

DOCKETED

Act 294

MAY 17 2004

Case Identification:

C-20030092; The Municipal Authority of the Township of Robinson v. PA-American Water Co., Western Allegheny Co. Municipal Authority, PA. Municipal Authorities Association, Intervenor

DATE: MAY 11 2004  
TIME: 1:36  
OFFICE OF SPECIAL ASSISTANTS

DOCUMENT

Initial Decision By:

ALJ Larry Gesoff

Deadline for Return to OSA:

May 11, 2004

This decision has not been reviewed by OSA.

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MAY 11 2004

OFFICE OF SPECIAL ASSISTANTS

\* \* \* \* \*

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

*Teresa J. Folger*

*4/30/04*

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

Act 294

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\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

Robert K. Bloom /rk

Commissioner

5-11-04

Date

Act 294

Case Identification:

C-20030092; The Municipal Authority of the Township of Robinson v. PA-American Water Co., Western Allegheny Co. Municipal Authority, PA Municipal Authorities Association, Intervenors

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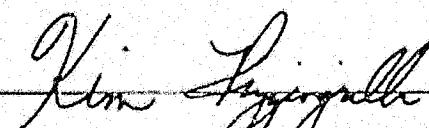
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I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

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Date

I do not want full Commission review of this decision.

  
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Commissioner

5-11-04  
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Act 294

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\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

Glen Thomas

Commissioner

5/11/04

Date

Act 294

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MAY 10 2004

OFFICE OF SPECIAL ASSISTANTS

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I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

Hendell J. Steward

Commissioner

5/6/04 X

Date

● Witherel & Kovacic ●  
Attorneys at Law

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MAY 24 2004

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MAY 17 2004

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

May 17, 2004

VIA FEDERAL EXPRESS

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

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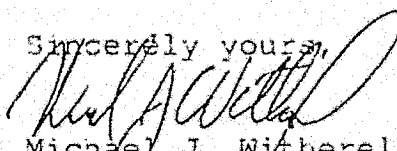
IN RE: The Municipal Authority of the Township of Robinson  
v. Pennsylvania-American Water Company  
Docket No. C-20030092

Dear Mr. McNulty:

Enclosed please find an original and nine (9) copies of the Exceptions of Amicus Pennsylvania Municipal Authorities Association to Initial Decision, that is to be filed 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

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

144

**ORIGINAL**  
BEFORE THE

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MAY 17 2004

PENNSYLVANIA PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

THE MUNICIPAL AUTHORITY OF THE)  
TOWNSHIP OF ROBINSON, )

v. )

Docket No. C-20030092

PENNSYLVANIA-AMERICAN WATER )  
COMPANY )

**DOCKETED**  
MAY 24 2004

EXCEPTIONS OF AMICUS PENNSYLVANIA  
MUNICIPAL AUTHORITIES ASSOCIATION TO INITIAL DECISION

AND NOW, comes the Pennsylvania Municipal Authorities Association (PMAA) by and through its attorneys, Michael J. Witherel and Witherel & Kovacic, and presents the instant exceptions to the initial decision of Administrative Law Judge Larry Gesoff dated April 8, 2004, and issued on April 28, 2004. The PMAA respectfully joins in the exceptions filed by the Municipal Authority of the Township of Robinson and incorporates those exceptions as if set forth at length herein. The PMAA also adds the following exceptions:

The Administrative Law Judge's factual findings concerning the 1995 Commission Final Order lack support in the record.

The PMAA takes exception to the findings and conclusions of the ALJ insofar as the ALJ concludes that Rider DRS is appropriately applied in this situation. Perhaps the best evidence that the ALJ has gotten it wrong is that PAWC has never used the rider in this fashion before.

Further, the ALJ focused almost entirely on the fact that the

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rider was properly approved and is a lawful rate. These matters, however, are not at issue. What is at issue is the scope of the rider, a matter which receives remarkably shallow consideration in the ALJ's decision. The real question in this case is not whether the rider was approved, but is, instead, whether the rider was intended to apply in a situation where PAWC was attempting to expand its sales to an existing customer by using the rider to underbid another water supplying entity like MATR. If it was so intended, some testimony concerning this scenario would clearly have been presented during the 1995 proceeding. No such testimony was presented.

The ALJ carefully selects, from the 1995 Commission proceedings, testimony which, he believes, supports his finding that Rider DRS was intended to "add new customers." This finding, however, is entirely beside the point. It is of no moment that the rider might have been intended to lure industrial clients to forego recycling or relocation and, hence, that PAWC would, thereby, gain a customer and add load. The question is whether the Commission was informed that PAWC intended to use the rider in place of its filed rate for resale where the competition for a customer's business was a municipal authority. There is simply no evidence that this was the case. In fact, the very testimony cited by the ALJ contains only three examples of situations in which "viable competitive alternatives" may arise: (1) development of the customer's own supply sources; (2) relocation of facilities; and

(3) installation of recycling equipment. Not one of these has occurred here, and none of those scenarios alert the Commission that Rider DRS would be applied in a situation like this.

It is not, therefore, sufficient for the ALJ to conclude that the Rider was intended to both retain and attract load. Some context for this conclusion must be established. The context in this case is that Rider DRS is being used to gain an unfair advantage in what ought to be a very simple matter of applying the rate for resale between competing water suppliers.

The PMAA's argument concerning the Filed Rate Doctrine was, in fact, developed, even though the ALJ failed to understand it.

There is a distinction between a party's failure to develop an argument and the inability, or unwillingness, of an adjudicative body to address that argument. The PMAA will again attempt to explain itself. All entities who sold water to WACMA over the last several decades have a filed rate at which resale water may be sold. Hence, the even playing field envisioned by the Doctrine. Here, the Commission is permitting one of the parties to apply a separate, much lower rate, one not envisioned for open competition between water suppliers. Hence, an uneven playing field which destroys the purpose of the Filed Rate Doctrine.

The PMAA also takes exception to the notion that the fact that DRS Rider is duly filed and, hence, "legal" somehow disposes of the PMAA's objections to the use of the rider in this case. An approved rate for industrial customers is also "legal" and properly

filed, but would be improper if used for residential customers. It is the very fact that a legitimately obtained rider, requested for a specific, limited use and approved for a specific, limited use, is being used here to tilt the playing field irretrievably in favor of one water producer over another that is the issue. The ALJ, instead of addressing this concern, misstates the PMAA's argument and then, having thus set up the straw man, knocks him down, proving absolutely nothing. As set forth more fully above, Rider DRS was not intended for, or approved as, a means for PAWC to increase its customer base at the expense of municipal authorities who cannot compete with such extraordinarily reduced rates. There is simply no evidence from the 1995 proceeding that the Commission envisioned PAWC using Rider DRS to compete directly with municipal authorities. That is what PAWC's resale rate is approved for, and the ALJ's decision that PAWC is free to apply the DRS Rider to virtually any situation in which it seeks to expand its customer base is tantamount to destroying the Filed Rate Doctrine by permitting one entity to bypass the appropriate filed rate for a given situation and to charge based on a much lower rate, even though that rate has no application here.

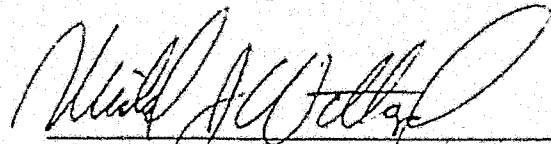
The ALJ's interpretation of Rider DRS leaves it without any practical limitations and permits PAWC unlimited ability to unfairly compete.

Applying the ALJ's interpretation of Rider DRS results in granting PAWC virtual carte blanche in competing for customers

using a rate which is a fraction of its resale rate. The ALJ's proposed interpretation would leave PAWC free to do the following: (1) establish some sales to a non-generating municipal authority (perhaps as little as 1% or less of the authority's needs); (2) wait for the next time that the non-generating authority is negotiating a new contract with its major supplier; (3) assert that PAWC's existing sales are potentially endangered by the new agreement; and (4) thereby apply Rider DRS and end up supplying 75% or more of the municipal authority's needs because no other water supplier can alter its resale rates at will, or to the extent permitted by Rider DRS. This cannot be what the Commission approved in 1996, and the ALJ's decision in this case must not be adopted by the Commission.

WHEREFORE, on the basis of the foregoing, and additionally for all of the reasons set forth in MATR's exceptions, the PMAA takes exception to the ALJ's decision and asks that it not be adopted by the Commission.

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

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CERTIFICATE OF SERVICE

I hereby certify this 17th day of May, 2004, that a true and correct copy of the within Exceptions of Amicus Pennsylvania Municipal Authorities Association to Initial Decision 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

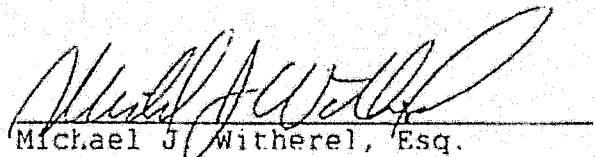
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May 18, 2004

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MAY 18 2004

VIA FEDERAL EXPRESS

Secretary  
Pennsylvania Public Utility Commission  
Keystone Building, 2<sup>nd</sup> Floor  
400 North Street  
Harrisburg, PA 17105-3265

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S OFFICE

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

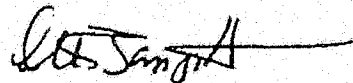
Gentlemen:

Please find enclosed for filing the original and nine (9) copies of Exceptions of The Municipal Authority of the Township of Robinson to Initial Decision of Administrative Law Judge.

As required by the Rules, true and correct copies of the enclosed Exceptions 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  
Enclosures

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

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# ORIGINAL

## COMMONWEALTH OF PENNSYLVANIA

### PUBLIC UTILITY COMMISSION

THE MUNICIPAL AUTHORITY OF THE )  
TOWNSHIP OF ROBINSON, )

Complainant - Petitioner, )

vs. )

PENNSYLVANIA AMERICAN WATER )  
COMPANY, )

Respondent. )

No.: C-20030092

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MAY 18 2004

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

EXCEPTIONS OF THE MUNICIPAL AUTHORITY OF THE  
TOWNSHIP OF ROBINSON TO INITIAL DECISION  
OF ADMINISTRATIVE LAW JUDGE

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Pa. I.D. #15929

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Attorneys for The Municipal Authority of  
the Township of Robison

John A. Pillar, Esq.  
Of Counsel

**DOCKETED**  
MAY 24 2004

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

THE MUNICIPAL AUTHORITY OF THE )  
TOWNSHIP OF ROBINSON, )

Complainant - Petitioner, )

vs. )

PENNSYLVANIA AMERICAN WATER )  
COMPANY, )

Respondent. )

No.: C-20030092

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**EXCEPTIONS OF THE MUNICIPAL AUTHORITY  
OF THE TOWNSHIP OF ROBINSON TO INITIAL DECISION  
OF ADMINISTRATIVE LAW JUDGE**

AND NOW COMES The Municipal Authority of the Township of Robinson ("MATR") and by its undersigned attorneys files these Exceptions to the Initial Decision of Administrative Law Judge Lawrence Gesoff, stating as follows:

**Exceptions**

1. The Administrative Law Judge erred in:
  - (a) finding that MATR did not meet its burden of proof in this proceeding; and
  - (b) concluding that Rider DRS rates are to be used to attract load as a matter of law; and
  - (c) concluding that Rider DRS was legally utilized by the Respondent Pennsylvania-American Water Company ("PAWC") under the facts of this case; and

(d) concluding that the application of Rider DRS in the PAWC Agreement does not violate Section 1034 of the Pennsylvania Public Utility Code; and

(e) dismissing MATR's Complaint.

2. The Administrative Law Judge erred in:

(a) failing to find that the expenditures of substantial funds by MATR to provide water service to WACMA should not be considered in adjudicating this case; and

(b) concluding that there existed a viable competitive alternative that would significantly reduce or eliminate PAWC's service to the Western Allegheny County Municipal Authority ("WACMA"); and

(c) failing to find that MATR was prepared to agree to provide WACMA with 75% of WACMA's total water needs if that quantity was the maximum amount of water WACMA was willing to purchase from MATR; and

(d) disregarding or failing to properly consider and apply the testimony provided from the proceedings in which Rider DRS was approved by the Commission in the first instance; and

(e) failing to find that WACMA's Noblestown-Champion Hill Service Area, that is, the area serviced by PAWC, remained functionally separate from the remainder of WACMA's water distribution system; and

(f) failing to accept the un rebutted testimony of WACMA's consulting Engineer and thus failing to find that the only time WACMA ever transferred water from the Noblestown-Champion Hill Service Area to the remainder of WACMA's water distribution system was in extraordinary conditions such as a water line break or the like; and

(g) failing to find PAWC had very little commitment to serving WACMA in that its agreement with WACMA strictly limited the amount of water WACMA could purchase from PAWC to only 75,000 gallons per day and contractually relieved itself of the duty to provide sufficient water pressure with which to fight fires; and

(h) failing to find that PAWC could not have serviced WACMA apart from the Noblestown-Champion Hill Service Area without the construction of additional facilities costing approximately 2.1 million dollars; and

(i) assuming, but not conceding, that Rider DRS applies under the facts of this case, failing to find that Rider DRS may be used by PAWC only to protect that share of the market it alleges it stood to lose; that is, five percent (5%); and

(j) failing to find that competition to supply WAMCA will cease at the expiration of and as the result of the PAWC Agreement; and

(k) permitting PAWC's witnesses to testify, over the objections of MATR, as to the following:

(i) Mr. Grundusky's testimony as speculative, that it is possible that without the PAWC Agreement, PAWC could lose its much lower post-1988 level of sales to WACMA, TR 73 and TR 70, line 6 through TR 73, line 6; and

(ii) Mr. Stout's testimony as expressing an ultimate conclusion and as based on hearsay that "my conclusion that Rider DRS is intended to attract sales for resale customers is based on my discussions with company officials at the time." TR 109, lines 2-24; and

(l) concluding that "WACMA could have decided to purchase 100% of its water requirements from MATR in the face of the PAWC's higher (\$3.90 per thousand gallons)

Group A Resale Rate," Initial Decision at 20, when WACMA historically never purchased all of water needs from any one supplier and testified without rebuttal that it did not want to do so; and

(m) failing to find that PAWC is the only Commission-regulated utility providing water for resale in the territory at issue.

### Narrative Factual Background

This case involves the interpretation of a provision in the filed tariff of Respondent Pennsylvania American Water Company ("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.<sup>1</sup>

Finding 28; MATR Exhibit 14.

The provision provides PAWC with latitude to negotiate rates with its resale customers under limited circumstances. The issue before the Commission is whether PAWC properly used Rider DRS in its dealings with the Western Allegheny County Municipal Authority ("WACMA").

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<sup>1</sup> 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.

WACMA is a distribution-only water system located in North Fayette Township. Finding of Fact ("Finding") 4; PAWC Exhibit No. 1-B. For many years, MATR has been the primary water supplier for WACMA. Most recently, MATR had 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. Finding 6; 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. Finding 4; *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. MATR Hearing Ex. 1, p. 33, lines 12-17; Hearing Transcript ("TR") 28, lines 4-8; TR 31, lines 7-10.<sup>2</sup> MATR's sales to WACMA comprise approximately 25-30% of MATR's total water sales. 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.

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<sup>2</sup> PAWC and WACMA have falsely argued that the \$4 million cost incurred in the expansion of MATR's water treatment plant included items that had nothing to do with that plant. They point to the "installation of the waste water system" as the only example. PAWC Initial Brief at pp. 15 and 28 and WACMA Main Brief at p. 35. Yet the record shows that the waste water system was an integral component of the water treatment plant expansion, not a separate sewage treatment facility unrelated to the water treatment process. PAWC confirmed this in its questioning of MATR's Executive Director. Q. [by PAWC's counsel] "... Can we agree that the explanation for the wastewater treatment system was described as being designed to recycle all of the filtered backwash water to the head of the water treatment plant for reprocessing as finished potable water? A. [by Mr. Lenze] We can agree to that." TR 31, lines 16-21.

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. MATR Hearing Ex.6. In 1999, however, WACMA interconnected the two systems. Finding 5. 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. Findings 31-33. 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%. Finding 31.<sup>3</sup>

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. Finding 7. In 2002, the negotiations intensified and the outstanding issues were narrowed to two: the length of the new agreement and the minimum purchase requirement. Findings 14-19. 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. Finding 10; Exhibit Lenze-6 to

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<sup>3</sup> PAWC's posturing as a long-time provider of water to WACMA ("since 1957") obscures the fact that until 1999 PAWC had only a single connection to the southern portion of WACMA's system, which portion was not connected to the much larger northern portion of the system. And even subsequent to 1999, when WACMA interconnected the northern and southern portions of its system, PAWC was not able to supply any significant amount of water to WACMA through its small, single connection. Both PAWC and WACMA admitted that PAWC could not become a primary supplier of water to WACMA without the substantial improvements constructed by PAWC pursuant to the PAWC Agreement at issue herein. See MATR Proposed Findings of Fact 60-62 and specifically TR 83, lines 4-9; TR 116, lines 14-18; and TR 131, lines 8-18.

MATR Hearing Ex. 1. MATR wanted a slightly longer term (25-30 years) with a minimum purchase requirement of 85%.<sup>4</sup> Finding 16. 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 one provider. See Finding 16. 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. Completion of Bulk Water Rates to WACMA, p. 2, attached to Exhibit Lenze-5 to MATR Hearing Ex. 1.

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. Finding 18; 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. Finding 22. 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. Finding 21. This rate was less than one-half of PAWC's normal tariff rate for resale customers. 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. MATR Hearing Ex. 1, p. 26, lines 11-14.

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<sup>4</sup> 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 a "demand" by

The PAWC Agreement falsely states that WACMA had "an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC." PAWC Agreement, p. 3, Preamble A. 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. MATR Hearing Ex. 1, p. 17, lines 17-20; p. 22, lines 12-25 through p. 23, line 2; p. 23, lines 5-8. Moreover, WACMA's actual purchases from MATR during 1998-2002 had been less than the 85% minimum required by the 1983 Agreement. 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.

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%. MATR Hearing Ex. 1, p. 25, line 11 through p. 25, line 26.<sup>5</sup> MATR commenced this action to

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

<sup>5</sup> PAWC has claimed to have "discredited" MATR's assertion regarding this 30% increase. As with any projection, that figure represented as "approximate" number, the very word utilized by MATR's witnesses. See MATR Hearing Ex. 1, p. 25, lines 18-25 through p. 26, lines 1-2. Second, Mr. Antonelli, a registered professional engineer, did not "significantly overstate the revenues that MATR's sales would likely produce on a normalized, ongoing basis." PAWC Initial Brief at p. 17. His use of the 442 million gallons of water sold to WACMA during the year 2002-2003, TR 52, lines 4-8, is 29 million gallons more water than WACMA purchased during the prior year, see Exhibit Lenze-2. However, it must be remembered that although the total number of gallons WACMA was purchasing from MATR were increasing annually; as a percentage of WACMA's total water consumption, MATR's sales to WACMA were decreasing. See MATR Hearing Exhibit 4. As WACMA's own Chairman testified, "there has been a dramatic increase in the number of residential and commercial customers in [WACMA's] service area," a trend he expects to continue. WACMA Hearing Ex. 1, p. 4, lines 15-21. Accordingly, because of WACMA's past annual increases and because of the "dramatic increases" predicted by WACMA and because of the fact that Mr. Antonelli is only projecting the amount of the rate increase, his estimate is not at all unreasonable. Surely no one would deny that if a water supplier loses a customer who previously purchased approximately 25% of that supplier's water, as is the case here, water rates will increase for those customers who remain.

PAWC also argues that MATR did not consider savings in avoided "purchased water costs." Purchased water costs means those costs incurred by MATR when it purchases water from another supplier. In this case, the other supplier was PAWC which charged MATR a rate of \$10.00 per thousand gallons, a rate approximately five (5) times the rate PAWC now wants to charge WACMA pursuant to the PAWC Agreement.) But such costs were a

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 in the record before the Honorable Administrative Law Judge.

### Argument

**The Honorable Administrative Law Judge erred with respect to his Findings, his Interpretation of Rider DRS and his Application of Rider DRS, Both as a Matter of Law and as Applied to the Facts of this Case, and MATR More Than Met its Burden of Proof with Respect Thereto.**

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. 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, MATR presented overwhelming evidence that PAWC's use of the Rider in the PAWC Agreement was illegal and should be rejected by the Commission.

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one-time matter. In 2002, the Moon Authority was unable to provide its customary quantities of water to WACMA, TR 52, lines 23-25 through TR 53, lines 1-3. As MATR Hearing Exhibit 4 demonstrates, Moon's supply to WACMA decreased by in excess of 56 million gallons between the years 2001 and 2002, despite the fact that Moon's sales to WACMA had been increasing dramatically since 1998. When Moon returned to its historic sales quotas to WACMA, the need for MATR to purchase water from PAWC would become non-existent. Finally, contrary to PAWC's assertion, Mr. Antonelli did not "disregard any capital cost savings that MATR would realize by being able to defer certain major improvement projects." PAWC Initial Brief at p. 17. Even PAWC agrees that these costs will be "deferred." *Id.* But whether these costs are immediate or will be deferred, they will nevertheless be incurred by MATR.

The Administrative Law Judge's Initial Decision failed to consider this substantial evidence and should be reversed.

**1. Rider DRS must 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").<sup>6</sup>

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’ plain purposes as presented to the Commission. The Administrative Law Judge, in his Initial Decision herein, made no reference to, and failed to apply, the Commission’s prior holdings regarding the experimental and narrow scope of the Rider.

**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,

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<sup>6</sup> 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 the second, in 1996, after remand from the Commonwealth Court.

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 illegal. 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.<sup>7</sup> 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.

PAWC asserts that the Rider may be used as a weapon to compete for another water supplier's customers. The Commission must 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. In doing so, the Commission must reject the Administrative Law Judge's construction of the Rider, as he failed to analyze or apply the Rider's plain meaning and ignored MATR's arguments regarding the same.

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.

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

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<sup>7</sup> 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.)

from the rate case at which the Rider was approved to determine that PAWC's use in this case 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).<sup>8</sup>

**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 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).

<sup>8</sup> The riders should be interpreted so that PAWC can meet competitive threats, not so that PAWC can become a competitive threat

- "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.<sup>9</sup> In almost every 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 self-servingly 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

<sup>9</sup> 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 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).

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 argued 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 “experimental, pilot program.” PAWC, then, could use the Riders to undercut another supplier’s rates and attempt to take the supplier’s customers, as was done in this case. 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—for

example, 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.<sup>10</sup>

The following is a sampling of references from the rate proceeding regarding the attraction of customers using Rider DIS<sup>11</sup>:

**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.”

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<sup>10</sup> 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

<sup>11</sup> 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.

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.<sup>12</sup> Importantly, no 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.

As evidenced above, MATR took great care in explaining its position to the Administrative Law Judge regarding an appropriate interpretation of the Riders. MATR submitted substantial excerpts from the base rate hearings at which the Riders were presented and approved (101 pages, including excerpts from Briefs), and provided the Commission with a detailed analysis of the prior hearing testimony throughout its Initial Brief. See MATR Hearing Exs. 5 and 5A. MATR desired to place before the Commission the full context regarding its approval of Rider DRS.

In contrast, PAWC provided the Commission with virtually no analysis or evidence regarding the meaning of the Rider in question, with the exception of self-serving testimony to which MATR objected. According to PAWC, its position should be accepted because its witness, Mr. Stout, helped draft the Riders and knows what they mean.<sup>13</sup> PAWC Initial Brief, p.

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<sup>12</sup> 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 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.

<sup>13</sup> William Stout is an outside consultant hired by PAWC to assist it in cost of operations and customer rate issues. He is employed by Gannett Fleming, Inc. PAWC Statement No. 3, p. 1-2.

12. Pursuant to this logic, if Mr. Stout says that PAWC has complied with Rider DRS, then that should be good enough for the Commission. And because MATR has no firsthand knowledge of the 1995 hearings, it has no business (according to PAWC) contradicting Mr. Stout. Id. at p. 12-13.

13. This line of argumentation is seriously deficient. As the Commission understands, adjudicatory bodies are called upon daily to interpret the language of constitutions, statutes and other legal enactments such as tariffs. It is the language of the provision at issue that governs this task. To the extent the language is ambiguous, the proceedings as a whole may be examined to determine the intent of the language. An individual participant's subjective understanding of the language (i.e., Mr. Stout's opinion) is entitled to no weight in this process. MATR emphasized this point at the hearing when it moved to strike a portion of Mr. Stout's testimony on the meaning of Rider DRS, as the testimony concerned the ultimate issue before the Commission. Judge Nene stated that: "Well, it does go to the ultimate issues here, and I don't think we are going to be persuaded on—make a finding of fact based on this statement. That is the issue that we are going to decide and we will decide it on the basis of the totality of the record. The motion to strike is denied." TR 109. MATR continues to contend that Mr. Stout's subjective beliefs regarding the intent of the Riders are wholly irrelevant, as would be the beliefs of Mr. Lenze or Mr. Antonelli, See PAWC Initial Brief, p. 12-13, and should have been excluded by the ALJ.

In this case, the Commission has before it the record of the entire proceeding at which the Riders were approved. It does not need to rely on the memories or subjective opinions of Mr. Stout, particularly when those subjective opinions were not shared with the Commission at the original hearings on the Riders.<sup>14</sup> MATR presented the Commission with a broad and fair

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<sup>14</sup> As MAIR demonstrated, none of the witnesses at the initial hearings stated that the Riders would or could be used to compete for another water provider's customers.

representation of relevant testimony from such hearings to aid the Commission in its interpretive function. PAWC, on the other hand, presented less than three sentences from the 1995 hearings, which sentences, absent any context, refer to using the Riders to "attract load." PAWC Initial Brief, p. 11-12.

The Administrative Law Judge, however, seemingly ignored the detailed analysis presented by MATR, making no reference to the voluminous record established by MATR with respect to the purpose of Rider DRS. Instead, the Administrative Law Judge, in the same fashion as PAWC, found a few uses of the word "attract" in the prior record and approved PAWC's actions without further analysis. The Administrative Law Judge's findings should be rejected as against the weight of the evidence and contrary to law.

**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. Pursuant to the Rider, PAWC must provide the Commission with sufficient evidence demonstrating that the customer has an alternative to PAWC's service and may leave PAWC's 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 recital in the PAWC Agreement 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. Finding 20. The reality, then, was that MATR was not offering to provide WACMA with all of its water needs, and WACMA clearly had no desire to purchase all of its water needs from MATR. Findings 9, 14, 16 and 20. PAWC cannot claim that WACMA had an alternative to significantly reduce or eliminate its purchases from PAWC and the ALJ erred in so finding.<sup>15</sup>

In fact, the Administrative Law Judge could only rely on self-serving speculation and conjecture by a PAWC employee (Mr. Grundusky) who played a key role in orchestrating the PAWC Agreement and whose self-interest is at stake in the outcome of these proceedings. See TR 86, lines 13-20.

MATR objected to Mr. Grundusky's testimony, TR 72, line 16 through 73, line 6. The ALJ who heard the case assured MATR that this speculation would not "be convincing" or "be the deciding factor." However, such testimony apparently was convincing and formed the basis of the Administrative Law Judge's erroneous conclusions that WACMA had a viable competitive alternative. See Initial Decision at 21.

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.

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<sup>15</sup> 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.

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. Finding 31; 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 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 (that is, the area not served by PAWC) 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. This testimony was not even challenged, let alone rebutted. These and the following facts should have been found as facts. Instead, they were ignored by the Administrative Law Judge.

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.<sup>16</sup>

The crucial fact is that PAWC could **not** have serviced WACMA apart from the Noblestown-Champion Hill Service Area. MATR Hearing Ex. 11-A, p. 2; TR 131, lines 8-14; MATR Hearing Ex. 11; TR 83, lines 4-9; TR 116, lines 14-18; TR 131, lines 8-18. How can PAWC assert to the Commission that it was threatened with the loss of a customer that it could not physically serve?

The Administrative Law Judge erroneously concludes that because the total quantity of water purchased from it by WACMA has declined since 1999, this fact alone somehow triggers

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<sup>16</sup> 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.

the right to utilize Rider DRS to now supply virtually all of WACMA's water needs. Initial Decision at 20f. 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 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. Finding 32.

In any case, PAWC is 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 and honest 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. The ALJ erred in holding otherwise.

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). Finding 32. Even at 85% there would have been plenty of water service available to PAWC, especially when, in the words of WACMA's Chairman, the "dramatic increase" in WACMA's customer base is a trend he expects to continue. WACMA Hearing Exhibit 1, p. 4, lines 15-19; see Finding 4. 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. Findings 14 and 20. The Administrative Law Judge erred in concluding that MATR constituted "an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC." Initial Decision 20.

In its arguments, PAWC even manipulated the very 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 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 and illegality of PAWC's position.

The Commission must reject PAWC's proposed use of Rider DRS and declare void PAWC's contract with WACMA. Where no threat existed to dispossess PAWC of its historic service to WACMA, Rider DRS cannot be applied.

**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 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. 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. PAWC Ex. 1-B, PAWC Statement No. 1, p. 3, lines 15-16. It was error for the Administrative Law Judge to not so find. 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 and the Initial Decision would establish a new, one-sided competitive situation, where privately-owned utilities

can aggressively pursue the largest customers of municipal authorities and the same authorities could not, under many circumstances, pursue the same utilities' 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.<sup>17</sup> These are outcomes that the Riders were enacted to prevent, not to encourage. The Commission cannot 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 Exceptions of Amicus Pennsylvania Municipal Authorities Association to Initial Decision, incorporated herein by reference; see, also, 66 Pa.C.S. § 1304.

WACMA, in its submissions, has questioned the motives of MATR. Unlike PAWC, MATR is not in the water business for private economic gain. MATR has no shareholders to

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<sup>17</sup> 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 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. This should have been found as fact. At such time, it is likely that WACMA will be compelled to purchase from PAWC, without the benefit of Rider DRS—

whom it must pay dividends and make profits. Instead, MATR is charged with protecting the interests of its ratepayers. And if MATR allows PAWC to improperly take one of its substantial customers, MATR's ratepayers will pay the price in higher rates. There is nothing improper about a municipal authority's desire to protect the interests of its rate payers. And there is nothing improper about a municipal authority compelling a competitor to abide by the laws of the Commonwealth and by the terms of its own tariff.

Both the Commission and PAWC referred to these Riders as an experiment. The Commission pledged to scrutinize PAWC's use of the Riders. Accordingly, MATR now requests the Commission to consider all of the implications of the use now claimed by PAWC and the devastating effects of the Initial Decision if unreversed, including the impact on municipal authorities, which provide low-cost service to many customers in the Commonwealth.

There may be a time when Pennsylvania opens up competition between water providers, both municipal and private. Before this time can arrive, however, the Commission and the state legislators will need to examine the present system and create rules that fairly provide for water providers and customers alike. None of the issues related to this type of competition were discussed, or even presented, during the Commission proceedings at which Rider DRS was approved. The reason is simple: the Commission never intended that Rider DRS would be used by PAWC to compete for another provider's customers.

In the end, if the Commission does not reverse the Initial Decision of the Administrative Law Judge and approves 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

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as no competitive alternative will exist. And PAWC's regular tariff rates, which increase on an almost annual basis and which are substantially in excess of MAIR's rates, will be truly disastrous to WACMA and its customers.

the ratepayers of PAWC to the detriment of MATR's ratepayers and the ratepayers of other municipal suppliers.

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 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 adopted by the Administrative Law Judge is plainly wrong and must be reversed. The Administrative Law Judge and PAWC attribute 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.

### Conclusion

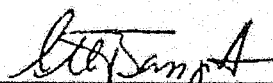
In 1995, PAWC requested a Rider that permitted it to avoid the loss of a large customer to the detriment of remaining customers. But the same consequence PAWC sought to avoid, it now wants to inflict upon MATR and MATR's customers. PAWC assured the Commission, in 1995, that the Rider would be a carefully administered experiment. But the use of the Rider now proposed by PAWC would visit wholesale changes on the rules of competition between water providers. PAWC claims that its proposed use of the Rider was always contemplated. But such use was never mentioned in the lengthy Commission proceedings at which the Rider was approved. The position of PAWC, approved by the Administrative Law Judge in his Initial

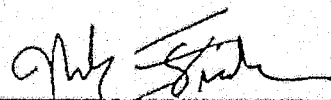
Decision, must be rejected as against the plain language and history of the Rider and against the substantial evidence presented by MATR.

For the foregoing reasons, MATR requests the Commission to grant and sustain MATR's Exceptions as set forth herein.

Respectively submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached EXCEPTIONS OF THE MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON TO INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE has been served on the following by e-mail and first class mail, postage prepaid, except as otherwise noted:

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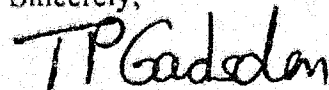
Re: The Municipal Authority Of The Township Of Robinson v. Pennsylvania-  
American Water Company  
Docket No. C-20030092

Dear Secretary McNulty:

Enclosed are the original and nine copies of the Replies of Respondent, Pennsylvania-American Water Company, to Exceptions to the Initial Decision of Administrative Law Judge Larry Gesoff 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 express mail.

Sincerely,



Thomas P. Gadsden

Enclosures

c Administrative Law Judge Larry Gesoff



CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Replies of Respondent Pennsylvania-American Water Company To The Exceptions Of The Municipal Authority Of The Township Of Robinson And The Pennsylvania Municipal Authorities Association upon the following persons, in the manner indicated, in accordance with the requirements of §1.54 (relating to service by a participant).

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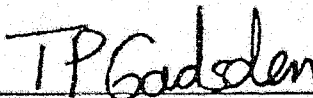
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Date: May 27, 2004



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MAY 27 2004

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

THE MUNICIPAL AUTHORITY OF THE :  
TOWNSHIP OF ROBINSON :

v. :

DOCKET NO. C-20030092

PENNSYLVANIA-AMERICAN WATER :  
COMPANY :

DOCKETED  
JUN 01 2004

REPLIES OF RESPONDENT  
PENNSYLVANIA-AMERICAN WATER COMPANY  
TO THE EXCEPTIONS OF THE MUNICIPAL AUTHORITY  
OF THE TOWNSHIP OF ROBINSON AND THE  
PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION

To the Initial Decision of  
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Date: May 27, 2004

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## I. INTRODUCTION

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.<sup>1</sup> 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.

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.

MATR's Complaint was assigned to Administrative Law Judge Larry Gesoff (the "ALJ"), who promptly scheduled a Prehearing Conference for July 18, 2003. Pursuant to a procedural schedule set at the Prehearing Conference, the parties engaged in extensive

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<sup>1</sup> All three interconnections are to be located in PAWC's existing service territory and hence there was no need for PAWC to request an expansion of its already certificated rights.

discovery; submitted direct testimony and accompanying exhibits; and presented their witnesses for cross-examination at an evidentiary hearing held in Pittsburgh on January 21, 2004. A detailed history of the proceeding, together with a thorough analysis of the record evidence, is set forth in PAWC's Initial Brief, dated March 8, 2004, and the Commission is urged to carefully review that discussion. In addition, on April 2, 2004 PAWC filed a Reply Brief in response to the Main Briefs submitted by MATR and the Pennsylvania Municipal Authorities Association ("PMAA").

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 Interim Emergency Order dated February 19, 2004, the ALJ denied MATR's Petition. On March 18, 2004, the Commission ratified Judge Gesoff's Order and adopted his ruling as its own. Specifically, the Commission concluded that MATR had failed to show either (1) that its right to relief was clear; (2) that it would be irreparably harmed if its Petition were not approved; or (3) that the relief it requested would not be injurious to the public interest.<sup>2</sup>

By Secretarial Letter dated April 28, 2004, the ALJ issued his Initial Decision ("I.D."), recommending that MATR's Complaint be dismissed and this proceeding

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<sup>2</sup> A copy of the Commission's March 18, 2004 Order is attached hereto as Appendix "A."

terminated. In so doing, the ALJ found that "the plain language and history of Rider DRS make it clear that the Rider is to be used to retain and attract incremental load" (I.D., p. 16). The ALJ also concluded that the Agreement between PAWC and WACMA fully satisfied the criteria for application of Rider DRS (I.D., pp. 18-22). Finally, the ALJ rejected arguments presented by MATR and the PMAA that the Agreement somehow violated the "Filed Rate Doctrine" and/or the anti-discrimination provisions of Section 1304 of the Code (66 Pa. C.S. §1304)(I.D., pp. 22-23).

MATR, not surprisingly, vehemently objects to the ALJ's dismissal of its Complaint and, at pages 2-5 of its Exceptions, purports to identify nineteen separate errors in the Initial Decision. However, the "supporting reasons" that should follow each exception pursuant to the Commission's regulations (52 Pa. Code §5.533(b)) are largely missing. Instead, MATR simply republishes large portions of its Initial Brief to the ALJ and makes little effort to tie that narrative back to the ALJ's specific findings of fact and conclusions of law. In short, MATR's Exceptions repeat many of the broad themes that MATR has articulated over the course of the past year, but do an exceedingly poor job of patching up (or explaining away) the many evidentiary holes in its analysis.

The PMAA elevates the debate to a new level when it implies that Judge Gcsoff was either incapable or unwilling to address its "Filed Rate Doctrine" argument (PMAA Exceptions, p. 3). It also argues that the scope of Rider DRS - - obviously the key issue in this proceeding - - received "remarkably shallow consideration" by the ALJ (*Id.*, p. 2).

As discussed herein, the PMAA's intemperate remarks are entirely unjustified and, if entertained at all,<sup>2</sup> should be affirmatively rejected.

## II. SUMMARY OF ARGUMENT

At page 25 of its Exceptions, MATR states as follows: "There is nothing improper about a municipal authority's desire to protect the interests of its rate payers." PAWC does not disagree. However, WACMA and its customers are no less deserving in this regard. Stated differently, MATR cannot claim certain rights as a municipal authority and, at the same time, contend that WACMA is powerless to protect itself and its customers.

As the ALJ correctly recognized (I.D., p. 23), this case is not about stealing customers or unfair competition. MATR had countless opportunities to negotiate an agreement with WACMA. Its failure to do so had absolutely nothing to do with the rate being offered by PAWC. In fact, the negotiations between PAWC and WACMA did not even begin in earnest until after WACMA had concluded that MATR was not prepared to deal with it in good faith. In short, MATR sought, unsuccessfully, to take advantage of its position as WACMA's principal water supplier to extract conditions to which WACMA was unwilling to accede.

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<sup>2</sup> The PMAA was granted intervention for the limited purpose of filing an *amicus* brief in support of MATR (July 18, 2003 Prehearing Order). Moreover, it is unclear how the PMAA, whose members presumably include both sellers (such as MATR) and buyers (such as WACMA), can credibly take sides in this dispute.

By offering up a tortured interpretation of Rider DRS, MATR seeks to accomplish through the regulatory process that which it could not achieve through negotiations - - namely, to hold WACMA hostage. However, in claiming to find support in the "plain language" and history of Rider DRS, MATR deliberately ignores, and asks this Commission to ignore, key components of both (e.g., Rider DRS' requirement that the rate charged recover the cost of "all new facilities added to serve the customer"). Indeed, MATR's aversion to the evidentiary record is fully revealed when it asserts that the testimony of Mr. William M. Stout, the one witness who was in a position to speak from firsthand knowledge to the intended purpose and scope of Rider DRS, should be disregarded as "subjective" (MATR Exceptions, p. 23).

Rather than focusing on the issues at hand, MATR devoted 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. As noted by the ALJ (I.D., pp. 23-24) such considerations are arguably irrelevant to the threshold issue of Rider DRS' scope and proper application. Moreover, and as discussed *infra*, MATR's contentions were thoroughly discredited on the record.

When a customer has available to it multiple sources of supply, there will always be "winners" and "losers." That, however, is no reason to strip the customer of its right to strike the best deal possible. PAWC acted, at all times, in full compliance with the requirements of Rider DRS and MATR's Complaint should, therefore, be dismissed.

### III. ARGUMENT

#### A. MATR Ignores the Plain Language And History Of Rider DRS

MATR contends that Rider DRS should be narrowly construed and only invoked, where necessary, to retain existing load and no more. For example, MATR asserts that Rider DRS should be available only “to a present customer who is already purchasing water from PAWC” (MATR Exceptions, p. 13). MATR further argues that it was never contemplated that Rider DRS would be utilized “in the context of attracting a customer away from another water supplier” (*Id.*, p. 20). MATR then makes a quantum leap to conclude that Rider DRS cannot be utilized in a manner that results in any loss of existing sales by an alternative provider. According to MATR, these limitations can be gleaned from the “plain language” of Rider DRS and from excerpts of the record developed at Docket No. R-00943231 wherein Rider DRS was first proposed and approved.

As explained in PAWC’s Initial and Reply Briefs, there is no evidentiary or other basis for reading into Rider DRS the restrictions that MATR, which did not participate in that earlier proceeding, now seeks to impose. To the contrary, the “plain language” of Rider DRS makes it abundantly clear that the Commission fully understood that the Rider could be used for the dual purpose of retaining and attracting incremental load. Otherwise, as Mr. Stout pointed out (PAWC St. 3, p. 4), and as Judge Gesoff expressly found (*I.D.*, p. 18), the reference to “additional facilities” as a component of the minimum costs to be recovered under Rider DRS would be meaningless. Unable to rationalize this critical language, MATR simply ignores it.

Nor can MATR find much comfort in the record developed at Docket No. R-00943231. While MATR is correct that more time was devoted in that case to discussing the retention of load than the attraction of load, the important point is that PAWC identified both as critical objectives when it first proposed Rider DRS. Thus, in his direct testimony in that case, Company witness Robowski explained that PAWC was proposing Rider DRS "to enhance its ability to maintain its existing customer base and, hopefully, attract new customers" (MATR Ex. 5; I.D., pp. 16-17). 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" (PAWC Exh. 3-A).

More importantly, in its eagerness to glom together snippets of testimony and briefs, MATR conveniently overlooks other parts of the record where the use of PAWC's competitive rate riders as load attraction tools was openly debated. Thus, at page 16 of its Exceptions, MATR implies that OTS witness Keim understood that the sole purpose of Rider DRS was "to retain ... high load factor customers." Unfortunately, MATR neglects to reproduce Mr. Keim's full response wherein, two sentences later, he acknowledged that Rider DRS was also designed to "attract new customers" (PAWC Exh. 3-A). Indeed, on the following page of his testimony (again not mentioned by MATR), Mr. Keim specifically discussed the applicability of Rider DRS to new customers (PAWC Exh. 3-A).<sup>4</sup>

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<sup>4</sup> MATR's failure to acknowledge these crucial portions of Mr. Keim's testimony was not lost on the ALJ (I.D., p. 18).

MATR would also have the Commission ignore the record developed in this proceeding. Significant in this regard is the unrebutted testimony of Mr. Stout, who advised PAWC in its 1995 rate proceeding and who personally participated in the drafting of Rider DRS. As Mr. Stout explained (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.

At page 23 of its Exceptions, MATR contends that “[a]n individual participant’s subjective understanding of the language (i.e., Mr. Stout’s opinion) is entitled to no weight” and suggests that Mr. Stout’s beliefs are no more relevant than would be any views held by MATR witnesses Lenze and Antonelli. MATR cites no authority for the proposition that an expert witness’ recollections lack probative value. In fact, PAWC is aware of numerous instances where the Commission has accorded substantial weight to the opinions of individuals who, like Mr. Stout in this case, were able to testify based on

firsthand knowledge of historic events. *See, e.g., Hatfield Township Municipal Authority v. PECO Energy Company*, Docket No. C-20016610 (Order entered May 23, 2003). As to MATR's second point, PAWC would simply note that Mr. Stout could credibly speak to the issue of PAWC's intent because he was there; Messrs. Lenze and Antonelli were not.<sup>2</sup>

Finally, MATR's analysis is internally inconsistent. On the one hand, MATR contends that PAWC's competitive rates should only be available where a customer "is already purchasing water from PAWC" and cannot be invoked to the detriment of another supplier. At the same time, at page 22 of its Exceptions, MATR seems to concede that Rider DIS (the companion provision to Rider DRS) could properly be utilized to persuade an industrial user to relocate its facilities. What MATR fails to recognize is that a decision to relocate facilities will almost invariably result in the loss of water sales by another (i.e., the incumbent supplier).

In its March 18, 2004 Order denying MATR's request for interim emergency relief, the Commission found that "the only logical interpretation of Rider DRS is that it was designed to facilitate both the retention and the attraction of load" (Appendix A, p. 5). MATR has presented nothing by way of Exceptions to alter that conclusion.

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<sup>2</sup> Of course, if MATR was concerned over the "subjectivity" of Mr. Stout's testimony, it could have tested his recollections through cross-examination. MATR chose not to do so and should not now be heard to complain.

**B. That WACMA Had Competitive Alternatives Cannot Be Seriously Disputed**

MATR next contends, in the alternative, that PAWC was never at risk of losing load and, therefore, had no need to invoke Rider DRS. To this end, MATR contends that “[n]o evidence was produced during these proceedings of a proposal by MATR or anyone else to significantly reduce or eliminate PAWC’s service to WACMA” (MATR Exceptions, p. 9). MATR further claims that it would have been willing to accept a 75% minimum take requirement and that, as such, it “was not offering to provide WACMA with all of its water needs” (MATR Exceptions, p. 25).

As a preliminary matter, it is somewhat disingenuous for MATR to suggest that it never had designs on PAWC’s business. To the contrary, as noted by the ALJ (I.D., p. 7), MATR, as early as 1999, specifically raised the possibility of furnishing 100% of WACMA’s needs. Moreover, following the interconnection of the two formerly separate WACMA systems in 1999, which made it possible for MATR to serve the area previously served exclusively by PAWC, MATR’s sales to WACMA increased markedly (from 742,795 GPD in 1998 to 1,074,926 GPD in 2002), while PAWC’s sales to WACMA plummeted (from 72,871 GPD in 1998 to 13,186 GPD in 2002)(MATR Exh. 4).

Second, the issue is not whether MATR made a formal proposal to completely displace PAWC as a supply source. Rather, the issue is whether WACMA had a viable competitive alternative to service from the Company and intended to select that alternative to the detriment of PAWC and its other customers. That WACMA had such

competitive options cannot be seriously disputed. In fact, and as the ALJ observed (I.D., pp 21-22), WACMA had at least two - - MATR and Moon Township.<sup>4</sup>

Third, it will never be known whether MATR would have been satisfied with a 75% minimum take provision because MATR repeatedly stonewalled WACMA on this issue (see discussion, *infra*). However, MATR misses the import of a minimum take requirement, which, by definition, speaks to the **minimum** that a purchaser must buy, not the **maximum** that it may buy. Thus, and as noted by Judge Gesoff (I.D., p. 20), even if MATR and WACMA had been able to reach agreement at the 75% level (or at the 85% level favored by MATR), there is nothing that would have prevented WACMA from purchasing all of its water needs from MATR. Indeed, one must question why WACMA would have paid PAWC \$3.90 per thousand gallons (i.e. the standard tariff rate) when, at least according to MATR, it could have purchased water from MATR for \$2.10 per thousand.

Finally, MATR, in footnotes 1 and 15 to its Exceptions, asserts that PAWC lacked the necessary "documentation" to prove that WACMA did, indeed, have competitive alternatives. This argument is so contrived that it hardly merits a response. As determined by the ALJ (I.D., p. 22), the availability of competitive alternatives was confirmed by numerous documents submitted for the record, including (1) the 1983 Agreement between WACMA and MATR (Exh. Lenze-1); (2) the October 2003 Extension Agreement (Exh. Morris-1); (3) correspondence between WACMA and

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<sup>4</sup> MATR complains that the ALJ's finding was based on "self-serving speculation and conjecture" by PAWC witness Grundusky (MATR Exceptions, p. 25). However, the data submitted by MATR, depicting increasing purchases by WACMA from both MATR and

MATR (Exhs. Lenze-4, Lenze-5, Lenze-6 and Lenze-7); (4) Annual Water Supply Reports filed by WACMA (MATR Exh. 3); (5) the tabulation of WACMA's water purchases during the period 1988-2002 (MATR Exh. 4); and (6) water allocation permits issued earlier this year by the DEP (PAWC Exhs. 4, 4-A, 4-B, 4-C and 4-D).

**C. PAWC Did Not "Steal" Or "Entice" WACMA Away From MATR**

MATR seeks to portray itself as an innocent victim of PAWC's predatory overtures. Thus, PAWC is variously accused of trying to "steal a competitor's customers" by "undercut[ting] another supplier's rates" in an attempt to "destroy competition" (MATR Exceptions pp. 14, 19). The record, however, tells a very different story.

As a preliminary matter, PAWC notes that a municipal authority, such as MATR, has no legally-protected franchise nor any exclusive service territory. *See, e.g. Application of Pennsylvania-American Water Co. (City of Coatesville Authority)*, 2001 Pa. PUC LEXIS 5. Stated differently, MATR has no absolute right to sell water to WACMA or, for that matter, anyone else. More importantly, whatever contractual relationship MATR once enjoyed with WACMA ceased to exist when MATR's 1983 agreement with WACMA, as extended, expired earlier this year.

In addition, and as the ALJ specifically found (I.D., p. 23), MATR has no one to blame but itself for the predicament it now finds itself in. As Mr. Morris and Mr. Nichols both testified (WACMA Exh. 1, pp. 11-12; WACMA Exh. 2, pp. 6-7), WACMA was

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Moon Township, speak for themselves. In addition, MATR itself characterizes Moon Township as "an additional provider" (MATR Exceptions, p. 28).

confident, as late as December 2002, that it was close to finalizing the terms of a new long-term agreement with MATR when, according to Mr. Morris (p. 12), MATR suddenly "presented an entirely new proposal." Notwithstanding MATR's radical and wholly unanticipated change of position, WACMA did not terminate discussions, but instead advised MATR by letter dated January 29, 2003 that it was still willing to proceed based on a 75% minimum take requirement and a 20 year contract term. At this point, MATR did not, as it now claims, merely reply "that it wanted another meeting to discuss these issues" (MATR Exceptions, p. 8). Rather, MATR continued to play games, as Mr. Morris explained (WACMA Exh. 1, pp. 14-15):

Q. Did MATR accept the WACMA proposal set forth in its January 29, 2003 letter?

A. No. With respect to the term of the Agreement, MATR did not accept the twenty year proposal, but instead proposed a formula based on the term of its financing of certain construction projects which, if undertaken, would have the effect of extending the term beyond twenty years. With respect to the minimum purchase requirements, MATR did not respond to WACMA's proposal except to state that it believes that the parties can reach agreement on this matter "at our next meeting."

Q. Mr. Lenze testified that MATR intended to accede to WACMA's request that the minimum purchase requirement be reduced to 75% of WACMA's total water needs. What is your reaction to that testimony?

A. If that were true, MATR could have agreed with our proposal in its February 12, 2003 letter which directly addressed that issue. In addition, MATR had repeated opportunities during the course of the negotiations over a period of several years to agree with WACMA on this point and did not do so. In view of the past history concerning this issue,

WACMA did not believe that there was any point in convening any further meetings.

As Mr. Morris' testimony confirms, PAWC did not "steal" or "entice" WACMA away from MATR. To the contrary, WACMA turned to PAWC only after concluding that MATR was not prepared to negotiate in good faith. Stated simply, MATR was provided every opportunity to strike a deal with WACMA but decided instead to try to string WACMA along in the hope of extracting even more favorable terms. MATR gambled and lost and it is not up to the Commission to turn back the clock.

**D. MATR's Sudden Aversion To Competitive Pressures Is Somewhat Disingenuous**

In view of all that has transpired to date, it is astounding that MATR would complain of unfair competition or that the PMAA would urge the Commission to reject the use of Rider DRS in this instance in order to "level the playing field" (PMAA Exceptions, p. 4). Any student of the utility industry knows that municipal authorities enjoy certain distinct advantages vis-à-vis for-profit companies. For example, municipal authorities can issue tax exempt debt and, therefore, generally have lower borrowing costs. In addition, they do not pay federal or state income taxes. Consequently, rather than "leveling the playing field," the opposing parties would have the Commission tilt it even more sharply in their favor by denying PAWC the ability to compete for incremental load.<sup>2</sup>

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<sup>2</sup> At pages 4-5 of its Exceptions, the PMAA asserts, presumably in reference to PAWC's proposed use of Rider DRS in this case, that municipal authorities "cannot compete with such extraordinarily reduced rates." No evidence was submitted by either MATR or the PMAA that would support this broad claim. More importantly, MATR could have wrapped up a deal with WACMA at MATR's proposed \$2.10 rate but for its own recalcitrance in negotiating other terms and conditions.

MATR's sudden aversion to competitive pressures is also somewhat disingenuous. As noted previously, MATR, following the interconnection of the WACMA systems in 1999, was more than willing to take advantage of its then lower price to increase sales to WACMA at PAWC's expense. Moreover, MATR, by its own account, has spent or is prepared to spend substantial amounts to ensure its ability to capture WACMA's expanding load requirements. These investments include treatment plant upgrades, additional interconnections and new or enlarged transmission lines -- precisely the type of projects that MATR now criticizes PAWC for undertaking. Finally, MATR apparently is prepared to do exactly what it contends PAWC should be prohibited from doing, namely discount its rates. At page 8 of its Exceptions, MATR claims that it was ready to sell water to WACMA at the rate of \$2.10 per thousand gallons. MATR's current rate, as noted in the Commission's March 18, 2004 Order (p. 3) denying MATR's *Petition for Interim Emergency Order*, is \$2.51.

**E. MATR's Equitable Arguments Lack Credibility  
And Should Be Ignored**

Throughout this proceeding, and again in its Exceptions, MATR has contended that its Complaint should be upheld because, *inter alia*, it purportedly (1) expended "substantial funds" to provide service to WACMA (MATR Exceptions, p. 3) and (2) "would be compelled to raise its water rates by approximately 30%" (MATR Exceptions, p. 9). PAWC respectfully submits that those considerations not only are irrelevant to resolution of the fundamental legal issues presented in this proceeding, but were thoroughly discredited upon closer examination.

## 1. That MATR Made Certain Investments In Anticipation Of WACMA Remaining A Customer

In his direct testimony (MATR Exh. 1), MATR witness 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. 28-30).<sup>8</sup> More significantly, a driving force behind the decision to construct additional treatment capacity was the fact that, in the early 1990's, 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

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<sup>8</sup> In its Exceptions (p. 6, fn. 2), MATR asserts that PAWC "falsely argued" that the wastewater system had nothing to do with the treatment plant expansion project. PAWC, in fact, has never made that claim. Rather, what the Company has suggested is that the wastewater treatment facilities benefited the entire plant and that their costs cannot be viewed as having been incurred solely for the purpose of providing service to WACMA.

the addition of Findlay Township as a regular customer” (Tr. 33-35).<sup>2</sup> In short, this project does not appear to have been driven by MATR’s service to WACMA.

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), not to serve WACMA.

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. 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, simply lacks credibility. The claim was initially made by Mr. Lenze (MATR

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<sup>2</sup> 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).

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.

MATR, in its Exceptions (p. 9, fn. 5), attempts to respond to these criticisms, arguing first that the 30% figure "represented an 'approximate' number." MATR next takes issue with PAWC's contention that Mr. Antonelli substantially overstated the

revenues that ongoing sales to WACMA would generate for MATR, contending that the figure used by Mr. Antonelli was only slightly more than sales in the prior year. In fact, during 2002-2003, the period utilized by Mr. Antonelli, MATR sold WACMA 1,074,926 GPD, which was about 224,000 GPD, or 26% more than the previous year (PAWC Reply Brief, p. 6; MATR Exh. 4). More to the point, Mr. Antonelli acknowledged that the sales levels he had used in his analysis were "on the high side" (Tr. 51).

MATR also alleges that the purchased water costs that Mr. Antonelli failed to take into account were "a one time matter." However, MATR cites no record support for this proposition and there is none. To the contrary, Mr. Antonelli agreed that MATR incurred substantial purchased water expense to serve WACMA's needs over a period of "several years" (Tr. 52). If MATR no longer served WACMA, these costs presumably would disappear and the resulting savings would offset, at least in part, the rate increase that MATR claims it would have to impose.

Lastly, MATR contends that Mr. Antonelli did not disregard certain capital cost savings because "whether these costs are immediate or will be deferred, they will nevertheless be incurred by MATR" (MATR Exceptions, p. 11). MATR's rationalization misses the point. If MATR can delay having to invest major construction dollars as a consequence of no longer serving WACMA, that will certainly mitigate, and perhaps even eliminate, MATR's need to increase rates in the near-term.

In short, MATR's rate analysis is severely flawed and should be disregarded.

## F. Miscellaneous Legal Arguments

At page 3 of its Exceptions, the PMAA asserts that the ALJ "failed to understand" its Filed Rate Doctrine argument, purportedly because he was incapable or unwilling to do so, and it then proceeds to "attempt to explain itself." The discussion that follows, however, is nonsensical. Contrary to the PMAA's apparent belief, the Filed Rate Doctrine was not developed to police competition between utilities and has nothing to do with creating "an even playing field." Rather, it stands for the proposition that a utility must charge the rates on file with the Commission unless and until those filed rates are changed. The Filed Rate Doctrine is not implicated in this case because the rate contained in PAWC's Agreement with WACMA falls well within the range of just and reasonable rates defined by Rider DRS. *See Pa. P.U.C. v. Pennsylvania-American Water Co. (Opinion and Order on Remand)*, 1996 Pa. P.U.C. LEXIS 199.

In like fashion, MATR claims that Rider DRS violates Section 1304 of the Code, which prohibits unreasonable discrimination (MATR Exceptions, p. 3).<sup>19</sup> This argument, which MATR makes no effort to support, was also rejected by the Commission in its 1996 *Opinion and Order on Remand*, wherein the Commission expressly found as follows: "The filing procedure approved herein will provide ample opportunity for regulatory review to assure the OCA and the Commission's enforcement staff that PAWC is not engaging in discriminatory practices under the riders."

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<sup>19</sup> MATR actually references Section 1034 of the Code. However, PAWC assumes that this is a typographical error.

#### IV. CONCLUSION

In the final analysis, the Commission should recognize the various concerns expressed by MATR and the PMAA for what they really are -- a transparent attempt by MATR to recapture a former customer that was able to negotiate a better deal elsewhere. As the ALJ and the Commission correctly observed in rejecting MATR's *Petition for Interim Emergency Order*: "[W]hile MATR would certainly benefit if its requested relief were granted, the public, as represented by the interests of PAWC and WACMA, and their respective customers, would be significantly disadvantaged" (March 18, 2004 Order at pp. 7-8). That is surely not a result that the Commission should facilitate.

For that and the other 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,



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Water Company

Date: May 27, 2004

## APPENDIX A

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Public Meeting held March 18, 2004

Commissioners Present:

Terrance J. Fitzpatrick, Chairman  
Vice Chairman Robert K. Bloom  
Glen R. Thomas  
Kim Pizzingrilli  
Wendell F. Holland

The Municipal Authority of the  
Township of Robinson

C-20030092

v.

Pennsylvania-American Water Company

Pennsylvania Municipal Authorities Association,  
Intervenor

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before us for consideration is the February 19, 2004 Order Certifying Material Question to the Commission (Certification Order). The Certification Order comes before this Commission pursuant to the procedures of 52 Pa. Code § 3.10(b),

regarding the grant of interim emergency relief.<sup>1</sup> On February 19, 2004, presiding ALJ Larry Gesoff issued an Interim Emergency Order (Emergency Order) denying interim emergency relief to the Municipal Authority of the Township of Robinson (MATR), based on the ALJ's consideration of the Petition for an Interim Emergency Order (Petition) filed February 12, 2004, by MATR. Pennsylvania-American Water Company (PAWC) filed an Answer to the Petition on February 17, 2004.

On February 26, 2004, PAWC filed a Non-Proprietary Brief in support of the Emergency Order. Also on February 26, 2004, the Western Allegheny County Municipal Authority (WACMA) filed a Brief on Interlocutory Review of Material Question. On February 27, 2004, MATR filed a Brief with regard to the Emergency Order.

### History of the Proceedings

Under a 1983 water supply agreement which expired on October 21, 2003, (the 1983 Agreement), WACMA purchased most of its water from MATR. On March 28, 2003, WACMA entered into a water supply agreement with PAWC to purchase most of its water from PAWC (the 2003 Agreement).

On April 15, 2003, MATR filed a Complaint asking the Commission to void the 2003 Agreement, asserting that it constitutes an unlawful exercise of PAWC's tariff Rider DRS-Demand Based Resale Service (Rider DRS). Consummation of the 2003 Agreement was conditioned upon the receipt of all necessary permits and approvals from the Pennsylvania Department of Environmental Protection (DEP). On October 16,

---

<sup>1</sup> Pursuant to the Commission's Rules of Administrative Practice and Procedure, the grant or denial of relief by an interim emergency order must be certified by the presiding Administrative Law Judge (ALJ) to the Commission as a material question to be addressed in accordance with 52 Pa. Code § 5.305 of our rules pertaining to interlocutory review.

2003, before the 1983 Agreement expired, WACMA and MATR entered into an agreement extending the term of the 1983 Agreement until the earlier of: (1) 24 hours after MATR receives written notice from WACMA that its Water Allocation Permit has been modified to increase WACMA's daily water allocation available from PAWC or (2) April 2, 2004.

On January 21, 2004, the Commission held a hearing on MATR's Complaint at which the Parties entered into several stipulations. The Parties will file Main Briefs on March 15 and Reply Briefs on April 2, 2004. On February 3, 2004, DEP issued the water allocation and public water supply permits required under Section 4.8 of the 2003 Agreement. On February 4, 2004, PAWC began to provide water to WACMA under the terms of the 2003 Agreement.

On February 12, 2004, MATR filed its Petition for Interim Emergency Order asking that the sale of water by PAWC to WACMA, under the 2003 Agreement, be barred until the Commission enters a final order in this proceeding. On February 17, 2004, PAWC filed an Answer to MATR's Petition.<sup>2</sup> On February 17, 2004, the Commission held a hearing pursuant to Section 3.9 of the Commission's procedural rules.<sup>3</sup> That Section requires that no interim emergency order may be issued until the presiding officer holds a hearing on the merits of the petition within ten days of receipt of the petition.

Witnesses did not testify at the hearing. Instead, counsel for the Parties gave oral argument in support of their positions. The record of the proceeding consists of the record made at the January 21, 2004 evidentiary hearing on the underlying

---

<sup>2</sup> The Commission's procedural rules at 52 Pa. Code § 3.6(b) provide that an Answer to a Petition for an interim emergency order is not required (because an allegation contained in such a petition is deemed to have been denied by opposing parties), but allows a participant to file an answer if desired.

<sup>3</sup> 52 Pa. Code § 3.9.

Complaint, *supra*, which the Parties incorporated by reference, the exhibits and a 46-page transcription of the notes of testimony.<sup>4</sup> The Parties did not file Briefs.

On February 19, 2004, ALJ Larry Gesoff issued an Interim Emergency Order (Emergency Order) denying interim emergency relief to MATR, based on his consideration of MATR's Petition. On the same date, the ALJ issued his Certification Order herein. The question certified is as follows:

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.

Responses to the ALJ's Emergency Order were filed as above noted.

#### Discussion

The only issue ripe for decision at this time is whether MATR is entitled to the relief requested in its Petition for Interim Emergency Relief pending the outcome of its Complaint. Section 3.7(a) of the Commission's Regulations, 52 Pa. Code § 3.7(a), provides that an interim emergency order<sup>5</sup> may be issued by the presiding officer upon a showing that:

- (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.

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<sup>4</sup> Transcript at 137-179.

<sup>5</sup> Section 3.10 of our Regulations, 52 Pa. Code § 3.10, requires that Section 5.305 of our Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.305, govern the review of interim emergency orders.

It is well settled that these prerequisites or elements for the issuance of an interim emergency order are cumulative. All of them must be met and the failure of a petitioner to meet any one of them requires the denial of emergency relief. See Emergency Order at 4, *see also Big Apple Dinner Theater, Inc. v. Bell of Pennsylvania*, Docket No. C-00934817 (Order entered April 30, 1993); *Crums Mill Associates, et al. v. Dauphin Consl. Water Supply*, Docket No. C-00934810 (Order entered April 16, 1993); *Leonard v. Thornburgh*, 463 A.2d 77 (Pa. Commw. 1983). We shall review the four elements *seriatim*.

#### **I. MATR's Right to Relief Is Not Clear**

MATR contended that it made a prima facie case that PAWC's sale of water to WACMA under Rider DRS is illegal. It argued that when approved by the Commission, Rider DRS was, and still is, to be used to retain a customer threatening to leave PAWC and not to attract new load except in a limited sense. (Tr. at 157, 166-167). PAWC responded that the evidence at the January 21, 2004 hearing makes it clear that the Parties to the Commission proceeding, which resulted in the Rider DRS being approved, anticipated that Rider DRS would be used to retain load, the situation here, and also to attract load, which is arguably also the situation here. (Tr. at 161).

The ALJ concluded that whether PAWC applied Rider DRS properly is the ultimate issue before the Commission. He also noted that the case on the merits is at the briefing stage, and that at this point MATR's right to relief is not clear. (Emergency Order at 5). Our review of the record as developed leads us to conclude that MATR has failed to demonstrate a clear right to the requested relief. It is apparent that the only logical interpretation of Rider DRS is that it was designed to facilitate both the retention and the attraction of load. (Emergency Order at 5). PAWC concedes that such was its intended purpose. (PAWC Statement 3). (PAWC Brief at 2-3). Therefore, MATR's right to relief is not clear.

## 2. MATR's Need for Relief is Immediate

The term "emergency" is defined in 52 Pa. Code 3.1 as follows:

Emergency – 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 pointed out that MATR's Complaint contained a request for injunctive relief but that MATR waited over ten months to file its petition for interim emergency relief. (Tr. at 162). MATR responded that its Complaint requested an injunction barring PAWC from constructing any facilities regarding the contested service. MATR added that when it filed its Complaint it could not have requested the relief it now seeks because at that time the 1983 Agreement was still in effect. It filed its Petition shortly after the 1983 Agreement expired. (Tr. at 167). Specifically, PAWC's service of water to WACMA under the 2003 Agreement began on February 4, 2004. MATR filed its Petition on February 12, 2004.

Our review of the record indicates that when it filed its Complaint, MATR did ask the Commission to prohibit PAWC from commencing service to WACMA under the terms of the 2003 Agreement, and its Petition for Interim Emergency Order seeks the same relief. However, while it can be argued that MATR slept on its rights, it appears that MATR's need for relief is immediate because it is no longer serving WACMA and PAWC is. (Emergency Order at 7). On this basis, we conclude that MATR has met this prerequisite for emergency relief.

### 3. MATR Will Not Suffer Irreparable Harm

MATR maintained that if it were to be successful on the merits, it would be irreparably harmed if emergency relief is not granted now because it would lose the revenue it would receive by continuing to sell water to WACMA, and it would be unable then to recover the revenue, under any cause of action, from PAWC or WACMA. (Tr. at 157). PAWC argued, on the other hand, that it is not necessarily injurious for a business enterprise to encounter competition in its field, citing *Brinks, Inc. v. Pennsylvania Public Utility Commission*, 1982 Pa. Commw. LEXIS 1264 (1982).

Premised on our review, we conclude that the injury alleged by MATR does not rise to the level of irreparable harm so as to justify emergency relief. We find that any alleged diminution in MATR's revenues would be precisely the kind of "competitive" impact that the Commonwealth Court has held "does not amount to an injury, irreparable or otherwise." (*See Brinks, supra*). Accordingly, we conclude that MATR has not satisfied the third prerequisite for the grant on an interim emergency order.

### 4. The Relief Requested Is Injurious to the Public Interest

MATR asserted that the relief it requested is not injurious to the public interest and that indeed the public interest would be harmed if an unlawful rate is permitted to be charged. According to MATR, it would have to increase its rates by about 30% because of the loss of WACMA as a customer, solely because of the illegal use by PAWC of Rider DRS. PAWC, on the other hand, questioned whether MATR would have to raise its rates by 30% if it loses WACMA as a customer.

The ALJ concluded 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. (Emergency Order at 9-10). We agree, and we would further note that MATR's principal claim, viz. that it would have to increase its rates by 30%, was unsupported. On cross-examination, 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. (PAWC Brief at 4).

### Conclusion

Upon review of the transcript, exhibits, and consideration of the Certification Order, we find that MATR has failed to meet three of the four prerequisites set forth at 52 Pa. Code § 3.7(a) so as to warrant a grant of emergency relief. Specifically, we conclude that MATR has not shown either (1) that its right to relief was clear; (2) that it would be irreparably harmed if its Petition were not approved; or (3) that the relief requested would not be injurious to the public interest. (Emergency Order at 5-10). Accordingly, we shall answer the question certified by ALJ Gesoff in the affirmative; **THEREFORE,**

### **IT IS ORDERED:**

1. That the material question certified per Order Certifying Material Question by Administrative Law Judge Larry Gesoff, on February 19, 2004, be, and hereby is, answered in the Affirmative.

2. That the Interim Emergency Order of Administrative Law Judge Larry Gesoff issued on February 19, 2004, is hereby ratified and adopted as the action of the Commission.

3. That the Petition of the Municipal Authority of the Township of Robinson for an Interim Emergency Order, filed on February 12, 2004, prohibiting the sale of water from Pennsylvania-American Water Company to the Western Allegheny County Municipal Authority is denied.

4. That a copy of this Opinion and Order be served upon all Parties of record.

**BY THE COMMISSION,**

James J. McNulty,  
Secretary

(SEAL)

ORDER ADOPTED: March 18, 2004

ORDER ENTERED: MAR 18 2004

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May 28, 2004

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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 4974-1

DOCUMENT  
FOLDER

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

Dear Mr. McNulty:

We enclose for filing with the Commission the signed original and nine copies of the Reply of Western Allegheny County Municipal Authority, Intervenor to the Exceptions of the Municipal Authority of the Township of Robinson and Pennsylvania Municipal Authorities Association to the Initial Decision of Administrative Law Judge Larry Gesoff in the above proceeding.

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

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

RECEIVED

MAY 28 2004

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

ew/31108

Enclosures

cc: Honorable Larry Gesoff  
Parties of Record

60

BEFORE THE

**ORIGINAL**

PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE MUNICIPAL AUTHORITY OF )  
 THE TOWNSHIP OF ROBINSON )  
 )  
 Complainant-Petitioner, )  
 )  
 v. )  
 )  
 PENNSYLVANIA-AMERICAN )  
 WATER COMPANY )  
 )  
 Respondent. )

**DOCKETED**  
JUN 01 2004

Docket No. C-20030092

**RECEIVED**

MAY 28 2004

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

REPLY OF INTERVENOR

**DOCUMENT  
FOLDER**

WESTERN ALLEGHENY COUNTY MUNICIPAL AUTHORITY  
TO EXCEPTIONS TO THE INITIAL DECISION OF  
ADMINISTRATIVE LAW JUDGE LARRY GESOFF

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Due Date: May 28, 2004

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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THE MUNICIPAL AUTHORITY OF )  
THE TOWNSHIP OF ROBINSON )

Complainant-Petitioner, )

v. )

Docket No. C-20030092 )

PENNSYLVANIA-AMERICAN )  
WATER COMPANY )

Respondent. )  
)

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**REPLY OF INTERVENOR**

**WESTERN ALLEGHENY COUNTY MUNICIPAL AUTHORITY**

**TO EXCEPTIONS TO THE INITIAL DECISION OF**

**ADMINISTRATIVE LAW JUDGE LARRY GESOFF**

**I. INTRODUCTION**

Western Allegheny County Municipal Authority ("WACMA") Intervenor in support of Respondent, Pennsylvania-American Water Company ("PAWC") has previously filed its Main Brief and Reply Brief in this proceeding. Those pleadings contain a detailed history and the current status of this proceeding which WACMA requests be incorporated by reference herein.

Following the closing of the record and the submission of Briefs by the parties, Administrative Law Judge Larry Gesoff issued his Initial Decision on April 28, 2004 in which he concluded, *inter alia*, that Complainant, The Municipal Authority of the Township of Robinson ("MATR") had failed to meet its burden of proof and that the Complaint should be dismissed. (I.D. pp. 24-25).<sup>1</sup> Judge Gesoff's Initial Decision also contains an accurate and detailed history of this proceeding. (I.D. pp. 1-4).

MATR and the Pennsylvania Municipal Authorities Association ("PMAA"), Intervenor for the limited purposes of filing an Amicus Brief (Tr. 8; I.D. 2)<sup>2</sup> have filed Exceptions to Judge Gesoff's Initial Decision. WACMA now replies to those Exceptions.

## II. THE EXCEPTIONS

MATR's pleading consists of two Main Exceptions with subparts (MATR Ec. pp. 1-5) followed by a "Narrative Factual Background" and a lengthy "Argument". The first Exception, which contains five subparts, generally takes issue with Judge Gesoff's conclusions of law that MATR has not met its burden of proof in this proceeding, that Rider DRS rates may be used to attract load as a matter of law, that Rider DRS was legally utilized by PAWC under the facts of this case, that the application of Rider DRS

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<sup>1</sup> Citations preceded by "I.D." refer to pages of the Initial Decision of Administrative Law Judge Larry Gesoff; by "Tr." to pages of the transcript of testimony; by "Ex." to hearing exhibits; by "MATR Ec." to pages of MATR's exceptions; and by "PMAA Ec." to pages of the PMAA Exceptions. The inclusion of the name of a witness followed by a numerical reference denotes an exhibit within the referenced hearing exhibit.

<sup>2</sup> In view of the limitations on PMAA's scope of intervention in this proceeding, it is questionable whether PMAA has standing to file Exceptions or any other pleadings in this proceeding.

to the PAWC-WACMA Agreement does not violate Section 1034 of the Public Utility Code and that the Complaint should therefore be dismissed.

The second Exception consisting of 13 subparts is a recitation of alleged failures by Judge Gesoff to make certain findings of fact. Significantly, with respect to most of these allegations of factual errors, there is little or no further support or development in the pleading and in some instances no further mention is made in the pleading.

In its Argument, MATR advances the same general arguments contained in its Initial and Reply Briefs. Essentially, MATR contends that Judge Gesoff erred in his analysis, findings and conclusions with respect to the genesis and the application of Rider DRS to the 2003 Agreement between WACMA and PAWC and otherwise failed to make the findings of fact and conclusions of law requested by MATR on these issues. MATR's Exceptions also continue to suggest that there was some impropriety in the actions of PAWC and WACMA which resulted in the 2003 Agreement to the exclusion of MATR.

PMAA's Exceptions consist of five pages and incorporates by reference the Exceptions of MATR. In somewhat caustic and personal terms, PMAA takes issue with Judge Gesoff's factual findings concerning the prior Commission proceeding that approved Rider DRS, his interpretation of Rider DRS in this proceeding and his comments concerning the failure of PMAA to develop the so-called "Filed Rate

Doctrine” issue.<sup>3</sup> Except for its brevity, PMAA’s treatment of these issues is virtually identical to that set forth in its Initial Brief.

### III. SUMMARY OF ARGUMENT

Judge Gesoff has written a very thorough and carefully crafted Decision and his conclusions of law with respect to the following essential issues are abundantly supported by the record and are well documented in his Decision:

1. Rider DRS rates are to be used to retain load and to attract load.
2. The four criteria for the application of Rider DRS to the PAWC Agreement between WACMA and PAWC have been met.
3. PAWC’s Rider DRS tariff is a duly filed tariff which establishes just and reasonable rates.
4. The application of Rider DRS rates in the PAWC Agreement does not violate Section 1304 of the Public Utility Code.
5. MATR has not met its burden of proof and its complaint should be dismissed. (I.D. p. 24).

It is clear that Judge Gesoff carefully considered and addressed the contentions of MATR and PMAA which he believed to be relevant to the essential issues and based on his sound findings of fact and the above conclusions of law dismissed the Complaint.

The Exceptions of MATR and PMAA generally advance the same arguments set forth in their respective Briefs. Those arguments have been resoundingly set to rest by Judge Gesoff’s excellent Decision. Accordingly, there is no sound basis on which the

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<sup>3</sup> PMAA’s treatment of this issue is confusing and, in any event, the “Filed Rate Doctrine” is clearly inapplicable to the facts of this case. Judge Gesoff succinctly and effectively disposed of this issue (I.D. p. 22; Note 41-44) and no further response is required or justified.

Commission should disturb Judge Gesoff's Decision which should be affirmed in its entirety.

#### IV. ARGUMENT

##### A. JUDGE GESOFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE CLEARLY SUPPORTED BY THE RECORD.

MATR and PMAA take issue with certain of Judge Gesoff's Finding of Fact which they then use as a basis for attacking his conclusions of law. Based on the evidence presented by the parties, Judge Gesoff incorporated into his Decision 33 separate Findings of Fact (I.D. pp. 5-14). These Findings of Fact are accurate and complete and are abundantly supported by citations to the record. Moreover and contrary to the arguments of MATR and PMAA, Judge Gesoff's Findings of Fact strongly support his conclusions of law.

Based on his Findings of Fact, Judge Gesoff succinctly summarizes his Decision as follows (I.D. pp. 4-5):

As the Commission made clear in its Ratification Order, Rider DRS is to be used to retain load and to attract load. The four criteria for the application of Rider DRS have been met. WACMA has purchased water from PAWC since 1957. WACMA and PAWC entered into a service agreement for a term of more than 10 years and at a daily load factor of not less than 0.75. WACMA had two viable competitive alternatives to service from PAWC and the intention to select that alternative to the detriment of PAWC and its other customers. PAWC produced documentary evidence of the existence of a competitive alternative.

**Because PAWC properly applied Rider DRS, the 2003 Agreement should not be disturbed and MATR's complaint should be dismissed. (Emphasis Added)**

**B. THE ARGUMENTS OF MATR AND PMAA CONCERNING THE APPLICATION OF RIDER DRS TO THE PAWC-WACMA AGREEMENT ARE WHOLLY WITHOUT MERIT.**

It is anticipated that the Reply to Exceptions filed on behalf of PAWC will address the issues raised by MATR and PMAA concerning the history and proper application of Rider DRS. The following will address the essential issues regarding Rider DRS which involve WACMA.

At the outset of the Discussion portion of his Decision, Judge Gesoff concisely states “that the ultimate issue to be discussed in this proceeding is whether the PAWC Agreement properly applies Rider DRS” (I.D. p. 15). The Judge then proceeded to apply the four requirements needed for the application of Rider DRS (I.D. pp.18-22). It does not appear from the Exceptions that MATR or PMAA seriously challenge the Judge’s well documented findings that the first three requirements of Rider DRS have been met.

**1. WACMA Clearly Had “Viable Competitive Alternatives” To PAWC.**

MATR continues to take issue with the Judge’s conclusion that WACMA had viable competitive alternatives to service from PAWC and intended to select that alternative to the detriment of PAWC (MATR Ec. pp. 3, 9, 13-14, 24). Judge Gesoff discusses in detail the requirement that WACMA have a viable competitive alternative to service from PAWC for Rider DRS to be apply and makes the following very pertinent findings:

At pages 15-16 and 29-30 of its Main Brief, MATR argues that the PAWC Agreement falsely states that WACM had “an alternative to significantly reduce, or perhaps

eliminate, its purchases from PAWC.” MATR refers to the negotiations to extend the 1983 Agreement wherein it had proposed to WACMA and 85% minimum purchase requirement, the same requirement contained in the 1983 Agreement. MATR states that it was prepared to accept WACMA’s request that it be a 75% supplier. It adds that WACMA’s actual purchases from MATR during 1998-2002 had been less than the 85% minimum required by the 1983 Agreement. MATR concludes that PAWC produced no evidence of a proposal by MATR or anyone else to significantly reduce or eliminate PAWC’s service to WACMA. **In addition, Mr. Lenze testified that the MATR Board was prepared to agree to 75% if that was all WACMA was willing to purchase.**

**There is no other record evidence to support MATR’s assertion. Even if there were, the assertion is of no consequence because the MATR Board never conveyed to WACMA its alleged readiness to agree to 75%. (Footnotes omitted) (Emphasis Added) (I.D. p. 20).**

Incredibly, MATR continues to argue in its Exceptions that Judge Gesoff erred by “failing to find that MATR was prepared to agree to provide WACMA with 75% of WACMA’s total water needs if that quantity was the maximum amount of water WACMA was willing to purchase from MATR” (MATR Ec. p.3, ¶12(c)) and later contends that “MATR was prepared to accept WACMA’s request that it be a 75% supplier” (MATR Ec. p.9).

These arguments are made by MATR in the face of the clear evidence of record that throughout the negotiations with MATR, WACMA made its position clear that the term of the Agreement could not exceed twenty years and that minimum purchase percentage could not be more than a maximum of 75% (WACMA Ex. 1, pp. 8-11). Notwithstanding the testimony of MATR to the contrary (MATR Ex. 1, pp. 22-23;

WACMA Ex. 1, p. 15), MATR never accepted WACMA's terms (WACMA Ex. 1, p. 15; MATR Ex. 1, Lenze-7).

MATR cites the requirement that WACMA purchase at least 75% to 85% of its water from MATR, as evidence that WACMA would still have purchased a substantial amount of water from PAWC. The flaw in MATR's analysis is its assumption that WAMCA would have purchased only the minimum amount of water required from MATR had it entered into a new water supply agreement. In fact, WACMA was negotiating a minimum purchase obligation with the *flexibility to use other water suppliers for part of its supply requirements*. Clearly, a minimum purchase obligation would not prevent WACMA from purchase 100% of its water requirement from MATR, particularly where the regular tariff rate of PAWC was substantially higher than the MATR rate.

With respect to MATR's interpretation of the application of the minimum purchase obligation, Judge Gesoff makes the following significant finding:

In addition, MATR is incorrect in assuming that WACMA would have purchased only the minimum amount MATR required had MATR and WACMA entered into a new contract. As Finding of Fact Nos. 7-20 demonstrate, WAMCA was negotiating for a minimum purchase obligation so it would have the flexibility to use other water suppliers for part of its supply requirements. Also, WACMA could have decided to purchase 100% of its water requirements from MATR in the face of the PAWC's higher (\$3.90 per thousand gallon ) Group A Resale Rate (I.D. p. 20).

Notwithstanding this clear and unequivocal language, MATR's Exceptions continue to misapprehend the nature of the minimum purchase requirement.

It is clear that at the time the 2003 Agreement was signed and during the period leading up to the execution of the Agreement, WACMA had viable competitive alternatives to service from PAWC and, absent the application of the Rider DRS rate, may well have selected one of those alternative suppliers. In view of the fact that WACMA's then 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. In addition, WACMA has historically purchased water from the Moon Township Municipal Authority which was also a viable alternative (PAWC Ex. 1, pp. 4-5; WACMA Ex. 1, p. 5).

With respect to the "viable competitive alternative" requirement, Judge Gesoff found as follows:

Contrary to MATR's argument, WACMA had two viable competitive alternatives to service from PAWC. They are MATR and Moon Township. Finding of Fact Nos. 31 and 32 demonstrate this. They show the amount of water WACMA purchased from MATR, Moon Township and PAWC from 1988 to 2002. Since 1999, when WACMA interconnected its two systems (see Finding of Fact No. 5), WACMA purchased more water from MATR and Moon Township and less water from PAWC.

Absent the application of Rider DRS, WACMA could have selected one of these alternative providers, i.e., MATR or Moon Township. Had this happened PAWC would have lost its existing sales to WACMA and the opportunity to increase sale to WACMA in the future. (I.D. pp.20-21).

It is clear that if WACMA had entered into a water supply agreement to purchase its water needs from another source, PAWC faced losing its existing sales to WACMA

and the opportunity to increase sales to WACMA in the future (PAWC Ex. 1, p. 7). Thus, Rider DRS was properly 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).

## 2. The "Documentation" Non-Issue.

MATR continues to argue in two footnotes that the "viable competitive alternative" requirement of Rider DRS has not been met since PAWC failed to produce documentary evidence of the existence of a competitive alternative. (MATR Ec. p. 5, Note 1; p. 25, Note 15). This is another "non-issue" which is not deserving of a response, except to point out that the record is replete with evidence, both testimony and documentary, establishing the existence of "competitive alternatives" (MATR Ex. 1, pp. 14-16, Lenze-1; MATR Exs. 3 and 4; PAWC Ex. 1, pp. 4-5).

Judge Gesoff resoundingly set this issue to rest by making the following findings with respect to the "documentation" argument:

In footnotes 1 and 10 of its Main Brief MATR argues that PAWC has not produced documentary evidence of the existence of a competitive alternative. The following, however, qualify as the needed documentary evidence: (1) the 1983 Agreement between WACMA and MATR; (2) the October 2003 Extension Agreement; (3) correspondence between WACMA and MATR; (4) Annual Water Supply Reports filed by WACMA; (5) the tabulation of WACMA's water purchases during the period 1988-2002; and (6) water allocation permits issued earlier this year by the DEP. (I.D. p. 22; citations in notes 35-40 omitted).

**C. THE GRANTING OF THE RELIEF SOUGHT IN THE EXCEPTIONS OF MATR AND PMAA WILL ADVERSELY AFFECT THE INTERESTS OF WACMA AND ITS CUSTOMERS.**

**I. Despite Its Good Faith Negotiations Over An Extensive Period Of Time, WACMA Was Unable To Reach Agreement With MATR.**

There is a thread throughout the MATR Exception which suggests that PAWC and, to a lesser extent, WACMA acted improperly in the negotiations leading up to the execution of the 2003 Agreement between PAWC and WACMA. As a result, MATR contends that it has been adversely affected and is requesting the Commission to rectify the situation.

Presumably, PAWC's Reply to MATR's Exceptions will address this issue insofar as it relates PAWC. From the standpoint of WACMA, the record is clear that WACMA engaged in good faith negotiations with MATR over an extensive period of time, but was never able to reach an agreement. Essentially, MATR "overplayed" its hand in the negotiations by attempting to insist on further concessions from WACMA and now is asking the Commission to intervene and correct what was essentially a negotiating blunder by MATR.

WACMA's Main Brief addressed in detail the facts which have given rise to this proceeding which WACMA requests be incorporated by reference herein (WACMA Main Brief, pp. 31-34). Essentially, WACMA and MATR engaged in good faith negotiations with MATR over a lengthy period of more than four years in advance of the

termination date of the 1983 Agreement (WACMA Ex. 1, pp. 7-8; MATR's Ex. 1, pp. 15-16, Lenze-4, Lenze-7).

Throughout those negotiations, WACMA maintained a consistent position with respect to two essential issues, namely that the minimum purchase obligation could not exceed 75% of WACMA's total water supply requirements and the term of the contract could not exceed twenty years (WACMA Ex. 1, p. 11). These 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).

As of the December 19, 2002 meeting between representatives of WACMA and MATR, WACMA was under the impression that the two issues had been resolved and that the purpose of the meeting was to finalize the language of a new water supply agreement (WACMA Ex. 1, pp. 11-12, 15). At that meeting, MATR proposed to again renegotiate the key provisions of the agreement, *i.e.*, that the term be extended from twenty years to thirty years and the minimum purchase requirement from 75% to 85% (WACMA Ex. 1, p. 12).

Subsequently, WACMA advised MATR that it was still willing to proceed with MATR based on its prior understanding (WACMA Ex. 1, pp. 13-14). WACMA also advised MATR at that time that if MATR was not willing to agree to the original terms WACMA would have to explore other long-term water supply sources (WACMA Ex. 1, pp. 13-14; MATR Ex. 1, Lenze-6). Notwithstanding the testimony of MATR to the

contrary (MATR Ex. 1, pp. 22-23; WACMA Ex. 1, p. 15), MATR did not accept WACMA's terms (WACMA Ex. 1, p. 15; MATR Ex. 1, Lenze-7).

As a result of the continued inability of the parties to reach an agreement on the essential issues as the termination date of the 1983 Agreement approached, WACMA pursued negotiations with PAWC culminating in the execution of the 2003 Agreement on March 28, 2003 (WACMA Ex. 1, pp. 16, 19-20; MATR Ex. 1, Lenze-9).

With respect to these negotiations, Judge Gesoff made the following significant findings of fact:

**Upholding PAWC's use of Rider DRS deprives MATR of a large volume of sales to the detriment of MATR and its customers. MATR will lose the revenue from the sales and its remaining customers might be on the receiving end of a rate increase. This predicament, however, is not the fault of WACMA or PAWC. It resulted from the failed negotiations between MATR and WACMA, summarized in Findings of Fact 7-20 above. At all times during the negotiations WACMA made its position clear, but MATR did not. Faced with an expiring contract and the eleventh hour escalation of terms it had previously rejected, WACMA contracted with PAWC. PAWC did not engage in predatory practices and did not entice WACMA to leave MATR. MATR cannot blame WACMA or PAWC for its failure to negotiate a new sales contract with WACMA. (I.D. p. 23). (Emphasis Added).**

In sum, this proceeding amounts to a desperate attempt by a "disappointed suitor" to use the Commission's processes to achieve an objective that it was unwilling or unable to accomplish through legitimate arms-length negotiations. Essentially, MATR is asking the Commission to advance its economic interests (which it failed to do) by denying to

WACMA the benefits of PAWC's competitive rate pursuant to Rider DRS and, in effect, to require WACMA to purchase water from MATR at a substantially higher rate.

## 2. The Adverse Impact On WACMA And Its Customers.

It is of vital concern to WACMA that it continue to have available a sufficient supply of water to meet the present and future needs of its customers. WACMA is currently receiving safe, reliable service from PAWC at a rate below that which it had been paying MATR. If the relief requested in the Complaint is granted, *i.e.*, voiding the 2003 Agreement and forcing any agreement between PAWC and WACMA to utilize PAWC's Group and Resale Rate, the consequences to WACMA and its customers would be devastating.

If the Agreement with PAWC is voided, WACMA will be left without a contract for the supply of at least 90% of the water it provides on a daily basis to approximately 12,871 customers through 3,982 service connections in Western Allegheny County (WACMA Ex. 1, p. 4). WACMA would be forced to purchase water at a much higher price until it is able to negotiate a new water supply agreement, assuming that is feasible given the history of the prior failed negotiations with MATR.

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 increase of

more than \$2.00/thousand gallons will clearly adversely affect WACMA and its customers.

The alternative to WACMA purchasing water from PAWC at its standard resale rate would be for WACMA to purchase water from MATR. Assuming WACMA would 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 is the rate MATR has been charging WACMA under the terms of the extended 1983 Agreement and which rate became effective on December 15, 2003 (Tr. 174-176).

With respect to the impact on WACMA and its customers if PAWC is not able to use Rider DRS, Judge Gesoff found:

Denying PAWC's use of Rider DRS, at the rate of \$1.90 per thousand gallon, would force WACMA to find a new water supplier, either at PAWC's resale rate of \$3.92 per thousand gallons or at whatever rate it could negotiate with MATR or a different supplier. Losing the rate of \$1.90 per thousand gallons would clearly be to the detriment of WACMA and its customers.

While these financial affects are significant, they do not drive the decision in this proceeding. Rather they are the (not unimportant) side effects of the decision. The issues in this proceeding, however, are whether PAWC's use of Rider DRS was the use the Commission contemplated when it approved the tariff filing in 1995 and whether PAWC's contract with WACMA met the criterion of Rider DRS. Those questions have been answered in the affirmative as discussed above. (I.D. pp. 23-24; Notes omitted).

Accordingly, it is abundantly clear that the granting of the relief sought by MATR in its Exceptions would adversely affect WACMA and its customers, both in

terms of service and economic impact. Moreover, that result would also adversely affect PAWC and its customers.

## V. CONCLUSION

Based on the foregoing, WACMA respectfully requests that (1) the Commission adopt the Initial Decision and Order of Administrative Law Judge Larry Gesoff; (2) the Complaint at Docket No. C20030092 be dismissed; and (3) this proceeding be marked closed.

Respectfully submitted,

VUONO & GRAY, LLC

By: 

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Susan C. Indrisano, Esq.

Attorneys for Western Allegheny  
County Municipal Authority

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(412) 471-1800

Due Date: May 28, 2004

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MAY 28 2004

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Reply of Intervenor Western Allegheny County Municipal Authority to Exceptions of the Municipal Authority of the Township of Robinson and Pennsylvania Municipal Authorities Association to the Initial Decision of Administrative Law Judge Larry Gesoff 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  
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Pittsburgh, PA 15222

Thomas P. Gadsden, Esq.  
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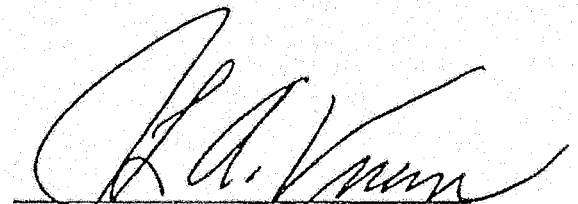
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Dated this 28th day of May, 2004.



John A. Vuono, Esq.



DATE: June 2, 2004

**DOCKETED**  
JUN 04 2004

SUBJECT: C-20030092

TO: Cheryl W. Davis, Director  
Office of Special Assistants

FROM: James J. McNulty  
Secretary  
nvl

**DOCUMENT  
FOLDER**

PA-AMERICAN WATER COMPANY  
VS  
MUNICIPAL AUTHORITY OF TOWNSHIP ROBINSON

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

**PA-AMERICAN WATER COMPANY  
AMICUS PA MUNICIPAL AUTHORITIES ASSOCIATION**

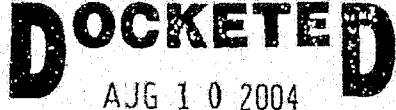
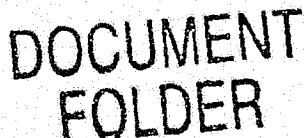
Reply Exceptions have been received from:

**RESPONDENT**

cc: Susan Hoffner

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**  
**Uniform Cover and Calendar Sheet**

14

<b>1. REPORT DATE:</b> July 20, 2004	<b>2. BUREAU AGENDA NO.</b> AUG-2004-OSA-0174*
<b>3. BUREAU:</b> Office of Special Assistants	
<b>4. SECTION(S):</b>	<b>5. PUBLIC MEETING DATE:</b> August 5, 2004
<b>6. APPROVED BY:</b> Director: C.W. Davis 7-1827 Mgr/Sprv: Legal Review:	<div style="text-align: center;">  <p>DOCKETED AJG 10 2004</p> </div>
<b>7. PERSONS IN CHARGE:</b> M. Knezevich 7-1828	<div style="text-align: center;">  <p>DOCUMENT FOLDER</p> </div>
<b>8. DOCKET NO.:</b> C-20030092	

- 9. (a) CAPTION (abbreviate if more than 4 lines)**  
**(b) Short summary of history & facts, documents & briefs**  
**(c) Recommendation**

(a) The Municipal Authority of the Township of Robinson (MATR) v. Pennsylvania-American Water Company (PAWC), Pennsylvania Municipal Authorities Association (PMAA), Intervenor

(b) Formerly, the Western Allegheny County Municipal Authority (WACMA) purchased most of its water from MATR. On March 28, 2003, WACMA entered into a water supply agreement with PAWC (the 2003 Agreement). On April 15, 2003, MATR filed a Complaint asking the Commission to void the 2003 Agreement. ALJ Larry Gesoff issued an Initial Decision on April 28, 2004, dismissing the Complaint. ALJ Gesoff concluded that PAWC had properly applied Rider DRS and that the 2003 Agreement should not be disturbed. MATR and PMAA each filed Exceptions. PAWC and WACMA filed Reply Exceptions.

(c) The Office of Special Assistants recommends that the Commission adopt a proposed draft Opinion and Order which denies the Exceptions of MATR and PMAA and adopts the ALJ's Initial Decision as the action of the Commission.

Order Doc. No. 479142v1

Calendar Doc. No. 479477v1

**10. MOTION BY:** Commissioner Thomas

Commissioner Bloom - Yes

Commissioner Pizzigrilli - Yes

**SECONDED:** Commissioner Chm. Fitzpatrick

Commissioner Holland - Yes

**CONTENT OF MOTION:** Postponement to Public Meeting of August 19, 2004 for the Commission's further consideration. *RJP*