

DEL SOLE CAVANAUGH STROYD LLC

The Waterfront Building Suite 300
200 First Avenue Pittsburgh, PA 15222

TEL 412.261.2393
FAX 412.261.2110
www.dsclaw.com

April 8, 2011

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APR - 8 2011

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA FEDERAL EXPRESS

Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Pettko vs. Pennsylvania American Water Company
Docket No.: C-2011-2226096

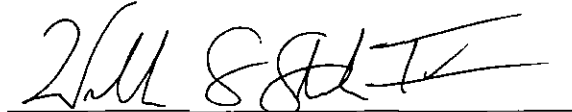
Dear Secretary:

Enclosed is Complainant's Opposition to Respondent's Motion for Judgment on the Pleadings. I have also enclosed a copy of the cover sheet of the Motion. Kindly date-stamp the copy and return it to me in the self-addressed, stamped envelope I have provided.

Thank you for your prompt attention to this matter.

Very truly yours,

DEL SOLE CAVANAUGH STROYD LLC



William S. Stickman, IV

Enclosures

cc: Anthony C. DeCusatis, Esq., (w/enclosure)

IN THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

C. LESLIE PETTKO, on behalf of himself)
and all others similarly situated,)
)
Complainants,)
)
vs.)
)
PENNSYLVANIA AMERICAN WATER)
COMPANY,)
)
Respondent.)
)

Docket No. C-2011-2226096

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**COMPLAINANT'S OPPOSITION TO RESPONDENT'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Complainant C. Leslie Pettko, on behalf of himself and all others similarly situated, by and through his attorneys, Del Sole Cavanaugh Stroyd LLC, submits this Opposition to Motion for Judgment on the Pleadings, averring as follows:

I. INTRODUCTION

Complainant C. Leslie Pettko brought this action against Respondent Pennsylvania American Water Company ("Penn American") seeking, *inter alia*, a refund pursuant to 66 Pa.C.S.A. § 1312 for amounts improperly billed to him by Penn American. Specifically, Mr. Pettko, whose water billing cycle runs from the middle of each month, contends that Penn American failed to pro-rate increases in the DSIC and STAS rates to the portion of the bill following the effective date of the increase—the effective date which was approved by this Commission and represented to customers such as Mr. Pettko. It is Mr. Pettko's position that this failure to pro-rate constitutes charges in violation of the Tariff, in that Penn American is collecting the increased rate for portions of Mr. Pettko's billing periods which occur before that increased rate is permitted.

Penn American has filed the instant Motion for Judgment on the Pleading, claiming that, as a matter of law, Mr. Pettko cannot prevail and that this case should be dismissed. Penn American bases this position on its own interpretation of the term “bills rendered” but sets forth no authoritative definition of that term. The documents submitted by Penn American cast doubt on its interpretation of that term and, ultimately, the propriety of its billing practices. As to the STAS charges, Penn American’s position is undermined by the fact that the Tariff documents themselves state that that charge is to be rendered on a “services rendered” basis. Moreover, Penn American’s argument that it is incapable of over-collecting revenue is based on a macro-level view of its relationship with the PUC and the ability to collect the permitted amount of both the DSIC and the STAS. This case, however, calls for a micro-level view of the relationship between Penn American and its individual customers and the manner in which it collects the DSIC and STAS from them. These considerations are markedly different.

Underlying Penn American’s billing practices, which it here contends are unassailable as a matter of law, is a system which is inherently inequitable to the rate-payers. Specifically, under this system some customers will **always** pay more than others (sometimes significantly more) based on nothing more than the dates their billing cycle begins and ends. This violates Section 1304 of the Public Utility Code, which requires that bills be apportioned in an equitable manner.

Finally, Penn American bases its Motion for Judgment on the Pleadings on its own selection of self-serving documents. Complainant has not yet had the opportunity to proceed to discovery and seek other documents to demonstrate that Penn American was not permitted to bill for increases in the DSIC and STAS prior to their effective dates. In short, Penn American has failed to demonstrate that it is entitled to judgment as a matter of law and Mr. Pettko should be

permitted to proceed in this case. Penn American's Motion for Judgment on the Pleadings should be denied.

II. ARGUMENT

- A. **There is a genuine issue of material fact as to whether Penn American violated its Tariff by charging its customers increased DSIC rates for the portion of their billing cycle prior to the approved effective date of the increase set forth in the Tariff.**

The Tariff governing Penn American's billings specifically states that increases in the DSIC charged to its customers have a definite effective date. Specifically, the Tariff states that the DSIC is to be updated quarterly with an "*Effective Date of Change*" set at April 1, July 1, October 1, and January 1. Penn American specifically advertised DSIC rate increases in the bills that it sends to its customers. For example, the bill immediately following the July 1, 2009 DSIC increase stated: "*Effective July 1, 2009*, the Distribution System Improvement Charge (DSIC) increased..." The plain language of both the governing Tariff and Penn American's billing statements demonstrate that there is a specific effective date of the rate increases. Penn American's billing practices, however, applied the increased rate even to those portions of a customer's bill which occurred before the approved effective date. Depending on the billing cycle of the customer, it is possible that the majority (or nearly all) of the billing period occurred prior to effective date of increase. Penn American nevertheless charges the customer the increased rate for the entire period. As such, for those portions of its customers' bills for which Penn American charges the increased rate before the effective date set forth in the Tariff, Penn American is in violation of Section 1303 of the Public Utility Code.¹

¹ *No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in such tariffs of such public utility*

Penn American's Motion claims that it is permitted, as a matter of law, to charge the increased rate even for portions of a customer's bill which occur prior to the effective date of a DSIC rate increase because the DSIC is permitted on a "bills rendered" rather than "services rendered" basis. Although Penn American has cited to several (self-selected) documents to support this contention, it has not pointed to a single definition of "bills rendered" from this Commission, case law, or the Pennsylvania Code—much less one which supports its contention that a customer may be billed an increased rate for his entire bill, where only a portion, perhaps a small portion, of the bill arose after the effective date. While Complainant does not question that the increased DSIC may be collected from customers on the portion of their bill arising after the effective date, it is not at this point clear that Penn American may collect the increased rate for portions of the bill prior to the effective date of the increase permitted by the Tariff.

In the absence of an authoritative definition for "bills rendered," Penn American's position that it may charge the increased amount for the entire billing period of a customer's cycle without pro-rating for the portion arising before the effective date is undermined by the very documents that it submitted in support of its Motion. Specifically, the 1999 Audit (of the 1997 DSIC collection) states:

The DSIC is to be expressed as a percentage carried to two decimal places and is applied to the *effective portion of the total amount billed* to each customer under the Company's otherwise applicable rates and charges, excluding amounts billed for public fire protection services and the State Tax Adjustment Surcharge (STAS).

applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable to a service rendered to a patron, shall, after notice of service conditions, *compute bills under the rate most advantageous to the patron.*

66 Pa.C.S.A. §1303 (emphasis added).

1999 Audit, Section 3, p. 5 (emphasis added). Likewise, the same Audit discusses the collection of the DSIC:

Distribution System Improvement Charge revenue is derived by multiplying the respective quarterly DSIC rate by **the applicable portion** of the total amount billed to each customer (excluding public fire protection service customers) exclusive of any STAS in effect.

1999 Audit, Section 4, p. 5 (emphasis added). This language makes it far from clear that Penn American is permitted to apply the increase DSIC charge to its customers for portions of their bills falling *before* the effective date of the authorized rate increase. At the very least, further proceedings, including discovery, are warranted.

Under Penn American's position, the *effective date of change* set forth in the governing Tariff is rendered meaningless. On the contrary, in actual practice, it may begin charging the increased amount for some of its customers nearly a month *before* the effective date which was approved by this Commission. Moreover, as explained further herein, by disregarding the effective date, Penn American's billing practices create an inherently inequitable system whereby some customers will *always* bear the increased rates more than others.

B. Penn American's DSIC and STAS billing methods create an inherently inequitable system whereby increases in both DSIC and STAS rates will always be imposed on some customers in a manner disproportionate to other customers.

Penn American's position—that it is permitted to bill customers increased DSIC and STAS rates for their entire billing cycle, including those portions of the cycle which occurred prior to the effective date of the rate increase—creates a system where some customers will *always* bear the burden of the rate increase to a greater degree than other customers. This violates Section 1304 of the Public Utility Code and should not be permitted.

Section 1304 states, in relevant part:

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage.

66 Pa.C.S.A. §1304 (in relevant part). Penn American's billing practices violate the provisions of this section in that (as illustrated below) they accrue to the disadvantage of some customers over others—determined only on the basis of the running dates of the customer's billing cycle.

By way of illustration, Mr. Pettko's billing cycle for June of 2009 (Bill attached as Exhibit 1) ran from June 18 to July 16, 2009.² Therefore, even though the **effective date** of the DSIC increase was July 1, Mr. Pettko, and all others with his billing cycle, was forced to pay the increased rate for the portion of his bill encompassing twelve days in June—more than one-third of the month. For customers who have billing cycles which begin and end in the first week of the month, those customer were forced to pay the increased rate for nearly an entire month prior to its effective date. Contrast this with the customer whose billing cycle runs from the first of the month or immediately before, who will pay the increased rate for only days, if at all, before the effective date. Because of the regularity of billing periods, the same customers will always end up paying proportionally more each time the DSIC rate is increased—based only on when their billing period falls in the month. This is inherently inequitable and is in violation of Section 1304 of the Public Utility Code.

Finally, Penn American claims that because the DSIC is reconciled on a regular basis, it *cannot* collect more than it is permitted. While this may be true in the aggregate *as to Penn American*, there is no mechanism by which the *individual aggrieved customers* are refunded their pro-rata share of the amounts they paid prior to the effective date of a DSIC rate increase.

² Due to the billing periods of approximately thirty days, Mr. Pettko's bills generally run from the third week of one month to the third week of the next month. Likewise, Complainant believes, and will demonstrate in discovery, that Penn American's other customers have similar billing cycles which account for approximately the same period each month.

Indeed, even if DSIC rates are lowered *as a whole*, there is no mechanism to pay back the specific amounts that each customer was prematurely billed. Further, each time the DSIC rate would be increased in the future, the same customers with a disadvantageous billing cycle will again be required to pay a disproportionate share. This is untenable under Section 1304.

Likewise, as to the STAS, Penn American cannot justify its actions in contravention of the Tariff language (see Section C below) by pointing out that on occasion, the STAS rate decreases or is a credit. Even in those circumstances, Penn American is still violating the provisions of its Tariff by prematurely applying a change in rate prior to the effective date. Moreover, it would also be in violation of Section 1304 because the failure to pro-rate would lead to some customers getting the benefit of the rate decrease or credit more than others—again, based only on the period of their billing cycle. As such, this defense proffered by Penn American must fail.

C. There is a genuine issue of material fact as to whether Penn American violated its Tariff by charging its customers increased STAS rates for the portion of their billing cycle prior to the approved effective date of the increase set forth in the Tariff.

Penn American's Motion for Judgment on the Pleadings should likewise be denied as to Complainant's allegations regarding Penn American's charging of increased STAS rates prior to the effective date of those rate increases. The very argument proffered by Penn American to support its practices under the DSIC—that increased rates may be collected on the entire billing period under Penn American's interpretation of a "bills rendered" rather than "services rendered" system—undermines Penn American's position as to the STAS rate increases. Specifically, even taking for granted Penn American's interpretation of the respective terms, the Tariff documents specifically state that the STAS is to be applied in a "services rendered" manner.

The documents submitted by Penn American demonstrate that the STAS is to be collected on a “services rendered” basis. For example, its Tariff specifically states, in regard to the STAS, that “*In addition to the net charges provided for in this Tariff, a surcharge of 0.45% will apply to all services rendered.*” Penn American Tariff (Issued December 16, 2009, Effective January 1, 2010), p. 12 (emphasis added). The “services rendered” language is the same each time the Tariff is amended to alter the STAS rate. Further, the December 18, 1986 Secretarial Letter from this Commission which Penn American submits states:

Section D of our order of March 10, 1970, further provides that: “Every tariff or supplement filed pursuant to this order shall carry an effective date which shall be ten days after its filing with this Commission *and be applicable for service rendered on or after the effective date.*”

December 18, 1986 Secretarial Letter, p. 1-2. These documents clearly demonstrate that the STAS is a “services rendered” charge, which (in relation to the DSIC) Penn American itself argues may not be collected for portions of bills arising before the effective date of the rate change.

Penn American takes a single phrase of the 1986 Secretarial Letter out of context to support a claim that, even though the Tariff and that very Letter provide a “services rendered” approach, at least as to this case the STAS is a “bills rendered” charge. Specifically, Penn American cites the line “[f]or utilities with billing cycles of more than one month, the tax shall be applied on a pro-rata basis,” to claim that where a utility sends out bills once a month, the STAS is a “bills rendered” charge. The language cited does not support this tortured interpretation. Taken in context, the language cited by Penn American simply means that where, as here, a utility’s billing cycle does not correspond to the calendar month (and thus spans more than one calendar month), the bill is to be pro-rated so that the customer would only be required to pay the increased rate for the amount falling after the effective date.

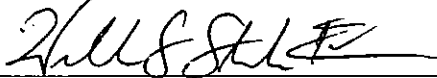
Penn American's interpretation would nullify both the purpose and the language of the Letter and the Tariff. The Letter specifically states that the STAS change will *be applicable for service rendered on or after the effective date*. There is no limiting language which would suggest that for a billing period straddling the effective date, Penn American is entitled to bill for the entire period, so long as the billing period is not more than one month. Further, there would be no need to limit pro-rating to that circumstance because, since the STAS changes only periodically, a multi-month bill would not cause the customer to pay for any more of the pre-effective date period than a customer with a 30 day cycle that straddles the effective date.

Penn American cannot have it both ways. It cannot set forth a theory whereby its interpretation of the phrase "bills rendered" as opposed to "services rendered" as to the DSIC justifies its collection of increased rates prior to the effective date of the increase, but at the same time claim that it can do so for the STAS where the Tariff language specifically states "services rendered." As such, although Mr. Pettko vehemently disagrees with Penn American's argument regarding the nature of "bills rendered" and its ability to collect increases of the DSIC prior to the effective date, even if Penn American prevails on that theory, it cannot prevail as to the STAS. As such, Penn American's Motion for Judgment on the Pleadings should be denied.

III. CONCLUSION

As explained at length above, Penn American has not established as a matter of law that it is permitted to charge its customers, including Mr. Pettko, increased DSIC and STAS rates for periods of their billing cycle which occur prior to the effective date of the rate increase. On the contrary, Penn American's argument and the documents that it submits in support of its position demonstrate the exact opposite. As such, Penn American's Motion for Judgment on the Pleadings should be denied.

DEL SOLE CAVANAUGH STROYD LLC

By: _____

Patrick K. Cavanaugh, Esquire

Stephen J. Del Sole, Esquire

Matthew T. Logue, Esquire

William S. Stickman IV, Esquire

Counsel for Complainants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of April, 2011 a true and correct copy of ***Complainant's Opposition to Respondent's Motion for Judgment on the Pleadings*** was served on the following by first class, U.S. mail:

Anthony C. DeCusatis, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
Attorney for Respondent



Patrick K. Cavanaugh

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PA PUBLIC UTILITY COMMISSION
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From: (412) 261-2393
William S. Stickman, Esquire
Del Sole Cavanaugh LLC
The Waterfront Building
200 First Avenue
Pittsburgh, PA 15222

Origin ID: BTPA



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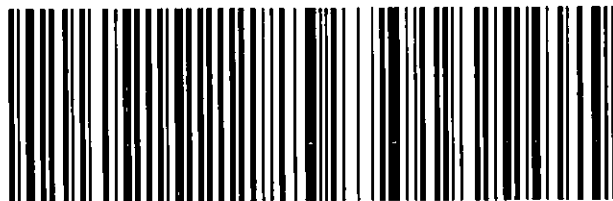
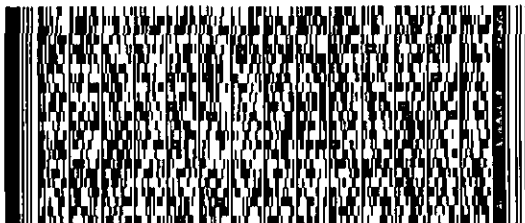
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