

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held January 12, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman, Joint Statement, Dissenting
Stephen M. DeFrank, Vice Chairman, Statement
Ralph V. Yanora
Kathryn L. Zerfuss, Joint Statement, Dissenting
John F. Coleman, Jr.

Application of Pennsylvania-American Water
Company for Approval of the Right to Offer,
Render, Furnish and Supply Wastewater Treatment
Service to the Public in an Additional Portion of
Elk Township, Clarion County, Pennsylvania

A-2022-3030364

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition) filed by Pennsylvania-American Water Company (PAWC) on August 31, 2022, seeking reconsideration of the Order entered on August 25, 2022 (*August 2022 Order*), relative to the above-captioned proceeding. For the reasons set forth below, we shall grant, in part, and deny, in part, the Petition, consistent with this Opinion and Order.

I. History of the Proceeding

On January 6, 2022, PAWC filed an Application seeking a Certificate of Public Convenience (Certificate), pursuant to 66 Pa. C.S. § 1102(a)(1)(i), to offer, render, furnish, or supply wastewater service to the public in an additional portion of Elk Township, Clarion County. The Commission approved the Application on August 25, 2022, via the *August 2022 Order*.

As previously noted, on August 31, 2022, the instant Petition was filed by PAWC. No response to the Petition has been filed.

By Order entered September 15, 2022, we granted reconsideration pending review of, and consideration on, the merits, pursuant to Pa. R.A.P. 1701(b)(3).

II. Discussion

A. Legal Standards

Initially, we note that any issue we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the Parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

The Public Utility Code (Code) establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. §§ 703(f) and 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of

our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision. The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 1982 Pa. PUC Lexis 4, *12-13:

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part.

In this regard we agree with the court in the Pennsylvania Railroad Company case, wherein it was stated that:

Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them . . . what we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission.

Under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Id.* at *13.

The Commission has administrative discretion regarding whether to grant or deny a petition for reconsideration of an order filed under Section 703(g). *West Penn Power Co., v. Pa. PUC*, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995). Such a petition, however, should only be granted judiciously and under appropriate circumstances,

because such action results in the disturbance of a final order. *Id.* (citing *City of Pittsburgh v. Pa. Dep't of Transportation*, 416 A.2d 461 (Pa. 1980)).

B. *August 2022 Order*

In the *August 2022 Order*, the Commission concluded that there is a need to make public wastewater service available in the requested territory, that PAWC will expand its service territory to new customers in compliance with Commission Regulations, that the economies of scale of an expanded customer base have a beneficial effect on existing customers, and that PAWC is fit to provide service. Finding that granting the Application for PAWC is necessary or proper for the service, accommodation, convenience, or safety of the public and in the public interest, we approved PAWC's Application and issued a Certificate authorizing PAWC to offer, render, furnish, and supply wastewater service to the public in an additional portion of Elk Township, Clarion County. *August 2022 Order* at 8-9.

In addition to granting the Application, pursuant to 66 Pa. C.S. §§ 501, 504 and 1103(a), the *August 2022 Order* directed PAWC to file a report with the Commission, within sixty days following entry of that Order, addressing violations indicated by the Pennsylvania Department of Environmental Protection (DEP) at PAWC's Norristown Water Treatment Plant and the current status of completing any approved corrective actions. This requirement was allegedly based upon an undocketed extra-record e-mail dated January 26, 2022, from DEP's Northwest Regional Office (DEP e-mail), that advised Commission Staff that PAWC is in violation of National Pollutant Discharge Elimination System (NPDES) Permit Nos. PA0060640 (Saw Creeks Wastewater Treatment Plant, Pike County), PA0061646 (Lake Scranton Water Filter Plant, Lackawanna County), and PA0244775 (Norristown Water Treatment Plant, Montgomery County). *August 2022 Order* at 7-8.

C. Petition

The Petition seeks reconsideration of the *August 2022 Order* granting the Application for the approval of the right to offer, render, furnish, or supply wastewater service to the public in an additional portion of Elk Township, Clarion County. In its Petition, PAWC contends that the *Duick* standard is met because the Commission committed clear errors of law. First, PAWC claims that reconsideration of the reporting requirement at Ordering Paragraph No. 3 of the *August 2022 Order* is warranted because the Commission violated PAWC's procedural due process rights by failing to give notice and an opportunity to be heard on the DEP's e-mail regarding an alleged violation of a NPDES permit for an unrelated treatment plant and the proposed condition of approval of its Application. PAWC further avers that Commission Staff never notified PAWC of, or gave PAWC an opportunity to respond to, the alleged incidents identified in the DEP's e-mail. Petition at 5.

Second, PAWC argues that the Commission imposed an environmental reporting condition on its approval that is beyond the scope of the Commission's statutory authority. PAWC contends that while 66 Pa. C.S. § 504 may give the Commission authority to require a regulated utility to file with the Commission a copy of a report filed with another regulatory agency, the Commission does not have the authority to require a utility to create a report pertaining to a matter subject to the jurisdiction of another regulatory agency. *Id.* at 5-6.

Third, PAWC avers that the Commission imposed an environmental reporting condition that exceeds the Commission's limited scope of review for an application under 66 Pa. C.S. §§ 1102 and 1103 and is not based upon substantial evidence of record. PAWC contends that the Commission's scope of review in an application proceeding is limited to whether PAWC is legally, financially, and technically fit to obtain a Certificate. Furthermore, PAWC argues that, as a certificated

public utility, it is presumed to be fit and there is no evidence in the record to suggest that the alleged environmental incidents identified in the DEP e-mail are sufficient to overcome a presumption of PAWC's fitness such that an environmental reporting requirement condition is necessary for Commission approval. *Id.* at 6.

Next, PAWC requests that the Commission delete Ordering Paragraph No. 3 at page 9 of the *August 2022 Order*, which requires PAWC to file a report within sixty days of entry of the *August 2022 Order* addressing alleged violations that DEP identified at PAWC's Norristown Water Treatment Plant. PAWC argues that the Norristown Water Treatment Plant is wholly unrelated to PAWC's wastewater operations in Elk Township, which are the subject of this proceeding. Additionally, PAWC avers that it was never provided with a copy of the DEP e-mail by Commission Staff. PAWC further contends that, following receipt of the DEP e-mail, Commission Staff sent Data Requests to PAWC; however, none of the Data Requests sought information about the Norristown Water Treatment Plant. As a result, PAWC claims that it had no knowledge of the Commission's concern about this issue or the potential inclusion of an approval condition related to an alleged environmental violation until the *August 2022 Order* was entered. PAWC argues that Commission Staff should have notified PAWC of the DEP e-mail and of its intent to incorporate an approval condition related to environmental reporting on an unrelated incident, and PAWC should have been afforded a meaningful opportunity to respond, including an opportunity to submit additional evidence. Inasmuch as PAWC had no notice of DEP's e-mail and no opportunity to be heard concerning it until the *August 2022 Order* was entered, PAWC contends that its procedural due process rights were violated. *Id.* at 6-7.

In addition, PAWC argues that Ordering Paragraph No. 3 of the *August 2022 Order* also exceeds the scope of the Commission's statutory authority. PAWC states that it has no objection to providing the Commission with a copy of any report that has been provided to DEP in circumstances where PAWC is afforded due

process; however, PAWC submits that 66 Pa. C.S. § 504 does not give the Commission authority to require a utility to create and file another report regarding the same matter, which is subject to the jurisdiction of a different regulatory agency. PAWC argues that it should not be required by the Commission to create another report about an alleged NPDES violation because no such condition is necessary to meet the applicable legal standard for approval of the Application. PAWC also acknowledges that an alleged violation of an NPDES permit may be relevant to the issue of PAWC's technical and legal fitness to obtain a Certificate, but, when considered in the context of the totality of PAWC's water and wastewater systems, PAWC avers that this alleged violation does not call into question the presumption of PAWC's technical or legal fitness and PAWC's good record on environmental compliance. Therefore, PAWC contends that the Application meets the legal standards for approval under 66 Pa. C.S. § 1103(a), and that there is no need for the Commission to impose this condition on the granting of a Certificate to PAWC. Finally, PAWC argues that the inclusion of the environmental reporting requirement exceeds the scope of Commission review and is a waste of public utility and customer resources. *Id.* at 7-8.

As relief, PAWC requests that the Commission grant its Petition and delete Ordering Paragraph No. 3, in its entirety, from the *August 2022 Order*. *Id.* at 9.

D. Disposition

As mentioned, Petitions for Reconsideration are governed by *Duick*, which essentially requires a two-step analysis. First, we determine whether a party has offered new or novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. We will not reconsider our previous decision based on arguments that have already been considered. However, we will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the

Commission in its previous order. The second step of the *Duick* analysis is, therefore, to evaluate the new or novel argument or overlooked consideration, in order to determine whether to modify our previous decision.

We agree with PAWC that reconsideration of our *August 2022 Order* is warranted under the *Duick* standard and that Ordering Paragraph No. 3 should be deleted. Specifically, we agree with PAWC that the reporting requirement set forth in Ordering Paragraph No. 3 is not based upon substantial evidence of record.¹ The Commission's scope of review in an application proceeding considers whether the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public under 66 Pa. C.S. § 1103(a). As a certificated public utility, PAWC is presumed to be fit and there is no evidence in the record to suggest that the alleged environmental incidents identified in the DEP e-mail are sufficient to overcome a presumption of PAWC's fitness such that an environmental reporting requirement is necessary. Given that Ordering Paragraph No. 3 was not based on substantial evidence, we find it unnecessary to address the remaining two claims made by PAWC.²

Further, we point out that the Norristown, Saw Creek, and Lake Scranton plants are unrelated to PAWC's wastewater operations in the instant Application regarding Elk Township operations in Clarion County.³ While the Commission is

¹ We note that the reporting requirement in Ordering Paragraph No. 3 of our *August 2022 Order* was not a condition to PAWC obtaining a Certificate in the instant Application. Additionally, PAWC timely filed its Petition regarding this reporting requirement. As such, PAWC did not waive its objections to Ordering Paragraph No. 3 of the *August 2022 Order* by accepting its Certificate in the Application matter.

² *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993).

authorized to require any public utility to file special reports under 66 Pa. C.S. § 504, the inclusion of an unrelated reporting requirement is misplaced in the instant uncontested Application proceeding. If the Commission desires additional information regarding the Norristown Water Treatment Plant, the Commission's Bureau of Technical Utility Services is permitted to submit separate data requests to PAWC and to make appropriate referrals for investigation regarding any alleged DEP violations related to these plants.

III. Conclusion

For the reasons set forth above, we shall grant, in part, and deny, in part, the Petition, consistent with this Opinion and Order; **THEREFORE,**

³ The Commission previously directed PAWC to provide a report to the Commission addressing the DEP violations and the status of completing DEP-approved corrective actions for the Saw Creeks Wastewater Treatment and Lake Scranton Water Filter Plants. *See Application of Pennsylvania American Water Company – Wastewater Division for approval of the right to: (1) acquire certain wastewater system assets from Foster Township, and (2) begin to offer, render, furnish or supply wastewater service to the public in portions of Foster Township, Luzerne County, Pennsylvania, Docket No. A-2021-3028676 (Order entered July 14, 2022).*

IT IS ORDERED:

1. That the Petition for Reconsideration filed by Pennsylvania-American Water Company on August 31, 2022, is granted, in part, and denied, in part.

2. That Ordering Paragraph No. 3 of our Opinion and Order entered on August 25, 2022, at Docket No. A-2022-3030364, is deleted.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: January 12, 2023

ORDER ENTERED: January 24, 2023