



and permits prior to constructing the wastewater system. The Commission concluded that this, in turn, created a legal impediment which prevented LWWC from providing wastewater services to certain lot owners. The Commission also determined that LWWC was not obligated to provide wastewater services to a 541-acre tract recently acquired by Eagle Rock because the tract was not in LWWC's certified territory.

Sale of Eagle Rock's Wastewater Plant  
To LWWC under Asset Purchase Agreement

Eagle Rock Company is owned by Double Diamond, a Texas development company, which developed the Eagle Rock Community in the Poconos. In 1996, Eagle Rock acquired the local wastewater treatment plant and operated it for Eagle Rock property owners until January 2003.

In 2003, Eagle Rock entered into an Asset Purchase Agreement with LWWC to sell the wastewater system. In 2003, LWWC took over and began to operate the wastewater system on a contract basis until it purchased the system in June 2004.

The Asset Purchase Agreement provided that LWWC would provide wastewater service to the Eagle Rock Community and future homes built by Eagle Rock on an adjacent 815-acre parcel and that it would "negotiate in good faith to arrange for utility service to additional parcels that Eagle Rock Resort Co. may acquire adjacent to Eagle Rock." Asset Purchase Agreement Addendum, Reproduced Record (R.R.) at 744a.

In late 2006, Eagle Rock acquired a 541-acre parcel adjacent to its 815 acre parcel, and called it “Mountain View.” Eagle Rock sought to have LWWC service Mountain View. LWWC refused to provide service to the Mountain View parcel because it did not believe it was required to do so under the Asset Purchase Agreement. LWWC also advised Eagle Rock that it was unable to provide service to several properties on the first two parcels because of the absence of DEP permits.

Eagle Rock’s Failure to Obtain DEP Permits  
And its Wastewater Piping Problems

Sometime during construction, Eagle Rock, unbeknownst to LWWC, put sewer pipe into the ground without connecting it to the wastewater system. Over time sewage backed up in the main until it was completely filled. In some areas, the pipe was not connected to the conduit and raw sewage went directly into the ground in violation of the Clean Streams Law.<sup>2</sup>

Subsequently, after a meeting between DEP and Eagle Rock, DEP informed LWWC and others of a moratorium on further development at Eagle Rock. Citing violations of the Pennsylvania Sewage Facilities Act<sup>3</sup> and the lack of Water Quality Management (Part II) Permits, DEP in a letter dated October 9, 2008, explained as follows:

Section 7(a)(1) of the Pennsylvania Sewage Facilities Act, 35 P.S. §750.7(a)(1), states that ‘[n]o permit may be issued by the local agency in those cases where a permit from the department is required pursuant to ... the Clean Streams Law.’ As discussed in our recent meeting, there

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<sup>2</sup> Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.1-691.1001.

<sup>3</sup> Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §§750.1-750.20a.

are several areas within the Eagle Rock development where sewer extensions had been constructed without necessary permits from the Department [DEP]. It has been represented to the Department [DEP] that these areas are shown in yellow and blue on the enclosed map which was previously submitted by Entech, Inc. During our meeting, representatives of Double Diamond [Eagle Rock] asserted that Water Quality Management (Part II) Permits are not required for those areas depicted in yellow and blue on the enclosed map because they qualify for an exception to the permitting requirement set for the in Section 207(b) of the Clean Streams Law. The Section 207(b) exception is not applicable because the sewer extensions at issue are not consistent with the approved Official Sewage Facilities Plan because, among other reasons, the number of lots varies significantly. The identification of the number of lots and associated equivalent dwelling units is a material content requirement of all plan revisions for new land development. See 25 Pa.Code §71.52(a)(1)(ii). The Department [DEP] cannot condone the issuance of building permits by a local agency for the construction of a structure that is intended to connect to sewage facilities where a written permit from the Department [DEP] is required (shown in yellow and blue on the map).

Letter from DEP to Eagle Rock, October 9, 2008, at 1-2; R.R. at 822a-823a.

The building permit moratorium prevented any new wastewater connections at the Eagle Rock development. The DEP imposed the building permit moratorium because Eagle Rock failed to follow the appropriate wastewater regulations and constructed sewer extensions without the necessary permits from the DEP in violation of the Pennsylvania Sewage Facilities Act. The DEP prohibited the Township from issuing building permits to Eagle Rock until Eagle Rock improved the infrastructure for the wastewater system and obtained the necessary permits from the DEP. See October 9, 2008, Letter from DEP to Eagle

Rock, at 1; R.R. at 1307a. The record confirms that Eagle Rock prematurely constructed sewer extensions without necessary permits from the DEP, in violation of the Clean Streams Law.

#### LWWC – Tariff Filing and Eagle Rock’s Complaint

On December 29, 2008, LWWC filed tariffs with the Commission for wastewater for several of its divisions. For its Northeast-PA division, it proposed a rate increase of \$633,942.00 (39.50% of annual revenue).

On February 12, 2009, Eagle Rock formally complained about the proposed rate increase for the Eagle Rock community of the Northeast-PA division. Eagle Rock alleged that (1) the proposed rate increase violated a 2004 Asset Purchase Agreement between Eagle Rock and LWWC; (2) LWWC failed to provide service to eight property owners in violation of Section 1501 of the PUC Code; and (3) LWWC failed to provide design details which prevented property owners from obtaining building permits.

The case was assigned to an ALJ. After evidentiary hearings, the ALJ concluded that Eagle Rock did not establish a *prima facie* case that a violation of Section 1501 of the PUC Code had occurred. The ALJ recommended that Eagle Rock’s complaint be dismissed.

On September 24, 2009, the Commission adopted the ALJ’s adjudication.

On appeal<sup>4</sup>, Eagle Rock raises four issues: (1) whether the Commission failed to issue an adjudication which adequately explained the basis for its Opinion and Order; (2) whether a public utility is required to fulfill its statutory duty to provide wastewater service within its certificated territory notwithstanding its claim that the failure to do so was caused by the action or inaction of a third party that is not subject to the Commission's jurisdiction and was unable to provide the sought-after utility service; (3) whether a public utility is obligated to charge the wastewater rate it contractually agreed to provide to its customers, which was relied on as an inducement when the wastewater system was originally sold to the public utility; and (4) whether a public utility is obligated to apply for Commission approval to expand its service territory to an area adjacent to its already certificated territories where it had agreed in writing to do so, all conditions precedent were met, and its commitment was confirmed through its prior and contemporaneous course of conduct?

## I.

### **Adequacy of the Commission's Decision**

First, Eagle Rock contends that the Commission's opinion and order were deficient because it failed to acknowledge, discuss, or consider various significant and relevant pieces of documentary and testimonial evidence. Eagle

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<sup>4</sup> Appellate review of an order of the Commission is limited to (1) determining whether a constitutional violation or error in procedure has occurred; (2) the decision is in accordance with the law; and (3) the necessary findings are supported by substantial evidence. PECO Energy Company v. Pennsylvania Public Utility Commission, 568 Pa. 39, 791 A.2d 1155 (2002).

When reviewing an order of the Commission, this Court must not substitute its own judgment for that of the Commission when substantial evidence supports the Commission's decision on a matter within the Commission's expertise. Popowsky v. Pennsylvania Public Utility Commission, 550 Pa. 449, 706 A.2d 1197 (1997).

Rock contends that the Commission's factual findings were not supported by substantial evidence and its legal conclusions were erroneous when compared to the evidence. Eagle Rock further contends that there was no separate section for the findings of fact, meaningful references to the record or an inadequate analysis of the issues which prevented this Court from conducting meaningful appellate review.

A Commission's decision is sufficient for purposes of review by this Court if it refers to the facts in the record which support its conclusion and sets forth the reasons for its decision. 66 Pa.C.S. §703(e); Consolidated Rail Corp. v. Pennsylvania Public Utility Commission, 625 A.2d 741 (Pa. Cmwlth. 1993). The Commission need not make formal findings and a failure to do so will not necessarily preclude review. City of Pittsburgh v. Pennsylvania Public Utility Commission, 526 A.2d 1243 (Pa. Cmwlth. 1987), appeal denied, 517 Pa. 628, 538 A.2d 880 (1988).

This Court has reviewed the extensive record, and concludes that the Commission properly evaluated the testimony and exhibits and addressed each issue raised by Eagle Rock. The Commission's decision did not contain numbered findings of fact. However, the Commission dissected each issue, thoroughly summarized each party's position, and explained and supported the bases for its order. The decision contained an adequate explanation of the necessary facts, references to exhibits, testimony and the ALJ's decision, and provided a thorough and clear-cut explanation of its review.

It is clear that the Commission accepted the position and proofs of LWWC and rejected that of Eagle Rock. Allegheny Center Associates v.

Pennsylvania Public Utility Commission, 570 A.2d 149 (Pa. Cmwlth. 1990). This Court had no difficulty whatsoever deciphering the bases for the Commission’s decision on appeal.

This issue is without merit.

## II.

### **LWWC’s Obligation to Provide Service to Eight Lots Where Eagle Rock Failed to Comply with DEP Regulations**

The Commission concluded that LWWC’s inability to serve certain lot owners was the fault of Eagle Rock and not a violation of Section 1501 of the PUC Code. Because Eagle Rock failed to obtain the proper regulatory permits, it created a legal impediment that prevented LWWC from providing wastewater services to lot owners in the Eagle Rock development. The Commission concluded that LWWC could not commit to provide wastewater service to the lots at issue until the infrastructure for the wastewater system was completed by Eagle Rock and permits were obtained from the DEP.

Eagle Rock contends that the Commission erred when it condoned LWWC’s refusal to provide service to the eight “innocent” potential customers at Mountain View. It maintains that LWWC was obligated under Section 1501 of the PUC Code to provide these customers service regardless of any misstep by Eagle Rock. Section 1501 of the PUC Code provides:

#### **§1501. Character of service and facilities.**

**Every public utility (1) shall furnish and maintain adequate, efficient, safe and reasonable services and**



facilities, and (2) 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. Such service shall also be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the Commission. (Emphasis added).

Eagle Rock argues that it was LWWC's responsibility under the PUC Code to at least cooperate with Eagle Rock to obtain Sewage Act Facility planning approvals or seek the DEP approvals in its own name, in spite of the fault attributed to Eagle Rock for failing to obtain permits. Eagle Rock claims LWWC's failure to do so was a clear violation of its statutory duty "to provide service" under Section 1501.

In rejecting Eagle Rock's argument, the Commission relied, in part, on Section 65.15 of Title 52 of the Pennsylvania Code (Pa. Code) which excuses a utility's refusal to provide water service in certain circumstances. Chapter 65 of Title 52 of the Pa. Code is entitled "Water Service." Section 65.15, 52 Pa. Code §65.15, provides:

**Refusal to serve applicants.**

(a) Non-Compliance with rules and regulations. **A public utility may decline to serve an applicant until the applicant has complied with Commonwealth and municipal regulations governing water service and the approved rules and regulations of the utility.**  
(Emphasis added)

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(c) Inadequate facilities of applicant. **A public utility may refuse to serve an applicant, if, in its judgment,**

**installation of the piping to the applicant is reasonably regarded as hazardous or of a character that satisfactory service cannot be given.** (Emphasis added).

Eagle Rock argues that Section 65.15 is inapplicable to this case because Chapter 65 of the Pennsylvania Code is entitled “Water Service,” not “Wastewater Service.” It claims that there are sections of the Pa.Code which expressly, by their terms, apply to Wastewater Service. Unlike these other sections, Section 65.15 does not.

The Commission’s expert interpretation of an aspect of utility law is entitled to great deference and will not be reversed unless clearly erroneous. Judicial deference to the views of the agency when implementing a statutory scheme is necessary, especially when the statutory scheme is complex. Popowsky. The Commission’s administrative expertise includes the interpretation of its regulations and governing statutes. Aronson v. Pennsylvania Public Utility Commission, 740 A.2d 1208 (Pa. Cmwlth. 1999).

Here, the Commission adopted LWWC’s interpretation of Section 65.15 which this Court agrees was reasonable. There is no separate chapter in the Pa. Code which governs “wastewater” service as opposed to “water” service. Although various sections of the Code refer to wastewater specifically, as opposed to water service, this Court finds no error in the proposition that Section 65.15 applies to both wastewater services and potable water service. Eagle Rock has not offered any rationale why a utility would be excused from providing potable water service if the applicant has not complied with DEP or municipal regulations, and not be excused from providing wastewater service under the same circumstances.

Even absent the specific language of Section 65.15 of the Pa. Code, this Court would find that the Commission did not err when it refused to require LWWC to provide service which would violate the DEP moratorium and regulations. In the face of the moratorium, LWWC could not lawfully commit to providing service until Eagle Rock completed the wastewater system infrastructure and permits were obtained. LWWC's inability to provide service in these circumstances was not a violation of Section 1501 of the PUC Code. Rather, it was unachievable in the absence of a completed infrastructure, which was the responsibility of Eagle Rock. LWWC argues that the onus and financial burden of Eagle Rock to remedy the problem at LWWC's expense and at the expense of the ratepayers is unjustified.

Upon review of the record, this Court must agree that Eagle Rock failed to show that LWWC violated its statutory duty to provide reasonable and adequate service to its customers pursuant to Section 1501 of the PUC Code. To require LWWC to provide service despite the DEP moratorium would place LWWC in the untenable position that would require it to violate a DEP order or municipal regulation to avoid a violation of Section 1501.

Accordingly, this issue is without merit.

### **III.**

#### **LWWC's Contractual and Statutory Obligation to Provide Service to Mountain View**

In its third issue, Eagle Rock asserts that LWWC was statutorily and contractually obligated to provide service to the recently acquired 541-acre parcel known as Mountain View.

However, accepting LWWC's evidence as credible, the Commission concluded that Mountain View was not located in LWWC's certificated territory; therefore, it was not legally required to provide service in that area. Not only would it be unlawful for LWWC to provide service outside its certificated territory, the DEP's moratorium also was in force in this location.

The record further supports the conclusion that there was no "binding contract" that required LWWC to provide service to lots in Mountain View.

Eagle Rock, however, relies on a service availability letter, also referred to as a "will serve letter," sent by LWWC concerning service to Mountain View. Eagle Rock insists that the "will serve letter" was the equivalent of a binding contract. The Commission disagreed and concluded that the "will serve letter" was not a binding contract. The "will serve letter" included conditions, one of which was that Eagle Rock and LWWC would establish a contractual arrangement for the design and construction of necessary wastewater infrastructure, which did not occur.

This Court agrees with the Commission that LWWC's "will serve letter" was not a binding contract because the conditions for service were not agreed upon. Rather, the "will serve letter" was akin to an offer. According to Anthony Donatoni, President of LWWC's parent company, Aqua Pennsylvania, Inc., a service availability letter is not a contract. Donatoni explained that LWWC

customarily sent service availability letters to developers every day. In this instance, Donatoni confirmed that there were conditions of service which were not yet agreed upon, including each party's responsibilities and duties.

Because the record supports the Commission's conclusion that there was no signed contract in place for LWWC to service Mountain View, this Court agrees with the Commission that the issue lacks merit.

#### IV.

#### **LWWC's Failure to Abide by the Asset Purchase Agreement**

In its fourth issue, Eagle Rock contends that LWWC failed to abide by its commitment in the 2004 Asset Purchase Agreement to promulgate a graduated rate structure.

The Asset Purchase Agreement contained a provision that LWWC would "propose" to the Commission an automatic rate increase concept that rates to the Eagle Rock customers would increase by 4% per year over an 8-year period. LWWC complied with the Asset Purchase Agreement and filed an Application for Approval (of its acquisition of the Eagle Rock wastewater system) which included the automatic rate increase.

The Office of Consumer Advocate (OCA) objected and a Corrective Amendment was filed which *excluded* the automatic rate increase concept. The Commission approved the acquisition of Eagle Rock, without the automatic rate increase. The Commission concluded that LWWC fulfilled its obligations under the Asset Purchase Agreement and "proposed" the rate increase.

The Commission also rejected Eagle Rock's position based upon waiver. Eagle Rock was duly notified of the Corrective Amendment and LWWC's withdrawal of the automatic rate increase. Critically, however, Eagle Rock *never* objected to or petitioned the Commission for reconsideration of the 2004 Application Order which approved the acquisition *without the automatic rate increase*.

Section 703(e) of the PUC Code requires that a party that wishes to object to an order must apply for reconsideration or rehearing "within 15 days" which Eagle Rock did not do. Eagle Rock was a joint applicant to the 2004 Application proceeding. Because it was a party to the Application Order, Eagle Rock received all documents in the case, including a Corrective Amendment which excluded the automatic rate increase. The Commission concluded that if Eagle Rock wanted to challenge the amendment it had to do so in 2004, not five years later in this proceeding. Once again, this Court discerns no error.

The Order of the Commission is affirmed.

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BERNARD L. McGINLEY, Judge

