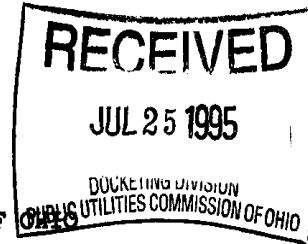


7C

11



BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the )  
 Application of Ohio Suburban )  
 Water Company for Approval of )  
 the Sale of Water-Works and )  
 Sewage Disposal Utility ) Case No. 95-318-WS-UNC  
 Facilities and the Substitution )  
 of the Utility Service Provider )  
 in the City of Huber Heights. )

CITY OF HUBER HEIGHTS RESPONSE  
 TO JOINT REPLY OF  
INDUSTRIAL WATER, INC. AND MIAMI COUNTY

On July 24, the City of Huber Heights received the July 21 Joint Reply of Industrial Water, Inc. and Miami County (hereinafter "Industrial/Miami"). The Industrial/Miami Joint Reply commends Huber Heights for assuming the Ohio Suburban Water Company Water Purchase Agreement with Industrial but then asks the Commission to use this utility substitution case for dealing with "additional concerns which can only be understood in the context of the water supply situation in Bethel Township." Joint Reply, p. 1. It identifies those concerns as "the potential that some of [Bethel Township's] water supplies will be abandoned" in the future as a result of EPA condemnation. Ibid. p. 8. It twists this "potential" into a threat of abandonment by Ohio Suburban. Ibid. pp. 8-9.

As a result, the County asks the Commission to deny the substitution of Huber Heights for Ohio Suburban, because Ohio Suburban might be more responsive to Bethel Township's "potential" water needs. Ibid. pp. 7-9. In the alternative, the Joint Reply asks the Commission to require the City of Huber Heights to supply water to private water supply systems in Bethel Township in the event they might need it. Ibid. p. 7. The County's requests should be denied.

In its Joint Reply, Miami County finally confesses to its exploitation of Industrial Water, of this case, and of this Commission's jurisdiction. The County describes how it initially used the emergency circumstances of the Industrial Water complaint case (PUCO Case No. 94-679-WS-CSS) to try to solve Bethel Township's water problem. Joint Reply, p. 2. The County does not explain how it would get around the statutory limits on Industrial Water's resale of water service to the County. See Huber Heights July 18 Submission of Ordinance, pp. 3-4; and R.C. 4905.02(B) and 4933.25.

Consistent with its secret agenda, the County has suggested that it knows what the Water Purchase Agreement meant "as originally contemplated" and "as originally negotiated," and it has accused the Commission of having "modified" that meaning. Miami County July 6 Appl. for Reh., pp. 4 & 5. As a result, the

County has alleged that "the original Ohio Suburban Contract" will not be honored." Ibid. p. 6. It has identified this alleged modification as the "overriding issue" of this case. Ibid. page 5.

Apparently, the Commission was not included in Miami County's secret agenda, for its October 20, 1994, Order and December 15, 1994, Entry on Rehearing properly focused on the facts and questions of Industrial Water's complaint by limiting the Water Purchase Agreement to service within the Wiley Industrial Park. See, Williamson Heater Co. v. Radich (1934), 128 Ohio St. 124, 1st para. of syllabus, which states that:

The syllabus of a decision of the Supreme Court of Ohio states the law of Ohio, but such pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the Court.

Miami County ignores this rule of law and complains that the Commission's limitation "abridged" the County's secret agenda. Joint Reply, p. 2.

Now the County is trying to use this case for achieving the secret agenda it lost and failed to pursue in the Industrial Water contract case. In this last regulatory step before Huber Heights closes its condemnation of Ohio Suburban's utility facilities, Miami County has asked the Commission to "reconsider" the Water Purchase Agreement and to "take a long range global

view of this application" in order to change the Water Purchase Agreement so it can address the County's "potential" water problems. Ibid. p. 6.

The City of Huber Heights submits that Miami County has misused Industrial Water, this case, and this Commission's jurisdiction to try to solve a problem that is not the subject of Industrial Water, this case, or this Commission's jurisdiction. That abuse of process has cost the citizens of Huber Heights hundreds of thousands of dollars in expenses, delays and lost rate reductions. If it delays the Commission's approval of Huber Heights' substitution for Ohio Suburban beyond early August, Miami County could cost the City another \$2,000,000 to \$3,000,000 in additional financing costs for the Ohio Suburban utility facilities.

Miami County argues that this case should be an abandonment case because "Huber Heights is not an equal substitute for Suburban" for providing service "in the event that another public water supply were to be condemned by the Ohio EPA." Ibid. pp. 6 and 8. Citing the Commission's abandonment and general supervisory powers, the County asserts that approval of substitution in this case would violate the Commission's statutory responsibilities. Ibid. pp. 6 and 7.

---

Miami County's arguments are in error. Ohio Suburban is not abandoning any existing water line "which has once been laid, constructed, opened, and used for public business." Nor is any such facility being "closed for traffic or service thereon, therein, or thereover," as required by R.C. 4905.20 and .21. Similarly, the cases cited by Miami County at pages 7 and 8 of its Joint Reply dealt with the actual abandonment of existing facilities and existing service and not with some possibility of the future extension of potential facilities and service for responding to potential problems.

In fact, the Huber Heights Contract Assumption should satisfy Miami County's demands in this case, because it satisfied the County's requirements in its July 13, 1995 Agreement to purchase the assets of Industrial Water, Inc. Under that Agreement Miami County purchased from Industrial Water all the water distribution assets system serving Wiley Industrial Park, including the Water Purchase Agreement.

Section 3(a)(iii) of the July 13 Agreement provided three alternatives for Industrial Water's assignment of the Ohio Suburban Water Purchase Agreement to Miami County:

3. Easement; Suburban Assignment.

- (a) Buyer's obligations under this Agreement are subject to the following conditions subsequent:

. . . .

(iii) Pursuant to the Suburban Agreement, Ohio Suburban must provide written approval of the assignment of the Suburban Agreement to Buyer. Within five (5) years from the date hereof, Buyer shall have received:

(A) approval from Ohio Suburban of the assignment of the Suburban Agreement; or

(B) a ruling from a court of competent jurisdiction that (1) Ohio Suburban is wrongfully withholding such written approval; or (2) Seller may assign the Suburban Agreement to Buyer; or

(C) a bona fide, unconditional, written agreement from the City of Huber Heights to fulfill Ohio Suburban's duties under the Suburban Agreement.

[Emphasis added.]

Huber Heights' July 17 Contract Assumption (filed herein July 18, 1995) satisfies Division (C) of that condition. The July 17 First Amendment to Condemnation Agreement expressly provides at page 1 that,

Huber Heights is appropriating the contract between Ohio Suburban and Industrial Water,

Inc., dated September 27, 1994, as approved by The Public Utilities Commission of Ohio ("PUCO") on October 20, 1994, and confirmed on December 15, 1994 by the PUCO in Case No. 94-679-WW-CSS . . .

(Emphasis added)

The Contract Assumption goes on to provide at page 2 that upon completion of Huber Heights' condemnation of Ohio Suburban's utility system (scheduled for September, 1995),

. . . Huber Heights hereby agrees to the assignment to Huber Heights of all of Ohio Suburban's right, title and interest in the Industrial Water Contract and agrees to assume and perform Ohio Suburban's obligations under such Industrial Water Contract.

(Emphasis added)

The City's Ordinance No. 95-0-814 expressly approves and adopts the First Amendment to Condemnation Agreement.

The July 17 Contract Assumption now constitutes the "bona fide, unconditional, written agreement from the City of Huber Heights to fulfill Ohio Suburban's duties under the Suburban Agreement" at the closing of the Condemnation Agreement in September, 1995. The only remaining obstacle to that timely closing is a prompt order in this case approving the substitution of Huber Heights for performing Ohio Suburban's utility duties, including its "duties under the Suburban Agreement."

Why is Miami County trying to delay or stop the Commission from allowing Huber Heights to fulfill Ohio Suburban's duties under the Suburban Agreement"? The reason is that Miami County is trying to use this case to implement its secret agenda by changing "Ohio Suburban's duties under the Suburban Agreement" from what the Commission approved in Case No. 94-679-WW-CSS. As illustrated by Miami County's July 6 Application for Rehearing and its July 21 Joint Reply, the County wants the Commission to expand the Water Purchase Agreement into a grand solution for solving all of Miami County's "potential" water problems. The solution of those problems is clearly beyond the scope of this case or the jurisdiction of this Commission.

Miami County's July 6 Application for Rehearing did not state that the Commission's 1994 and 1995 order and entries approving the Water Purchase Agreement and reminding Miami County of that Agreement's limits were "unreasonable or unlawful," as required by R.C. 4903.10. The Application merely declared that the Commission's orders in Case No. 94-679-WW-CSS "erred in limiting the provision of water under the Suburban-Industrial Contract to only businesses within Wiley Industrial Park. . ." and "requests" that the Commission use this case to "reconsider its position." Miami County July 6 Appl. for Reh., pp. 1 and 4.



However, Miami County had intervened and actively participated in the 1994 contract approval case. When Miami County saw its secret agenda frustrated by the Wiley limitation in the Commission's October 20, 1994, Order and December 15, 1994, Entry on Rehearing in Case No. 94-679-WS-CSS, it neither complained nor sought rehearing. The County has not demonstrated why the Commission should use this case to change its prior order and entries.

#### CONCLUSION

With the July 17, 1995, assignment and assumption by Huber Heights of the September 23, 1994, Water Purchase Agreement between Ohio Suburban Water Company and Industrial Water, Inc., as approved by this Commission in Case No. 94-679-WW-CSS, the conditions for approval of a substitution of service in this case have not only been fully satisfied but also exceeded. Huber Heights' Contract Assumption also satisfies the condition of Miami County's July 13, 1995, Agreement to purchase the assets of Industrial Water, Inc., including the Water Purchase Agreement.

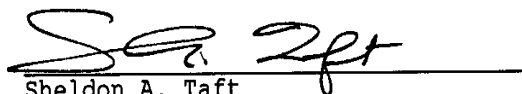
The City of Huber Heights respectfully requests that the Commission approve the substitution application of this case as quickly as possible. In order to satisfy the requirements of low cost state financing and notice obligations to the Ohio

Suburban bondholders, this case must be decided by early August. If this schedule is not met, the citizens of Huber Heights would have to bear substantially increased financing costs for acquiring the Ohio Suburban utility facilities, in addition to suffering further delays in the rate decreases that will result from the City's acquisition of the utility facilities and substitution for the utility service.

Because of the efforts of intervenor Miami County to try to change this Commission's prior order and entries and expand the Water Purchase Agreement as approved in Case No. 94-679-WW-CSS, the City of Huber Heights respectfully requests that the Commission's order approving this substitution case confirm yet again the Water Purchase Agreement's limitation to service to the owner-operators of Industrial Water, Inc., within the current boundary of the Wiley Industrial Park.

Respectfully submitted,

CITY OF HUBER HEIGHTS



Sheldon A. Taft  
VORYS, SATER, SEYMOUR AND PEASE  
P.O. Box 1008  
52 East Gay Street  
Columbus, Ohio 43216-1008  
(614) 464-6400

Counsel for  
City of Huber Heights

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Huber Heights Response to Joint Reply of Industrial Water, Inc. and Miami County has been served upon the following parties in this proceeding by personal delivery, telefax or regular U.S. mail, postage prepaid, this 25th day of July, 1995.

Sally W. Bloomfield, Esq.  
Bricker & Eckler  
100 S. 3rd Street  
Columbus, Ohio 43215-4191

Duane W. Luckey, Assistant Attorney General  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, Ohio 43215

Barth Royer, Esq.  
Bell, Royer & Sanders  
33 S. Grant Avenue  
Columbus, Ohio 43215-3927

George H. Lovett  
5205 South County Road 25-A  
Tipp City, Ohio 45371

Janine L. Migden, Esq.  
Hahn, Loeser & Parks  
10 West Broad Street  
Suite 1800  
Columbus, Ohio 43215

  
Sheldon A. Taft