

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**  
**Harrisburg, Pa. 17105-3265**

**Susan K. Pickford, et al.**

**v.**

**Pennsylvania-American Water Company**

**Public Meeting of May 14, 2009**

**1206921-OSA**

**Docket No. C-20078029 et al.**

**Statement of Chairman Cawley**

Beginning August 2, 2007, 23 Formal Complaints were filed by customers of Pennsylvania American Water Company (PAWC) (Joint Complainants) against PAWC's plan to convert its treatment plan from chlorination to chlorimation. On September 7, 2007, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement. On October 5, 2007, Administrative Law Judge (ALJ) Marlane R. Chestnut issued an Initial Decision wherein she recommended that the Commission grant a Preliminary Objection filed by PAWC which alleged that the complaint should be dismissed for lack of Commission jurisdiction over the subject matter. The ALJ noted that the Department of Environmental Protection (DEP) had granted PAWC's application to use chlorimation in its two water treatment plants serving its customers in Cumberland and York Counties.

The ALJ reasoned that the Commission lacks jurisdiction over the subject matter in this case. The ALJ commented that although there is a long line of appellate cases recognizing the broad definition of service contained in 66 Pa.C.S. §1501, the Commission's jurisdiction is not limitless. The ALJ found that, while to some extent the Commission's jurisdiction over the service provided by water utilities overlaps that of DEP, issues involving the quality and purity of water are exclusively within the jurisdiction of DEP and EPA under the Pennsylvania Safe Drinking water Act, 35 P.S. §§721.1 & 721.17- 721.17 and the Safe Drinking Water Act, 42 U.S.C. §§300j. (Initial Decision at 9).

Complainants Susan K. Pickford, Sharon Landis, and the OCA filed Exceptions to the Initial Decision. PAWC filed Reply Exceptions.

On March 20, 2008, we entered an Opinion and Order (March 20, 2008 Opinion and Order) reversing the Initial Decision of ALJ Chestnut, reasoning as follows:

After review and consideration of the record, we find that this Commission, under the Code, and the DEP, under the state and federal Safe Drinking Water Acts, have joint jurisdiction over water quality. The established spheres of influence are that the Commission has regulatory authority under 66 Pa. C.S. § 1501 over the quality of public utilities' facilities and services, whereas the DEP has primary jurisdiction over the sub-issue of water purity under the Safe Drinking Water Act. Based on the foregoing discussion, we conclude that the instant proceeding is one involving an issue over which both this Commission and the DEP hold

joint jurisdiction. As such, we will reverse the ALJ's determination that the Commission lacks subject matter jurisdiction over this matter and grant the Parties' Exceptions on this issue.

(March 20, 2008 Opinion and Order at 16).

On April 14, 2008, DEP filed a Petition to Intervene/Notice of Intervention. On the same date, DEP filed a Motion in Limine and a Memorandum in Support wherein DEP requested the exclusion of evidence and testimony concerning the public health determinations made in the context of DEP's permitting decisions to allow the use of chloramines at PAWC's drinking water facilities in the instant proceeding.

On May 6, 2008, ALJ Chestnut (1) issued an Order which granted DEP's petition to intervene; (2) granted DEP's Motion in Limine; (3) permitted those customers who were listed in Complaints filed at Docket Nos. C-20078029 and C-20078030 to file complaints in their own names; (4) granted the request of the Joint complainants and the OCA that a public input hearing be held; (5) noted that the burden of proving that PAWC has violated the Public Utility Code is on the Complainants pursuant to 66 Pa.C.S. §332(a); (6) modified the discovery regulations and encouraged the parties to cooperate and exchange information on an informal basis when possible; (7) granted PAWC's request for a protective order pursuant to 52 Pa. Code §5.363; (8) included various other procedural requirements, such as those relating to the service list, filing requirements, specific requirements relating to the hearings, testimony and briefs; and (9) specifically reminded the parties of 52 Pa. Code §1.35(c), which provides that the effect of signing a document constitutes a certificate by the individual that the document is "well-grounded in fact and is warranted by existing law," and not "interposed for an improper purpose, such as to harass or cause unnecessary delay" or expense, and that sanctions for violation of that provision are available.

On May 20, 2008, the Joint Complainants filed a Petition for Review and Answer to a Material Question and Request for Stay of the Proceeding. Specifically, the Joint Complainants requested that the Commission reverse the ALJ's ruling and allow them to present testimony regarding "the public health and safety issues associated with chloramines and chloramine disinfection byproducts."

In an Opinion and Order entered September 15, 2008, we granted the Motion in Limine. We found that the Complainants in this proceeding have concerns regarding the suitability of water treated by chloramines for household use; the effect that the change in treatment will have on PAWC's facilities, including lead leaching from pipes; affordability concerns of installing filtration systems; safety concerns; and concerns regarding whether PAWC provided adequate and timely notice of this change in treatment, and that all of these issues are within our jurisdiction.

We reasoned that the DEP has primary jurisdiction with regard to the public health issues related to the use of chloramines at PAWC facilities. Therefore, allowing the introduction of public health-related evidence from the DEP permitting decisions

would be improper. The Commission will not second-guess the DEP's permitting decisions or its public health determinations regarding the use of chloramines. Therefore, the parties could not use this venue to collaterally attack the decisions of the DEP or standards related to disinfectants properly within its authority under the federal and state safe drinking water laws.

Parties were not precluded from introducing non-public health evidence relevant to those issues of water quality that do lie within the Commission's jurisdiction, even if the evidence was also previously presented before the DEP. Examples of those issues beyond the SDWA and properly within the jurisdiction of the Commission were, *inter alia*: (1) whether reasonable and adequate notice was given to customers by Pennsylvania-American Water Company (distinct from the DEP's permitting requirements); (2) whether the company's choice of treatment alternatives and its cost and implementation was prudent and appropriate (again, distinct from DEP's review and requirements); and (3) whether water provided at the tap is suitable for all household uses and constitutes the provision of safe, adequate, efficient, and reasonable service and facilities under 66 Pa.C.S. §1501.

In her Initial Decision, ALJ Chestnut found that the Complainants in this proceeding did not meet their burden of proof that PAWC violated Section 1501 of the Public Utility Code. Accordingly, the ALJ recommended that the complaints be dismissed. The Complainants filed Exceptions on March 10, 2009. PAWC filed Reply Exceptions on March 12, 2009. DEP filed Reply Exceptions on March 25, 2009.

The Opinion and Order recommended by our Office of Special Assistants adopts the ALJ's Decision, denies the Complainant's Exceptions, and adopts a Settlement Agreement entered into between the OCA and PAWC.

The OCA and PAWC deem the Settlement Agreement to be a satisfactory resolution of the change in disinfection process from chlorine to chloramines in PAWC's two treatment plants. Additionally, the OCA and PAWC agreed that they would implement the procedures in the Settlement without regard to the outcome of the proceeding. The provisions of the agreement are set forth as follows:

1. If PAWC proceeds with chlorination, PAWC will adopt its Mechanicsburg Sampling Plan to monitor for nitrification in compliance with the DEP permits. Monitoring will continue as long as PAWC is using chloramines in its two systems, absent any regulatory changes or DEP-issued modifications requiring PAWC to do otherwise.
2. Prior to implementing chlorination, PAWC will finalize an action plan consistent with the DEP permits to use in case of nitrification.

3. Subject to DEP review and approval, PAWC will monitor lead levels at the homes of 10 customers selected by the OCA. The monitoring will continue as long as chlorination is used, and if the customer desires such monitoring.
4. At least three months before implementing chlorination, PAWC will provide certain information, including, but not limited to, removal of chloramines from household water, effect on household plumbing, chloramines disinfection, health and safety issues for customers and their pets.
5. PAWC will provide training to customer service representatives concerning the issues set forth in the previous paragraph and equipment capable of effective filtration of chloramines and chloramine byproducts.
6. PAWC will be vigilant in monitoring the developments related to the health effects and regulations concerning nitrogenous and iodinated disinfection byproducts and will post an annual summary of its finding on its website.

The Commission's decision today correctly respects DEP's permitting decisions or its public health determinations regarding the use of chloramines, which are clearly within its jurisdiction. This agency should not be working at cross-purposes with a sister agency acting within its jurisdiction. Accordingly, I will vote to adopt the OSA-proposed Opinion and Order.

Further, I support the adoption of the Settlement Agreement. The procedures set forth in the agreement address many of the concerns advanced by the Complainants regarding health and safety issues. Moreover, I note that several of the actions proposed in the Settlement Agreement relate to matters clearly within DEP's jurisdiction.

DATE: May 14, 2009

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James H. Cawley, Chairman