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**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held August 29, 2002

**Commissioners Present:**

Glen R. Thomas, Chairman,  
Robert K. Bloom, Vice Chairman  
Aaron Wilson, Jr.  
Terrance J. Fitzpatrick  
Kim Pizzingrilli

Joint Application of Pennsylvania-American  
Water Company and Thames Water Aqua  
Holdings GmbH for all approvals required under  
the Public Utility Code in connection with a  
change in control of Pennsylvania-American  
Water Company

A-212285F0096  
A-230073F0004

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for consideration and disposition are the Exceptions filed separately on July 11, 2002, by the following Parties: the Office of Consumer Advocate (OCA); the Office of Trial Staff (OTS); and the Citizens for Pennsylvania's Future, d/b/a Penn Future, Defend Our Watershed!, Daniel S. Townsend, and Joseph Laver (collectively, the PennFuture Parties). These Exceptions were filed regarding the Initial Decision of Administrative Law Judge (ALJ) Wayne L. Weismandel issued on June 21, 2002, in the above-captioned proceeding. Replies to the Exceptions were filed on

July 22, 2002, by the Pennsylvania-American Water Company (PAWC) and Thames Water Aqua Holdings GmbH (Thames) (collectively, Joint Applicants).

### **History of the Proceeding**

On December 14, 2001, the Joint Applicants filed a Joint Application for all approvals required under the Public Utility Code in connection with a change in control of Pennsylvania-American Water Company (Joint Application). Timely Protests or Notices to Intervene were filed by the following Parties: Utility Workers Union of America, AFL-CIO (UWUA) and the Utility Workers Union of America Local Union No. 537 (Local 537) (Union Protest); the OCA; the OTS; and the Office of Small Business Advocate (OSBA).

On March 1, 2002, the PennFuture Parties filed a late-filed Petition to Intervene and Protest. This Petition was granted by Order dated March 12, 2002.

On March 5, 2002, UWUA and Local 537 filed a letter dated the same date stating that they had "reached a settlement" resolving their concerns with respect to the proposed acquisition of PAWC by Thames. On March 15, 2002, UWUA filed a Memorandum of Agreement between UWUA and Thames dated March 1, 2002.

On March 18, 2002, the Commission on Economic Opportunity (CEO) filed a late-filed Petition to Intervene (CEO Petition). On April 10, 2002, Joint Applicants timely filed their Answer in Opposition (CEO Petition Answer) to the CEO Petition. By Initial

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Portions of this Section are adopted from pages 1-8 of the Initial Decision without further attribution.

Decision dated April 11, 2002 (April 11<sup>th</sup> Initial Decision), the ALJ denied the CEO Petition.

Public Input Hearings were held in two sessions (1:00 p.m. and 6:30 p.m.) on April 24, 2002, at King's College, Wilkes-Barre, Pennsylvania. Representatives on behalf of all active participants attended. A total of twenty-four witnesses (including Representatives Phyllis Mundy and John Yudichak) presented sworn testimony at the two sessions of the Public Input Hearing. A transcript of the 1:00 p.m. session containing 66 pages (numbered 18 through 83) and a transcript of the 6:30 p.m. session containing 61 pages (numbered 84 through 144) were prepared.

On April 25, 2002, CEO filed Exceptions (CEO Exceptions) to the April 11<sup>th</sup> Initial Decision, a Motion for Stay of Proceedings (CEO Stay Motion), and a copy of a Petition for Review filed with the Commonwealth Court of Pennsylvania. (See No. 1037 C.D. 2002). On May 2, 2002, OCA filed Exceptions (OCA Exceptions) to the April 11<sup>th</sup> Initial Decision. On May 6, 2002, Joint Applicants filed their Answer (Stay Motion Answer) to the CEO Stay Motion. By Opinion and Order entered on May 9, 2002, the Commission denied the CEO Stay Motion, the CEO Exceptions, and the OCA Exceptions.

The Initial Hearing convened as scheduled on May 7, 2002. Representatives of Joint Applicants, the OCA, the OTS, the PennFuture Parties, and the OSBA participated. A transcript of the Initial Hearing containing 183 pages was produced. All active participants completed presentation of their evidence on May 7, 2002. Timely Main Briefs were filed by Joint Applicants, the OCA, the OTS, and the PennFuture Parties. Timely Reply Briefs were filed by Joint Applicants, the OCA, and the PennFuture Parties.

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In the Initial Decision, the ALJ recommended that we find that the Applicants have met their burden of proof and that the Application be granted, subject to certain conditions which the Joint Applicants agreed to accept. As mentioned above, timely Exceptions were filed by the OCA, the OTS, and the PennFuture Parties. The Joint Applicants filed timely Replies to the Exceptions.

### Discussion

The ALJ made specific Findings of Fact and Conclusions of Law (I.D., pp. 8-15 and 37-40, respectively), which are adopted herein by reference, unless modified or reversed, expressly or by necessary implication, by this Opinion and Order.

#### **A. Description of the Companies and the Proposed Merger**

The ALJ described, at pages 15-18 of the Initial Decision, the Parties and circumstances surrounding this Joint Merger Application. On September 16, 2001, American Water Works Company, Inc. (AWWC), the parent of PAWC, entered into an Agreement and Plan of Merger (Merger Agreement) with RWE Aktiengesellschaft (RWE), Thames, a wholly-owned subsidiary of RWE, and Apollo Acquisition Company (Apollo), a subsidiary of Thames. Pursuant to the terms of the Merger Agreement, AWWC and Apollo would merge and AWWC, the surviving corporation, would become a wholly-owned direct or indirect subsidiary of Thames. On December 14, 2001, the Joint Applicants filed their Joint Application in pursuance of the Merger Agreement. The parties, the transaction and the approvals requested by the Joint Applicants are more fully described below.

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PAWC is a Pennsylvania corporation that provides regulated water and wastewater service. As of year-end 2001, PAWC furnished water service to approximately 568,000 customers and wastewater service to approximately 11,000 customers. With PAWC's acquisition of the assets and service areas of Citizens Utilities Water Company of Pennsylvania, in January 2002, and Lehman Pike Water and Sewer Company, in April 2002, PAWC currently provides service to 604,000 water and 12,500 wastewater customers. PAWC's service territory covers 35 counties and encompasses 357 municipalities with a total population served of approximately 2 million. PAWC is a wholly-owned subsidiary of AWWC.

AWWC is a Delaware corporation that owns the stock of various subsidiary operating water and wastewater utilities, including PAWC. AWWC also owns the stock of non-utility subsidiaries including the American Water Works Service Company, which provides a variety of services to AWWC's operating utilities; the American Water Capital Corporation, which is the financing vehicle for the AWWC system; and other subsidiaries that are in the business of providing management services to water and wastewater systems owned by others. Through its operating water and wastewater companies, AWWC furnishes service to approximately 15 million consumers throughout the United States and Canada. AWWC is the largest investor-owned water utility holding company in the United States. AWWC is a public company, and its stock is listed and actively traded on the New York Stock Exchange.

Thames is a company organized under the laws of the Federal Republic of Germany. Thames owns several subsidiaries including Thames Water Plc (Thames Water), which is the management company responsible for the operations of all of Thames' water and wastewater businesses (collectively, Thames and Thames Water will be referred to as Thames Germany).

Thames Germany is the largest water/wastewater utility in the United Kingdom, where it provides service to 12 million people in and around the City of London, and the third largest water/wastewater services company in the world, serving over 43 million people world-wide. Within the United States, Thames Germany owns E'town Corporation (E'town), one of the nation's largest investor-owned water and wastewater utilities. Through its subsidiaries, Elizabethtown Water Company, Mount Holly Water Company and Applied Wastewater Management, Inc., E'town provides water and wastewater service to approximately one million people in 54 municipalities located throughout eight counties in central New Jersey. E'town also provides water and wastewater management services in New Jersey through two non-regulated subsidiaries. A detailed corporate profile of Thames Germany is set forth in Exhibit C to the Joint Application.

RWE, the parent of Thames, is a company organized under the laws of the Federal Republic of Germany. RWE is a leading international multi-utility company with core businesses in electricity, water, natural gas and waste management. RWE is the largest electric company in Germany and the third largest electricity provider in Europe. With its Thames Germany subsidiaries, RWE is the third largest water supplier in the world. RWE is also the second largest natural gas supplier in Germany. In addition, RWE has a leading position in the global coal market through Pittsburgh-based CONSOL Energy Inc., which is the second largest coal producer in the United States and the sixth largest world-wide. RWE has a total market capitalization in excess of \$21 billion, which would rank it second only to Duke Energy among domestic electric, gas and water utilities. A detailed corporate profile of RWE is set forth in Exhibit B to the Joint Application.

Apollo is a Delaware corporation formed solely for the purpose of merging into AWWC and has not conducted any unrelated activities since its organization. Apollo is a wholly-owned subsidiary of Thames.

The merger of AWWC with Apollo will result in AWWC becoming a wholly-owned subsidiary of Thames. PAWC will continue to be a subsidiary of AWWC. In short, the merger will affect only the ownership of the shares of AWWC. The corporate identities, corporate structures and assets of AWWC and PAWC will be unaffected, and PAWC will continue to exist as a Pennsylvania corporation subject to the jurisdiction and regulation of the Commission. A complete copy of the Merger Agreement was provided as Exhibit A to the Joint Application. Organizational charts depicting the present corporate structure of AWWC and RWE, the structural elements of the proposed transaction and the post-merger corporate alignment are provided in Attachment 2 to Joint Applicants' Statement 2.

Under the terms of the Merger Agreement, outstanding shares of AWWC's common stock not already owned by Thames or its affiliates will be converted into a right to receive payment of \$46.00 per share, unless the holder exercises the appraisal rights granted under Delaware law. The Merger Agreement further provides that AWWC's outstanding non-debt senior securities, consisting of Preferred Stock, Preference Stock and Preferential Stock, will be redeemed. None of PAWC's securities will be affected by the merger.

The transaction contemplated by the Merger Agreement required approval by the holders of AWWC voting stock. Accordingly, on December 5, 2001, following review by the Securities and Exchange Commission (SEC), AWWC issued a Proxy Statement describing the proposed transaction and notifying the holders of its voting

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stock of their right to vote in person or by proxy at the special meeting of stockholders scheduled for January 17, 2002. The stockholders' meeting was held as scheduled, and AWWC's shareholders approved the merger by a substantial margin. By letter dated January 25, 2002, PAWC notified the Commission of the results of AWWC's shareholder vote.

## **B. Legal Requirements Regarding Mergers**

As a preliminary matter before discussing the Exceptions, we note that any issue or Exception that we do not specifically address 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. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pennsylvania Public Utility Commission*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Also, before discussing the Exceptions, we will review the requirements of law regarding the burden of proof in this proceeding. As the proponent of a rule or order of this Commission, the Joint Applicants bear the burden of proof. 66 Pa. C.S. §332(a). The Pennsylvania Supreme Court has held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other side. If a party has satisfied its burden of proof, it must then be determined whether the opposing party has submitted evidence of "co-equal" value or weight to refute the first party's evidence. *Morrissey v. Commonwealth of Pennsylvania, Department of Highways*, 424 Pa. 87, 225 A.2d 895 (1986).



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Furthermore, any order of this Commission granting an application, in whole or in part, must be based on substantial evidence. *Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission*, 337 A.2d 922, 925 (Pa. Cmwlth. 1975). The term "substantial evidence" has been defined by the Pennsylvania Courts as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Murphy v. Department of Public Welfare, White Haven Center*, 480 A.2d 382, 386 (Pa. Cmwlth. 1994); *Erie Resistor Corporation v. Unemployment Compensation Board of Review*, 194 Pa. Super. 278, 166 A.2d 96, 97 (1961).

Regarding the requirements for obtaining a certificate of public convenience in Pennsylvania, the applicable law for the factual setting in this proceeding is found in both the statutes and case law of the Commonwealth of Pennsylvania. Sections 1102 and 1103 of the Public Utility Code (Code) provide, in pertinent part:

**§1102. Enumeration of acts requiring certificate**

(a) **General rule.** Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

(3) For any public utility or an affiliated interest of a public utility as defined in section 2101 (relating to definition of affiliated interest), except a common carrier by railroad subject to the Interstate Commerce Act, [footnote omitted] to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property

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used or useful in the public service. Such approval shall not be required if:

(i) the undepreciated book value of the property to be acquired or transferred does not exceed \$1,000;

(ii) the undepreciated book value of the property to be acquired or transferred does not exceed the lesser of:

(A) 2% of the undepreciated book value of all fixed assets of such public utility; or

(B) \$5,000 in the case of personalty or \$50,000 in the case of realty;

(iii) the property to be acquired is to be installed new as a part of or consumed in the operation of the used and useful property of such public utility; or

(iv) the property to be transferred by such public utility is obsolete, worn out or otherwise unserviceable. Subparagraphs (i) through (iv) shall not be applicable, and approval of the commission evidenced by a certificate of public convenience shall be required, if any such acquisition or transfer of property involves a transfer of patrons.

66 Pa. C.S. §1102.

**§1103. Procedure to obtain certificates of public convenience**

(a) **General rule.**—Every application for a certificate of public convenience shall be made to the commission in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The

commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

66 Pa. C.S. §1103.

Sections 1102 and 1103 were interpreted by the Pennsylvania Supreme Court in *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 295 A.2d 825 (1972), and provide the legal standard against which the question of approval of the Joint Application must be measured. In *City of York*, the Supreme Court said:

[A] certificate of public convenience approving a merger is not to be granted unless the Commission is able to find affirmatively that public benefit will result from the merger. . . . [T]hose seeking approval of a utility merger [are required to] demonstrate more than the mere absence of any adverse effect upon the public. . . . [T]he proponents of a merger [are required to] demonstrate that the merger will affirmatively promote the "service, accommodation, convenience, or safety of the public" in some substantial way.

*City Of York*, 449 Pa. at 141, 295 A.2d at 828.

### C. Exceptions, Reply Exceptions, and Resolutions

#### 1. Substantial Benefits from the Merger

The first issue raised on Exceptions which we will discuss is the issue of substantial benefits from the merger. The ALJ determined that the Joint Applicants

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presented sufficient evidence to meet the requirements delineated in *City of York, supra*. Accordingly, the ALJ recommended that the Application be approved subject only to the conditions to which the Joint Applicants have agreed. (I.D., pp. 24-27).

In their separately filed Exceptions, the OCA, the OTS, and the PennFuture Parties except to this recommendation. The OCA contends, among other things, that the ALJ failed to ensure that affirmative benefits will flow through to ratepayers and misapplied the standards in *City of York* in concluding that no further conditions beyond those accepted by the Applicants need be imposed. (OCA Exc., pp. 3-10). The OTS argues, among other things, that the ALJ erred in concluding that the quantification of benefits was not necessary and misapplied the *City of York* standards. (OTS Exc., pp. 3-13). The PennFuture Parties submit that the ALJ erred in reducing the Commission's role in ensuring substantial benefits flow to ratepayers by refusing to recommend conditions to which the Applicants have not agreed. (PennFuture Exc., pp. 5-7).

In their Replies to Exceptions, the Joint Applicants assert that the ALJ properly weighed the evidence and correctly applied the *City of York* standard, and that no quantification of benefits was necessary. (Applicants R.Exc., pp. 4-15).

In our consideration of these matters, we note the following. The OTS' own witness, Eric Van Jeschke, acknowledged, under cross-examination, that the positive attributes of the proposed merger identified by the Joint Applicants would, if realized, constitute affirmative public benefits (Tr., pp. 260-263). The OTS re-interprets *City of York* as requiring a dollar-and-cents "quantification" of such benefits before the Commission may approve a merger, acquisition, or change in control. In so doing, the

OTS ignores the fact that this very same argument was rejected in the *City of York* case itself, as well as in subsequent Commission decisions.

The OTS relies on the Commission's Opinion and Order approving the GPU/First Energy merger' as support for its "quantification" mandate. However, *GPU/FirstEnergy* can be distinguished from this proceeding in many respects. Most notably, GPU bundled its application for merger approval with a request to recover over \$300 million in purchased electric power costs by GPU's subsidiaries', Metropolitan Edison Company (MetEd) and Pennsylvania Electric Company (Penelec).<sup>2</sup> Nevertheless, neither *GPU/FirstEnergy* nor the Commonwealth Court's opinion affirming the Commission's merger approval in that case' made the "quantification" of public benefits an element of the *City of York* test.

The alleged need for a quantification of potential benefits or detriments was litigated by the protesting parties in *City of York*. In that proceeding, the Commission denied the protestants' discovery requests that were designed and intended to "quantify" the rate effects of the proposed merger. *City of York, et al. v. York Telephone and Telegraph Company*, 45 Pa. P.U.C. 106 (1970). Notwithstanding the absence of quantification, the Pennsylvania Supreme Court had no difficulty affirming this Commission's decision to approve the merger and stated that the Commission's

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<sup>2</sup> *Joint Application for Approval of The Merger of GPU, Inc. With FirstEnergy Corp.*, Docket Nos. A-110300 F0095 and A-110400F0040 (Order entered June 20, 2001) (hereafter, *GPU/FirstEnergy*).

<sup>3</sup> *Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Interim Relief*, Docket Nos. P-00001860 and P-00001861 (Order entered June 20, 2001).

<sup>4</sup> *ARIPPA v. Pennsylvania Public Utility Commission*, 792 A.2d 636 (Pa. Cmwlth. 2002) (*ARIPPA*).

consideration of the "probable general effect of the merger upon rates" was all that the Code required. 295 A.2d at 829.

The OTS' argument that the *City of York* test cannot be met without quantifying the specific effects of alleged savings was also rejected by the Commission in *Application of Newtown Artesian Water Company and Indian Rock Water Company*, 76 Pa. P.U.C. 260 (1992). The Commission accepted the Administrative Law Judge's findings in that case as fully consistent with the *City of York*. The ALJ found that the proposed merger would produce lower financing costs over a prospective 25-year time period. 76 Pa. P.U.C. at 268.

Furthermore, in every major water utility merger or acquisition since *Newtown Artesian*, this Commission has relied upon findings that the transaction would likely produce lower capital costs or reduce other expenses without demanding that either the level of such savings or their impact on rates be quantified. See, e.g., *Application of United Water of Pennsylvania, Inc.*, Docket Nos. A-210013F0014 and A-230077F0003 (Order entered January 27, 2000) (*United*). In that proceeding, we determined that the transfer of control of a majority of UWR's stock appeared to offer the possibility of greater amounts of capital being available as acquisition opportunities presented themselves in Pennsylvania.

In *GPU/FirstEnergy* (p. 38) and *ARIPPA* (792 A.2d at 656), this Commission approved a proposed merger and the Commonwealth Court affirmed that decision despite the absence of a "quantification" of "merger savings." The Commonwealth Court found that it was lawful and appropriate to determine the amount of "merger savings" and the "disposition" thereof in a post-merger proceeding held to adjudicate rate-related issues raised by the MetEd/Penelec Petition for Interim Relief.

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The quantification of merger savings was an issue in *GPU/FirstEnergy* only because of the unique facts of that case. As previously noted, the *GPU/FirstEnergy* application for merger approval was coupled with MetEd's and Penelec's "single issue" rate filing to recover, or defer for future recovery, over \$300 million per year in purchased power costs the companies estimated they would incur to meet their Provider of Last Resort obligations. Other parties contended, and the Commission ultimately agreed, that it would not be proper or equitable to allow the utilities to recover \$300 million per year in additional costs at the same time GPU and its merger partner retained all of the anticipated "merger savings." Because of the "rate caps" in place for MetEd's and Penelec's regulated electric distribution service, it was understood that neither company would be coming before the Commission in a base rate proceeding for several years, thereby eliminating the possibility that merger-related savings might be reflected in customers' base rates any time soon.<sup>4</sup>

In contrast to *GPU/FirstEnergy*, a viable mechanism already exists for promptly reflecting any savings that may materialize from the proposed merger in PAWC's rates. Unlike many of Pennsylvania's regulated electric utilities, PAWC must seek rate relief on a regular basis because of the substantial capital investment which is necessary to meet new and evolving water quality standards and to replace aging infrastructure (See Joint Applicants' Initial Brief, pp. 30-33). And, unlike *GPU/FirstEnergy*, the Joint Applicants agreed "up front" to pass back all savings that might be generated by the proposed transaction in PAWC's future rate cases, while also agreeing to forego recovery of the acquisition premium, transaction costs and the retention bonuses

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<sup>4</sup> Apparently, a base rate filing would have been unlikely in any event, because evidence was adduced that MetEd's and Penelec's transmission and distribution service was producing a fair return. See *GPU/FirstEnergy*, p. 36; *ARIPPA*, 792 A.2d at 656.

created to ensure that key employees stay on after the transaction is consummated (Joint Applicants' St. 1, p. 9; Joint Applicants' St. 2, p. 8; I.D., p. 13).<sup>4</sup> The normal process of examining and setting PAWC's base rates will capture any savings that might flow from the combination of American and Thames Holdings and will do so more promptly, accurately and thoroughly than the post-merger "quantification" approved in *ARIPPA*, *supra*.

For these reasons, we conclude that the ALJ properly applied the *City of York* standards in reaching his determination that the Applicants had met their burden of proof without a dollars-and-cents quantification of the public benefits. Neither the *City of York* nor any subsequent Commission Decision requires a dollars-and-cents quantification of public benefits. As noted above, and by the ALJ (I.D., pp. 24-26), the *City Of York* standard requires that the Joint Applicants demonstrate that the merger will affirmatively promote the convenience, safety, accommodation, or service of the public in some substantial way. To meet their burden of proof regarding the substantial merger benefits, the Joint Applicants presented credible evidence that the contemplated transaction will affirmatively promote the service, accommodation, convenience, or safety of the public.

Combining the largest investor-owned water company in the United States, PAWC's parent, with a member of the corporate family of the third largest water supplier in the world, RWE, will produce enhanced financing capabilities for the regulated utility, PAWC. By making AWWC part of a much larger and financially stronger company, the proposed transaction will substantially increase AWWC's access to capital at favorable rates. Currently, financing for the AWWC system is done on a consolidated basis

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<sup>4</sup> GPU and First Energy acknowledged that "merger savings" could be used to reduce cost of service in a future transmission/distribution rate case, but only to the extent that such savings exceeded merger-related transaction costs. See *GPU/First Energy*, p. 39.



through AWWC's financing subsidiary, American Water Capital Corporation (AWCC) (Joint Applicants' St. 4-R, p. 11). Prior to the announcement of the proposed transaction, AWCC's debt was rated A- and Baa1 by Standard and Poors and Moody's, respectively (Joint Applicants' St. 3-R, p. 5). In contrast, RWE is rated AA- by Standard and Poors and A1 by Moody's, which are both higher than AWCC's ratings (Joint Applicants' St. 3-R, pp. 5-6; Joint Applicants' St. 4-R, p. 10). Significantly, the announcement of the proposed transaction prompted the credit rating agencies to consider raising the AWWC/AWCC credit ratings to equal those of RWE (Joint Applicants' St. 4-R, p. 10). An upgrade in credit ratings translates into lower borrowing costs and, ultimately, savings for customers.

Additionally, AWWC's association with RWE will provide access to European capital markets, which is not currently available (Joint Applicants' St. 2, p. 10). The ability to place debt in non-domestic markets can provide substantial benefits because there are many times when debt can be issued at lower cost outside the United States as a consequence of domestic interest rate or market conditions. This increased flexibility in obtaining access to sources of capital is a benefit to PAWC's customers, albeit one that cannot currently be quantified.

Another anticipated benefit of the transaction is found in the area of research and development. The combination of AWWC and Thames will have a particularly beneficial effect for their respective research and development efforts because each has a somewhat different focus. AWWC is an industry leader in the identification and deactivation of pathogenic organisms such as giardia and cryptosporidium. Thames, in turn, has an equally high reputation in the areas of alternative treatment technologies, such as desalination, and facility management, rehabilitation and repair. For example, Thames is at the cutting edge of technological development in burst pipe prediction and



In response, the Joint Applicants contend that the ALJ did not misconstrue the purpose of the OCA's rejected conditions. Instead, the Applicants assert that the ALJ properly considered the evidence of record and concluded that the Joint Applicants had met their burden of proving substantial benefits of the merger without the rejected OCA conditions. For these reasons, the Joint Applicants argue that the OCA's Exceptions regarding its rejected conditions should be denied. (Applicants R. Exc., pp. 15-19).

Regarding this issue, we agree with the ALJ that, under Section 1103(a) of the Code, *supra*, we are authorized to impose any conditions and terms we deem to be "just and reasonable." We will separately address the OCA's proposed Condition Number 16, relating to the appropriate currency to be used in documents filed by PAWC with this Commission, below. However, we agree with the ALJ that the balance of the OCA's rejected conditions are neither necessary nor appropriate.

In discussing these conditions, we initially note that the Joint Applicants have agreed to eight significant conditions to the proposed merger. The Joint Applicants have agreed to forego any claim in future rate proceedings for the acquisition premium, transaction costs, and retention bonuses designed to retain key employees and officers. The Joint Applicants have also agreed to promptly report any downgrading of the bonds of RWE, Thames, AWWC or AWWC's subsidiaries. In addition, the Joint Applicants have agreed to maintain and provide access to English language versions of RWE's and Thames' annual reports, provide English language versions of documents produced in proceedings before this Commission, and maintain PAWC's books and records at a location within the United States. Importantly, the Joint Applicants have expressly agreed to safeguard the condition of PAWC's watershed land holdings. (Joint Applicants R. Exc., pp. 17, 18).

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In its Exceptions, the OCA noted that a specific number of its proposed conditions had been rejected by the ALJ. (*See* OCA Exc., pp. 11-21). According to the OCA: "The purpose of the conditions is to protect customers from the risks identified so that the transaction does not harm customers. If the conditions are not adopted by the PUC, then customers will be worse off than they are today." *Id.*, p. 11.

The ALJ has recommended a finding that the Joint Applicants have satisfied their burden of proof in showing that the merger will provide a substantial public benefit. That is a sound recommendation and in full accord with all of the evidence of record. The fears and concerns raised by the OCA as justification for its proposed conditions are not born out by that same record. Excluding the OCA's proposed Condition Number 16, the Joint Applicants have thoroughly rebutted each of the OCA's contentions regarding the specific conditions rejected by the ALJ. (Joint Applicants' R.Exc., pp. 11-18). As noted by the Joint Applicants, the OCA's concerns rest largely on speculation or result in a demand for conditions that go farther than anything previously imposed by this Commission.

We find that the OCA's proposed Condition Number 16 requires a different result. That Condition reads as follows:

Condition 16. Require that whenever PAWC is requested to provide documents to the Commission, or in any proceeding before the Commission, concerning the operations of RWE or any other subsidiaries or holdings of RWE, that all financial statements be provided in their original currency and in U.S. dollars (converted as of the date of the financial statement). For example, RWE's financial statements as of December 31, 2001, would be provided in U.S. Dollars using

the conversion rate between dollars and euros on  
December 31, 2001.

(OCA Exc., p. 23).

In its Exceptions, the OCA argues that its proposed Condition Number 16 "is a straightforward condition designed to ease the review and use of any financial statements. Further, it is essentially the companion condition to Condition 15, requiring that documents be provided in English." (OCA Exc., p. 24). The Joint Applicants did not expressly respond to the OCA's arguments on this Condition in their Reply Exceptions. However, in their Main Brief, the Joint Applicants argued that "Condition 16 . . . is . . . objectionable in that strict compliance could encompass a tremendous amount of work depending on the document(s) in question. Rather than having the Commission lay down a blanket rule, the Joint Applicants believe that this concern (i.e. currency conversion) can be best handled on a case-by-case basis." (Joint Applicants' M.B., p. 51).

We find that the OCA's proposed Condition Number 16 is just and reasonable. As noted by the Joint Applicants, conversion of financial documents from euros to dollars can encompass "a tremendous amount of work." However, this is work that should be performed by the corporation that is engaged in international business and not by Commission staff or other parties. Likewise, conversion of financial data is a cost of doing business that should be borne by the international corporation and not by the regulated company or its ratepayers. Good business practice seems to dictate that records be maintained in the currencies of all countries in which the corporation is doing business.

As a practical matter, the OCA's proposed Condition Number 16 is necessary and appropriate. If requests for conversion of financial data were addressed on

a case-by-case basis, substantial delays in Commission proceedings could result. Moreover, case-by-case requests would be a significant and unnecessary drain on the resources of the Commission and other parties.

We will clarify the OCA's proposed Condition Number 16 in two respects. First, in accomplishing the currency conversion called for by that Condition, we shall require that the Financial Accounting Standards Board foreign currency translation pronouncements be applied. Second, we shall provide that if the original document is not in U.S. currency, then PAWC must certify the accuracy of the conversion. This second modification is consistent with the certification requirement in Condition Number 15 relating to translation of documents.

For the foregoing reasons, we will grant this Exception to the extent that the OCA's proposed Condition Number 16 is adopted. The balance of the OCA's Exception Number 2 will be denied.

**3. The Environmental Protection Amendment and Water Shed Protection**

The ALJ recommended rejecting the PennFuture Parties' argument that the Commission is under an affirmative duty in this proceeding to conserve and maintain the environment by virtue of the provisions of the Environmental Rights Amendment to the Pennsylvania Constitution (Article 1, §27). Article 1, §27 states:

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§27. Natural resources and the public estate.

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee [\*342] of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The ALJ concluded that the Commission has a duty to protect the environment with respect to regulated public utilities. But the ALJ also determined that that oversight does not extend to future actions which might be taken by a third party. The ALJ also recommended rejecting the PennFuture Parties' conditions regarding 500 foot buffer strips around reservoirs and \$10 million funding for land trusts and conservatories. (I.D., pp. 34-36).

In their Exceptions, the PennFuture Parties contend, among other things, that the ALJ improperly avoided application of the Environmental Rights Amendment and provided insufficient protections for reservoirs and water supplies. (PennFuture Exc., pp. 7-11).

In their Replies to the Exceptions, the Joint Applicants argue that the ALJ properly rejected the PennFuture Parties' arguments regarding the Environmental Rights Amendment. The Joint Applicants maintain that, in the 30-year span since the adoption of that Amendment, neither this Commission nor any court has applied it in the manner that the PennFuture Parties propose. (Joint Applicants R.Exc., 19-21).

With respect to the Environmental Rights Amendment, we concur with the ALJ that the PennFuture Parties are incorrect in attributing to this Commission

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affirmative duties to maintain the environment by virtue of the provisions of the Environmental Rights Amendment. In *Borough of Moosic v. Pennsylvania Public Utility Commission*, 429 A.2d 1237(1981), the Commonwealth Court said:

We view Section 27 to be self-executing only as it applies to the commission's regulation of a utility's own conduct which is within the ambit of the regulatory jurisdiction of the commission as created by statute and directly affects the environment.

429 A.2d at 1240 (emphasis in original). Thus, while this Commission has a duty to protect the environment under the Environmental Rights Amendment, our jurisdiction does not extend to future actions which a third party might take, even when those actions may be harmful to the environment. Other entities, including the Pennsylvania Department of Environmental Protection and county and local governments have jurisdiction to prevent or punish those harms.

Regarding the 500 foot buffer strips around PAWC reservoirs and the \$10 million funding for land trusts, we also concur with the ALJ that this Commission cannot, by the imposition of conditions, require actions beyond its jurisdiction in regulating public utility companies. *Cf. West Penn Railways v. Pennsylvania Public Utility Commission*, 135 Pa. Super. 89, 4 A.2d 545 (1939). For these reasons, we will deny the PennFuture Parties' Exceptions regarding the Environmental Rights Amendments, the 500 foot buffer strips, and the \$10 million funding for land trusts and conservancies.



**Conclusion**

We have reviewed the record as developed in this proceeding including the ALJ's Initial Decision and the Exceptions and Replies filed thereto. Based on our review, we shall grant in part and deny in part the Exceptions of the OCA. The Exceptions of the OTS and the PennFuture Parties will be denied; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions filed on July 11, 2002, by the Office of Consumer Advocate are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Exceptions filed on July 11, 2002 by the Office of Trial Staff and the Citizens for Pennsylvania's Future, d/b/a Penn Future, Defend Our Watershed!; Daniel S. Townsend, and Joseph Laver, to the Initial Decision of Administrative Law Judge Wayne L. Weismandel issued on June 21, 2002, are denied.

3. That the Initial Decision of Administrative Law Judge Wayne L. Weismandel is adopted, to the extent that it is consistent with this Opinion and Order.

4. That the written direct testimony of Eugene M. Brady filed by the Commission on Economic Opportunity on May 13, 2002, in the above-captioned case be stricken.

5. That the Protests filed by the Utility Workers Union of America, AFL-CIO and the Utility Workers Union of America Local Union No. 537 on January 11,

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2002, by the Office of Consumer Advocate on January 14, 2002, and by Citizens for Pennsylvania's Future, d/b/a Penn Future, Defend Our Watershed!, Daniel S. Townsend, and Joseph Laver on March 1, 2002, in the above-captioned case are sustained in part and denied in part in accordance with the discussion contained in the Initial Decision.

6. That the Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH For All Approvals Required Under The Public Utility Code In Connection With A Change In Control Of Pennsylvania-American Water Company filed December 14, 2001, Docket Nos. A-212285F0096 and A-230073F0004, is granted, subject to the duly authorized officers of American Water Works Company, Inc., RWE Aktiengesellschaft, Apollo Acquisition Company, Pennsylvania-American Water Company, and Thames Water Aqua Holdings GmbH, having filed with the Pennsylvania Public Utility Commission within thirty (30) days of the entry date of the Commission's Order their fully-executed written acceptance of each of the following conditions:

a) Pennsylvania-American Water Company shall not include in its rates, in any fashion, any portion of the costs associated with the retention bonus program established pursuant to the Agreement and Plan of Merger dated September 16, 2001, between American Water Works Company, Inc., RWE Aktiengesellschaft, Thames Water Aqua Holdings GmbH, and Apollo Acquisition Company.

b) Pennsylvania-American Water Company shall not include in its rates, in any fashion, any portion of the acquisition premium or goodwill associated with the transaction occurring as a result of the Agreement and Plan of Merger dated September 16, 2001, between American Water Works Company, Inc., RWE

Aktiengesellschaft, Thames Water Aqua Holdings GmbH, and Apollo Acquisition Company.

c) Pennsylvania-American Water Company shall not include in its rates, in any fashion, any portion of the costs associated with analyzing, negotiating, consummating, or seeking approval of the transaction occurring as a result of the Agreement and Plan of Merger dated September 16, 2001, between American Water Works Company, Inc., RWE Aktiengesellschaft, Thames Water Aqua Holdings GmbH, and Apollo Acquisition Company.

d) Pennsylvania-American Water Company shall report to the Pennsylvania Public Utility Commission within thirty business days any downgrading of the bonds of RWE Aktiengesellschaft, Thames Water Aqua Holdings GmbH, American Water Works Company, Inc., or any subsidiary of American Water Works Company, Inc., including a full copy of the report issued by the bond rating agency.

e) Pennsylvania-American Water Company's Annual Report to the Pennsylvania Public Utility Commission shall include a complete, English-language copy of the annual reports of RWE Aktiengesellschaft and of Thames Water Aqua Holdings GmbH. This requirement can be satisfied by Pennsylvania-American Water Company's including in its Annual Report to the Pennsylvania Public Utility Commission an electronic reference or Internet link to an English-language copy of the annual reports of RWE Aktiengesellschaft and of Thames Water Aqua Holdings GmbH.

f) Whenever Pennsylvania-American Water Company is requested to provide documents to the Pennsylvania Public Utility Commission, or in any proceeding before the Pennsylvania Public Utility Commission, concerning the operations

of RWE Aktiengesellschaft or any other subsidiaries or holdings of RWE Aktiengesellschaft, those documents shall be provided in English. If the original document is not in English, then Pennsylvania-American Water Company must certify the accuracy of the English-language translation.

g) Whenever Pennsylvania-American Water Company is requested to provide documents to the Commission, or in any proceeding before the Commission, concerning the operations of RWE or any other subsidiaries or holdings of RWE, all financial statements shall be provided in their original currency and in U.S. dollars (converted in accordance with Financial Accounting Standards Board foreign currency translation pronouncements). If the original document is not in U.S. currency, then Pennsylvania-American Water Company must certify the accuracy of the conversion.

h) Pennsylvania-American Water Company shall keep its books and records at a location within the United States.

i) Pennsylvania-American Water Company shall continue to protect and safeguard the condition of all of its watershed land-holdings surrounding its reservoirs and well fields in Pennsylvania.

j) Pennsylvania-American Water Company shall maintain its existing watershed protection program arising out of the Commission-approved settlement in *Joint Application of Pennsylvania-American Water Company ("PAWC") and Pennsylvania Gas and Water Company ("PG&W") for approval of (1) the transfer, by sale, of substantially all of the water works property and rights of PG&W to PAWC including the subdivision of transferred real estate; (2) the commencement by PAWC of*

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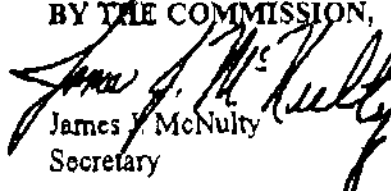
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*water service in the certificated territory of PG&W; and (3) the abandonment by PG&W of water service to the public, Docket Number A-212285F2002, Order adopted and entered December 14, 1995, as clarified by, Clarifying Order adopted and entered January 11, 1996.*

7. That upon compliance with Ordering Paragraph No. 6, above, a certificate of public convenience be issued evidencing the Pennsylvania Public Utility Commission's approval of the transaction occurring as a result of the Agreement and Plan of Merger dated September 16, 2001, between American Water Works Company, Inc., RWE Aktiengesellschaft, Thames Water Aqua Holdings GmbH, and Apollo Acquisition Company, and the record at Docket Nos. A-212285F0096 and A-230073F0004 be then marked closed.

8. That upon non-compliance with Ordering Paragraph No. 6, above, the Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH for all approvals required under the Public Utility Code in connection with a change in control of Pennsylvania-American Water Company filed December 14, 2001, is dismissed, and the record at Docket Nos. A-212285F0096 and A-230073F0004 shall then be marked closed.

BY THE COMMISSION,



James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: August 29, 2002

ORDER ENTERED:

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