

Selling Chester Water Authority Assets:

The Latest on Litigation Efforts by The City of Chester



By Michael Klein

The Chester Water Authority (CWA) was incorporated in 1939 by the City of Chester (the City). At that time most of its users and property were located within the City limits. Currently, CWA serves approximately 200,000 people and businesses across 37 municipalities throughout Chester and Delaware Counties. CWA also provides water to customers in Maryland and Delaware. [p. 5 of CWA's Petition for Allowance of Appeal to the PA Supreme Court, (hereinafter the "Appeal")]. Since May 2017, when CWA received an unsolicited offer from Aqua Pennsylvania, Inc. (Aqua) to purchase the water system

assets of CWA for approximately \$410 million, the possible sale of CWA's water system assets, by the City, has sparked litigation at various levels and in multiple courts in Pennsylvania. This article will focus on a recent decision issued by the Commonwealth Court on September 16, 2021 (the Commonwealth Court Decision). That has been followed by the Appeal to the PA Supreme Court, filed by CWA on September 17, 2021.

As a matter of background, CWA was not created as a joint authority. The City appointed all board members until Act 73 of 2012, (Act 73) became law. Act 73 amended the *Municipality Authorities Act*

(the MMA), to apply to multi-jurisdictional authorities that meet certain criteria to provide for equal board representation to the jurisdictions that meet the specified criteria. CWA meets that specified criteria. As a result, CWA went from having a five-member board appointed by the City, to having a nine member board, with the City, Chester County, and Delaware County, each appointing and having three members. After the unsolicited purchase offer was received by CWA, its board unanimously rejected it. That however, was not the end, but only part of the beginning of a long and litigious process continuing to this day.



A factor driving the lengthy process is that the participants each have much at stake. For example, the City, which is a financially distressed city, and under the supervision of a state appointed receiver, has looked to sell the assets of CWA to Aqua in order to provide financial resources to the City. CWA and many of its constituents have opposed the sale due to concerns, including resulting rate increases. The City sought a declaration in Delaware County Court that it had the unilateral power to seize, and terminate CWA. This could then lead to the sale of CWA's water system. The trial court, citing Act 73, held that the City could not dissolve CWA and sell its water system, without the concurrence of Chester County and Delaware County. The City and Aqua filed an appeal of the trial court's decision to the Commonwealth Court.

The Commonwealth Court Decision, is a 5-2 decision, ruling that Act 73 had no impact on the City's ability to unilaterally seize and take control of CWA's assets. The majority opinion stated, in part, that the court "conclusively establishes that Section 5622(a) of the MAA vests it (the City) with the unfettered power to unilaterally transfer the Authority, and all of its assets, on the City's own free will and terms without any input from the Authority itself." The dissenting opinion stated, in part, that "...It is patently unconscionable to permit the City to pay off its own municipal debt by selling the Authority's assets that were paid for by

its ratepayers, the vast majority of whom reside in the Counties and elsewhere. In fact, the General Assembly granted the Counties 'seats at the table' to prevent the City from looting the Authority, using the sale of the Authority's assets as its own municipal piggy bank by enacting Section 5610(a.1)." As you can see, there are differing judicial legal views as to the proper outcome of this matter.

CWA has filed the Appeal to the PA Supreme Court. The Appeal is in the form of a Petition For Allowance Of Appeal. It requests discretionary review of the Commonwealth Court Decision. The Supreme Court is not obligated to consider and issue a decision on the merits of the Appeal. It will only do so if it allows the Appeal. The PA Supreme Court looks for special and important reasons to allow an appeal. One such reason is the question presented is of substantial public importance as to require prompt and definitive resolution by the PA Supreme Court. Another such reason is that the question presented is one of first impression. [Pa.R.A.P.1114].

CWA has garnered some support for the allowance of its Appeal from various sources, such as the organization, Food & Water Watch, and PA House Speaker Bryan Cutler and Representative John Lawrence, each of whom filed applications to file Friend of the Court briefs asking the PA Supreme Court to review the case. Among the reasons stated for their support is that Act 73 prevents the City from unilaterally taking control of CWA and selling its assets. I will report on what actions are taken by the PA Supreme Court.

Drone Attacks on Critical Infrastructure My column in the Fall issue of this magazine was devoted to the topic of cybersecurity. But equally important is

the security of critical physical infrastructure of water systems. As with cyberattacks, the perpetrators of physical attacks on critical infrastructure are using

more sophisticated means of attack. Example in point

is the recent revelation, in a federal law enforcement bulletin, of a July 2020, drone crash near an unidentified electric substation in Pennsylvania. According to the report, obtained by ABC News during November, 2021, the drone was likely meant to damage or disrupt electric equipment. The drone was not successful in causing any damage. However, there is cause for concern because drone attacks can be a realistic threat to critical infrastructure. Water systems should consider adding drone attacks to the various threats that need to be addressed in their plans to protect critical infrastructure. More information on the drone attack is available at <https://wjla.com/news/nation-world/watch-intelligence-bulletin-reveals-plot-against-pennsylvania-electrical-grid>.

About the Author

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