparently said that someone at York is requiring DYWA to use 1,000 gpd. Id. at 18 (citations omitted). York noted that, among other things, this purported conversation predates the water sales agreement. Id.

York also responded to Red Lion’s argument that there could be hydraulic issues associated with the emergency interconnect due to repeated shut downs and chemical imbalances. York M.B. at 22-23. York noted that Red Lion’s witness, Mr. Kahwajy, is not an

engineer and has never performed any formal hydraulic analyses about the emergency interconnect, in contrast to York's witness. Id. at 23. York argued that Mr. Kahwajy's claims are speculative, at best, undermined by Red Lion's answers to discovery in this proceeding and do not account for the usage of Red Lion's two bulk water purchase customers. Id. at 23-24. York concluded that any chemical imbalances that arise as a result of the emergency interconnect would suggest a lack of operational control, planning and preparation on the part of Red Lion and that "a competent plant operator should be well-prepared for infrequent treatment plant shut downs." Id. at 25-26.

York next responded in its Main Brief to Red Lion's argument that the emergency interconnect would negatively impact DYWA's system or operations. York M.B. at 26. York began by noting that DYWA supports the emergency interconnect and that it would be antithetical for DYWA to enter into an agreement that would negatively affect its system or operations. Id. York further reiterated its position regarding the faults in Red Lion's positions on these issues, including Mr. Kahwajy's mistaken belief that the emergency interconnect will cause the tanks to overflow. Id. at 26-28. York also reiterated its position why Red Lion's arguments regarding the blending of the two water supplies is also without merit, including the testimony of its witness who is a civil engineer that the DEP requirements will be satisfied. Id. at 28-31. York concluded that the emergency interconnect will confer substantial benefits to DYWA while having no negative impact on the systems or operations of York, DYWA or Red Lion. Id. at 31.

In its Reply Brief, York refuted Red Lion's claim that the emergency interconnect is inconsistent with the company's tariff because DYWA did not exhaust all of its alternatives to obtaining adequate high-quality water before approaching York. York noted that no testimony or exhibits were presented by Red Lion on this issue as part of its direct case and its sole support for its position is one answer made by the DYWA witness during cross-examination. York R.B. at 4. As a preliminary matter, York objects that it had no notice of this allegation prior to Red Lion filing its Main Brief. Id. at 4-5. York added, however, that even if this alleged violation were properly raised in this proceeding, it should be rejected for several reasons, including 1) that the allegation lacks any evidentiary support that York failed to perform any analysis, 2) that

there are no feasible alternative sources of supply, 3) Red Lion has mischaracterized the purpose of the tariff rule in question, 4) Red Lion fails to recognize that DYWA has been unable to obtain an adequate high-quality source of supply from Red Lion, and 5) the Commission can waive the applicable tariff if it is in the public interest to do so. Id. at 5-9.

York also argued in its Reply Brief that Red Lion's arguments about blending of the water supplies should be rejected. York argued that the company presented substantial, thorough and credible evidence through a civil engineer with substantial experience in this area that there will be no issues with the blending of these two water supplies. Id. at 9-10. York argued that Red Lion offered no evidence to refute the company's analysis but relies solely on conclusory statements and conjecture to support its case. Id. at 10. York noted that the law is clear that DYWA is responsible for the quality of water on its own distribution system and that Red Lion's argument that there is confusion should be rejected. Id. at 10-11. York noted that Red Lion relied on selective quotes from the hearing transcript to support its position. Id. at 11; *citing*, Tr. 82-83. York then noted that the company will need to obtain a water supply permit from DEP before providing service to DYWA through the emergency interconnect and that at that time the water quality will be ensured. Id. at 12.

Finally, York also responded in its Reply Brief to Red Lion's argument that the emergency interconnect violates the water sales agreement between Red Lion and DYWA. York argued that Red Lion mischaracterized when DYWA is contractually permitted to enter into an emergency interconnect with an alternative supplier. Id. at 13. York added that its reading of the sales agreement provides DYWA the right to enter into an agreement for a second source of supply to ensure it can serve its customers in the event of any system problems. Id. at 13-14. York then showed that the record confirms that DYWA has deemed it necessary to obtain an emergency interconnect to ensure an adequate supply of water. Id. at 14. York also argued that Red Lion's argument that York will be supplying more water than necessary to maintain the emergency interconnect should be rejected because the minimum amount of water agreed upon is necessary to cover York's capital costs and expenses associated with the emergency interconnect. Id. Likewise, York also argued that Red Lion's "take or pay" argument is without merit because the minimum amount is designed to cover York's investment and incremental

costs. Id. at 15. Additionally, York refuted Red Lion's argument that the emergency interconnect is really a bulk water sales agreement by claiming that entering into an emergency interconnect agreement complies with DYWA's rights under the water sales agreement with Red Lion. Id. at 16. Lastly, York argues that the Commission lacks jurisdiction to interpret the water sales agreement.

d. Red Lion response to York

In response to York's argument that the Commission lacks jurisdiction to interpret the water sales agreement, Red Lion argued that the Commission does not need to interpret the water sales agreement but that the plain language of the agreement speaks for itself. Red Lion R.B. at 6. Red Lion argued that DYWA has not met the requirements of Section 4.1 of the water sales agreement since it has not established the purchase of water is necessary to maintain an emergency interconnect. Id. Red Lion generally provided in its Reply Brief no other response to the positions advocated by York other than to reiterate its positions taken in its Main Brief.

Disposition

Substantial record evidence in this proceeding demonstrates that the emergency interconnect agreement is reasonable and in the public interest. As such, the agreement will be approved.

To begin, as noted above, Section 507 of the Public Utility Code requires that, except for a contract between a public utility and a municipal corporation to furnish service at the regularly filed and published tariff rates, no contract or agreement between any public utility and any municipal corporation shall be valid unless filed with the commission at least 30 days prior to its effective date. 66 Pa.C.S. § 507. Furthermore, upon notice to the municipal authorities, and the public utility concerned, the commission may, prior to the effective date of such contract or agreement, institute proceedings to determine the reasonableness, legality or any other matter affecting the validity thereof and, upon the institution of such proceedings, such contract or agreement shall not be effective until the commission grants its approval thereof. Id. As York

noted in its Main Brief, the Commission will approve such a contract if it determines the contract is reasonable and in the public interest. York M.B. at 5-6 (noting that historically, the public interest has been defined to include ratepayers, shareholders and the regulated community) (citations omitted).

In this case, York and DYWA have requested that the Commission approve an emergency interconnect agreement wherein York will supply DYWA with an additional source of supply for DYWA's water distribution system. York St. 1 at 4. Pursuant to the agreement, York will provide up to a maximum of 250,000 gpd of water to the extent called upon by DYWA but DYWA is not required to take a minimum amount of water. Id. at 5, 7. Under York's currently effective tariff rates and based on the minimum amount of 3 million gallons per month, DYWA would pay York approximately \$20,731 per month. Id. at 7. Currently, DYWA's only source of water supply is Red Lion. Id. at 9. As York witness Hand testified, the DEP encourages community water suppliers to maintain more than one source of supply. As Mr. Hand stated:

Q. To your understanding, does DEP encourage public water suppliers to have alternative sources of supply?

A. Yes. For community water suppliers (CWSs), whether they have surface water suppliers or groundwater supplies, DEP encourages them to maintain more than one source of supply. DEP's 2006 Public Water Supply (PWS) Manual actually indicates that each CWS should maintain more than one source of supply. The manual states that "this may be accomplished by a combination of groundwater and/or surface water sources, or through interconnections with other systems." A copy of the relevant page is provided as Exhibit JTH-6.

Here, DYWA only has one current source of water supply – Red Lion. I further observe that DYWA does not own or operate its own water treatment plant and is currently 100% reliant upon Red Lion. If something were to happen that negatively affects Red Lion's source of supply or treatment works, DYWA may be unable to meet the water service demands of its customers. Indeed, recent local and national incidents have demonstrated the benefits of having multiple sources of water supply and alternate sources of supply have become a focus in not only Pennsylvania, but across the United States.

Id. at 9. Mr. Hand then testified regarding specific examples of where an alternative source of water supply, such as what would be provided through the emergency interconnect proposed in this case, has been in the public interest.

For example, Mr. Hand testified regarding an incident in West Virginia where chemicals seeped from a ruptured storage tank into a river just upstream from the water company's intake pipes creating a federal state of emergency, as well as an incident in Carlisle, Cumberland County where a power failure resulted in a water advisory and mandatory water restrictions where there were no alternate sources of water supply and water had to be trucked in from adjacent townships. Id. at 9-10. Mr. Hand also testified regarding an incident in New Oxford Borough, Adams County where a fire occurred at a chemical company causing the authority to shut down its intake. Id. at 10. In that instance, however, the authority had previously entered into an emergency interconnect with York and York provided the authority with nearly 100% of its water demand through the interconnect. Id. The company and the authority were later praised for their foresight in establishing the emergency interconnect prior to when it was needed. Id.

Mr. Hand's testimony is compelling. The emergency interconnect proposed in this proceeding should be approved because it is in the public interest. York has demonstrated that the DEP encourages community water suppliers to have an alternative source of supply. Having an alternative source of supply is in the public interest because it is possible that communities that rely solely on one source of water supply may be without that source of supply for unknown reasons and in unexpected times. Such times could include power outages or contamination of the lone source of supply, as noted above. There could be other reasons why a source of supply could be rendered unusable. Having an alternative source of supply will avoid any unsafe situations where a community is left without its lone source of water supply. As a result, the proposed emergency interconnect agreement is in the public interest and should be approved because it complies with DEP's recommendation that community water suppliers maintain more than one source of supply. York and DYWA are exercising the same foresight that York and New Oxford Borough exercised in entering into their emergency interconnect.

Ideally, DYWA will never have to take advantage of the emergency interconnect; if it does, however, the emergency interconnect will already be in place and available for use.

In contrast, Red Lion's arguments against the emergency interconnect are without merit and will be rejected.

First, Red Lion argued in its Main Brief that DYWA does not meet the criteria under York's tariff to enter into negotiations with York for the proposed emergency interconnect because DYWA witness Stokes admitted during the hearing that DYWA did not explore, let alone exhaust, all alternatives to obtaining an adequate high-quality source of water. Red Lion M.B. at 6-7, *quoting*, Tr. 59. In response, York argued that Red Lion never presented any evidence in support of this claim as part of its direct case. York R.B. at 4-5. York also argued, among other things, that there are no feasible alternatives that can provide an alternative source of supply requested by DYWA. *Id.* at 5-9. York is correct and Red Lion's argument will be rejected.

Red Lion is correct that York's tariff provides that, "When a York County municipality or authority has exhausted all alternatives to obtaining an adequate high-quality source of supply, they may apply to the Company for the purchase of water." In this case, however, Red Lion has not demonstrated that there are alternatives to obtaining an adequate high-quality source of supply available that DYWA should have considered before entering into the agreement with York. As York argued, Red Lion offered no identification of viable alternatives for the record and York is the only water utility that is certificated to provide service within the general vicinity of DYWA's lower pressure zone. York R.B. at 5-6. In sum, there are no other viable alternatives for DYWA to have considered prior to approaching York.

Furthermore, the comment made by Ms. Stokes is not substantial evidence sufficient to support Red Lion's argument. As noted above, the decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is 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, *supra*. Here, Red Lion has not sufficiently supported its argument that DYWA failed to exhaust all alternatives to obtaining an adequate high-quality source of supply so that they may apply to York for the purchase of water. Ms. Stokes' answer during cross examination is not sufficient to grant Red Lion's complaint and deny the emergency interconnect.

Second, Red Lion also argued in its Main Brief that "the record does not reflect any evidence that potential unknown blending problems will not create a public health issue. Rather the record reflects that York believes that DYWA will be responsible for blending and DYWA believes York will be responsible." Red Lion M.B. at 8, *quoting*, Tr. 82. In response, York argued that "nothing could be farther from the truth." York R.B. at 9. York added that it presented credible evidence through Mr. Hand, who is a civil engineer with substantial experience, that there will be no issue with the blending and Red Lion did not refute this analysis. Id. at 9-10. York also noted that there is no confusion over who will be responsible for the blending because DYWA is responsible for the water quality issues on its own system. Id. at 10. York also argued that Red Lion selectively quoted from the hearing transcript to support its position that there is confusion. Id. at 11. York concluded that DEP approval will also be obtained before it provides service through the emergency interconnect. Id. at 12.

With regard to this issue, Red Lion is asking York to prove a negative of an "unknown" problem – that unknown blending problems will not create a public health issue. Red Lion has not demonstrated that the blending *will* cause a public health issue. On the other hand, York has provided a level of assurance in this proceeding that no public health issue will be created by the emergency interconnect. Absent greater evidence that a public health issue *will* occur, there is sufficient record evidence in this case, as York noted in its brief, that it is unlikely that a public health issue will arise. Furthermore, it is sufficient that the parties have indicated that this matter will continue to be looked at through the DEP permitting process and as the parties continue to work out the details of the agreement. Red Lion's arguments to the contrary will be rejected.

Third, Red Lion also argued in its Main Brief that the proposed emergency interconnect is simply a bulk water sales agreement. Red Lion noted that there is only a passing reference in the agreement to an emergency purchase and that the “take or pay” provision in agreement makes it a bulk water sales agreement. Red Lion M.B. at 8-10. Red Lion also argued that the emergency interconnect is a bulk water sales agreement because York will only provide water to DYWA’s lower pressure zone. Id. at 4. In response, York argued that, even if the Commission had subject matter jurisdiction over Red Lion’s breach of contract claim, which it contends it does not, the emergency interconnect does not breach the terms of Red Lion’s water sales agreement with DYWA. York R.B. at 12-16. More specifically, York argued that, under the water sales agreement, DYWA has the right to enter into an agreement for a second source of supply to ensure it can serve its customers in the event of any systemic problems. Id. at 13-14. York also argued that Red Lion is incorrect that the emergency interconnect requires DYWA to take more water than is necessary to maintain the emergency interconnect. Id. at 14-15.

Again, York is correct and Red Lion’s arguments will be rejected. DYWA agreed as part of the emergency interconnect to purchase a minimum amount of water because it could not pay any upfront contribution toward the cost of the facilities required as part of the emergency interconnect. Instead, DYWA’s contribution toward the costs of the interconnect will come in the form of the minimum payments each month. This agreement is not unreasonable in a situation where a local municipality, for example, may not be able to afford a one-time, upfront payment but instead would seek to make its financial contribution on a monthly basis over time. Neither this provision, nor the fact that the word “emergency” is only used in the agreement in a passing reference, makes the emergency interconnect a bulk sales agreement. Likewise, Red Lion’s argument that the emergency interconnect should be rejected because it will only serve one zone in DYWA’s system is without merit because, in the event of an emergency, it is better to be able to serve one of two zones than none of two zones. The emergency interconnect should not be denied for some of DYWA’s customers because it may not be able to provide a direct benefit to all of DYWA’s customers. Furthermore, it may be possible that even those customers in the upper pressure zone would receive some indirect benefits of the agreement.

There is no other record evidence to support denying the proposed emergency interconnect or granting Red Lion's complaint.

Conclusion

The request of York and DYWA for an emergency interconnect agreement is approved because it is reasonable and in the public interest. The agreement satisfies Sections 507 and 508 of the Public Utility Code, because it will provide DYWA with more than one source of supply, as is encouraged by the DEP. York and DYWA are commended for having the foresight to enter into this agreement so that DYWA can be prepared in the event of a problem with DYWA's lone source of water supply. In contrast, the complaint filed by Red Lion will be dismissed because Red Lion has failed to demonstrate that the proposed emergency interconnect in anyway violates the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. §§ 507, 701.
2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).
3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).
4. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence

by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

5. The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

6. "Substantial evidence" is 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. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa.Super. 278, 166 A.2d 96 (1961); and Murphy v. Dept. of Public Welfare, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

7. Except for a contract between a public utility and a municipal corporation to furnish service at the regularly filed and published tariff rates, no contract or agreement between any public utility and any municipal corporation shall be valid unless filed with the commission at least 30 days prior to its effective date. Upon notice to the municipal authorities, and the public utility concerned, the commission may, prior to the effective date of such contract or agreement, institute proceedings to determine the reasonableness, legality or any other matter affecting the validity thereof. Upon the institution of such proceedings, such contract or agreement shall not be effective until the commission grants its approval thereof. 66 Pa.C.S. § 507.

8. Section 508 of the Public Utility Code empowers the Commission to revise, reform or vary public utility contracts in certain circumstances. 66 Pa.C.S. § 508.

9. The York Water Company has satisfied its burden to demonstrate that the proposed emergency interconnect agreement it entered into with DYWA is reasonable and in the public interest.

10. Red Lion has failed to demonstrate that York has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the proposed emergency interconnect agreement.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the application of The York Water Company, dated June 16, 2017 at docket number U-2017-2610587, for the approval of the Emergency Interconnect Agreement by and between The York Water Company and Dallastown-Yoe Water Authority is hereby granted.

2. That the formal complaint filed by the Red Lion Municipal Authority against The York Water Company at docket number C-2017-2616962 is dismissed in its entirety with prejudice.

Date: May 25, 2018

/s/
Joel H. Cheskis
Deputy Chief Administrative Law Judge