

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

**Morgan Lewis**  
COUNSELORS AT LAW

ORIGINAL

Thomas P. Gadsden  
Esquire  
215.963.5234  
tgadsden@morganlewis.com

April 1, 2004

**VIA FEDERAL EXPRESS**

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

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

Dear Secretary McNulty:

Enclosed are the original and nine copies of the Reply Brief of Respondent Pennsylvania-American Water Company in the above-docketed matter.

As indicated on the attached Certificate of Service, copies of the Brief are being served concurrently on all counsel of record by first class mail.

Sincerely,

*TP Gadsden*

Thomas P. Gadsden  
Enclosures

c. Administrative Law Judge Larry Gesoff (w/encs.)

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PA PUBLIC UTILITY COMMISSION  
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**ORIGINAL**

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

v.

**PENNSYLVANIA-AMERICAN WATER  
COMPANY**

**DOCKET NO. C-20030092**

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

**Before Administrative Law Judge Larry Gesoff**

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**Thomas P. Gadsden  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
215.963.5234  
tgadsden@morganlewis.com**

**Counsel for Pennsylvania-American  
Water Company**

**Of Counsel:**

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

**Date: April 2, 2004**

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## I. INTRODUCTION

On March 8, 2004, PAWC<sup>1</sup> filed its Initial Brief in this matter. Therein, PAWC explained that MATR's attempt to arbitrarily restrict the use of Rider DRS was entirely unsupported and contrary to substantial record evidence. PAWC further pointed out that MATR's "equitable" arguments were irrelevant and, in any event, had been thoroughly discredited. Finally, the Company suggested that MATR's sudden aversion to price competition was somewhat disingenuous given its willingness, in the past, to increase sales to WACMA at PAWC's expense.

PAWC files this Reply Brief in response to the Initial Brief submitted by MATR and to the Post-Hearing Amicus Brief of the Pennsylvania Municipal Authorities Association ("PMAA"). Before turning to specific contentions set forth in those Briefs, PAWC offers several observations. First, and notwithstanding broad assertions to the contrary, neither MATR nor the PMAA can claim an informed understanding of the scope of Rider DRS as neither party participated in the case in which Rider DRS was first proposed and adopted. Perhaps for that reason, both parties ignore entirely the testimony of Mr. Stout, who helped PAWC in the drafting of Rider DRS and who was, therefore, able to speak from firsthand knowledge to its intended purpose.

Second, MATR and the PMAA resort to the time-honored litigation strategy of attributing arguments to PAWC that PAWC never made and then responding to them (i.e., the "strawman" approach). The most glaring example of this tactic is found in the PMAA's Brief,

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<sup>1</sup> Abbreviated terms carry the same meaning as defined in Pennsylvania-American Water Company's Initial Brief.

which devotes an entire section to the Commission's authority to rule in this matter. In fact, PAWC has never suggested that the Commission lacks such authority or that its exercise of such authority would unlawfully interfere with PAWC's internal management. Accordingly, much of what the PMAA has to say is totally irrelevant to the issues that must be addressed in this case.

Finally, the Commission should recognize the various "policy" 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 "policy" that the Commission should embrace.<sup>2</sup>

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<sup>2</sup> Furthermore, 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 debate.

## II. ARGUMENT

### A. MATR And The PMAA Ignore The Plain Language And History Of Rider DRS

MATR and the PMAA contend, in strikingly similar terms, 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 Brief, p. 21).<sup>2</sup> 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" (MATR Brief, p. 27). The opposing parties then make 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 and the PMAA, 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 Brief, there is no evidentiary or other basis for reading into Rider DRS the restrictions that the opposing parties, neither of which participated in that earlier proceeding, now seek 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), 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 and the PMAA simply ignore it.

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<sup>2</sup> In like fashion, the PMAA claims that Rider DRS "presuppose(s) an existing relationship between PAWC and the customer ..." (PMAA Brief, p. 5).

Nor can the opposing parties 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, that is perfectly understandable given that the parties to that case represented existing and not prospective customers. More importantly, in their eagerness to glom together snippets of testimony and briefs, MATR and the PMAA conveniently overlook other parts of the record where the use of PAWC's competitive rate riders as load attraction tools was openly debated.<sup>4</sup>

For example, at page 6 of its Brief, the PMAA asserts that "[i]f the rider had been meant to include situations where PAWC was seeking to add a customer, ... Mr. Robowski would certainly have so indicated ...". In fact, Mr. Robowski did (PAWC Exh. 3-A): "These initiatives are being recommended by PAWC to enhance its ability to maintain its existing customer base and hopefully, attract new customers." Similarly, at page 23 of its Brief, 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).

Moreover, MATR's analysis is internally inconsistent. On the one hand, MATR contends that PAWC's competitive rates should not be available where another water supplier is involved. At the same time, at page 29 of its Brief, MATR seems to concede that Rider DIS (the

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<sup>4</sup> The PMAA claims victory on the strength of what it characterizes as MATR's "broader sampling of testimony" (PMAA Brief, fn. 8). However, this is not a contest where success is measured by the frequency of use of the terms "load retention" and "load attraction." Rather, the important point is that PAWC identified both as critical objectives when it first proposed Rider DRS.

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 short, MATR and the PMAA would rewrite Rider DRS in a manner that is at odds with the specific language in question and that was never intended by either PAWC or the Commission.

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

MATR and the PMAA next contend, 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 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 Brief, p. 30). MATR further points out that its sales to WACMA, in percentage terms, declined following the interconnection of WACMA's two, previously separate, service areas in 1999.

Whether MATR would have been satisfied with a 75% minimum take provision will never be known 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. 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.

Equally frivolous is the suggestion that MATR somehow suffered after the two WACMA service areas were interconnected. In fact, and as the following data extracted from MATR

Exhibit 4 clearly show, MATR's sales to WACMA increased substantially between 1998 (the last year before the interconnection) and 2002 (the last year for which complete data were presented):

Year	Average Gallons Per Day (GPD)	Percentage of WACMA Purchases
1998	742,795	77.1%
1999	822,433	72.0%
2000	885,000	72.4%
2001	851,000	66.0%
2002	1,074,926	79.5%

During this same period, PAWC's sales to WACMA declined in both percentage (from 7.6% to 1.0%) and volumetric (from 72,871 GPD to 13,186 GPD) terms (MATR Exh. 4).

Notably MATR was not the only entity that benefited from the interconnection of the WACMA system. Again as shown on MATR Exhibit 4, Moon Township increased its sales to WACMA from 147,444 GPD in 1998 to an average of 329,706 GPD for the years 1999-2002. In other words, WACMA had not one, but two competitive alternatives to PAWC - - MATR and Moon.

Finally, the PMAA, in footnotes 1 and 10 to its Brief, 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. Nonetheless, PAWC notes that the availability of competitive alternatives is 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 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**

The opposing parties seek to portray MATR as an innocent victim of PAWC's predatory overtures. Thus, PAWC is variously accused of "flouting the rules in pursuit of market dominance" (PMAA Brief, p. 3), of "engaging in an unauthorized form of competition" (*Id.*, p. 18), and of "stealing a competitor's customers" (MATR Brief, p. 21). 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. 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, 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 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 at that point, 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. Rather than acceding to WACMA's request, 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 Brief, p. 19). 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.

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 admission, 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 6 of its Initial Brief, 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 revealed during oral argument on MATR's *Petition for Interim Emergency Order* (Tr. 174), is \$2.51.

#### **E. Miscellaneous Legal Arguments**

At the outset of its Brief, the PMAA asserts that "this case is about the continued validity of the Filed Rate Doctrine" (p. 1). However, apart from parroting MATR's contentions regarding the intended scope of Rider DRS, the PMAA never develops this argument. In any event, the Commission has previously ruled on the issue, concluding in its *Opinion and Order on Remand* at Docket No. R-00943231, 1996 Pa. PUC LEXIS 199, that Rider DRS did not violate

the Filed Rate Doctrine because PAWC's competitive riders established a range of "just and reasonable rates" and constituted "duly filed tariffs."

In like fashion, MATR claims that Rider DRS violates Section 1304 of the Code, which prohibits unreasonable discrimination (MATR Brief, p. 17). 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."

### III. CONCLUSION

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. In this case, PAWC was presented with an opportunity to increase its sales and thereby spread its fixed costs over a larger number of units. PAWC acted, at all times, in full compliance with the requirements of Rider DRS and MATR's Complaint should, therefore, be dismissed.

Respectfully submitted,



Thomas P. Gadsden  
Morgan Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, Pennsylvania 19103-2921  
215.963.5234  
tgadsden@morganlewis.com

Counsel for Pennsylvania-American  
Water Company

Of Counsel:

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

Date: April 2, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the Reply Brief of Respondent Pennsylvania-American Water Company upon the following persons, in the manner indicated, in accordance with the requirements of §1.54 (relating to service by a participant).

**BY FIRST CLASS MAIL**

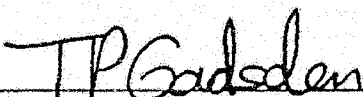
**Albert J. Zangrilli, Jr., Esquire  
Yukevich, Marchetti, Liekar & Zangrilli, P.C.  
11 Stanwix Street  
Pittsburgh, PA 15222-1324**

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

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

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

Date: April 1, 2004

  
\_\_\_\_\_  
Thomas P. Gadsden  
Counsel for Pennsylvania-American  
Water Company

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SECRETARY'S BUREAU

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

ATTORNEYS AT LAW

11 STANWIX STREET

SUITE 1024

PITTSBURGH, PENNSYLVANIA 15222-1324

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

TELEPHONE 412/261-6777

FAX 412/261-6789

ORIGINAL

April 2, 2004

*Via Federal Express*

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

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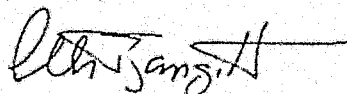
RE: The Municipal Authority of the Township of Robinson  
vs. Pennsylvania American Water Company  
Docket No.: C-20030092

Gentlemen:

Please find enclosed the original and nine (9) copies of the Reply Brief of Complainant The Municipal Authority of the Township of Robinson. Please file and docket this Brief on behalf of The Authority.

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

Very truly yours,



Albert J. Zangrilli, Jr.

AJZ/ph  
Enclosures

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COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

THE MUNICIPAL AUTHORITY OF THE )  
TOWNSHIP OF ROBINSON, )

Complainant – Petitioner, )

vs. )

PENNSYLVANIA AMERICAN WATER )  
COMPANY, )

Respondent. )

Docket No.. C-20030092

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SECRETARY'S BUREAU

REPLY BRIEF OF COMPLAINANT THE MUNICIPAL AUTHORITY  
OF THE TOWNSHIP OF ROBINSON

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

MATR presented overwhelming evidence in support of its interpretation of Rider DRS.

Pennsylvania American Water Company (“PAWC”), in its Initial Brief, has taken the odd position that “MATR not only failed to carry its burden of proof—it failed to present any affirmative evidence whatsoever” regarding the proper interpretation of Rider DRS. See, e.g., PAWC Initial Brief, p. 9 and 13. The irony of this position is apparently lost on PAWC.

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MATR has placed before the Commission the issue of whether PAWC improperly utilized Rider DRS in its contract with WACMA. Bound up with this determination, however, is a matter of significant public importance: whether Riders DRS and DIS are a warrant for PAWC to compete for the customers of other water providers using non-tariff rates. The importance of the matter is attested to by the intervention of the Pennsylvania Municipal Authorities Association ("PMAA"), which recognized that the Commission's decision could seriously affect municipal authorities and their customers throughout the Commonwealth. See Post-Hearing Amicus Brief of PMAA. Given the magnitude of the issues before the Commission, MATR took great care in explaining its position regarding an appropriate interpretation of the Riders. In its Initial Brief, MATR provided the Commission with sufficient context to understand the approval of the Riders eight years ago. 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 Ex. 5 and 5A.

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>1</sup> PAWC Initial Brief, p. 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

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<sup>1</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.

(according to PAWC) contradicting Mr. Stout. Id. at p. 12-13. 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.

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>2</sup> MATR presented the Commission with a broad and fair representation of relevant testimony from such hearings, to aid the Commission in its interpretive function. PAWC, on the other hand, presented less than

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<sup>2</sup> As MATR demonstrated in its Initial Brief, 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.

three sentences in its Brief from the 1995 hearings, which sentences, absent any context, refer to using the Riders to "attract load." PAWC Initial Brief, p. 11-12. PAWC now refers to these meager offerings as "substantial record evidence." Despite the paucity of PAWC's response, PAWC criticized MATR for allegedly failing to provide "any affirmative evidence whatsoever" regarding the proper interpretation of Rider DRS. PAWC Initial Brief, p. 13.

The converse is true. MATR has demonstrated with overwhelming evidence that the Riders were not intended to be used so that PAWC could "attract" a customer away from a rival water provider. PAWC is quite correct in arguing that, "glaring evidentiary deficiencies" exist in this case; but they are PAWC's deficiencies, not MATR's.

**PAWC is attempting to use Rider DRS as a competitive weapon to take a customer from MATR.**

MATR has persistently asserted that PAWC is attempting to use Rider DRS as a competitive weapon to take a customer from MATR. PAWC surprisingly claims that "this characterization is inaccurate." PAWC Initial Brief, p. 10. The facts, however, are indisputable. Over a fourteen (14) year period, from 1988 through 2002, PAWC provided WACMA with an annual average of 4.2% of WACMA's total water needs (MATR Hearing Exhibit 4), and only for distribution in a tiny geographic portion (1.68 square miles) of North Fayette Township, an area known as the Noblestown-Champion Hill Service Area. See MATR Hearing Exhibit 6. MATR historically provided WACMA with approximately 90% of WACMA's water needs.<sup>3</sup> Id. PAWC has used Rider DRS, not 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

retain its prior service to WACMA, but to take all of the service previously provided to WACMA by MATR. This surely constitutes using the Rider as a "competitive weapon."

Contrary to PAWC's and WACMA's assertions, MATR did not present "equitable arguments" for the Commission's consideration.

PAWC (and to a lesser extent, WACMA) has characterized some of the facts developed by MATR as the "groundwork" for irrelevant equitable arguments.<sup>4</sup> PAWC misunderstands MATR's position. MATR has demonstrated that: (1) it has made substantial capital investment to serve WACMA; and (2) it will be required to raise its rates by approximately 30% due to the loss of WACMA as a customer. MATR has never suggested that the Commission should void the PAWC Agreement based solely on these facts or that MATR deserves equitable relief solely to prevent these losses. Instead, these facts provide the Commission with context to understand the interpretive issues central to this case.

The claim of both PAWC and WACMA, that MATR's witnesses were "thoroughly discredited" on these factual issues, is not supported by any fair review of the testimony. However, in some instances, MATR submits that PAWC and WACMA have failed to

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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 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.

<sup>4</sup> Interestingly enough, PAWC itself has offered "equitable" sounding arguments in support of its position, arguing that MATR cannot now complain about price competition because after "WACMA interconnected its previously separate service areas in 1999, MATR was more than willing to take advantage of its then lower price to increase sales to WACMA at PAWC's expense." PAWC Initial Brief, p. 13. This argument fails on several levels. First, MATR had absolutely no control over the source from which WACMA obtained its water and certainly did not know that PAWC's sales were decreasing after the interconnect. More importantly, MATR's own sales, as a percentage of WACMA's water purchases, declined significantly after the date of the interconnection, to the point that WACMA was in breach of its minimum purchase requirements under the 1983 Agreement. As MATR noted in its Initial Brief, the only beneficiary of the 1999 interconnect was the Moon Township Municipal Authority. The argument that MATR was engaged in a price competition with PAWC after the 1999 interconnect is wholly unsupported.

understand the testimony of MATR's witnesses or have chosen to mischaracterize it. For example, PAWC and WACMA want the Commission to believe that the 4 million-dollar 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 understanding itself:

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

As this testimony indicates, the wastewater treatment system is an integral part of the water treatment process.

Particularly egregious is PAWC's boast that it has discredited MATR's assertion that MATR will have to increase its water rates by approximately 30% if it loses WACMA as a customer. First, as with any projection, that figure represents 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. First, 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, that water rates will increase for those customers who remain.

Further, the amount of purchased water costs was a one-time matter. (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!)<sup>5</sup> Proof of this assertion is as follows: 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, Mr. Antonelli did not, as PAWC wants the Commission to believe, “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.

Ultimately, MATR agrees with PAWC and WACMA that these issues are collateral ones. The precise numbers are not particularly important. It is the fact that MATR lost a customer that purchases 25% of its water, and that such loss will result in stranded investment and in increased rates, which is important to the policy arguments made by MATR. See MATR’s Proposed Findings of Fact No. 31-35 and 71. PAWC has argued in prior proceedings that the Riders were intended to prevent stranded investment due to the loss of customers and also has argued that the loss of large high load customers will affect the rates charged to its other customers. MATR has demonstrated herein that these losses are not unique to PAWC. In fact, because MATR is a much smaller entity than PAWC, the loss of a customer as large as WACMA has a greater adverse affect on MATR. PAWC’s attempt to minimize these losses is unavailing. PAWC (and WACMA) can quibble with the precise percentage of a capital investment that is attributable to MATR’s service of WACMA or with the precise percentage rate increase MATR’s remaining customers will experience due to the loss of WACMA as a customer. The mathematically precise numbers are not the point. Certainly, in making major capital

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<sup>5</sup> PAWC’s rates, even the exorbitant \$10.00 per 1,000 gallons, are in the record. MATR pled these rates in its Complaint at par 16 which allegation was admitted in PAWC’s Answer. The applicable PAWC Tariff

expenditures MATR had to consider a customer which purchases 25% of its water. Certainly, the loss of a customer that purchases 25% of MATR's water will seriously impact MATR's rates. These facts are relevant to the policy arguments raised by MATR in its Initial Brief.

PAWC wanted 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 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 intent of the Commission is evident in the case of PUC v. Consumers Pennsylvania Water Company – Roaring Creek Division, 1997 Pa. PUC Lexis 93. In Roaring Creek, the Commission applied the logic of the prior PAWC cases (in which the Commission approved Riders DRS and DIS) to another water company seeking a load retention rate. The water company argued that the prior PAWC cases stood “for the proposition that a utility can be permitted to flex down its rates below the fully allocated cost of service in order to retain large industrial customers on its system.” Id. at \*76-77 (emphasis added). The Commission agreed. Citing directly from PAWC II, the Commission stated that “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 . . .” Id. at \*85 (emphasis added). In the Roaring Creek case, the

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also showing these rates is MATR Hearing Exhibit 14.

customer at issue accounted for approximately 24% of the water company's revenues. The Commission held that "consistent with our action in Pennsylvania-American, we did not take lightly, in the matter before us, the possibility of (the industrial customer) leaving the system." Id. at \*86 (emphasis added). Accordingly, the Commission emphasized that the Rider rate was to be used to prevent a large customer from leaving a system. In this case, PAWC turns the logic of Rider DRS on its head: it used the Rider rate to take a large customer away from MATR—a customer that accounts for 25% of MATR's revenues.

The fundamental question is simple: Did the Commission intend that the Riders be used by PAWC to compete for another provider's business? The language of the Riders, the testimony at the original hearings, the policy issues raised herein and the opinions of the Commission all demonstrate that the Commission did not so intend.

**Contrary to the mandate of Rider DRS, PAWC did not obtain documentation to establish the existence of a competitive alternative to service from PAWC.**

Rider DRS contains the following directive:

The Company shall require documentation to establish, to the Company's satisfaction, the existence of a competitive alternative. Such documentation may include, but is not limited to, an affidavit of the customer or, if the customer is a corporation, an affidavit of one or more of its officers.

MATR Hearing Ex. 14 (emphasis added).

This directive was added to the Rider, by the Commission, in order to ensure that the Rider was not improperly used—i.e., that PAWC did not simply take the word of the customer.<sup>6</sup> PAWC must perform some level of investigation to determine whether use of the Rider is appropriate. PAWC performed no such investigation in this case.

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<sup>6</sup> PUC v. PAWC, 1995 Pa. PUC Lexis, at \*94-95. In this opinion, the ALJ stated that: "I do have one recommended modification for the two riders. Each of them provides that the Commission may require documentation. I agree with the OIS that the word 'shall' should be substituted for 'may.' I think that there

WACMA, in its Brief, attempts to circumvent this requirement by focusing on PAWC's actual knowledge:

14. Given the decline in purchases from PAWC since 1999, PAWC believed that WACMA was purchasing more water from one or more other providers. PAWC further believed that WACMA would likely be attempting to negotiate a contract to cover all of its water needs following the expiration of the 1983 Agreement with MATR." . . . "15. PAWC was not aware that in the negotiations between MATR and WACMA, WACMA was insisting that it be obligated to purchase a minimum of 75% of its total needs from MATR.

WACMA Brief, p. 15, par. 14-15 (emphasis added).

WACMA appears to be suggesting that, regardless of the facts, PAWC truly believed that a competitive alternative existed which would eliminate its sales to WACMA.

There are several problems with this line of argumentation. First, the Rider is not available to a customer when PAWC merely "believes" that a competitive alternative exists. It is available when such alternative exists in fact and the customer intends to select it. "The rider is available to a customer that: . . . (4) has a viable competitive alternative to service from the Company and intends to select that alternative . . ." (emphasis added). PAWC's beliefs, then, are irrelevant to whether the Rider is available.

Second, in its Brief, WACMA presses strangely divergent claims on whether a competitive alternative did exist. On the one hand, WACMA claims that MATR constituted a clear competitive alternative to PAWC, based on PAWC's existing supply agreement with MATR (the 1983 Agreement) and its ongoing negotiations with MATR. WACMA Main Brief, p. 30. On the other hand, WACMA insists that after years of

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should be no significant opposition to this change, for many of the parties. The change is designed, obviously, to require the Company to scrutinize the justification for the rate reduction. I repeat that these departures will be scrutinized in subsequent proceedings and warn the Company that it should be careful in using its new flexibility." The Commission accepted this recommendation. PUC v. PAWC, 1995 Pa. PUC Lexis 170, at \*96.

negotiation with MATR there was "no likelihood" that WACMA could negotiate an acceptable agreement with MATR and that the negotiations were essentially dead—in which case, MATR presumably was not a competitive alternative. WACMA Brief, p. 34 and 37-38. The claims are fundamentally incompatible and call into question whether the Rider was appropriately utilized in this instance.

**The granting of MATR's requested relief will not be "disastrous" to WACMA and its customers.**

WACMA's prediction of "disastrous" consequences should the Commission grant MATR its requested relief is baseless and illogical. See WACMA Main Brief, p. 37. This speculation is based on several premises, each of which is false: (1) that MATR will not negotiate an agreement to serve WACMA; (2) that any agreement with MATR would involve the purchase of water at \$2.51/thousand gallons, an amount much greater than WACMA's Rider rate with PAWC; and (3) that WACMA may be compelled to purchase water from PAWC at its regular tariff rates of \$3.92/thousand gallons.<sup>7</sup>

WACMA accurately states that MATR charged it \$2.51/thousand gallons for water purchased under the terms of the extended 1983 Agreement. Exhibit Morris-1 to

<sup>7</sup> WACMA also laments the substantial costs already incurred by PAWC to build the interconnection facilities necessary to serve WACMA. These costs are irrelevant to the Commission's decision, as they were incurred voluntarily by PAWC, with full knowledge that MATR had challenged the validity of PAWC's agreement with WACMA. The PAWC Agreement was executed on March 28, 2003. MATR filed its Formal Complaint and Petition for Declaratory Order on or about April 15, 2004. In its Complaint, MATR averred that "PAWC will soon commence construction of the facilities necessary to serve WACMA under the PAWC Agreement" and requested the Commission to prohibit PAWC from "constructing any facilities with respect to such serv.ce." See Complaint par. 46 and ad damnum clause to Count III. PAWC admitted in its Answer that "PAWC plans to start construction shortly of the additional facilities needed to serve WACMA under the PAWC Agreement" and further argued that "the Commission lacks the statutory authority to enjoin PAWC from constructing such facilities", citing case law in support of this proposition. PAWC Answer, par. 45-49 (emphasis added). There is some question as to whether the Commission may enjoin a utility from constructing new facilities. There is no question, however, that the Commission may void a contract that is in violation of the utility's tariff. In other words, while PAWC may have been within its rights to build facilities as it saw fit, it proceeded at its own risk. PAWC at all times knew that the Commission may declare the PAWC Agreement illegal and therefore void.

WACMA Hearing Ex. 1. That was because the parties had not negotiated a new long term agreement. This would not be the rate charged by MATR to WACMA in the event a new long term agreement was reached. Indeed, in the parties' prior negotiations, MATR was prepared to provide water to WACMA at a rate of \$2.10/thousand gallons. See attachment to Exhibit Lenze-5 to MATR Hearing Ex. 1 (Computation of Bulk Water Rates to WACMA). This rate, moreover, is only \$0.20/thousand gallons more than PAWC's Rider DRS rate and almost half of PAWC's regular tariff rate. Such a rate would hardly be "disastrous" to WACMA and its customers.

During the course of this dispute and through February of 2004, MATR continued to serve WACMA, pursuant to an extension of the 1983 Agreement (the Extension Agreement) At all times, MATR has indicated its willingness to provide future, long term service to WACMA. The assertion that MATR may not provide water to WACMA defies logic, as MATR has documented the severe impact that the loss of WACMA as a customer will have on MATR's operations and has gone to great lengths in this litigation to preserve WACMA as a customer. There also is absolutely no reason to believe that WACMA will be compelled to purchase water from PAWC at the regular tariff rate of \$3.92/thousand gallons. MATR and the Moon Township Municipal Authority were both prepared to sell WACMA water at much lower rates. Finally, there is no reason to believe that WACMA and MATR cannot reach a reasonable agreement for the long term provision of water. MATR has already indicated, under oath, that it was prepared to consent to WACMA's demands of a 75% minimum purchase volume and a fifteen year term. MATR Hearing Ex. 1, p. 17, lines 17-20; Exhibit Lenze-5 and Exhibit Lenze-7.

Ultimately, WACMA's visions of disaster are misplaced. As MATR's witnesses testified, MATR will be unable to serve WACMA at the expiration of the 15 year PAWC Agreement. MATR Hearing Ex. 2, p. 11-12. Without substantial planning and infrastructure improvements made in anticipation of such service, MATR would not have sufficient capacity to serve WACMA and its projected water demands. *Id.* At such time, it is likely that WACMA will be compelled to purchase from PAWC, without the benefit of Rider DRS—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 MATR's rates, will be truly disastrous to WACMA and its customers. There is an impending disaster for WACMA's customers, but it has been caused entirely by PAWC.

WACMA has harshly criticized the alleged motives of MATR, writing that MATR's "real objective" in these proceedings is to use the Commission to advance MATR's own "economic interests" and to deny WACMA the benefit of PAWC's "competitive" rate. WACMA Brief, p. 39. MATR's motives (which are irrelevant in the application of the law in this case), however, cannot be so simply stated. Of course, MATR desires to retain a large and valuable customer, for whom MATR has made a substantial investment to serve over many years. And this desire relates to MATR's "economic interests" rightly understood. Unlike PAWC, MATR is not in the water business for private economic gain. MATR has no shareholders to 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.

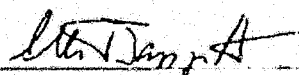
And there is nothing improper about a municipal authority compelling a competitor to abide by the laws of the Commonwealth and by the terms of its own tariff.

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.

For the foregoing reasons, MATR respectfully requests that the Commission grant the relief requested in its Formal Complaint and Initial Brief.

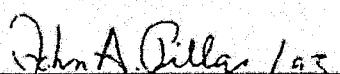
Respectfully submitted,

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

By:   
Albert J. Zangrilli, Jr.

By:   
Mark Fischer

11 Stanwix Street, Suite 1024  
Pittsburgh, PA 1522-1324  
(412) 261-6777

By:   
John A. Pillar

680 Washington Road

Suite 8101  
Pittsburgh, PA 15228-1925

Attorneys for The Municipal Authority  
of the Township of Robinson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached **REPLY BRIEF OF COMPLAINANT MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON** has been served on the following by e-mail and first class mail, postage prepaid, except as otherwise noted:

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

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

Attorneys for Pennsylvania American Water Company

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

(rights reserved)

MICHAEL J. WITHEREL, ESQ.  
([wk-law@rvvems.org](mailto:wk-law@rvvems.org))  
Witherel & Kovacil  
966 Perry Highway  
Pittsburgh, PA 15237-2107

Attorneys for Pennsylvania Municipal Authorities Association, Amicus Curiae

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

Attorneys for Western Allegheny County Municipal Authority, Proposed Intervenor

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

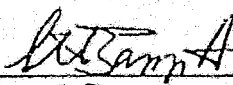
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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

DATE: April 2, 2004

  
\_\_\_\_\_  
ALBERT J. ZANGRILLI, JR.

**ORIGINAL**

Law Offices

**VUONO & GRAY, LLC**

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

2310 Grant Building

Pittsburgh, PA 15219-2383

April 2, 2004

Richard R. Wilson  
of Counsel

Telephone  
412-471-1800

Facsimile  
412-471-4477

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

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

MAILED WITH U. S. POSTAL SERVICE  
CERTIFICATE OF MAILING  
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Dear Mr. McNulty:

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

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

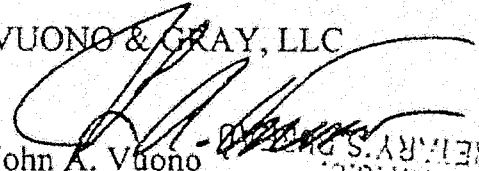
Will you please acknowledge receipt and filing of the enclosed on the copy of this letter of transmittal and return it to me in the envelope provided for that purpose.

Sincerely yours,

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FOLDER

VUONO & GRAY, LLC

John A. Vuono

  
SECRETARY S. P. M. 11/11/03  
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Enclosures

cc: Honorable Larry Gesoff  
Parties of Record

**ORIGINAL**

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Docket No. C-20030092

APR 2 2004  
PA PUE SECRETARY'S OFFICE

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

**DOCKETED**  
APR 06 2004

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

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

**DOCUMENT  
FOLDER**

Due Date: April 2, 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. )

PENNSYLVANIA-AMERICAN )  
WATER COMPANY )

Respondent. )

) Docket No. C-20030092  
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REPLY BRIEF OF  
WESTERN ALLEGHENY COUNTY MUNICIPAL AUTHORITY  
INTERVENOR

I. STATEMENT OF THE CASE

The Western Allegheny County Municipal Authority ("WACMA") is a municipal corporation, organized and existing under the Pennsylvania Municipal Authorities Act of 2001.

WACMA was formed in 1953 for the purpose of distributing municipal water. WACMA currently serves approximately 12,871 customers through 3,982 connections in

North Fayette and Findlay Townships, Allegheny County. (WACMA Ex. 1, p. 4).<sup>1</sup> It does not produce water and for many years has purchased all of its water from interconnected water suppliers, including Pennsylvania-American Water Company ("PAWC"), The Municipal Authority of the Township of Robinson ("MATR") and the Moon Township Municipal Authority. (WACMA Ex. 1, pp. 4-5).

On October 28, 1983 WACMA entered into a Water Supply Agreement with MATR (the "1983 Agreement") pursuant to which MATR, until recently, has supplied a majority of WACMA's water supply needs. The 1983 Agreement was scheduled to expire on October 21, 2003. (MATR Ex. 1, Lenze-1). For a period of approximately four years prior to that date WACMA and MATR engaged in negotiations to extend or renew the Agreement. (WACMA Ex. 1, p. 6-11). Ultimately, the parties were not able to reach an agreement, primarily because MATR was unwilling to meet WACMA's essential requirements concerning the term of the agreement and the minimum purchase guarantee (WACMA Ex. 1, pp. 8-9; 12-16).

As the result of the failure to reach an agreement with MATR, WACMA initiated serious discussions with PAWC in early 2003 which culminated in the execution of a fifteen year Water Sales Agreement on March 28, 2003 (the "2003 Agreement"). (WACMA Ex. 1, pp. 12-19). The 2003 Agreement was entered into pursuant to the terms of PAWC's Rider DRS-Demand Based Resale Service ("Rider DRS") as set forth

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<sup>1</sup> Citations preceded by "Tr." refer to pages of the transcript of testimony and by "Ex." to hearing exhibits. The inclusion of the name of a witness followed by a number within a citation denotes an exhibit within the referenced hearing exhibit.

in PAWC's tariff and to the Commission's Order entered June 6, 1996 at Docket No. R-00943231 ("the Rider DRS proceeding").

On April 16, 2003, MATR initiated this proceeding by filing a Formal Complaint and Petition for Declaratory Order against PAWC in which it requested that the Commission issue an Order (a) voiding the 2003 Agreement between PAWC and WACMA; (b) declaring that any agreement between PAWC and WACMA must utilize the Group and Resale Rate from PAWC's tariff; and (c) prohibiting PAWC from commencing service to WACMA pursuant to the 2003 Agreement or from constructing any facilities with respect to such service.<sup>2</sup> Subsequently, PAWC filed its Answer and New Matter and WACMA filed a Petition to Intervene in support of PAWC.

The Complaint proceeding was assigned to Administrative Law Judge Larry Gesoff. At the Prehearing Conference held on July 18, 2004, *inter alia*, WACMA was authorized to intervene as a party<sup>3</sup> and the Pennsylvania Municipal Authorities Association ("PMAA") was granted the right to intervene for the limited purpose of filing a Post-Hearing Amicus Brief.

The substance of MATR's Complaint, PAWC's Answer and New Matter and WACMA's Petition to Intervene and the prior history of the proceeding are set forth in detail in the Statement of the Case contained in WACMA's Main Brief and will not be repeated herein.

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<sup>2</sup> At the Prehearing Conference, MATR's counsel withdrew the request for injunctive relief.

<sup>3</sup> An Order granting the Petition to Intervene was served on July 24, 2004.

Following extensive discovery, the direct testimony of the parties was submitted in written form. An Oral Hearing was held on July 21, 2004<sup>4</sup> at which the witnesses for MATR, PAWC and WACMA, who had submitted written direct testimony, verified their testimony and were available for cross-examination.<sup>5</sup>

On February 12, 2004, MATR filed a Petition for Interim Emergency Order ("Emergency Petition") requesting that the Commission prohibit the sale of water by PAWC to WACMA under the 2003 Agreement until the Commission entered a final Order in this proceeding.<sup>6</sup> On February 17, 2004, Judge Gesoff held a telephonic hearing during which he considered the Emergency Petition and PAWC's Answer, in which WACMA joined. (Tr. 164-165). On February 19, 2004, Judge Gesoff served an Interim Emergency Order denying MATR's Emergency Petition and a Certification of a Material Question to the Commission. At its Public Meeting on March 18, 2004, the Commission entered its Opinion and Order which affirmed Judge Gesoff's decision to deny MATR's Emergency Petition ("Emergency Opinion and Order").

Subsequently, the parties submitted Main Briefs and PMAA filed a Post-Hearing Amicus Brief in this proceeding. WACMA now submits its Reply Brief to the MATR and PMAA Briefs.

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<sup>4</sup> Administrative Law Judge Fred R. Nene presided at the hearing as a substitute for Judge Gesoff.

<sup>5</sup> At the hearing, the Complaint and Answer were made a part of the record. (Tr. pp. 9-10).

<sup>6</sup> The Interim Emergency Petition apparently was precipitated by the fact that on February 4, 2004 PAWC advised Judge Gesoff and the parties to the proceeding that the Department of Environmental Protection ("DEP") had issued the necessary water supply permits and that PAWC was commencing service under the 2003 Agreement (MATR Ex. 15)

## II. STATEMENT OF THE QUESTION INVOLVED

As addressed in detail in WACMA's Main Brief, with limited exceptions, the pleadings and evidence proffered by MATR concentrate on various collateral issues, most of which are equitable in nature and none of which are pertinent to the essential issues involved in this proceeding.

The Briefs submitted by MATR and PMAA to a large extent follow this same pattern and attempt to inject into this proceeding certain collateral and irrelevant issues, when in fact the sole issue before the Commission is:

**Whether or not MATR, as the Complainant, has carried its burden of proving that PAWC's interpretation and implementation of Rider DRS as it applies to the 2003 Agreement is erroneous.**

## III. SUMMARY OF THE ESSENTIAL ARGUMENTS OF MATR AND PMAA

MATR argues that (1) the application of Rider DRS to the 2003 Agreement is erroneous because the plain and unambiguous language of Rider DRS prohibits such application; (2) Rider DRS was never intended to apply to the instant situation, *i.e.*, to permit PAWC to attract as well as to retain business; and (3) MATR's concept of public policy "militates" against such application. (The "public policy" arguments advanced by MATR and PMAA are convoluted and, in any event, clearly are not pertinent to the instant situation where the Commission in the Rider DRS proceeding considered the public interest and related public policy implications at the time it approved Rider DRS. Moreover, if the relief requested by MATR and PMAA were granted, the record establishes that the result would be that the interests of WACMA and PAWC and their

respective customers would be adversely affected which would be clearly contrary to sound public policy.)

The primary arguments contained in PMAA's Amicus Brief closely parallel those set forth in the MATR Brief.<sup>7</sup> In addition, PMAA attempts to raise a so-called "Filed Rate Doctrine" argument, which is difficult to follow and in any event is not credible. (This issue was set to rest in the Rider DRS proceeding in which the Commission found that Rider DRS did not violate the Filed Rate Doctrine since the riders provided for a range of just and reasonable rates and constituted "duly filed tariffs"). PMAA also devotes a considerable portion of its Main Brief to a non-issue, *i.e.*, an attempt to rebut an alleged assertion by PAWC that the Commission lacks the authority to rule on this matter. (A careful review of the pleadings and the record does not reveal any challenge or even a suggestion by PAWC that the Commission may not have the authority to act on this matter.)

#### IV. SUMMARY OF WACMA'S POSITION

WACMA has set forth in detail in its Main Brief an even-handed and accurate abstract of the testimony of all of the witnesses which contains detailed citations to the evidence of record. (WACMA Main Brief, pp. 5-25).

Based on the foregoing, it is the position of WACMA that (1) the 2003 Agreement meets all of the requirements for the proper application of Rider DRS; (2) Rider DRS

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<sup>7</sup> PMAA originally submitted an amicus brief as an attachment to its Petition to Intervene. Its Amicus Brief filed on March 5, 2004 is substantially the same as its original Brief, notwithstanding the subsequent development of an extensive evidentiary record, and includes only minimal references to the record.

expressly permits PAWC to enter into alternative water arrangements under certain circumstances in order to both retain and to attract sale for resale customers; and (3) the collateral arguments advanced by MATR and PMAA are not pertinent to the sole issue involved in this proceeding and, in any event, are not credible.<sup>8</sup> As a consequence, MATR has failed to meet its burden of proving that PAWC's interpretation and implementation of Rider DRS as it applies to the 2003 Agreement is erroneous.

WACMA engaged in good faith negotiations with MATR for more than four years and was unable to negotiate a new water supply agreement. It is clear that the sole objective of MATR, "a disappointed suitor", is to use the Commission's processes to force WACMA to purchase water for resale from MATR at a substantially higher rate than the existing PAWC rate. As will be shown, the record establishes that the granting of the relief sought by MATR will adversely affect the interests of WACMA and its customers.

## V. ARGUMENT

### A. CONTRARY TO THE ASSERTIONS OF MATR AND PMAA, THE 2003 AGREEMENT SATISFIES THE ESSENTIAL REQUIREMENTS OF RIDER DRS.

MATR and PMAA argue that the 2003 Agreement fails to meet the essential requirements of Rider DRS. As addressed extensively in WACMA's Main Brief, Rider DRS is available to a customer that: (a) purchases water from the Company for Resale;

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<sup>8</sup> See comments concerning certain of the collateral issues set forth in parentheses in Section III, *supra*.

(b) enters into a Service Agreement for a term of not less than 10 years; (c) during the original and any renewal term of the Service Agreement, agrees to maintain a daily load factor of not less than 0.75; and (d) has a competitive alternative to service from the Company and intends to select that alternative to the detriment of the Company and its other customers. (PAWC, Ex. 1-A) The rates to be charged qualifying customers under Rider DRS shall not exceed the "Maximum Rate", nor be less than the "Minimum Rate", as defined in the Tariff, and shall be subject to an agreed upon "Escalation Clause." (PAWC Ex. 1-A).

In addressing the essential elements of Rider DRS, MATR limits its analysis to requirements (a) and (d) which it states are of particular relevance in determining whether Rider DRS was correctly applied to the 2003 Agreement. (MATR Main Brief, p. 19). PMAA concedes in its Brief that "[t]here is no dispute that the second and third parts of the rider are met in this case." (PMAA Amicus Brief, p. 4). Accordingly, the parties agree and the record confirms that requirements (b) and (c) have been met.

With respect to requirements (a) and (d), it is assumed that PAWC will address in detail in its Reply Brief the issues raised by MATR and PMAA, including the background and history of Rider DRS. The following will address the essential issues regarding Rider DRS which relate primarily to WACMA.

**1. WACMA "Purchases" Water From PAWC For Resale As Required By Rider DRS.**

Despite the tortuous attempts by MATR to argue that the present tense usage in Rider DRS of the word "purchases" does not relate "to possible future purchases" (MATR Main Brief, p. 19), the fact is WACMA has been purchasing water from PAWC for resale since 1957. (MATR Exs. 11 and 11-A; WACMA Ex. 1, p. 6).

As noted above, WACMA is a distribution-only authority that purchases water for resale and distribution to over 12,000 customers in North Fayette and Findlay Townships in Allegheny County, PA. (WACMA Ex. 1, p. 4). Accordingly, the 2003 Agreement clearly meets requirement (a) that the customer purchases water from the company for resale.

**2. WACMA Had Viable "Competitive Alternatives" To PAWC.**

MATR argues that "[t]he [2003] Agreement falsely states that WACMA had 'an alternative to significantly reduce, or perhaps eliminate, its purchases from PAWC'." (MATR Main Brief, p. 15). MATR refers to the prior negotiations between MATR and WACMA with respect to the proposed extension of the 1983 Agreement. Specifically, 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. (MATR Main Brief, pp. 29-30). The flaw in MATR's analysis is its assumption that WACMA 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. A minimum purchase obligation would not prevent WACMA from choosing to purchase 100% of its water requirements from MATR, particularly where the regular tariff rate of PAWC was substantially higher than the MATR rate.

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 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.<sup>9</sup> 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).

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 plus the opportunity to increase sales to WACMA in the future.<sup>10</sup> (PAWC Ex. 1, p 7).

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<sup>9</sup> MATR testified that it was prepared to provide water to WACMA at a rate of \$2.10/thousand gallons. (MATR Ex. 1, Lenze-5).

<sup>10</sup> As indicated in Mr. Grundusky's testimony, based upon the recent decline in water purchases from PAWC by WACMA, and because it was not privy to the terms of the negotiations between MATR and WACMA, PAWC believed that WACMA would likely attempt to negotiate a contract to cover all of its water needs following expiration of the 1983 Agreement. (Tr. pp. 91-92).

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).

MATR raises in two footnotes the issue that PAWC has failed to provide required "documentation" with respect to the "competitive alternatives". (MATR Main Brief, footnotes 1 and 10). This is another "non-issue" 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, Lenzc-1; MATR Exs. 3 and 4; PAWC Ex. 1, pp. 4-5).

**B. RIDER DRS PERMITS PAWC TO ATTRACT NEW BUSINESS AS WELL AS TO RETAIN OLD BUSINESS.**

MATR and PMAA argue at length that Rider DRS was never intended to permit PAWC to attract new business. This argument was addressed in detail in PAWC's Main Brief (PAWC's Main Brief, pp. 10-13) and it is assumed that the latest allegations contained in the MATR and PMAA Briefs will again be challenged by PAWC in its Reply Brief.

Suffice it to say, the record in the Rider DRS proceeding clearly supports the conclusion that the Commission intended that PAWC could use Rider DRS to both attract and retain load.

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

Significantly, with respect to this issue, the Commission in its Opinion and Order in connection with the Emergency Petition stated:

...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).<sup>11</sup>

It is clear that the intended purpose of Rider DRS is to both retain and attract sale for resale customers and, as shown above, Rider DRS has been properly implemented by PAWC in connection with the 2003 Agreement.

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<sup>11</sup> Emergency Opinion and Order, p. 5.

**C. MATR SHOULD NOT BE PERMITTED TO USE THE COMMISSION'S PROCESSES TO ADVANCE ITS ECONOMIC INTERESTS TO THE DETRIMENT OF WACMA AND ITS CUSTOMERS.**

**1. What This Proceeding Is Really About.**

WACMA's Main Brief addressed in detail the facts which have given rise to this proceeding. (WACMA Main Brief, pp. 31-34). Essentially, WACMA and MATR engaged in lengthy negotiations extending over 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,<sup>12</sup> 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).

What this proceeding is really about is a desperate attempt by a "disappointed suitor" to use the Commission's processes to achieve an objective that it was not willing or able to accomplish through arms-length negotiations. In sum, MATR is asking the Commission to advance its economic interests 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.

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<sup>12</sup> The MATR Brief states "As of December of 2003, the parties had not been able to resolve these differences." (MATR Main Brief, p. 14). This is apparently a typographical error and the date should be "December of 2002".

**2. The Granting Of The Relief Requested By MATR Will Adversely Affect WACMA And Its Customers.**

As discussed extensively in WACMA's Main Brief (WACMA Main Brief, pp. 37-39), it is of vital concern to WACMA that it continues to have available a sufficient supply of water to meet the present and future needs of its customers. 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 disastrous.

If the 2003 Agreement 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.

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).

Accordingly, it is clear that the granting of the relief sought by MATR would adversely affect WACMA and its customers, both in terms of service and economic impact. Moreover, for the reasons set forth in the Main Briefs of WACMA and PAWC, that result would also adversely affect PAWC and its customers.

VI. CONCLUSION

Based on the foregoing, WACMA respectfully requests that the Administrative Law Judge (1) make the findings set forth in the headings to the Argument in Section V of this Reply Brief; and (2) deny the relief sought by Plaintiff and dismiss the Complaint.

Respectfully submitted,

VUONO & GRAY, LLC

By: 

John A. Vuono, Esq.

Susan C. Indrisano, Esq.

Attorneys for Western Allegheny  
County Municipal Authority

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

Due Date: April 2, 2004

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CERTIFICATE OF SERVICE

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

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

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

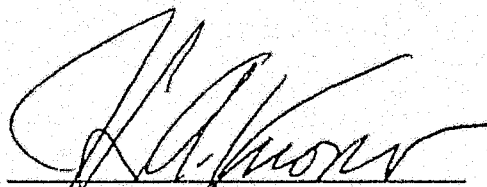
Bohdan R. Pankiw, Esq.  
Chief Counsel  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17105-3265

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

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

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

Dated this 2nd day of April, 2004.

  
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John A. Vuono, Esq.