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March 12, 2008

BY E-FILE

The Honorable James McNulty
Secretary, Public Utility Commission
Commonwealth Keystone Building
2nd Floor
400 North Street
Harrisburg, PA 17120

Re: Susan Pickford, et. al. v. Pennsylvania American Water Company
Docket No. C-20078029, et al.

Dear Secretary McNulty:

Accompanying this letter is the Reply of Pennsylvania-American Water Company to Complainants' Exceptions to Initial Decision of Administrative Law Judge Marlane R. Chestnut February 18, 2009 in the above-referenced matter.

A copy of the same has been served as indicated on the enclosed Certificate of Service. Thank you.

Sincerely,

Michael D. Klein

Enclosures

cc: All Parties on the Certificate of Service

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC UTILITY COMMISSION

Susan K. Pickford	PUC Docket No.	C-20078029
Robert F. and Nancy L. Cox		C-20078030
Anthony F. Davis		C-20078031
Lisa M. Walker		C-20078034
Victoria Millard		C-20078035
Christine and Erik Bish		C-20078036
David and Jessica Sears		C-20078037
Matt and Tricia J. Coniglio		C-20078038
Hans and Renee Wertz		C-20078039
Barbara Stern		C-20078041
William V. Bottonari		C-20078042
Kelly L. Houpt		C-20078043
Arthur J. Sconing		C-20078044
Gerard E. and Barbara Martin		C-20078045
Carl L. Crone		C-20078046
Sharon Landis		C-20078050
Ann Marie Judson		C-20078051
Adele Wilcox and John Kirk		C-20078052
Danielle Oakes		C-20078061
Missak Sisserian		C-2008-2044004
v.		
Pennsylvania-American Water Company		

REPLY OF PENNSYLVANIA-AMERICAN WATER COMPANY TO COMPLAINANTS EXCEPTIONS TO INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE MARLANE R. CHESTNUT FEBRUARY 18, 2009

Respondent Pennsylvania-American Water Company ("PAWC"), by and through its undersigned counsel, hereby respectfully submits this Reply to the Exceptions to the Initial Decision ("Initial Decision") of Administrative Law Judge Marlane R. Chestnut ("Judge Chestnut") filed by the formal complainants who are acting jointly in this proceeding ("Joint

Complainants" or "Complainants") ("Joint Complainants' Exceptions")[1]. Joint Complainants' Exceptions should be denied and the Initial Order affirmed for the reasons set forth below.

As an initial matter, Joint Complainants do not "identify the finding of fact or conclusion of law to which exception is taken" as required by Section 5.533 of the Commission's regulations. Instead, Joint Complainants make sweeping and repetitive claims regarding the scope of the proceeding. In the interest of economy, PAWC has not replied to these claims each time they appear. However, for the purposes of waiver, each reply should be considered made to each exception to which it is applicable.

1. **Joint Complainants' Exception 1. The ALJ erred in finding that notice was reasonable and adequate where significant evidence was adduced at hearing that 1) the untimeliness of the notice resulted in denying complainants their due process right to appeal the permits and otherwise object to or challenge the safety and necessity of chloramination in a full and fair hearing in the appropriate forums and 2) the notice did not provide timely, adequate or complete information on which customers could understand their risks and prepare to protect themselves and their families**

   a. **Joint Complainants' Attempt to Challenge the Notice Provided Regarding the DEP Permits is Improper**

With respect to Joint Complainants' claim that Joint Complainants were denied the right to challenge the permits issued to PAWC by the Department of Environmental Protection ("DEP") "in the only forum available to address health and environmental concerns regarding chloramination due solely to PAWC's failure to provide meaningful, timely, reasonable and adequate notice," Joint Complainants' Exceptions at 5, Judge Chestnut properly ruled that this proceeding "cannot include examination of the reasonableness or adequacy of the various notices required by DEP throughout the permitting process." Initial Decision at 29. In fact, as noted by

[1] The pages of Joint Complainants' Exceptions are not numbered. For convenience, citations to Joint Complainants' Exceptions will contain page references assuming that the first page after the table of contents is "page 1" and that the pages are numbered sequentially thereafter.

Judge Chestnut, id., and explained in detail in the Reply Brief ("PAWC's Reply Brief") served by PAWC on December 5, 2008 at 10-11, Joint Complainants' claim that the Commission needs to address alleged failures in the DEP permitting process already has been rejected by the Commission.

In the Petition for Interlocutory Review and Answer to a Material Question and Request for Stay of the Proceedings to the Extent Necessary ("Joint Complainants' Petition for Interlocutory Review") filed by Joint Complainants on May 16, 2008, Joint Complainants argued "there are important public health and safety determinations which have not been made with respect to [chloramines] and which this Commission, in the absence of any action taken by... DEP, is mandated to examine." Joint Complainants' Petition for Interlocutory Review at 1-2, see Joint Complainants' Exceptions at 8 ("Inasmuch as the clear failure of PAWC to provide reasonable and adequate notice cost the consumers the right to challenge the health and environmental issues associated with chloramine through DEP, it is incumbent on the PUC to act to protect the consumers and their homes until these issues can be properly litigated or resolved."). The Commission denied the Petition for Interlocutory Review explaining that "[t]he Commission will not second-guess the DEP's permitting decisions" and that "[t]he parties may not use this venue to collaterally attack the decisions of the DEP." Opinion and Order ("Opinion and Order") entered by the Commission on September 15, 2008 at 14.

Moreover, Joint Complainants' attempt to reopen DEP's determinations regarding "health and environmental issues" under the guise of a challenge to the notice provided by PAWC violates the Prehearing Order ("Prehearing Order #1") issued by Judge Chestnut on May 5, 2008, and the Opinion and Order. As explained by Judge Chestnut in Prehearing Order #1:

> As the agency entrusted with the jurisdiction to administer and enforce the federal and state standards relating to disinfectants applied to drinking water,

> DEP evaluated the public health issues associated with the use of chloramines, and, as stated in DEP's Motion "the permit issued to respondent incorporates limits and conditions needed to protect public health." That decision cannot be collaterally attacked in this proceeding, nor is this [proceeding] the appropriate venue to challenge the federal and state standards relating to disinfectants.

Prehearing Order #1 at ¶6.

In the Opinion and Order, the Commission quoted the above excerpt from Prehearing Order #1 and continued.

> [W]e agree with the ALJ's decision to grant the DEP's Motion in Liminie. The DEP has primary jurisdiction with regard to the public health issues related to the use of chloramines at PAWC facilities... The Commission will not second-guess the DEP's permitting decisions or its public health determinations regarding the use of chloramines. The parties may not use this venue to collaterally attack the decisions of the DEP or the standards related to disinfectants properly within its authority under the federal and state safe drinking water laws.

Opinion and Order at 14.

Finally, as explained in PAWC's Reply Brief at 11-12, to the extent relevant to this proceeding, DEP's regulations regarding publication of notices in the Pennsylvania Bulletin for permit applications under the Safe Drinking Water Act do not require notice for a change in treatment chemicals. In accordance with 25 Pa. Code § 109.503(d)(1), notice is only required for applications submitted under § 109.503(a) or (b)(1), or § 109.507. A change in chemical treatment, i.e., a change from chlorine to chloramine, does not fall within those sections. "Changes in treatment chemicals" are instead categorized as "minor changes" that do not require publication. 25 Pa. Code § 109.503(b)(2). In fact, the Environmental Hearing Board ("EHB") rejected the same challenge to the notice provided regarding the DEP permits that the Joint Complainants raise in this proceeding stating that:

> Here, Pickford does not argue that PAWC's permits were mischaracterized in the Bulletin; rather, she contends that the notices did not include enough pertinent information. Specifically, she complains that the notices did not

> state that chloramine could be used under the permits as a disinfectant. It would be unreasonable to require the Department to publish an entire permit in the Bulletin. There is no reason or requirement for selecting the disinfection method in drinking water permits for special notice or particular emphasis. Since we see nothing inaccurate, incomplete, or misleading in the Bulletin notices of PAWC's permits, it was Appellant's duty to secure copies of the permits and to appeal from any challenged aspects therein. PAWC cannot be expected to defend in 2008 a permit issued in 2004 because one of its customers did not realize until recently that the permits authorized chloramination.

Pickford v. Pennsylvania American Water Co., 2008 WL 2081196 at 2 (Pa. E.H.B.).

On December 9, 2008 the Commonwealth Court affirmed the decision of EHB explaining:

> EHB was correct in determining that the regulations do not require published notices for construction or operation permits for water treatment plants to single out for emphasis the disinfection method to be used. Inasmuch as the DEP provided the required notices of its actions, Pickford should have filed her appeals within thirty days of notice under 25 Pa. Code § 1021.52(a)(2)(i), but she failed to do so.

Pickford v. Department of Environmental Protection, No. 999 C.D. 2008 at 7 (Pa. Commw. Ct. 2008).

Thus, not only is this proceeding the wrong venue for Joint Complainants' "constitutional argument of due process with regard to the notice issue," Joint Complainants' Exceptions at 11, but Joint Complainants' claims already have been rejected in the appropriate venue.

b. The Notice Provided by PAWC Was and Is Reasonable and Adequate

As an initial matter, Joint Complainants argue that, because they can no longer challenge the DEP permits, no amount of advance notice is adequate.

> In her Decision, the ALJ mischaracterizes and minimizes the position of joint complainants on notice as solely one of insufficient time to prepare for the transition. Complainants' [sic] bring a constitutional argument of due process with regard to the notice issue in that notice was not timely, reasonable or adequate to provide customers with knowledge, time and opportunity sufficient to exercise their right to oppose the action in full and fair hearing.

Joint Complainants' Exceptions at 11. See also, id. at 10-11 (90-days advance notice "would not resolve the fundamental issue of the loss of rights to appeal and seek a hearing on the health and environmental issues before DEP"). For the reasons set forth above, Joint Complainants' attempt to collaterally attack the DEP permitting process, which has been upheld by EHB and the Commonwealth Court, is improper.

Instead, Judge Chestnut properly ruled that the actual notice given by PAWC to its customers was and is reasonable and adequate in light of both the results in this proceeding and PAWC's established successful practice and past experience. Initial Decision at 32-33. As explained by Judge Chestnut, "there is no specific Commission regulation or order determining the amount of time that customers must be informed whenever a water company changes its choice of disinfectant. Therefore, [PAWC] had to exercise its discretion as to how to proceed once the decision to implement the conversion was made." Id. at 32.

As explained in PAWC's Reply Brief at 13-14, Joi Corrado, Customer Communications Manager for American Water, testified that PAWC sent mail and e-mail invitations for an informational meeting to local and state officials, as well as to Commission, Office of Consumer Advocate ("OCA"), and DEP representatives. PAWC Statement No. 1 at 4. These invitations discussed PAWC's intent to change treatment chemicals from chlorine to chloramine. Id. Tours of the PAWC's water treatment plants also were given to interested attendees. Id. at 5. PAWC mailed brochures discussing the planned change to chloramines to customers on July 12, 2008. Id. These brochures informed customers of the transition, when it would take place, the chloramination process, the affected areas, precautions for kidney dialysis patients and fish owners, and information regarding two upcoming public meetings regarding the switch. Id. On

July 13, 2008, PAWC also sent brochures to hospitals and dialysis centers and made individual phone calls to these and other major users to notify them and answer related questions. Id.

In addition, Joi Corrado testified that, with respect to both the information provided by PAWC and the timeframe for notice, "based on prior experience when we transitioned to chloramines in other systems, we communicated to customers within similar timeframes and we hadn't received any issues from customers that it wasn't enough time for them to prepare." Tr. at 468. Joint Complainants did not challenge this evidence, see Tr. at 443–44, 472, and have offered no countervailing evidence to suggest that PAWC's method of notice has been previously challenged or is otherwise unreasonable in light of PAWC's past experience and practice.

"It is well established that the Commission cannot 'interfere with the management of a utility unless an abuse of discretion or arbitrary action taken by the company has been shown.'" Initial Decision at 32 (quoting Pa. Public Utility Comm'n v. Philadelphia Electric Co., 561 A.2d 1224, 1226-27 (Pa. 1989)); see also, Rahn v. Pennsylvania-American Water Co., 2007 WL 2198196 at 6 (Pa. P.U.C.) (under the "'management discretion doctrine,' the Commission may not interfere with or micromanage utility management decisions, unless there is a manifest abuse of discretion or some showing of arbitrary utility action.") (citing Pub. Util. Comm'n v. Pa. Elec. Co., 522 Pa. 338, 344, 561 A.2d 1224, 1226-27 (1989)). Furthermore, the decision must not be examined in hindsight, but in light of what the utility knew or should have known at the time the decision was made. Pub. Util. Comm'n v. Pa. Elec. Co., 522 Pa. 338 at 344, 561 A.2d 1224 at 1227. Therefore, Judge Chestnut properly ruled that:

> "[i]t was reasonable for the company to employ the same methods of communication as it has used successfully in the past for similar conversions to chloramination. The entire publicity campaign - which included press releases, plant tours, advertisements, direct mailings, contact with regulators and community leaders, pet store posters, informational meetings, bill inserts, individual telephone calls to major

> users, posting of information on the company website, etc. - was employed by the company based on its prior experience, and was reasonably implemented."

Initial Decision at 32.[2]

Joint Complainants did not challenge PAWC's evidence, see Tr. at 443–44, 472, and have offered no countervailing evidence to suggest that PAWC's method of notice has been previously challenged or is otherwise unreasonable in light of PAWC's past experience and practice. Instead, Joint Complaints merely assert, without any evidence, that the notice provided by PAWC was inadequate. See Joint Complainants' Exceptions at 7[3].

Furthermore, as Joint Complainants have acknowledged, after PAWC notified its customers of the proposed switch to chloramines "[fifty-six] customers filed complaints with the PUC" and "complaint was filed with the DEP."[4] Complainants Brief Following Hearing ("Joint Complainants' Brief") served by Joint Complainants on November 22, 2008 at 15. Thus, as explained by Judge Chestnut, "[t]he efforts undertaken by the company did exactly what they

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[2] Curiously, Joint Complainants' object to Judge Chestnut noting that PAWC invited local and state officials, the Commission, OCA and DEP to an informational meeting and provided direct telephonic notice to hospitals, dialysis center, supermarkets and other major users. Joint Complainants' Exceptions at 9-10. Obviously, there is no reason for Judge Chestnut to ignore notice provided to civic leaders, regulators and major water users as part of PAWC's notification process.

[3] Joint Complainants state throughout Joint Complainants' Exceptions that PAWC provided only 17 days notice of the proposed switch to chloramines. See, e.g., Joint Complainants' Exceptions at 7. The 17 days appears to based on the time between an informational hearing held by PAWC on July 26, 2007 and August 12, 2007, the proposed date for the switch to chloramines. However, PAWC provided, at a minimum, almost 30 days notice since on July 12, 2007 it sent via first class mail brochures to its customers discussing the switch to chloramines, including the planned August 12 transition date. Initial Decision at 22.

[4] Joint Complainants' claim that 37 consumers were "disenfranchised due to a procedural error" caused by the timing of the notice provided by PAWC, Joint Complainants' Exceptions at 7, is spurious at best. At no time during the approximately 18 months between the filing of the complaints and the hearing did the complainants, who were represented by experienced counsel attempt to amend the complaints. If the complaints were dismissed due to "a procedural error," the fault lies with the complainants' counsel, not PAWC.

were supposed to do - used a variety of platforms to give its customers accurate information as to what was going to happen, and an appropriate opportunity to have those concerns addressed." Initial Decision at 32.

Finally, since PAWC has voluntarily delayed implementation of chloramination, there is no concrete injury or other actual harm that can be redressed by order of the Commission. In addition, PAWC has since settled with OCA on terms that render the claim of inadequate notice moot. Among other requirements, the Settlement obligates PAWC to provide at least three months' advance notice to its customers before switching to chloramines. Joint Complainants cannot plausibly argue they have not been given adequate notice of an event that has been postponed, on which public input and evidentiary hearings have been conducted, and for which they will receive 90-days advance notice before its ultimate implementation.

2. <u>Joint Complainants' Exception 2</u>. The ALJ erred and abused her discretion by excluding admissible and relevant testimony of consumers and complainants

As with Joint Complainants' Exception 1, Joint Complainants' Exception 2 appears primarily to be an attempt to collaterally attack the DEP permits and to re-litigate the issues resolved by the Opinion and Order:

> The consumers' voices have yet to be heard on the issues that concern them in a meaningful forum. The period to comment and seek hearing on the permits is long gone... [C]onsumers should be allotted the opportunity to challenge this utility action in a forum that will allow testimony on health and environmental effects be it the DEP, the EPA or the legislature.

Joint Complainants' Exceptions at 14. For the reasons set forth above, this attempt is improper. Moreover, the Commission does not have the authority to grant the relief apparently sought by Joint Complainants, namely a hearing before DEP, EPA or the legislature, nor is this relief relevant to Joint Complainants' claimed exception.

Joint Complainants' also repeat the general allegations made in Joint Complainants' Exception 1 regarding the adequacy of the notice provided by PAWC. Joint Complainants' Exceptions at 13-14. These allegations, which are unrelated to Joint Complainants' Exception 2, are unavailing for the reasons set forth above.

Joint Complainants' claims regarding Judge Chestnut's evidentiary rulings are equally unavailing. First, Joint Complainants allege that "[c]onsumers were constantly interrupted and intimidated about uttering statements that would be unacceptable. Many witness commented that they did not know what they were allowed to say." Joint Complaint's Exceptions at 12. If the witnesses were confused regarding the scope of the testimony they were allowed to give, the fault lies with Joint Complainants.

In an effort to avoid exactly the issue about which Joint Complainants' complain, following a dispute between Joint Complainants and PAWC over the scope of the testimony to be given at the public input hearing, on October 10, 2008 Judge Chestnut issued an Order Regarding Public Input Hearing specifying the form of notice to be published by Joint Complainants regarding the public input hearing. In particular, the Judge Chestnut directed that the notice include the following language printed in bold type, "No testimony or discussion of the health effects of chloramines - since this issue is addressed by DEP - will be allowed." Order Regarding Public Input Hearing. However, on October 20, 2008, Joint Complainants ignored the Order Regarding Public Input hearing and published their own form of notice, which had been specifically rejected by Judge Chestnut. With the exception of the time and location of the hearing, the notice published by Joint Complainants did not contain any of the language required by the Order Regarding Public Input Hearing, including the language set forth in bold print regarding the scope of testimony to be given at the hearing.

According to Judge Chestnut, the notice published by Joint Complainants "was not at all clear, which is why I rejected it. Not only did the notice that I directed be used contain specific language concerning the scope of the testimony that would be permitted at the public input hearing, it contained company contact information that was not included in the notice Ms. Pickford used." Order Denying PAWC Motion to Cancel Hearing issued by Judge Chestnut on October 21, 2008 at 3. However, despite Joint Complainants' flagrant disregard of the Order Regarding Public Input Hearing, Judge Chestnut denied PAWC's motion to cancel the public input hearing, explaining "[d]espite this unacceptable behavior, I will not grant the Motion and cancel the public input session. The location, date and time contained in the notice were correct, and I am mindful of the effect of cancellation on customers who, because they are not represented by Ms. Pickford, should not be penalized because of her actions." Id. Throughout this case, Judge Chestnut exhibited the patience of Job. In many instances, such as the one just described, she made every effort to enable the Joint Complainants to present their case despite their repeated failures to comply with the relevant rules and Orders.

At the public input hearing, Judge Chestnut explained that the witnesses would not be allowed to testify regarding health effects or to provide expert opinion testimony, that the parties might object if they believe that the testimony is outside the scope of the proceeding or the witness is not competent to give it, and that the witnesses should not be intimidated or feel attacked. Tr. at 151-156. For Joint Complainants to now complain that the witnesses at the public input hearing were mistreated is outrageous.

Contrary to Joint Complainants' claims, Joint Complainants' Exceptions at 13, Judge Chestnut properly prohibited Josephine Rakow from testifying at the public input hearing. Joint Complainants originally identified Dr. Rakow as expert witness regarding health effects.

Supplemental Prehearing Memorandum ("Joint Complainants' Supplemental Prehearing Memorandum") filed by Joint Complainants on August 15, 2008; C.I.C. Statement 1, Dr. Josephine Catherine Muski Rakow ("Dr. Rakow's Testimony") served by Joint Complainants on August 22, 2008. PAWC objected to the admissibility of Dr. Rakow's Testimony on various grounds, including that it violated Prehearing Order #1's prohibition on health effects testimony, Objection of PAWC to Admissibility of C.I.C. Statement 1 – Dr. Josephine Catherine Muski Rakow, D.O. at ¶¶ 12-18, Aug. 25, 2008; see also Prehearing Order #1 at p. 4, and the testimony was stricken by Judge Chestnut, Order Regarding Testimony, Sept. 25, 2008. With this background, Judge Chestnut was understandably concerned regarding the subject matter on which Dr. Rakow intended to testify at the public input hearing and conducted the following investigation:

> Judge Chestnut: Dr. Rakow, are you testifying as a customer?
>
> Dr. Rakow: I am a customer as well health officer for this borough, and I do not intent to talk about health issues.
>
> Judge Chestnut: You understand you cannot give expert testimony?
>
> Dr. Rakow: I have been reviewing all of the literature.
>
> Judge Chestnut: No. That's expert testimony. You cannot do that..
>
> Dr. Rakow: Can I testify in that I believe that Pennsylvania-American water is guilty of fraud?
>
> Judge Chestnut: No.
>
> Dr. Rakow: Can I testify that the scientific community does not -
>
> Judge Chestnut: No. No, that's expert testimony. You can't do it.

Tr. at 163-164.

Based on this exchange, Judge Chestnut reasonably concluded that Dr. Rakow intended to provide expert testimony on issues outside the scope of this proceeding and properly prohibited her from testifying. Tr. at 164 ("Dr. Rakow, you know, I don't think I'm going to let you testify. This is going to cause too many problems. If you have a comment to make purely as a customer - but it doesn't sound like you're going to be able to limit yourself, so I am going to ask you to step down."). Moreover, Joint Complainants have not identified how the testimony of Dr. Rakow would have differed from the testimony of the multiple customers that did testify at the public input hearing or what prejudice Joint Complainants suffered.

3. **Joint Complainants Exception 3. The ALJ erred and abused her discretion in denying Complainant/customer Susan Pickford the opportunity to testify on issues properly before the Commission**

In accordance with Rule 3.7 of the Pennsylvania Rules of Professional Conduct, Judge Chestnut properly prohibited Susan Pickford, co-counsel for Joint Complainants[5], from testifying as a fact witness. Tr. at 243-248. Rule 3.7 provides that:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[5] Joint Complainants were represented at the public input hearing by experienced regulatory counsel Edmund "Tad" Berger and Ms. Pickford. Tr. at 243.

Despite the clear prohibition of Rule 3.7(a), Joint Complainants attempt to relieve Ms. Pickford of complying with the Rules of Professional Conduct by shifting her professional obligations to PAWC and Judge Chestnut:

> Both PAWC and the ALJ were fully aware that [Ms. Pickford] had factual information relevant to efforts made in the critical period of time between the July 13th notice and the intended implementation date. . . . All parties could reasonably foresee that she would be a witness along with other named joint complainants. . . . In fact, the timing of PAWC's objection, with a copy of the Rule in hand, as well as the ALJ's comments and palpable disdain for Ms. Pickford would suggest that both had well anticipated and prepared for Ms. Pickford to take the witness stand.

Joint Complainants' Exceptions at 15. Obviously, the familiarity of PAWC and Judge Chestnut with the Rules of Professional Conduct have no bearing on Ms. Pickford's professional obligations.

Furthermore, contrary to Joint Complaints' claim that "[n]o inquiry was made as to the nature of any prejudice allegedly suffered by PAWC," Joint Complainants' Exceptions at 15, counsel for PAWC explained that:

> The problem that this presents for the Public Utility Commission and also for Pennsylvania-American Water and I think any other party involved in this case, and what Rule 3.7 is to guard against is the situation where the advocate may have competing or conflicting interests with the other parties that it represents to the point where, after a case is tried and decided, a party who would be one of the Joint Complainants would raise an issue under 3.7 and the entire case would have to be re-done again.

Tr. at 245. Similarly, Judge Chestnut explained that "the problem is that you're an attorney representing clients in this proceeding, and as an attorney and as a witness you have two different obligations. An attorney's obligation is to represent the interest of the client, but a witness has to answer truthfully, and sometimes they are in conflict." Tr. at 246.

In contrast, despite requesting and receiving a recess to consider the issue, Tr. at 250-251, Joint Complainants did not identify any prejudice that they would suffer if Ms. Pickford did not

testify. Similarly, other than the unsupported allegation that "[a]dditional significant factual testimony" would have been provided by Ms. Pickford, Joint Complainants' Exceptions at 14, Joint Complaints have made no effort to demonstrate that the Joint Complainants were prejudiced by Judge Chestnut prohibiting Ms. Pickford from testifying.

Finally, as noted by Judge Chestnut, Joint Complaints were represented by Mr. Berger, as well as Ms. Pickford, and Ms. Pickford could have withdrawn as counsel and testified if she believed it was important enough. Tr. at 247.

4. Joint Complainants' Exception 4. The ALJ erred and abused her discretion in striking the testimony of Complainants' expert Dr. Clifford Conaway

Judge Chestnut properly excluded the written testimony of Dr. C. Clifford Conaway served by Joint Complainants on August 22, 2008 and identified as C.I.C. ST. 2 ("Dr. Conaway's Testimony") on procedural and substantive grounds.

a. Dr. Conaway's Testimony Was Properly Excluded on Procedural Grounds

For the reasons set forth in the Initial Decision at 39-42 and in PAWC's Brief at 20-25, Judge Chestnut properly excluded Dr. Conaway's Testimony because Joint Complainants did not justify their failure to file a timely answer to the Objection to the Admissibility of Dr. C. Clifford Conaway's Written Testimony, C.I.C. ST. 2 ("PAWC's Objection") filed by PAWC on August 25, 2008.

According to Joint Complainants, because PAWC's Objection "was not penned as a Motion to Strike nor was a notice to plead attached. . . . Complainants viewed the document as objections and not a motion and as such did not respond within the 20 days required for an answer to a Motion." Joint Complainants' Exception at 16-17. However, in their Petition for Reconsideration of Order Striking Expert Testimony of Complainants in Response to Objections by PAWC to Admissibility of C.I.C. Witness Statement 2 - Dr. C. Clifford Conaway ("Joint

Complainants' Petition for Reconsideration") filed October 10, 2008 Joint Complainants are much more candid, stating that they "did not believe that the Commission's rules required [them] to present a written response," Joint Complainants' Petition at 2, and that they "believed the objections would be addressed at the time of presentation of the testimony," Joint Complainants' Petition for Reconsideration at 3. As explained by Judge Chestnut, regardless of whether PAWC's pleading was considered to be a motion or an objection, "there was no good reason for Ms. Pickford and Mr. Berger," both of whom are experienced attorneys, "not to understand that a response should have been made." Initial Decision at 40. Indeed, as noted by Judge Chestnut, both DEP and OCA "understood that a response was appropriate, and did so in a timely fashion." Id.

Furthermore, as explained in PAWC's Brief at 22-23, Joint Complainants' claim that they believed PAWC's Objection would not be addressed until the October 29, 2008 expert witness hearing is not credible given the unnecessary and expensive burden such a delay would have created. PAWC's Objection requested that Dr. Conaway's Testimony be ruled inadmissible in its entirety. The same day that PAWC filed PAWC's Objection, PAWC also filed objections requesting that three other of Joint Complainants' witness statements be ruled in admissible in their entirety: Objection of PAWC to the Admissibility of C.I.C. Statement 1 - Unidentified Expert Witness, Objection of PAWC to C.I.C. Statement 1 - Dr. Josephine Catherine Muski Rakow, D.O.; and Objection of PAWC to the Admissibility of C.I.C. Statement 5 - Unidentified Expert Witness. If PAWC's objections were not ruled upon until the expert witness hearing, Joint Complainants would have been required to pay Dr. Conaway and the other witnesses to travel to Harrisburg and attend the hearing despite the possibility that PAWC's objections would be sustained and that these witnesses would not be permitted to testify. In addition, PAWC (and,

potentially, DEP) would have had to prepare and serve written rebuttal testimony, which was required to be served on or before September 30, 2008, with respect to these witness statements, and would have been required to pay its rebuttal witnesses to travel to Harrisburg and attend the hearing, again, despite the possibility that PAWC's objections would be sustained and that the rebuttal testimony would be unnecessary. It is difficult to believe that Joint Complainants expected that parties would be required to undertake this expense and burden when it could be avoided simply by PAWC's objections being ruled on before the hearing. See Initial Decision at 40-41 (quoting PAWC's Brief).

In fact, the Order Regarding Testimony ("Order Regarding Testimony") issued by Judge Chestnut on September 25, 2008, sustained each of PAWC's objections and ruled that Joint Complainants would not be permitted to present any part of Dr. Conaway's Testimony or the witness statements of Dr. Josephine Catherine Muski Rakow or Joint Complainants' two unidentified witnesses. Nonetheless, Joint Complainants did not challenge the Order Regarding Testimony with respect to the witness statements of Dr. Josephine Catherine Muski Rakow or either of Joint Complainants' two unidentified witnesses. Joint Complainants' claim that they believed that PAWC's objections would not be ruled on until the hearing is particularly dubious given that PAWC would have been forced to prepare and serve rebuttal testimony and pay its rebuttal witnesses to travel to Harrisburg and attend the hearing in connection with these witness statements, which Joint Complainants have not even claimed are admissible.

Furthermore, Joint Complainants' responsibility to answer within 20 days after service of PAWC's Objection under Section 5.103(c) was not contingent on the inclusion of the "notice to plead." In particular, Section 5.103(c), which provides that "[a] party has 20 days from the date of service within which to answer or object to a motion, unless the period of time is otherwise

fixed by the Commission or the presiding officer," does not alter the time to answer a motion based on whether the motion includes a "notice to plead." In contrast, Pa. Rule of Civil Procedure 1026 excuses a failure to respond if "notice to plead" is not provided: "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading, but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead." The Commission could have included the quoted excerpt from Rule of Civil Procedure 1026 in Section 5.103(c), but did not do so. That is because the Commission did not intend that Section 5.103(c) would excuse the failure to file a responsive pleading.

In addition, 52 Pa. Code § 1.2(a) authorizes the presiding officer to disregard any "error or defect of procedure which does not affect the substantive rights of the parties." In exercising this discretion, the presiding officer should consider "the party's conduct and allegations, the impact on regulatory predictability, [his or her] desire to avoid additional, unnecessary and expensive burdens, the impact on the parties' due process rights and [his or her] exercise of sound discretion." Re Allegiance Telecom of Pennsylvania, P-00011882, 2001 WL 1564053 (Pa. P.U.C. Sept. 4, 2001). Joint Complainants addressed DEP's Motion in Limine, which did not include a "notice to plead," and clearly understand the need to answer even in the absence of a "notice to plead." Furthermore, as noted by Judge Chestnut, Initial Decision at 42, Joint Complainants' conduct has not included providing a "notice to plead," as evidenced by Joint Complainants' Motion for Extension of Time, which did not include a "notice to plead." Delaying ruling on PAWC's Objection until the hearing as Joint Complainants suggest also would have imposed an unnecessary and expensive burden on Joint Complainants and PAWC. Therefore, because the substantive rights of Joint Complainants were not affected by the fact the

PAWC's Objection did not include a "notice to plead," Judge Chestnut was authorized to sustain PAWC's Objection based on Joint Complainants' failure to answer as required by 52 Pa. Code § 5.103(c).

b. Dr. Conaway's Testimony Was Properly Excluded on Substantive Grounds

Dr. Conaway's Testimony is inadmissible (1) because it is not relevant and material evidence under 52 Pa. Code § 5.401(a); (2) because it violates and is contrary to Prehearing Order #1, which prohibits evidence "relating to the public health determinations made in the context of DEP's permitting decisions to allow the use of chloramines at the PAWC facilities at issue here," Prehearing Order #1 at p. 4, and the Opinion and Order; and (3) for the following reasons set forth in detail in PAWC's Brief at 25-34.

i. The majority of Dr. Conway's Testimony is on the impermissible issue of health effects.

ii. Dr. Conaway's Testimony violates the various Scheduling Orders in this proceeding by addressing issues that were not identified in Joint Complainants' Supplemental Prehearing Memorandum.

iii. Dr. Conaway's testimony regarding corrosion of pipes and deterioration of certain elastomers is without foundation. Dr. Conaway is a consulting toxicologist. Dr. Conaway's Testimony at 1-2.

iv. Fish kills and other alleged impacts to environmental biota from water hydrants and broken water mains are beyond the scope of this proceeding and the Commission's jurisdiction.

v. Dr. Conaway's testimony on nitrification is without foundation. Moreover, Dr. Conaway's sole testimony on this issue, "the problems associated with the nitrification of water that occurs," is too vague to be of probative value.

vi. Dr. Conaway's testimony regarding the reasonableness, prudence and safety of using chloramine, is based on inadmissible factors, including health effects, and appears to be an attempt by the Joint Complainants to re-litigate the issues raised in their Petition for Interlocutory Review.

See also, Initial Decision at 42 (noting that Joint Complaint's witness statements "were largely or completely improper (either because they contained testimony determined in numerous orders to be outside the scope of the proceeding, were not identified in joint complainants' supplemental prehearing memorandum, were without proper foundation or were not competent...)").

According to Joint Complainants, "Dr. Conway's testimony was offered, not to collaterally challenge DEP's permitting process or EPA's rulemaking, but only to address the enumerated issues of 'whether the company's choice of treatment alternatives and its cost and implementation was prudent and appropriate' in light of current peer reviewed scientific research and articles relating to lead leaching, pipe corrosion, elastomer degradation, effect on aquatic life and chloramine's comparative effectiveness as a bactericide to chlorine." Joint Complainants' Exceptions at 17. However, Dr. Conaway is more forthcoming regarding the purpose of his testimony, which he states is "to review the potentially adverse effects associated with chloramine treatment in municipal water systems, and to compare those effects with other methods of water treatment that can be utilized." Dr. Conaway's Testimony at 2, lines 17-19. Although Dr. Conway fails to specify that the "effects" addressed by his testimony are health effects, from even a cursory review of his testimony it is clear that consulting toxicologist Dr. Conaway is testifying about impermissible public health-related evidence in an effort to collaterally attack DEP's permitting decisions in this case. For example, Dr. Conaway testifies regarding the formation and potential health effects of disinfectant byproducts on

- p. 2, line 20 through p. 9, line 11;
- p. 13, line 12 through p 14, line 6;
- p. 18, lines 1-7;
- p. 19, lines 15-17 and lines 19-23; and
- p. 20, line 10 through p. 21, line 3 of Dr. Conway's Testimony;

and regarding EPA regulation of disinfectant byproducts on

- p. 9, line 12 through p. 13, line 11; and
- p. 21, line 4 through p. 23, line 2 of Dr. Conway's Testimony.

Joint Complainants argue that testimony regarding "the toxicological nature of chloramines byproducts and the anticipated regulation of these byproducts" is admissible because it "is not offered to attack the DEP permitting process but to discuss the reasonableness of the decision to begin the use of a chemical treatment system that is currently not necessary to comply with EPA regulations." Joint Complainants' Exceptions at 18. Joint Complainants continue:

> This testimony is offered specifically to address the choice of treatment alternatives in terms of reasonableness and prudence of cost and implementation given all the knowledge we have about chloramines as well as the likelihood that another change in treatment will be necessary.

Id. at 18-19.

However, this precise argument already has been rejected by the Commission. In their Petition for Interlocutory Review, Joint Complainants stated:

> [N]either federal nor state regulations have yet addressed the health and safety of chloramine disinfection byproducts. New emerging disinfectant byproducts of chloramine have been identified and determined by the scientific community as being highly toxic and far more harmful to human health than the byproducts of chlorine EPA now regulates. EPA has included two

> of these byproducts on their CCL3 which is open to comment at this time.
>
> The question then is, is it reasonable and safe service for PAWC to proceed to introduce this disinfectant given the very high likelihood that these byproducts will be regulated or banned in the very near future.

Petition for Interlocutory Review at 1-2.

At its July 17, 2008 public meeting, the Commission denied the Petition for Interlocutory Review. As explained in the Commission's Opinion and Order:

> 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 permitted 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. The parties may 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.

Opinion and Order at 14. See also Opinion and Order at 11 ("the Legislature has entrusted the permitting of drinking water suppliers to the DEP from a public health and safety perspective").

5. Exception 5. The ALJ erred and abused her discretion in disallowing all testimony related to health and safety where such evidence would have been offered in the context of reasonableness of choice and suitability and not in the context of regulation or issues within the jurisdiction of the DEP

As noted above, the Commission already has rejected Joint Complainants' claim that the Commission should consider public health issues related to the use of chloramines. Opinion and Order at 14. In fact, contrary to Joint Complainants' claim that "[t]he Commission recognized that it is the use of evidence regarding health, not the mere fact that it addresses health concern, that should have been considered when they expressly added the language 'distinct from DEP's permitting requirements," Joint Complainants' Exceptions at 20, the Opinion and Order clearly states that the parties are not precluded from "introducing non-public health evidence that is relevant to those

issues of water quality that do lie within the Commission's jurisdiction, even if the evidence was previously presented before the DEP." Opinion and Order at 14 (emphasis added).

Finally, while Joint Complainants note that during the public input hearing OCA objected that the testimony was being too limited, Joint Complainants' Exceptions at 22, it should be noted that OCA has not filed exceptions to the Initial Decision.

CONCLUSION

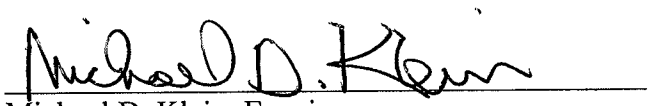
As noted above, rather than "identify the finding of fact or conclusion of law to which exception is taken" as required by Section 5.533 of the Commission's regulations, Joint Complainants Exceptions' make sweeping and repetitive claims regarding the scope of this proceeding. In particular, completely ignoring the Commission's prior rulings, throughout Joint Complainants' Exceptions, Joint Complainants' attempt to re-litigate their claims regarding the notice provided for the DEP permits and the alleged health effects of chloramines. These issues were fully litigated before the Commission and addressed by the Opinion and Order entered by the Commission on September 15, 2008. In fact, the Joint Complainants' claims regarding notice have been rejected by the Environmental Hearings Board and the Commonwealth Court. Judge Chestnut's evidentiary rulings and Initial Decision have faithfully complied with the Opinion and Order.

Joint Complainants' other exceptions are equally unavailing. Contrary to Joint Complainants' claims, Judge Chestnut provided Joint Complainants a full and fair hearing - in fact, three hearings, a public input hearing, a fact witness hearing and an expert witness hearing - on the issues properly before the Commission. Throughout this process, Joint Complainants, who were represented by experienced counsel, were provided ample opportunity to present relevant and appropriate testimony. Joint Complainants' failure to do so is not the fault of Judge Chestnut.

Finally, PAWC notes that Joint Complainants have not taken exception to Judge Chestnut's conclusions that (1) the terms and conditions of the Joint Petition for Settlement ("Joint Petition for Settlement") filed by PAWC and OCA, and supported by DEP, are just, reasonable and in the public interest, and (2) the Joint Petition for Settlement should be approved by the Commission without modification.

For the foregoing reasons, PAWC respectfully requests that the Commission (1) dismiss the Joint Complainants' Exceptions, (2) approve the Initial Decision, and (3) approve the Joint Petition for Settlement without modification.

Respectfully submitted,



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Certificate of Service

I hereby certify that I have on this 12th day of March, 2009, served a true and correct copy of the foregoing document upon the persons and in the manner indicated below:

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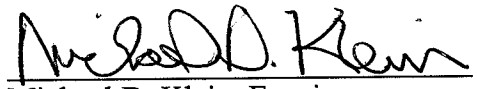

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