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September 3, 2010

VIA FIRST CLASS MAIL

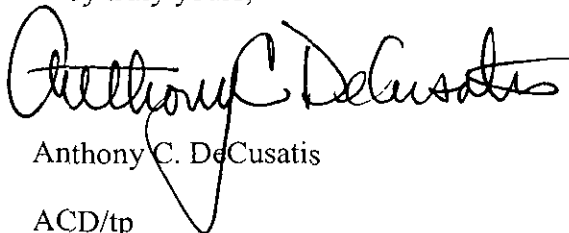
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Pennsylvania Public Utility Commission v. Pennsylvania-American Water
 Company – Northeast Wastewater Operations
 Docket No. R-2010-2166214**

Dear Secretary Chiavetta:

Enclosed for filing are an original and three copies of Pennsylvania-American Water Company's Motion To Strike Complaint and Motion *In Limine* To Exclude Testimony Submitted On Behalf Richard and Antoinette Callori. As evidenced by the enclosed Certificate of Service (original and three copies) copies of the Motions have been served upon the presiding officer, counsel for the Calloris and the active parties.

Very truly yours,



Anthony C. DeCusatis

ACD/tp
Enclosures

cc: Per Certificate of Service
 Seth A. Mendelsohn

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P.P.U.C.
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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SECRETARY'S BUREAU

**PENNSYLVANIA PUBLIC UTILITY
COMMISSION**

v.

**PENNSYLVANIA-AMERICAN WATER
COMPANY – Northeast Wastewater
Operations**

DOCKET NO. R-2010-2166214

**MOTION TO STRIKE COMPLAINT
AND MOTION *IN LIMINE* TO EXCLUDE TESTIMONY
SUBMITTED ON BEHALF OF RICHARD AND ANTOINETTE CALLORI**

Pursuant to 52 Pa. Code §§ 5.101(a), 5.103 and 5.243(e)(2), Pennsylvania-American Water Company (PAWC or the Company) moves: (1) to strike the Complaint of Richard and Antoinette Callori to the extent it seeks active party status in this case; and (2) for a motion *in limine* excluding from the record in this case the written testimony of Patrick L. Briegel. The Calloris' Complaint has been filed too late to allow the Calloris to have active party status. *See* Prehearing Order, p. 3. Additionally, the testimony offered by the Calloris at the rebuttal phase of this case is clearly not rebuttal. It does not rebut anything. Instead, it represents an improper attempt to introduce case-in-chief testimony out of time by simply labeling it "rebuttal." This is a direct violation of the Commission's regulations at 52 Pa. Code § 5.243(e)(2) and should not be permitted.

In further support of its Motions, PAWC states as follows:

I. MOTION TO STRIKE

1. The Calloris, through their counsel, have submitted a Complaint more than four months after this case was filed. The Calloris' counsel provided the Company a courtesy copy of

the Complaint by e-mail on August 27, 2010. The Company has not yet been served by the Commission with the Complaint and, therefore, does not have the docket number the Commission has – or will – assign to it.

2. The Callori Complaint has been filed nearly two months after the Prehearing Conference was held and after the deadline set at that time for complainants to elect active party status (Prehearing Order, p. 3). It has also been more than a month since, at the request of homeowners in the Blue Mountain and Saw Creek communities, two well-publicized public input hearings were held at Saw Creek on July 30, 2010.

3. Neither the Calloris nor their counsel participated in the Prehearing Conference. They did not submit a Prehearing Memorandum or otherwise provide notice of the witness(es) they intended to present, the subject matter(s) such witness(es) would address or the issues they believed would be raised by such testimony.

4. The Calloris – like all customers – were provided notice of the filing of the Company's rate request and were provided information on how to participate if they desired to do so. Moreover, the two, well-publicized public input hearings held at Saw Creek at the request of Blue Mountain and Saw Creek homeowners and homeowners' associations provided other opportunities and venues for participation, which the Calloris (or Mr. Briegel) could have used to express their views. They chose not to do so.

5. The Calloris have not met the requirements for active party status. They have not offered an explanation for their belated entrance into this case and still have not complied with the requirements of the Prehearing Order.

6. In view of the foregoing, the Calloris should not be afforded active party status in this case and, to the extent their Complaint seeks, or might be interpreted as seeking, active party status, their Complaint should be stricken.

II. MOTION *IN LIMINE*

7. The testimony of Mr. Patrick L. Briegel addresses the imposition of “availability” charges in the Blue Mountain service area of PAWC’s Northeast Wastewater Operations. PAWC’s current tariff does not provide for availability charges to be imposed on unimproved lots within that service area. When PAWC acquired the Blue Mountain system, it adopted the rates of the former owner, which did not impose such charges. In the current rate filing, PAWC did not propose to initiate such charges for the Blue Mountain service area.

8. Mr. Scott J. Rubin submitted direct testimony (OCA Statement No. 2) that mentioned the subject of availability charges for Blue Mountain (p. 11) and explained that, while he favored the initiation of such charges, “[i]t is unclear, however, whether PAWC is currently able to serve a substantial number of new customers without installing new sewer mains.”

9. Mr. Briegel’s testimony purports to be “rebuttal.” However, Mr. Briegel candidly states that the purpose of his testimony is simply to “respond” to Mr. Rubin’s testimony, not to “rebut” it. *See Callori St. PLB-1, p. 1.* Mr. Briegel does not “rebut” anything in Mr. Rubin’s testimony, nor could it, since they both favor the imposition of availability charges. Mr. Briegel’s testimony simply expands upon and supplements the positions set forth in Mr. Rubin’s direct testimony, which is not “rebuttal.” It is, in fact, case-in-chief testimony that is being submitted belatedly and improperly at the rebuttal phase of the case. Mr. Briegel’s testimony stands in opposition to the Company’s direct case – not the OCA’s – and, as such, is case-in-chief testimony that should have been submitted on or before August 5, 2010 when the direct

testimony of all other parties was due. The belated submission of opposing party testimony is prejudicial and unfair. It is also a violation of the Commission's rules of administrative practice and procedure.

10. The Commission's regulation at 52 Pa. Code § 5.243(e)(2) provides that "A party will not be permitted to introduce evidence during a rebuttal phase which: . . . [s]hould have been included in the party's case-in-chief." The Commission has consistently applied Section 5.243(e)(2) to exclude what, in substance, is case-in-chief evidence that parties seek to introduce at the rebuttal phase. Thus, in *Affiliated Interest Agreement Between Metropolitan Edison Co., Pennsylvania Elec. Co. and Jersey Central Power and Light Co.*¹, an intervenor's testimony was stricken for violating Section 5.243(e)(2):

On May 24, 1991, Allegheny Electric Cooperative, Inc., ("AEC") filed a Petition to Intervene, asserting its interest as both a customer and as a supplier of electricity. AEC submitted written rebuttal testimony on June 18, 1991. Met-Ed/Penelec objected to the rebuttal testimony, relying on 52 Pa. Code § 5.243(e) which states, in pertinent part, that rebuttal testimony will not be permitted if matters contained therein could have been presented through direct testimony. The ALJ refused to admit the AEC testimony, but granted AEC's Petition to Intervene. AEC filed a Petition for Interlocutory Review with the Commission on June 25, 1991, and filed its Brief in Support thereof on July 2, 1991. Met-Ed/Penelec filed a Brief in Opposition. By Order entered August 1, 1991, we waived the thirty day response time and denied AEC's Petition.

The Commission also excluded direct testimony submitted at the rebuttal phase in *Amended Petition Of Bethlehem Steel Corp. and Hadson Development Corp.*²:

¹ Docket Nos. G-900240, P-900485, P-910502, C-913373 and P-910502C001, 1992 Pa. PUC LEXIS 87 (April 2, 1992) at *8-9.

² Docket Nos. P-870235, C-913318, P-910515 and C-913764, 1992 Pa. PUC LEXIS 120 (November 17, 1992) at *9-10.

On June 4, 1992, the Commission entered an order granting interlocutory review but determining that Cambria Partners would not be permitted to submit direct testimony regarding priority of its project during the rebuttal phase because it had failed to present such testimony in its direct case.

11. The Calloris are **not** *pro se* complainants. Additionally, Mr. Briegel emphasized in his testimony that Ms. Callori “is also a member of the Board of Directors of the Blue Mountain Lake Club,” which is “the community association which governs Blue Mountain Lake and owns its common areas and roads” (Callori St. PLB-1, pp. 1-2). In short, the Calloris are surrogates for the homeowners’ association. As such, and given: (1) Ms. Callori’s leadership role in that organization; (2) the organization’s state of knowledge about this case; and (3) the role that the homeowners’ association played in organizing and promoting the public input hearings held in the Northeast service area, the Calloris cannot now contend that there is any reasonable basis for their belated entrance in this case or for their belated introduction of case-in-chief evidence at the rebuttal phase of this proceeding. Indeed, they should be estopped from doing so.

12. The proffered testimony of Mr. Briegel is case-in-chief testimony, not “rebuttal” testimony. As such, its submission at this late date is improper. Accordingly, it should not be included in the record in this case.

WHEREFORE, for the reasons set forth above, Pennsylvania-American Water Company's Motion to Strike the Complaint of the Calloris to the extent that Complaint seek active party status and its Motion *In Limine* to exclude the proffered testimony of Patrick L. Briegel should be granted. The introduction of additional active parties that absented themselves from this proceeding until this late stage would have a significant adverse effect on the orderly progress of this case. The Calloris individually, and in Ms. Callori's role as a member of the board of the homeowners' association, had ample opportunity to participate in this proceeding before now and to have their views known. Their decision to delay in doing so compromises the integrity of the administrative process, prejudices the Company and impedes the orderly progress of this case.

Respectfully Submitted



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Dated: September 3, 2010

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PENNSYLVANIA PUBLIC UTILITY
COMMISSION**

v.

**PENNSYLVANIA-AMERICAN WATER
COMPANY – Northeast Wastewater
Operations**

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DOCKET NO. R-2010-2166214

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served copies of the Motion To Strike Complaint And Motion *In Limine* of Pennsylvania-American Water Company upon the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

The Honorable Charles E. Rainey, Jr.
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Office of Administrative Law Judge
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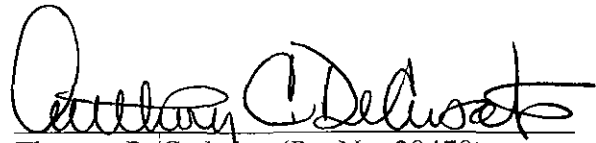
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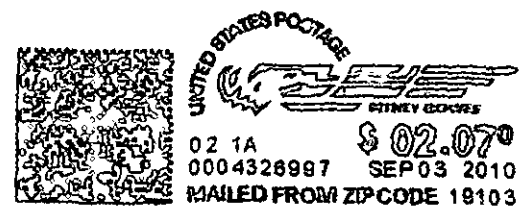
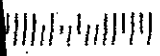
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