

**[J-55-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

IRWIN A. POPOWSKY, CONSUMER ADVOCATE,	:	No. 19 MAP 2005
	:	
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered July 13,
v.	:	2004 at 1995 CD 2003, affirming the
	:	Order of the Public Utility Commission
	:	entered on August 8, 2003 at C-
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	00015377, C-20028177, C-20028361.
	:	
	:	
Appellee	:	
	:	853 A.2d 1097 (Pa. Cmwlth. 2004) (en
PENNSYLVANIA - AMERICAN WATER COMPANY,	:	banc)
	:	
	:	
Intervenor	:	
	:	ARGUED: May 16, 2005

DISSENTING OPINION

MADAME JUSTICE NEWMAN

DECIDED: November 21, 2006

The Majority concludes that the demonstration of public need for water, alone, is insufficient to require a water company to extend its water lines and service to the residents of Mount Pleasant Township (Township) without contributions from those residents in aid of construction. Based on this precept, the Majority affirms the Order of the Commonwealth Court to require contribution in aid of construction by the residents of the Township before the Pennsylvania American Water Company (PAWC) will begin

the water line extensions.¹ Because I believe that the determination of the Public Utility Commission (Commission) is fundamentally flawed and would vacate and remand this matter for further findings, I must respectfully dissent.

The gravamen of this appeal is Consumer Advocate's challenge to the application of the Commission's line extension regulations. As noted by the Majority, these regulations were adopted in compliance with the substantive and procedural requirements of the Commonwealth Documents Law,² the Commonwealth Attorneys Act,³ and the Regulatory Review Act.⁴ However, I agree with Consumer Advocate that the regulations conflict with the duty that every utility has pursuant to Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, to provide service to the public where a need for the service has been demonstrated.

It is beyond cavil that utility service is crucial to the well being of the public, which, because of the monopolistic nature of public utilities, generally has no other source for the service. Section 1501 provides that:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, **extensions**, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and

¹ The plight of these residents has been assumed by Irwin A. Popowsky (Consumer Advocate), Appellant in the matter before this Court.

² Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §§ 1102-1602.

³ Section 204(b) of the Act of October 15, 1980, P.L. 950, 71 P.S. § 732-204(b).

⁴ Act of June 25, 1982, P.L. 633, reenacted and amended by, Act of June 30, 1989, P.L. 73, 71 P.S. §§ 745.1 to 745.15.

the public.

66 Pa.C.S. 1501.

The PAWC certificate of public convenience includes many municipalities and territories in thirty-five counties in this Commonwealth, including Mount Pleasant Township. The Township has no alternative supplier to which it may legally turn for public water service. Further, it is undisputed that the water supply in the Township is inadequate and that the water quality is poor. While PAWC has not refused to service the Township at all, it has refused to service the Township unless the residents, wishing to connect to service line extensions to receive the benefits of public water service, pay a non-refundable, non-reimbursable contribution in aid of construction of \$2,255.00 per household. I believe this determination flies in the face of the statutory requirement that public utilities, as governmentally authorized monopolies, bear the cost of capitalizing the investment necessary to extend service to *bona fide* service applicants. When interpreting Section 1501, the appellate courts of this Commonwealth have generally concluded that the costs associated with maintaining and expanding the physical facilities necessary to provide utility service are the initial responsibility of the public utility.⁵ In circumstances in which there is no public need for improvements or extensions in service, *e.g.*, when the proposed project involves special services or benefits only a particular customer or developer, the Commission and courts have

⁵ See Kossman v. Pa. Pub. Util. Comm'n, 694 A.2d 1147 (Pa. Cmwlth. 1997); Honey Brook Water Co. v. Pa. Pub. Util. Comm'n, 647 A.2d 653 (Pa. Cmwlth. 1994) (*en banc*), petition for allowance of appeal denied, 655 A.2d 518 (Pa. 1995); East Goshen Twp. v. Pa. Pub. Util. Comm'n, 486 A.2d 550 (Pa. Cmwlth. 1985); Fairview Water Co. v. Pa. Pub. Util. Comm'n, 422 A.2d 1209 (Pa. Cmwlth. 1980); McCormick v. Pa. Pub. Util. Comm'n, 409 A.2d 962 (Pa. Cmwlth. 1980); Ridley Twp. v. Pa. Pub. Util. Comm'n, 94 A.2d 168 (Pa. Super. 1953); Borough of Warren v. Pa. Pub. Serv. Comm'n, 1922 WL 2961 (Pa. Super. 1922).

approved the assessment of customer contributions.⁶

The Commission relies on its regulations found at 52 Pa. Code §§ 65.1 and 65.21-65.23, which establish a duty in a public utility to provide line extensions to *bona fide* service applicants without customer contribution where the annual expected revenues equal or exceed the annual expenses and capital costs associated with the new line. 52 Pa. Code § 65.21 (1). According to the regulations, if the annual revenue does not equal or exceed the line's annual costs, then the utility may require a contribution from customers that is proportional to the annual costs not covered by the annual revenue. 52 Pa. Code § 65.12 (2). The regulations were adopted pursuant to Section 1501 of the Public Utility Code, which expressly authorizes a utility, with the approval of the Commission, to adopt "reasonable rules and regulations governing the conditions under which it shall be required to render service." 66 Pa.C.S. § 1501. The Commission determined that it is reasonable to require customer contributions to an extension if the contributions are required to prevent the utility from a negative return on investment, *i.e.*, the utility must realize at least a "break even" return on mandated extensions. The Commission believes that new customers should be required to contribute to the cost of a utility's extension when it is necessary to protect that utility's existing customers from excessive rates or to preserve the financial viability of the utility.

⁶ See Kossman v. Pa. Pub. Util. Comm'n, 694 A.2d 1147 (Pa. Cmwlth. 1997) (development); Lynch v. Pa. Pub. Util. Comm'n, 594 A.2d 816 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, 605 A.2d 335 (Pa. 1992) (single customer); Huntingdon, Inc. v. Pa. Pub. Util. Comm'n, 464 A.2d 601 (Pa. Cmwlth. 1983) (residential development); Colonial Prods. Co. v. Pa. Pub. Util. Comm'n, 146 A.2d 657 (Pa. Super. 1958) (single customer); Borough of Phoenixville v. Pa. Pub. Util. Comm'n, 280 A.2d 471 (Pa. Cmwlth. 1971) (shopping center); see also City of Altoona v. Pa. Pub. Util. Comm'n, 77 A.2d 740 (Pa. Super. 1951) (eight property owners).

I believe that this "break-even analysis," which is the touchstone of the line extension regulations, is neither required nor consonant with the Public Utility Code. Section 1501 clearly requires a utility to provide safe and adequate service to an area lacking public water without customer contribution where a public need exists and the financial viability of the utility is not threatened. The statute does not include a caveat that "repairs, changes, alterations, substitutions, extensions, and improvements" are made only where the financial health or profitability of the utility can be maintained. The Commission rejected this public need argument in its adjudication, noting it has consistently held that public need does not invalidate the regulation's requirement for customer contribution where the cost of supplying service is more than the immediate return from that service.⁷

To advance his "public need" argument, Consumer Advocate relies principally upon the holding in Ridley Township v. Pennsylvania Public Utility Commission, 94 A.2d 168 (Pa. Super. 1953). Ridley requires public utilities to provide service without customer contribution unless the utility can demonstrate material economic harm or undue burden upon existing customers. Id. at 171. In Ridley, twelve homeowners sought an extension of a public water utility's facilities to a residential section of a township, a part of which was already served by the utility. In addition, the township

⁷ The Commission cites its previous determinations in Popowsky v. Pennsylvania American Water Company, Docket No. R-00943155C001, 1997 Pa. P.U.C. Lexis 143, 1997 WL 1050746 (Order entered June 9, 1997) (specifically rejecting the public need exception to the regulations); and Collier Township v. Pennsylvania American Water Company, Docket No. C-00934978 (Order entered March 18, 1996) (evidence of contaminated and insufficient wells did not overcome the economic standards set forth in the line extension regulations). I note that neither of these matters was reviewed by an appellate court.

requested the installation of fire hydrants. Despite evidence showing that the extension would entail the expenditure of less than one-fourth of one percent of the company's current and accrued assets, the Commission concluded that it was "not economically feasible" for the utility to extend its mains and did not require the extension. Id. at 170.

The homeowners appealed, and the Superior Court reversed. It found that pursuant to the Public Utility Code, a utility may not serve only the presently profitable territory covered by its franchise. The Superior Court reasoned as follows:

A public utility cannot collect the cream in its territory and reject the skimmed milk. . . . If a portion of the territory served is not profitable, but the entire service produces a fair return on the investment, the utility may still be required to serve the unprofitable portion, if the rendering of such service does not result in an unreasonable burden on its other service. . . .

Ordinarily, it is not the business of the citizen or consumer to construct any part of a utility's system. There are, doubtless, instances where, under special circumstances, warranted by the evidence, the Commission may, in the exercise of its administrative discretion, withhold exercise of its power unless patrons offer to participate in the cost of construction. But no inflexible rule can be laid down; participation in construction costs cannot be exacted indiscriminately; and it cannot be required upon a mere showing that an extension will not immediately produce an adequate profit.

Id. at 171 (internal citations and quotation marks omitted). Thus, the Superior Court held that affected members of the public "are entitled to fire protection and domestic water service without subsidizing a large and prosperous utility." Id. at 172. Of even greater significance, the Ridley court rejected the position of the Commission that individual line extensions must be profitable for the utility, or customer contributions are required. The court observed that the "purpose of an inquiry upon a complaint for refusing an extension of facilities is . . . to determine the effect of an extension upon the **total** return from the overall operation of the entire system." Id. at 170 (emphasis

added). As did the Superior Court in Ridley, I find that the Commission erred in failing to analyze whether, by extending the service line to the Township residents, the total revenues and expenses would produce an impermissible rate of return or financial harm to the utility. There is a palpable distinction between securing a fair return and maintaining the current level of profitability, a distinction that was not explored in the hearings before the Commission. Because I believe that the regulations promulgated by the Commission, and their strict application, are at odds with Section 1501, I would vacate the Order of the Commonwealth Court and remand for additional findings. The statutory rule provides that “[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, **extensions**, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.” 66 Pa.C.S. § 1501 (emphasis added). While the statute provides the Commission with the authority to promulgate regulations to ensure that the statutory mandate is met, and while the statute permits utilities to formulate rules as to how it will conform to the statutory mandate, I believe that the General Assembly has decreed that the “accommodation, convenience, and safety of its patrons, employees, and the public” is the paramount concern.

On the established record, there can be little doubt that those portions of Mt. Pleasant Township requesting service are in need of a public water system. Moreover, whether one uses the figures of Consumer Advocate that 568 residents would use the service or the figure of PAWC that 744 residential customers would be served, this is clearly not a de minimus number and militates even more for a determination that public need is the overriding factor here. The degree of public need in this case is not one of mere accommodation or convenience but one affecting public health and safety, and I

believe that the Commission erred in concluding that, absent customer contributions, the Utility need not extend water service to the affected area. The Commission should have evaluated the need for customer contributions on the basis of a fair overall return to the utility, not on the basis of whether the individual line extension would be profitable. Accordingly, because: (1) a utility is obligated by statute to supply service within its certificated area; (2) there is a demonstrated substantial need for water service in the Township; (3) there is no finding that extending service into the Township would have a detrimental effect on the total return on investment of PAWC, I believe that the Order of the Commonwealth Court should be vacated and the matter remanded for additional findings.