

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Municipal Authority of the
Township of Robinson

v.

Pennsylvania-American Water Company

Pennsylvania Municipal Authorities Association,
Intervenor

C-20030092

DOCUMENT
FEB 19 2004

DOCUMENT

SECOND INTERIM ORDER

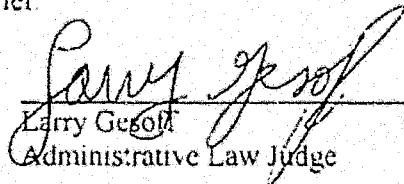
On June 13, 2003, the Pennsylvania Municipal Authorities Association (PMAA) filed a motion to intervene and an amicus brief. The proper pleading to obtain intervener status is a petition, not a motion; I will treat PMAA's motion to intervene as a petition. In its prehearing memorandum Pennsylvania American Water Company objected to the filing of an amicus brief at that stage in the proceeding if they could file another brief at the conclusion of the proceeding. At the prehearing conference held July 18, 2003, the parties did not object to PMAA's intervention and counsel for PMAA decided to file an amicus brief at the conclusion of the hearing. Counsel for PMAA stated also that PMAA's sole purpose in this proceeding is to file an amicus brief Tr. 8.

THEREFORE:

IT IS ORDERED:

1. That the petition of the Pennsylvania Municipal Authorities Association to intervene in this proceeding for the purpose of filing an amicus brief is granted.
2. That the Pennsylvania Municipal Authorities Association is a party to this proceeding solely for the purpose of filing an amicus brief.

Date: January 15, 2004


Larry Gesoff
Administrative Law Judge



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Office Of Administrative Law Judge
P.O. Box 3265, Harrisburg, PA 17105-3265
January 28, 2004

IN REPLY PLEASE
REFER TO OUR FILE

In Re: C-20030092

(See letter dated 01/28/2004)

Municipal Authority of the Township of Robinson
v.
Pennsylvania-American Water Company

For the Commission to enter an order prohibiting Pennsylvania-American Water Company from commencing service to Western Allegheny County Municipal Authority pursuant to the Pennsylvania-American Water Company Agreement, or constructing any facilities with respect to such service.

Hearing Notice

This is to inform you that a hearing on the above-captioned case will be held as follows:

Type: Hearing on Petition for Interim Emergency Order

Date: Tuesday, February 17, 2004

Time: 10:00 a.m.

Location: 11th floor hearing room
Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, Pennsylvania

Presiding: Administrative Law Judge Larry Gesoff
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
Telephone: (412) 565-3550
Fax: (412) 565-5692

DOCUMENT
FOLDER

DOCKETED
FEB 27 2004

Please mark your records accordingly.

If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. Please call the scheduling office at the Public Utility Commission:

- Scheduling Office: (717) 787-1399.
- AT&T Relay Service number for persons who are deaf or hearing-impaired: 1-800-654-5988.

pc: Judge Gesoff
Steve Springer, Scheduling Officer
Beth Plantz
Docket Section
Calendar File



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Office Of Administrative Law Judge
P.O. Box 3265, Harrisburg, PA 17105-3265
January 28, 2004

IN REPLY PLEASE
REFER TO OUR FILE

In Re: C-20030092

(See letter dated 11/17/2003)

Municipal Authority of the Township of Robinson
v.
Pennsylvania-American Water Company

For the Commission to enter an order prohibiting Pennsylvania-American Water Company from commencing service to Western Allegheny County Municipal Authority pursuant to the Pennsylvania-American Water Company Agreement, or constructing any facilities with respect to such service.

Hearing Cancellation Notice

This is to inform you that the Further Hearing on the above-captioned case scheduled to be held on Thursday, January 22, 2004 at 9:00 a.m. was canceled.

Presiding: Administrative Law Judge Larry Gesoff
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
Telephone: (412) 565-3550
Fax: (412) 565-5692

Please mark your records accordingly.

pc: Judge Gesoff
Steve Springer, Scheduling Officer
Beth Plantz
Docket Section
Calendar File

DOCUMENT

DOCKETED
FEB 17 2004

RJP

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Office of Administrative Law Judge

1103 Pittsburgh State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222

Tel: 412-565-3550
Fax: 412-565-5692
IN REPLY PLEASE
REFER TO OUR FILE



DOCUMENT

February 9, 2004

DOCKETED

APR 14 2004

TO ALL PARTIES OF RECORD:

Re: Municipal Authority of the Township of Robinson v.
Pennsylvania American Water Company
Docket No. C-20030092

The transcript of testimony taken in the above entitled proceeding indicates that the parties will file briefs.

In accordance with the Commission's Rules of Practice, main briefs shall be filed on or before March 8, 2004; reply briefs, if any, shall be filed on or before April 2, 2004. If briefs are not received within the allotted time, they shall not be accepted for filing, except by special permission of the presiding officer. Your main briefs should be concise and must comply with 52 Pa. Code §5.501. If you do not file a main brief, no reply brief will be accepted from you.

An original and nine (9) copies of each main and reply brief must be filed with the Commission in accordance with 52 Pa. Code §1.4 and in care of the Docket Section, P.O. Box 3265, Harrisburg, PA 17105-3265. Also, two copies must be served on each party of record. Please provide me with one print copy of the brief and a copy on a 3.5" diskette compatible with Microsoft Word.

Very truly yours,

Larry Gesoff
Administrative Law Judge

LG:bmf

cc: Docket Section
Beth Plantz
Chief, Scheduling Unit

RECEIVED
2004 FEB 12 AM 10:49
SECRETARY'S BUREAU

OALJ Hearing Report

Please Check Those Blocks Which Apply

Docket No:	C-2C030092		YES	NO
Case Name:	Authority of the Township of Robinson v. Pennsylvania-American Water Company	Prehearing Held:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		Hearing Held:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		Testimony Taken:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		Transcript Due:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Location:	Pittsburgh	Hearing Concluded:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Date:	January 21 and 22 , 2004	Further Hearing Needed:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
ALJ:	Vicky Gerson FRED NENE	Estimated Add'l Days:		
Reporting Firm:	Commonwealth Reporting	RECORD CLOSED:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		DATE:		
		Briefs to be Filed:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		DATE:		
		Bench Decision:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		REMARKS:	ONLY ONE DAY OF HEARINGS WERE HELD. NO HEARING NECESSARY ON JAN 22, 04. RECORD WILL CLOSE UPON FILING OF BRIEFS.	

DOCUMENT FILED

11

PLEASE PRINT CLEARLY - Incomplete Information may result in delay of processing.

Name and Telephone Number	Address	Who are you representing?
ALBERT J ZANUSZILLI, JR. Telephone: (412) 261-6780	11 STANWIX ST. SUITE 1024 PITTSBURGH PA 15222 City: PITTSBURGH State: PA Zip: 15222	MATR, (COMPLAINANT)
KEVIN J. O'HARE Telephone:	11 STANWIX STREET, SUITE 1024 PITTSBURGH PA 15222 City: PITTSBURGH State: PA Zip: 15222	MATR (COMPLAINANT)
John S. O'Leary Telephone: 412 343 0970	680 WASHINGTON RD SUITE B101 PITTSBURGH PA 15228 City: PITTSBURGH State: PA Zip: 15228	MATR
	E-mail Address: gzanuszi@ym13.com	Fax Number: (412) 261-6789
	E-mail Address: KOHARE@YMLZ.COM	Fax Number (412) 261-6784
	E-mail Address:	Fax Number: 412 343 0971

Check this box if additional parties or attendees appear on back of form.

Burton Spin

Reporter's Signature

Note: Completion of this form does not constitute an entry of appearance, see 52 Pa. Code §§1.24 and 1.25.

YUKEVICH, MARCHETTI, LIEKAR & ZANGRILLI, P.C.

ATTORNEYS AT LAW

11 STANWIX STREET

SUITE 1024

PITTSBURGH, PENNSYLVANIA 15222-1324

Writer's Direct Dial:
(412) 261-6780

TELEPHONE 412/261-6777
FAX 412/261-6789

ORIGINAL

February 12, 2004

VIA FEDERAL EXPRESS

Pennsylvania Public Utility Commission
Secretary's Bureau
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

RECEIVED

FEB 12 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DOCUMENT
FOLDER

ATTN: Docket Section

RE: THE MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON VS.
PENNSYLVANIA-AMERICAN WATER COMPANY ET AL.
PUC Docket No.: C-20030092

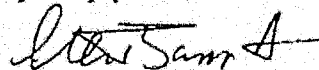
Gentlemen:

Please find enclosed for filing the original Petition for Interim Emergency Order.

As required by the Rules, true and correct copies of the enclosed Petition have been served on Administrative Law Judge Gesoff and counsel for all participants in the manner set forth in the Certificate of Service.

Thank you very much.

Very truly yours,



Albert J. Zangrilli, Jr.

AJZ/ph
Enclosure

cc: The Honorable Larry Gesoff, ALJ (w/ enclosure)
The Honorable Robert A. Christianson (w/enclosure)
Thomas P. Gadsden, Esq. and
Anthony C. DeCusatis, Esq. (w/ enclosure)
Susan Simms Marsh, Esq. (w/ enclosure)
Michael J. Witherel, Esq. (w/ enclosure)
John A. Vuono, Esq. (w/ enclosure)

ORIGINAL

RECEIVED

FEB 12 2004

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

THE MUNICIPAL AUTHORITY OF THE)
TOWNSHIP OF ROBINSON,)

Complainant - Petitioner,)

vs)

PENNSYLVANIA AMERICAN WATER)
COMPANY,)

Respondent.)

Docket No.: C-20030092

DOCUMENT
FOLDER

DOCKETED

FEB 27 2004

PETITION FOR INTERIM EMERGENCY ORDER

AND NOW COMES The Municipal Authority of the Township of Robinson ("MATR") and by its undersigned attorneys files this Petition for Interim Emergency Order pursuant to 52 Pa. Code §3.6 et seq., averring as follows:

1. On or about April 15, 2003, MATR filed a Formal Complaint and Petition for Declaratory Judgment in this matter. That Complaint is incorporated herein by reference as though more fully set forth herein.

2. In this action, MATR alleges, in short and inter alia, that Respondent Pennsylvania American Water Company ("PAWC") entered into a Water Sales Agreement dated March 28, 2003 ("Agreement") with the Western Allegheny County Municipal Authority ("WACMA") pursuant to which PAWC agreed to sell and WACMA agreed to purchase virtually all of WACMA's water needs at a rate set pursuant to a tariff rider known as "Rider DRS".

3. MATR alleges that the use of Rider DRS in this case is illegal for the reasons set forth in its Complaint and Prehearing Memorandum which documents are incorporated herein by reference as though more fully set forth herein.

4. On January 21, 2004, a hearing was held on this matter before the Honorable Frederick R. Nene, Administrative Law Judge, who presided over the hearing in the absence of the Honorable Larry Gesoff, the Administrative Law Judge to whom this case had been assigned. A full and complete record was made of the facts and circumstances pertaining to the Complaint and the alleged defenses thereto was made and the transcript thereof was filed with the Commission.

5. The Agreement was admitted into evidence at the hearing¹ and is incorporated herein by reference as though more fully set forth herein.

6. The Agreement provides, inter alia, as follows:

“The parties recognize and expressly agree that the consummation of this transaction is conditioned upon receiving approval from the PA PUC to the extent such approval is required.” Par. 4.6.

“[PAWC] represents and warrants...that this Agreement shall be filed with the Pennsylvania Public Utility Commission (PUC) and is subject to review by the PUC.” Par. 24.1.

7. Nevertheless, on February 4, 2004, only days after the hearing, MATR was informed that PAWC immediately commenced the sale of water pursuant to the Agreement.

8. No approval for the implementation of the Agreement was ever granted by the Commission or any Administrative Law Judge and the question of the Agreement's legality is the core issue pending before this Tribunal.

9. Chief Administrative Law Judge Christianson who adjudicated the case involving the initial approval of Rider DRS stated:

¹ The Agreement is attached to MATR Hearing Exhibit 1 as Exhibit Lenze - 9.

I do endorse the [Riders], as at least an experiment to see if they are useful and viable. . . . I remind the Company that these [Riders] will be scrutinized in subsequent cases and that it has no inherent right to, in the next rate case after a rate reduction has been granted, pass on the lost revenue to other customers. Its actions and decisions will be scrutinized by the Commission.

PUC et al. v. PAWC, 1995 Pa. PUC LEXIS 173 at *93-94 (PUC, 1995).

10. PAWC's attempted use of Rider DRS in the Agreement is clearly suspect, for the reasons set forth in MATR's Complaint; namely, that Rider DRS was never intended to be used as a competitive weapon to allow PAWC to take a customer from another water supplier; in this case, MATR.

11. By this Petition, MATR is requesting that PAWC be prohibited from selling water to WACMA pursuant to the Agreement until a final order is entered with respect to the legality of the Agreement; that is, MATR is simply requesting that the status quo be maintained until such final order is entered.

12. If this Petition is not granted, PAWC will continue to sell water at an unlawful rate because:

(a) the rate charged by PAWC pursuant to the Agreement is illegal and not otherwise authorized by the Commission; and

(b) the Public Utility Code requires that a lawful rate be charged and paid at all times; and

(c) discrimination among ratepayers arises if an unlawful rate is charged.

13. The appropriate oversight and regulation of PAWC will not be achieved if PAWC is permitted to commence service pursuant to an Agreement which has not yet been approved by the Commission and the legality of which is being challenged in a pending Commission proceeding.

14. The record of the hearing is devoid of any persuasive evidence that the use of Rider DRS is legal in this case.

15. For the reasons set forth herein, MATR's right to relief is clear. 52 Pa. Code § 3.7(a)(1).

16. MATR's need for relief is immediate because the illegal water sales commenced on February 4, 2004. 52 Pa. Code § 3.7(a)(2).

17. MATR's injury will be irreparable if the relief is not granted because MATR will lose the revenue it would charge for the sale of water to WACMA. MATR will not be able to recover such losses from either PAWC or WACMA pursuant to any cause of action. See West Penn Power Company vs. Pennsylvania Public Utility Commission et al., 150 Pa. Commw. 349, 615 A.2d 951 (1992)(economic injury can satisfy the irreparable injury requirement) and 52 Pa. Code § 3.7 (a)(3). Furthermore, PAWC's illegal use of its tariff constitutes "irreparable injury of the most serious nature and [is] a proper subject of a preliminary injunction." Pennsylvania Public Utility Commission v. Israel, 356 Pa. 400, 52 A.2d 317 at 321, 1947 LEXIS 355***7 (1947).

18. The relief requested is not injurious to the public interest. 52 Pa. Code § 3.7 (a)(4). To the contrary, the public interest will be harmed if an unlawful rate is permitted to be charged because:

(a) PAWC's rate payers will be adversely affected by PAWC's illegal use of Rider DRS in the Agreement because the rate charged pursuant to Rider DRS is approximately one-half the legal tariff rate which should apply to WACMA; and

(b) the rate payers of WACMA may be obligated to pay PAWC the difference between the lawful rate and the unlawful rate in the event a final order is issued either striking down the Agreement or prohibiting sales to WACMA pursuant to Rider DRS; and

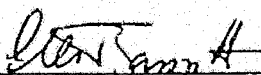
(c) MATR will be required to increase its rates by approximately 30% (see MATR Hearing Exhibit 1, pp. 25-26), chiefly because of the loss of WACMA as a customer. This increase will be burdensome and unfair to MATR's customers in both Robinson and Findley Townships because, if MATR ultimately prevails in this case, the result will have been an unnecessary rate increase paid by MATR's customers.

19. Maintaining the status quo until the issuance of a final order will lead to the fairest and most just result, a result in complete conformity with the principles of sound utility regulation.

WHEREFORE, The Municipal Authority of the Township of Robinson respectfully requests that an interim emergency order be entered barring the sale of water pursuant to the Water Sales Agreement by and between the Pennsylvania American Water Company and the Western Allegheny County Municipal Authority dated March 28, 2003 until a final order is entered.

YUKEVICH, MARCHETTI, LIEKAR
& ZANGRILLI, P.C.

By:


Albert J. Zangrilli, Jr.

By:

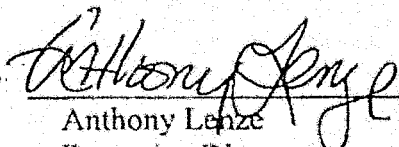

Kevin J. O'Hare

Attorneys for Complainant - Petitioner

VERIFICATION

I, Anthony Lenze, verify that I am Executive Director of the Municipal Authority of the Township of Robinson and that I am authorized to make this verification on its behalf. The statements made in the foregoing **Petition for Interim Emergency Order** are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of *18 Pa C.S. §4904*, relating to unsworn falsification to authorities.

THE MUNICIPAL AUTHORITY
OF THE TOWNSHIP OF ROBINSON

By: 

Anthony Lenze
Executive Director

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached **PETITION FOR INTERIM EMERGENCY ORDER** has been served on the following by e-mail and first class mail, postage prepaid, except as otherwise noted:

HONORABLE LARRY GESOFF
(lgesoff@state.pa.us)
Administrative Law Judge
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

HONORABLE ROBERT A. CHRISTIANSON
Chief Administrative Law Judge
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17105
(via Federal Express)

THOMAS P. GADSDEN, ESQ.
(tgadsden@morganlewis.com)
ANTHONY C. DECUSATIS, ESQ.
(adecusatis@morganlewis.com)
Morgan Lewis
1701 Market Street
Philadelphia, PA 19103-2921

Attorneys for Pennsylvania American Water Company

SUSAN SIMMS MARSH, ESQ.
(smarsh@pawc.com)
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

(rights reserved)

MICHAEL J. WITHEREL, ESQ.
(wk-law@rwvems.org)
Witherel & Kovacil
966 Perry Highway
Pittsburgh, PA 15237-2107

Attorneys for Pennsylvania Municipal Authorities Association, Amicus Curiae

JOHN A. VUONO, ESQ.
(jvuono@vuonogray.com)
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Attorneys for Western Allegheny County Municipal Authority, Proposed Intervenor

BOHDAN R. PANKIW, ESQ.
Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265


(via first class mail only)

RECEIVED

FEB 12 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DATE: February 12, 2004


ALBERT J. ZANGRILLI, JR.

YUKEVICH, MARCHETTI, LIEKAR & ZANGRILLI, P.C.

ATTORNEYS AT LAW

11 STANWIX STREET

SUITE 1024

PITTSBURGH, PENNSYLVANIA 15222-1324

Writer's Direct Dial:
(412) 261-6780

TELEPHONE 412/261-6777
FAX 412/261-6780

February 12, 2004

VIA FEDERAL EXPRESS

Pennsylvania Public Utility Commission
Secretary's Bureau
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

RECEIVED

FEB 12 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

ATTN: Docket Section

RE: THE MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON VS.
PENNSYLVANIA-AMERICAN WATER COMPANY ET AL.
PUC Docket No.: C-20030092

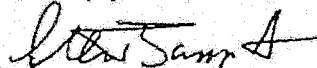
Gentlemen:

Please find enclosed for filing the original Petition for Interim Emergency Order.

As required by the Rules, true and correct copies of the enclosed Petition have been served on Administrative Law Judge Gesoff and counsel for all participants in the manner set forth in the Certificate of Service.

Thank you very much.

Very truly yours,



Albert J. Zangrilli, Jr.

AJZ/ph
Enclosure

cc: The Honorable Larry Gesoff, ALJ (w/ enclosure)
The Honorable Robert A. Christianson (w/enclosure)
Thomas P. Gadsden, Esq. and
Anthony C. DeCusatis, Esq. (w/ enclosure)
Susan Simms Marsh, Esq. (w/ enclosure)
Michael J. Witherel, Esq. (w/ enclosure)
John A. Vuono, Esq (w/ enclosure)

RJP

RECEIVED

FEB 12 2004

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

THE MUNICIPAL AUTHORITY OF THE)
TOWNSHIP OF ROBINSON,)

Complainant - Petitioner,)

vs.)

PENNSYLVANIA AMERICAN WATER)
COMPANY,)

Respondent.)

Docket No : C-20030092

PETITION FOR INTERIM EMERGENCY ORDER

AND NOW COMES The Municipal Authority of the Township of Robinson ("MATR") and by its undersigned attorneys files this Petition for Interim Emergency Order pursuant to 52 Pa. Code §3.6 et seq., averring as follows:

1. On or about April 15, 2003, MATR filed a Formal Complaint and Petition for Declaratory Judgment in this matter. That Complaint is incorporated herein by reference as though more fully set forth herein.

2. In this action, MATR alleges, in short and inter alia, that Respondent Pennsylvania American Water Company ("PAWC") entered into a Water Sales Agreement dated March 28, 2003 ("Agreement") with the Western Allegheny County Municipal Authority ("WACMA") pursuant to which PAWC agreed to sell and WACMA agreed to purchase virtually all of WACMA's water needs at a rate set pursuant to a tariff rider known as "Rider DRS".

3. MATR alleges that the use of Rider DRS in this case is illegal for the reasons set forth in its Complaint and Prehearing Memorandum which documents are incorporated herein by reference as though more fully set forth herein.

4. On January 21, 2004, a hearing was held on this matter before the Honorable Frederick R. Nene, Administrative Law Judge, who presided over the hearing in the absence of the Honorable Larry Gesoff, the Administrative Law Judge to whom this case had been assigned. A full and complete record was made of the facts and circumstances pertaining to the Complaint and the alleged defenses thereto was made and the transcript thereof was filed with the Commission.

5. The Agreement was admitted into evidence at the hearing¹ and is incorporated herein by reference as though more fully set forth herein.

6. The Agreement provides, inter alia, as follows:

“The parties recognize and expressly agree that the consummation of this transaction is conditioned upon receiving approval from the PA PUC to the extent such approval is required.” Par. 4.6.

“[PAWC] represents and warrants...that this Agreement shall be filed with the Pennsylvania Public Utility Commission (PUC) and is subject to review by the PUC.” Par. 24.1.

7. Nevertheless, on February 4, 2004, only days after the hearing, MATR was informed that PAWC immediately commenced the sale of water pursuant to the Agreement.

8. No approval for the implementation of the Agreement was ever granted by the Commission or any Administrative Law Judge and the question of the Agreement’s legality is the core issue pending before this Tribunal.

9. Chief Administrative Law Judge Christianson who adjudicated the case involving the initial approval of Rider DRS stated:

¹ The Agreement is attached to MATR Hearing Exhibit 1 as Exhibit Lenze – 9.

I do endorse the [Riders], as at least an experiment to see if they are useful and viable. . . . I remind the Company that these [Riders] will be scrutinized in subsequent cases and that it has no inherent right to, in the next rate case after a rate reduction has been granted, pass on the lost revenue to other customers. Its actions and decisions will be scrutinized by the Commission.

PUC et al. v. PAWC, 1995 Pa. PUC LEXIS 173 at *93-94 (PUC, 1995).

10. PAWC's attempted use of Rider DRS in the Agreement is clearly suspect, for the reasons set forth in MATR's Complaint; namely, that Rider DRS was never intended to be used as a competitive weapon to allow PAWC to take a customer from another water supplier; in this case, MATR.

11. By this Petition, MATR is requesting that PAWC be prohibited from selling water to WACMA pursuant to the Agreement until a final order is entered with respect to the legality of the Agreement; that is, MATR is simply requesting that the status quo be maintained until such final order is entered.

12. If this Petition is not granted, PAWC will continue to sell water at an unlawful rate because:

- (a) the rate charged by PAWC pursuant to the Agreement is illegal and not otherwise authorized by the Commission; and
- (b) the Public Utility Code requires that a lawful rate be charged and paid at all times; and
- (c) discrimination among ratepayers arises if an unlawful rate is charged.

13. The appropriate oversight and regulation of PAWC will not be achieved if PAWC is permitted to commence service pursuant to an Agreement which has not yet been approved by the Commission and the legality of which is being challenged in a pending Commission proceeding.

14. The record of the hearing is devoid of any persuasive evidence that the use of Rider DRS is legal in this case.

15. For the reasons set forth herein, MATR's right to relief is clear. 52 Pa. Code § 3.7(a)(1).

16. MATR's need for relief is immediate because the illegal water sales commenced on February 4, 2004. 52 Pa. Code § 3.7(a)(2).

17. MATR's injury will be irreparable if the relief is not granted because MATR will lose the revenue it would charge for the sale of water to WACMA. MATR will not be able to recover such losses from either PAWC or WACMA pursuant to any cause of action. See West Penn Power Company vs. Pennsylvania Public Utility Commission et al., 150 Pa. Commw. 349, 615 A.2d 951 (1992)(economic injury can satisfy the irreparable injury requirement) and 52 Pa. Code § 3.7(a)(3). Furthermore, PAWC's illegal use of its tariff constitutes "irreparable injury of the most serious nature and [is] a proper subject of a preliminary injunction." Pennsylvania Public Utility Commission v. Israel, 356 Pa. 400, 52 A.2d 317 at 321, 1947 LEXIS 355***7 (1947).

18. The relief requested is not injurious to the public interest. 52 Pa. Code § 3.7(a)(4). To the contrary, the public interest will be harmed if an unlawful rate is permitted to be charged because:

(a) PAWC's rate payers will be adversely affected by PAWC's illegal use of Rider DRS in the Agreement because the rate charged pursuant to Rider DRS is approximately one-half the legal tariff rate which should apply to WACMA; and

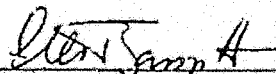
(b) the rate payers of WACMA may be obligated to pay PAWC the difference between the lawful rate and the unlawful rate in the event a final order is issued either striking down the Agreement or prohibiting sales to WACMA pursuant to Rider DRS; and

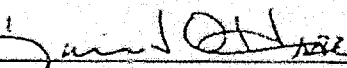
(c) MATR will be required to increase its rates by approximately 30% (see MATR Hearing Exhibit 1, pp. 25-26), chiefly because of the loss of WACMA as a customer. This increase will be burdensome and unfair to MATR's customers in both Robinson and Findley Townships because, if MATR ultimately prevails in this case, the result will have been an unnecessary rate increase paid by MATR's customers.

19. Maintaining the status quo until the issuance of a final order will lead to the fairest and most just result, a result in complete conformity with the principles of sound utility regulation.

WHEREFORE, The Municipal Authority of the Township of Robinson respectfully requests that an interim emergency order be entered barring the sale of water pursuant to the Water Sales Agreement by and between the Pennsylvania American Water Company and the Western Allegheny County Municipal Authority dated March 28, 2003 until a final order is entered.

YUKEVICH, MARCHETTI, LIEKAR
& ZANGRILLI, P.C.

By: 
Albert J. Zangrilli, Jr.

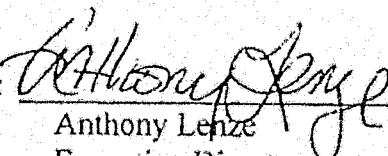
By: 
Kevin J. O'Hare

Attorneys for Complainant - Petitioner

VERIFICATION

I, Anthony Lenze, verify that I am Executive Director of the Municipal Authority of the Township of Robinson and that I am authorized to make this verification on its behalf. The statements made in the foregoing **Petition for Interim Emergency Order** are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of *18 Pa.C.S. §4904*, relating to unsworn falsification to authorities.

**THE MUNICIPAL AUTHORITY
OF THE TOWNSHIP OF ROBINSON**

By: 

Anthony Lenze
Executive Director

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached PETITION FOR INTERIM EMERGENCY ORDER has been served on the following by e-mail and first class mail, postage prepaid, except as otherwise noted:

HONORABLE LARRY GESOFF
(lgsoff@state.pa.us)
Administrative Law Judge
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

HONORABLE ROBERT A. CHRISTIANSON
Chief Administrative Law Judge
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17105
(via Federal Express)

THOMAS P. GADSDEN, ESQ.
(tgadsden@morganlewis.com)
ANTHONY C. DECUSATIS, ESQ.
(adecusatis@morganlewis.com)
Morgan Lewis
1701 Market Street
Philadelphia, PA 19103-2921

Attorneys for Pennsylvania American Water Company

SUSAN SIMMS MARSH, ESQ.
(smarsh@pawc.com)
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

(rights reserved)

MICHAEL J. WITHEREL, ESQ.
(wk-law@rsvvems.org)
Witherel & Kovacil
966 Perry Highway
Pittsburgh, PA 15237-2107

Attorneys for Pennsylvania Municipal Authorities Association, Amicus Curiae

JOHN A. VUONO, ESQ.
(jvuono@vuonogray.com)
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Attorneys for Western Allegheny County Municipal Authority, Proposed Intervenor

BOHDAN R. PANKIW, ESQ.
Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

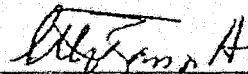
(via first class mail only)

RECEIVED

FEB 12 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DATE: February 12, 2004


ALBERT J. ZANGRILLI, JR.

Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: 215.963.5000
Fax: 215.963.5001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

ORIGINAL

RECEIVED
2004 FEB 20 AM 10:27
SECRETARY'S BUREAU

Thomas P. Gadsden
Esquire
215 963 5234
tgadsden@morganlewis.com

February 17, 2004

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: **The Municipal Authority Of The Township Of Robinson v. Pennsylvania-
American Water Company**
Docket No. C-20030092

Dear Secretary McNulty:

Enclosed are the original and two copies of the Answer of Pennsylvania-American Water Company to the Petition for Interim Emergency Order filed by the Municipal Authority of the Township of Robinson in the above-docketed matter.

As indicated on the attached Certificate of Service, copies of the Answer are being served concurrently on Administrative Law Judge Gesoff and all counsel by both electronic and first class mail.

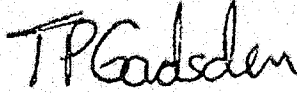
DOCUMENT
FOLDER

RJP

35

James J McNulty
February 17, 2004
Page 2

Sincerely,



Thomas P. Gadsden
Counsel for Pennsylvania-American
Water Company

Enclosures

c: Administrative Law Judge Larry Gesoff

RECEIVED

2004 FEB 20 AM 10: 27

SECRETARY'S BUREAU

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

2004 FEB 20 AM 10:28

THE MUNICIPAL AUTHORITY OF THE :
TOWNSHIP OF ROBINSON :

P. S. D. C.
SECRETARY'S BUREAU

v. :

DOCKET NO. C-20030092

PENNSYLVANIA-AMERICAN WATER :
COMPANY :

DOCKETED
MAR 01 2004

DOCUMENT
FOLDER

**ANSWER OF PENNSYLVANIA-AMERICAN WATER COMPANY
TO THE PETITION FOR INTERIM EMERGENCY ORDER
OF THE MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON**

Pennsylvania-American Water Company ("PAWC" or the "Company"), Respondent in the above-captioned matter, hereby answers the *Petition for Interim Emergency Order* (the "Petition") filed on February 12, 2004 by the Municipal Authority of the Township of Robinson ("MATR"). In summary, PAWC respectfully submits that MATR has failed to satisfy any of the four prerequisites for the granting of interim emergency relief under 52 Pa. Code §3.7. MATR has not shown that its right to relief is clear and, after waiting for ten months to pursue its requested injunction, cannot credibly argue that its need for relief is immediate. Furthermore, MATR's claim of irreparable harm is totally unsupported. Lastly, it is apparent that the public interest would be injured and not served if WACMA were denied the benefit of its arm's-length negotiations with MATR and PAWC. For those and the other reasons set forth below, the Petition should be dismissed and the relief requested therein denied.

I. It is admitted that MATR filed a *Complaint and Petition for Declaratory Judgment* (the "Complaint") in this matter on April 15, 2003. By way of further answer, PAWC notes that MATR's Complaint included a request that the Commission enjoin PAWC from commencing service to the Western Allegheny County Municipal Authority ("WACMA")

pursuant to the parties' March 28, 2003 Water Sales Agreement and from constructing any facilities with respect to such service. At the July 18, 2003 Prehearing Conference, MATR advised the Administrative Law Judge that it had decided not to pursue injunctive relief at that time (*see Prehearing Order*, dated July 18, 2003, p. 2).

2. It is admitted that PAWC and WACMA executed a Water Sales Agreement on March 28, 2003. That Agreement, which was entered into the record at the January 21, 2004 evidentiary hearing held herein, speaks for itself.

3. It is admitted that MATR has made this allegation. By way of further answer, PAWC avers that it has demonstrated conclusively, on the record, that the March 28, 2003 Agreement reflects a proper application of Rider DRS and is in full accord with PAWC's tariff and the Commission's prior Orders on this matter.

4. Admitted.

5. Admitted.

6 - 8. It is admitted that the March 28, 2003 Agreement contains the language quoted by MATR in Paragraph No. 6 of its Petition and that, on February 4, 2004, PAWC advised the parties and the Administrative Law Judge that it had initiated service under the Agreement. It is denied that PAWC required the prior approval of the Commission in order for the Agreement to become effective. Indeed, in its June 6, 1996 *Opinion and Order on Remand* at Docket No. R-00943231, the Commission specifically rejected an Office of Consumer Advocate proposal that contracts executed pursuant to Rider DRS be reviewed and approved by the Commission in advance. *See Pa. P.U.C. v. Pennsylvania-American Water Co.* 1996 Pa. P.U.C. LEXIS 199.

9. It is admitted that Judge Christianson's Recommended Decision at Docket No. R-00943231 contains the language quoted by MATR in Paragraph 9 of its Petition. It is denied that

the treatment of so-called "lost revenue" in a subsequent rate proceeding has any bearing on the legality of the March 28, 2003 Agreement, which, according to MATR, is "the core issue pending before the Tribunal" (Petition, p. 2).

10. Denied. By way of further answer, PAWC notes that it has served WACMA for over 45 years and that it has the right - - indeed, the legal obligation - - to continue to do so in accordance with the terms and conditions of its Commission-approved tariff.

11. Denied. By way of further answer, PAWC avers that MATR no longer has any contractual right to sell water to WACMA and WACMA no longer is under any contractual obligation to purchase water from MATR. Indeed, the Extension Agreement under which MATR and WACMA were operating, and which was entered into the record in this proceeding as Exhibit Morris-1 to WACMA Exhibit No. 1, expressly provides as follows (p. 2):

2. The [October 20, 1983] Agreement shall not terminate on October 21, 2003, but, rather shall continue in full force and effect until the first to occur of either: (a) 24 hours after receipt by MATR of written notice of receipt by WACMA of the Permit or (b) April 2, 2004.

Earlier this month, the Department of Environmental Protection ("DEP") issued a Water Allocation Permit authorizing WACMA to purchase up to 1.6 million gallons per day ("GPD") from PAWC.¹ In accordance with the above-quoted language, WACMA provided MATR the required written notice and, consequently, MATR's Agreement to sell water to WACMA expired by its own terms. Accordingly, MATR does not appear to be asking "that the status quo be maintained." To the contrary, it is, in effect, seeking to have this Commission force WACMA to

¹ On the same day, the DEP issued four additional Water Allocation Permits authorizing WACMA to purchase up to 1.0 million GPD from MATR; 500,000 GPD from the Moon Township Municipal Authority; 200,000 GPD from the Findlay Township Water Authority; and 1,500 GPD from the Borough of Oakdale. Each of these supplemental Permits, however, becomes null and void if WACMA terminates or fails to renew its purchase water agreement with PAWC.

enter into a new purchased water contract with MATR for the duration of this proceeding.

PAWC respectfully submits that the Commission is without the authority to grant such relief.

12. Denied. By way of further answer, PAWC avers that the rate charged WACMA by PAWC under the March 28, 2003 Agreement falls within the range of permissible rates defined by Rider DRS and, as such, has been authorized by the Commission and is lawful in all respects. *See Opinton and Order on Remand, supra* ("Service agreements negotiated under Rider DRS will represent the application of filed, published and pre-approved tariff rates, that is rates within the range of "just and reasonable" rates defined by the "floor" and "ceiling" rates set forth in Rider DRS"). Notably, at the evidentiary hearing held on January 21, 2004, MATR, through its counsel, stated that it was no longer asserting that the rate set forth in the March 28, 2003 Agreement was less than the minimum or "floor" rate required by Rider DRS (Tr. 18-19).

13. Denied for the reasons set forth in Paragraphs 8, 11 and 12, *supra*.

14 - 15. Denied. By way of further answer, PAWC avers that the record in this case makes it abundantly clear that Rider DRS was always intended to provide PAWC a vehicle to both retain and attract water sales under circumstances where a current or prospective customer had a viable competitive alternative to service from PAWC (*see* PAWC St. 3; PAWC Exhibit 3-A). In any event, MATR has not established and, PAWC respectfully submits, cannot establish that its "right to relief is clear," which is a threshold showing to the issuance of an Interim Emergency Order under 52 Pa. Code §3.7(a)(1).

16. Denied. By way of further answer, PAWC notes that the term "emergency" is defined at 52 Pa. Code §3.1 as follows: "A situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting." PAWC submits that MATR has failed to demonstrate "a clear and present danger to

life or property" or that its need for relief is "immediate." In *Crums Mill Associates v. Dauphin Consolidated Water Supply Co.*, 1993 Pa. PUC LEXIS 90, the Commission declined to issue an Interim Emergency Order notwithstanding allegations of "financial peril," reasoning that "the Complainants knew or should have known of their financial dilemma some four months prior to perceiving the need for emergency relief from the Commission "

As noted *supra*, MATR was similarly aware, when it filed its Complaint in April, 2003, of the alleged financial implications to it of the loss of WACMA as a customer and, indeed, initially sought to have the Commission enjoin the construction of facilities and the commencement of service by PAWC pending the conclusion of this proceeding. In July, 2003, MATR decided not to press its request for injunctive relief and it should not now be heard to complain some seven months later.

17. Denied. By way of further answer, PAWC avers that any diminution in the Authority's revenues would be precisely the kind of "competitive" impact that the Commonwealth Court has expressly held "does not amount to an injury, irreparable or otherwise." *Brink's Inc. v. Pa. P.U.C.*, 1982 Pa. Cmmw. LEXIS 1264 (1982) ("All that Brink's can claim is that the exercise of the temporary authority by Brooks will cause Brink's to face competition for business as a contract carrier. No basis can be found for concluding that it is necessarily injurious for an American business enterprise to encounter competition in its field").

18. Denied as follows:

(a) PAWC's customers (other than WACMA) will not be affected by the Commission's action on the Petition because PAWC's base water rates will not change during the pendency of this proceeding. PAWC, however, would be adversely affected if the requested Interim Emergency Order were granted because its current rates, as approved by Commission

Order entered January 29, 2004 at Docket No. R-00038304, assume that the March 28, 2003 Agreement is in effect and generating ongoing annual sales revenues from WACMA totaling \$807,972 (PAWC Ex. 3-A Revised, p. 10R)(i.e. that level of sales was imputed in calculating PAWC's pro forma present rate revenues and, therefore, served to reduce its claimed revenue requirement by a commensurate amount).

(b) It is unclear what recourse, if any, PAWC would have against WACMA in the event that it were eventually determined that PAWC could not sell water to WACMA at the Rider DRS contract rate. What is clear is that WACMA, and perhaps its customers, would be adversely affected if the proposed Interim Emergency Order were issued because WACMA presumably would have to purchase water from MATR at the prior MATR contract rate or, alternatively, from PAWC at its Sale for Resale rate, both of which are higher than the Rider DRS contract rate set forth in the March 28, 2003 Agreement.

(c) Denied. By way of further answer, PAWC avers that MATR has failed to establish that it would require any rate increase if it lost WACMA as a customer. To the contrary, the cross-examination of Mr. Antonelli, who prepared the analysis on which MATR relies, demonstrated that he had substantially overstated the prospective impact of the loss of WACMA and, in the process, had completely ignored certain offsetting savings (Tr. 48-54). Furthermore, MATR has not shown or, for that matter, even alleged that it would need and/or would contemplate a rate increase during the pendency of this proceeding.²

19. Denied for all of the reasons previously discussed.

² In fact, at page 22 of MATR's most recent Annual Consulting Engineer's Report, which was similarly prepared by Mr. Antonelli and was provided to PAWC in discovery (Set I, No. 3), it is noted that MATR's annual debt service is expected to decline by \$1,062,560 during its fiscal year beginning July 1, 2004.

WHEREFORE, PAWC requests that MATR's Petition for Interim Emergency Order be dismissed and the relief requested therein denied.

Respectfully submitted.



Thomas P. Gadsden
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
215.963.5234
tgadsden@morganlewis.com

Counsel for Pennsylvania-American
Water Company

Date: February 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Answer of Pennsylvania-American Water Company to the Petition for Interim Emergency Order filed by the Municipal Authority of the Township of Robinson upon the following persons, in the manner indicated, in accordance with the requirements of §1.54 (relating to service by a participant).

BY FIRST CLASS MAIL AND ELECTRONIC MAIL

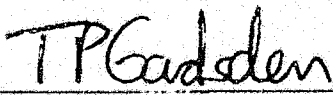
**Albert J. Zangrilli, Jr., Esquire
Yukevich, Marchetti, Liekar & Zangrilli, P.C.
11 Stanwix Street
Pittsburgh, PA 15222-1324**

**John A. Vuono, Esquire
Vuono & Gray LLC
2310 Grant Building
Pittsburgh, PA 15219-2383**

**Michael J. Witherel, Esquire
Witherel & Kovacic
966 Perry Highway
Pittsburgh, PA 15237**

**John A. Pillar
Law Offices of John A. Pillar
680 Washington Road
Suite B101
Pittsburgh, PA 15228-1925**

Date. February 17, 2004



Thomas P. Gadsden

Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Te: 215.963.5000
Fax: 215.963.5001
www.morganlewis.com

ORIGINAL

Morgan Lewis
COUNSELORS AT LAW

ORIGINAL

Thomas P. Gadsden
Esquire
215.963.5234
tgadsden@morganlewis.com

SECRETARY'S BUREAU

2004 FEB 25 PM 2:44

RECEIVED

February 26, 2004

VIA HAND DELIVERY

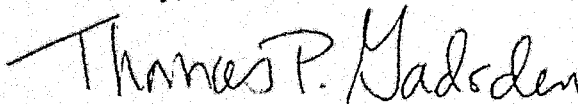
James J. McNulty,
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building - 2nd Floor
400 North Street
Harrisburg, PA 17120

Re: **The Municipal Authority Of The Township Of Robinson v. Pennsylvania-American Water Company -- Docket No. C-20030092**

Dear Secretary McNulty:

Enclosed are the original and nine copies of the Brief of Respondent Pennsylvania-American Water Company In Support Of The Interim Emergency Order Issued By Administrative Law Judge Larry Gesoff on February 19, 2004. As indicated on the Certificate of Service attached to the enclosed Brief, copies of the Brief are being served concurrently on Administrative Law Judge Gesoff and all counsel by both electronic and first class mail.

Sincerely,



Thomas P. Gadsden
Counsel for Pennsylvania-American
Water Company

Enclosures

c: Per Certificate of Service

DOCUMENT
FOLDER

RJP

45

ORIGINAL

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**THE MUNICIPAL AUTHORITY OF THE
TOWNSHIP OF ROBINSON** :

v. :

**PENNSYLVANIA-AMERICAN WATER
COMPANY** :

Docket No. C-20030092

**BRIEF OF RESPONDENT
PENNSYLVANIA-AMERICAN WATER COMPANY**

**In Support Of The Interim Emergency Order
Issued By Administrative Law Judge Larry Gesoff
On February 19, 2004
And Requesting That The Material Question Certified
By Judge Gesoff Be Answered In The Affirmative**

**Thomas P. Gadsden
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5234
Counsel for Pennsylvania-American
Water Company**

**Of Counsel:
Susan Simms Marsh
Associate Corporate Counsel
Pennsylvania-American Water
Company
800 West Hershey Park Drive
Hershey, PA 17033
717.531.3208**

Date: February 26, 2004

DOCKETED
MAR 2 2004

SECRETARY'S BUREAU

MAR 25 PM 2:45

RECEIVED

**DOCUMENT
FOLDER**

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT.....	2
A. MATR's Right To Relief Is Not Clear	2
B. MATR's Need For Relief Is Not Immediate.....	3
C. MATR Will Not Suffer Irreparable Harm.....	3
D. The Relief Requested Is Injurious To The Public Interest	4
III. CONCLUSION	5

I. INTRODUCTION

On February 12, 2004, the Municipal Authority of the Township of Robinson ("MATR"), the Complainant herein, filed a *Petition for Interim Emergency Order* (the "Petition"). Through its Petition, MATR seeks to enjoin, pending the conclusion of this proceeding, further water sales by Pennsylvania-American Water Company ("PAWC") to the Western Allegheny County Municipal Authority ("WACMA") pursuant to a March 28, 2003 Water Sales Agreement (the "Agreement") executed by those two parties.¹ PAWC filed an Answer in opposition to the Petition on February 17, 2004 and an emergency hearing was held telephonically that same day before Administrative Law Judge Larry Gesoff (the "ALJ").

On February 19, 2004, the ALJ issued an Interim Emergency Order (the "February 19 Order") denying MATR's Petition. In so doing, the ALJ found that MATR had failed to meet three of the four prerequisites set forth at 52 Pa. Code §3.7 for the granting of emergency relief. More specifically, the ALJ concluded that MATR had not shown either (1) that its right to relief was clear, (2) that it would be irreparably harmed if the Petition were not approved, or (3) that the relief requested would not be injurious to the public interest (February 19 Order, pp. 5-10). In accordance with the Commission's regulations (52 Pa. Code §§3.10, 5.305), the ALJ contemporaneously certified the following material question for the Commission's consideration:

Whether the Interim Emergency Order issued February 19, 2004 denying MATR's request for interim emergency relief is in accord with the evidence developed in the proceeding.

¹ The Agreement was negotiated in accordance with the terms of PAWC's Rider DRS-Demand Based Resale Service ("Rider DRS") and, pursuant to the Commission's Order entered June 6, 1996 at Docket No. R-00943231, was filed with the Commission and served on the Office of Consumer Advocate.

PAWC files this Brief in support of the February 19 Order and respectfully requests that the question certified by the ALJ be answered in the affirmative.

II. ARGUMENT

The ALJ has provided the Commission with a remarkably coherent and thoughtful analysis of the issues presented by MATR's Petition, particularly in light of the time constraints under which he was operating. PAWC agrees in full with the ALJ's factual findings and legal conclusions and, for that reason, urges the Commission to answer the certified question in the affirmative. PAWC files this Brief merely to point out several additional considerations not mentioned explicitly in the February 19 Order that lend further support to the ALJ's decision.

A. MATR's Right To Relief Is Not Clear

At page 8 of the February 19 Order, the ALJ opines that "the prospect of MATR prevailing on the merits is in doubt." In fact, PAWC respectfully submits that MATR's position is untenable. As noted by the ALJ, Mr. Stout, focusing on the specific tariff language in question, explained why the only logical interpretation of Rider DRS is that it was designed to facilitate both the retention and the attraction of load (February 19 Order, p. 5). Significantly, Mr. Stout, who personally assisted PAWC in developing its competitive rate offerings and participated in the proceeding that led to their adoption, also testified that such was their intended purpose (PAWC St. 3).

As to MATR's contention that the March 28, 2003 Agreement required the Commission's pre-approval before becoming effective, the ALJ, while agreeing with PAWC that it did not, indicates that the Commission did not discuss this issue in its final Order in PAWC's 1994-95 base rate proceeding (February 19 Order, p. 6). Although that is true of the Commission's initial order in that case, the Commission, in its *June 6, 1996 Opinion and Order*

on Remand, 1996 Pa. PUC LEXIS 199, specifically rejected an OCA proposal that contracts executed pursuant to Rider DRS be reviewed and approved in advance.

B. MATR's Need For Relief Is Not Immediate

At page 7 of the February 19 Order the ALJ concludes that "it appears that MATR's need for relief is immediate because it is no longer serving WACMA and PAWC is." At the same time, the ALJ acknowledges that MATR arguably "slept on its rights."

In *Crumbs Mill Associates v. Dauphin Consolidated Water Supply Co.*, 1993 Pa. PUC LEXIS 90, the Commission declined to issue an Interim Emergency Order notwithstanding allegations of "financial peril," reasoning that "the Complainants knew or should have known of their financial dilemma some four months prior to perceiving the need for emergency relief from the Commission." MATR was similarly aware when it filed its Complaint in April, 2003, of the alleged financial implications to it of the loss of WACMA as a customer and initially sought to have the Commission enjoin the commencement of service by PAWC under the March 28, 2003 Agreement. In July, 2003, MATR advised the ALJ that it was not pursuing injunctive relief at that time and then inexplicably, waited seven months to renew its request. Any claim by MATR of "immediacy" was lost long ago.

C. MATR Will Not Suffer Irreparable Harm

At page 8 of the February 19 Order, the ALJ concludes that the injury alleged by MATR does not rise to the level of irreparable harm justifying emergency relief. PAWC agrees and suggests that any diminution in MATR's revenues would be precisely the kind of "competitive" impact that the Commonwealth Court has expressly held "does not amount to an injury, irreparable or otherwise." *Brinks, Inc. v. Pa. P.U.C.*, 1982 Pa. Cmmw. LEXIS 1264 (1982) ("All that Brink's can claim is that the exercise of the temporary authority by Brooks will cause Brink's to face competition for business as a contract carrier. No basis can be found for

concluding that it is necessarily injurious for an American business enterprise to encounter competition in its field.”).

D. The Relief Requested Is Injurious To The Public Interest

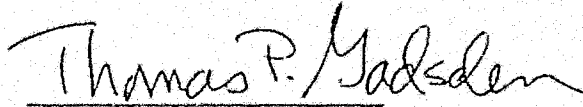
The ALJ properly finds that, while MATR would certainly benefit if its requested relief were granted, the public - - as represented by the interests of PAWC, WACMA and their respective customers - - would be significantly disadvantaged (February 19 Order, pp. 9-10). PAWC agrees, and further notes that MATR’s principal claim, i.e. that it would have to increase its rates by 30%, was totally unsupported. Indeed, the cross-examination of Mr. Antonelli, on whose calculations MATR relied, revealed that he (1) grossly overstated the revenues that MATR’s sales to WACMA could reasonably be expected to produce on a normalized, ongoing basis; (2) ignored the purchased water costs that MATR would no longer incur if it was not obliged to serve WACMA; and (3) failed to take into account the capital cost savings that would accrue to MATR by being able to defer several large projects.

In addition, MATR admitted that its debt service costs would decline by \$1.0 million in its fiscal year beginning July 1, 2004, but argued that this was irrelevant because its debt service costs were scheduled to rise (albeit by a much smaller amount) the following year. MATR’s response misses the point. It matters not whether MATR could justify a rate increase in the second half of 2005. Rather, what is relevant for purposes of its request for emergency relief is that MATR has not shown, and cannot show, that it would need to raise its rates during the pendency of this proceeding if its Petition were denied.

III. CONCLUSION

For the reasons set forth in the February 19 Order, as supplemented above, the certified question should be answered in the affirmative and MATR's *Petition for Interim Emergency Order* should be denied.

Respectfully submitted,



Thomas P. Gadsden
Morgan Lewis & Bockius LLP
1701 Market Street
Philadelphia, Pennsylvania 19103-2921
215 963 5234

Counsel for Pennsylvania-American
Water Company

Of Counsel:
Susan Simms Marsh
Associate Corporate Counsel
Pennsylvania-American Water
Company
800 West Hershey Park Drive
Hershey, PA 17033
717.531.3208

Date: February 26, 2004

RECEIVED
2004 FEB 26 PM 2:45
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Brief of Respondent Pennsylvania-American Water Company In Support Of The Interim Emergency Order Issued By Administrative Law Judge Larry Gesoff On February 19, 2004 upon the following persons, in the manner indicated, in accordance with the requirements of §1.54 (relating to service by a participant).

BY FIRST CLASS MAIL AND ELECTRONIC MAIL

Albert J. Zangrilli, Jr., Esquire
Yukevich, Marchetti, Liekar & Zangrilli, P.C.
11 Stanwix Street
Pittsburgh, PA 15222-1324

John A. Vuono, Esquire
Vuono & Gray LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Michael J. Witherel, Esquire
Witherel & Kovacik
966 Perry Highway
Pittsburgh, PA 15237

John A. Pillar
Law Offices of John A. Pillar
680 Washington Road
Suite B101
Pittsburgh, PA 15228-1925

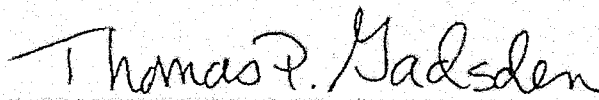
Honorable Larry Gesoff
Administrative Law Judge
Pennsylvania Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

SECRETARY'S BUREAU

2004 FEB 26 PM 2:45

RECEIVED

Date: February 26, 2004


Thomas P. Gadsden

ORIGINAL

Law Offices

VUONO & GRAY, LLC

John A. Vuono
William A. Gray
Mark T. Vuono*
Dennis J. Kusturiss
Christine M. Dolfi
Louise R. Schrage
Susan C. Indrisano+
*Also Admitted in Florida
+Also Admitted in Maryland

2310 Grant Building

Pittsburgh, PA 15219-2383

February 26, 2004

Richard R. Wilson
of Counsel

Telephone
412-471-1800

Facsimile
412-471-4477

Re: The Municipal Authority of the Township of Robinson ("MATR")
v. Pennsylvania-American Water Company ("PAWC")
(Western Allegheny County Municipal Authority ("WACMA")-Intervenor)
Pennsylvania Public Utility Commission
Docket No. C-20030092
Our File 4974

DOCUMENT

Mr. James J. McNulty
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

FEDERAL EXPRESS
RECEIVED

FEB 26 2004

Dear Mr. McNulty:

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

We enclosed for filing with the Commission the signed original and nine (9) copies of the Brief in behalf of Western Allegheny County Municipal Authority, Intervenor, Addressing The Interlocutory Review Of The Material Question submitted by Judge Larry Gesoff.

We are simultaneously e-mailing one copy and mailing by first class mail two (2) copies of the Brief to the parties shown on the Certificate of Service attached to the Brief.

Will you please acknowledge receipt and filing of the enclosed on the copy of this letter of transmittal and return it to me in the envelope provided for that purpose.

Sincerely yours,

VUONO & GRAY, LLC

John A. Vuono

CW/30553

Enclosures

cc: Honorable Larry Gesoff
Parties of Record

65

ORIGINAL

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE MUNICIPAL AUTHORITY OF
THE TOWNSHIP OF ROBINSON

Complainant-Petitioner,

v.

PENNSYLVANIA-AMERICAN
WATER COMPANY

Respondent.

DOCKETED
MAR 03 2004

Docket No. C-20030092

DOCUMENT

BRIEF OF INTERVENOR

WESTERN ALLEGHENY COUNTY MUNICIPAL AUTHORITY

ADDRESSING INTERLOCUTORY REVIEW

OF MATERIAL QUESTION

RECEIVED

FEB 26 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

JOHN A. VUONO, ESQ.
Attorney for
WESTERN ALLEGHENY COUNTY
MUNICIPAL AUTHORITY
Intervenor

VUONO & GRAY, LLC
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800

Due Date: February 26, 2004

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE.....	1
II. ESSENTIAL FACTS.....	3
III. STATEMENT OF QUESTION CERTIFIED TO COMMISSION ...	4
IV. POSITION OF WACMA	4
V. ARGUMENT.....	5
A. THE BURDEN OF PROOF REQUIRED FOR THE ISSUANCE OF AN INTERIM EMERGENCY ORDER IS WELL-ESTABLISHED.....	5
B. JUDGE GESOFF'S CONCLUSION THAT MATR FAILED TO MEET ITS BURDEN OF PROOF IS ABUNDANTLY SUPPORTED BY THE RECORD	6
1. Whether MATR's right to relief is clear.....	6
2. Whether MATR's need for relief is immediate	7
3. Whether any injury to MATR would be irreparable if its requested relief is not granted.....	9
4. Whether the relief requested is not injurious to the public interest.....	9
C. THE GRANTING OF THE RELIEF REQUESTED WILL CLEARLY BE INJURIOUS TO THE INTERESTS OF WACMA, PAWC AND THEIR RESPECTIVE CUSTOMERS.....	10
V. CONCLUSION AND REQUESTED RELIEF	13

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THE MUNICIPAL AUTHORITY OF)
THE TOWNSHIP OF ROBINSON)

Complainant-Petitioner,)

v.)

PENNSYLVANIA-AMERICAN)
WATER COMPANY)

Respondent.)

) Docket No. C-20030092
)
)
)
)
)
)
)

BRIEF OF INTERVENOR

WESTERN ALLEGHENY COUNTY MUNICIPAL AUTHORITY

ADDRESSING INTERLOCUTORY REVIEW

OF MATERIAL QUESTION

I. STATEMENT OF THE CASE

This proceeding arises out of a formal Complaint and Petition for Declaratory Order filed on April 16, 2003 by The Municipal Authority of the Township of Robinson ("MATR") against the Pennsylvania-American Water Company ("PAWC"). The case is assigned to Administrative Law Judge Larry Gesoff.

Pursuant to a Petition to Intervene, Western Allegheny County Municipal Authority ("WACMA") was permitted to intervene in support of PAWC by the First Interim Order of Judge Gesoff dated, July 24, 2003.

A hearing in connection with the Complaint proceeding was held on January 21, 2004 and the record is closed. The case is before Judge Gesoff for disposition on the merits, pending the filing of Briefs.

On February 12, 2004, MATR filed a Petition for Interim Emergency Order ("Petition"). The Petition requests that the sale of water by PAWC to WACMA under the 2003 Agreement, as identified in Section II below, be prohibited until the Commission enters a final order in the Complaint proceeding.

On February 17, 2004, PAWC filed an Answer to MATR's Petition. A hearing on the Petition was held before Judge Gesoff on February 17, 2004, pursuant to §3.9 (52 Pa. Code §3.9) of the Commission's procedural rules. At the hearing, WACMA joined in the Answer filed by PAWC (Tr. 164-165).¹

On February 19, 2004, Judge Gesoff served his Interim Emergency Order ("Interim Order") denying MATR's Petition and his Certification of the Material Question to the Commission.

In accordance with 52 Pa. Code §5.305(c), WACMA submits its Brief addressing the merits of the material question submitted by Judge Gesoff for interlocutory review by the Commission.

¹ Citations preceded by "Tr." refer to pages of the transcript of testimony; by "Ex." to hearing exhibits; and by "Int. Ord." to Judge Gesoff's Interim Order.

II. ESSENTIAL FACTS

The Interim Order contains a detailed summary of the history and background of the case and will be repeated herein only to the extent necessary to develop the position of WACMA.

Pursuant to a Water Supply Agreement dated October 20, 1983 ("1983 Agreement"), WACMA purchased substantially all of its water from MATR (MATR Ex. 1; Lenze Ex. 1). The 1983 Agreement was scheduled to expire on October 20, 2003. Despite negotiations with MATR which extended over a number of years (WACMA Ex. 1, pp. 8-9), WACMA and MATR were unable to reach an agreement on a new water supply agreement (WACMA Ex. 1, pp. 14-15).

On March 28, 2003, WACMA entered into a Water Supply Agreement with PAWC to purchase most of its water from PAWC ("2003 Agreement") (MATR Ex. 1; Lenze Ex. 9). The 2003 Agreement was to become effective as of October 21, 2003, subject to the issuance of the necessary permits and approvals from the Pennsylvania Department of Environmental Protection ("DEP").

The 2003 Agreement provides that PAWC will construct at its cost substantial interconnection facilities in order to serve WACMA's needs. At the time of the hearing on January 21, 2004, PAWC had made substantial progress in the construction of the new facilities, certain of which were completed with the balance being in various stages of completion (WACMA Ex. 1, p. 21; Morris Ex. 4).

On October 16, 2003, WACMA and MATR entered into an Agreement extending the term of the 1983 Agreement until the earlier of (1) twenty-four hours after MATR

received written notice from WACMA that its Water Allocation Permit was modified to increase WACMA's daily water allocation from MATR to PAWC or (2) April 2, 2004 (WACMA Ex. 1; Morris Ex. 2).

On February 3, 2004, the DEP issued the Water Allocation and Public Water Supply Permits required by the 2003 Agreement (PAWC Ex. 4, 4A, 4B, 4C and 4D). On February 4, 2004, the 1983 Agreement was terminated and PAWC began to provide water to WACMA pursuant to the 2003 Agreement (MATR Ex. 15).

III. STATEMENT OF QUESTION CERTIFIED TO COMMISSION

Whether the Emergency Order issued by Judge Gesoff on February 19, 2004 denying MATR's request for interim emergency relief is in accord with the evidence developed in the proceeding?

IV. POSITION OF WACMA

Judge Gesoff accurately summarized and applied the criteria governing the issuance of interim emergency orders as set forth in §3.7 (52 Pa. Code §3.7) of the Commission's procedural regulations. His conclusion that MATR failed to establish three of the four prerequisites necessary for the issuance of interim emergency orders and his Interim Order denying MATR's Petition are clearly and abundantly supported by the evidence developed in the proceeding.

Among the three prerequisites which Judge Gesoff found that MATR had failed to establish, is the one which most directly affects WACMA, namely "The relief requested is not injurious to the public interest." As is shown in more detail in Section C of the

Argument herein, it is the position of WACMA that the evidence developed in the proceeding clearly establishes that the granting of the emergency relief requested would be injurious to the public interest which, as Judge Gesoff correctly found, encompasses WACMA, PAWC and the respective customers of WACMA and PAWC.

V. ARGUMENT

A. THE BURDEN OF PROOF REQUIRED FOR THE ISSUANCE OF AN INTERIM EMERGENCY ORDER IS WELL-ESTABLISHED.

In addressing the issue raised by MATR's Petition, Judge Gesoff properly concluded that the issuance of an Interim Emergency Order is governed by §3.7 (52 Pa. Code §3.7) of the Commission's regulations which provides in pertinent part as follows:

3.7. Issuance of interim emergency orders.

(a) A presiding officer may issue an interim emergency order upon finding that the following exist:

- (1) The petitioner's right to relief is clear.**
- (2) The need for relief is immediate.**
- (3) The injury would be irreparable if relief is not granted.**
- (4) The relief requested is not injurious to the public interest. (Emphasis Added)**

(Int. Ord. p. 4)

In applying the above regulation, Judge Gesoff correctly concluded that (a) the prerequisites for the issuance of an Interim Emergency Order are cumulative; (b) MATR

has the burden of proving all four prerequisites; and (c) failure to prove any one of them results in the denial of the relief requested (Int. Ord., p. 4).

The Judge's interpretation and application of the above regulation is consistent with prior Commission precedents and accurately describes the heavy burden of proof which must be met by one seeking the extraordinary relief of an Interim Emergency Order.

B. JUDGE GESOFF'S CONCLUSION THAT MATR FAILED TO MEET ITS BURDEN OF PROOF IS ABUNDANTLY SUPPORTED BY THE RECORD.

In reaching his conclusion that the Petition should be denied, Judge Gesoff analyzed in detail each of the four prerequisites for the granting of Interim Emergency Relief in the light of the facts of record. He also carefully analyzed the respective arguments of the parties with respect to each of the criteria. His findings and conclusions are supported by appropriate references to the facts of record.

No useful purpose will be served by repeating the Judge's detailed analysis of the facts and their application to the prerequisites. The following will briefly summarize the important findings by the Judge on which he based his conclusions with respect to each of the prerequisites.

1. Whether MATR's right to relief is clear.

In support of his conclusion that MATR failed to establish that its right to relief is clear, the Judge found:

(a) MATR's right to relief is the precise issue presently before the Commission in the Complaint proceeding, namely whether PAWC has properly applied Tariff Rider DRS.

(b) Commission approval of the 2003 Agreement was not required before PAWC began to provide service to WACMA.

(c) The fact that MATR's right to relief is not clear is adequate grounds to deny the Petition
(Int. Ord. pp. 5-6).

2. **Whether MATR's need for relief is immediate.**

Although the Judge concedes that MATR waited over ten months to file its Petition for Interim Emergency Relief even though its Complaint contained a request for injunctive relief, the Judge gave MATR the benefit of the doubt on this point and concluded that "MATR's need for relief is needed because it is no longer serving WACMA and PAWC" (Int. Ord. pp.6-7).

It is the position of WACMA that MATR failed to timely pursue any available remedies and cannot now contend that its need for relief is immediate for the following reasons:

(a) Judge Gesoff accurately confirmed that "emergency" is defined in the regulations as "a situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting. (52 Pa. Code §3.1) (Int. Ord., p. 6) It is submitted that MATR has not

established that an "emergency" exists within the meaning of this definition and the regulations.

(b) MATR specifically waived the request for injunctive relief set forth in its original Complaint at the Prehearing Conference on July 18, 2003 (Prehearing Order, p. 2)

(c) MATR was aware that WACMA had entered into the 2003 Agreement dated March 28, 2003 with PAWC pursuant to which MATR would purchase most of its water supply from PAWC and that PAWC was obligated under the 2003 Agreement to construct substantial interconnection facilities in order to provide service for WACMA (MATR Ex. 1, p. 26).

(d) MATR knew that WACMA had filed with the DEP on or about June 10, 2003 a Water Allocation Permit to substantially increase WACMA's daily water allocations from PAWC (MATR Ex. 4).

(e) Based on MATR's knowledge of the facts, including the actions taken by WAMCA and PAWC in reasonable reliance upon the 2003 Agreement, and MATR's failure to pursue any available remedies in a timely fashion (indeed, specifically waiving its request for injunctive relief), MATR should be estopped from successfully arguing that its need for relief is immediate within the meaning of the regulations.

3. Whether any injury to MATR would be irreparable if its requested relief is not granted.

In support of his conclusions that he was unable to find that any injury to MATR would be irreparable if the relief requested is not granted, the Judge found:

(a) The cases cited by MATR in support of its irreparable harm claim are distinguishable and inapplicable to the facts of this case;

(b) It is not necessarily injurious for a business enterprise to encounter competition in its field and such competition does not rise to the level of irreparable harm (Int. Ord. pp. 7-8).

4. Whether the relief requested is not injurious to the public interest.

In concluding that MATR had failed to prove that the requested relief would not be injurious to the public interest, the Judge found:

(a) MATR's contention that it would have to raise its rates by 30% if it loses WACMA as a customer was rejected.

(b) Granting the relief requested by MATR would be injurious to the public interest insofar as the public includes the interests of WACMA and PAWC and their respective customers

(Int. Ord. pp. 8-10).

Because of its importance to WACMA, the fourth prerequisite concerning the impact of the relief sought on the public interest is addressed in more detail in the following Section of this argument.

C. THE GRANTING OF THE RELIEF REQUESTED WILL CLEARLY BE INJURIOUS TO THE INTERESTS OF WACMA, PAWC AND THEIR RESPECTIVE CUSTOMERS.

As noted above, Judge Gesoff concluded that MATR had failed to establish that the granting of the Petition would not be injurious to the public interest. In support of his conclusion, Judge Gesoff found:

Granting the relief MATR requests, however, would be injurious to the public insofar as the public includes the interests of PAWC and WACMA. In addition, PAWC's customers would lose the advantage of their share of PAWC's fixed costs being spread over a larger customer base and WACMA's customers would lose the advantage of WACMA passing the lower costs of its water supply through to them.

I cannot conclude, therefore, that the relief MATR requests would not be injurious to the public. MATR has not met its burden of proving this fourth prerequisite for the issuance of an interim emergency order.

(Int. Ord., pp. 9-10).

The relevant facts of record, as summarized below, abundantly support the Judge's findings and conclusion on this issue.

WACMA serves customers in North Fayette and Findlay Townships in Allegheny County. It is a distribution-only authority which relies on other parties to supply all of its water (WACMA Ex. 1, p. 4).

WACMA serves approximately 4,871 customers through 3, 982 service connections. It provides service for both residential and commercial customers. There has been a dramatic increase in the number of residential and commercial customers in its

service area. WACMA has no reason to believe that this trend will not continue (WACMA Ex. 1, p. 4).

It is of vital concern to WACMA that it continues to have available a sufficient supply of water to meet the present and future needs of its customer base. Despite ongoing negotiations between WACMA and MATR to extend the 1983 Agreement which was scheduled to expire on October 20, 2003 (WACMA Ex. 1, pp. 8-13), WACMA and MATR were unable to reach an agreement on a new water supply agreement (WACMA Ex. 1, pp. 14-15).

As a result, on March 28, 2003 WACMA entered into the 2003 Agreement with PAWC (MATR Ex. 1; Lenze Ex. 9). On February 4, 2004, the 1983 Agreement was terminated and PAWC began to provide water to WACMA pursuant to the 2003 Agreement (MATR Ex. 15). PAWC has now replaced MATR as WACMA's primary water supplier (Tr. 142-143).

The MATR Petition requests that an Interim Emergency Order be entered "barring the sale of water pursuant to the Water Sales Agreement by and between the Pennsylvania-American Water Company and the Western Allegheny County Municipal Authority dated March 28, 2003 until a final Order is entered." If such an Order were entered, the consequences would be disastrous to WACMA and its customers. At the present time, WACMA does not have a written water supply agreement with MATR. If the Commission should grant the Petition, there is no assurance that WACMA would be able to negotiate a new water supply agreement with MATR that would adequately protect the interests of its customers.

The 2003 Agreement with PAWC provides for a rate of \$1.90/thousand gallons, subject to an annual escalation factor based on the annual increase in the Consumer Price Index for all urban consumers (WACMA Ex. 1, p. 21). In addition, the 2003 Agreement requires PAWC to construct at its cost substantial interconnection facilities in order to serve WACMA's needs. At the time of the hearing on January 21, 2004, PAWC had made substantial progress in the construction of the new facilities, certain of which were completed with the balance being in various stages of completion (WACMA Ex. 1, p. 21; Morris Ex. 4).

Judge Gesoff found that WACMA is "currently receiving safe, reliable service from PAWC at a rate below what it had been paying MATR" (Int. Ord., p.9). WACMA's present ideal competitive situation, both in terms of rates and service, should be contrasted with the situation in the event the Commission should grant MATR's Petition. Even if WACMA was able to reach a satisfactory agreement with MATR, if WACMA were forced to resume purchasing water from MATR, at the very least, its costs would increase substantially. Specifically, if WACMA is required to purchase water from MATR, its costs would increase to \$2.51/thousand gallons, which was the rate MATR had been charging WACMA under the terms of the extended 1983 Agreement which rate became effective on December 15, 2003 (Tr. 174-176; Int. Ord p. 3). The alternative would be to purchase water from PAWC at its then current resale rate. At the time MATR filed its formal Complaint, PAWC's sale for resale rate was \$3.92/thousand gallons, which may have been subject to change as the result of PAWC's base rate case, which rates became effective in January, 2004 (Tr. 176-177).

In sum, it is certain that the granting of MATR's Petition would adversely affect WACMA and its customers, both in terms of service and economic effect, as well as PAWC and its customers. Judge Gesoff's conclusion that MATR failed to establish that the issuance of the interim order would not be injurious to the public interest is clearly supported by the record.

V. CONCLUSION AND REQUESTED RELIEF

Based on the foregoing, WACMA respectfully requests that the Commission:

1. Conclude that the Interim Emergency Order issued February 19, 2004 denying MATR's request for interim emergency relief is in accord with the evidence developed in the proceeding; and
2. Deny the Petition of The Municipal Authority of the Township of Robinson for an Interim Order prohibiting the sale of water from Pennsylvania-American Water Company to the Western Allegheny County Municipal Authority.

Respectfully submitted,

VUONO & GRAY, LLC

By: 

John A. Vuono, Esq.

Attorney for Western Allegheny
County Municipal Authority

VUONO & GRAY, LLC
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800

Due Date: February 26, 2004

/30525

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Brief of Intervenor Western Allegheny County Municipal Authority Addressing Interlocutory Review of Material Question on the following parties of record by e-mail (1 copy) and by first class mail, postage prepaid (2 copies):

The Honorable Larry Gesoff
Pennsylvania Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

Bohdan R. Pankiw, Esq.
Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

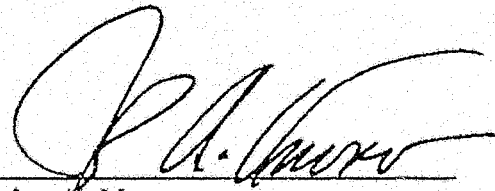
Albert J. Zangrilli, Jr., Esq.
Yukevich, Marchetti, Lickar & Zangrilli, P.C.
11 Stanwix Street
Suite 1024
Pittsburgh, PA 15222-1324

Thomas P. Gadsden, Esq.
Anthony C. DeCusatis, Esq.
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

John A. Pillar, Esq.
Washington Center Building
680 Washington Road
Suite B101
Pittsburgh, PA 15228

Michael J. Witheral, Esq.
Witherel & Kovacik
966 Perry Highway
Pittsburgh, PA 15237

Dated this 26th day of February, 2004.


John A. Vuono

730525

YUKEVICH, MARCHETTI, LIEKAR & ZANGRILLI, P.C.

ATTORNEYS AT LAW

11 STANWIX STREET

SUITE 1024

PITTSBURGH, PENNSYLVANIA 15222-1324

Writer's Direct Dial.
(412) 261-6780

TELEPHONE 412/261-8777

FAX 412/261-6789

February 27, 2004

ORIGINAL

DOCUMENT

RECEIVED

FEB 27 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Via Federal Express

Pennsylvania Public Utility Commission
Secretary's Bureau
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

ATTN: Docket Section

RE: The Municipal Authority of the Township of Robinson
vs. Pennsylvania American Water Company
Docket No.: C-20030092

DOCUMENT

Gentlemen:

Please find enclosed the original and nine (9) copies of the BRIEF OF
COMPLAINANT THE MUNICIPAL AUTHORITY OF THE TOWNSHIP OF
ROBINSON RE INTERIM EMERGENCY ORDER ENTERED FEBRUARY 19, 2004.

Copies of this letter and the Brief have been served in accordance with the
Certificate of Service.

Very truly yours,

Albert J. Zangrilli, Jr.

AJZ/ph

Enclosures

79

COMMONWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION

ORIGINAL
DOCKETED

MAR 03 2004

THE MUNICIPAL AUTHORITY OF THE)
TOWNSHIP OF ROBINSON,)

Complainant - Petitioner,)

vs.)

PENNSYLVANIA AMERICAN WATER)
COMPANY,)

Respondent.)

Docket No.: C-20030092

RECEIVED

FEB 27 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BRIEF OF COMPLAINANT THE MUNICIPAL AUTHORITY
OF THE TOWNSHIP OF ROBINSON RE INTERIM EMERGENCY
ORDER ENTERED FEBRUARY 19, 2004

AND NOW COMES The Municipal Authority of the Township of Robinson ("MATR") and by its undersigned attorneys files this Brief re Interim Emergency Order Entered by Administrative Law Judge Larry Gesoff on February 19, 2004 as follows:

While MATR respectfully disagrees with the decision of the Administrative Law Judge, MATR believes the Administrative Law Judge concluded that he cannot make a finding with respect to whether MATR's right to relief is clear because this case is not ripe for making such a finding. As stated by the Administrative Law Judge: "Whether PAWC applied Rider DRS properly is the ultimate issue before the Commission. The case on the merits is in the briefing state. At this point MATR's right to relief is not clear." Interim Emergency Order at p. 2.

Accordingly, MATR requests the Commission to leave the Administrative Law Judge's ruling undisturbed until the Judge makes a final ruling at the conclusion of the

DOCUMENT

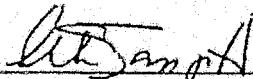
briefing stage, but without prejudice to MATR to request the Commission to review the Interim Emergency Order at that time. In the event the Administrative Law Judge has ruled in favor of Pennsylvania-American Water Company, MATR's Petition for an Interim Emergency Order will be moot. In the event the Administrative Law Judge has ruled in favor of MATR, the Commission will have the benefit of the Administrative Law Judge's Ruling and Opinion with which to review and evaluate his decision with respect to the Petition for an Interim Emergency Order.

This will not be a lengthy process. Main briefs are due March 8 and reply briefs are due April 2, 2004. Administrative Law Judge Gesoff has indicated to counsel that he will proceed with dispatch in rendering his decision.

In the alternative to the foregoing, MATR relies on its highly detailed Complaint and Petition for Interim Emergency Relief and the entire record created in this proceeding in urging the Commission to grant the relief it requests because of PAWC's predatory use of Tariff Rider DRS in a fashion completely contrary to the intent of the Commission.

Respectfully submitted,

YUKEVICH, MARCHETTI, LIEKAR &
ZANGRILLI, P.C.

By: 
Albert J. Zangrilli, Jr.
Pa. I.D. # 15929

Attorneys for The Municipal Authority
of the Township of Robinson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached BRIEF OF
COMPLAINANT THE MUNICIPAL AUTHORITY OF THE TOWNSHIP OF
ROBINSON RE INTERIM EMERGENCY ORDER ENTERED FEBRUARY 19,
2004 has been served on the following by e-mail and first class mail, postage prepaid,
except as otherwise noted:

HONORABLE LARRY GESOFF
(lgesoff@state.pa.us)
Administrative Law Judge
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

HONORABLE ROBERT A. CHRISTIANSON
Chief Administrative Law Judge
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17105
(via Federal Express)

THOMAS P. GADSDEN, ESQ.
(tgadsden@morganlewis.com)
ANTHONY C. DECUSATIS, ESQ.
(adecusatis@morganlewis.com)
Morgan Lewis
1701 Market Street
Philadelphia, PA 19103-2921

Attorneys for Pennsylvania American Water Company

SUSAN SIMMS MARSH, ESQ.
(smarsh@pawc.com)
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

(rights reserved)

MICHAEL J. WITHEREL, ESQ.
(wk-law@rwvems.org)
Witherel & Kovacil
966 Perry Highway
Pittsburgh, PA 15237-2107

Attorneys for Pennsylvania Municipal Authorities Association, Amicus Curiae

JOHN A. VUONO, ESQ.
(juono@vuonogray.com)
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Attorneys for Western Allegheny County Municipal Authority, Intervenor

BOHDAN R. PANKIW, ESQ.
Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

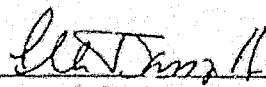
(via first class mail only)

RECEIVED

FEB 27 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DATE: February 27, 2004


ALBERT J. ZANGRILLI, JR.

OALJ Hearing Report

Please Check Those Blocks Which Apply

Docket No.:	C-20030092		YES	NO
Case Name:	The Municipal Authority of the Township of Robinsor v. Pennsylvania -American Water Company	Prehearing Held:	<input type="checkbox"/>	<input type="checkbox"/>
Location:	Pittsburgh	Hearing Held:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Date:	February 17, 2004	Testimony Taken:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
ALJ:	Larry Gesoff	Transcript Due:	<input type="checkbox"/>	<input type="checkbox"/>
Reporting Firm:	Commonwealth Reporting	Hearing Concluded:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		Further Hearing Needed:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		Estimated Add'l Days:		
		RECORD CLOSED:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		DATE:	April 2, 2004	
		Briefs to be Filed:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		DATE:	3/15 + 4/2/04	
		Bench Decision:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		REMARKS:		

DOCUMENT
FOLDER

RECEIVED

PA PUBLIC UTILITIES COMMISSION
PLEASE PRINT CLEARLY; Incomplete Information may result in delay of processing.

Name and Telephone Number	Address	Who are you representing?
Albert J. Zangrillo, Jr.	11 Starbuck St. Suite 1024 <small>City: Pittsburgh State: PA Zip: 15222</small>	MATR / by Telephone
Telephone:	E-mail Address:	Fax Number:
John A. Pillar	680 Washington Rd Suite 810i <small>City: Pittsburgh State: PA Zip: 15228</small>	MATR / by Telephone
Telephone:	E-mail Address:	Fax Number:
Thomas P. Gadsden	1701 Market St <small>City: Philadelphia State: PA Zip: 19103</small>	PA American / by Telephone
Telephone:	E-mail Address:	Fax Number:

Check this box if additional parties or attendees appear on back of form

Richard A. Miller

Reporter's Signature

Note: Completion of this form does not constitute an entry of appearance, see 52 Pa. Code §§1.24 and 1.25.

Witherel & Kovacik
Attorneys at Law

966 Perry Highway • Pittsburgh, Pa. 15237
412 / 366-6629 • 412 / 366-6333 • FAX 366-3329

ORIGINAL

March 5, 2004

VIA FEDERAL EXPRESS

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

DOCKETED
MAR 12 2004

IN RE: The Municipal Authority of the Township of Robinson
v. Pennsylvania-American Water Company
Docket No. C-20030092

Dear Mr. McNulty:

Enclosed please find an original and nine (9) copies of the Post-Hearing Amicus Brief that is to be filed on behalf of the Pennsylvania Municipal Authorities Association in reference to the above-captioned matter.

We are also e-mailing one (1) copy and mailing (2) copies of the Brief to all parties of record as indicated on the attached Certificate of Service.

Thank you for your attention to this matter. Please contact me if you have any questions or concerns regarding the enclosed.

Sincerely yours,


Michael J. Witherel

**DOCUMENT
FOLDER**

MJW/ark
Enclosures
cc: Honorable Judge Gesoff
All Parties of Record

RECEIVED

MAR 05 2004

PA PUBLIC UTILITY COMMISSION
REGISTRARY'S OFFICE

with offices at
21 West Market Street • Blairsville, Pa. 15717 • 724 / 459-0500
U.S. Route 422 • Elderton, Pa. 15736 • 724 / 354-5110

64

ORIGINAL

RECEIVED

MAR 05 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE MUNICIPAL AUTHORITY OF THE)
TOWNSHIP OF ROBINSON,)

v.)

PENNSYLVANIA-AMERICAN WATER)
COMPANY,)

Docket No. C-20030092

POST-HEARING AMICUS BRIEF OF
PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION

AND NOW, comes the Pennsylvania Municipal Authorities Association (PMAA) by and through its attorneys, Michael J. Witherel, Esq., and Witherel & Kovacik, and presents the instant Post-Hearing Amicus Brief for the Commission's consideration, and in support thereof avers as follows:

SUMMARY OF THE ARGUMENT

After a hearing in this case, and the admission of numerous exhibits, the PMAA's position has not changed that this case is about the continued validity of the Filed Rate Doctrine, which is the keystone of the regulation of public utilities. Attempts to circumvent the provisions of that Doctrine is, necessarily, a matter of importance to utility customers throughout the Commonwealth. The hearing testimony and evidence presented to the Commission establishes beyond cavil that PAWC is engaged in a transparent attempt to bypass the applicable tariff rate. Every piece of evidence from the 1994 Commission action which resulted in

the approval of "Rider DRS" for PAWC shows that the rider is a shield granted to PAWC to fend off attempts by other suppliers seeking to lure away PAWC's existing customers. It was never intended as, and is not written to be, a sword with which PAWC may engage in the predatory practice of undercutting another supplier for the purpose of gaining either a new customer, or new service from an existing customer. Thus, neither the express wording of the exception nor the purpose behind that exception have any application in this case. The Commission need look no further than the repeated argument and sworn testimony offered by PAWC representatives during the 1994 proceeding which establishes that the rider is not to be used as it is in this case as an excuse for PAWC to undercut MATR's established relations with WACMA.

Further, permitting offensive use of the rider in this case would be myopic public utility policy. All water suppliers, and in particular all municipal authorities, have an interest in the evenhanded application of rules and regulations by the PUC. Hence, whether the proper remedy in this case arises under §1303, 1304 or §528, the contract entered into cannot be permitted at the rate quoted by PAWC. While the short-term results may be that one customer, WACMA, has (at least initially) very favorable rates (please see the escalation clause in Rider ADR), there is an equal short-term disadvantage to MATR and its rate-payers, who have now lost a long-standing customer under an inherently unfair rate practice. In the long term, PAWC will necessarily have to increase its rates to WACMA and/or its rate-payers and, should PAWC continue

to undercut other water suppliers, true competition, involving approved and appropriate tariff rates, will disappear entirely. Hence, the genius of the Filed Rate Doctrine, which limits utilities to their filed and approved tariff rates, thereby assuring above-board treatment of all customers and rate payers.

Finally, an entity such as PAWC, which has publicly touted its "rigorous pursuit of growth by consolidation" should not be permitted, at the expense of municipal authorities, to flout the rules in pursuit of market dominance. Competition among water suppliers is governed by rules which are useful and beneficial to Commonwealth and its citizens only if they are followed.

RELEVANT FACTS

This is a proceeding initiated by the Municipal Authority of the Township of Robinson (MATR), seeking a declaratory order on the appropriateness of the Pennsylvania American Water Company's (PAWC) use of an exception to its normal tariff rates (Rider DRS) to compete for business with a customer who presently purchases water from both PAWC and Complainant. Western Allegheny County Municipal Authority (WACMA) is a distribution-only authority which presently purchases water from both MATR and from PAWC. WACMA and MATR were engaged in negotiations for a new contract during late 2002, but WACMA entered into a contract with PAWC for provision of all of its water needs at a rate which PAWC was able to offer only because it applied Rider DRS, which is applicable when an existing customer of PAWC is intending to switch to a competitor, thereby depriving PAWC

of an existing customer. The rider reads, in relevant part, as follows:

This rider is available to a customer that:

- (1) purchases water from the Company for resale;
- (2) enters into a Service Agreement for a term of not less than 10 years;
- (3) during the original and any renewal terms of the Service Agreement, agrees to maintain a daily load factor of not less than 0.75; and
- (4) has a viable competitive alternative to service from the Company and intends to select the alternative to the detriment of the Company and its other customers.

There is no dispute that the second and third parts of the rider are met in this case. However, read together, parts (1) and (4) presuppose an existing relationship between PAWC and the customer which is being threatened by a competitor, i.e., that PAWC's ability to maintain the existing relationship is threatened by a competitor. Here, no such relationship exists.

The direct testimony of Robert L. Robowski in the 1994 Commission proceeding which led to the approval of Rider DRS establishes that the rider is intended for high-load customers who have a competitive alternative to service from PAWC. He lists three examples: "e.g., the development of their own supply sources, the relocation of facilities, the installation of recycling equipment" (MATR Exhibit 5, Tab 1 at 5). Tellingly, Mr. Robowski

did not indicate in any fashion that the rider is intended for use where another water supplier is competing for business which PAWC does not then have. Instead, he spoke only of situations where the customer engages in self-help by finding a supply of water that does not come from a public utility. If the rider had been meant to include situations where PAWC was seeking to add a new customer, or to expand the service offered to an existing customer, by underbidding another water supplying entity, Mr. Robowski would certainly have so indicated, and in all likelihood the rider would have not have been approved. Instead, Robowski's testimony is all that the Commission needs to consider, as it is binding on PAWC, having come from PAWC's representative, and leads to the inescapable conclusion that the rider was intended to: (1) entice high load factor customers who have their own sources of water to instead purchase from PAWC; and (2) prevent high load factor customers from leaving PAWC in favor of providing their own source of water. This testimony is certainly not an indication that PAWC intended the rider to apply where it is bidding on a new customer (or new business from an existing customer) in direct competition with a municipal authority which is bound by its own rate schedule. The "new customers" would be industrial customers who had, in the past, recycled or developed their own source of water, but who are lured by the low rate provided under the rider to abandon their previous means of acquiring water and purchase water from PAWC.

The record of the 1994 proceeding is replete with instances evidencing the understanding of all interested parties that the

rider was very limited in scope, and was not generally applicable to PAWC's ability to attract new business. Indeed, the focus of the rider on industrial customers who would turn to self-generation or recycling is the sole focus of PAWC's brief to the Commission. "First, at this juncture, the Company sees no valid reason to offer to negotiate a below-tariff rate with an **industrial customer** that does not have a viable competitive alternative to PAWC's water service." (Answer, Tab C at 103) (bold emphasis added, underline in original). PAWC placed express limitations on its request for the riders (MATR Hearing Exhibit 5-A, Tab 1). There is no mention that the rider would be used as a means to undercut the rates of other water suppliers, and for good reason. **The rider was never intended to apply where another water supplier was involved, and more particularly, where PAWC is seeking to replace the other supplier, and not the other way around.** The briefs of the consumer advocate and the trial staff also reflect that the focus of the riders which PAWC sought in 1994 was the retention of existing high-load customers which had viable alternatives and would leave for another supplier absent a lower rate offered by PAWC (MATR Hearing Exhibit 5-A, Tabs 3-5).

Thus, the record cannot be more clear that an existing customer must be considering an alternative to service from PAWC before the rider can be utilized. Even so, there is no indication in the record that the rider may be used to do more than to maintain the historic level of service provided to the customer in question.

One more evidentiary matter should be addressed. PAWC makes some effort to establish that it had been "losing" business to MATR prior to the negotiation of the current agreement with WACMA, and that this somehow permits PAWC to invoke the rider. Specifically, testimony was presented that a "loss of revenue" occurred when WACMA chose to purchase more water from MATR in 2001 and 2002 (Hearing Transcript at 75). This "loss" however, was quantified at \$58,000, or 1/10 of 1% of PAWC's income (HT at 78, 80). Thus, there is no true "loss" of a customer here, particularly since the contract which MATR and WACMA were negotiating provided for WACMA to retain the ability to purchase from other sources.

Also, a compelling case has been made that PAWC's actions have nothing to do with maintaining an existing customer simply from the efforts necessary to fulfill the challenged contract. PAWC does not have facilities in place to service WACMA under the challenged contract (HT at 83), and would need to add three pumping stations to do so (HT 116). Therefore, a review of any objective observer leads to the inescapable conclusion that there is no basis for finding that an exiting PAWC customer was considering another source for its water needs, making the application of Rider DRS entirely inappropriate in this case.

Finally, the mischief inherent in the active misuse of a limited exception to the normal rates, like the rider in question, is plainly shown here. PAWC's operating "loss" due to WACMA's choice of provider over two years was a minuscule part of its income. Yet, in order to cure this alleged shortfall, PAWC is

proposing that it be permitted to wrest from MATR a customer which has historically purchased 30% of MATR's water on a yearly basis. The absurdity of this position cannot be lost on the Commission, and cannot, as a matter of public policy, be permitted to occur.

COMMISSION AUTHORITY

PAWC suggests that the Commission lacks the authority to rule in this matter. The Commission's mission and authority are discussed at length in Aileen Reid GTE North, Inc. and the Bell Telephone Company of Pennsylvania, May 25, 1993, 1993 WL 855847, at 4-5 (Pa.P.U.C.). The Commission noted that it is "a creature of statute and possesses only those powers specifically enumerated in the Public Utility Code, 66 Pa. C.S. §§ 101, et seq. City of Philadelphia v. Philadelphia Electric Company, 504 Pa. 312, 473 A.2d 997 (1984)." The question was whether the Commission could force a utility to serve in an area other than the one certified by the Commission pursuant to 66 Pa. C.S. §102. The Commission rejected the contention that it could act only when invited to do so since "the Legislature contemplated that the Commission does not have to wait for a party to file a complaint or a utility to file an application in order to undertake appropriate action." In this respect, the Commission cited to Section 1505 of the Code, 66 Pa. C.S. § 1505, which provides for the Commission to act on its own initiative:

"Whenever the Commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory,

or otherwise in violation of this part, the Commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public."

The Commission continued, "the courts have rejected the argument that public utilities have duties only to existing patrons or employees, because to do so renders the word "public" in these sections needless surplusage. Postal Telegraph-Cable Co. v. Pa. P.U.C., 154 Pa. Superior Ct. 340, 35 A.2d 535 (1944); West Penn. Pys. Co. v. Pa. P.U.C., 142 Pa. Superior Ct. 140, 15 A.2d 539 (1940). Thus, one must conclude the Legislature specifically contemplated that the Commission could order extensions of service, when appropriate to serve the 'accommodation, convenience and safety of the public', 66 Pa. §§1501, 1505, and not a particular customer base."

While it is true that the situation presented in Aileen Reid, the proper service area for an electrical utility, is not the same issue presented here, the principles underlying the discussion that matter are equally applicable here:

The purpose of public utility regulation is to ensure the public receives adequate service at reasonable rates. Metropolitan Edison Co. v. Public Service Commission, 127 Pa. Superior Ct. 11, 191 A. 678 (1937). The overriding concern is the public interest. D. F. Blast, Inc. v. Pa. P.U.C., 185 Pa. Superior Ct. 487, 138 A.2d 270 (1958), reversed on other grounds, 397 Pa. 246, 154 A.2d 505 (1959); Sayre v. Pa. P.U.C., 161 Pa. Superior Ct. 182, 54 A.2d 95 (1947); Colombo v. Pa. P.U.C., 159 Pa.

Superior Ct. 483, 48 A.2d 59 (1946). The operation of a public utility is impressed with a public interest and subject to regulation pursuant to the police power. Rocoff v. Buncher Co., 395 Pa. 477, 151 A.2d 83 (1945). The Legislature created the Commission to carry out this necessary regulation and protect the public interest. Metropolitan Edison Co., supra, n.12.

This task requires flexibility, since the public interest is a dynamic concept, which will not be adequately protected unless the Commission has the authority to meet changing needs. The very concept of regulation implies ongoing and continuous supervision by the regulatory agency of those regulated. The Legislature recognized and provided for the need for flexibility in the Code. The Commission must grant certificates of public convenience, when it finds such action to be in the public interest. 66 Pa. C.S. §1103. To such certificates, the Commission "may impose such condition as it may deem to be just and reasonable." Id.

The Commission should, therefore, reach the underlying issues in this matter, regardless of its decision on whether those questions have been presented in the most appropriate fashion.

And, in any event, this case, properly viewed, is a very simple matter of interpreting the proper filed tariff rate to be applied. This is an issue which is singularly within the Commission's expertise. In National Properties, Inc. v. Citizens Utilities Water Company of Pennsylvania, 1998 WL 34067537 (Pa.PUC February 28, 1998), the Commission was faced with the question of whether a water utility properly classified customers for purposes of applying the appropriate tariff rate. The question presented was whether a "master metered apartment building is more like a commercial customer than a residential customer." The issue before the Commission was whether "Citizens' classification of its two apartment complexes as residential service customers instead of

commercial service customers, violates Pennsylvania Public Utility Code provisions barring unreasonable discrimination in rates (66 Pa.C.S. §1304) and service (66 Pa.C.S. §1502)." The Commission found in that case that the classification was reasonable.

Here, the same type of issue is presented: i.e., the propriety of including a specific customer within a tariff category. Thus, the issues here are whether PAWC is engaging in unreasonable discrimination in rates or service. Unlike the case in National Properties, however, it is clear that the tariff rate applied in this case does not include customers like WACMA. Accordingly, it is well within the Commission's authority to rule on the propriety of PAWC's use of the rider in this instance.

Indeed, the Commission has its choice in this case of statutory provisions under which PAWC's actions are improper. It may conclude either that the contract violates the Section 1303 prohibition against a utility charging any rate other than that specified in its tariff, or, as noted above, the Section 1304 prohibition against establishing unreasonable differences between classes of service. 66 Pa.C.S. §§ 1303, 1304. Section 1303 "has been interpreted to mean that public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility. Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission, 663 A.2d 281, 284 (Pa.Cmwlth.1995)." Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Com'n, 808 A.2d 1044, 1050 (Pa.Cmwlth.2002).

In Philadelphia Suburban, PAWC entered into an agreement whereby it would purchase an existing municipal authority and then pay for it by giving the municipality free fire hydrant service. The court found that this arrangement clearly violated Section 1303 of the Public Utility Code:

Free public utility service has been examined by our appellate courts and found to be anathema to a system of regulation and publication of a utility's tariffs. In American Aniline Products, Inc. v. City of Lock Haven, 288 Pa. 420, 425, 135 A. 726, 727 (1927), our Supreme Court determined that a city's agreement to provide free water service in order to induce an industry to locate within its boundaries 'is discrimination against other users and void against public policy,' reasoning that '[t]he discriminatory engagements of both [the municipal utility and the customer] are prohibited as matters of public policy for reasons so frequently stated we need not repeat them here.'

Id. The court found that neither the contract between the municipality nor the fact that the free service was actually payment for an asset justified deviation from the applicable tariff rate. Id.

The court also addressed an argument, similar to that made by PAWC here, that the Commission may not interfere with the internal management of a utility. The court held, however, that the issue was not a question of management, but a question of the applicable rates "over which the PUC has ongoing regulatory authority and responsibility." Id., footnote 8. Again, the same analysis applies here. PAWC may not avoid its applicable tariff rate through an artful reading of an inapplicable rider to its tariff rates.

In fact, the language used by the court in rejecting PAWC's actions in the Philadelphia Suburban case is equally applicable and instructive in this case:

We return to the language of Section 1303 of the Public Utility Code, which prohibits a public utility from straying from its approved tariff "directly or indirectly, by any device whatsoever, or in anywise...." 66 Pa.C.S. § 1303 (emphasis added). Coatesville will pay the public utility for fire hydrant service and then the public utility, Pennsylvania-American, will pay, dollar for dollar, an equal amount into the Coatesville Economic Development Fund. This is free service. Using shareholder funds to make the "contribution," establishing a tracking mechanism and separating these contributions from Pennsylvania-American's rate base do not provide a safe harbor from Section 1303's mandate. They merely do indirectly what the Free Service Covenant does directly: effect a tariff deviation.

* * *

Judicial intolerance for deviation from regulated rates has continued unabated [since 1887].

* * *

Pennsylvania-American and the PUC argue that the PUC has the authority to allow tariff deviation where it is in the public interest. Administrative agencies do not have the authority to order a regulated company to change lawful conduct on the theory that it is in the best interest of their customers. Aetna Casualty and Surety Insurance Co. v. Insurance Department, 536 Pa. 105, 638 A.2d 194 (1994). The corollary is equally true; an agency cannot waive a mandate of statute because it is in the public interest. In Pennsylvania Electric Co., 663 A.2d at 284-285, we specifically held that the PUC lacks the authority to waive a tariff eligibility requirement for the stated reason that it would advance the "public interest." Indeed, a statutory command defines the public interest, and an administrative agency established to enforce that statutory command simply lacks the authority to issue countermand orders.

Pennsylvania-American contends that if we do not affirm the PUC, we sound the death knell for charitable donations by utilities. It argues from a false premise. Pennsylvania-American's payments to the Coatesville Economic Development Fund are not donations but, rather, contractual obligations. We sound the death knell only for pretextual "donations" that are, in actuality, rebates.

Id., at 1054-57. It is, perhaps, not surprising that PAWC is again attempting to be creative in its means of "rigorously" seeking expansion. However, as in Philadelphia Suburban, PAWC may not avoid a published tariff in any way, including through an overly-broad reading of a rider to the tariff rates.

Of course, if PAWC is interested in only a proper application of the rider, then it could protect the existing business it has from WACMA by applying the rider to WACMA, but only to the extent of WACMA's traditional use of PAWC as a supplier. This is appropriate since PAWC cannot trigger the rider unless an existing customer is going to decrease its use of water from PAWC, or leave it entirely as a customer, in favor of another source of supply. MATR was not attempting to obtain PAWC's share of WACMA's business. However, if, under the rider, PAWC is convinced that WACMA has shown it was considering obtaining all of its water from MATR, then PAWC may be permitted under the rider to offer WACMA the water load it has traditionally supplied at a rate set pursuant to Rider ADS. In fact, since PAWC has taken the position that the rider is in effect, the Commission should reform the contract to provide that only the load traditionally serviced by PAWC is available under the contract, and that is at the below-tariff rate. "Section 508 does not establish precise guidelines for the exercise of the PUC's

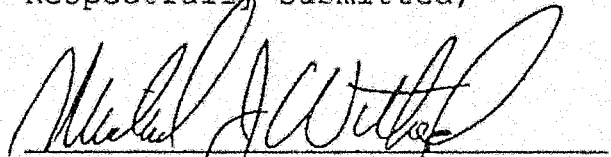
contract reformation authority, but it does give the PUC broad and flexible range to find that a contract's terms are 'unjust, unreasonable, inequitable, or otherwise contrary or adverse to public interest....' 66 Pa.C.S. § 508." Shenango Tp. Bd. of Sup'rs v. Pennsylvania Public Utility Com'n, 686 A.2d 910, 913-14 (Pa.Cmwlth.Ct. 1996). It would certainly be within the "broad and flexible range" of the Commission's authority to give WACMA the benefit of the rider provision with respect to only that service which PAWC can legitimately "protect" under the rider, and to void the contract in all other respects, permitting the normal competition between water utilities.

CONCLUSION

Important issues of public utility law and policy are before the Commission. What PAWC seeks to do in this instance is to avoid entirely its applicable tariff rates and to engage in an unauthorized form of competition with other water suppliers. The rider was approved by the PUC upon testimony and argument that made no mention of a predatory use of the rider to obtain customers or load from other entities. Rather, the rider was granted after repeated reference to "industrial" customers who were engaging in, or were likely to engage in, self-help through supplying their own water. Having never mentioned before the PUC in 1994 that the rider could be used offensively against competing suppliers, PAWC (which has a history of creative attempts to avoid its published tariffs) cannot now credibly assert that the rider may properly be used as the basis for the contract in this case. The Commission

may level the playing field here by issuing an order preventing use of the rider, which the PMAA strongly urges, as well as any other relief which the Commission may deem appropriate.

Respectfully submitted,



Michael J. Witherel, Esq.
Attorney for the
Pennsylvania Municipal
Authorities Association

PA I.D. 27726
Witherel & Kovacik
966 Perry Highway
Pittsburgh, PA 15237

(412) 366-6629

CERTIFICATE OF SERVICE

I hereby certify this 5th day of March, 2004, that a true and correct copy of the within Post-Hearing Amicus Brief of the Pennsylvania Municipal Authorities Association was served upon the following via electronic mail and first-class United States Mail, postage pre-paid:

The Honorable Larry Gesoff
Pennsylvania Public Utilities Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
lgesoff@state.pa.us

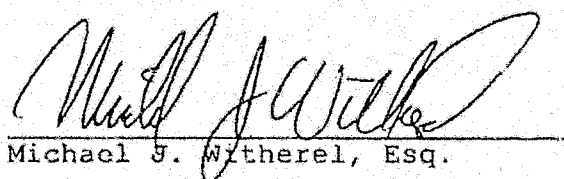
Albert J. Zangrilli, Jr., Esq.
Yukevich, Marchetti, Liekar & Zangrilli, P.C.
11 Stanwix Street, Suite 1024
Pittsburgh, PA 15222
azangrilli@YMLZ.com

John A. Vuono, Esq.
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219
jvuono@vuonogray.com

Thomas P. Gadsden, Esq.
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103
tgadsden@morganlewis.com

Bohdan R. Pankiw, Chief Counsel
Pennsylvania Public Utilities Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105
bpankiw@state.pa.us

John A. Pillar, Esq.
Washington Center Building, Suite B101
680 Washington Road
Pittsburgh, PA 15228
pillarlaw@stargate.net


Michael J. Witherel, Esq.

RECEIVED
MAR 05 2004
PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

ORIGINAL

Law Offices

VUONO & GRAY, LLC

John A. Vuono
William A. Gray
Mark T. Vuono*
Dennis J. Kuaturias
Christine M. Dolfi
Louise R. Schrage
Susan C. Indrisano+
*Also Admitted in Florida
+Also Admitted in Maryland

2310 Grant Building

Pittsburgh, PA 15219-2383

March 8, 2004

Richard R. Wilson
of Counsel

Telephone
412-471-1800

Facsimile
412-471-4477

Re: The Municipal Authority of the Township of Robinson ("MATR")
v. Pennsylvania-American Water Company ("PAWC")
(Western Allegheny County Municipal Authority ("WACMA")-Intervenor)
Pennsylvania Public Utility Commission
Docket No. C-20030092
Our File 4974

Mr. James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

MAILED WITH U. S. POSTAL SERVICE
CERTIFICATE OF MAILING
FORM 3817

DOCUMENT
FOLDER

Dear Mr. McNulty:

We enclose for filing with the Commission the signed original and nine copies of the Main Brief in behalf of Western Allegheny County Municipal Authority, Intervenor.

We are simultaneously sending by electronic mail one copy and by first class mail two copies of the Brief to the parties shown on the Certificate of Service attached to the Brief.

Will you please acknowledge receipt and filing of the enclosed on the copy of this letter of transmittal and return it to me in the envelope provided for that purpose.

Sincerely yours,

VUONO & GRAY, LLC

John A. Vuono

RJP

RECEIVED

MAR 08 2004

CW/30689

Enclosures

cc: Honorable Larry Gesoff
Parties of Record

ORIGINAL

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

144

ORIGINAL

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE MUNICIPAL AUTHORITY OF)
THE TOWNSHIP OF ROBINSON)

Complainant-Petitioner,)

v.)

Docket No. C-20030092

PENNSYLVANIA-AMERICAN)
WATER COMPANY)

Respondent.)

RECEIVED

MAR 08 2004

MAIN BRIEF OF

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

WESTERN ALLEGHENY COUNTY MUNICIPAL AUTHORITY

INTERVENOR

DOCUMENT
FOLDER

DOCKETED
MAR 11 2004

JOHN A. VUONO, ESQ.
SUSAN C. INDRISANO, ESQ.
Attorneys for
WESTERN ALLEGHENY COUNTY
MUNICIPAL AUTHORITY
Intervenor

VUONO & GRAY, LLC
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800

Due Date: March 8, 2004

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE.....	1
II. STATEMENT OF THE QUESTION INVOLVED	4
III. ABSTRACT OF TESTIMONY	5
A. TESTIMONY RELATING TO MATR	5
B. TESTIMONY RELATING TO PAWC	12
C. TESTIMONY RELATING TO WACMA	17
IV. SUMMARY OF ARGUMENT	26
V. ARGUMENT	26
A. MATR HAS FAILED TO MEET ITS BURDEN OF PROVING THAT PAWC'S INTERPRETATION AND IMPLEMENTATION OF THE RIDER DRS TO THE 2003 AGREEMENT IS ERRONEOUS	27
1. PAWC's Tariff Rider DRS Expressly Permits PAWC To Enter Into Alternative Water Arrangements Under Certain Circumstances In Order To Retain Or Attract Sale For Resale Customers.....	27
2. The 2003 Agreement Meets The Criteria Required By Rider DRS	28
B. THE COLLATERAL ARGUMENTS ADVANCED BY MATR ARE NOT PERTINENT TO THE SOLE ISSUE INVOLVED IN THIS PROCEEDING AND, IN ANY EVENT, ARE NOT CREDIBLE.....	31

TABLE OF CONTENTS

	<u>Page</u>
1. WACMA Prematurely Terminated Negotiations With MATR For A New Water Supply Agreement.....	31
2. MATR Made Capital Investments In Reliance On The Continuation Of Its Contract With WACMA ..	34
3. MATR Will Be Required To Increase Its Rates By 30% If It Loses The WACMA Business.....	36
C. THE GRANTING OF THE RELIEF REQUESTED BY MATR WILL ADVERSELY AFFECT WACMA AND ITS CUSTOMER	37
VI. CONCLUSION AND REQUESTED RELIEF	40

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THE MUNICIPAL AUTHORITY OF)
THE TOWNSHIP OF ROBINSON)

Complainant-Petitioner,)

v.)

Docket No. C-20030092

PENNSYLVANIA-AMERICAN)
WATER COMPANY)

Respondent.)
)

**MAIN BRIEF OF
WESTERN ALLEGHENY COUNTY MUNICIPAL AUTHORITY
INTERVENOR**

I. STATEMENT OF THE CASE

This proceeding was initiated on April 16, 2003 by the filing of a Formal Complaint and Petition for Declaratory Order ("Complaint") by The Municipal Authority of the Township of Robinson ("MATR") against Pennsylvania-American Water Company ("PAWC").

The Complaint requests that the Commission issue an Order (a) voiding the March 28, 2003 Water Sales Agreement ("2003 Agreement") between PAWC and the Western

Allegheny County Municipal Authority ("WACMA"); (b) declaring that any agreement between PAWC and WACMA must utilize the Group and Resale Rate from PAWC's tariff; and (c) prohibiting PAWC from commencing service to WACMA pursuant to the 2003 Agreement or from constructing any facilities with respect to such service.

In its Answer to MATR's Complaint, PAWC requested that the Complaint be dismissed and the request for declaratory order be denied. Under "New Matter", PAWC affirmatively alleged that (a) it has the statutory obligation to serve WACMA; (b) WACMA satisfies the Demand Based Resale Service ("Rider DRS") availability requirements; (c) the rate provided for in the 2003 Agreement is substantially greater than the "minimum rate" required by Rider DRS; and (d) the Commission lacks the statutory authority to enjoin PAWC from constructing the necessary facilities to serve WACMA.

On July 12, 2003 WACMA filed a Petition to Intervene in the proceeding in support of PAWC. In its Petition, WACMA stated, *inter alia*, that its existing Agreement ("1983 Agreement") was scheduled to expire on October 20, 2003; that despite WACMA's good faith negotiations it has not been able to negotiate an extension of the 1983 Agreement with MATR; that WACMA has entered into the 2003 Agreement with PAWC to provide water for WACMA beginning on October 21, 2003; and that the granting of the relief sought in the Complaint will adversely affect WACMA and its customers since WACMA would be unable economically to provide water service for the customers in its service area.

The Complaint proceeding was assigned to Administrative Law Judge Larry Gesoff. A telephonic Prehearing Conference was held on July 18, 2003. During the

Prehearing Conference the attorney for MATR informed Judge Gesoff that MATR would not be pursuing the injunctive relief sought in the Complaint. On the same day, Judge Gesoff issued his Prehearing Order which, among other actions, permitted WACMA to intervene in the proceeding as a party.

In accordance with the procedural schedule set forth in Judge Gesoff's Prehearing Order, the parties engaged in extensive discovery. Subsequently, the direct testimony of the parties was submitted in written form.

The proceeding was assigned for oral hearing in Pittsburgh on January 21, 2004. The hearing was held before Judge Fred R. Nene, who substituted for Judge Gesoff. At the hearing, all of the witnesses for MATR, PAWC and WACMA who had submitted written direct testimony verified their testimony and were available for cross-examination.¹

On February 12, 2004, MATR filed a Petition for Interim Order requesting that the Commission prohibit the sale of water by PAWC to WACMA under the 2003 Agreement until the Commission entered a final Order in this proceeding.² On February 13, 2004 PAWC filed an Answer to MATR's Petition. A telephonic hearing on the Petition was held before Judge Gesoff on February 17, 2004 pursuant to §3.9 (52 Pa. Code §3.9) of the

¹ At the hearing, the Complaint and Answer were made a part of the record (Tr. 10).

² The Petition for Interim Emergency Order apparently was precipitated by the fact that on February 4, 2004 PAWC advised Judge Gesoff and the parties to the proceeding that the Department of Environmental Protection ("DEP") had issued the necessary water supply permits and that PAWC was commencing service under the 2003 Agreement (MATR Ex. 15).

Commission Procedural Rules. At the hearing, WACMA joined in the Answer filed by PAWC. (Tr. 164-165).³

On February 19, 2004 Judge Gesoff served his Interim Emergency Order denying MATR's Petition and his Certification of a Material Question to the Commission.

In accordance with the Prehearing Order, as amended by Judge Gesoff's modification of the briefing schedule, WACMA submits its Main Brief.

II. STATEMENT OF THE QUESTION INVOLVED

With very limited exceptions, the pleadings and testimony, including exhibits, proffered by MATR concentrate on various collateral issues, most of which are equitable in nature and none of which are pertinent to the essential issues involved in this proceeding. Specifically, MATR's evidence has emphasized (a) its negotiations with WACMA concerning a new water supply agreement to replace the 1983 Agreement and its characterization of those negotiations; (b) its claim that it had made substantial capital investments in order to serve WACMA and would be adversely affected as a consequence of the loss of the WACMA business; and (c) its contention that the loss of the WACMA business would require MATR to raise its rates by 30%. Assuming *arguendo* that these are valid arguments (which the record clearly shows they are not), they are clearly not relevant to the only issue before the Commission.

³ Citations preceded by "Tr." refer to pages of the transcript of testimony and by "Ex." to hearing exhibits. The inclusion of the name of a witness followed by a dash and a number within a citation denotes an exhibit within the referenced Hearing Exhibit.

The sole issue before the Commission in this proceeding is whether or not MATR, as the Complainant, has carried its burden of proving that PAWC's interpretation and implementation of Rider DRS as it applies to the 2003 Agreement is erroneous.

WACMA respectfully submits that the record abundantly supports the conclusion that MATR has failed to meet its burden of proof.

III. ABSTRACT OF TESTIMONY

A. TESTIMONY RELATING TO MATR

Testimony of Anthony T. Lenze.

1. Anthony T. Lenze has been employed as the Executive Director of MATR since November of 2000 and testified in that capacity on behalf of MATR. (MATR Ex. 1, p. 3).

2. As the Executive Director, Mr. Lenze administers existing contracts and is responsible for, among other things, negotiating contracts. (MATR Ex. 1, p. 3).

3. MATR is a municipal authority that produces and distributes water within its own municipality and supplies water to certain other municipal authorities pursuant to contracts. (Complaint, ¶¶ 1, 3). MATR serves approximately 3900 residential customers and 600 commercial customers. (MATR Ex. 1, p. 4).

4. Through February 4, 2004, MATR supplied municipal water in bulk to WACMA pursuant to a contract between MATR and WACMA dated October 20, 1983, as extended. (MATR Ex. 1, Lenze-1).

5. The 1983 Agreement requires that "MATR furnish water to [WACMA] in such quantities as [WACMA] shall require but not exceeding the gallons per month nor the time limitations as set herein. WACMA agrees to purchase a minimum of 85% of its total water needs in any given year from MATR." (MATR Ex. 1, Lenze-1).

6. The 1983 Agreement was scheduled to terminate on October 20, 2003. (MATR Ex. 1, Lenze-1).

7. Mr. Lenze stated that MATR and WACMA commenced negotiations with respect to an extension or renewal of the 1983 Agreement shortly after he began working at MATR in November of 2000 (MATR Ex. 1, p. 14) and those negotiations were ongoing until approximately mid-February of 2003 (MATR Ex. 1, p. 16).

8. A letter dated May 4, 1998 from Mr. Lenze's predecessor at MATR to Mr. Robert Owens, the Manager of WACMA, constitutes the first letter in MATR's files that sets forth the proposed terms and conditions with respect to a new agreement between MATR and WACMA. (MATR Ex. 1, Lenze-4). In that letter, MATR states that one of the items to be considered by the parties is the minimum percentage of water needs that MATR would supply. (MATR Ex. 1, pp. 15 - 16).

9. Mr. Lenze testified that MATR did not at any time demand that it supply WACMA with all of WACMA's water needs, or in excess of 85% of WACMA's total water needs. (MATR Ex. 1 p. 17); rather, he stated that MATR requested that it supply between 75 and 85 percent of WACMA's total water needs. (MATR Ex. 1 p. 17).

10. In a letter dated August 16, 2002 MATR advised WACMA that it was amenable to a 20 year term and agreed in principal to a 75% minimum purchase

requirement. (MATR Ex. 1, Lenze-5). MATR's agreement to these terms was contingent upon WACMA supplying information pertaining to its current and future average peak day water usage. (MATR Ex. 1, Lenze-5).

11. The "contingent upon" language was included because WACMA is a very fast-growing service area and MATR needed to know how much water 75% would represent over a 20 year period. (MATR Ex. 1, p. 19).

12. MATR was aware at all times that WACMA had other suppliers of water, namely PAWC, Moon Authority and the Findlay Township Water Authority. (MATR Ex. 1, p. 19).

13. MATR and WACMA met on December 19, 2002 ("December 2002 Meeting") to continue negotiations. MATR discussed extending the term of the agreement to 30 years and raising the minimum purchase requirement from 75% to 85%, but raising the minimum percentage was never an absolute categorical demand by MATR and MATR was aware that 85% was never acceptable to WACMA. (MATR Ex. 1, p. 21).

14. In a letter dated January 29, 2003, Mr. Morris, the Chairman of WACMA, advised MATR that it was not agreeable to the proposals made at the December 2002 Meeting, specifically the extension of the agreement to 30 years and the increase of WACMA's minimum purchase obligation from 75% to 85%. (MATR Ex. 1, Lenze-6).

15. In a letter to WACMA dated February 12, 2003, MATR stated that it believed the parties could reach an agreement with respect to the minimum purchase

amount and that "discussions regarding same will be far more productive at our next meeting." (MATR Ex. 1, Lenze-7).

16. Pursuant to Mr. Lenze's testimony, at the time the February 12, 2003 letter was written, MATR intended to accede to WACMA's request that MATR supply no more than 75% of WACMA's total water needs; however another meeting never took place. (MATR Ex. 1, p. 23).

17. In 1995 MATR spent approximately \$4 million to expand its Water Treatment Plant from 3 million gallons per day to 6 million gallons per day in order to better serve its customers, including WACMA. (MATR Ex. 1, p. 23). However, this \$4 million figure cited by Mr. Lenze also included the costs associated with installation of a waste water treatment system (Tr. 30-31).

18. MATR's increase in transmission capabilities was planned in order to accommodate WACMA's needs (MATR Ex. 1, pp. 24-25); however, expansion of MATR's treatment and supply capacity was also an explicit condition of a 1992 water contract between MATR and the Findlay Township Water Authority (Tr. 34-35).

19. MATR received a grant of \$485,000 from the United States Environmental Protection Agency to aid in the cost of increasing the size of MATR's main water transmission lines which increase is due, in part, to the need to continue to serve WACMA. MATR has also expended additional funds of \$60,000 plus engineering costs in order to obtain the funding for the line increase. (MATR Ex. 1, p. 23-24).

20. Construction has not yet begun on the expansion of MATR's main water transmission line (Tr. 35). According to MATR's water production records for 2003, MATR's current production capacity is 4.3 million gallons per day (Tr. 14).

21. According to MATR's projections, if WACMA were not a customer, expansion of the "main water transmission line" would not be needed until 2008. (Tr. 48-49)

22. In the latter portion of March of 2003 MATR became aware that WACMA had entered into a water supply agreement with PAWC which agreement was to commence following expiration of the 1983 Agreement. (MATR Ex. 1, p. 26).

23. A letter dated April 11, 2003 from Mr. Lenze to the Chairman of WACMA and Deborah P. Lippert of PAWC advised that MATR had made a written request for a copy of the 2003 Agreement pursuant to the Pennsylvania Right to Know Act. (MATR Ex. 1, Lenze-8).

24. Pursuant to that request, a copy of the 2003 Agreement was received by MATR on May 14, 2003. (MATR Ex. 1, p. 28; Lenze-9).

25. Mr. Lenze testified that the loss of WACMA as a customer will cause MATR to be required to raise the rates of its remaining customers by approximately 30%. (MATR Ex. 1 p. 25-26). This figure is based on calculations made by MATR's consulting engineer. (Tr. 39).

Testimony of Raymond H. Antonelli

26. Raymond H. Antonelli, Sr., P.E., the President of NIRA Consulting Engineers, Inc. ("NIRA"), testified on behalf of MATR. Mr. Antonelli testified that he

has been the consulting engineer for MATR for 21 years and during that time NIRA has designed and overseen construction of approximately 75% of MATR's current water distribution facility and approximately 70% of MATR's current water treatment facility. (MATR Ex. 2 p. 5).

27. One of Mr. Antonelli's responsibilities as consulting engineer for MATR is to prepare Annual Reports and Operating Budgets, including calculations for precise rate increases when necessary. (MATR Ex. 2 p. 6).

28. MATR made certain improvements to its system. Specifically, a new 12-inch 4,000-foot water line along Mobay Road at a total cost of approximately \$145,595.68. (MATR Ex. 2, pp. 7-8).

29. One purpose of this extension was to allow the construction of a second metered connection to the WACMA system. (MATR Ex. 2, p. 8). However, another reason was to provide sufficient fire flows to the new Lowe's home improvement center, also a client of MATR. (Tr. 54-55)

30. Lowe's was probably assessed a tap-in fee by MATR, thereby offsetting at least part of the cost of the installation of the new line. (Tr. 54-56)

31. Additional improvements to MATR's transmission and treatment systems are anticipated (MATR Ex. 2, p. 43). The projected time frame for making these improvements will be significantly further in the future if MATR is not required to meet WACMA's water demands. (MATR Ex. 2, pp. 44-49).

32. Mr. Antonelli prepared the analysis upon which MATR asserts that it will be required to increase its rates by approximately 30% if WACMA ceases to purchase water from MATR. (Tr. 50-51).

33. In calculating the consequence to MATR of lost revenue from WACMA's water purchases, Mr. Antonelli did **not** take into account purchased water and incurred standby expenses (totaling \$458,500) which would be avoided in the event MATR was not supplying WACMA with water. (Tr. 52-54).

34. MATR has interconnections with the following water suppliers; one with Coraopolis Borough (with a capacity of 700,000 gallons per day); one with Moon Township Municipal Authority (with a capacity of 1,000,000 gallons per day); and three with PAWC (with a capacity of 1,800,000 gallons per day). (MATR Ex. 2, pp. 8-9).

35. MATR supplies water to WACMA via gravity connections from MATR's Water Storage Facilities, but during periods of high demand within the WACMA system, WACMA must utilize their booster pumping stations in order to sustain adequate water storage levels. (MATR Ex. 2, p. 9).

36. Mr. Antonelli testified that the hydraulic gradient of MATR's system could supply most or all of WACMA's system by gravity if WACMA's Transmission and Distribution System was upgraded to take advantage of this hydrostatic pressure. (MATR Ex. 2, p. 10). MATR produced no documents in support of this opinion (Tr. 56-57).

37. In Mr. Antonelli's opinion, the hydraulic gradient of the PAWC system in the WACMA service area, is not capable of supply water to WACMA without the need

to continuously pump into the WACMA system. To Mr. Antonelli's knowledge, the only area of the WACMA system which can be served without the need for pumping is the Oakdale Area which is located in the southern most sector of WACMA's system. (MATR Ex. 2, pp. 10-11; Antonelli-2).

38. In Mr. Antonelli's opinion, it is unlikely that MATR would be able to compete with Pennsylvania American to be WACMA's water supplier at the expiration of the PAWC Agreement 15 years from now. Unless planning and infrastructure improvements were being made in anticipation of providing such service, MATR would have insufficient capacity to serve WACMA and its projected consumptive demands. However, without the benefit of a long-term service agreement, MATR could not afford to make these improvements. (MATR Ex. 2, pp. 11-12).

39. In Mr. Antonelli's opinion WACMA could have a problem maintaining a daily load factor of 0.75 during the term of the PAWC Agreement. Since WACMA's distribution and transmission capabilities are concentrated in the northern tier, if there are interruptions in service from water line breaks in the piping system in the south, the largest segment of the system population will be affected. (MATR Ex. 2, pp. 12-13).

B. TESTIMONY RELATING TO PAWC

Testimony of Bernard J. Grundusky.

1. Bernard J. Grundusky has been employed as the Manager of Business Development for PAWC since July 1, 2000 and testified in that capacity on behalf of PAWC. (PAWC Ex. 1, p. 1).

2. As the Manager of Business Development, Mr. Grundusky's responsibilities include analyzing and conducting due diligence related to potential acquisitions and other related business factors at PAWC. (PAWC Ex. 1, p. 2).

3. PAWC and WACMA entered into a Water Sales Agreement dated March 28, 2003. As required, the 2003 Agreement was filed with the Commission and served on the Office of Consumer Advocate. (PAWC Ex. 1, p. 3).

4. The 2003 Agreement is based upon the terms of Rider DRS-Demand Resale Service ("Rider DRS") of PAWC's tariff. (PAWC Ex. 1, p. 2).

5. Rider DRS was one of three riders approved by the Commission in its final Order entered July 24, 1995 in PAWC's 1995 water base rate case, at Docket No. R-0943231, to permit the company to charge competitive rates in order to retain or attract sales from qualifying large volume users. In addition to Rider DRS, the Commission approved Rider DIS (Demand Industrial Service) and EGS (Electric Generation Service). (PAWC Ex. 1, pp. 2-3).

6. WACMA has been a customer of PAWC or its predecessor since 1957 during which time PAWC has provided sale for resale water services to WACMA continuously. (PAWC Ex. 1, p. 3).

7. Rider DRS, as approved by the Commission, is available to any customer that (1) purchases water from PAWC for resale; (2) enters into service agreement for a term of not less than ten years; (3) during the original and any renewal terms of the service agreement agrees to maintain a daily load factor of not less than 0.75; and (4) has a viable competitive alternative to service from PAWC and intends to select that

alternative to the detriment of PAWC and its other customers. (PAWC Ex. 1, p. 4; PAWC Ex. 1-A).

8. Rider DRS further provides that the rates to be charged qualifying customers shall not exceed the maximum rate nor be less than the minimum rate, both as defined in Rider DRS and shall be subject to an agreed upon escalation clause. (PAWC Ex. 1, p. 4; PAWC Ex. 1-A).

9. The 2003 Agreement satisfies the terms of Rider DRS because (1) WACMA is purchasing water from PAWC for resale; (2) the PAWC Agreement is for a term of more than ten years; (3) WACMA has agreed to maintain a load factor of at least 0.75; and (4) WACMA clearly has competitive alternatives such as MATR, Robinson Township and Moon Township Municipal Authority. WACMA also expressed its intent to select one of those alternatives which would have resulted in a loss to PAWC of existing sales as well as the opportunity for additional sales to WACMA. (PAWC Ex. 1, pp. 4-5).

10. The rate specified in the 2003 Agreement is above the minimum rate set forth in Rider DRS and the 2003 Agreement provides for escalation of the contract rate. (PAWC Ex. 1, p. 4).

11. The loss of existing sales to WACMA and the loss of the opportunity for additional sales to WACMA would mean that the fixed costs of PAWC that are and will be recovered from WACMA would have to instead be borne by PAWC until that loss is reflected in rates and, thereafter, would have to be made up by PAWC's other customers through higher rates. (PAWC Ex. 1, p. 5).

12. WACMA was an existing customer of PAWC at the time the 2003 Agreement was entered into and PAWC faced the possibility of (1) losing its existing sales; (2) permanently losing the higher historic level of sales it had made to WACMA prior to 1999; and (3) losing the opportunity for increased sales to WACMA. (PAWC Ex. 1, p. 7).

13. The 2003 Agreement permits PAWC to charge competitive rates under Rider DRS to address the competitive alternatives available to WACMA which WACMA intended to pursue to the detriment of PAWC and its other customers. (PAWC Ex. 1, p. 7).

14. Given the decline in purchases from PAWC since 1999, PAWC believed that WACMA was purchasing more water from one or more other providers. PAWC further believed that WACMA would likely be attempting to negotiate a contract to cover all of its water needs following the expiration of the 1983 Agreement with MATR. If another supplier were meeting all the water needs of WACMA, WACMA would not possibly purchase any water from PAWC. (Tr. pp. 90-92).

15. PAWC was not aware that in the negotiations between MATR and WACMA, WACMA was insisting that it be obligated to purchase a minimum of 75% of its total needs from MATR. (Tr. p. 91).

Testimony of Steven J. Seidl.

16. Steven J. Seidl has been employed as the Vice President of Engineering of PAWC since 1995 and testified in that capacity on behalf of MATR. (MATR Ex. 2, p. 1).

17. As the Vice President of Engineering, Mr. Seidl's responsibilities include overseeing, organizing, scheduling and coordinating construction projects and insuring compliance with engineering and water quality policies and procedures. (PAWC Ex. 2, pp. 1-2).

18. Mr. Seidl disagrees with Mr. Antonelli's statements that the hydraulic gradient of the PAWC system in the WACMA area is not capable of supplying water to WACMA without the need to continuously pump into the WACMA system. He further disagrees with Mr. Antonelli's statement that all three of the interconnects between WACMA and PAWC require pumping. (PAWC Ex. 2, pp. 2-4).

19. PAWC's points of connection located at the southern, southeastern, and western sections of the WACMA system will provide all of the necessary redundancy and reliability to assure that water can continue to be supplied to and within the WACMA system in the event of main breaks within the WACMA system. (PAWC Ex. 2, pp. 4-5).

Testimony of William M. Stout, P.E.

20. Mr. William M. Stout, the President of the Valuation and Rate Division of Gannett Fleming Inc., testified on behalf of PAWC at the hearing. (PAWC Ex. 3, p. 1).

21. In the course of his profession, Mr. Stout directs and supervises studies concerning rate design for water utilities. (PAWC Ex. 3, p. 1).

22. Mr. Stout participated in the development of Rider DRS as it was filed with and approved by the Commission in Docket No. R-0943231. (PAWC Ex. 3, p. 3).

23. The purpose of Rider DRS is to retain and attract sales for resale customers that might otherwise use alternative sources of water supply in such a manner that a

contribution toward PAWC's fixed costs is received, thereby reducing the amount of fixed costs to be recovered from other customers. (PAWC Ex. 3, p. 4).

24. Rider DRS is intended to attract sales for resale customers as is indicated by the tariff's incorporation of the cost of new facilities as part of the definition of minimum rate. The construction of new facilities would be for the purpose of serving a new customer. (PAWC Ex. 3, p. 4).

25. At the same time that Rider DRS was filed and approved, Rider EGS also was filed and approved. Rider EGS is constructed in a similar manner to Rider DRS and, at the time of filing, PAWC did not have any electric generation customers, which supports the fact that the Riders were intended to attract customers as well as retain them. (PAWC Ex. 3, p. 4).

26. Rider DRS is also intended to retain existing customers for which new facilities would not be required. (PAWC Ex. 3, p. 4).

C. TESTIMONY RELATING TO WACMA

Testimony of Philip W. Morris.

1. Phillip W. Morris is Chairman of WACMA. He has been a member of the Board of WACMA since 1985 and resides at 4803 Main Street, McDonald, PA 15057. (WACMA Ex. 1, pp 1-2).

2. WACMA was formed in 1953 for the purpose of distributing municipal water. It currently serves approximately 12,871 customers through 3,982 connections in the North Fayette and Findlay Townships, both of which are in Allegheny County. (WACMA Ex. 1, p. 4). There has been a dramatic increase in the number of residential

and commercial customers in WACMA's service area in recent years. WACMA has no reason to believe this trend will not continue. (WACMA Ex. 1, p. 4).

3. WACMA does not produce water and is dependent on other parties to supply all of its water. (WACMA Ex. 1, p. 4).

4. The WACMA Board has five members who are appointed by the North Fayette Township Supervisors for a term of five years. The Board regularly meets once a month and convenes special meetings from time to time as necessary. (WACMA Ex. 1, pp. 2-3).

5. It is of vital concern to WACMA that it continue to maintain the availability of an adequate supply of water to its present and expanding customer base. (WACMA Ex. 1, p. 5).

6. WACMA's water supply has historically come from several sources: PAWC, MATR, Findlay Township Water Authority and Oakdale Borough. (WACMA Ex. 1, p. 6).

7. WACMA entered into a water supply contract with MATR on October 20, 1983 pursuant to which MATR supplied a majority of WACMA's water supply needs. The term of the 1983 Agreement was scheduled to expire on October 21, 2003. (WACMA Ex. 1, p. 6).

8. Since assuming the Chairmanship of WACMA, Mr. Morris has worked closely with WACMA's engineer and solicitor in the process of renegotiating a new water supply agreement with MATR. (WACMA Ex. 1 pp. 7-8). Negotiations between

WACMA and MATR for a renewal of the 1983 Agreement began as early as May 4, 1998. (WACMA Ex. 1, pp. 7-8; MATR Ex. 1, Lenze-4).

9. A March 11, 1999 letter from MATR to WACMA set forth certain of the terms MATR proposed for the new agreement, specifically that WACMA be required to purchase between 85% and 100% of its water needs from MATR. (WACMA Ex. 1, p. 10, Morris-2).

10. WACMA consistently made clear to MATR at renegotiation meetings and through correspondence that the minimum purchase percentage should not be more than 75 % and that the term of the contract should not exceed twenty years. (WACMA Ex. 1, p. 11).

11. The Board of WACMA required these terms due to concerns regarding MATR's ability to contain its costs, the ever increasing demand for water service within WACMA's service area, and WACMA's knowledge of the changing nature of the water supply business. (WACMA Ex. 1, p. 9).

12. MATR and WACMA continued to negotiate by means of correspondence and meetings and, while there were some lengthy gaps between negotiating sessions and correspondence, the negotiations between the parties continued through the year 2002. (WACMA Ex. 1, p. 11).

13. The primary reason for the lengthy period of negotiations was the continued inability of WACMA and MATR to reach agreement on two issues: (1) the length of the contract; and (2) the minimum percentage of WACMA's total water needs required to be purchased from MATR. (WACMA Ex. 1, pp. 8-9).

14. Pursuant to a letter from MATR dated August 16, 2002 (See MATR Ex. 1, Lenze- 5) and a meeting on September 26, 2002, WACMA believed an agreement in principal had been reached on all of the essential issues, including an agreed term of twenty years and minimum purchase obligation of 75% of WACMA's total requirements. (WACMA Ex. 1, p. 11).

15. Based on this 'agreement in principal', WACMA and MATR began drafting the new service agreement. (WACMA Ex. 1, pp. 11-12).

16. On December 19, 2002 a meeting of representatives of WACMA and MATR was held. WACMA believed that the purpose of the meeting was to finalize the language of the new water supply agreement. (WACMA Ex. 1, pp. 14-15).

17. At the December 2002 Meeting, MATR presented an entirely new proposal which, among other things, identified certain major capital improvements, set a 30 year term for the agreement, and provided for an increase in the purchase requirement from 75% to 85% at an early point during the term of the agreement. (WACMA Ex. 1, p. 12).

18. WACMA advised MATR that, in view of the completely unexpected change in MATR's position, it was necessary to review the matter with the WACMA Board, its consulting engineer and its solicitor. MATR was further advised that it should not expect a response until the WACMA Board was able to take formal action at its January 2003 meeting. (WACMA Ex. 1, pp. 12-13).

19. The WACMA Board met on January 21, 2003 to formally discuss the developments in negotiations with MATR, specifically the events at the December 2002 Meeting. (WACMA Ex. 1, p. 13).

20. At the January 21, 2003 meeting, the WACMA Board members authorized Mr. Morris to advise MATR that WACMA was not willing to accept the revised proposal MATR made at the December 2002 Meeting, but that WACMA was still willing to proceed based on its understanding of the agreement reached prior to that meeting. (WACMA Ex. 1, p. 13).

21. At the January 21, 2003 meeting, the WACMA Board concluded that although it was not breaking off negotiations with MATR, since there were only eight months until the MATR contract was scheduled to terminate it was necessary to seriously consider an alternative water supplier. (WACMA Ex. 1, p. 16).

22. On January 29, 2003 Mr. Morris wrote a letter to MATR advising it that (a) WACMA was not willing to extend the term of the Agreement for thirty years; (b) WACMA was not willing to increase their minimum purchase obligation from 75% to 85% shortly after the new agreement would take effect; (c) MATR's latest proposal was contrary to its letter of August 16, 2002 to WACMA in which MATR accepted a twenty year term and agreed in principal to a 75% minimum purchase obligation (See MATR Ex. 1, Lenze-5); and (d) WACMA was still willing to proceed with a new agreement with MATR on the basis of a twenty year term and 75% minimum purchase obligation. The letter requested that MATR advise WACMA by not later than February 14, 2003, whether it was willing to proceed based upon the terms of the letter. Mr. Morris further stated in the letter that if an agreement could not be reached with MATR on the terms indicated, in the interests of its customers WACMA would have to explore other long-term water supply sources. (WACMA Ex. 1, pp. 13-14; MATR Ex. 1, Lenze-6).

23. MATR responded on February 12, 2003 but did not accept WACMA's proposal of a twenty year term; rather, MATR proposed a formula based on the term of its financing of certain construction projects which would have the effect of extending the term of the agreement beyond twenty years. MATR did not respond to the minimum purchase requirement issue, but stated that it believed the parties could reach an agreement "at our next meeting." (WACMA Ex. 1, p. 15, MATR Ex.1, Lenze-7).

24. Pursuant to a directive from the WACMA Board, Mr. Morris pursued negotiations with PAWC regarding a water supply agreement. (WACMA Ex. 1, p. 16).

25. Prior to this time, WACMA purchased water from PAWC and its predecessor pursuant to a water supply contract dated August 28, 1957, as amended (MATR Ex. 11 and 11-A; WACMA Ex. 1, p. 6).

26. As a consequence of WACMA's ongoing relationship with PAWC, WACMA had previously been approached from time to time by representatives of PAWC, either in person or via unsolicited written correspondence, who were interested in expanding the volume of business with WACMA. (WACMA Ex. 1, pp. 16-17).

27. Prior to January 21, 2003, the Board of WACMA derived some level of comfort in knowing that there were competitive companies vying for WACMA's business; however, the Board did not seriously contemplate entering into a new agreement with PAWC. (WACMA Ex. 1, p. 17).

28. As the termination date of the MATR Agreement approached and negotiations were not coming together between MATR and WACMA during the latter

half of 2002, Mr. Morris was of the personal opinion that WACMA should consider more seriously the interest of PAWC. (WACMA Ex. 1, p. 18).

29. Once initiated, negotiations with PAWC progressed quickly (Tr. 113). On March 28, 2003, WACMA entered into the 2003 Agreement whereby WACMA agreed to purchase most of its water from PAWC. (MATR Ex. 1, Lenze-9). The PAWC Agreement was to become effective as of October 21, 2003, subject to the issuance of the necessary permits and approvals from the Pennsylvania Department of Environmental Protection ("DEP"). (MATR Ex. 1, Lenze-9).

30. The 2003 Agreement provides that PAWC will construct at its cost substantial interconnection facilities in order to serve WACMA's needs. At the time of the hearing on January 21, 2004, PAWC had made substantial progress in the construction of the new facilities, certain of which were completed, with the balance being in various stages of completion. (WACMA Ex. 1, p. 21, Morris-4).

31. On October 16, 2003, WACMA and MATR entered into an agreement extending the term of the 1983 Agreement until the earlier of (a) twenty-four hours after MATR received written notice from WACMA that its DEP Water Allocation Permit was modified as required or (2) April 2, 2004. (WACMA Ex. 1, Morris-2).

32. On February 3, 2004, the DEP issued the Water Allocation and Public Water Supply Permits required by the 2003 Agreement (PAWC Ex. 4, 4A, 4B, 4C, and 4D). On February 4, 2004, the 1983 Agreement was terminated and PAWC began to provide water to WACMA pursuant to the 2003 Agreement (MATR Ex. 15).

Testimony of David G. Nichols.

33. David G. Nichols, the Principal Engineer of Nichols & Slagle Engineering, Inc., also testified on behalf of WACMA. Mr. Nichols has served as the professional engineer for WACMA since January 1993. (WACMA Ex. 2, p. 5).

34. Mr. Nichols has been involved in the negotiations between WACMA and MATR for a new agreement and it is his opinion that negotiations broke down when at the December 2002 Meeting MATR changed its position concerning the term of the contract and the minimum percentage of water that WACMA would be required to purchase from MATR. (WACMA Ex. 2, pp. 6).

35. Both the rate and methodology as negotiated for the new agreement were satisfactory in their last presentation prior to the December 2002 Meeting (Tr. 131-132) and the term and minimum percentage of water to be purchased had been agreed to in principal. (WACMA Ex. 2, p. 7).

36. WACMA representatives were very surprised and frustrated with the introduction of totally new proposed provisions by MATR at the meeting without any advance notice. MATR's changes in terms caused WACMA to reconsider the likelihood of obtaining an acceptable agreement with MATR. (WACMA Ex. 2, p. 7).

37. The benefits of PAWC's proposal during negotiations included a stable projected water rate and the addition of three new supply points, which added the reliability of multiple supply sources with two treatment plants. (WACMA Ex. 2, p. 8).

38. Except for the provisions related to the term of the agreement and minimum purchase obligation, the proposals of MATR and PAWC are competitive. Mr. Nichols believes PAWC will be able to meet WACMA's service needs. (WACMA Ex. 2, p. 9).

39. Mr. Nichols disagrees with Mr. Antonelli's testimony regarding MATR's ability to supply water to WACMA from MATR's Water Storage Facilities via gravity connections with booster pumping utilized during periods of high demand. (WACMA Ex. 2, p. 9). WACMA currently operates booster pumps continuously in order to maintain gravity pressure in the higher elevations of North Fayette Township and to fill its water storage tanks. (WACMA Ex. 2, pp. 9-10).

40. Mr. Nichols disagrees with Mr. Antonelli's testimony regarding PAWC's ability to supply water through its hydraulic gradient in the WACMA/Robinson Service Area. PAWC is capable of supplying water into portions of the WACMA system without pumping and could transfer limited volumes into the WACMA storage tanks. (WACMA Ex. 2, p. 10).

41. Mr. Nichols disagrees with Mr. Lenze's testimony that MATR never demanded that it supply WACMA with all of WACMA's water needs. MATR's letter of March 11, 1999 to WACMA (WACMA Ex. 1, Morris-2) stated: "It would be our intention to preserve that [85%] level of service with a possible expansion to 100% if feasible in a new agreement for services." (WACMA Ex. 1, Morris-2).

IV. SUMMARY OF ARGUMENT

1. **MATR Has Failed To Meet Its Burden Of Proving That PAWC's Interpretation And Implementation Of Rider DRS To The 2003 Agreement Is Erroneous.**
2. **PAWC's Tariff Rider DRS Expressly Permits PAWC To Enter Into Alternative Water Arrangements Under Certain Circumstances In Order To Retain Or Attract Sale For Resale Customers.**
3. **The 2003 Agreement Meets All Of The Rider DRS Requirements.**
4. **The Collateral Arguments Advanced By MATR Are Not Pertinent To The Sole Issue Involved In This Proceeding And, In Any Event, Are Not Credible.**
5. **WACMA Engaged In Good Faith Negotiations With MATR For More Than Four Years And Was Unable To Negotiate A New Water Supply Agreement.**
6. **MATR's Objective Is To Use This Proceeding To Force WACMA To Purchase Its Water Supply From MATR At A Substantially Higher Rate Than The Existing PAWC Rate.**
7. **The Record Supports A Finding That The Granting Of The Relief Sought By MATR Will Adversely Affect WACMA And Its Customers.**

V. ARGUMENT

- A. **MATR HAS FAILED TO MEETS ITS BURDEN OF PROVING THAT PAWC'S INTERPRETATION AND IMPLEMENTATION OF THE RIDER DRS TO THE 2003 AGREEMENT IS ERRONEOUS.**

It is assumed that in its Main Brief that PAWC will address in detail the background and legal effect of Rider DRS and its application to the 2003 Agreement. Accordingly, this Brief will address only the essential issues regarding Rider DRS which apply to WACMA.

1. PAWC's Tariff Rider DRS Expressly Permits PAWC To Enter Into Alternative Water Arrangements Under Certain Circumstances In Order To Retain Or Attract Sale For Resale Customers.

The applicable PAWC tariff, which was approved by the Commission,⁴ includes Rider DRS which makes a special rate available to any customer that meets the following requirements:

- (1) purchases water from PAWC for resale;
- (2) enters into a Service Agreement for a term of not less than 10 years;
- (3) during the original and any renewal terms of the Service Agreement, agrees to maintain a daily load factor or not less than 0.75; and
- (4) has a viable competitive alternative to service from PAW and intends to select that alternative to the detriment of the PAWC and its other customers.

(PAWC, Ex. 1-A)

Rider DRS further provides that the rates to be charged qualifying customers shall not exceed the "Maximum Rate", nor be less than the "Minimum Rate", as defined in the tariff, and shall be subject to an agreed upon "Escalation Clause." (PAWC Ex. 1-A). Agreements entered into under Rider DRS must be filed with the Commission and the Office of Consumer Advocate ("OCA") within five days of their execution. (PAWC Ex. 1-A).

MATR has asserted that Rider DRS may not be used to retain sale-for-resale customers that might otherwise use alternative sources of water supply. (Complaint

⁴ See *Pa. PUC v. Pennsylvania-American Water Co.*, 1995 Pa. PUC Lexis 170.

¶41). However, Mr. Stout, who assisted PAWC in developing and obtaining Commission approval of its competitive rate offering and the DRS Rider, testified that Rider DRS was designed to both attract and retain load. (PAWC Ex. 3, p. 4). In support of his position, Mr. Stout pointed out that Rider DRS incorporates as part of the definition of "minimum rate" the cost of new facilities. The cost of new facilities would be a consideration only if PAWC was to serve a new customer. He also pointed out that the intention that Rider DRS be used to attract new customers is further evidenced by the fact that a "sister rider" for electric generation service (Rider EGS) with similar provisions was filed and approved by the Commission at the same time as Rider DRS. At the time of filing and approval, PAWC did not have any electric generation customers; therefore, the only use for the Rider would be to attract new customers. (PAWC Ex. 3, p. 4).

In sum, the intended purpose of Rider DRS is to both retain and attract sales for resale customers and, as will be shown in the following section, it has been properly implemented by PAWC in connection with the 2003 Agreement.

2. The 2003 Agreement Meets The Criteria Required By Rider DRS.

The 2003 Agreement meets the requirements of Rider DRS, satisfies the minimum and maximum rate provisions of the tariff, contains an escalation clause, and, pursuant to the Commission's requirements was filed on a confidential basis with the Commission and the OCA. (Complaint ¶11; PAWC Ex. p. 4).

The following summary demonstrates that the 2003 Agreement clearly meets the requirements of Rider DRS:

(1) **Resale Customer.**

WACMA is a distribution-only authority that purchases water for resale and distribution to cover 12,000 customers in North Fayette and Findlay Townships in Allegheny County. (WACMA Ex. 1, pp. 4-6). Therefore, the PAWC Agreement meets the requirement that the customer purchase water for resale.

(2) **Term.**

The 2003 Agreement is for a term of 15 years (Complaint ¶11; WACMA Ex. 1, p. 20). Consequently, WACMA satisfies the requirement that the Service Agreement be for a term of not less than 10 years.

(3) **Daily Load Factor.**

WACMA has agreed to maintain a daily load factor of not less than 0.75 during the original and any renewal terms of the Service Agreement. (Answer, ¶54). Although Mr. Antonelli, a witness for MATR, questioned whether WACMA would be able to maintain the necessary daily load factor in the event of "water line breaks in the piping system coming from the South" (MATR Ex. 2, p 12), Mr. Seidl, PAWC's Vice President of Engineering, testified that in the event of such a break, PAWC's points of connection located in the southern, southeastern, and western sections of the WACMA system would provide all of the necessary redundancy and reliability to assure a continued supply of water. (PAWC Ex. 2, pp 4-5). WACMA has met the requirement to maintain a daily load factor of not less than 0.75 and, based upon the testimony discussed above, verified its actual ability to do so.

(4) **Competitive Alternative.**

At the time the 2003 Agreement was signed and during the time leading up to the execution of the Agreement, WACMA had a viable competitive alternative to service from PAWC and, absent the application of the rate under Rider DRS, may have selected that alternative. The 1983 Agreement was scheduled to expire on October 20, 2003 (WACMA Ex. 1, pp. 8-13). In view of the fact that WACMA's current water supply agreement was with MATR and negotiations between WACMA and MATR to renew that agreement had been ongoing since 1998 (MATR Ex. 1, pp 14-16), WACMA clearly had a viable competitive alternative to the services offered by PAWC. Moon Township Municipal Authority was also a viable alternative. (PAWC Ex. 1, pp 4-5). If WACMA had entered into a water supply agreement to purchase all of its water needs from another source, PAWC faced losing its existing sales to WACMA plus the opportunity to increase sales to WACMA in the future.⁵ (PAWC Ex. 1, p 7). Rider DRS was appropriately applied to prevent WACMA from choosing another water provider and possibly shutting PAWC out as a source altogether, a situation that would cause certain fixed costs of PAWC to be borne entirely by PAWC's other customers, as opposed to being recovered in part through sales to WACMA. (PAWC Ex. 1, p 5).

It is clear that the record supports a finding that the 2003 Agreement meets all of the requirements of Rider DRS.

⁵ As indicated in Mr. Grundusky's testimony, based upon the recent decline in water purchases from PAWC by WACMA, and because it was not privy to the terms of the negotiations between MATR and WACMA, PAWC believed that WACMA would likely attempt to negotiate a contract to cover all of its water needs following expiration of the 1983 Agreement. (Tr. pp. 90-92).

B. THE COLLATERAL ARGUMENTS ADVANCED BY MATR ARE NOT PERTINENT TO THE SOLE ISSUE INVOLVED IN THIS PROCEEDING AND, IN ANY EVENT, ARE NOT CREDIBLE.

It is significant that rather than addressing the single issue raised by the Complaint, the testimony presented by MATR, with minor exceptions, concentrates on certain collateral or equitable arguments. It is the position of WACMA that those arguments are not pertinent to the essential issue in this proceeding and, as will be shown, are not credible.

1. WACMA Prematurely Terminated Negotiations With MATR For A New Water Supply Agreement.

Mr. Lenze, a witness for MATR, testified at length concerning his conception of the negotiations with WACMA concerning a new Water Sales Agreement. He attempts to leave the impression that with respect to the two issues that were most important to WACMA, namely the minimum purchase requirement and the length of the agreement (WACMA Ex. 1, p. 11), MATR was willing to meet WACMA's demands concerning these two issues.

On the contrary, after lengthy negotiations extending over more than four years and as the termination date of the 1983 Agreement approached, Mr. Lenze's letter of February 12, 2003 to WACMA stated that he believed that the parties could reach an agreement with respect to the minimum purchase requirement and that "discussions regarding same will be far more productive at our next meeting" (MATR Ex. 1, Lenze-7).

The testimony of Mr. Morris for WACMA clearly establishes that there was no valid basis for Mr. Lenze's optimistic speculation, given the history of WACMA's prior

negotiations with MATR. Mr. Morris for WACMA and Mr. Lenze for MATR both testified that negotiations between the parties began as early as 1998 (WACMA Ex. 1, pp. 7-8; MATR Ex. 1, p. 15; MATR Ex. 1, Lenze-4) and that those negotiations continued through the year 2002. (WACMA Ex. 1, p. 11; MATR Ex. 1, p. 16). Mr. Lenze testified that correspondence dated May 4, 1998 from MATR to WACMA (MATR Ex. 1, Lenze-4) acknowledged early on that one of the items for consideration between the parties would be minimum purchase quantity. (MATR Ex. 1, p. 16). Mr. Morris further testified that throughout the negotiations WACMA maintained a consistent position with respect to its two main issues, *i.e.*, that the minimum purchase percentage from MATR should not exceed 75% and the term of the contract could not exceed twenty years. (WACMA Ex. 1, p. 11). These essential requirements were fashioned by the WACMA Board because of their concerns regarding MATR's ability to contain its costs, the ever increasing demand for water service within WACMA's service area and WACMA's knowledge of the changing nature of the water supply business. (WACMA Ex. 1, p. 9). The primary reason for the lengthy period of negotiations was the continued inability of WACMA and MATR to reach agreement on these two main issues. (WACMA Ex. 1, pp. 8-9).

As a result of a letter from MATR dated August 16, 2002 (MATR Ex. 1, Lenze-5) and a follow up meeting on September 26, 2002, WACMA reasonably believed that an agreement in principal had been reached on all of the essential issues, including an agreed term of twenty years and a minimum purchase obligation of 75% of WACMA's total requirements. (WACMA Ex. 1, p. 11). Based on this "agreement in principal",

WACMA and MATR began drafting a new service agreement (WACMA Ex. 1, pp. 11-12).

On December 19, 2002, a meeting of representatives of WACMA and MATR was held ("December 2002 Meeting"). WACMA was under the impression that the purpose of the meeting was to finalize the language of the new water supply agreement (WACMA Ex. 1, pp. 14-15). At the meeting, to the surprise of the WACMA representatives, MATR presented an entirely new proposal which, among other things, referred to certain major capital improvements, increased the term of the agreement from twenty years to thirty years and the minimum purchase requirement from 75% to 85% at an early point during the term of the agreement. (WACMA Ex. 1, p. 12).

In response to this development, the WACMA Board authorized Mr. Morris to advise MATR that WACMA was not willing to accept the revised proposal made at the December 2002 Meeting, but that WACMA was still willing to proceed with MATR based on its understanding of the agreement reached prior to that meeting. (WACMA Ex. 1, p. 13). By letter dated January 29, 2003, Mr. Morris advised MATR of the position of the WACMA Board. The letter requested that MATR advise WACMA by not later than February 14, 2003 whether it was willing to proceed based upon the terms of the letter and that if an agreement could not be reached, in the interests of its customers, WACMA would have to explore other long-term water supply sources. (WACMA Ex. 1, pp. 13-14; MATR Ex. 1; Lenze-6).

Even at this late date and given WACMA's clear position on the issue, MATR's response letter of February 12, 2003 did not accept WACMA's proposal for a twenty

year term. Instead, MATR proposed a formula based on the term of MATR's financing of certain construction projects which would have the effect of extending the term of the agreement beyond twenty years. (MATR Ex. 1, Lenze-7). It also did not respond to WACMA's position with respect to the minimum purchase requirement, but merely stated that it believed that the parties could reach an agreement "at our next meeting". (WACMA Ex. 1, p. 15; MATR Ex. 1, Lenze-7).

As a result of the apparent inability of the parties to reach agreement on the essential issues required by WACMA and the approaching termination date of the 2003 Agreement, Mr. Morris was instructed by the WACMA Board to pursue negotiations with PAWC regarding a water supply agreement. (WACMA Ex. 1, p. 16). These negotiations culminated in the negotiations and execution of the 2003 Agreement on March 28, 2003. (MATR Ex. 1, Lenze-9).

In sum, the testimony clearly establishes that despite its good faith negotiations over a period of more than four years, WACMA was not able to negotiate a contract with MATR that would satisfactorily protect the interests of its customers.

2. MATR Made Capital Investments In Reliance On The Continuation Of Its Contract With WACMA.

Witnesses for MATR contended that MATR has undertaken or planned several capital projects which were or will be required to some extent for MATR to be able to continue to serve WACMA in the future, namely (a) a \$4,000,000 expansion of MATR's water treatment plant to expand its capacity from 3,000,000 gallons per day to 6,000,000 gallons per day in 1995 (MATR Ex. 1, p. 23); (b) preliminary design work, etc. related to

a proposed expansion of MATR's main water transmission line. (MATR Ex. 1, pp. 23-24); and (c) a new water line along Mobay Road. (MATR Ex. 2, pp. 7-8).

Mr. Lenze's cross-examination established that, at the very least, he had exaggerated the extent of the projects and their relationship to WACMA. Among other things, the stated costs of the 1995 expansion of the treatment plant also included a waste water treatment system. (Tr. 30-31). Also, the decision to expand the treatment plant was primarily influenced by the fact that MATR was obligated to increase its capacity pursuant to a long-term contract to supply a substantial amount of water requirements for Findlay Township. (Tr. 34-35).

With respect to the proposed expansion of the main water transmission line, there is serious doubt as to its relationship, if any, to WACMA. As witness Lenze testified on cross-examination, construction on the line has not been initiated (Tr. 35-36); there would be no need for the project until at least the year 2008 if PAWC succeeds MATR as WACMA's primary water supplier (Tr. 48-49); and, in any event, one of the principal reasons for the project is to increase fire flows to MATR's existing customer. (Tr. 46-47).

With respect to a proposed new 12-inch water line along Mobay Road purportedly to serve WACMA's needs, Mr. Antonelli acknowledged at least one other reason for the line was to provide sufficient fire flows to a new Lowe's store and that Lowe's likely paid a "tap-in" fee that covered a portion of the capital costs. (MATR Ex. 2, pp. 7-8; Tr. 54-56).

Even if an improvement or increase in MATR's capabilities in reliance on retaining WACMA as a customer were relevant to the issue before the Commission, the testimony of MATR's witnesses establishes that such reliance is specious and not credible.

3. MATR Will Be Required To Increase Its Rates By 30% If It Loses The WACMA business.

Mr. Lenze testified that the loss of WACMA as a customer will require MATR to raise the rates for its remaining customers by approximately 30%. He provided no support for this assertion which he testified was based on calculations made by MATR's consulting engineer, Mr. Antonelli. (MATR Ex. 1, pp. 25-26; Tr. 39).

The cross-examination of Mr. Antonelli developed the following flaws in his analysis which resulted in the "30% assertion":

(a) He substantially overstated the revenues that MATR's water sales to WACMA would generate (Tr. 51-52);

(b) He omitted the savings of approximately \$460,000 that would accrue to MATR, resulting from purchased water costs that would be eliminated if WACMA were no longer a customer (Tr. 52-54); and

(c) He did not take into account the savings that MATR would realize by being able to defer certain capital improvement projects. (MATR Ex. 2, pp. 44-49).

In sum, even if it were relevant, there is no credible evidence of record to support the "30% assertion".

C. THE GRANTING OF THE RELIEF REQUESTED BY MATR WILL ADVERSELY AFFECT WACMA AND ITS CUSTOMERS.

WACMA serves customers in North Fayette and Findlay Townships in Allegheny County. It is a distribution-only authority which relies on other parties to supply all of its water. (WACMA Ex. 1, p. 4).

WACMA serves approximately 4,871 customers through 3,982 service connections. It provides service for both residential and commercial customers. There has been a dramatic increase in the number of residential and commercial customers in its service area. WACMA has no reason to believe that this trend will not continue. (WACMA Ex. 1, p. 4).

On February 4, 2004, the 1983 Agreement was terminated and PAWC began to provide water to WACMA pursuant to the 2003 Agreement. (MATR Ex. 15). PAWC has now replaced MATR as WACMA's primary water supplier. (Tr. 142-143).

It is of vital concern to WACMA that it continues to have available a sufficient supply of water to meet the present and future needs of its customers. MATR's Complaint requests that the Commission issue an order (a) voiding the 2003 Agreement between PAWC and MATR and (b) declaring that any agreement between PAWC and WACMA must utilize the Group and Resale Rate from PAWC's tariff.

The consequences of granting the relief requested would be disastrous to WACMA and its customers. In the event the Commission voids the 2003 Agreement, WACMA will be left without a written water supply agreement. As addressed in detail in Section (B)(1) of this Argument, WACMA negotiated in good faith with MATR over a

period of more than four years and ultimately was unsuccessful in reaching an acceptable water supply agreement. If the Commission should grant the relief sought in the Complaint, there is no likelihood that WACMA would now be able to negotiate a new water supply agreement with MATR that would adequately protect the interests of its customers.

WACMA is currently receiving safe, reliable service from PAWC at a rate below that which it had been paying MATR. WACMA's present situation, both in terms of rates and service, should be contrasted with the situation that would arise in the event the Commission were to grant MATR's request that WACMA be forced to utilize the PAWC Tariff Group and Resale Rate when purchasing water from PAWC. The 2003 Agreement with PAWC provides for a rate of \$1.90/thousand gallons, subject to an annual escalation factor based on the annual increase in the Consumer Price Index for all urban consumers. (WACMA Ex. 1, p. 21).

If WACMA is required to purchase water from PAWC at its then current resale rate the effect will be a substantial increase in WACMA's water costs. At the time MATR filed its formal Complaint, PAWC's sale for resale rate was \$3.92/thousand gallons, which may have been subject to change as the result of PAWC's base rate case, which rates became effective in January, 2004. (Tr. 176-177). This significant hike in cost will adversely affect WACMA and its customers.

In addition, the 2003 Agreement requires PAWC to construct at its cost substantial interconnection facilities in order to serve WACMA's needs. At the time of the hearing on January 21, 2004, PAWC had made substantial progress in the construction of the new

facilities, certain of which were completed with the balance being in various stages of completion. (WACMA Ex. 1, p. 21; Morris - 4).

The alternative for WACMA having to purchase water from PAWC at the standard resale rate would be for WACMA to purchase water from MATR. Assuming WACMA would even be able to reach a satisfactory agreement with MATR, at the very least, WACMA's costs would increase substantially. Specifically, if WACMA is required to purchase water from MATR, its costs would increase to \$2.51/thousand gallons, which was the rate MATR had been charging WACMA under the terms of the extended 1983 Agreement which rate became effective on December 15, 2003. (Tr. 174-176).

The foregoing analysis emphatically demonstrates MATR's real objective in filing its Complaint. MATR seeks to use the Commission's processes to advance its economic interest, *i.e.*, to deny WACMA the benefits of PAWC's competitive rate pursuant to Rider DRS and to require WACMA to continue to purchase water from MATR at a substantially higher rate. For all of these reasons, it is clear that the granting of the relief sought by MATR would adversely affect WACMA and its customers, both in terms of service and economic effect.

VI. CONCLUSION AND REQUESTED RELIEF

Based on the foregoing, WACMA respectfully requests that the Administrative Law Judge (1) make the findings set forth in the Summary of the Argument set forth in Section IV of this Main Brief; and (2) deny the relief sought and dismiss the Complaint.

Respectfully submitted,

VUONO & GRAY, LLC

By: John A. Vuono /cut
John A. Vuono, Esq.
Susan C. Indrisano, Esq.
Attorneys for Western Allegheny
County Municipal Authority

VUONO & GRAY, LLC
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800

Due Date: March 8, 2004

130526

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Main Brief of Intervenor Western Allegheny County Municipal Authority on the following parties of record by electronic mail (1 copy) and by first class mail, postage prepaid (2 copies):

The Honorable Larry Gesoff
Pennsylvania Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

Thomas P. Gadsden, Esq.
Anthony C. DeCusatis, Esq.
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103

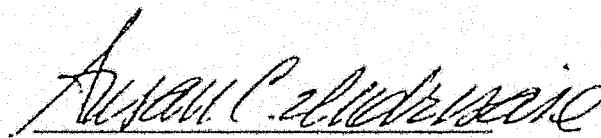
Bohdan R. Pankiw, Esq.
Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

John A. Pillar, Esq.
Washington Center Building
680 Washington Road
Suite B101
Pittsburgh, PA 15228

Albert J. Zangrilli, Jr., Esq.
Yukevich, Marchetti, Liekar & Zangrilli, P.C.
11 Stanwix Street
Suite 1024
Pittsburgh, PA 15222-1324

Michael J. Witheral, Esq.
Witherel & Kovacik
966 Perry Highway
Pittsburgh, PA 15237

Dated this 8th day of March, 2004.


Susan C. Indrisano, Esq.

YUKEVICH, MARCHETTI, LIEKAR & ZANGRILLI, P.C.

ATTORNEYS AT LAW

11 STANWIX STREET

SUITE 1024

PITTSBURGH, PENNSYLVANIA 15222-1324

Writer's Direct Dial:
(412) 261-6780

TELEPHONE 412/261-8777

FAX 412/261-6789

March 8, 2004

Via Federal Express

Pennsylvania Public Utility Commission
Secretary's Bureau
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

ATTN: Docket Section

RECEIVED

MAR 08 2004

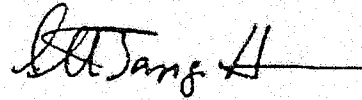
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: The Municipal Authority of the Township of Robinson
vs. Pennsylvania American Water Company
Docket No.: C-20030092

Gentlemen:

Please find enclosed the Initial Brief of Complainant The Municipal Authority of the Township of Robinson. Please file and docket this Brief on behalf of The Authority. Copies of this letter and the Brief have been served in accordance with the Certificate of Service attached to the Brief.

Very truly yours,



Albert J. Zangrilli, Jr.

DOCUMENT
FOLDER

AJZ/ph

Enclosure

~~DOCKETED~~
MAR 12 2004

RECEIVED

MAR 08 2004

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

THE MUNICIPAL AUTHORITY OF THE
TOWNSHIP OF ROBINSON,

Complainant -- Petitioner,

vs.

PENNSYLVANIA AMERICAN WATER
COMPANY,

Respondent.

)
)
) Docket No.: C-20030092
)
)
)
)
)
)
)

**INITIAL BRIEF OF COMPLAINANT THE MUNICIPAL AUTHORITY
OF THE TOWNSHIP OF ROBINSON**

AND NOW COMES The Municipal Authority of the Township of Robinson ("MATR"), pursuant to an Order of Administrative Law Judge Lawrence Gesoff, and by its undersigned attorneys files this Initial Brief of Complainant The Municipal Authority of the Township of Robinson, stating as follows:

Proposed Findings of Fact

1. Complainant-Petitioner MATR is a municipal authority organized and existing pursuant to the Municipality Authorities Act, 53 Pa.C.S.A. § 5601 et seq., and having its principal offices at 4192 Campbells Run Road, Pittsburgh, Pennsylvania 15205. Complaint, par. 1 as admitted in Answer of PAWC; Transcript of Hearing held on January 21, 2004 (hereinafter, "TR") 9.

DOCUMENT
FOLDER

DOCKETED
MAR 12 2004

2. Respondent Pennsylvania American Water Company ("PAWC") is a Pennsylvania public utility having its principal offices in Western Pennsylvania at 300 Galley Road, McMurray, Pennsylvania 15317. Complaint, par. 2 as admitted in Answer of PAWC; TR 9.

3. MATR produces and distributes water for the residents and businesses of the Township of Robinson in Allegheny County, Pennsylvania and supplies water to certain other municipal authorities pursuant to contracts. Complaint, par. 3 as admitted in Answer of PAWC; TR 9.

4. On or about October 20, 1983, MATR entered into a written agreement with the Western Allegheny County Municipal Authority ("WACMA") (hereinafter this Agreement shall be referred to as the "1983 Agreement"). Exhibit Lenze-1 attached to MATR Hearing Ex. 1; p.11, lines 21-25 through p.12, lines 1-2.

5. The 1983 Agreement expired by its terms on or about October 21, 2003. Exhibit Lenze-1 attached to MATR Hearing Ex. 1, Section 4.

6. The 1983 Agreement was extended by means of an Extension Agreement dated October 16, 2003, by and between MATR and WACMA. Exhibit Morris-1 attached to WACMA Hearing Ex. 1 (hereinafter referred to as "Extension Agreement").

7. WACMA is a municipal authority that operates a water distribution system but does not produce water itself. Complaint, par. 6 as admitted in Answer of PAWC; TR 9.

8. Pursuant to the 1983 Agreement and the Extension Agreement, WACMA was obligated to purchase no less than 85% of its water requirements from MATR. See Section 1 of the 1983 Agreement

9. MATR earns substantial revenue from its contract with WACMA, which revenue benefits all of its ratepayers. Exhibits Lenze-2 and 3 to MATR Hearing Ex. 1 and MATR Hearing Ex. 1, p. 13, line 5 through p.14, line 5.

10. On or about March 28, 2003, PAWC entered into a written agreement with WACMA pursuant to which PAWC agreed to sell to WACMA a minimum of 90% of WACMA's water requirements (hereinafter referred to as the "PAWC Agreement"). Exhibit Lenze-9 to MATR Hearing Ex. 1.

11. Pursuant to the PAWC Agreement, PAWC will sell water to WACMA at the rate of \$1.90 per 1000 gallons, subject to adjustment increases provided for in the Agreement. Exhibit Lenze-9 to MATR Hearing Ex. 1 at §2.1 of the PAWC Agreement.

12. The rate to be charged WACMA by PAWC as set forth in the PAWC Agreement is established by PAWC pursuant to Rider DRS -- Demand Based Resale Service. Complaint par. 22 as admitted in Answer of PAWC; TR 9.

13. If PAWC cannot legally charge WACMA a rate calculated pursuant to Rider DRS, then PAWC would be obligated by its Tariff to charge WACMA pursuant to its Class A and Class B Sales for Resale Tariff which provide a rate of \$3.92 per 1,000 gallons of water sold. Admitted in PAWC's Answer, pars. 14-17; TR 9; TR 77, lines 10-14. (This Tariff provision is MATR Hearing Ex.14)

14. PAWC's Tariff provides that, "Group A" rates apply to sales to private or public water utilities where the water is to be resold to consumers of the utilities and where the purchaser is using the water as its primary source of supply. "Group B" rates apply to sales to private or public water utilities where the water is to be resold to consumers of the

utilities and where the water is being used as an emergency source of supply. Complaint par. 17 as admitted in Answer of PAWC; TR 9. See also MATR Hearing Ex. 14.

15. The difference between the Class A and Class B Sales for Resale Tariff rate and the Rider DRS rate is \$2.02 per 1,000 gallons of water sold.

16. Pursuant to the PAWC Agreement, PAWC will be the primary source of WACMA's water. Complaint par. 18 as admitted in Answer of PAWC; TR 9.

17. Pursuant to the PAWC Agreement, WACMA will be purchasing water from PAWC for resale to WACMA's own customers. Complaint par. 19 as admitted in Answer of PAWC; TR 9.

18. Rider DRS is available to PAWC customers only if all of the following conditions are met: the customer (a) purchases water from PAWC for resale; (b) enters into a Service Agreement with PAWC for a term of not less than 10 years; (c) agrees to maintain a daily load factor of not less than 0.75; and (d) has a viable competitive alternative to service from PAWC and intends to select the alternative to the detriment of PAWC and its other customers. Complaint par. 23 as admitted in Answer of PAWC; TR 9; Rider DRS is PAWC Ex. 1-A.

19. MATR's wholesale water rates are substantially less than PAWC's Group A resale rate. Complaint par. 33 as admitted in Answer of PAWC; TR 9.

20. The average daily water production of MATR during 2003 was approximately 4.3 million gallons per day. TR 14 lines. 14-18.

21. MATR serves approximately 3,900 residential customers and 600 commercial customers. MATR Hearing Ex. 1 at p. 10, lines 18-23.

22. Between 1988 and 2002, WACMA purchased the quantities of water from MATR, Findlay Township Water Authority, Moon Township Municipal Authority and PAWC as is set forth on MATR Hearing Ex. 4

23. MATR Hearing Ex. 4 accurately summarizes the data set forth in WACMA's Annual Water Supply Reports for the years 1988 through and including 2002. The Annual Water Supply Reports are MATR Hearing Ex. 3.

24. Exhibit Lenze-2 to MATR Hearing Exhibit 1 accurately sets forth WACMA's annual purchases from MATR for the years 1988 through and including 2003 and MATR's gross revenues from such sales.

25. MATR and WACMA entered in negotiations with respect to a new water supply agreement at least two years prior to the expiration of the 1983 Agreement ("Negotiations"). MATR Hearing Ex. 1, p. 14, lines 12-20; WACMA Hearing Ex. 1, p. 7, lines 17-22, p. 17, lines 20-21.

26. During these Negotiations, MATR never demanded that WACMA purchase:

(a) all of its water needs from MATR; MATR Hearing Ex. 1, p. 16, line 24 through p. 17, line 7; or

(b) in excess of 85% of WACMA's total water needs from MATR. MATR Hearing Ex. 1, p. 17, lines 8-11; p. 21, lines 12-18; TR 118 line 15 through TR 119, line 3.

27. MATR was prepared to agree to provide WACMA with 75% of WACMA's total water needs if that was the maximum amount of water WACMA was willing to purchase from MATR. MATR Hearing Ex. 1, p. 17, lines 17-20; p. 22, lines 12-25 through p. 23, line 2; p. 23, lines 5-8. MATR was prepared to provide water to WACMA at a rate of \$2.10 per

1000 gallons. Computation of Bulk Water Rates to WACMA, p. 2, attached to Exhibit Lenze-5 to MATR Hearing Ex. 1.

28. Prior to the commencement of this proceeding, MATR knew that WACMA was obtaining daily water supply from other water suppliers but did not know the precise quantities of water WACMA was obtaining from these other suppliers. MATR Hearing Ex. 1, p. 19, lines 17-25 through p. 20, line 2.

29. During the Negotiations, WACMA was never willing to agree to purchase 85% or more of its total water needs from MATR. MATR Hearing Ex. 1, p. 27, lines 3-5; TR 114, lines 1-2.

30. WACMA's policy is not to have any single supplier be WACMA's sole source of water supply. TR 116, lines 2-5.

31. In 1995, MATR expended approximately four million dollars to expand its water treatment plant, in part, to continue to serve WACMA. MATR Hearing Ex. 1, p. 33, lines 12-17; TR 28, lines 4-8; TR 31, lines 7-10.

32. MATR expended approximately \$60,000, plus engineering costs, in order to obtain a \$485,000 grant from the United States Environmental Protection Agency to increase the size of its main water transmission line, in part, to continue to serve WACMA. MATR Hearing Ex. 1, p. 23, lines 23 through p. 24, line 22.

33. In 2001, MATR expended approximately \$145,593 to construct a new 12" water line, making it possible to construct a 12 inch diameter interconnect to the WACMA distribution system. MATR Hearing Ex. 2, p. 7, line 25 through p. 8, line 13.

34. As a result of losing WACMA as a customer, MATR must increase its rates to its remaining customers. MATR Hearing Ex. 1, p. 25, lines 11-17.

35. The amount of the rate increase MATR must make to offset the loss of WACMA as a customer is 30%. MATR Hearing Ex. 1, p. 25, line 14 through p. 26, line 26.

36. MATR first learned of the PAWC Agreement in late March 2003. MATR Hearing Ex. 1, p. 26, lines 11-14.

37. Immediately after learning about the PAWC Agreement, MATR requested a copy from WACMA. MATR Hearing Ex. 1, p. 26, lines 15-17.

38. WACMA did not provide MATR with a copy of the PAWC Agreement at that time. MATR Hearing Ex. 1, p. 26, lines 18-19.

39. WACMA delivered a copy of the PAWC Agreement to MATR on May 14, 2003, only when compelled to do so by means of a proceeding by MATR pursuant to Pennsylvania's Right To Know Act. MATR Hearing Ex. 1, p. 27, lines 12-24.

40. MATR has two interconnection points with the WACMA water distribution system ("Interconnect"). MATR Hearing Ex. 2, p. 6, lines 17-20.

41. The first Interconnect is 8 inches in diameter and was constructed in approximately 1965. MATR Hearing Ex. 2, p. 7, lines 11-12.

42. The second Interconnect is 12 inches in diameter and was constructed in 2001. MATR Hearing Ex. 2, p. 7, lines 12-13.

43. The 8" Interconnect is capable of pumping more than one million gallons of water per day from MATR to the WACMA water distribution system. MATR Hearing Ex. 2, p. 7, lines 16-17.

44. The 12" Interconnect is capable of pumping more than two million gallons of water per day from MATR to the WACMA water distribution system. MATR Hearing Ex. 2, p. 7, lines 18-20.

45. At one time, WACMA operated two distinct water distribution systems. WACMA Hearing Ex. 2, p. 3, lines 19-20; PAWC Statement No.2, p. 3, lines 6-9; TR 102, lines 13-25 through TR 103, line 5.

46. In 1998, WACMA constructed a pipeline to connect the two distinct systems. TR 123, lines 23-24. (Hereinafter this pipeline will be referred to as the "Wittengale Line").

47. The connection of the two distinct systems occurred in 1999. TR 123, line 25 through TR 124, line 1; PAWC Statement No. 2, p. 5, line 12.

48. The Wittengale Line is marked on the Western Allegheny County Municipal Authority Water Distribution Map dated February 2003, bearing a Plot Date of April 1, 2003 (herein referred to as "WACMA Distribution Map") as running from PTA (herein referred to as "Point A") to PTB (Point B) along Wittengale Road. MATR Hearing Ex. 6; TR 123, lines 19-22.

49. The WACMA Distribution Map shows the Wittengale line as being an 8" line and approximately 14,700 linear feet in length. MATR Hearing Ex. 6. See also PAWC Statement No. 2, p. 3, line 7. (The distance can be measured by using the scale of 1" = 1,400' set forth on the WACMA Distribution Map.)

50. The Wittengale Line was constructed by WACMA to: (1) improve reliability of service to a growing area in North Fayette Township, (2) to extend service to existing houses along Wittengale Road and (3) to provide a back-up supply to the Noblestown-Champion Hill Service Area. TR 126, lines 2-14.

51. PAWC had no part in or knowledge of the construction by WACMA of the Wittengale Line. WACMA Hearing Ex. 2, p. 6, lines 7-9.

52. Pursuant to an Agreement dated August 28, 1957, by and between WACMA and West Penn Water Company, PAWC sold water to WACMA for resale in one of the previously distinct areas of WACMA's service territory. MATR Hearing Ex. 11-A (second preamble and paragraph FIRST of Exhibit 11-A)

53. West Penn Water Company was a predecessor of PAWC. TR 129, lines 19-21.

54. The distinct area in which the water purchased from PAWC was in turn distributed by WACMA is known as the Noblestown-Champion Hill Service Area of WACMA's service territory. MATR Hearing Ex. 11-A (second preamble and paragraph FIRST of this Exhibit).

55. The Noblestown-Champion Hill Service Area of WACMA's distribution system is shown on the WACMA Distribution Map. MATR Hearing Ex. 6; TR 124, lines 6-16.

56. The Noblestown-Champion Hill Service Area comprises approximately 1.68 square miles out of the approximately 25 square mile area of North Fayette Township. (These areas can be computed by using the scale of 1"=1,400' set forth on WACMA's Distribution Map.)

57. The 1957 Agreement between West Penn Water Company and WACMA provides, in part, as follows:

FOURTH: ..It is expressly agreed by the Authority that in no event shall the Water Company be required to supply water to the Authority at rates in excess of 500 gallons a minute or in quantities exceeding 75,000 gallons per day; and

SIXTH: The Water Company is not hereby offering water for fire protection service to the Authority or its customers through or by the Authority's proposed distribution system or in any part

of the territory which will be served by the Authority's proposed distribution system. The Authority agrees that the Water Company shall not be considered in any manner an insurer of property or persons or as having undertaken to supply sufficient water to extinguish fires or to protect any person or any property against loss or damage by fire or otherwise.

MATR Hearing Ex. 11-A, p.2

58. After the construction of the Wittengale Line, no water was transferred either into the Wittengale Line or via the Wittengale line to the other parts of WACMA's service territory except in extraordinary conditions because, *inter alia*, the water provided to the Wittengale line is provided from WACMA's northern gradients; TR 127, lines 19-20.

59. In addition to the Noblestown-Champion Hill Service Area or gradient WACMA has two additional gradients; namely, (1) the Commercial District and (2) everything other than the Commercial District and Noblestown-Champion Hill Service Area (hereinafter referred to as the "Third Gradient"). TR 124, line 6 through TR 125, line 8.

60. PAWC could not have fulfilled its obligations to WACMA pursuant to the PAWC Agreement by means of the Wittengale Line. TR 131, lines 8-14.

61. PAWC could not have adequately met WACMA's water supply needs pursuant to the PAWC Agreement without the construction of three (3) facilities described in MATR Hearing Ex. 11. TR 83, lines 4-9; TR 116, lines 14-18; TR 131, lines 8-18.

62. The approximate cost of the three (3) facilities referred to in the previous Finding of Fact is \$2,106,215.00. MATR Hearing Ex. 11.

63. The WACMA distribution system normally operates at a hydraulic gradient below the hydraulic gradient of MATR. MATR Hearing Ex. 2, p. 9, lines 23-25.

64. WACMA installed a pressure-reducing valve at the point where the Wittengale Line connects to the Noblestown-Champion Hill Service Area. TR 125, lines 9-18.

65. The pressure-reducing valve is shown on WACMA's Distribution Map as "PRY #2." Id.

66. The purpose of the pressure-reducing valve is to control the water pressure in WACMA's Noblestown and Champion Hill Service Area. TR 125, lines 9-18; TR 103, lines 14-20.

67. Without the existence of the pressure-reducing valve, the water coming down the Wittengale Line from the northern gradients of WACMA's system would become the exclusive source of water in the Noblestown-Champion Hill Service Area of WACMA. TR 125, lines 19-24.

68. The Commercial District and the Third Gradient are supplied water by MATR through the 12-inch and 8-inch Interconnects described in Proposed Finding of Fact 40-44.

69. During 2002, MATR produced approximately 4.3 million gallons of water on an average daily basis. TR 14, lines 14-18; TR 20, lines 6-9.

70. During 2002, WACMA purchased 1,074,926 gallons of water from MATR on an average daily basis. MATR Hearing Ex. 3 (WACMA Annual Water Supply Report for Calendar Year 2002, p. 6).

71. During 2002, WACMA purchased approximately twenty-five percent (25%) of MATR's water production on an average daily basis. (Mathematical computation)

72. During 1993, MATR produced approximately 2.6 million gallons of water on an average daily basis. TR 20, lines 10-13.

73. During 1993, WACMA purchased 732,753 gallons of water from MATR on an average daily basis. MATR Hearing Ex. 3 (WACMA Annual Water Supply Report for Calendar Year 1993 at p. 5).

74. During 1993, WACMA purchased approximately twenty-eight percent (28%) of MATR's water production on an average daily basis. (Mathematical computation)

75. WACMA is the only utility regulate by the PUC providing water in the region where North Fayette Township is located. PAWC Ex. No. 1-B; PAWC Statement No. 1, p. 3, lines 15-16.

Narrative Factual Background

This case involves the interpretation of a provision in the filed tariff of PAWC. The provision, known as "Rider DRS", provides as follows:

This Rider is available to a customer that:

- (1) purchases water from the Company for resale;
- (2) enters into a Service Agreement for a term of not less than 10 years;
- (3) during the original and any renewal terms of the Service Agreement, agrees to maintain a daily load factor of not less than 0.75; and
- (4) has a viable competitive alternative to service from the Company and intends to select that alternative to the detriment of the Company and its other customers.¹

MATR Exhibit 14.

The provision provides PAWC with latitude to negotiate rates with its resale customers under limited circumstances. MATR will discuss the scope and limitations of

¹ The requirement of a "competitive alternative" must be established by documentation, provided to PAWC by the customer, including but not limited to an affidavit signed by an officer of the customer. MATR Exhibit 14. No such documentation was offered into evidence at the hearing. MATR submits this is a failure to prove a necessary element of PAWC's case

Rider DRS in the Argument section of this Brief. The issue before the Commission is whether PAWC properly used Rider DRS in its recent dealings with WACMA.

WACMA is a distribution-only water system located in North Fayette Township. PAWC Exhibit No. 1-B. For many years, MATR has been the primary water supplier for WACMA. Most recently, MATR has been selling water to WACMA pursuant to an agreement entered into by the parties in 1983 (the "1983 Agreement"). Pursuant to the 1983 Agreement, MATR was required to sell, and WACMA was required to purchase, a minimum of 85% of WACMA's water needs. MATR Hearing Exhibit 1, p. 12. For the ten year period between 1988 and 1997, MATR in fact provided WACMA annually with between 89.2% and 94% of its total needs. MATR Exhibit 4. During this period, WACMA purchased its remaining water needs from PAWC, Findlay Township Water Authority, and Moon Township Municipal Authority. *Id.* More specifically, WACMA purchased an average of 7.2% of its water annually from PAWC between 1988 and 1997.

Over the years, MATR has invested substantial funds in facilities necessary to serve WACMA. In 1995, MATR spent approximately \$4 million to expand its water treatment plant and other related facilities to continue serving its customers, including WACMA. Proposed Finding 31. MATR's sales to WACMA comprise approximately 25-30% of MATR's total water sales. Proposed Findings 69-74. By contrast, PAWC's sales to WACMA comprise approximately 0.1% of PAWC's total water sales. TR 79, line 22 through TR 80, line 4.

WACMA's distribution system originally included two separate systems, which served two distinct geographical areas. MATR provided water to the northern system, which served the overwhelming majority of WACMA's customers. PAWC only provided

water to WACMA's "southern system", which system was significantly smaller and served many less customers. This system, known as the Noblestown-Champion Hill Service Area, comprised only 1.68 square miles out of the approximately 25 square mile area of North Fayette Township. Proposed Finding 56. In 1999, however, WACMA interconnected the two systems. After the interconnect was completed, WACMA's usage patterns began to change. WACMA began purchasing a greater percentage of water from the Moon Township Municipal Authority and a lesser percentage of water from both MATR and PAWC. MATR Hearing Exhibit 4. Between 1998 and 2002, WACMA's annual water purchases were as follows: from MATR, between 66% and 79.5%; from PAWC, between less than 1% and 7.6%; and from the Moon Township Municipal Authority, between 15.3% and 32.5%. Id.

The 1983 Agreement between MATR and WACMA was due to expire in 2003. In anticipation of this expiration date, the parties began negotiating a new agreement in 1998. In 2002, the negotiations intensified and the outstanding issues were narrowed to two: the length of the new agreement and the minimum purchase requirement. Proposed Finding 25. WACMA indicated that it would agree to a 20 year agreement, which would require it to purchase from MATR a minimum of 75% of its water needs. Exhibit Lenze-6 to MATR Hearing Ex. 1. MATR wanted a slightly longer term (25-30 years) with a minimum purchase requirement of 85%.² Proposed Findings 25-27. As of December of 2003, the parties had not been able to resolve these differences. Specifically, WACMA emphatically stated that it did not want to agree to purchase more than 85% of its water needs from any

² As WACMA pointed out during the proceedings, early in the negotiations (1999) MATR stated in a letter its intention to "preserve that level of service (85%) with a possible expansion to 100% if feasible in a new agreement for services." Exhibit Morris-2 to WACMA Hearing Exhibit 1. This letter cannot be construed as

one provider. Proposed Findings 29-30. The parties, however, had agreed upon a rate, that was adjustable based upon specified cost categories. At the commencement of the agreement, the rate would be \$2.10 per thousand gallons of water.

In January of 2003, WACMA indicated in a letter to MATR that its demands for a 20 year agreement with a 75% minimum purchase requirement were firm. Exhibit Lenze-6, to MATR Hearing Ex. 1. MATR replied that it wanted another meeting to discuss these issues. Exhibit Lenze-7, to MATR Hearing Ex. 1. WACMA did not respond to MATR but went to PAWC to obtain a second proposal. At that time, PAWC's tariff rate for resale customers such as WACMA was \$3.92 per thousand gallons. Proposed Finding 13. In order to prepare a proposal acceptable to WACMA, PAWC utilized Rider DRS to propose a rate of \$1.90 per thousand gallons of water. This rate was less than one-half of PAWC's normal tariff rate for resale customers. Proposed Findings 13-15. On March 28, 2003, the parties signed a 15 year agreement, pursuant to which PAWC would sell to WACMA a minimum of 90% of its water needs at an adjustable rate, initially set at \$1.90 (the "PAWC Agreement"). MATR had no knowledge that WACMA was negotiating with PAWC and did not learn of the PAWC Agreement until after it was executed by the parties. Proposed Findings 36-39.

The PAWC Agreement falsely states that WACMA had "an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC." As stated above, MATR had proposed to WACMA an 85% minimum purchase requirement, the same requirement contained in the 1983 Agreement. In fact, MATR was prepared to accept WACMA's request that it be a 75% supplier. Proposed Finding 27. Moreover, WACMA's

a "demand" by MATR for 100% of WACMA's water service. Moreover, all of the negotiations in the 2002-03 time frame involved the consideration of a minimum purchase requirement of between 75% and 85%.

actual purchases from MATR during 1998-2002 had been less than the 85% minimum required by the 1983 Agreement. MATR knows of no evidence, and no evidence was produced during these proceedings, of a proposal by MATR or anyone else to significantly reduce or eliminate PAWC's service to WACMA.

Pursuant to section 4.6 of the PAWC Agreement, the parties recognized and expressly agreed that "consummation of this transaction is conditioned upon receiving approval from the PA PUC to the extent such approval is required." Although PAWC filed the PAWC Agreement with the Commission, it has not received approval as of this date. And despite this pending proceeding, which challenges the validity of the PAWC Agreement, PAWC has constructed approximately \$2.2 million of facilities in order to provide the service required by the Agreement.

Certainly, without using Rider DRS, PAWC would not have been able to enter the PAWC Agreement with WACMA. By using the Rider, PAWC was able to strip MATR of one of its most significant customers. As a result of PAWC's actions, MATR will suffer a substantial reduction in revenue and will be compelled to raise its water rates by approximately 30%. Proposed Findings 34-35. MATR has commenced this action to determine the validity of the PAWC Agreement and to determine whether PAWC was permitted under its Tariff to use Rider DRS in the circumstances described herein.

Argument

MATR's Complaint requests the Commission to construe the terms of Rider DRS, and ultimately to determine the purpose of such Rider. PAWC claims that it may use the Rider as a competitive weapon, to take customers away from a neighboring water supplier. MATR will demonstrate herein that PAWC's position is wholly unsupported by the

language of the Rider, the history of the Rider's approval, the Commission's opinions with respect to the Rider, and important public policy issues that militate against PAWC's position. Moreover, PAWC's use of the Rider violates Section 1304 of the Public Utility Code, which prohibits a public utility, with respect to rates, from granting unreasonable preferences to persons, corporations or municipal corporations and from subjecting the same to unreasonable disadvantage. 66 Pa.C.S. § 1304.

For the reasons set forth herein, PAWC's use of the Rider in the PAWC Agreement was improper and should be rejected by the Commission.

1. Rider DRS should be construed narrowly by the Commission.

No one can deny that Riders DRS and DIS (collectively, the "Riders") were new concepts in the water industry. Prior to the Commission's approval of these Riders, no water companies in Pennsylvania had the benefit of flexible tariff provisions in any way similar to the Riders. Because this was a first step for the water supply industry, in approving the Riders the Commission stressed the need for caution in their application.

Quoting from PAWC's initial Brief, the Commission wrote that: "As [PAWC] states, the competitive rate riders approved in this case do not represent an attempt to deregulate the water utility industry: 'Rather, they will apply in discrete, well-defined situations to a limited number of potentially eligible customers.'" PUC v. PAWC, 1996 Pa.PUC Lexis 141, at *13-14 (citing PAWC Initial Brief at p. 25)(This decision shall be referred to herein as "PAWC II").³

³ During the initial rate proceedings in which the Riders were approved, the Commission wrote two opinions. One in 1995, after the completion of hearings before the ALJ. And one in 1996, after remand from the Commonwealth Court.

The Commission also quoted with approval the Administrative Law Judge's ("ALJ") Recommended Decision: "I remind [PAWC] that these proposals will be scrutinized in subsequent cases . . ." *Id.* at *16 (citing Recommended Decision). The ALJ was explicit in his call for cautious application of the new Riders, stating that the Riders were "an experiment to see if they are useful and viable." *PUC v. PAWC*, 1995 Pa.PUC Lexis 173, at *93 (This decision shall be referred to herein as "PAWC I"). The ALJ went further, "warn[ing] [PAWC] that it should be careful in using its new flexibility." *Id.* at *94-95.

The need for careful application of the Riders was even recognized by the various parties to the rate case in which the Riders were approved. PAWC referred to the Riders as representing "a limited initial step in testing the feasibility of these sorts of initiatives for water companies" (*Id.* at *85) and one of its witnesses referred to the riders as an "experimental pilot program" with which it would "proceed cautiously." MATR Exhibit 5, tab 3, p. 3. The OCA viewed the Riders as "a sort of test case for water utilities in Pennsylvania." PAWC I at *86.

All of these words of caution counsel against an expansive view of the Riders and their applicability. And they counsel against acceptance of PAWC's attempt to stretch the words of the Rider beyond their plain meaning and beyond the Riders' purposes as presented to the Commission.

2. PAWC's use of Rider DRS is not supported by the plain language of such Rider.

In interpreting an unambiguous tariff provision, the Commission is bound to apply the plain meaning of the provision. When the provision in question is ambiguous and

susceptible of multiple interpretations, the Commission must arrive at a reasonable interpretation of the language, considering the purpose and context of the provision at issue. See Reynolds Disposal Company v. PUC, 79 Pa.Cmwlth. 222, 227-28, 468 A.2d 1179, 1182-83 (1983)(“[W]e find that the PUC’s interpretation does not offend the literal meaning of the rule. . . . Rather, the rule in question contained ambiguous language that conveyed no clear, literal meaning; the rule was susceptible of a number of interpretations. In light of this ambiguity, we find that the PUC interpreted the rule in a most reasonable fashion.”); and Neary v. PUC, 78 Pa.Cmwlth. 636, 639, 468 A.2d 520, 521 (1983)(stating that terms in a tariff provision must be understood in context and in light of the purpose of the provision).

Rider DRS allows PAWC, under certain narrow circumstances, to negotiate a non-tariff rate for its resale customers. The Rider is applicable only with respect to a customer who (a) purchases water from PAWC for resale; (b) enters into a Service Agreement with PAWC for a term of not less than 10 years; (c) agrees to maintain a daily load factor of not less than 0.75; and (d) has a viable competitive alternative to service from PAWC and intends to select the alternative to the detriment of PAWC and its other customers.

The plain language of the Rider demonstrates that PAWC’s attempted use of the Rider is improper. Provisions (a) and (d) of the Rider are particularly relevant to this analysis. First, the customer at issue “purchases” water from PAWC – the provision is in the present tense and does not relate to possible future purchases. In other words, the Rider is available to a present customer who is already purchasing water from PAWC. Second, such customer must have a “viable competitive alternative” to service from PAWC. Said differently, the customer is intending to cease purchasing water from PAWC and instead

purchase water from the competitive alternative. In these situations, and in these situations alone, PAWC has some flexibility to offer a competitive rate in order to prevent its existing customer from moving to a competitor. Provision (d) further states that the customer's selection of the alternative will be to the "detriment of PAWC and its other customers." Again, this provision makes sense if we understand the "detriment" to mean the loss of a substantial customer, which customer is currently paying a portion of PAWC's expenses. Accordingly the very language of the Rider indicates that it was intended to allow PAWC to prevent the loss of existing customers to competitive alternatives, not to steal a competitor's customers.

The Commission recognized the central purpose of the Rider:

Negotiated rates must not become merely a means by which utilities shift the responsibility for lost revenues to core customers who have no competitive alternative. At the same time, however, we realize that the loss of a large industrial customer to an alternative source of supply is harmful to all remaining customers. For this reason we support negotiated incentive rates providing that it can be demonstrated that without such rates the customer can and will switch to a competitive source of supply . . .

PAWC I, at *95-96 (emphasis added).

Note that it is the "loss" of a large customer that is detrimental to the remaining customers, an interpretation that is consistent with the Rider's plain language.⁴ One has to twist the Rider's language to find that the failure of PAWC to entice another supplier's customer is the sort of detriment that triggers the Rider's applicability.

⁴ The Commission similarly stated that "the existence of a competitive threat is the primary criterion of these riders." PAWC II, at *8, n.4 (emphasis added) The word "threat" plainly connotes a risk that PAWC will lose a customer to a third party. A "threat" cannot reasonably be understood to include the decision of a non-customer to continue receiving service from another supplier. In a later rate case, the Commission also characterized the Riders as permitting PAWC "to negotiate contracts for water service with industrial and resale customers that have competitive alternatives and whose departure would be detrimental to it and other customers" PUC et al. v. PAWC, 2002 Pa. PUC LEXIS 1, *101-02 (emphasis added) (The PUC, here, clearly indicates that the Rider was intended to prevent, where possible, the departure of customers.)

PAWC asserts that the Rider may be used as a weapon to compete for another water supplier's customers. The Commission should reject this construction as inconsistent with the Rider's plain meaning, and limit use of the Rider to those circumstances where PAWC needs a competitive rate to retain an existing customer.

3. Nowhere in the voluminous PUC record regarding Riders DRS and DIS is it suggested, argued or contemplated that the Riders could be used in the manner proposed by PAWC.

MATR believes that the plain language of Rider DRS is clear and controls this case. However, in the event that the Commission finds ambiguity in the Rider, the Commission need only examine the record from the rate case at which the Rider was approved to determine that PAWC's proposed use was at no time contemplated.

The Commission itself understood both Riders DRS and DIS as being vehicles for PAWC to retain customers. See fn. 4 hereto and quotations supra, from PAWC I and II. Additionally, during the extensive testimony taken by the Commission with respect to the initial approval of the Riders, the focus on customer retention is pervasive. The following are a sampling of quotations from such testimony:

Robert L. Robowski (PAWC witness):

- "I think the company has a responsibility that if it is given the ability to retain a customer by the Commission, to retain that customer and not to willy-nilly just let that customer leave the system and thereby pass on whatever cost contribution that customer has currently contributing to disappear and have the other customers pick it up." MATR Exhibit 5, tab 2, p. 395-96 (emphasis added).

Dr. Robert Romancheck, P.E. (PAWC-LUG witness):

- "Q. Do you agree that PAWC has a need for the proposed Rider DIS? A. Yes. The almost annual rate increases set forth by the Company have resulted in large industrial customer water rates being so high, that unless the Company responds, industrial customers will leave the system. If large

customers leave the system, the stranded investment costs will be assigned to remaining customers." MATR Exhibit 5, tab 6, p. 21 (emphasis added).

- "Q. Do you know whether any of these 14 customers have present plans of leaving the system? A. I believe that a certain number of them have indeed investigated the potential building of wells for their facilities." MATR Exhibit 5, tab 7, p. 847-48 (emphasis added)

- "A. . . . because by keeping a customer there are other benefits that all customer classes get." Id. at p. 851 (emphasis added).

- "A. . . . 3) Mr. Caitlin's proposed rejection of the Company's Rate Rider DIS would greatly inhibit the Company's ability to negotiate and to retain its valuable large, high load factor, customer base." MATR Exhibit 5, tab 8, p. 5 (emphasis added).

David F. Keim (OTS witness):

- "A. . . . Additionally, this customer must have a viable competitive water service alternative and would use this alternative source to the resulting detriment of PAWC and its customers; i.e. the customer leaving the Company's system." MATR Exhibit 5, tab 10, p. 2 (emphasis added).

- "Q. Why has the Company proposed these tariffs? A. According to Company witness Robowski, Rider DIS and Rider DRS were proposed in order to retain those high load factor customers that may have an available competitive alternate water supply source and intend to pursue such an option to the detriment of PAWC and its customers." Id. at p. 4 (emphasis added).

- "Q. On this issue of load retention tariffs, do you see parallels between the water area and the gas area? A. Well, comparisons as far as needing alternative supplies. I think you can make an analogy there, yes. Q. In fact, in the gas area in Pennsylvania and other states it has been almost routine in the past how many years to allow companies to enter into special contracts to retain large customers, even offering them rates below tariff rates? In the gas area. A. There's been a lot of gas incentive purchase programs in Pennsylvania. I'll agree with that." MATR Exhibit 5, tab 11, p. 739-40 (emphasis added).

- "Q. In response to a question by Mr. Boehm I believe it would be an adequate paraphrase to say that you stated that the remaining customers of Pennsylvania-American Water Company would be better off if a customer who threatened to leave the system would make some contribution, and I think Mr. Boehm even said no matter how small, to the system cost, rather than leaving the system, and I believe that your answer was: yes, they

would be better off with some contribution, no matter how small. MR. BOEHM: Objection, Your Honor. I said contributions to fixed costs. I think the record will reflect. Q. With that clarification, some contribution to fixed costs. And you said that they would be better off, did you not? A. Yes, I did. Q. Isn't it true, though, Mr. Keim, that in some instances the cost of retaining a particular customer may be even greater than the contribution that that customer is willing to make to fixed costs? *Id.* at p. 749 (emphasis added).

- "Q. Let me ask you: is it your opinion that those riders should be applied to as many customers as possible? A. No. It is my opinion that those should be utilized as a tool to meet alternative threats from competition. Q. Why not apply those to every customer that technically meets the requirements of the tariff? A. Because the tariffs are a retention tool to be utilized to meet threats from alternative suppliers and should be used for those large customers that meet the company requirements. . . . The riders should be utilized to meet alternative threats from competition and as a retention tool by the company to prevent customer migration, yes." *Id.* at p. 758 (emphasis added).⁵

Brian Kalcic (Armeo witness):

- "Q. Do you agree that the Company should require documentation to establish the existence of a customer's competitive supply alternative? A. Yes. The existence of a competitive supply alternative is a necessary condition for establishing a load retention rate." MATR Exhibit 5, tab 14, p. 2 (emphasis added).

- "A. . . . As I discuss below, incorporating this type of price floor will significantly undermine the stated purpose of the proposed tariff which is to provide PAWC with the rate flexibility necessary to prevent uneconomic bypass of its system. . . . Q. Mr. Kalcic, please elaborate on the concept of 'uneconomic bypass' and explain how competitive service rates are intended to prevent it. A. Bypass of a local utility occurs when a customer leaves the system for a substitute (lower-cost) supply resource." *Id.* at p. 3 (emphasis added).

- "A. . . . So long as the rate offered by the Company to retain the load of a bypass customer is sufficient to recover the production costs of water and provide some contribution to system fixed costs, the utility is better off retaining the customer than losing it. If a utility were to lose this type of bypass load to alternative supplies, such action would be labeled as uneconomic bypass since it represents an inefficient outcome or lost opportunity for the utility and its ratepayers. Obviously, competitive

⁵ The riders should be interpreted so that PAWC can meet competitive threats, not so that PAWC can become a competitive threat

service rates are intended to provide the price flexibility necessary for a utility to compete for customers who have a viable competitive supply alternative, and therefore prevent uneconomic bypass." *Id.* at p.4 (emphasis added).

Thomas S. Catlin (OCA witness):

- "Q. Hypothetically, Mr. Catlin, if large customers were to leave the company's system, would you agree that a significant revenue requirement impact would be felt by other customers? A. Not necessarily." MATR Exhibit, tab 16, p. 769 (emphasis added).

- "Q. . . . So I take it there, Mr. Catlin, that you aren't categorically opposing the concept of lower rates for some customers to retain their business? A. That's correct, I'm not categorically opposing that. What I'm saying is that it needs to be looked at based on the individual or case-by-case circumstances involved." *Id.* at p. 776 (emphasis added).

- "A. I think generally that Mr. Kalcic and I are in agreement that (a) there is both economic and uneconomic bypass possibilities. The difference that I think—our primary difference is how to ensure that only the discounts absolutely necessary to retain a customer and avoid uneconomic bypass are allowed." MATR Exhibit 5, tab 17, p. 1206 (emphasis added).

- "Q. Now, Mr. Catlin, if, in fact, tariffs in this case are not approved, do you think that this discounted rate still might be appropriate in specific cases where it is demonstrated to the Commission that essentially the customer might leave Pennsylvania-American and it might leave in the situation that would cause there to be revenue shortfall, all of the things that we have been talking about? You think it would be appropriate to do on a case-by-case basis, is that right? A. Yes." *Id.* at p. 1209 (emphasis added).

- "A. . . . I would assume that the Commission would not change its view that for discount to be recoverable, it has to be demonstrated that it was necessary to offer that discount to retain the customer." *Id.* at p. 1212 (emphasis added).

As the above quotations demonstrate, the focus on customer retention was overwhelming during the rate case at which the Riders were approved.⁶ In almost every

⁶ The Briefs from the rate proceedings similarly focused on retention of customers. See MATR Exhibit 5-A: "A minimum price that high would provide insufficient flexibility for the Company to negotiate a price likely to retain a customer that is seriously contemplating a competitive alternative. . . . [Rider DIS] would apply to an existing customer only if, in the absence of some action by the Company, the customer would leave the system." Tab 2, p. 44 (emphasis in original), discussion of whether a discounted rate is necessary to "retain the customer" Tab 3, p. 129; "In the present proceeding, without providing evidence of any specific existing

case, the need for the Riders was discussed in terms of providing PAWC a means to keep customers who were at risk to leave the system. Further, the giving of discounted rates to certain customers was justified by reference to revenues that would be lost if such customers left the system. Even PAWC seemed to recognize this in its proposed contract with WACMA. The PAWC Agreement recites that WACMA is a current customer of PAWC and that WACMA "has an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC." Exhibit Lenze-9 to MATR Hearing Ex. 1. As will be discussed herein, these recitations are false. But at a minimum they demonstrate that PAWC believed that Rider DRS was to be used to retain customers.

Despite the focus on customer retention in the prior rate proceeding, PAWC has, and no doubt will continue to, point out that on certain occasions during the rate proceedings parties and witnesses made reference to using the Riders to "attract" customers. As argued above, a use of the Riders to "attract" customers is inconsistent with the Riders' plain language, which language supersedes any testimony given by witnesses at the rate proceeding. However, if the Commission believes that the witness references to "attracting" customers is pertinent to its interpretation of the Riders, these references must be understood in context.

No party or witness at any time during the rate proceedings argued, suggested or contemplated that the Riders could be used by PAWC to compete for another supplier's customers. Such a use would be wholly inconsistent with the notion that the Riders are an

by-pass alternatives, PAWC asserts that its proposals will enable it to counter by-pass threats and retain high-volume customers by negotiating rates based upon other than cost-of-service considerations." Tab 3, p. 136; "The positions of PAWLUG and ARMCO are similar. Each submits that the Commission should do for this water utility what it has done for many gas and electric utilities; that is, essentially to sanction negotiation of a long-term discount rate for a large customer, where that customer has a less expensive alternative to utility service and will leave the Company's system in favor of the alternative." Tab 4, p. 47 (emphasis added).

“experimental, pilot program.” PAWC, then, could use the Riders to undercut another supplier’s rates and attempt to take the supplier’s customers. The Riders would pit PAWC against the municipal authorities in Western Pennsylvania and destroy competition for industrial users and resellers. This usage of the Riders raises serious policy issues which will be addressed in detail below. For now, it is enough to state that the Commission would not have approved such a revolutionary change in the water supply industry without any discussion whatsoever of the implications of such a change.

Moreover, in every instance where a party provided an example of “attracting” customers with discounted rates, one of two specific contexts was referenced, both involving the attracting an industrial customer, using Rider DIS: (a) attracting a customer to relocate into PAWC’s service territory, or (b) attracting a customer that currently uses its own source of water—i e., a well—and is considering replacing that source with PAWC water service. The concept of “attracting” customers was never considered in the context of attracting a customer away from another water supplier.⁷

The following is a sampling of references from the rate proceeding regarding the attraction of customers using Rider DIS⁸:

⁷ PAWC, in its own initial Brief submitted in the rate proceedings, stated as follows: “The proposed riders would enable it to separately negotiate rates with qualifying high load factor customers who can establish: (1) that they have available to them a viable competitive alternative to service from PAWC, such as the development of their own supply sources, the relocation of facilities or the installation of recycling equipment” MATR Exhibit 5-A, tab 1, p. 101. Although this quote does not specifically address the issue of attracting customers, it should be noted that PAWC does not describe the Riders as being used by PAWC to compete with other water suppliers; instead PAWC highlights a customer’s options as (1) using PAWC water, (2) developing a well or other source of water, or (3) relocating. As will be discussed below, PAWC never contended that the Riders could be used to compete for another supplier’s customers.

⁸ None of the sparse examples cited by PAWC in its Exhibit 3-A contradict MATR’s position set forth herein. Moreover, PAWC has based its case on 9 pages of testimony and a few excerpts from legal briefs. MATR has provided the Commission with a much broader sampling of testimony from the proceedings.

Robert L. Robowski (PAWC witness):

- "Q. Can you agree with me, Mr. Robowski, that there are numerous cost factors that affect the decision of a business when it's deciding where to locate? A. Oh, I'm sure that's true. Q. How does the company intend to evaluate the importance of the cost of water in that decision in order to determine whether and to what extent a discount is required to attract a new customer? A. I think in that—did you say an existing customer or a new customer? Q. No. A new customer. A. A new customer. We're talking about a business which is considering – A. Moving into the area. Q. – locating into the company's service territory. A. Okay. . . . Now, we are not going to go out and just because it's nice, because a customer is going to move into the area, give them water for a dollar a thousand." MATR Exhibit 5, tab 2, p. 397-98 (emphasis added)(discussion of "attracting" new customer limited to industrial customer relocating into PAWC service territory).

- "Q. Mr. Robowski, what is the basis for the distinction between requiring a two-year service agreement from industrial customers and a ten-year service agreement from resale customers? A. Well, I think the only distinction there is that normally sales for resale customers are not in the same position as industrial customers, and that means that industrial customers have a lot of other alternatives that they can consider, whether they want to stay in a particular community or move out, or whether, you know, their production would be more beneficial in one area or another; and the longer period of time for industrial customer, I think, would be prohibitive in the industrial customer's mind." MATR Exhibit 5, tab 4, p. 1154-55 (emphasis added)("alternatives" relate to moving into or out of an area. No reference is made to competitive suppliers).

William Stout (PAWC witness):

- "Q. Do you have any knowledge of like riders for other water utilities in Pennsylvania? A. I do not have knowledge of like riders for other water utilities, but I do for energy utilities. Q. For energy? A. Yes. Q. Would you consider these riders economic development riders as in electric energy utilities, sir? A. I believe that in some instances the use of the rider would promote economic development, but I do not necessarily believe that that is their entire intent. Q. To what instances are you referring, Mr. Stout? A. Instances in which, as a result of the availability of the rider, a customer would locate in the company's territory as opposed to locating elsewhere." MATR Exhibit 5, tab 5, p. 328-29 (emphasis added)(When the PAWC witness was specifically asked for the instances in which the rider would promote economic development for PAWC (i.e., attract business), the

witness pointed to the relocation of an industrial customer. The witness did not reference the taking of a customer from another water supplier).

Dr. Robert Romancheck, P.E. (PAWC-LUG witness):

- "Q. Do you know whether any of these 14 customers have present plans of leaving the system? A. I believe that a certain number of them have indeed investigated the potential building of wells for their facilities." Exhibit 5, tab 7, p. 847-48.

"A. By the fact that the Company would appear to another industrial customer, or several large industrial customers, as being a utility who is forward-thinking in the development of rates in their large water users just by virtue of the philosophy that they place out on the table may induce customers to come into the system, which i.e. then would increase water sales and would decrease customer bills. So there is that fact, and it has happened in electric industry. Q. The electric industry, yes; but do you know of any water customers or potential water customers of PA-American that that is even discussed on? A. Again, I am looking at the possibility of the marketing aspect of it because a large industrial would have the ability to make the choice, either purchase from PA-American, or put in their own facilities, or not move into the territory. It is another piece of the equation." Exhibit 5, tab 9, p. 1182 (emphasis added)(Again, the scenarios contemplated do not include persuading a customer to switch from another supplier to PAWC).

Brian Kalcic (Armco witness):

- "A. . . . "[I]t is my understanding that ARMCO currently has a series of wells in production, and in combination with those wells and recycling its own water, it provides upward of 80 percent of its total usage internally." Exhibit 5, tab 15, p. 1190 (part of a discussion of ARMCO's alternative water sources).

In sum, the record references varying scenarios regarding the attraction of business, including persuading a customer to relocate to PAWC's service territory and persuading a customer to rely less (or not at all) on the customer's own well systems. Any use of the Riders to attract customers should be limited to these scenarios.⁹ Importantly, no

⁹ Understood in the context presented during the rate proceedings, "attraction" of customers refers to the obtaining of a new customer who previously was not obtaining water from a utility or public water provider—again, persuading a customer to switch from wells to PAWC's water system, or to relocate into

discussion was held during the rate proceedings regarding use of the Riders to persuade a customer to leave its present water company in favor of PAWC. The reason is simple: Rider DRS was never intended for such purpose. The Commission should reject PAWC's proposed use of the Rider.

4. PAWC's proposed contract with WACMA should be declared void as it proposes a rate not authorized by PAWC's Tariff.

PAWC's attempted use of Rider DRS in its agreement with WACMA is inconsistent with both the language and intent of the Rider.

As argued above, the plain language of the Rider limits its use to the retention of customers who are threatening to leave the system. Under the Rider, PAWC must provide the Commission with sufficient evidence demonstrating that the customer has an alternative to PAWC's service and may leave the system. PAWC, however, is attempting to use the Rider, not to retain a customer, but to take a customer from MATR.

Despite the assertions of PAWC, WACMA was not threatening to leave PAWC's system. MATR had offered to provide WACMA with a portion of its water needs, consistent with historical usage. MATR, in short, wanted to retain its customer. The contractual recital that WACMA "has an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC", is simply false. In fact, throughout WACMA's negotiation with MATR, WACMA made it clear that it desired to reduce its historical percentage of water purchases from MATR from 85% to 75% to which MATR was prepared to agree. Proposed Finding 27. The reality, then, was that MATR was not offering to provide WACMA with all of its water needs, and WACMA clearly had no

the area and utilize PAWC as a water source "Attraction" never was used to refer to persuading a customer to switch from one provider to another.

desire to purchase all of its water needs from MATR. Proposed Findings 25-30. PAWC cannot claim that WACMA had an alternative to significantly reduce or eliminate its purchases from PAWC.¹⁰

The thin reed upon which PAWC's argument rests is the reduction in its sales of water to WACMA since 1999. According to this argument, PAWC claims an entitlement to use Rider DRS to prevent a further reduction of such sales. A review of WACMA's supply history is appropriate before examining this argument further.

In 1999, WACMA, of its own accord, interconnected its two water distribution systems. Prior to 1999, the systems were entirely separate. Before the systems were connected, MATR provided in excess of 90% of WACMA's total water needs to the larger system. MATR Hearing Ex. 4. PAWC only served the smaller system, the Noblestown-Champion Hill Service Area, providing an annual average of 7.2% of WACMA's water needs Id.

Even after WACMA – for its own purposes and without the participation and knowledge of PAWC – constructed the Wittengale Line to interconnect the Noblestown-Champion Hill Service Area to the rest of WACMA's system, the two areas remained **functionally separate**. As testimony indicated, the water to supply the Wittengale Line came from the northern portion of WACMA, served exclusively by MATR (and arguably by the Moon Township Municipal Authority). The pressure from the higher-elevated MATR system was so great that it would have overwhelmed the Noblestown-Champion

¹⁰ Pursuant to Rider DRS, PAWC has the duty to establish through documentation the existence of a "competitive alternative." There is no evidence that PAWC has done so. In fact, PAWC's representatives were unaware of the specifics of MATR's negotiations with WACMA and had not reviewed any of MATR's proposals. TR 86, lines 3-12. Instead, PAWC based its assertion of a "competitive alternative" on the fact that its own sales to WACMA had lessened during the past several years. As will be discussed herein, this is an inadequate basis for invoking the Rider.

Hill Service Area. The construction of a pressure reduction valve was required to prevent this from happening.

Most significantly, David Nichols, WACMA's Engineer, testified the only time WACMA ever transferred water from the Noblestown-Champion Hill Service Area to the Wittengale Line was "in an extraordinary condition, if we had a line break or something, we could allow it to proceed in that direct [sic], but it wouldn't happen routinely." TR 127, line 24 through TR 128, line 1.

Throughout this time, PAWC evidenced very little commitment to serving WACMA, as its agreement with WACMA strictly limited the amount of water WACMA could purchase from it to a mere 75,000 gallons per day and at such low pressure that PAWC required a contract term making it clear that it could not be relied on to have sufficient water pressure with which to fight fires.

SIXTH: The Water Company is not hereby offering water for fire protection service to the Authority or its customers through or by the Authority's proposed distribution system or in any part of the territory which will be served by the Authority's proposed distribution system. The Authority agrees that the Water Company shall not be considered in any manner an insurer of property or persons or as having undertaken to supply sufficient water to extinguish fires or to protect any person or any property against loss or damage by fire or otherwise. MATR Hearing, Ex. 11-A, p.2

This lack of commitment or ability on the part of PAWC to serve WACMA is all the more striking when one considers that the area serviced by PAWC is immediately adjacent to its interconnect with WACMA. Meanwhile, the significant water pressure from MATR was so overwhelming that WACMA had to construct a pressure reducing valve at the point where the Wittengale Line connected to the Noblestown-Champion Hill

Service Area, even when the Interconnects between MATR and WACMA were approximately 4.6 miles distant.¹¹

The crucial fact is that PAWC could not have serviced WACMA apart from the Noblestown-Champion Hill Service Area. Proposed Findings 57 and 60 through 61. How can PAWC assert to the Commission that it was threatened with the loss of a customer that it could not physically serve?

PAWC apparently argues that because the total quantity of water purchased from it by WACMA has declined since 1999, this fact alone somehow triggers the right to utilize Rider DRS to now supply virtually all of WACMA's water needs. This is a misuse and misinterpretation of Rider DRS.

Even assuming that Rider DRS would apply in such a situation (and MATR does not concede that it does), the only reasonable use of the Rider in such a circumstance would be to permit PAWC to utilize Rider DRS only to recapture that share of the market it allegedly lost which, as MATR Hearing Exhibits 4 and 3 clearly demonstrate, equaled only five percent (5%) of WACMA's total consumption, averaged over the 15 year period of 1988 to 2002.

PAWC claims that since the systems were connected, WACMA has taken a lower percentage of water from PAWC. This statement is true, as far as it goes. It is also true that WACMA has taken a lower percentage of water from MATR since 1999—i.e., MATR's historical averages of in excess of 90% shrunk to 66% in 2001. These reductions

¹¹ This computation can be made from the facts of record. MATR Hearing Ex. 6 is a map of WACMA's Distribution System. Measuring the distance via the most direct water lines from the pressure reducing valve (marked as PRV #2 on the Map) to the closest interconnect with MATR (marked as "St. Pike P. Sta") results in 177 inches. Multiplying this total by 1440' per the scale shown on the Map yields 24,780'. Dividing this number by 5,280 feet (the number of feet in a mile) yields 4.6 miles.

have as much to do with the presence of Moon Township Municipal Authority as an additional provider as with the interconnection of WACMA's systems.

In any case, PAWC seems to be claiming a right to use Rider DRS to retain its pre-1999 level of service to WACMA. Particularly, PAWC focuses on its 10% level of supply achieved in 1997 as a benchmark of service it has lost. Aside from the obvious complications—for instance, why choose 10%, as opposed to its 6% level in 1993 or its 7.6% level in 1998 or an average number of 7.2%—a basic flaw exists in PAWC's argument. PAWC, through its proposed contract with WACMA, is not merely attempting to retain some prior level of service. It proposes to use Rider DRS to capture all of the service previously provided by MATR. The PAWC Contract would catapult PAWC from a 5%-10% provider to a minimum 90% provider. This is not a load retention contract. It is a contract aimed at taking another supplier's customer. As such, it is not authorized by any fair interpretation of Rider DRS. As discussed above, the Rider cannot be interpreted, and was never intended to be used to attract customers away from competitors.

In fact, MATR never threatened or demanded to oust PAWC's right to sell water to WACMA. The highest percentage of WACMA's water needs that MATR sought was 85%, the same amount WACMA was obligated to purchase from MATR pursuant to the 1983 Agreement (but did not, in fact, purchase from MATR for any of the years 1998 through 2002). Even at 85% there would have been plenty of water service available to PAWC, especially given, in the words of WACMA's Chairman, the "dramatic increase" in WACMA's customer base which, as he also testified, is a trend he expects to continue. WACMA Hearing Exhibit 1, p. 4, lines 15-19. But MATR was prepared to reduce its percentage of WACMA's total water needs to 75% in the new contract it was negotiating

with WACMA, thus freeing up even more of WACMA's market to be supplied by other providers. Proposed Finding 27.

The Commission should reject PAWC's proposed use of Rider DRS and declare void PAWC's contract with WACMA.

5. Strong policy reasons militate against the Commission permitting PAWC to use the Riders to "attract" another supplier's customers.

It is disingenuous for PAWC to now claim that its attempted use of Rider DRS was always contemplated, when neither PAWC nor any of the other parties participating in the proceedings presented any explanation of the Riders which included using the Riders "offensively", as a weapon to gain customers from competitors. As MATR will discuss below, PAWC's proposed use of Rider DRS would effect a significant change regarding competition in the water supply industry. The policy implications of this change would demand serious consideration by the Commission. As no consideration was given, one must infer that the change was not intended or contemplated.

Unlike with the gas and electric industries, the water industry has not experienced any sustained calls for increased competition. Thomas Catlin, the OCA's witness during the rate proceedings at which the Riders were approved, stated that the water industry is facing "far less" pressure to become more competitive than, for instance, the electric, gas or telephone industries. MATR Exhibit 5, tab 16, p. 768. The OCA emphasized this point in its Reply Brief, noting the "difference in the nature and extent of 'competition' in the water utility world." MATR Exhibit 5-A, tab 4, p. 48-49.

One obvious difference is that unlike with the energy utilities, most of the suppliers of water in Pennsylvania are not companies regulated by the PUC -- they are municipal entities. In Western Pennsylvania, PAWC is the only significant public utility supplying

water. Proposed Finding 75. Its “competitors” are municipal authorities. However, pursuant to the Municipality Authorities Act, 53 Pa.C.S.A. § 5607(b)(2), an authority is not permitted to “unnecessarily burden or interfere with existing business by the establishment of competitive enterprises.” More specifically, the section prohibits an authority from engaging in a project “which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes.” Id.

Because of this statutory provision, MATR arguably could not do what PAWC has done in this case—i.e., construct new facilities in order to take a customer from a competitor. Thus, if PAWC were successful in its proposed use of Rider DRS, then PAWC would have a profound advantage against municipal authorities in competing for business. PAWC could undercut a municipal authority’s rates in order to take the authority’s customer. The same municipal authority may be prohibited from engaging in this type of competitive activity.

MATR believes that the Commission had no intention of opening up competition of the type described above. Indeed, this scenario was not considered by the Commission or any parties to the rate proceedings. Simply put, PAWC’s interpretation of the Riders would establish a new, one-sided competitive situation, where PAWC can aggressively pursue the largest customers of municipal authorities and the same authorities could not, under many circumstances, pursue PAWC’s customers.

This use of the Riders is fundamentally inconsistent with the purposes of the Riders presented by PAWC in the rate proceedings. Repeatedly during these proceedings, witnesses spoke of the need to provide PAWC with a tool to retain its customers. When customers leave the system, it was argued, the remaining customers suffer a loss of

revenue and increased rates. Also, PAWC would lose the value of the investment it made to serve the customer. It makes little sense to provide these benefits to PAWC and its customers at the expense of municipal authorities and their customers. PAWC, in this case, is attempting to take a long established customer from MATR. MATR will suffer a substantial loss of revenue. Its customers will suffer a substantial rate increase. And MATR's investments throughout the years, made to serve WACMA, will be lost.¹² These are outcomes that the Riders were enacted to prevent, not to encourage. It is not within the Commission's purview to reward the customers of public water companies at the expense of the customers of municipal water companies. On the contrary, the Commission must always keep in mind the public interest, broadly understood as the interest of the citizens of the Commonwealth, regardless of from whom they purchase their water. See Post-Hearing Brief of Pennsylvania Municipal Authorities Association, incorporated herein by reference, see, also, 66 Pa.C.S. § 1304.

PAWC even appears to be manipulating the concept of a "load retention" agreement. The PAWC Agreement recites that WACMA has an alleged "competitive alternative" to reduce or replace PAWC's service. At the time of such Agreement, PAWC was providing only 1% of WACMA's water needs. MATR Hearing Exhibit 4. Because this minimal service level is allegedly at risk of further reduction or elimination, PAWC claims the right to enter a 90% requirements contract with WACMA at reduced rates. Under this logic, any minimal level of service will provide PAWC with a rationale to compete for all of a customer's needs. This is an especially insidious position, given the

¹² Also, as MATR's engineer testified, once MATR loses a customer of this magnitude, it is unlikely that it will be able to regain it. "Without the benefit of a long-term Service Agreement MATR could not afford to make the necessary improvements and would therefore not be prepared to provide service at the expiration of

fact that most water resellers, due to the encouragement of state and local health officials, have established multiple emergency interconnects with neighboring systems. WACMA testified herein that it has emergency interconnects with several water providers. WACMA Hearing Exhibit 1, p.5, line 19 through p. 6 line 2. By PAWC's logic, all PAWC must do is establish an emergency interconnect with a reseller. Then it can parlay this minimal service level into a bid to take over as sole provider to avoid "losing" its "customer." This scenario is another example of the unreasonableness of PAWC's position.

Both the Commission and PAWC referred to these Riders as an experiment. The Commission pledged to scrutinize PAWC's use of the Riders. Accordingly, the Commission should consider all of the implications of the use now claimed by PAWC, including the impact on municipal authorities, which provide low-cost service to many customers in the Commonwealth. None of the implications raised herein by MATR were considered by the Commission during the rate proceedings. The obvious reason is that no one intended that the Rider be used as now suggested by PAWC. In the end, if the Commission approved PAWC's usage of Rider DRS in this instance, it would be giving PAWC a unique weapon, which none of its competitors would have. And it would be protecting the ratepayers of PAWC to the detriment of MATR's ratepayers and the ratepayers of other municipal suppliers.

As stated earlier in this Brief, the Commission is bound to apply the plain meaning of an unambiguous tariff provision. MATR has argued that the language of Rider DRS is unambiguous and does not support the position taken by PAWC herein. However, to the

the WACMA-PAWC Agreement when WACMA's consumptive demands will be even greater because of growth of North Fayette Township." MATR Hearing Exhibit 2, p.11, line 15 through p.12, line 9.

extent the Commission believes the provision in question to be ambiguous and susceptible of multiple interpretations, it must arrive at a reasonable interpretation of the language, considering the purpose and context of the provision at issue. For the reasons set forth herein, the construction of Rider DRS urged by PAWC is plainly unreasonable. PAWC attributes a purpose to the Rider which was not considered by the Commission or any party to the initial rate proceedings, and which purpose would effect a substantial and serious change to the rules of competition in the water supply industry. PAWC's position must be rejected.

Conclusion

For the foregoing reasons, MATR requests the Honorable Administrative Law Judge to enter Findings of Fact as proposed by MATR and to enter the following Conclusions of Law:

1. Rider DRS must narrowly construed.
2. Rider DRS may only be used by PAWC for the purpose of retaining an existing customer.
3. Rider DRS may not be used by PAWC for the purpose of competing for another water supplier's customer.
4. (In the alternative) Any use of Rider DRS to attract customers is limited to customers who are considering relocating into PAWC's service area or who are considering abandoning or decreasing reliance on private water supplies.
5. PAWC has not met the criteria for use of Rider DRS with respect to the PAWC Agreement.

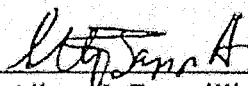
6. The rate charged by PAWC in the PAWC Agreement is contrary to its approved tariff.


7. PAWC's use of Rider DRS in the PAWC Agreement violates Section 1304 of the Public Utility Code.

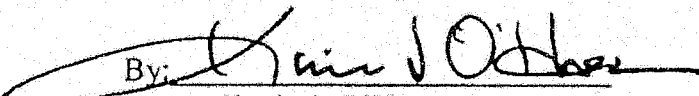
8. PAWC's use of Rider DRS in the PAWC Agreement is contrary to sound public policy.

Respectively submitted,

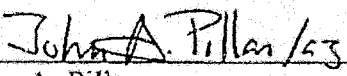
YUKEVICH, MARCHETTI, LIEKAR
& ZANGRILLI, P.C.

By: 
Albert J. Zangrilli, Jr.

By: 
Mark Fischer

By: 
Kevin J. O'Hare

11 Stanwix Street, Suite 1024
Pittsburgh, PA 1522-1324
(412) 261-6777

By: 
John A. Pillar
680 Washington Road
Suite 8101
Pittsburgh, PA 15228-1925

Attorneys for The Municipal Authority
of the Township of Robinson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached **INITIAL BRIEF OF COMPLAINANT MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON** has been served on the following by e-mail and first class mail, postage prepaid, except as otherwise noted:

HONORABLE LARRY GESOFF
(lgesoff@state.pa.us)
Administrative Law Judge
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

THOMAS P. GADSDEN, ESQ.
(tgadsden@morganlewis.com)
ANTHONY C. DECUSATIS, ESQ.
(adecusatis@morganlewis.com)
Morgan Lewis
1701 Market Street
Philadelphia, PA 19103-2921

Attorneys for Pennsylvania American Water Company

SUSAN SIMMS MARSH, ESQ.
(smarsh@pawc.com)
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

(rights reserved)

MICHAEL J. WITHEREL, ESQ.
(wk-law@rwvems.org)
Witherel & Kovacil
966 Perry Highway
Pittsburgh, PA 15237-2107

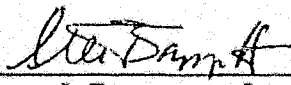
Attorneys for Pennsylvania Municipal Authorities Association, Amicus Curiae

JOHN A. VUONO, ESQ.
(jvuono@vuonogray.com)
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Attorneys for Western Allegheny County Municipal Authority, Proposed Intervenor

BOHDAN R. PANKIW, ESQ.
Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265
(via first class mail only)

DATE: March 8, 2004



ALBERT J. ZANGRILLI, JR.

Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: 215.963.5000
Fax: 215.963.5001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

ORIGINAL

Thomas P. Gadsden
Esquire
215 963 5234
tgadsden@morganlewis.com

March 8, 2004

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

DOCKETED
MAR 12 2004

SECRETARY'S BUREAU

2004 MAR -8 AM 2:20

RECEIVED

Re: **The Municipal Authority Of The Township Of Robinson v. Pennsylvania-American Water Company**
Docket No. C-20030092

Dear Secretary McNulty:

Enclosed are the original and nine copies of the Initial Brief of Pennsylvania-American Water Company in the above-docketed matter.

As indicated on the attached Certificate of Service, copies of the Brief are being served concurrently on all counsel of record by both electronic and express mail.

Sincerely,

Thomas P Gadsden

Thomas P. Gadsden
Enclosures

c: Administrative Law Judge Larry Gesoff

DOCUMENT
FOLDER

109

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

THE MUNICIPAL AUTHORITY OF THE :
TOWNSHIP OF ROBINSON :

v. :

DOCKET NO. C-20030092

PENNSYLVANIA-AMERICAN WATER :
COMPANY :

INITIAL BRIEF OF RESPONDENT
PENNSYLVANIA-AMERICAN WATER COMPANY

Before Administrative Law Judge Larry Gesoff

RECEIVED
MARCH 9 11:21
SECRETARIAT BUREAU

Thomas P. Gadsden
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5234
tgadsden@morganlewis.com

Counsel for Pennsylvania-American
Water Company

Of Counsel:

Susan Simms Marsh
Associate Corporate Counsel
Pennsylvania-American
Water Company
800 West Hershey Park Drive
Hershey, PA 17033
717.531.3208

Date: March 8, 2004

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE.....	1
A. History Of The Proceeding	2
B. Background Of Rider DRS	4
C. The March 28, 2003 Agreement	6
D. Burden Of Proof.....	7
II. QUESTION PRESENTED	8
III. SUMMARY OF ARGUMENT.....	8
IV. ARGUMENT.....	10
A. MATR's Proposed Interpretation Of Rider DRS Is Entirely Unsupported And, Indeed, Is Belied By Substantial Record Evidence	10
B. The March 28, 2003 Agreement Fully Complies With The Terms Of Rider DRS.....	13
C. MATR's Equitable Arguments Are Irrelevant And Lack Credibility	14
V. CONCLUSION	19

I. STATEMENT OF THE CASE

The Western Allegheny County Municipal Authority ("WACMA") is a municipal corporation, organized and existing under the Pennsylvania Municipality Authorities Act of 2001, that provides water service to the public in North Fayette Township. Because WACMA lacks its own sources of water supply, it has, for many years, purchased all of its water requirements from adjacent interconnected water suppliers, including Pennsylvania-American Water Company ("PAWC") (for over 45 years), the Municipal Authority of the Township of Robinson ("MATR") and the Moon Township Municipal Authority ("Moon").

In recent years, WACMA bought the majority of its water from MATR pursuant to the terms of a twenty-year agreement entered into by the parties in 1983. With that agreement scheduled to expire in October 2003, WACMA explored with MATR the possibility of renewing their water sales arrangement and, in fact, various proposals were exchanged during the second half of 2002. Eventually, however, the parties were unable to come to a meeting of the minds, principally because MATR insisted that any new contract extend for a period that WACMA believed was excessive.

When WACMA and MATR reached an impasse in early 2003, WACMA launched discussions with PAWC to see whether PAWC would be able and willing to take on a larger role in meeting WACMA's long-term water needs. Thereafter, on March 28, 2003, WACMA and PAWC executed a fifteen year Water Sales Agreement (the "Agreement") which called for PAWC to construct three additional interconnections with WACMA and to become WACMA's primary water supplier. The March 28, 2003 Agreement was negotiated in accordance with the terms of PAWC's Rider DRS-Demand Based Resale Service ("Rider DRS"), as set forth in

PAWC's tariff, and, pursuant to the Commission's Order entered June 6, 1996 at Docket No. R-00943231, was filed, on a confidential basis, with the Commission and the Office of Consumer Advocate. This proceeding followed.

A. History Of The Proceeding

On April 15, 2003, MATR filed a *Formal Complaint and Petition for Declaratory Order* (the "Complaint"). In its Complaint, MATR asked the Commission (i) to void the Agreement between PAWC and WACMA as an unlawful exercise of Rider DRS; (ii) to declare that any sales by PAWC to WACMA must be priced at PAWC's "Group A Resale Rate;" and (iii) to prohibit PAWC from commencing service pursuant to the Agreement and from constructing any facilities with respect to such service.

On May 16, 2003, PAWC filed an Answer to MATR's Complaint, denying its material averments and requesting that the Complaint be dismissed and the proposed Declaratory Order denied. In "New Matter," PAWC explained why WACMA satisfied Rider DRS' availability requirements and demonstrated that the rate contained in the Agreement was substantially greater than the "Minimum Rate" mandated by Rider DRS. Citing applicable Appellate Court precedent, the Company also pointed out that there is no basis in law for the Commission to grant the injunctive relief sought by MATR in any event. On June 4, 2003, MATR filed a Reply to PAWC's New Matter.

MATR's Complaint was assigned to Administrative Law Judge Larry Gesoff (the "ALJ") and, by Notice issued on June 5, 2003, a Prehearing Conference was scheduled for July 18, 2003. At the Prehearing Conference (which was held telephonically) and/or in Orders entered

subsequent thereto, the ALJ (i) established a litigation schedule; (ii) ruled on certain discovery motions; (iii) authorized WACMA to intervene with full party status; and (iv) allowed the Pennsylvania Municipal Authorities Association ("PMAA") to intervene for the limited purpose of filing an *amicus* brief in support of MATR.¹ In addition, during the Prehearing Conference, MATR, through its counsel, informed the ALJ that it would not be pursuing injunctive relief at that time.

Pursuant to the procedural schedule set at the Prehearing Conference, the parties engaged in extensive discovery, following which direct testimony and accompanying exhibits were pre-filed by MATR, PAWC and WACMA. In mid-December MATR advised the ALJ that it would not be submitting any rebuttal testimony. An evidentiary hearing was held in Pittsburgh on January 21, 2004 before the Honorable Fred R. Nene, who sat in for Judge Gesoff. Witnesses for MATR, PAWC and WACMA were presented and cross-examined, producing a 136 page transcript.

On February 4, 2004, PAWC advised the ALJ and the parties that all required water supply permits had been issued by the Department of Environmental Protection ("DEP") and, consequently, that PAWC had commenced service under the Agreement earlier that day. Eight days later, on February 12, 2004, MATR filed a *Petition for Interim Emergency Order* seeking to enjoin operation of the Agreement pending the outcome of this case. A timely Answer was submitted by PAWC and an emergency hearing was convened telephonically on February 17, 2004. By Order dated February 19, 2004, the ALJ denied MATR's Petition.

¹ PMAA actually attached a brief to its intervention petition, but later agreed, in effect, to withdraw and refile it at the conclusion of this case.

B. Background Of Rider DRS

During the late 1980s and early 1990s, PAWC experienced the loss of a number of significant industrial and sale for resale customers. For example, in its 1993 base rate proceeding, PAWC noted that its sales had been adversely affected by the decision of the North Penn Water Authority and North Wales Water Authority to construct a new water treatment facility. The migration of these two customers alone cost PAWC approximately \$1.27 million in annual operating revenues. *Pa. P.U.C. v. Pennsylvania-American Water Co.*, 1994 Pa. PUC LEXIS 120.

In response to the loss of these and other customers, and in an attempt to better position itself to attract new and incremental load, PAWC proposed in its 1994 general base rate filing to add three competitive rate offerings to its tariff: Rider DRS, applicable to resale customers; Rider DIS, applicable to large industrial customers; and Rate EGS, applicable to electric cogeneration facilities. The proposed Riders and Rate EGS were challenged by several of the parties to that proceeding. Some, including the OCA and OTS, opposed the Riders and recommended that they either be rejected or substantially revised. Others, most notably the Pennsylvania-American Water Large Users Group, contended that the eligibility criteria were too stringent and should be expanded.

Riders DRS and DIS, as well as Rate EGS, were approved, with minor modification, by Commission Order entered July 24, 1995. *Pa. P.U.C. v. Pennsylvania-American Water Co.*, 1995 Pa. PUC LEXIS 170. The July 24 Order was promptly appealed by the OCA, which argued, *inter alia*, that the competitive riders were unlawful because they allowed PAWC to negotiate non-tariff rates without specifying a maximum or minimum rate and without requiring

prior Commission review and approval. At the Commission's request, the matter was remanded to the Commission to allow it to consider and address the legal concerns raised by the OCA on appeal. At PAWC's recommendation, the proposed tariff language was revised to define ranges of acceptable rate levels and to provide that negotiated agreements would be submitted to (but not pre-approved by) the Commission. With these modifications, Riders DRS and DIS and Rate EGS were approved by Order entered June 6, 1996 and have been an integral part of PAWC's published tariff ever since. *Pa. P.U.C. v. Pennsylvania-American Water Co.*, 1996 Pa. PUC LEXIS 199.

A copy of Rider DRS from PAWC's currently effective tariff was presented as PAWC Exhibit 1-A. As explained by Mr. Grundusky (PAWC St. 1, p. 4), Rider DRS is available to any customer that (1) purchases water from the Company for resale; (2) enters into a Service Agreement for a term of not less than 10 years; (3) agrees to maintain an average daily load factor of not less than 0.75; and (4) has a viable competitive alternative to service from PAWC and intends to select that alternative to the detriment of the Company and its other customers. Rider DRS further provides that the rates to be charged qualifying customers shall not exceed the "Maximum Rate," nor be less than the "Minimum Rate," and shall be subject to an agreed upon "Escalation Clause." The "Minimum Rate" is defined as follows:

Minimum Rate: The Minimum Rate shall be sufficient to recover; (1) the Production Cost of Water; (2) the fixed costs (depreciation and pre-tax return) associated with all new facilities added to serve the customer; and (3) some portion of the fixed costs of the Company's other facilities. For purposes of this rider, the Production Cost of Water shall be the variable cost the Company incurs to produce additional treated water, which consists of expenses for electric power, chemicals and purchased water.

Agreements entered into under Rider DRS must be filed with the Commission, and contemporaneously served on the OCA, within five days of their execution and are to be treated on a confidential basis.

C. The March 28, 2003 Agreement

PAWC has provided water service to WACMA, or its predecessors, since 1957 through a single, metered point of interconnection located in South Fayette Township. In 1999, WACMA completed the construction of interconnecting pipelines that allowed it to transfer water from the eastern end of its system to the area theretofore served exclusively by the Company. This enabled WACMA to increase its purchases from other providers, principally MATR and Moon, and significantly reduce its purchases from PAWC. Indeed, as a result of those system changes, WACMA's purchases from the Company fell 75% - 80% below prior sales levels (PAWC St. 1, p. 5; MATR Exh. 3).

During this period, PAWC periodically made overtures to WACMA about selling it more water. Those discussions, however, did not progress until early 2003 when, according to Mr. Morris, WACMA's Chairman, WACMA and MATR were unable to resolve their differences regarding the renewal terms of their 1983 purchase water agreement.² In the first quarter of 2003, the talks between PAWC and WACMA intensified, culminating in the execution on March 28, 2003 of the Agreement that MATR contests in this proceeding. The essential terms of that Agreement, a copy of which was entered into the record as an attachment (Lenze Exhibit 9) to MATR Exhibit 1, may be summarized as follows:

² As Mr. Morris explained (WACMA Exh. 1, pp. 13-15), MATR insisted on a lengthy term tied to the financing of future capital projects and continued to hold out for an 85% minimum take requirement.

- PAWC shall install the facilities required to establish three additional metered interconnections with WACMA.¹
- WACMA shall purchase at least 90% of its total water system requirements from PAWC at a daily load factor of not less than 0.75.
- WACMA shall pay PAWC \$1.90 for each 1,000 gallons, which price will be adjusted annually by application of the prior year's increase in the national Consumers Price Index.
- The Agreement runs for an initial term of 15 years and shall extend automatically for additional one-year periods unless terminated by six-months advance written notice by either party.

As noted previously, the Agreement was filed with the Commission, and a copy served on the OCA, on March 28, 2003.

D. Burden Of Proof

As this case has evolved, MATR's Complaint has contracted into a single allegation - - namely, that Rider DRS cannot be utilized in a manner that results in the loss of existing sales by an alternative supplier. As the proponent of this extraordinarily narrow interpretation of PAWC's Commission-approved tariff, MATR bears a very heavy and, given the record in this proceeding, insurmountable burden (66 Pa. C.S. §332(a)).

The Pennsylvania Supreme Court has held that the term "burden of proof" imparts a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1995). "Preponderance of the evidence," in turn, means that one party has presented evidence that is more convincing, even by a small amount, than the evidence presented

¹ All such interconnection sites are located within PAWC's existing service territory (PAWC St. 1, p. 3; PAWC Exh. 1-B).

by the other side. If the evidence is co-equal, the party with the burden of proof loses.

Morrissey v. Pa. Dept. of Highways, 424 Pa. 87, 225 A.2d 895 (1987); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 134 Pa. Cmwlth. 218, 221-22, 578 A.2d 600, 602 (1990). In addition, the Commission's findings of fact must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk and Western Railway v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

II. QUESTION PRESENTED

1 Has MATR demonstrated, by a preponderance of the evidence, that PAWC's interpretation and application of Rider DRS are in error?

III. SUMMARY OF ARGUMENT

In early 2003, WACMA, a long-standing PAWC customer, approached the Company and indicated that it was interested in purchasing additional volumes of water from PAWC once its then existing water sales agreement with MATR expired later that year. In accordance with its statutory obligation to serve under Section 1501 of the Public Utility Code (66 Pa. C.S. §1501), PAWC proceeded to construct the facilities required to reliably meet WACMA's needs.

MATR has not challenged PAWC's right (indeed, its obligation) to sell water to WACMA, but instead contends that it may only do so at its tariffed Sale for Resale rate. Because that rate substantially exceeds the price which MATR historically has charged for its service, MATR hopes to use this proceeding to deny WACMA the benefits of PAWC's competitive rate offering, i.e. Rider DRS, and to force WACMA to continue to purchase water

from it. More specifically, MATR asserts that Rider DRS may not be utilized if the net result is a reduction in sales by an existing supplier.

MATR's tortured interpretation of Rider DRS should be rejected. Even though it had the burden of proving that PAWC's proposed application of Rider DRS was unlawful, MATR submitted no evidence in support of its position. Nor, for that matter, did MATR offer any response, through rebuttal or cross-examination, to the testimony submitted by PAWC which clearly established that Rider DRS was intended to enable PAWC to both retain and attract load in circumstances where, as here, it is in the best interests of its other customers to do so. Moreover, after initially complaining that the unit price agreed to by PAWC and WACMA fell below the "Minimum Rate" defined by Rider DRS, MATR abandoned that argument at hearing.

Rather than focusing on the issues at hand, MATR spent most of its time - - and virtually all of its testimony - - trying to fashion various equitable arguments, including claims that it had made significant investments in order to serve WACMA and that it would have to raise its rates by 30% if it lost WACMA as a customer. PAWC respectfully submits that such considerations are irrelevant to the threshold issue of Rider DRS' scope and proper application. In addition, and as discussed *infra*, each of MATR's contentions was thoroughly discredited on the record.

IV. ARGUMENT

A. MATR's Proposed Interpretation Of Rider DRS Is Entirely Unsupported And, Indeed, Is Belied By Substantial Record Evidence

In its Complaint (p. 5), MATR described WACMA as comprising "two, completely separate systems, which systems serve different geographic areas and are not connected in any manner." On the basis of this misunderstanding, MATR argued that PAWC, through the construction of additional interconnections, was, in effect, trying to steal a customer that it had not previously served, i.e. what MATR characterized as the "Primary System." Even though it was pointed out repeatedly that WACMA long ago interconnected its two service areas,⁴ MATR has persisted in arguing that "Rider DRS was never intended to be used as a competitive weapon to allow PAWC to take a customer from another water supplier; in this case, MATR." *Petition For Interim Emergency Order*, p. 3. This characterization is inaccurate and, even if accepted, lends no support to MATR's position in this case.

When WACMA approached PAWC in early 2003, PAWC was presented an opportunity to protect itself against the further loss of sales to WACMA, to regain the sales that it had lost following the 1999 interconnection of the two, previously separate WACMA systems, and to become WACMA's principal water supplier. As Mr. Grundusky explained (PAWC St. 1, pp. 4-6):

⁴ When asked about this in discovery, Mr. Lenze claimed that it was not until MATR deposed Mr. Nichols in this case that he learned the two WACMA systems had been interconnected. In fact, MATR was made aware of this development as early as February, 2000 (Tr. 17-18).

WACMA clearly has competitive alternatives, such as the Complainant, Robinson Township, Allegheny County and Moon Township Municipal Authority. WACMA also expressed its intent to select that alternative, which would have resulted in the loss of the Company's existing sales, as well as the loss of the opportunity for additional sales, both of which would have worked to the detriment of the Company and its other customers.

* * *

Q. Is it possible that, without the Water Sales Agreement, Pennsylvania-American could lose even its much lower post-1998 level of sales to WACMA?

A. Yes, it was. Because WACMA increased its ability to transfer water to the southern section of its system, it became practical for WACMA to purchase the bulk of its water from other, lower-priced providers. The initial term of WACMA's agreement to purchase water from Robinson Township was set to expire on October 20, 2003. We believed that it was likely that WACMA would attempt to negotiate a new agreement sufficient to cover virtually all of its water supply needs. If WACMA contracted with Robinson Township, PAWC's pre-1999 level of sales would be lost permanently, and its lower past-1999 level of sales could be lost as well.²

As discussed *supra*, Riders DRS and DIS and Rate EGS were approved at the conclusion of PAWC's 1994-95 base rate proceeding. A review of relevant excerpts from the record developed in that case makes it quite clear that the parties fully understood that the competitive rate offerings proposed by PAWC would be used for the dual purpose of retaining and attracting load (PAWC Exh. 3-A). For example, in his direct testimony in that proceeding, Office of Trial Staff witness Kcim observed: "These three tariffs were proposed by the Company in order to

² Although counsel for MATR tried to establish that there was no reason for PAWC to be concerned about a further erosion of sales to WACMA (Tr. 85-92), the March 28, 2003 Agreement shows otherwise: "Western Allegheny currently purchases a portion of its water supply from the Water Company for resale to its customers, and has an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC."

enhance its ability to maintain its existing customer base and to attract new customers" (*Id.*).

Thereafter, in its Initial Brief to Chief Administrative Law Judge Christianson, PAWC described the purpose of its competitive rate riders in terms of "retaining or attracting incremental load"

(*Id.*) Similarly, in its Reply Brief, the OTS stated: "The purpose of these changes should be to allow PAWC the flexibility to negotiate rates that retain or attract loads that otherwise would be lost" (*Id.*).

Furthermore, Mr. Stout, who advised the Company in that case and participated in the drafting of those tariff provisions, confirmed that Rider DRS was designed with both of those objectives in mind (PAWC St. 3, p. 4):

Q. What is the purpose of Rider DRS?

A. The purpose of Rider DRS is to retain and attract Sales for Resale customers that might otherwise use alternative sources of water supply in such a manner that a contribution toward the Company's fixed costs is received, thereby reducing the amount of fixed costs to be recovered from other customers.

Q. What is the basis for your statement that Rider DRS is intended to attract Sales for Resale customers?

A. My conclusion that Rider DRS intended to attract Sales for Resale customers is based on my discussion with Company officials at the time and the tariff's incorporation of the cost of new facilities as a part of the Minimum Rate. The construction of new facilities would be for the purpose of serving a new customer. This makes clear that the rider is intended to attract new customers as well as retaining existing customers for which new facilities would not be required.

MATR was not a party to the 1994-95 case and neither of its witnesses professed any firsthand knowledge of the intent of the parties to that proceeding. In fact, neither Mr. Lenze nor

Mr. Antonelli expressed an opinion as to the proper interpretation and application of Rider DRS. Furthermore, MATR chose not to cross-examine Mr. Stout and, though provided the opportunity, offered no rebuttal to his testimony. In other words, MATR not only failed to carry its burden of proof - - it failed to present any affirmative evidence whatsoever on this threshold issue.

Wholly apart from these glaring evidentiary deficiencies, PAWC submits that MATR's sudden aversion to price competition is somewhat disingenuous. After all, when WACMA interconnected its previously separate service areas in 1999, MATR was more than willing to take advantage of its then lower price to increase sales to WACMA at PAWC's expense. MATR should not now be heard to complain.

B. The March 28, 2003 Agreement Fully Complies With The Terms Of Rider DRS

Arrangements entered into pursuant to Rider DRS must comply with certain basic requirements - - (1) a service term of not less than ten years; (2) a pricing term that exceeds the "Minimum Rate" defined in the tariff and that is subject to annual escalation; and (3) a commitment by the buyer to maintain a daily load factor of at least 0.75. As explained by Mr. Grundusky (PAWC St. 1, p. 4), the March 28, 2003 Agreement fully satisfies these criteria.

In its Complaint, MATR asserted that the contract rate negotiated by PAWC and WACMA was "less than the minimum rate allowed by Rider DRS." However, Mr. Grundusky demonstrated that this is not true (PAWC St. 1, pp. 6-7; PAWC Ex. 1-C). To the contrary, the contract rate (\$1.90 per thousand gallons) is substantially greater than the "Minimum Rate," regardless of whether the latter is measured on a total Company (\$1.05) or Pittsburgh area (\$0.88) basis. Confronted with this information, counsel for MATR subsequently advised that

"[w]e are not prepared to contest or to attempt to assert that the contract rate is less than the minimum rate allowed by Rider DRS" (Tr. 19).

MATR witness Antonelli also opined that WACMA might have difficulties maintaining a daily load factor of 0.75 in the hypothetical situation of "water line breaks in the piping system coming from the South (MATR Exh. 2, p. 12). However, PAWC's Vice President of Engineering, Mr. Seidl, put Mr. Antonelli's concerns to rest (PAWC St. 2, pp. 4-5):

Interruptions of service from water line breaks in the piping system coming from the South would be offset by transmitting the required water from PAWC's other interconnection points and vice versa. PAWC's points of connection, located at the southern, southeastern and western sections of the WACMA system, will provide all of the necessary redundancy and reliability to assure that water can continue to be supplied to, and within, the WACMA system in the event of main breaks within the WACMA system.

In fact, and as Mr. Nichols pointed out (WACMA Exh. 2, pp. 8-9), the additional reliability provided by PAWC's multiple interconnection points was an important factor taken into account by WACMA.

C. MATR's Equitable Arguments Are Irrelevant And Lack Credibility

Rather than addressing the legal issues presented by MATR's Complaint, Messrs. Lenze and Antonelli endeavored to lay the groundwork for various equitable arguments. PAWC respectfully submits that those considerations not only are irrelevant, but were shown, upon further examination, to lack credibility.

1. That MATR Might Have Been Willing To Drop Its Request For An 85% Minimum Take Provision

It matters not why MATR, after months and even years of negotiations, was unable to close a deal with WACMA. Moreover, Mr. Lenze's speculation as to what the MATR Board ultimately might have done is simply that, speculation. What the record shows is that when WACMA highlighted the minimum take requirement as a major source of concern, MATR, in its final correspondence on the matter, was only willing to state that it believed the parties could reach agreement on this issue "at our next meeting" (WACMA Exh. 1, pp. 14-15).⁶

2. That MATR Made Certain Investments In Anticipation of WACMA Remaining A Customer

At pages 23-25 of his direct testimony (MATR Exh. 1), Mr. Lenze discussed two projects that he alleged were undertaken, at least in part, in order for MATR to be able to continue to serve WACMA: (i) a purported \$4.0 million expansion of MATR's treatment plant in 1995; and (ii) design and engineering work related to a possible expansion of MATR's "main water transmission line." However, as Mr. Lenze's cross-examination demonstrated, there were other, arguably more important reasons why MATR made these investments.

As a preliminary matter, Mr. Lenze grossly overstated the cost of the 1995 project by quoting a figure that encompassed not only an expansion of the plant's capacity, but the installation of a wastewater treatment system as well (Tr. 28-31). More significantly, a driving force behind the decision to construct additional treatment capacity was the fact that, in the early

⁶ As noted by Mr. Morris (WACMA Exh. 1, p. 20), WACMA was willing to commit to a 90% minimum take provision with PAWC because PAWC offered greater rate certainty and stability over the long-term.

1990s, MATR entered into a long-term contract to supply at least 85% of Findlay Township's water requirements. Indeed, in its application to the Department of Environmental Resources for a public water supply permit, MATR described the need for the treatment plant expansion as "[d]ue to population growth in the service area and the addition of Findlay Township as a regular customer" (Tr. 33-35).²

WACMA's role in the expansion of the "main water transmission line" is equally tenuous. First, construction on this line has not even started (Tr. 35-36). Second, there would be no need for this work until at least the year 2008 if PAWC were to supplant MATR as WACMA's primary supplier (Tr. 48-49). Third, and as MATR noted in its application to the Environmental Protection Agency for grant money, one of the principal purposes of this project is to increase fire flows to MATR's own customers (Tr. 46-47).

Mr. Antonelli also testified that MATR had made improvements to its system purportedly to serve WACMA, citing "a new 12-inch water line along Mobay Road" (MATR Exh. 2, pp. 7-8). Yet, when questioned on this claim, Mr. Antonelli readily admitted that the line had another purpose, i.e. to provide sufficient fire flows to a new Lowe's home improvement store. Mr. Antonelli further acknowledged that Lowe's was probably assessed a tap-in fee by MATR, thereby helping to defray the cost of installing the new line (Tr. 54-56).

² It is possible that the additional sales to Findlay Township served to cover most and perhaps all of the debt service incurred by MATR when it financed the treatment plant expansion. Mr. Lenze did not know (Tr. 35).

3. That MATR Would Have To Increase Its Rates By 30% If It Lost WACMA As A Customer

This assertion, like so many others that MATR has made during the course of this proceeding, was thoroughly discredited. The claim was initially made by Mr. Lenze (MATR Exh. 1, pp. 25-26). However, when he was asked about it, Mr. Lenze made it clear that, in this instance, he was relying entirely on work performed by Mr. Antonelli (Tr. 39).

As subsequent questioning of Mr. Antonelli brought to light, there are at least three serious problems with his rate analysis. First, he significantly overstated the revenues that MATR's sales to WACMA would likely produce on a normalized, ongoing basis (Tr. 51-52). Second, Mr. Antonelli completely ignored the savings that would accrue to MATR in the form of avoided purchased water costs if WACMA were no longer a customer. Those costs approximated \$460,000 in MATR's last (2002-2003) fiscal year (Tr. 52-54). Third, Mr. Antonelli disregarded the capital cost savings that MATR would realize by being able to defer certain major improvement projects. In the case of the "main water transmission line" project discussed *supra*, the annual debt service cost estimated by Mr. Antonelli ranged between \$270,000 and \$300,000.

Moreover, following oral argument on its *Petition for Interim Emergency Order*, MATR moved into evidence a debt service schedule which shows that MATR's future capital costs (i.e. repayment of principal and interest on outstanding indebtedness) will be substantially below the levels presumptively recovered through its existing rates (MATR Exh. 16). As that schedule indicates, MATR's total annual debt service will approximate \$2.77 million during its current fiscal year, will decline to \$1.70 million next year, and fall in a range of \$2.1-\$2.2 million

thereafter. In short, MATR has not demonstrated that the loss of sales to WACMA will require it to increase its rates.

4. That PAWC Could Not Serve WACMA Without Continually Pumping

Mr. Antonelli made this assertion in his direct testimony based largely, and perhaps entirely, on his review of a topographical map of the area (MATR Exh. 2, pp. 9-10). His claim was shown to be factually erroneous by both Mr. Seidl (PAWC St. 2, pp. 2-4) and Mr. Nichols (WACMA Exh. 2, pp. 9-10).

V. CONCLUSION

For the reasons set forth above, PAWC respectfully requests that MATR's Complaint at Docket No. C-20030092 be dismissed, the relief sought therein denied, and this proceeding terminated.

Respectfully submitted,

Thomas P Gadsden

Thomas P. Gadsden
Morgan Lewis & Bockius LLP
1701 Market Street
Philadelphia, Pennsylvania 19103-2921
215.963.5234
tgadsden@morganlewis.com

Counsel for Pennsylvania-American
Water Company

Of Counsel:

Susan Simms Marsh
Associate Corporate Counsel
Pennsylvania-American Water
Company
800 West Hershey Park Drive
Hershey, PA 17033
717.531.3208

Date: March 8, 2004

RECEIVED
2004 MAR -8 AM 2:21
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Initial Brief of Respondent Pennsylvania-American Water Company upon the following persons, in the manner indicated, in accordance with the requirements of §1.54 (relating to service by a participant).

BY ELECTRONIC MAIL AND EXPRESS MAIL

**Albert J. Zangrilli, Jr., Esquire
Yukevich, Marchetti, Liekar & Zangrilli, P.C.
11 Stanwix Street
Pittsburgh, PA 15222-1324**

**John A. Vuono, Esquire
Vuono & Gray LLC
2310 Grant Building
Pittsburgh, PA 15219-2383**

**Michael J. Witherel, Esquire
Witherel & Kovacik
966 Perry Highway
Pittsburgh, PA 15237**

**John A. Pillar
Law Offices of John A. Pillar
680 Washington Road
Suite B101
Pittsburgh, PA 15228-1925**

**Honorable Larry Gesoff
Administrative Law Judge
Pennsylvania Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222**

RECEIVED
2004 MAR - 8 AM 2:21
SECRETARY'S BUREAU

Date: March 8, 2004

Thomas P Gadsden
Thomas P. Gadsden
Counsel for Pennsylvania-American
Water Company

YUKEVICH, MARCHETTI, LIEKAR & ZANGRILLI, P.C.

ATTORNEYS AT LAW

11 STANWIX STREET

SUITE 1024

PITTSBURGH, PENNSYLVANIA 15222-1324

ORIGINAL

Writer's Direct Dial:
(412) 261-6780

TELEPHONE 412/261-6777

FAX 412/261-6789

March 11, 2004

Via Federal Express

Pennsylvania Public Utility Commission
Secretary's Bureau
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

RECEIVED

MAR 11 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

ATTN: Docket Section

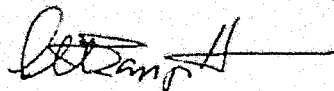
RE: The Municipal Authority of the Township of Robinson
vs. Pennsylvania American Water Company
Docket No.: C-20030092

Gentlemen:

On March 8, 2004, Complainant The Municipal Authority of the Township of Robinson filed and served its Initial Brief. In reviewing the transmittal letter, I noted that, inadvertently, I may not have included the nine copies of the Initial Brief in addition to the original Brief. To the extent the nine copies were not included in that transmittal, I am enclosing them herewith.

I apologize for any inconvenience I may have caused.

Very truly yours,



Albert J. Zangrilli, Jr.

**DOCUMENT
FOLDER**

AJZ/ph
Enclosures

RJP

cc: All counsel shown on
Certificate of Service

138

2. Respondent Pennsylvania American Water Company ("PAWC") is a Pennsylvania public utility having its principal offices in Western Pennsylvania at 300 Galley Road, McMurray, Pennsylvania 15317. Complaint, par. 2 as admitted in Answer of PAWC; TR 9.

3. MATR produces and distributes water for the residents and businesses of the Township of Robinson in Allegheny County, Pennsylvania and supplies water to certain other municipal authorities pursuant to contracts. Complaint, par. 3 as admitted in Answer of PAWC; TR 9.

4. On or about October 20, 1983, MATR entered into a written agreement with the Western Allegheny County Municipal Authority ("WACMA") (hereinafter this Agreement shall be referred to as the "1983 Agreement"). Exhibit Lenze-1 attached to MATR Hearing Ex. 1; p.11, lines 21-25 through p.12, lines 1-2.

5. The 1983 Agreement expired by its terms on or about October 21, 2003. Exhibit Lenze-1 attached to MATR Hearing Ex. 1, Section 4.

6. The 1983 Agreement was extended by means of an Extension Agreement dated October 16, 2003, by and between MATR and WACMA. Exhibit Morris-1 attached to WACMA Hearing Ex. 1 (hereinafter referred to as "Extension Agreement").

7. WACMA is a municipal authority that operates a water distribution system but does not produce water itself. Complaint, par. 6 as admitted in Answer of PAWC; TR 9.

8. Pursuant to the 1983 Agreement and the Extension Agreement, WACMA was obligated to purchase no less than 85% of its water requirements from MATR. See Section 1 of the 1983 Agreement.

9. MATR earns substantial revenue from its contract with WACMA, which revenue benefits all of its ratepayers. Exhibits Lenze-2 and 3 to MATR Hearing Ex. 1 and MATR Hearing Ex. 1, p. 13, line 5 through p.14, line 5.

10. On or about March 28, 2003, PAWC entered into a written agreement with WACMA pursuant to which PAWC agreed to sell to WACMA a minimum of 90% of WACMA's water requirements (hereinafter referred to as the "PAWC Agreement"). Exhibit Lenze-9 to MATR Hearing Ex. 1.

11. Pursuant to the PAWC Agreement, PAWC will sell water to WACMA at the rate of \$1.90 per 1000 gallons, subject to adjustment increases provided for in the Agreement. Exhibit Lenze-9 to MATR Hearing Ex. 1 at §2.1 of the PAWC Agreement.

12. The rate to be charged WACMA by PAWC as set forth in the PAWC Agreement is established by PAWC pursuant to Rider DRS – Demand Based Resale Service. Complaint par. 22 as admitted in Answer of PAWC; TR 9.

13. If PAWC cannot legally charge WACMA a rate calculated pursuant to Rider DRS, then PAWC would be obligated by its Tariff to charge WACMA pursuant to its Class A and Class B Sales for Resale Tariff which provide a rate of \$3.92 per 1,000 gallons of water sold. Admitted in PAWC's Answer, pars. 14-17; TR 9; TR 77, lines 10-14. (This Tariff provision is MATR Hearing Ex.14)

14. PAWC's Tariff provides that, "Group A" rates apply to sales to private or public water utilities where the water is to be resold to consumers of the utilities and where the purchaser is using the water as its primary source of supply. "Group B" rates apply to sales to private or public water utilities where the water is to be resold to consumers of the

utilities and where the water is being used as an emergency source of supply. Complaint par. 17 as admitted in Answer of PAWC; TR 9. See also MATR Hearing Ex. 14.

15. The difference between the Class A and Class B Sales for Resale Tariff rate and the Rider DRS rate is \$2.02 per 1,000 gallons of water sold.

16. Pursuant to the PAWC Agreement, PAWC will be the primary source of WACMA's water. Complaint par. 18 as admitted in Answer of PAWC; TR 9.

17. Pursuant to the PAWC Agreement, WACMA will be purchasing water from PAWC for resale to WACMA's own customers. Complaint par. 19 as admitted in Answer of PAWC; TR 9.

18. Rider DRS is available to PAWC customers only if all of the following conditions are met: the customer (a) purchases water from PAWC for resale; (b) enters into a Service Agreement with PAWC for a term of not less than 10 years; (c) agrees to maintain a daily load factor of not less than 0.75; and (d) has a viable competitive alternative to service from PAWC and intends to select the alternative to the detriment of PAWC and its other customers. Complaint par. 23 as admitted in Answer of PAWC; TR 9, Rider DRS is PAWC Ex. 1-A.

19. MATR's wholesale water rates are substantially less than PAWC's Group A resale rate. Complaint par. 33 as admitted in Answer of PAWC; TR 9.

20. The average daily water production of MATR during 2003 was approximately 4.3 million gallons per day. TR 14 lines. 14-18.

21. MATR serves approximately 3,900 residential customers and 600 commercial customers. MATR Hearing Ex. 1 at p. 10, lines 18-23.

22. Between 1988 and 2002, WACMA purchased the quantities of water from MATR, Findlay Township Water Authority, Moon Township Municipal Authority and PAWC as is set forth on MATR Hearing Ex. 4.

23. MATR Hearing Ex. 4 accurately summarizes the data set forth in WACMA's Annual Water Supply Reports for the years 1988 through and including 2002. The Annual Water Supply Reports are MATR Hearing Ex. 3.

24. Exhibit Lenze-2 to MATR Hearing Exhibit 1 accurately sets forth WACMA's annual purchases from MATR for the years 1988 through and including 2003 and MATR's gross revenues from such sales.

25. MATR and WACMA entered in negotiations with respect to a new water supply agreement at least two years prior to the expiration of the 1983 Agreement ("Negotiations"). MATR Hearing Ex. 1, p. 14, lines 12-20, WACMA Hearing Ex. 1, p. 7, lines 17-22, p. 17, lines 20-21.

26. During these Negotiations, MATR never demanded that WACMA purchase:

(a) all of its water needs from MATR; MATR Hearing Ex. 1, p. 16, line 24 through p. 17, line 7; or

(b) in excess of 85% of WACMA's total water needs from MATR. MATR Hearing Ex. 1, p. 17, lines 8-11; p. 21, lines 12-18, TR 118 line 15 through TR 119, line 3.

27. MATR was prepared to agree to provide WACMA with 75% of WACMA's total water needs if that was the maximum amount of water WACMA was willing to purchase from MATR. MATR Hearing Ex. 1, p. 17, lines 17-20; p. 22, lines 12-25 through p. 23, line 2; p. 23, lines 5-8. MATR was prepared to provide water to WACMA at a rate of \$2.10 per

1000 gallons. Computation of Bulk Water Rates to WACMA, p. 2. attached to Exhibit Lenze-5 to MATR Hearing Ex. 1.

28. Prior to the commencement of this proceeding, MATR knew that WACMA was obtaining daily water supply from other water suppliers but did not know the precise quantities of water WACMA was obtaining from these other suppliers. MATR Hearing Ex. 1, p. 19, lines 17-25 through p. 20, line 2.

29. During the Negotiations, WACMA was never willing to agree to purchase 85% or more of its total water needs from MATR. MATR Hearing Ex. 1, p. 27, lines 3-5; TR 114, lines 1-2.

30. WACMA's policy is not to have any single supplier be WACMA's sole source of water supply. TR 116, lines 2-5.

31. In 1995, MATR expended approximately four million dollars to expand its water treatment plant, in part, to continue to serve WACMA. MATR Hearing Ex. 1, p. 33, lines 12-17; TR 28, lines 4-8; TR 31, lines 7-10.

32. MATR expended approximately \$60,000, plus engineering costs, in order to obtain a \$485,000 grant from the United States Environmental Protection Agency to increase the size of its main water transmission line, in part, to continue to serve WACMA. MATR Hearing Ex. 1, p. 23, lines 23 through p. 24, line 22.

33. In 2001, MATR expended approximately \$145,593 to construct a new 12" water line, making it possible to construct a 12 inch diameter interconnect to the WACMA distribution system. MATR Hearing Ex. 2, p. 7, line 25 through p. 8, line 23.

34. As a result of losing WACMA as a customer, MATR must increase its rates to its remaining customers. MATR Hearing Ex. 1, p. 25, lines 11-17.

35. The amount of the rate increase MATR must make to offset the loss of WACMA as a customer is 30%. MATR Hearing Ex. 1, p. 25, line 14 through p. 26, line 26.

36. MATR first learned of the PAWC Agreement in late March 2003. MATR Hearing Ex. 1, p. 26, lines 11-14

37. Immediately after learning about the PAWC Agreement, MATR requested a copy from WACMA. MATR Hearing Ex. 1, p. 26, lines 15-17.

38. WACMA did not provide MATR with a copy of the PAWC Agreement at that time. MATR Hearing Ex. 1, p. 26, lines 18-19.

39. WACMA delivered a copy of the PAWC Agreement to MATR on May 14, 2003, only when compelled to do so by means of a proceeding by MATR pursuant to Pennsylvania's Right To Know Act. MATR Hearing Ex. 1, p. 27, lines 12-24.

40. MATR has two interconnection points with the WACMA water distribution system ("Interconnect"). MATR Hearing Ex. 2, p. 6, lines 17-20.

41. The first Interconnect is 8 inches in diameter and was constructed in approximately 1965. MATR Hearing Ex. 2, p. 7, lines 11-12.

42. The second Interconnect is 12 inches in diameter and was constructed in 2001. MATR Hearing Ex. 2, p. 7, lines 12-13.

43. The 8" Interconnect is capable of pumping more than one million gallons of water per day from MATR to the WACMA water distribution system. MATR Hearing Ex. 2, p. 7, lines 16-17.

44. The 12" Interconnect is capable of pumping more than two million gallons of water per day from MATR to the WACMA water distribution system. MATR Hearing Ex. 2, p. 7, lines 18-20.

45. At one time, WACMA operated two distinct water distribution systems. WACMA Hearing Ex. 2, p. 3, lines 19-20; PAWC Statement No.2, p. 3, lines 6-9; TR 102, lines 13-25 through TR 103, line 5.

46. In 1998, WACMA constructed a pipeline to connect the two distinct systems. TR 123, lines 23-24. (Hereinafter this pipeline will be referred to as the "Wittengale Line").

47. The connection of the two distinct systems occurred in 1999. TR 123, line 25 through TR 124, line 1; PAWC Statement No. 2, p. 5, line 12.

48. The Wittengale Line is marked on the Western Allegheny County Municipal Authority Water Distribution Map dated February 2003, bearing a Plot Date of April 1, 2003 (herein referred to as "WACMA Distribution Map") as running from PTA (herein referred to as "Point A") to PTB (Point B) along Wittengale Road. MATR Hearing Ex. 6; TR 123, lines 19-22.

49. The WACMA Distribution Map shows the Wittengale line as being an 8" line and approximately 14,700 linear feet in length. MATR Hearing Ex. 6. See also PAWC Statement No. 2, p. 3, line 7. (The distance can be measured by using the scale of 1" = 1,400' set forth on the WACMA Distribution Map.)

50. The Wittengale Line was constructed by WACMA to: (1) improve reliability of service to a growing area in North Fayette Township, (2) to extend service to existing houses along Wittengale Road and (3) to provide a back-up supply to the Noblestown-Champion Hill Service Area. TR 126, lines 2-14.

51. PAWC had no part in or knowledge of the construction by WACMA of the Wittengale Line. WACMA Hearing Ex. 2, p. 6, lines 7-9.

52. Pursuant to an Agreement dated August 28, 1957, by and between WACMA and West Penn Water Company, PAWC sold water to WACMA for resale in one of the previously distinct areas of WACMA's service territory. MATR Hearing Ex. 11-A (second preamble and paragraph FIRST of Exhibit 11-A)

53. West Penn Water Company was a predecessor of PAWC. TR 129, lines 19-21.

54. The distinct area in which the water purchased from PAWC was in turn distributed by WACMA is known as the Noblestown-Champion Hill Service Area of WACMA's service territory. MATR Hearing Ex. 11-A (second preamble and paragraph FIRST of this Exhibit).

55. The Noblestown-Champion Hill Service Area of WACMA's distribution system is shown on the WACMA Distribution Map. MATR Hearing Ex. 6; TR 124, lines 6-16.

56. The Noblestown-Champion Hill Service Area comprises approximately 1.68 square miles out of the approximately 25 square mile area of North Fayette Township. (These areas can be computed by using the scale of 1"=1,400' set forth on WACMA's Distribution Map.)

57. The 1957 Agreement between West Penn Water Company and WACMA provides, in part, as follows:

FOURTH: ...It is expressly agreed by the Authority that in no event shall the Water Company be required to supply water to the Authority at rates in excess of 500 gallons a minute or in quantities exceeding 75,000 gallons per day; and

SIXTH: The Water Company is not hereby offering water for fire protection service to the Authority or its customers through or by the Authority's proposed distribution system or in any part

of the territory which will be served by the Authority's proposed distribution system. The Authority agrees that the Water Company shall not be considered in any manner an insurer of property or persons or as having undertaken to supply sufficient water to extinguish fires or to protect any person or any property against loss or damage by fire or otherwise.

MATR Hearing Ex. 11-A, p.2

58. After the construction of the Wittengale Line, no water was transferred either into the Wittengale Line or via the Wittengale line to the other parts of WACMA's service territory except in extraordinary conditions because, *inter alia*, the water provided to the Wittengale line is provided from WACMA's northern gradients, TR 127, lines 19-20.

59. In addition to the Noblestown-Champion Hill Service Area or gradient WACMA has two additional gradients; namely, (1) the Commercial District and (2) everything other than the Commercial District and Noblestown-Champion Hill Service Area (hereinafter referred to as the "Third Gradient"). TR 124, line 6 through TR 125, line 8.

60. PAWC could not have fulfilled its obligations to WACMA pursuant to the PAWC Agreement by means of the Wittengale Line. TR 131, lines 8-14.

61. PAWC could not have adequately met WACMA's water supply needs pursuant to the PAWC Agreement without the construction of three (3) facilities described in MATR Hearing Ex. 11. TR 83, lines 4-9; TR 116, lines 14-18; TR 131, lines 8-18.

62. The approximate cost of the three (3) facilities referred to in the previous Finding of Fact is \$2,106,215.00. MATR Hearing Ex. 11.

63. The WACMA distribution system normally operates at a hydraulic gradient below the hydraulic gradient of MATR. MATR Hearing Ex. 2, p. 9, lines 23-25.

64. WACMA installed a pressure-reducing valve at the point where the Wittengale Line connects to the Noblestown-Champion Hill Service Area. TR 125, lines 9-18.

65. The pressure-reducing valve is shown on WACMA's Distribution Map as "PRY #2." Id.

66. The purpose of the pressure-reducing valve is to control the water pressure in WACMA's Noblestown and Champion Hill Service Area. TR 125, lines 9-18; TR 103, lines 14-20.

67. Without the existence of the pressure-reducing valve, the water coming down the Wittengale Line from the northern gradients of WACMA's system would become the exclusive source of water in the Noblestown-Champion Hill Service Area of WACMA. TR 125, lines 19-24.

68. The Commercial District and the Third Gradient are supplied water by MATR through the 12-inch and 8-inch Interconnects described in Proposed Finding of Fact 40-44.

69. During 2002, MATR produced approximately 4.3 million gallons of water on an average daily basis. TR 14, lines 14-18; TR 20, lines 6-9.

70. During 2002, WACMA purchased 1,074,926 gallons of water from MATR on an average daily basis. MATR Hearing Ex. 3 (WACMA Annual Water Supply Report for Calendar Year 2002, p. 6).

71. During 2002, WACMA purchased approximately twenty-five percent (25%) of MATR's water production on an average daily basis. (Mathematical computation)

72. During 1993, MATR produced approximately 2.6 million gallons of water on an average daily basis. TR 20, lines 10-13.

73. During 1993, WACMA purchased 732,753 gallons of water from MATR on an average daily basis. MATR Hearing Ex. 3 (WACMA Annual Water Supply Report for Calendar Year 1993 at p. 5).

74. During 1993, WACMA purchased approximately twenty-eight percent (28%) of MATR's water production on an average daily basis. (Mathematical computation)

75. WACMA is the only utility regulate by the PUC providing water in the region where North Fayette Township is located. PAWC Ex. No. 1-B; PAWC Statement No. 1, p. 3, lines 15-16.

Narrative Factual Background

This case involves the interpretation of a provision in the filed tariff of PAWC. The provision, known as "Rider DRS", provides as follows:

This Rider is available to a customer that.

- (1) purchases water from the Company for resale;
- (2) enters into a Service Agreement for a term of no: less than 10 years;
- (3) during the original and any renewal terms of the Service Agreement, agrees to maintain a daily load factor of not less than 0.75; and
- (4) has a viable competitive alternative to service from the Company and intends to select that alternative to the detriment of the Company and its other customers.¹

MATR Exhibit 14.

The provision provides PAWC with latitude to negotiate rates with its resale customers under limited circumstances. MATR will discuss the scope and limitations of

¹ The requirement of a "competitive alternative" must be established by documentation, provided to PAWC by the customer, including but not limited to an affidavit signed by an officer of the customer. MATR Exhibit 14. No such documentation was offered into evidence at the hearing. MATR submits this is a failure to prove a necessary element of PAWC's case.

Rider DRS in the Argument section of this Brief. The issue before the Commission is whether PAWC properly used Rider DRS in its recent dealings with WACMA.

WACMA is a distribution-only water system located in North Fayette Township PAWC Exhibit No. 1-B. For many years, MATR has been the primary water supplier for WACMA. Most recently, MATR has been selling water to WACMA pursuant to an agreement entered into by the parties in 1983 (the "1983 Agreement"). Pursuant to the 1983 Agreement, MATR was required to sell, and WACMA was required to purchase, a minimum of 85% of WACMA's water needs. MATR Hearing Exhibit 1, p. 12. For the ten year period between 1988 and 1997, MATR in fact provided WACMA annually with between 89.2% and 94% of its total needs. MATR Exhibit 4. During this period, WACMA purchased its remaining water needs from PAWC, Findlay Township Water Authority, and Moon Township Municipal Authority Id. More specifically, WACMA purchased an average of 7.2% of its water annually from PAWC between 1988 and 1997.

Over the years, MATR has invested substantial funds in facilities necessary to serve WACMA. In 1995, MATR spent approximately \$4 million to expand its water treatment plant and other related facilities to continue serving its customers, including WACMA. Proposed Finding 31. MATR's sales to WACMA comprise approximately 25-30% of MATR's total water sales. Proposed Findings 69-74. By contrast, PAWC's sales to WACMA comprise approximately 0.1% of PAWC's total water sales. TR 79, line 22 through TR 80, line 4.

WACMA's distribution system originally included two separate systems, which served two distinct geographical areas. MATR provided water to the northern system, which served the overwhelming majority of WACMA's customers. PAWC only provided

water to WACMA's "southern system", which system was significantly smaller and served many less customers. This system, known as the Noblestown-Champion Hill Service Area, comprised only 1.68 square miles out of the approximately 25 square mile area of North Fayette Township. Proposed Finding 56. In 1999, however, WACMA interconnected the two systems. After the interconnect was completed, WACMA's usage patterns began to change. WACMA began purchasing a greater percentage of water from the Moon Township Municipal Authority and a lesser percentage of water from both MATR and PAWC. MATR Hearing Exhibit 4. Between 1998 and 2002, WACMA's annual water purchases were as follows: from MATR, between 66% and 79.5%; from PAWC, between less than 1% and 7.6%; and from the Moon Township Municipal Authority, between 15.3% and 32.5%. Id

The 1983 Agreement between MATR and WACMA was due to expire in 2003. In anticipation of this expiration date, the parties began negotiating a new agreement in 1998. In 2002, the negotiations intensified and the outstanding issues were narrowed to two: the length of the new agreement and the minimum purchase requirement. Proposed Finding 25. WACMA indicated that it would agree to a 20 year agreement, which would require it to purchase from MATR a minimum of 75% of its water needs. Exhibit Lenze-6 to MATR Hearing Ex. 1. MATR wanted a slightly longer term (25-30 years) with a minimum purchase requirement of 85%.² Proposed Findings 25-27. As of December of 2003, the parties had not been able to resolve these differences. Specifically, WACMA emphatically stated that it did not want to agree to purchase more than 85% of its water needs from any

² As WACMA pointed out during the proceedings, early in the negotiations (1999) MATR stated in a letter its intention to "preserve that level of service (85%) with a possible expansion to 100% if feasible in a new agreement for services." Exhibit Morris-2 to WACMA Hearing Exhibit 1. This letter cannot be construed as

one provider. Proposed Findings 29-30. The parties, however, had agreed upon a rate, that was adjustable based upon specified cost categories. At the commencement of the agreement, the rate would be \$2.10 per thousand gallons of water.

In January of 2003, WACMA indicated in a letter to MATR that its demands for a 20 year agreement with a 75% minimum purchase requirement were firm. Exhibit Lenze-6, to MATR Hearing Ex. 1. MATR replied that it wanted another meeting to discuss these issues. Exhibit Lenze-7, to MATR Hearing Ex. 1. WACMA did not respond to MATR but went to PAWC to obtain a second proposal. At that time, PAWC's tariff rate for resale customers such as WACMA was \$3.92 per thousand gallons. Proposed Finding 13. In order to prepare a proposal acceptable to WACMA, PAWC utilized Rider DRS to propose a rate of \$1.90 per thousand gallons of water. This rate was less than one-half of PAWC's normal tariff rate for resale customers. Proposed Findings 13-15. On March 28, 2003, the parties signed a 15 year agreement, pursuant to which PAWC would sell to WACMA a minimum of 90% of its water needs at an adjustable rate, initially set at \$1.90 (the "PAWC Agreement"). MATR had no knowledge that WACMA was negotiating with PAWC and did not learn of the PAWC Agreement until after it was executed by the parties. Proposed Findings 36-39.

The PAWC Agreement falsely states that WACMA had "an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC." As stated above, MATR had proposed to WACMA an 85% minimum purchase requirement, the same requirement contained in the 1983 Agreement. In fact, MATR was prepared to accept WACMA's request that it be a 75% supplier. Proposed Finding 27. Moreover, WACMA's

a "demand" by MATR for 100% of WACMA's water service. Moreover, all of the negotiations in the 2002-03 time frame involved the consideration of a minimum purchase requirement of between 75% and 85%.

actual purchases from MATR during 1998-2002 had been less than the 85% minimum required by the 1985 Agreement. MATR knows of no evidence, and no evidence was produced during these proceedings, of a proposal by MATR or anyone else to significantly reduce or eliminate PAWC's service to WACMA.

Pursuant to section 4.6 of the PAWC Agreement, the parties recognized and expressly agreed that "consummation of this transaction is conditioned upon receiving approval from the PA PUC to the extent such approval is required." Although PAWC filed the PAWC Agreement with the Commission, it has not received approval as of this date. And despite this pending proceeding, which challenges the validity of the PAWC Agreement, PAWC has constructed approximately \$2.2 million of facilities in order to provide the service required by the Agreement.

Certainly, without using Rider DRS, PAWC would not have been able to enter the PAWC Agreement with WACMA. By using the Rider, PAWC was able to strip MATR of one of its most significant customers. As a result of PAWC's actions, MATR will suffer a substantial reduction in revenue and will be compelled to raise its water rates by approximately 30%. Proposed Findings 34-35. MATR has commenced this action to determine the validity of the PAWC Agreement and to determine whether PAWC was permitted under its Tariff to use Rider DRS in the circumstances described herein.

Argument

MATR's Complaint requests the Commission to construe the terms of Rider DRS, and ultimately to determine the purpose of such Rider. PAWC claims that it may use the Rider as a competitive weapon, to take customers away from a neighboring water supplier. MATR will demonstrate herein that PAWC's position is wholly unsupported by the

language of the Rider, the history of the Rider's approval, the Commission's opinions with respect to the Rider, and important public policy issues that militate against PAWC's position. Moreover, PAWC's use of the Rider violates Section 1304 of the Public Utility Code, which prohibits a public utility, with respect to rates, from granting unreasonable preferences to persons, corporations or municipal corporations and from subjecting the same to unreasonable disadvantage 66 Pa.C.S. § 1304

For the reasons set forth herein, PAWC's use of the Rider in the PAWC Agreement was improper and should be rejected by the Commission.

1. Rider DRS should be construed narrowly by the Commission.

No one can deny that Riders DRS and DIS (collectively, the "Riders") were new concepts in the water industry. Prior to the Commission's approval of these Riders, no water companies in Pennsylvania had the benefit of flexible tariff provisions in any way similar to the Riders. Because this was a first step for the water supply industry, in approving the Riders the Commission stressed the need for caution in their application.

Quoting from PAWC's initial Brief, the Commission wrote that: "As [PAWC] states, the competitive rate riders approved in this case do not represent an attempt to deregulate the water utility industry. Rather, they will apply in discrete, well-defined situations to a limited number of potentially eligible customers" PUC v. PAWC, 1996 Pa.PUC Lexis 141, at *13-14 (citing PAWC Initial Brief at p. 25)(This decision shall be referred to herein as "PAWC II").³

³ During the initial rate proceedings in which the Riders were approved, the Commission wrote two opinions. One in 1995, after the completion of hearings before the ALJ. And one in 1996, after remand from the Commonwealth Court.

The Commission also quoted with approval the Administrative Law Judge's ("ALJ") Recommended Decision: "I remind [PAWC] that these proposals will be scrutinized in subsequent cases . . ." *Id.* at *16 (citing Recommended Decision). The ALJ was explicit in his call for cautious application of the new Riders, stating that the Riders were "an experiment to see if they are useful and viable." PUC v. PAWC, 1995 Pa.PUC Lexis 173, at *93 (This decision shall be referred to herein as "PAWC I"). The ALJ went further, "warn[ing] [PAWC] that it should be careful in using its new flexibility." *Id.* at *94-95.

The need for careful application of the Riders was even recognized by the various parties to the rate case in which the Riders were approved. PAWC referred to the Riders as representing "a limited initial step in testing the feasibility of these sorts of initiatives for water companies" (*Id.* at *85) and one of its witnesses referred to the riders as an "experimental pilot program" with which it would "proceed cautiously." MATR Exhibit 5, tab 3, p. 3. The OCA viewed the Riders as "a sort of test case for water utilities in Pennsylvania." PAWC I at *86.

All of these words of caution counsel against an expansive view of the Riders and their applicability. And they counsel against acceptance of PAWC's attempt to stretch the words of the Rider beyond their plain meaning and beyond the Riders' purposes as presented to the Commission.

2. PAWC's use of Rider DRS is not supported by the plain language of such Rider.

In interpreting an unambiguous tariff provision, the Commission is bound to apply the plain meaning of the provision. When the provision in question is ambiguous and

susceptible of multiple interpretations, the Commission must arrive at a reasonable interpretation of the language, considering the purpose and context of the provision at issue. See Reynolds Disposal Company v. PUC, 79 Pa.Cmwlth. 222, 227-28, 468 A.2d 1179, 1182-83 (1983) (“[W]e find that the PUC’s interpretation does not offend the literal meaning of the rule . . . Rather, the rule in question contained ambiguous language that conveyed no clear, literal meaning; the rule was susceptible of a number of interpretations. In light of this ambiguity, we find that the PUC interpreted the rule in a most reasonable fashion.”); and Neary v. PUC, 78 Pa.Cmwlth. 636, 639, 468 A.2d 520, 521 (1983) (stating that terms in a tariff provision must be understood in context and in light of the purpose of the provision).

Rider DRS allows PAWC, under certain narrow circumstances, to negotiate a non-tariff rate for its resale customers. The Rider is applicable only with respect to a customer who (a) purchases water from PAWC for resale; (b) enters into a Service Agreement with PAWC for a term of not less than 10 years; (c) agrees to maintain a daily load factor of not less than 0.75; and (d) has a viable competitive alternative to service from PAWC and intends to select the alternative to the detriment of PAWC and its other customers.

The plain language of the Rider demonstrates that PAWC’s attempted use of the Rider is improper. Provisions (a) and (d) of the Rider are particularly relevant to this analysis. First, the customer at issue “purchases” water from PAWC—the provision is in the present tense and does not relate to possible future purchases. In other words, the Rider is available to a present customer who is already purchasing water from PAWC. Second, such customer must have a “viable competitive alternative” to service from PAWC. Said differently, the customer is intending to cease purchasing water from PAWC and instead

purchase water from the competitive alternative. In these situations, and in these situations alone, PAWC has some flexibility to offer a competitive rate in order to prevent its existing customer from moving to a competitor. Provision (d) further states that the customer's selection of the alternative will be to the "detriment of PAWC and its other customers." Again, this provision makes sense if we understand the "detriment" to mean the loss of a substantial customer, which customer is currently paying a portion of PAWC's expenses. Accordingly the very language of the Rider indicates that it was intended to allow PAWC to prevent the loss of existing customers to competitive alternatives, not to steal a competitor's customers.

The Commission recognized the central purpose of the Rider:

Negotiated rates must not become merely a means by which utilities shift the responsibility for lost revenues to core customers who have no competitive alternative. At the same time, however, we realize that the loss of a large industrial customer to an alternative source of supply is harmful to all remaining customers. For this reason we support negotiated incentive rates providing that it can be demonstrated that without such rates the customer can and will switch to a competitive source of supply . .

PAWC I, at *95-96 (emphasis added).

Note that it is the "loss" of a large customer that is detrimental to the remaining customers, an interpretation that is consistent with the Rider's plain language.⁴ One has to twist the Rider's language to find that the failure of PAWC to entice another supplier's customer is the sort of detriment that triggers the Rider's applicability.

⁴ The Commission similarly stated that "the existence of a competitive threat is the primary criterion of these riders." PAWC II, at *8, n4 (emphasis added). The word "threat" plainly connotes a risk that PAWC will lose a customer to a third party. A "threat" cannot reasonably be understood to include the decision of a non-customer to continue receiving service from another supplier. In a later rate case, the Commission also characterized the Riders as permitting PAWC "to negotiate contracts for water service with industrial and resale customers that have competitive alternatives and whose departure would be detrimental to it and other customers." PUC et al v PAWC, 2002 Pa. PUC LEXIS 1, *101-02 (emphasis added)(The PUC, here, clearly indicates that the Rider was intended to prevent, where possible, the departure of customers.)

PAWC asserts that the Rider may be used as a weapon to compete for another water supplier's customers. The Commission should reject this construction as inconsistent with the Rider's plain meaning, and limit use of the Rider to those circumstances where PAWC needs a competitive rate to retain an existing customer.

3. Nowhere in the voluminous PUC record regarding Riders DRS and DIS is it suggested, argued or contemplated that the Riders could be used in the manner proposed by PAWC.

MATR believes that the plain language of Rider DRS is clear and controls this case. However, in the event that the Commission finds ambiguity in the Rider, the Commission need only examine the record from the rate case at which the Rider was approved to determine that PAWC's proposed use was at no time contemplated.

The Commission itself understood both Riders DRS and DIS as being vehicles for PAWC to retain customers. See fn. 4 hereto and quotations supra. from PAWC I and II. Additionally, during the extensive testimony taken by the Commission with respect to the initial approval of the Riders, the focus on customer retention is pervasive. The following are a sampling of quotations from such testimony:

Robert L. Robowski (PAWC witness):

- "I think the company has a responsibility that if it is given the ability to retain a customer by the Commission, to retain that customer and not to willy-nilly just let that customer leave the system and thereby pass on whatever cost contribution that customer has currently contributing to disappear and have the other customers pick it up." MATR Exhibit 5, tab 2, p. 395-96 (emphasis added).

Dr. Robert Romancheck, P.E. (PAWC-LUG witness):

- "Q. Do you agree that PAWC has a need for the proposed Rider DIS? A. Yes. The almost annual rate increases set forth by the Company have resulted in large industrial customer water rates being so high, that unless the Company responds, industrial customers will leave the system. If large

customers leave the system. the stranded investment costs will be assigned to remaining customers." MATR Exhibit 5, tab 6, p. 21 (emphasis added).

- "Q Do you know whether any of these 14 customers have present plans of leaving the system? A. I believe that a certain number of them have indeed investigated the potential building of wells for their facilities." MATR Exhibit 5, tab 7, p. 847-48 (emphasis added).

- "A . . . because by keeping a customer there are other benefits that all customer classes get." *Id.* at p. 851 (emphasis added).

- "A. . . . 3) Mr. Caitlin's proposed rejection of the Company's Rate Rider DIS would greatly inhibit the Company's ability to negotiate and to retain its valuable large, high load factor, customer base." MATR Exhibit 5, tab 8, p. 5 (emphasis added).

David F. Keim (OTS witness):

- "A . . . Additionally, this customer must have a viable competitive water service alternative and would use this alternative source to the resulting detriment of PAWC and its customers; i.e. the customer leaving the Company's system." MATR Exhibit 5, tab 10, p. 2 (emphasis added).

- "Q Why has the Company proposed these tariffs? A According to Company witness Robowski, Rider DIS and Rider DRS were proposed in order to retain those high load factor customers that may have an available competitive alternate water supply source and intend to pursue such an option to the detriment of PAWC and its customers." *Id.* at p. 4 (emphasis added).

- "Q On this issue of load retention tariffs, do you see parallels between the water area and the gas area? A Well, comparisons as far as needing alternative supplies. I think you can make an analogy there, yes. Q In fact, in the gas area in Pennsylvania and other states it has been almost routine in the past how many years to allow companies to enter into special contracts to retain large customers, even offering them rates below tariff rates? In the gas area. A There's been a lot of gas incentive purchase programs in Pennsylvania. I'll agree with that." MATR Exhibit 5, tab 11, p. 739-40 (emphasis added).

- "Q In response to a question by Mr. Boehm I believe it would be an adequate paraphrase to say that you stated that the remaining customers of Pennsylvania-American Water Company would be better off if a customer who threatened to leave the system would make some contribution, and I think Mr. Boehm even said no matter how small, to the system cost, rather than leaving the system, and I believe that your answer was: yes, they

would be better off with some contribution, no matter how small. MR. BOEHM: Objection, Your Honor. I said contributions to fixed costs, I think the record will reflect. Q. With that clarification, some contribution to fixed costs. And you said that they would be better off, did you not? A. Yes, I did. Q. Isn't it true, though, Mr. Keim, that in some instances the cost of retaining a particular customer may be even greater than the contribution that that customer is willing to make to fixed costs? Id. at p. 749 (emphasis added).

- "Q. Let me ask you: is it your opinion that those riders should be applied to as many customers as possible? A. No. It is my opinion that those should be utilized as a tool to meet alternative threats from competition. Q. Why not apply those to every customer that technically meets the requirements of the tariff? A. Because the tariffs are a retention tool to be utilized to meet threats from alternative suppliers and should be used for those large customers that meet the company requirements. . . . The riders should be utilized to meet alternative threats from competition and as a retention tool by the company to prevent customer migration, yes." Id. at p. 758 (emphasis added).⁵

Brian Kalcic (Armco witness):

- "Q. Do you agree that the Company should require documentation to establish the existence of a customer's competitive supply alternative? A. Yes. The existence of a competitive supply alternative is a necessary condition for establishing a load retention rate." MATR Exhibit 5, tab 14, p. 2 (emphasis added).

- "A. . . . As I discuss below, incorporating this type of price floor will significantly undermine the stated purpose of the proposed tariff which is to provide PAWC with the rate flexibility necessary to prevent uneconomic bypass of its system. . . . Q. Mr. Kalcic, please elaborate on the concept of 'uneconomic bypass' and explain how competitive service rates are intended to prevent it. A. Bypass of a local utility occurs when a customer leaves the system for a substitute (lower-cost) supply resource." Id. at p. 3 (emphasis added).

- "A. . . . So long as the rate offered by the Company to retain the load of a bypass customer is sufficient to recover the production costs of water and provide some contribution to system fixed costs, the utility is better off retaining the customer than losing it. If a utility were to lose this type of bypass load to alternative supplies, such action would be labeled as uneconomic bypass since it represents an inefficient outcome or lost opportunity for the utility and its ratepayers. Obviously, competitive

⁵ The riders should be interpreted so that PAWC can meet competitive threats, not so that PAWC can become a competitive threat.

service rates are intended to provide the price flexibility necessary for a utility to compete for customers who have a viable competitive supply alternative, and therefore prevent uneconomic bypass." *Id.* at p.4 (emphasis added).

Thomas S. Catlin (OCA witness):

- "Q. Hypothetically, Mr. Catlin, if large customers were to leave the company's system, would you agree that a significant revenue requirement impact would be felt by other customers? A. Not necessarily." MATR Exhibit, tab 16, p. 769 (emphasis added).

- "Q. . . . So I take it there, Mr. Catlin, that you aren't categorically opposing the concept of lower rates for some customers to retain their business? A. That's correct, I'm not categorically opposing that. What I'm saying is that it needs to be looked at based on the individual or case-by-case circumstances involved." *Id.* at p. 776 (emphasis added).

- "A. I think generally that Mr. Kalcic and I are in agreement that (a) there is both economic and uneconomic bypass possibilities. The difference that I think—our primary difference is how to ensure that only the discounts absolutely necessary to retain a customer and avoid uneconomic bypass are allowed." MATR Exhibit 5, tab 17, p. 1206 (emphasis added).

- "Q. Now, Mr. Catlin, if, in fact, tariffs in this case are not approved, do you think that this discounted rate still might be appropriate in specific cases where it is demonstrated to the Commission that essentially the customer might leave Pennsylvania-American and it might leave in the situation that would cause there to be revenue shortfall, all of the things that we have been talking about? You think it would be appropriate to do on a case-by-case basis, is that right? A. Yes." *Id.* at p. 1209 (emphasis added).

- "A. . . . I would assume that the Commission would not change its view that for discount to be recoverable, it has to be demonstrated that it was necessary to offer that discount to retain the customer." *Id.* at p. 1212 (emphasis added)

As the above quotations demonstrate, the focus on customer retention was overwhelming during the rate case at which the Riders were approved.⁶ In almost every

⁶The Briefs from the rate proceedings similarly focused on retention of customers. See MATR Exhibit 5-A: "A minimum price that high would provide insufficient flexibility for the Company to negotiate a price likely to retain a customer that is seriously contemplating a competitive alternative . . . [Rider DIS] would apply to an existing customer only if, in the absence of some action by the Company, the customer would leave the system." Tab 2, p. 44 (emphasis in original); discussion of whether a discounted rate is necessary to "retain the customer" Tab 3, p. 129; "In the present proceeding, without providing evidence of any specific existing

case, the need for the Riders was discussed in terms of providing PAWC a means to keep customers who were at risk to leave the system. Further, the giving of discounted rates to certain customers was justified by reference to revenues that would be lost if such customers left the system. Even PAWC seemed to recognize this in its proposed contract with WACMA. The PAWC Agreement recites that WACMA is a current customer of PAWC and that WACMA "has an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC." Exhibit Lenze-9 to MATR Hearing Ex. 1. As will be discussed herein, these recitations are false. But at a minimum they demonstrate that PAWC believed that Rider DRS was to be used to retain customers.

Despite the focus on customer retention in the prior rate proceeding, PAWC has, and no doubt will continue to, point out that on certain occasions during the rate proceedings parties and witnesses made reference to using the Riders to "attract" customers. As argued above, a use of the Riders to "attract" customers is inconsistent with the Riders' plain language, which language supersedes any testimony given by witnesses at the rate proceeding. However, if the Commission believes that the witness references to "attracting" customers is pertinent to its interpretation of the Riders, these references must be understood in context.

No party or witness at any time during the rate proceedings argued, suggested or contemplated that the Riders could be used by PAWC to compete for another supplier's customers. Such a use would be wholly inconsistent with the notion that the Riders are an

by-pass alternatives, PAWC asserts that its proposals will enable it to counter by-pass threats and retain high-volume customers by negotiating rates based upon other than cost-of-service considerations." Tab 3, p. 136; "The positions of PAWLUG and ARMCO are similar. Each submits that the Commission should do for this water utility what it has done for many gas and electric utilities: that is, essentially to sanction negotiation of a long-term discount rate for a large customer, where that customer has a less expensive alternative to utility service and will leave the Company's system in favor of the alternative." Tab 4, p. 47 (emphasis added).

"experimental, pilot program" PAWC, then, could use the Riders to undercut another supplier's rates and attempt to take the supplier's customers. The Riders would pit PAWC against the municipal authorities in Western Pennsylvania and destroy competition for industrial users and resellers. This usage of the Riders raises serious policy issues which will be addressed in detail below. For now, it is enough to state that the Commission would not have approved such a revolutionary change in the water supply industry without any discussion whatsoever of the implications of such a change.

Moreover, in every instance where a party provided an example of "attracting" customers with discounted rates, one of two specific contexts was referenced, both involving the attracting an industrial customer, using Rider DIS. (a) attracting a customer to relocate into PAWC's service territory, or (b) attracting a customer that currently uses its own source of water—i.e., a well—and is considering replacing that source with PAWC water service. The concept of "attracting" customers was never considered in the context of attracting a customer away from another water supplier.⁷

The following is a sampling of references from the rate proceeding regarding the attraction of customers using Rider DIS⁸:

⁷ PAWC, in its own initial Brief submitted in the rate proceedings, stated as follows: "The proposed riders would enable it to separately negotiate rates with qualifying high load factor customers who can establish: (1) that they have available to them a viable competitive alternative to service from PAWC, such as the development of their own supply sources, the relocation of facilities or the installation of recycling equipment. . . ." MATR Exhibit 5-A, tab 1, p. 101. Although this quote does not specifically address the issue of attracting customers, it should be noted that PAWC does not describe the Riders as being used by PAWC to compete with other water suppliers; instead PAWC highlights a customer's options as (1) using PAWC water, (2) developing a well or other source of water, or (3) relocating. As will be discussed below, PAWC never contended that the Riders could be used to compete for another supplier's customers.

⁸ None of the sparse examples cited by PAWC in its Exhibit 3-A contradict MATR's position set forth herein. Moreover, PAWC has based its case on 9 pages of testimony and a few excerpts from legal briefs. MATR has provided the Commission with a much broader sampling of testimony from the proceedings.

Robert L. Robowski (PAWC witness):

- "Q. Can you agree with me, Mr. Robowski, that there are numerous cost factors that affect the decision of a business when it's deciding where to locate? A. Oh, I'm sure that's true. Q. How does the company intend to evaluate the importance of the cost of water in that decision in order to determine whether and to what extent a discount is required to attract a new customer? A. I think in that—did you say an existing customer or a new customer? Q. No. A new customer. A. A new customer. We're talking about a business which is considering – A. Moving into the area. Q. – locating into the company's service territory. A. Okay. . . . Now, we are not going to go out and just because it's nice, because a customer is going to move into the area, give them water for a dollar a thousand." MATR Exhibit 5, tab 2, p. 397-98 (emphasis added)(discussion of "attracting" new customer limited to industrial customer relocating into PAWC service territory).

- "Q. Mr. Robowski, what is the basis for the distinction between requiring a two-year service agreement from industrial customers and a ten-year service agreement from resale customers? A. Well, I think the only distinction there is that normally sales for resale customers are not in the same position as industrial customers, and that means that industrial customers have a lot of other alternatives that they can consider, whether they want to stay in a particular community or move out, or whether, you know, their production would be more beneficial in one area or another; and the longer period of time for industrial customer, I think, would be prohibitive in the industrial customer's mind." MATR Exhibit 5, tab 4, p. 1154-55 (emphasis added)("alternatives" relate to moving into or out of an area. No reference is made to competitive suppliers).

William Stout (PAWC witness):

- "Q. Do you have any knowledge of like riders for other water utilities in Pennsylvania? A. I do not have knowledge of like riders for other water utilities, but I do for energy utilities. Q. For energy? A. Yes. Q. Would you consider these riders economic development riders as in electric energy utilities, sir? A. I believe that in some instances the use of the rider would promote economic development, but I do not necessarily believe that that is their entire intent. Q. To what instances are you referring, Mr. Stout? A. Instances in which, as a result of the availability of the rider, a customer would locate in the company's territory as opposed to locating elsewhere." MATR Exhibit 5, tab 5, p. 328-29 (emphasis added)(When the PAWC witness was specifically asked for the instances in which the rider would promote economic development for PAWC (i.e., attract business), the

witness pointed to the relocation of an industrial customer. The witness did not reference the taking of a customer from another water supplier).

Dr. Robert Romancheck, P.E. (PAWC-LUG witness):

- "Q Do you know whether any of these 14 customers have present plans of leaving the system? A. I believe that a certain number of them have indeed investigated the potential building of wells for their facilities." Exhibit 5, tab 7, p. 847-48.

"A. By the fact that the Company would appear to another industrial customer, or several large industrial customers, as being a utility who is forward-thinking in the development of rates in their large water users just by virtue of the philosophy that they place out on the table may induce customers to come into the system, which i.e. then would increase water sales and would decrease customer bills. So there is that fact, and it has happened in electric industry. Q. The electric industry, yes; but do you know of any water customers or potential water customers of PA-American that that is even discussed on? A. Again, I am looking at the possibility of the marketing aspect of it because a large industrial would have the ability to make the choice, either purchase from PA-American, or put in their own facilities, or not move into the territory. It is another piece of the equation." Exhibit 5, tab 9, p. 1182 (emphasis added)(Again, the scenarios contemplated do not include persuading a customer to switch from another supplier to PAWC).

Brian Kalcic (Armeo witness):

- "A . . . "[I]t is my understanding that ARMCO currently has a series of wells in production, and in combination with those wells and recycling its own water, it provides upward of 80 percent of its total usage internally." Exhibit 5, tab 15, p. 1190 (part of a discussion of ARMCO's alternative water sources).

In sum, the record references varying scenarios regarding the attraction of business, including persuading a customer to relocate to PAWC's service territory and persuading a customer to rely less (or not at all) on the customer's own well systems. Any use of the Riders to attract customers should be limited to these scenarios.⁹ Importantly, no

⁹ Understood in the context presented during the rate proceedings, "attraction" of customers refers to the obtaining of a new customer who previously was not obtaining water from a utility or public water provider --again, persuading a customer to switch from wells to PAWC's water system, or to relocate into

discussion was held during the rate proceedings regarding use of the Riders to persuade a customer to leave its present water company in favor of PAWC. The reason is simple: Rider DRS was never intended for such purpose. The Commission should reject PAWC's proposed use of the Rider.

4. PAWC's proposed contract with WACMA should be declared void as it proposes a rate not authorized by PAWC's Tariff.

PAWC's attempted use of Rider DRS in its agreement with WACMA is inconsistent with both the language and intent of the Rider.

As argued above, the plain language of the Rider limits its use to the retention of customers who are threatening to leave the system. Under the Rider, PAWC must provide the Commission with sufficient evidence demonstrating that the customer has an alternative to PAWC's service and may leave the system. PAWC, however, is attempting to use the Rider, not to retain a customer, but to take a customer from MATR.

Despite the assertions of PAWC, WACMA was not threatening to leave PAWC's system. MATR had offered to provide WACMA with a portion of its water needs, consistent with historical usage. MATR, in short, wanted to retain its customer. The contractual recital that WACMA "has an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC", is simply false. In fact, throughout WACMA's negotiation with MATR, WACMA made it clear that it desired to reduce its historical percentage of water purchases from MATR from 85% to 75% to which MATR was prepared to agree. Proposed Finding 27. The reality, then, was that MATR was not offering to provide WACMA with all of its water needs, and WACMA clearly had no

the area and utilize PAWC as a water source. "Attraction" never was used to refer to persuading a customer to switch from one provider to another.

desire to purchase all of its water needs from MATR. Proposed Findings 25-30. PAWC cannot claim that WACMA had an alternative to significantly reduce or eliminate its purchases from PAWC.¹⁰

The thin reed upon which PAWC's argument rests is the reduction in its sales of water to WACMA since 1999. According to this argument, PAWC claims an entitlement to use Rider DRS to prevent a further reduction of such sales. A review of WACMA's supply history is appropriate before examining this argument further.

In 1999, WACMA, of its own accord, interconnected its two water distribution systems. Prior to 1999, the systems were entirely separate. Before the systems were connected, MATR provided in excess of 90% of WACMA's total water needs to the larger system. MATR Hearing Ex. 4. PAWC only served the smaller system, the Noblestown-Champion Hill Service Area, providing an annual average of 7.2% of WACMA's water needs. Id.

Even after WACMA – for its own purposes and without the participation and knowledge of PAWC – constructed the Wittengale Line to interconnect the Noblestown-Champion Hill Service Area to the rest of WACMA's system, the two areas remained functionally separate. As testimony indicated, the water to supply the Wittengale Line came from the northern portion of WACMA, served exclusively by MATR (and arguably by the Moon Township Municipal Authority). The pressure from the higher-elevated MATR system was so great that it would have overwhelmed the Noblestown-Champion

¹⁰ Pursuant to Rider DRS, PAWC has the duty to establish through documentation the existence of a "competitive alternative." There is no evidence that PAWC has done so. In fact, PAWC's representatives were unaware of the specifics of MATR's negotiations with WACMA and had not reviewed any of MATR's proposals. TR 86. Lines 3-12. Instead, PAWC based its assertion of a "competitive alternative" on the fact that its own sales to WACMA had lessened during the past several years. As will be discussed herein, this is an inadequate basis for invoking the Rider.

Hill Service Area. The construction of a pressure reduction valve was required to prevent this from happening.

Most significantly, David Nichols, WACMA's Engineer, testified the only time WACMA ever transferred water from the Noblestown-Champion Hill Service Area to the Wittengale Line was "in an extraordinary condition, if we had a line break or something, we could allow it to proceed in that direct [sic], but it wouldn't happen routinely." TR 127, line 24 through TR 128, line 1.

Throughout this time, PAWC evidenced very little commitment to serving WACMA, as its agreement with WACMA strictly limited the amount of water WACMA could purchase from it to a mere 75,000 gallons per day and at such low pressure that PAWC required a contract term making it clear that it could not be relied on to have sufficient water pressure with which to fight fires:

SIXTH: The Water Company is not hereby offering water for fire protection service to the Authority or its customers through or by the Authority's proposed distribution system or in any part of the territory which will be served by the Authority's proposed distribution system. The Authority agrees that the Water Company shall not be considered in any manner an insurer of property or persons or as having undertaken to supply sufficient water to extinguish fires or to protect any person or any property against loss or damage by fire or otherwise. MATR Hearing, Ex. 11-A, p.2

This lack of commitment or ability on the part of PAWC to serve WACMA is all the more striking when one considers that the area serviced by PAWC is immediately adjacent to its interconnect with WACMA. Meanwhile, the significant water pressure from MATR was so overwhelming that WACMA had to construct a pressure reducing valve at the point where the Wittengale Line connected to the Noblestown-Champion Hill

Service Area, even when the Interconnects between MATR and WACMA were approximately 4.6 miles distant.¹¹

The crucial fact is that PAWC could not have serviced WACMA apart from the Noblestown-Champion Hill Service Area. Proposed Findings 57 and 60 through 61. How can PAWC assert to the Commission that it was threatened with the loss of a customer that it could not physically serve?

PAWC apparently argues that because the total quantity of water purchased from it by WACMA has declined since 1999, this fact alone somehow triggers the right to utilize Rider DRS to now supply virtually all of WACMA's water needs. This is a misuse and misinterpretation of Rider DRS.

Even assuming that Rider DRS would apply in such a situation (and MATR does not concede that it does), the only reasonable use of the Rider in such a circumstance would be to permit PAWC to utilize Rider DRS only to recapture that share of the market it allegedly lost which, as MATR Hearing Exhibits 4 and 3 clearly demonstrate, equaled only five percent (5%) of WACMA's total consumption, averaged over the 15 year period of 1988 to 2002.

PAWC claims that since the systems were connected, WACMA has taken a lower percentage of water from PAWC. This statement is true, as far as it goes. It is also true that WACMA has taken a lower percentage of water from MATR since 1999—i.e., MATR's historical averages of in excess of 90% shrunk to 66% in 2001. These reductions

¹¹ This computation can be made from the facts of record. MATR Hearing Ex. 6 is a map of WACMA's Distribution System. Measuring the distance via the most direct water lines from the pressure reducing valve (marked as PRV #2 on the Map) to the closest interconnect with MATR (marked as "St. Pike P. Sta") results in 17.7 inches. Multiplying this total by 1400' per the scale shown on the Map yields 24,780'. Dividing this number by 5,280 feet (the number of feet in a mile) yields 4.6 miles.

have as much to do with the presence of Moon Township Municipal Authority as an additional provider as with the interconnection of WACMA's systems.

In any case, PAWC seems to be claiming a right to use Rider DRS to retain its pre-1999 level of service to WACMA. Particularly, PAWC focuses on its 10% level of supply achieved in 1997 as a benchmark of service it has lost. Aside from the obvious complications—for instance, why choose 10%, as opposed to its 6% level in 1993 or its 7.6% level in 1998 or an average number of 7.2%—a basic flaw exists in PAWC's argument. PAWC, through its proposed contract with WACMA, is not merely attempting to retain some prior level of service. It proposes to use Rider DRS to capture all of the service previously provided by MATR. The PAWC Contract would catapult PAWC from a 5%-10% provider to a minimum 90% provider. This is not a load retention contract. It is a contract aimed at taking another supplier's customer. As such, it is not authorized by any fair interpretation of Rider DRS. As discussed above, the Rider cannot be interpreted, and was never intended to be used to attract customers away from competitors.

In fact, MATR never threatened or demanded to oust PAWC's right to sell water to WACMA. The highest percentage of WACMA's water needs that MATR sought was 85%, the same amount WACMA was obligated to purchase from MATR pursuant to the 1983 Agreement (but did not, in fact, purchase from MATR for any of the years 1998 through 2002). Even at 85% there would have been plenty of water service available to PAWC, especially given, in the words of WACMA's Chairman, the "dramatic increase" in WACMA's customer base which, as he also testified, is a trend he expects to continue. WACMA Hearing Exhibit 1, p. 4, lines 15-19. But MATR was prepared to reduce its percentage of WACMA's total water needs to 75% in the new contract it was negotiating

with WACMA, thus freeing up even more of WACMA's market to be supplied by other providers. Proposed Finding 27.

The Commission should reject PAWC's proposed use of Rider DRS and declare void PAWC's contract with WACMA.

5. Strong policy reasons militate against the Commission permitting PAWC to use the Riders to "attract" another supplier's customers.

It is disingenuous for PAWC to now claim that its attempted use of Rider DRS was always contemplated, when neither PAWC nor any of the other parties participating in the proceedings presented any explanation of the Riders which included using the Riders "offensively", as a weapon to gain customers from competitors. As MATR will discuss below, PAWC's proposed use of Rider DRS would effect a significant change regarding competition in the water supply industry. The policy implications of this change would demand serious consideration by the Commission. As no consideration was given, one must infer that the change was not intended or contemplated.

Unlike with the gas and electric industries, the water industry has not experienced any sustained calls for increased competition. Thomas Cathin, the OCA's witness during the rate proceedings at which the Riders were approved, stated that the water industry is facing "far less" pressure to become more competitive than, for instance, the electric, gas or telephone industries. MATR Exhibit 5, tab 16, p. 768. The OCA emphasized this point in its Reply Brief, noting the "difference in the nature and extent of 'competition' in the water utility world." MATR Exhibit 5-A, tab 4, p. 48-49.

One obvious difference is that unlike with the energy utilities, most of the suppliers of water in Pennsylvania are not companies regulated by the PUC—they are municipal entities. In Western Pennsylvania, PAWC is the only significant public utility supplying

water. Proposed Finding 75. Its "competitors" are municipal authorities. However, pursuant to the Municipality Authorities Act, 53 Pa.C.S.A. § 5607(b)(2), an authority is not permitted to "unnecessarily burden or interfere with existing business by the establishment of competitive enterprises." More specifically, the section prohibits an authority from engaging in a project "which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes." Id.

Because of this statutory provision, MATR arguably could not do what PAWC has done in this case—i.e., construct new facilities in order to take a customer from a competitor. Thus, if PAWC were successful in its proposed use of Rider DRS, then PAWC would have a profound advantage against municipal authorities in competing for business. PAWC could undercut a municipal authority's rates in order to take the authority's customer. The same municipal authority may be prohibited from engaging in this type of competitive activity.

MATR believes that the Commission had no intention of opening up competition of the type described above. Indeed, this scenario was not considered by the Commission or any parties to the rate proceedings. Simply put, PAWC's interpretation of the Riders would establish a new, one-sided competitive situation, where PAWC can aggressively pursue the largest customers of municipal authorities and the same authorities could not, under many circumstances, pursue PAWC's customers.

This use of the Riders is fundamentally inconsistent with the purposes of the Riders presented by PAWC in the rate proceedings. Repeatedly during these proceedings, witnesses spoke of the need to provide PAWC with a tool to retain its customers. When customers leave the system, it was argued, the remaining customers suffer a loss of

revenue and increased rates. Also, PAWC would lose the value of the investment it made to serve the customer. It makes little sense to provide these benefits to PAWC and its customers at the expense of municipal authorities and their customers. PAWC, in this case, is attempting to take a long established customer from MATR. MATR will suffer a substantial loss of revenue. Its customers will suffer a substantial rate increase. And MATR's investments throughout the years, made to serve WACMA, will be lost¹² These are outcomes that the Riders were enacted to prevent, not to encourage. It is not within the Commission's purview to reward the customers of public water companies at the expense of the customers of municipal water companies. On the contrary, the Commission must always keep in mind the public interest, broadly understood as the interest of the citizens of the Commonwealth, regardless of from whom they purchase their water. See Post-Hearing Brief of Pennsylvania Municipal Authorities Association, incorporated herein by reference; see. also, 66 Pa.C.S. § 1304.

PAWC even appears to be manipulating the concept of a "load retention" agreement. The PAWC Agreement recites that WACMA has an alleged "competitive alternative" to reduce or replace PAWC's service. At the time of such Agreement, PAWC was providing only 1% of WACMA's water needs. MATR Hearing Exhibit 4. Because this minimal service level is allegedly at risk of further reduction or elimination, PAWC claims the right to enter a 90% requirements contract with WACMA at reduced rates. Under this logic, any minimal level of service will provide PAWC with a rationale to compete for all of a customer's needs. This is an especially insidious position, given the

¹² Also, as MATR's engineer testified, once MATR loses a customer of this magnitude, it is unlikely that it will be able to regain it. "Without the benefit of a long-term Service Agreement MATR could not afford to make the necessary improvements and would therefore not be prepared to provide service at the expiration of

fact that most water resellers, due to the encouragement of state and local health officials, have established multiple emergency interconnects with neighboring systems. WACMA testified herein that it has emergency interconnects with several water providers. WACMA Hearing Exhibit 1, p.5, line 19 through p. 6 line 2. By PAWC's logic, all PAWC must do is establish an emergency interconnect with a reseller. Then it can parlay this minimal service level into a bid to take over as sole provider to avoid "losing" its "customer." This scenario is another example of the unreasonableness of PAWC's position.

Both the Commission and PAWC referred to these Riders as an experiment. The Commission pledged to scrutinize PAWC's use of the Riders. Accordingly, the Commission should consider all of the implications of the use now claimed by PAWC, including the impact on municipal authorities, which provide low-cost service to many customers in the Commonwealth. None of the implications raised herein by MATR were considered by the Commission during the rate proceedings. The obvious reason is that no one intended that the Rider be used as now suggested by PAWC. In the end, if the Commission approved PAWC's usage of Rider DRS in this instance, it would be giving PAWC a unique weapon, which none of its competitors would have. And it would be protecting the ratepayers of PAWC to the detriment of MATR's ratepayers and the ratepayers of other municipal suppliers.

As stated earlier in this Brief, the Commission is bound to apply the plain meaning of an unambiguous tariff provision. MATR has argued that the language of Rider DRS is unambiguous and does not support the position taken by PAWC herein. However, to the

the WACMA-PAWC Agreement when WACMA's consumptive demands will be even greater because of growth of North Fayette Township." MATR Hearing Exhibit 2, p.11, line 15 through p 12, line 9.

extent the Commission believes the provision in question to be ambiguous and susceptible of multiple interpretations, it must arrive at a reasonable interpretation of the language, considering the purpose and context of the provision at issue. For the reasons set forth herein, the construction of Rider DRS urged by PAWC is plainly unreasonable. PAWC attributes a purpose to the Rider which was not considered by the Commission or any party to the initial rate proceedings, and which purpose would effect a substantial and serious change to the rules of competition in the water supply industry. PAWC's position must be rejected.

Conclusion

For the foregoing reasons, MATR requests the Honorable Administrative Law Judge to enter Findings of Fact as proposed by MATR and to enter the following Conclusions of Law:

1. Rider DRS must narrowly construed.
2. Rider DRS may only be used by PAWC for the purpose of retaining an existing customer.
3. Rider DRS may not be used by PAWC for the purpose of competing for another water supplier's customer.
4. (In the alternative) Any use of Rider DRS to attract customers is limited to customers who are considering relocating into PAWC's service area or who are considering abandoning or decreasing reliance on private water supplies.
5. PAWC has not met the criteria for use of Rider DRS with respect to the PAWC Agreement.

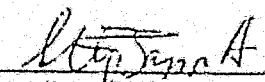
6. The rate charged by PAWC in the PAWC Agreement is contrary to its approved tariff.


7. PAWC's use of Rider DRS in the PAWC Agreement violates Section 1304 of the Public Utility Code.

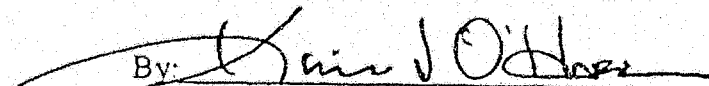
8. PAWC's use of Rider DRS in the PAWC Agreement is contrary to sound public policy.

Respectively submitted,

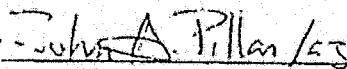
YUKEVICH, MARCHETTI, LIEKAR
& ZANGRILLI, P.C.

By: 
Albert J. Zangrilli, Jr.

By: 
Mark Fischer

By: 
Kevin J. O'Hare

11 Stanwix Street, Suite 1024
Pittsburgh, PA 1522-1324
(412) 261-6777

By: 
John A. Pillar
680 Washington Road
Suite 8101
Pittsburgh, PA 15228-1925

Attorneys for The Municipal Authority
of the Township of Robinson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached INITIAL BRIEF OF
COMPLAINANT MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON has been served
on the following by e-mail and first class mail, postage prepaid, except as otherwise noted:

HONORABLE LARRY GESOFF
(lgesoff@state.pa.us)
Administrative Law Judge
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

THOMAS P. GADSDEN, ESQ.
(tgadsden@morganlewis.com)
ANTHONY C. DECUSATIS, ESQ.
(adecusatis@morganlewis.com)
Morgan Lewis
1701 Market Street
Philadelphia, PA 19103-2921

Attorneys for Pennsylvania American Water Company

SUSAN SIMMS MARSH, ESQ.
(smarsh@pawc.com)
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

(rights reserved)

MICHAEL J. WITHEREL, ESQ.
(wk-law@rwvems.org)
Witherel & Kovacil
966 Perry Highway
Pittsburgh, PA 15237-2107

Attorneys for Pennsylvania Municipal Authorities Association, Amicus Curiae

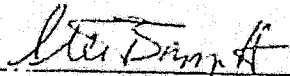
JOHN A. VUONO, ESQ.
(jvuono@vuonogray.com)
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Attorneys for Western Allegheny County Municipal Authority, Proposed Intervenor

BOHDAN R. PANKIW, ESQ.
Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

(via first class mail only)

DATE: March 8, 2004


ALBERT J. ZANGRILLI, JR.