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July 22, 2011

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Walter Painter and Donna Painter v. Aqua Pennsylvania, Inc.
Docket No. C-2011-2239556

Dear Secretary Chiavetta:

Enclosed please find the Motion of Aqua Pennsylvania, Inc. for Judgment on the Pleadings for the above-referenced proceeding. Copies will be provided as indicated on the certificate of service.

Respectfully Submitted,

Christopher T. Wright

CTW/skr

Enclosure

cc: Honorable Conrad A. Johnson
Certificate of Service
Kimberly A. Joyce

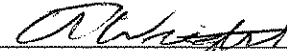
CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

VIA E-MAIL & FIRST CLASS MAIL.

Patrick K. Cavanaugh, Esquire
Del Sole Cavanaugh Stroyd LLC
The Waterfront building, Suite 300
200 First Avenue
Pittsburgh, PA 15222

Date: July 22, 2011




Christopher T. Wright

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Walter Painter, Donna Painter, and	:	
Others Similarly Situated,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2011-2239556
	:	
Aqua Pennsylvania, Inc.,	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE §§ 5.102(b) AND 5.103(c), YOU MAY ANSWER THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR ANSWER SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.



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Of Counsel:

Post & Schell, P.C.

Date: July 22, 2011

Attorneys for Aqua Pennsylvania, Inc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Walter Painter, Donna Painter, and	:	
Others Similarly Situated,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2011-2239556
	:	
Aqua Pennsylvania, Inc.,	:	
	:	
Respondent.	:	

**MOTION OF AQUA PENNSYLVANIA, INC.
FOR JUDGMENT ON THE PLEADINGS**

TO ADMINISTRATIVE LAW JUDGE
CONRAD A. JOHNSON:

AND NOW, comes Aqua Pennsylvania, Inc. (“Aqua”), by and through its attorneys, Post & Schell, P.C., and files this Motion for Judgment on the Pleadings pursuant to Section 5.102 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.102, and requests that the above-captioned Complaint be summarily dismissed in its entirety and with prejudice. In support thereof, Aqua states as follow:

I. INTRODUCTION AND BACKGROUND

1. Aqua is a “public utility” subject to the Pennsylvania Public Utility Code, 66 Pa. C.S. § 101 *et seq.*, and regulated by the Commission. Aqua provides water services pursuant to a Commission-approved tariff which governs Aqua’s rates and terms and conditions of service.

2. Complainant Donna/Walter Painter (“Complainant”) is a residential water customer of Aqua with a service address of 126 Colony Drive, New Wilmington, Lawrence County, Pennsylvania 16142.

3. On or about April 21, 2011, Complainant filed the above-captioned Complaint with the Commission. Attached to the Complaint in support of Paragraph 4 of the Complaint were separately-numbered paragraphs set forth in the “Statement of Facts and Request for Relief and supporting exhibits.”

4. Aqua was served with the Complaint by a Secretarial Letter dated May 5, 2011.

5. The Complaint is styled as a “class action” and asserts the following four claims against Aqua: (1) violation of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (“UTCPL”), Act of December 17, 1968, P.L. 1224, 73 P.S. §§ 201-1 to 201-9; (2) conversion; (3) breach of contract; and (4) refund pursuant to Section 1312 of the Public Utility Code, 66 Pa. C.S. § 1312. (*See* Complaint, Statement of Facts and Request for Relief, *passim*.)

6. The allegations set forth in the Complaint relate to Aqua’s Distribution System Improvement Charge (“DSIC”) and whether the DSIC should be billed on a “services rendered” or “bills rendered” basis. Specifically, the Complaint alleges Aqua implemented increases in its DSIC on a “bills rendered” basis instead of pro-rating those increases on a “services rendered” basis. (*See* Complaint, Statement of Facts and Request for Relief, ¶¶ 25-32.) The Complaint contends that Aqua’s practice in implementing increases in its DSIC on a “bills rendered” basis resulted in the retroactive billing of an increased rate to Aqua’s customers for the period of their billing cycle preceding the effective date of the increase. (*See* Complaint, Statement of Facts and Request for Relief, ¶ 33.)

7. The Complaint requests the following relief: actual and statutory damages under the UTPCPL; damages to compensate Complainant for losses, as well as punitive damages and all permissible fees; and damages to compensate Complainant for the amount Complainant was required to pay, together with interest, a penalty of 50%, and all court costs and attorneys' fees. (See Complaint, Statement of Facts and Request for Relief, pp. 7-10.)

8. On May 25, 2011, Aqua filed an Answer and New Matter to the Complaint.

9. By Prehearing Order dated May 31, 2011, the Honorable Administrative Law Judge Conrad A. Johnson ("ALJ") scheduled an initial hearing in this matter for June 30, 2011.

10. On June 6, 2011, Complainant filed a Motion for Change of Hearing Date. Aqua timely filed and served its Answer to Complainant's Motion on June 16, 2011.

11. Aqua also filed and served on June 16, 2011, its Motion to Stay the Hearing Date indefinitely pending the full and final disposition of any summary motions that could dispose of this matter in its entirety. Complainant filed and served an Answer to Aqua's Motion, concurring with the indefinite stay of the hearing date.

12. On June 21, 2011, Complainant served a reply to Aqua's New Matter.

13. On June 23, 2011, the Commission issued a Cancellation Notice, canceling the initial hearing scheduled for June 30, 2011.

14. Aqua notes that, on or about February 8, 2011, Counsel for Complainant filed a complaint against the Pennsylvania American Water Company ("PAWC"), asserting substantially similar claims regarding PAWC's implementation of periodic increases in its DSIC. See *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096. Aqua further notes that currently pending before the Office of Administrative Law Judge is a motion

for judgment on the pleadings filed on behalf of PAWC on March 23, 2011, requesting that the complaint be dismissed in its entirety as a matter of law.

15. The allegations and claims in the Complaint arise from and are related solely to Aqua's Commission-approved tariff and the rates charged pursuant thereto. (See Complaint, Statement of Facts and Request for Relief, *passim*.) For the reasons set forth below, there is no genuine issue as to a material fact and, as a matter of law, Complainant is not entitled to any of the relief sought in the Complaint. Therefore, for the reasons more fully explained below, Aqua is herein requesting that the Complaint be dismissed in its entirety and with prejudice.

II. STANDARD FOR JUDGMENT ON THE PLEADINGS

16. Section 5.102 of the Commission's regulations provides the Commission's standard of review for a request for judgment on the pleadings:

(1) Standard for grant or denial on all counts. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

(2) Standard for grant or denial in part. The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa. Code § 5.102(d)(1), (2).

17. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa. C.S. § 703(b); 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the

question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

18. As explained below, this case pending before Your Honor does not involve disputed questions of fact. The questions presented are matters of well-settled law. A hearing in this matter would be a fruitless exercise. For these reasons and as more fully explained below, Aqua is entitled to judgment on the pleadings and the above-captioned Complaint should be dismissed in its entirety and with prejudice.

III. ARGUMENT

A. **Aqua has Issued and Collected the DSIC Surcharge in Accordance with the Terms and Conditions of Its Commission-Approved Tariff.**

19. Aqua incorporates by reference Paragraphs 1 through 18, *supra*, as though set forth fully herein.

20. In response to the problem of the Commonwealth's aging water infrastructure, on December 18, 1996, the General Assembly adopted subsection (g) of Section 1307 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1307(g), which expressly authorizes the Commission to implement a DSIC for water utilities. As recently described by the Commission:

The DSIC is a regulatory tool created in Pennsylvania that has since been adopted, in similar versions, in seven states. The purpose of the DSIC is to provide the Company with the resources to accelerate the rate of aging water distribution system infrastructure replacement in a timely, cost-effective manner. Water utilities with an approved DSIC tariff may charge a sliding scale of rates collected through a quarterly surcharge that enables the recovery of the fixed costs (depreciation and pre-tax return) of certain non-revenue producing, non-expense reducing distribution system improvement projects completed and placed in service between base rate cases. DSIC approved projects include main and valve replacement, main cleaning and relining, fire hydrant

replacement, main extensions to eliminate dead ends, solutions to regionalization projects and meter change outs. Customer safeguards include an auditing process, an annual reconciliation of over or under collections, with over collections being refunded with interest, and resetting the charge to zero at the time of new base rates or if the company is over earning, and customer notice of rate changes. A cap of 5% of a customer's total billed revenue for the month has also been one of the safeguards.

Re: Petition of Pennsylvania-American Water Co. for Approval to Implement a Tariff Supplement...Revising the Distribution System Improvement Charge, Docket No. P-00062241, et al., Order at p. 5 (July 11, 2007).

21. The benefits of the DSIC include: (a) promoting the acquisition of small and non-viable water systems consistent with Commission policy (see 52 Pa. Code §§ 69.701, 69.711 (relating to small and nonviable systems)); (b) promoting the regionalization of water systems, consistent with Commission Policy (see 52 Pa. Code § 69.721 (relating to acquisitions)); (c) reducing rate case expenses by decreasing the frequency of base rate case filings; (d) allowing water utilities to afford remediation projects that would otherwise be cost prohibitive due to regulatory lag; and, (e) decreasing water main breaks, service interruptions, low pressure problems, and discolored water. *Id.*

22. On August 26, 1996, the Commission issued an order authorizing Aqua's predecessor, Philadelphia Suburban Water Company ("PSWC"), to establish a DSIC surcharge. *Petition of Philadelphia Suburban Water Company, Docket No. P-00961036 (August 26, 1996)*, which is attached hereto as "**Appendix A.**" Included as part of that Order was a sample DSIC surcharge acceptable to the Commission. Subsequently, PSWC filed a DSIC surcharge, which was approved by the Commission. Pursuant to the Commission's form of DSIC surcharge, PSWC's DSIC included a maximum cap of 5% of billed revenues. *See Supplement No. 34 to*

Tariff Water-PA.P.U.C. No. 15, Seventh Revised Page No. 10 (“Supplement No. 34”), which is attached hereto as “**Appendix B.**”

23. Aqua increases its DSIC percentage and bills and collects the DSIC from its customers in accordance with its Commission-approved tariff. PSWC’s Supplement No. 34 applied the DSIC surcharge on a “service rendered” basis. (*See Appendix B.*) However, the form of DSIC surcharge attached to the Commission order authorizing Aqua’s predecessor, PSWC, to establish a DSIC surcharge suggested that the DSIC surcharge apply on a “bills rendered” basis. (*See Appendix A, Attachment A, p. 1.*)

24. On March 29, 2000, PSWC received correspondence from the Commission’s Bureau of Audits recommending that PSWC modify its DSIC from “service rendered” to “bills rendered” basis. A true and correct copy of the Letter to Robert M. Griffin from Glenn W. Bartron, dated March 29, 2000, is attached hereto and marked as “ **Appendix C.**” Thereafter, the Commission approved PSWC’s tariff supplement to change the application of the DSIC surcharge from a “service rendered” to “bills issued” basis. *See Supplement No. 35 to Tariff Water-PA.P.U.C. No. 16, Nineteenth Revised Page No. 20 (“Supplement No. 35”),* which is attached hereto as “**Appendix D.**” Since the Commission’s approval of Supplement No. 35, Aqua’s DSIC surcharge has been applied on a “bills issued” or “bills rendered” basis, rather than on a “service rendered” basis. (*See Appendix D.*)

25. On July 23, 2009, the Commission issued an order authorizing Aqua to include a maximum DSIC surcharge of 7.5% of billed revenues. *Pa. Pub. Util. Comm’n v. Aqua Pa., Inc.*, Docket Nos. R-2008-2079310, *et al.* (July 23, 2009). Thereafter, Aqua filed a DSIC surcharge in accordance with the Commission’s order. A true and correct copy of Aqua’s DSIC surcharge,

Supplement No. 110 to Tariff Water-PA.P.U.C. No. 1, Forty First Revised Page No. 20 (“Supplement No. 110”) is attached hereto and marked as “**Appendix E.**”

26. As explained above, pursuant to Aqua’s Commission-approved tariff, the DSIC surcharge applies to customers’ bills on a “bills issued” or “bills rendered” basis, rather than a “services rendered” basis. It is well-established that a utility’s Commission-approved tariff -- list of services, rules for service and rates for service -- has the full force of law and is binding on the utility and its customers. *Pa. Electric Co. v. Pa. Public Utility Comm’n*, 663 A.2d 281 (Pa. Cmwlth. 1995); *Brockway Glass Co. v. Pa. Public Utility Comm’n*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Stiteler v. Bell Telephone Co. of Pa.*, 379 A.2d 339 (Pa. Cmwlth. 1977). In the absence of an exception by the Commission, “a public utility may not charge any rate other than that lawfully tariffed.” *Pennsylvania Electric Co. v. Pa. Pub. Util. Comm’n*, 663 A.2d 281, 284 (Pa. Cmwlth. 1995) (quotation omitted). Further, tariff provisions approved by the Commission are *prima facie* reasonable. *Lynch v. Pa. Public Utility Comm’n*, 594 A.2d 816 (Pa. Cmwlth. 1991); *appeal denied*, 529 Pa. 670, 605 A.2d 335 (1992).

27. Complainant’s contention that Aqua is not authorized to apply the DSIC surcharge to services rendered before the effective date of the increased DSIC surcharge (*see* Reply to New Matter, ¶ 9), disregards the well-established difference between rates approved to become effective on a “bills rendered” basis as compared to a “service rendered” basis.

28. The difference between “bills rendered” and “services rendered” for purposes of public utility rates is well-settled. For example, on February 8, 1980, the Commission entered an order granting an energy cost rate increase for Metropolitan Edison Company (“Met Ed”) effective for “bills rendered” on and after March 1, 1980. In a subsequent order, the

Commission explained the basis for its February 8, 1980 Order granting Met Ed's request that the rate increase become effective on a "bills rendered" basis, stating:

[I]t was the Commission's intent to increase Met Ed's rate so as to generate revenues in March and April, sufficient to obviate increasing the short-term debt limit under the revolving credit agreement until a final order is issued. If the tariff was made effective for service rendered on or after March 1, 1980, there would have been a lag in the collection revenues in March and April, 1980. Thus, Met Ed was allowed to increase its energy cost rate effective for bills rendered on and after March 1, 1980.

Pa. Pub. Util. Comm'n v. Metropolitan Edison Co., Docket No. I-79040308, 37 P.U.R.4th 77, 96 n.3 (May 23, 1980). However, in the subsequent proceeding, the Commission denied Met Ed's request that its base rate increase also become effective on a "bills rendered" basis instead of a "service rendered" basis, stating:

Notwithstanding our previous determinations, all rate changes permitted by this order shall be put into effect for service rendered on and after the date specified. The departure from this normal practice in the June 19, 1979, and February 8, 1980, orders was for the respondents' energy charges only and for the purpose of insuring an immediate increase in cash flow. Here, respondents' base rates are also being changed, and we do not find at present such urgency to increase respondents' cash flow as would warrant granting an increase for bills rendered on and after a date specified. The substantial increases granted by this order will, in our opinion, be adequate when recovered for service rendered on and after the date specified.

Id. at *96.

29. Clearly the Commission contemplates a different meaning and purpose for rates effective on a "bills rendered" basis as compared to a "service rendered" basis. Indeed, the Commission often conditions changes in rates to become effective on either a "bills rendered" or "service rendered" basis.¹ Notably, in the order adopting the DSIC surcharge for PAWC the

¹ See, e.g., *Re North Penn Gas Co.*, Docket No. 850279, 73 P.U.R.4th 63, 65, 61 Pa.P.U.C. 43, 46 (Jan. 29, 1986) ("North Penn Gas Co. may reflect the reduction in the § 1307(f) rate approved

Commission acknowledged that “the company proposes that the DSIC become effective for *service rendered* on and after” a specific date; however, the sample tariff language adopted by the Commission specifically provided that the “DSIC will become effective for *bills rendered* on and after January 1, 1997.” *In re Pennsylvania-American Water Co.*, Docket No. P-00961031, 1996 WL 944341 at *1, *9 (Aug. 26, 1996) (emphasis added).

30. It is to be noted that there are valid reasons for the Commission’s decision to adopt a “bills rendered” procedure for the DSIC. First, the DSIC surcharge only recovers return and depreciation associated with plant that actually is in-service at least *one month prior to the effective date of the DSIC rate change*. (See Appendix E.) Stated otherwise, each quarterly change to Aqua’s DSIC rate does not become effective until one to four months after the DSIC-qualified plant has been placed in-service. Therefore, customers receiving an increase to a DSIC surcharge on a “bills rendered” basis will have been receiving the benefit of the DSIC-eligible plant throughout the “service period” of their bills, and for several months. Second, because the amount to be recovered through the DSIC is fixed, based upon known plant investment incurred prior to the implementation of a new DSIC rate, and because the DSIC is a fully reconciled charge, customers are paying an appropriate annualized level of costs on a “bills rendered” basis.

31. Based on the foregoing, it cannot be contested that Aqua’s Commission-approved tariff authorizes Aqua to apply the DSIC surcharge to customers’ bills on a “bills issued” or

by the commission in bills rendered after the effective date of the tariff”); *In re Kentucky Data Link, Inc.*, Docket Nos. A-311413, et al., 2006 WL 4068900 (Dec. 28, 2006) (“The following surcharge rates apply to all customer bills issued on or after July 1, 2006”); *but, cf. Pa. Public Util. Comm’n v. Equitable Gas Co.*, Docket Nos. R-2009-2088072, et al., 2010 WL 4904664 (Nov. 4, 2010) (“[T]he purchased gas rates established therein shall become effective for service rendered on and after October 1, 2009.”); *Pa. Public Util. Comm’n v. Fryburg Water Co.*, Docket Nos. R-2009-2105601, et al., 2010 WL 237771 (Jan. 14, 2010) (“[T]ariff or tariff supplement may be filed on less than statutory notice, and may be filed to become effective for service rendered on and after the date on which the Commission's Order in this case is entered.”).

“bills rendered” basis. Since the Commission’s approval of Supplement No. 35, Aqua’s DSIC surcharge consistently has been applied on a “bills issued” or “bills rendered” basis, rather than on a “service rendered” basis. (See Appendix D.)

32. There is nothing in the Complaint to contest or otherwise refute the fact that, at all times material hereto, Aqua has issued customer bills and collected the DSIC surcharge in accordance with the terms and conditions of its Commission-approved tariff. Accordingly, Aqua respectfully requests that the Complaint be dismissed in its entirety and with prejudice.

B. The Commission has Exclusive Jurisdiction Over the Claims Set Forth in the Complaint.

33. Aqua incorporates by reference Paragraphs 1 through 32, *supra*, as though set forth fully herein.

34. A Commission-approved tariff, and the rates charged pursuant thereto, is not a private, freely negotiable instrument between the customer and the utility. Rather, a Commission-approved tariff provides a list of services, rules for service, and rates for service, which have the full force of law and is binding on the utility and its customers. *Pennsylvania Electric Co. v. Pa. Pub. Util. Comm’n*, 663 A.2d 281 (Pa. Cmwlth. 1995); *Brockway Glass Co. v. Pa. Pub. Util. Comm’n*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Stiteler v. Bell Telephone Co. of Pa.*, 379 A.2d 339 (Pa. Cmwlth. 1977).

35. It is well-settled that the Commission has the exclusive jurisdiction over the rates and services of public utilities. *Gasparro v. Pa. Pub. Util. Comm’n*, 814 A.2d 1282, 1285 (Pa. Cmwlth. 2003); *Bell Telephone Company of Pa. v. Sanner*, 375 A.2d 93 (Pa. Super. 1977); *Philadelphia Electric Co. v. Pa. Human Relations Com.*, 290 A.2d 699, 700 (Pa. Cmwlth. 1972); *Behrend v. Bell Telephone Co. of Pa.*, 431 Pa. 63, 243 A.2d 346 (1968). Therefore, any challenge to a public utility’s rates or services is within the exclusive jurisdiction of the

Commission. Stated otherwise, there is no other agency or trial court that has the authority to rule on the validity or implementation of a public utility's rates and services. A complainant cannot circumvent the jurisdiction of the Commission by attempting to characterize a challenge or opposition to a public utility rate or service as an UTPCPL claim, claim for conversion, or contract claim.

36. Further, subsection (c) of Section 1312 of the Public Utility Code provides:

No action shall be brought in any court for a refund, unless and until the commission shall have determined that the rate in question was unjust or unreasonable, or in violation of any regulation or order of the commission, or in excess of the applicable rate contained in an existing and effective tariff, and then only to recover such refunds as may have been awarded and directed to be paid by the commission in such order.

66 Pa. C.S. § 1312(c). To permit a complainant to disguise their utility-rate claim so as to bypass the jurisdiction of the Commission would render the plain language of Section 1312 meaningless, and would violate the primary jurisdiction of the Commission.

37. The Complaint is styled as a "class action" and asserts the following four claims against Aqua: (1) violation of UTPCPL; (2) conversion; (3) breach of contract; and (4) refund pursuant to Section 1312 of the Public Utility Code. (*See* Complaint, Statement of Facts and Request for Relief, *passim*.)

38. The allegations and claims in the Complaint arise from and are related solely to Aqua's Commission-approved tariff and the rates charged pursuant thereto. (*See* Complaint, Statement of Facts and Request for Relief, *passim*.) It cannot be disputed that Aqua's Commission-approved DSIC is a rate of a public utility. Therefore, regardless of how Complainant attempts to characterize the claims, the Complaint is a utility rate claim subject to the exclusive jurisdiction of the Commission.

39. In Complainant's Reply to New Matter, Complainant attempts to argue that, should the Commission find that any of Complainant's claims or requested remedies are not within its jurisdiction, then those matters will be resolved by the Court of Common Pleas.² In support, Complainant argues that, under Section 103(c) of the Public Utility Code, 66 Pa. C.S. § 103(c), the remedies provided to customers by the Commission do not abrogate any remedies in equity or under common or statutory law that may be available to those customers. Complainant's reliance on Section 103(c) is misplaced and, moreover, misses the point of the Commission's exclusive jurisdiction.

40. Section 103(c) of the Public Utility Code provides as follows:

Remedies cumulative. Except as otherwise provided in this part, nothing in this part shall abridge or alter the existing rights of action or remedies in equity or under common or statutory law of this Commonwealth, and the provisions of this part shall be cumulative and in addition to such rights of action and remedies.

66 Pa. C.S. § 103(c).

41. Under Section 103(c), a utility customer may seek equitable, common law, or statutory remedies that *may be available*. However, what Section 103(c) does not provide is an alternative or cumulative remedy for customers to challenge a public utility's rates or services. As explained above, the Commission has the exclusive jurisdiction over the rates and services of

² The Commission is without jurisdiction to adjudicate UTPCPL claims. *See Pa. Pub. Util. Comm'n v. The Bell Telephone Company of Pennsylvania*, Docket Nos. R-891200, *et al.*, 1989 Pa. PUC LEXIS 198; 71 Pa. PUC 338 (Nov. 9, 1989) (involving ALJ grant of motion to dismiss claims asserted under the Pennsylvania Unfair Trade Practices and Consumer Protection Law). The Commission also is without jurisdiction to adjudicate contract claims. *See Adams v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003) (concluding that the Commission lacked jurisdiction over private contractual disputes); *see also Fairview Water Co. v. Pa. Pub. Util. Comm'n*, 502 A.2d 162 (Pa. 1985) (holding that the Commission does not have jurisdiction to determine the scope and validity of an easement); *Tucker v. Pa. Pub. Util. Comm'n*, 917 A.2d 378, 380 (Pa. Cmwlth. 2007) (holding that the Commission lacks jurisdiction to adjudicate matters relating to negotiable instruments).

public utilities. Although a utility customer may seek equitable, common law, or statutory remedies against a public utility that are *unrelated* to rates and services, such remedies are simply unavailable to challenge the rates and services of a public utility.

42. The Commission has extensive rules in place governing the billing practices of utilities. *See* 66 Pa. C.S. §§ 1401-1418, 52 Pa. Code Chapter 56. If Complainant is permitted to bring tariff and billing related complaints to civil courts through claims based upon other statutory or common law provisions, this will disrupt the legislative intent to commit to the Commission the authority to regulate utilities. *See, e.g., Chester County v. Philadelphia Electric Co.*, 420 Pa. 422, 425, 218 A.2d 331, 332 (1966) (“The State, speaking through the Public Utility Law ... has given the Public Utility Commission all-embracing regulatory jurisdiction over companies such as the defendant company in this case.”) (citation omitted).

43. As explained above, the allegations and claims in the Complaint arise from and are related solely to Aqua’s Commission-approved tariff and the rates charged pursuant thereto. Because such claims are within the exclusive jurisdiction of the Commission, the remedies under UTPCPL, conversion, and contract principles are not available for Complainant’s utility-rate claim, either before this Commission or otherwise.

44. For these reasons, Complainant’s claims for violation of the UTPCPL, conversion, and breach of contract must be dismissed in their entirety and with prejudice.

C. The Relief Sought in the Complaint is Not Available.

45. Aqua incorporates by reference Paragraphs 1 through 44, *supra*, as though set forth fully herein.

46. The Complaint requests the following relief: actual and statutory damages under the UTPCPL; damages to compensate Complainant for losses, as well as punitive damages and all permissible fees; and damages to compensate Complainant for the amount Complainant was

required to pay, together with interest, a penalty of 50%, and all court costs and attorneys' fees. (See Complaint, Statement of Facts and Request for Relief, pp. 7-10.)

47. As explained above, the claims and allegations set forth in the Complaint relate solely to Aqua's Commission-approved DSIC surcharge rate. Therefore, Complainant's utility-rate claim is within the exclusive jurisdiction of the Commission. Consequently, Complainant's claims for relief for the alleged violation of the UTPCPL, conversion, and breach of contract simply are not available for Complainant's utility-rate claim, either before this Commission or otherwise.

48. Furthermore, the Commission does not have the authority to order a public utility to pay monetary damages. See *Diane M. Hamilton and Eva J. Hamilton v. Verizon Pa., Inc.*, Docket No. C-2009-2135715, 2010 Pa. PUC LEXIS 234 at *8 (July 28, 2010) (Finalized Initial Decision) (citing *DeFrancesco v. Western Pennsylvania Water Co.*, 499 Pa. 374, 453 A.2d 595 (1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977)). In addition, the Commission does not have general authority to order payment of attorneys fees. See *MCI WorldCom, Inc. v. Bell Atlantic-Pa.*, Docket No. C-00993005, 2000 Pa. PUC LEXIS 67 (Dec. 21, 2000) (dismissing claims for attorneys' fees and costs for lack of jurisdiction). Consequently, Complainant's claims for compensatory damages, punitive damages, 50% penalty, interest, costs, and attorneys' fees must be dismissed.

49. Finally, the Complaint fails to state a basis for refund under Section 1312 of the Public Utility Code. Section 1312 provides, in pertinent part, as follows:

General Rule. If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority

to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive. Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility. The commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact.

66 Pa. C.S. § 1312(a).

50. The Complainant is not entitled to a refund pursuant to Section 1312 of the Public Utility Code, because, as explained above, at all times material hereto, Aqua has issued customer bills and collected the DSIC surcharge in accordance with the Pennsylvania Public Utility Code, the orders, regulations and policies of the Commission, and the terms and conditions of Aqua's Commission-approved tariff. There is nothing in the Complaint to suggest otherwise. Accordingly, under the plain language of Section 1312, Complainant is not entitled to a refund related to Aqua's DSIC surcharge.

51. Further, as the Commonwealth Court of Pennsylvania has found:

Section 1312 authorizes refunds only when the record will support a finding that the utility's rates during the refund period were unlawful or in violation of the utility's tariff or unjust or unreasonable, that is, productive of revenues unreasonably advantageous to the utility's owners as in excess of a fair return on the fair value of the utility's property used in providing public service.

Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n, 464 A.2d 565-66 (Pa. Cmwlth. 1983). Applying surcharges, such as the Aqua DSIC surcharge, on a bills rendered basis does not place any customer at a disadvantage. *See Petition of Nat'l Fuel Gas Distrib. Corp.*, Docket No. P-850075, 1986 Pa. PUC LEXIS 132 (Feb. 28, 1986) (holding that a surcharge applied on a bills

rendered basis does not place customers at a disadvantage because the surcharge is designed to recover the recoupment amount over the application period).

52. In addition, the refund sought by Complainant would violate the “Commission-made rates” doctrine. The “Commission-made rates” doctrine prevents the Commission from ordering refunds of monies collected by a utility under authority of a prior Commission-approved tariff. *Duquesne Light Co. v. Pa. Pub. Util. Comm’n*, 507 A.2d 433, 438 (Pa. Cmwlth. 1986). As explained above, Aqua’s Commission-approved tariff applies the DSIC surcharge on a “bills issued” or “bills rendered” basis, rather than on a “service rendered” basis.

53. Finally, the refund sought by Complainants would amount to impermissible retroactive ratemaking. “The [Commission] clearly may not establish rates which are calculated to retroactively recover surpluses or refund deficits created by inaccuracies in its prior rate authorizations.” *Popowsky v. Pa. Pub. Util. Comm’n*, 868 A.2d 606, 609 (Pa. Cmwlth. 2004). Therefore, to the extent that Complainants are entitled to any relief, which Aqua denies, such relief may only be prospective.

54. For these reasons, Complainant is not entitled to the relief sought in the Complaint and, therefore, the Complaint should be dismissed in its entirety and with prejudice.

IV. CONCLUSION

55. Aqua incorporates by reference Paragraphs 1 through 54, *supra*, as though set forth fully herein.

56. The allegations and claims in the Complaint arise from and are related solely to Aqua’s Commission-approved tariff and the rates charged pursuant thereto. Consequently, the Commission has the exclusive jurisdiction over the Complainant’s utility-rate claim.

57. Since the Commission's approval of Supplement No. 35, Aqua's DSIC surcharge has been applied on "bills issued" or "bills rendered" basis, rather than on a "service rendered" basis. There is a distinct difference and purpose for rates effective on a "bills rendered" and "service rendered" basis. In this case, the Commission authorized Aqua to apply the DSIC surcharge to customers' bills on a "bills issued" or "bills rendered" basis. There is nothing in the Complaint to contest or otherwise refute the fact that, at all times material hereto, that Aqua has issued customer bills and collected the DSIC surcharge in accordance with the terms and conditions of its Commission-approved tariff.

58. This case does not involve disputed questions of fact. The questions presented are matters of well-settled law. A hearing in this matter would be a fruitless exercise. For these reasons, as more fully explained above, Aqua is entitled to judgment on the pleadings and the above-captioned Complaint should be dismissed in its entirety and with prejudice.

WHEREFORE, Aqua Pennsylvania, Inc. respectfully requests that the Honorable Administrative Law Judge Conrad A. Johnson enter an order dismissing the above-captioned Complaint in its entirety and with prejudice.

Respectfully submitted,



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Of Counsel:

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Date: July 22, 2011

Attorneys for Aqua Pennsylvania, Inc.

Appendix A

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held August 22, 1996

Commissioners Present:

John M. Quain, Chairman
Lisa Crutchfield, Vice Chairman
John Hanger
Robert K. Bloom

Petition of Philadelphia Suburban Water
Company for Approval to Implement a
Tariff Supplement Establishing a
Distribution System Improvement Charge

Docket No. P-00961036

OPINION AND ORDER

THE COMMISSION:

I. Background

On March 20, 1996, the Philadelphia Suburban Water Company (PSWC or company) filed the above-referenced petition with this Commission requesting regulatory approval to file and implement an automatic adjustment clause tariff that would establish a Distribution System Improvement Charge (DSIC or surcharge) pursuant to Section 1307(a) of the Public Utility Code, 66 Pa.C.S. §1307(a). Section 1307(a) provides statutory authority for a utility to establish, subject to Commission review and approval, a tariffed automatic adjustment clause mechanism designed to provide "a just and reasonable return on the rate base" of the public utility.

As proposed by PSWC, the DSIC would operate to recover the fixed costs (depreciation and pre-tax return) of certain non-revenue producing, non-expense reducing infrastructure rehabilitation projects completed and placed in service between Section 1308 base rate cases. The company maintains that the property additions eligible for the DSIC will be limited to revenue neutral infrastructure projects, consisting principally of replacement investments in so-called "mass property" accounts. The DSIC is designed to provide the company with the resources it needs to accelerate its investment in new utility plant to replace aging water distribution infrastructure, facilitating compliance with evolving regulatory requirements imposed by the Safe Drinking Water Act (SDWA) and the implementation of solutions to regional water supply problems.

To illustrate its point, the company states that it has 3,180 miles of mains, that it is currently rehabilitating approximately 15 miles of main each year, and that, at that pace, it would require approximately 212 years to make all of the needed improvements to existing facilities. The company also states that water service, more than any other utility service, is critical to maintaining public health as water is "a necessity of life and vital for public fire protection services." Petition at 3.

The company alleges that the DSIC may enable it to break out of a cycle, imposed on it by its capital investment needs, of filing base rate relief every 15 months. Any reduction in rate case filing frequency would generate costs savings which would inure to the benefit of customers and the Commission. In its petition, the company proposes certain accounts

for recovery, time-frames and other procedures to be followed in implementing the DSIC. The details of those procedures will be discussed below.

To begin with, the company proposes that the DSIC become effective for service rendered on and after July 1, 1996. The company also proposes that the initial charge to be calculated would recover the fixed costs of eligible plant additions that have not previously been reflected in the company's rate base and will have been placed in service between January 1, 1996 and May 31, 1996. Thereafter, the company proposes to update the DSIC on a quarterly basis to reflect eligible plant additions placed in service during the three-month periods ending one month prior to the effective date of each DSIC update. Petition at 3-4.

The company also proposes that the DSIC be capped at 5% of the amount billed to customers under otherwise applicable rates and charges, exclusive of amounts recovered under the State Tax Adjustment Surcharge (STAS). If the cap is reached, the company would not seek any additional increases. Petition at 4.

As with any Section 1307 automatic adjustment clause, the DSIC will be subject to an annual reconciliation, whereby the revenue received under the DSIC for the reconciliation period will be compared to the Company's eligible costs for that period. The difference between such revenues and costs will be recouped or refunded to customers, as appropriate, in accordance with Section 1307(e). Petition at 5.

Lastly, in terms of procedures, the company proposes that the DSIC will be reset to zero as of the effective date of new Section 1308 base rates that provide for prospective

recovery of the annual costs that had previously been recovered under the DSIC. Petition at 5. And to avoid over recovery of costs in the absence of a base rate case, the company also proposed that the DSIC will be reset to zero if, in any quarter, data filed with the Commission in the company's then most recent Annual or Quarterly Earnings Report shows that the company will earn a rate of return that would exceed the rate of return used to calculate its fixed costs under the DSIC. Petition at 5.

In terms of the legal issues raised by its petition, the company also states that its proposed automatic adjustment clause and procedures are lawful for a number of reasons found in statutory and case law. With regard to statutory law, PSWC states that Section 1307(a) of the Public Utility Code, 66 Pa. C.S. §1307(a), provides that a company may establish a sliding scale of rates or such other method for the automatic adjustment of the rates to recover a variety of costs. Petition at 19. Moreover, the company has cited circumstances in which the Commission has authorized the use of Section 1307 (a) automatic adjustment clauses to recover a wide array of expenses, depreciation and capital costs. See Pennsylvania Industrial Energy Coalition v. Pa. P.U.C., 653 A.2d 1336 (Pa. Cmwlth. 1995) (PIEC) (recovery of electric utilities' demand-side management costs); 52 Pa. Code §69.181 (recovery of gas utilities' take or pay liabilities to pipeline suppliers); 52 Pa. Code §69.341(b) (recovery of gas utilities' gas supply realignment costs and stranded costs resulting from Federal Energy Regulatory Commission Order 636); and 52 Pa. Code §69.353 (recovery of water utilities' principal and interest due on PennVEST obligations). Petition at 20-21.

*
Answers were filed by the Office of Trial Staff (OTS) (Answer filed April 9, 1996), the Office of Small Business Advocate (OSBA) (Answer filed May 3, 1996) and the Office of Consumer Advocate (OCA) (Comments and testimony filed May 6, 1996). Protests to the petition were also filed by many individual customers.

In its answer, the OTS requests that the Commission deny the company's petition based on legal and technical grounds. With regard to the legal objections, the OTS argues that, since the facilities are "new" facilities, the company is attempting to circumvent a base rate review through the use of a surcharge, in violation of the Court's decision in PIEC.

The OSBA's answer did not submit legal arguments opposing the implementation of the DSIC. Rather, the OSBA has requested that the Commission conduct a thorough investigation regarding the reasonableness and lawfulness of the proposed tariff supplement as they affect the company's various customer classes.

In its comments, the OCA argues against the implementation of the DSIC alleging that the company does not need the DSIC mechanism and that implementation of a DSIC mechanism would provide in excess of a fair return to the company. With regard to legal arguments, OCA challenges the legality of the surcharge based upon the same arguments outlined in OTS' answer based on its interpretation of Section 1307(a) and the PIEC decision.

On May 30, 1996, the company filed a reply with the Commission addressing the comments raised in the answers filed by OTS, OSBA and OCA. The OCA then filed a response to this reply on June 19, 1996. In PSWC's reply to the various parties concerning the legality of the DSIC, the company continued to support the legality of a surcharge under

Section 1307(a) of the Public Utility Code and the Commonwealth Court decision in PIEC, and supplied rebuttal arguments in support of its need for the DSIC and the legality of its proposal.

II. Discussion

At the outset of this discussion regarding the PSWC petition, we believe it necessary to clarify the Commission's view of the scope of this proceeding and the nature of the PSWC proposal. Because the PSWC petition requests regulatory approval to file and implement a certain type of automatic adjustment clause, we will not address, in this order, the specific factual issues that may be raised by the proposed tariff supplement submitted as Exhibit A to the petition. The Commission views the tariff supplement in Exhibit A as no more than the company's proposal as to how such an automatic adjustment clause should be structured. Indeed, as explained below, the specific tariff supplement proposed by PSWC will not be approved by this order.

Therefore, to the extent that parties have objections and/or complaints to the rates to be charged by means of an automatic adjustment clause that provides for the recovery of a water company's infrastructure improvement costs, those objections and/or complaints would be appropriately addressed to an actual PSWC tariff filing that contains specific rates to be charged to consumers based on specific distribution system improvement expenditures. A Section 701 complaint would be the appropriate procedural vehicle to challenge such a tariff filing and, provided that factual issues are raised, the filing of such a complaint will

entitle the complainant to a hearing before an administrative law judge and an adjudication of the complaint.

Thus, the key issues raised by the PSWC petition, and to be resolved in this order, are generic threshold issues regarding (1) the legality of the type of automatic adjustment clause proposed by the company and (2) the appropriate general structure of such an automatic adjustment clause that conforms to the requirement of the statute and Pennsylvania case law. In other words, this proceeding will address the legal issue concerning the adoption of the surcharge pursuant to Section 1307(a) of the Code. In addition, the Commission will outline the general parameters of a surcharge mechanism that meets the requirement of the statute, that is consistent with the case law, that has adequate safeguards to protect consumers' interests and, therefore, constitutes a surcharge that is likely to receive regulatory approval when filed.

To begin with, we applaud companies who present this Commission with innovative ideas to address recurring problems for their respective industries. In the water industry, companies are faced with the dual tasks of improving the quality of the water delivered to customers due to the new mandates of the SDWA and other governmental requirements and, at the same time, maintaining an aging water utility infrastructure. We recognize that, in recent years, PSWC and other Pennsylvania water companies have been required to make significant investments in new utility plant for projects such as: the filtration of surface water supplies; the replacement of aging water distribution plant; and, the implementation of meter replacement programs. In addition, water companies face the daunting challenge of

rehabilitating their existing distribution infrastructure before the property reaches the end of its service life to avoid serious public health and safety risks.

In the Commission's judgement, the establishment of a DSIC along the lines proposed by PSWC can substantially aid the water company in meeting these challenges on behalf of the water consuming public. We agree with the company that the establishment of a DSIC would enable the company to address, in an orderly and comprehensive manner, the problems presented by its aging water distribution system, and would have a direct and positive effect upon water quality, water pressure and service reliability. For these reasons, we endorse the concept of using an automatic adjustment clause to address this regulatory problem for the water industry in Pennsylvania and, in particular, the type of DSIC proposed by PSWC.

A. Legal Issues

In Pennsylvania, utility costs are recovered from customers through Section 1308 base rates and through Section 1307 automatic adjustment clauses. The purpose of a Section 1307 automatic adjustment clause is to provide an automatic mechanism enabling utilities to recover specific costs not covered by general rates. Allegheny Ludlum Steel Corporation v. Pa. P.U.C., 501 Pa. 71, 75 n.3, 459 A.2d 1218, 1220 n.3 (1983). Moreover, Section 1307(e), 66 Pa. C.S. §1307(e), provides that the automatic adjustment clause procedures shall include an annual report detailing the revenues collected and the expenses incurred under the automatic adjustment clause, followed by a public hearing to reconcile the amounts and to determine any refunds owed to customers or additional recovery due from customers.

Until recently, an automatic adjustment clause has usually been applied only to gas and electric companies. However, the Commission has provided for the recovery of capital costs in at least one instance to date, i.e., for PECO Energy's costs to convert oil-fired units to units which burn natural gas. Philadelphia Electric Co. ECR No.3, Docket No. M-00920312 (Order adopted April 1, 1993). The Commission has also adopted a policy statement which encourages water companies to seek Section 1307(a) cost recovery for their PENNVEST debt costs, 52 Pa. Code §69.361, and policy statements approving Section 1307 cost recovery for certain FERC Order 636 stranded costs, 52 Pa. Code §69.341(b)(4), and electric utility coal uprating costs, 52 Pa. Code §57.124(a). Moreover, since 1970, the Commission has authorized all utilities to use an automatic adjustment clause mechanism to recover certain incremental changes in state tax rates. 52 Pa. Code §69.44.

Pennsylvania case law regarding the permissible scope of Section 1307 cost recovery, while not extensive, supports a broad interpretation of that section. In National Fuel Gas Distribution Corp. v. Pa. P.U.C., 473 A.2d 1109, 1121 (Pa. Cmwlth. 1984), the Commonwealth Court held that the purpose of Section 1307 of the Code is to permit reflection in customer charges of changes in one component of a utility's cost of providing public service without the necessity of the "broad, costly and time-consuming inquiry" required in a Section 1308 base rate case. Moreover, under the 1995 PIEC decision, the Commonwealth Court adopted the Commission's legal position that its use of Section 1307 was not limited to fuel and purchased power costs. At the same time, the Commonwealth Court cautioned that Section 1307 should have limited application and should not override

the traditional ratemaking process. PIEC at 1349. In determining whether DSM costs could be recovered through the Section 1307 mechanism, the Court wrote:

Although we agree that Section 1307 should have limited application and the PUC should not use it to disassemble the traditional rate-making process, the General Assembly did not limit the allowance of automatic adjustment to only fuel costs and taxes which are generally beyond the control of the utility. Instead, the General Assembly specifically allowed the recovery of fuel costs and also allowed the PUC or the utilities to initiate the automatic adjustment of costs within specific procedures....In this case, Section 1319 of the Code specifically states that all prudent and reasonable costs should be recovered and sets forth requirements that the proposed programs be determined to be "prudent and cost-effective" by the PUC (or the Bureau of Conservation, Economics and Energy Planning as designated by the PUC), before any costs may be recovered through the surcharge mechanism.

PIEC at 1349 (emphasis added). The Court then concluded that the recovery of DSM costs under Section 1307 was lawful because the language of Section 1307 gives the Commission discretion to establish automatic adjustment clauses for the recovery of prudently incurred costs, and because in Section 1319 the legislature specifically identified and provided for the recovery of prudent and reasonable costs for developing DSM programs.

Clearly, the Court in PIEC recognized the importance of the statute (Section 1319) in providing for the recovery of development costs of the DSM programs via Section 1307. However, the Court also recognized that the language of Section 1307 is not limited to a narrow set of costs (as advocated by the industrials), that whether the costs at issue should be recovered via an automatic adjustment clause is a matter of Commission discretion, and

that the court "is not free to substitute its discretion for the discretion properly exercised by the PUC in establishing the surcharge method." PIEC at 1349.

Turning to the PSWC proposal to file and implement an automatic adjustment clause to recover its distribution system improvement costs, we find that the proposal is appropriately limited and narrowly tailored to recover a specific category of utility costs - the incremental fixed costs (depreciation and pre-tax return) associated with non-revenue producing, non-expense reducing distribution system improvement projects completed and placed in service between base rate cases. Recovery of this narrow set of costs is clearly permitted under Section 1307 (a) (which has no cost category limitation in its language) and Pennsylvania case law; and, in the Commission's judgment, this proposal is in no way a mechanism to "disassemble" the traditional ratemaking process for several reasons: first, the DSIC is designed to identify and recover the distribution system improvement costs incurred between rate cases; second, the costs to be recovered represent a narrow subset of the company's total cost of service; and third, the DSIC amount will be capped at a relatively low level to prevent any long-term evasion of a base rate review of these plant costs. Indeed, the company's proposal recognizes that there will be a full review of these costs in a subsequent Section 1308 base rate proceeding. We also note that the DSIC is designed to reflect only the costs of the eligible plant additions that are actually placed in service during the 3-month periods ending one month prior to the effective date of each surcharge update; this key provision serves to avoid any potential violation of Section 1315 and this state's long-standing "used and useful" rule.

Additionally, we find that Sections 1307(d) and (e) provide broad auditing powers to the Commission and a formal reconciliation mechanism to carefully monitor the operation of such a surcharge. While admittedly Section 1307(d) is addressed to fuel cost adjustment audits, we do not view the Commission's auditing power over automatic adjustment clauses as limited to only fuel costs, given the broad auditing and investigative powers granted to the Commission via Sections 504, 505, 506, and 516 of the Public Utility Code. 66 Pa. C. S. §§504, 505, 506, 516. Nor would we be likely to approve a utility's request for approval of an automatic adjustment clause in the absence of its complete agreement that the Commission has such auditing powers. Moreover, Section 1307(e) provides for a mandatory annual reconciliation report regarding the revenues and expenses recovered via an automatic adjustment clause and a "public hearing on the substance of the report and any matters pertaining to the use by such public utility" of the automatic adjustment clause. As such, the costs to be recovered via the company's DSIC proposal will be subject to the Commission's auditing powers, an annual reconciliation report and public hearings.

B. General Tariff Parameters

The basic elements of a tariff supplement to implement a lawful DSIC mechanism include a statement of purpose and description of eligible property, a specification of its effective date and the dates of its subsequent quarterly updates, details regarding the computation methodology, and appropriate consumer safeguards. The proposed tariff supplement included with the PSWC petition, as Exhibit A, includes most of these elements but, in the Commission's judgment, certain elements should be modified in order to

adequately protect consumer interests and to comply with Section 1307. In order to provide guidance to PSWC and any other water utility that may need to implement a DSIC, the Commission has developed sample tariff language that, if used in a water utility's Section 1307 proposed tariff supplement, is likely to receive the Commission's approval. The sample tariff language is contained in Attachment A to this order.

* The major differences between the tariff supplement proposed by PSWC and the sample tariff language in Attachment A can be summarized as follows:

- specification of the eligible plant accounts by type and account number;
- provision to include recovery of main extensions installed to implement solutions to regional water supply problems that have been documented as presenting a significant public health and safety concern to existing customers;
- ~~specification that the costs of projects funded by PENNVEST loans are~~
~~not eligible;~~
- * provision of a prospective January 1, 1997 effective date for the tariff supplement and the property eligible for the initial filing;
- if more than 2 years have elapsed since the utility's last base rate case, use of the equity return rate determined by staff and specified in the latest Quarterly Earnings Report released by the Commission;
- greater specification of the depreciation and pretax return elements in the formula to calculate the DSIC;

- added provision to provide interest to consumers for any over recoveries during operation of the DSIC; and
- provision for customer notice of any DSIC changes.

Thus, use of the sample tariff language will fully explain the DSIC computation, including a listing of DSIC eligible property and related account numbers, so that in future years the purpose and intent of the DSIC surcharge will be apparent from reading only the tariff supplement. Additionally, the inclusion of plant account numbers and descriptions of property eligible for DSIC cost recovery parallels the format used for other Section 1307 surcharges, such as the ECR for electric utilities, the GCR for gas distribution utilities and the SCR for steam heat companies.

With these changes to PSWC's proposal, the eligible property, filing dates, parameters, and consumer safeguards have been significantly strengthened. In particular, we note here that the provisions (1) for resetting the DSIC to zero if the company's rate of return exceeds its allowable rate of return, and (2) for resetting the DSIC to zero as of the effective date of new Section 1308 base rates that provide for prospective recovery of the eligible plant costs both serve as effective and reliable rate mechanisms to insure that the DSIC automatic adjustment clause will not produce rates in excess of a fair return to the utility, as required by Section 1307(a). We also note that the provision of a 5% of billed revenues cap on the maximum amount of any DSIC insures that the surcharge mechanism will not evade the Section 1308 base rate process and its intensive top-to-bottom review of all company revenue, expense, rate base and return claims. See Attachment A, p.4. In other words, the

5% cap will insure that the surcharge will not allow the company to avoid a base rate review of the eligible property in perpetuity.

Accordingly, although we are denying the PSWC petition to the extent that it requests permission to file and implement a Section 1307(a) tariff supplement to implement a surcharge as set forth in its Exhibit A, we invite the company to file a new tariff supplement consistent with the parameters outlined in the sample tariff language set forth in Attachment A to this order. The sample tariff language in Attachment A is identical to that recommended for the Pennsylvania-American Water Company at Docket No. P-00961031 which has also requested permission to file a DSIC surcharge..

As with other Section 1307 tariff filings, the new tariff supplement should provide for a notice period of no less than 60 days to allow sufficient time for staff review of the proposed tariff supplement and its initial rates for consistency with the sample tariff language and for accuracy of the plant account, depreciation, pre-tax return and other elements of the DSIC calculation. If recommended for approval by staff and formally approved by the Commission, the tariff supplement and initial rates to implement the DSIC will be permitted to go into effect, subject to the outcome of any timely filed complaints. Subsequent quarterly updates, however, may be filed on 10 days notice as originally proposed by the company.

THEREFORE,

IT IS ORDERED:

1. That the petition filed by the Philadelphia Suburban Water Company (PSWC) to file and implement a Section 1307(a) automatic adjustment clause tariff that would establish a Distribution System Improvement Charge (DSIC) is hereby approved in part and denied in part consistent with this order.

2. That all protests, answers and other objections filed with respect to the PSWC petition are hereby granted in part and denied in part consistent with this order.

3. That any complaints regarding the rates to be charged pursuant to a DSIC tariff supplement may be filed if and when PSWC files a tariff supplement with specific rates in accordance with the tariff parameters outlined by this order.

4. That the parameters set forth in the Appendix A are hereby adopted to serve as sample tariff language to be implemented for tariff supplements to establish a DSIC.

5. That the normal auditing, reconciliation, reporting and public hearing procedures applicable to all 1307(e) filings will likewise apply to all DSIC tariff supplements.

*
6. That this order be published in the Pennsylvania Bulletin.

7. That this order be served upon Philadelphia Suburban Water Company, the Office of Consumer Advocate, the Office of Small Business Advocate, the Office of Trial Staff and the National Association of Water Companies.

BY THE COMMISSION,

John G. Alford
John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: August 22, 1996

ORDER ENTERED: AUG 26 1996

Sample Tariff Language

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE (DSIC)

I. General Description

Purpose: To recover the fixed costs (depreciation and pre-tax return) of certain non-revenue producing, non-expense reducing distribution system improvement projects completed and placed in service and to be recorded in the individual accounts, as noted below, between base rate cases and to provide the Company with the resources to accelerate the replacement of aging water distribution infrastructure, to comply with evolving regulatory requirements imposed by the Safe Drinking Water Act and to develop and implement solutions to regional water supply problems. The costs of extending facilities to serve new customers are not recoverable through the DSIC. Also, Company projects receiving PENNVEST funding are not DSIC-eligible property.

Eligible Property: The DSIC-eligible property will consist of the following:

- services (account 323), meters (account 324) and hydrants (account 325) installed as in-kind replacements for customers;
- mains and valves (account 322) installed as replacements for existing facilities that have worn out, are in deteriorated condition, or upgraded to meet Chapter 65 regulations of Title 52;
- main extensions (account 322) installed to eliminate dead ends and to implement solutions to regional water supply problems that have been documented as presenting a significant health and safety concern for customers currently receiving service from the Company or the acquired Company;
- main cleaning and relining (account 322) projects; and
- unreimbursed funds related to capital projects to relocate Company facilities due to highway relocations.

Effective Date: The DSIC will become effective for bills rendered on and after January 1, 1997.

II. Computation of the DSIC

Calculation: The initial charge, effective January 1, 1997, shall be calculated to recover the fixed costs of eligible plant additions that have not previously been reflected in the Company's rate base and will have been placed in service between September 1, 1996, and November 30, 1996. Thereafter, the DSIC will be updated on a quarterly basis to reflect eligible plant additions placed in service during the three-month periods ending one month prior to the effective date of each DSIC update. Thus, changes in the DSIC rate will occur as follows:

<u>Effective Date of Change</u>	<u>Date To Which DSIC-Eligible Plant Addition Reflected</u>
April 1	February 28
July 1	May 30
October 1	August 31
January 1	November 30

The fixed costs of eligible distribution system improvement projects will consist of depreciation and pre-tax return, calculated as follows:

Depreciation: The depreciation expense will be calculated by applying to the original cost of DSIC-eligible property the annual accrual rates employed in the Company's last base rate case for the plant accounts in which each retirement unit of DSIC-eligible property is recorded.

Pre-tax return: The pre-tax return will be calculated using the state and federal income tax rates, the Company's actual capital structure and actual cost rates for long-term debt and preferred stock as of the last day of the three-month period ending one month prior to the effective date of the DSIC and subsequent updates. The cost of equity will be the equity return rate approved in the Company's last fully-litigated base rate proceeding for which a final order was entered not more than two years prior to the effective date of the DSIC. If more than two years shall have elapsed between the entry of such a final order and the effective date of the DSIC, then the equity return rate used in the calculation will be the equity return rate calculated by the Commission Staff in the latest Quarterly Report on the Earnings of Jurisdictional Utilities released by the Commission.

III. Safeguards

Cap: The DSIC will be capped at 5% of the amount billed to customers under otherwise applicable rates and charges.

Audit/Reconciliation: The DSIC will be subject to audit at intervals determined by the Commission. It will also be subject to annual reconciliation based on a reconciliation period consisting of the 12 months ending December 31 of each year. The revenue received under the DSIC for the reconciliation period will be compared to the Company's eligible costs for that period. The difference between revenue and costs will be recouped or refunded, as appropriate, in accordance with Section 1307(e), over a one year period commencing on April 1 of each year. If DSIC revenues exceed DSIC-eligible costs, such overcollections will be refunded with interest. Interest on the overcollections will be calculated at the residential mortgage lending specified by the Secretary of Banking in accordance with the Loan Interest and Protection Law (41 P. S. sec.101, et seq.) and will be refunded in the same manner as an overcollection.

New Base Rates: The charge will be reset at zero as of the effective date of new base rates that provide for prospective recovery of the annual costs that had theretofore been recovered under the DSIC. Thereafter, only the fixed costs of new eligible plant additions, that have not previously been reflected in the Company's rate base, would be reflected in the quarterly updates of the DSIC.

Earning Reports: The charge will also be reset at zero if, in any quarter, data filed with the Commission in the Company's then most recent Annual or Quarterly Earnings reports show that the Company will earn a rate of return that would exceed the allowable rate of return used to calculate its fixed costs under the DSIC as described in the Pre-tax return section.

Customer Notice: Customers shall be notified of changes in the DSIC by including appropriate information on the first bill they receive following any change. An explanatory bill insert shall also be included with the first billing.

Appendix B

ISSUED: December 20, 1996

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EFFECTIVE: January 1, 1997
Supplement No. 34

Philadelphia Suburban Water Company

to
WATER-PA.P.U.C.NO. 15

SEVENTH REVISED PAGE NO. 10

CANCELLING SIXTH REVISED PAGE NO. 10

R I D E R

STATE TAX SURCHARGE APPLICABLE TO ALL RATES

In addition to the net charges provided for in this Tariff, a surcharge of 0.00% will apply to all service rendered on and after October 27, 1995.

The above surcharge will be recomputed, using the same elements prescribed by the Commission:

- (a) Whenever any of the tax rates used in the calculation of the surcharge are changed;
- (b) Whenever the utility makes effective increased or decreased rates; and
- (c) On March 31, 1971, and each year thereafter.

The above recalculation will be submitted to the Commission within 10 days after the occurrence of the event or date which occasioned such recomputation; and if the recomputed surcharge is less than the one in effect, the utility will, and if the recomputed surcharge is more than the one in effect, the utility may, submit with such recomputation a tariff or supplement to reflect such recomputed surcharge, the effective date of which shall be 10 days after filing.

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE (DSIC)

(C)

In addition to the net charges provided for in this Tariff, a surcharge of 0.50% will apply to all service, excluding public fire hydrants, rendered on or after January 1, 1997.

I. General Description

Purpose: To recover the fixed costs (depreciation and pre-tax return) of certain non-revenue producing, non-expense reducing distribution system improvement projects completed and placed in service and to be recorded in the individual accounts, as noted below, between base rate cases and to provide the Company with the resources to accelerate the replacement of its aging water distribution infrastructure, to comply with evolving regulatory requirements imposed by the Safe Drinking Water Act and to develop and implement solutions to regional water supply problems. Company projects receiving PENNVEST funding are not DSIC - eligible property.

Eligible Property: The DSIC-eligible property will consist of the following:

- services (account 323), meters (account 324) and hydrants (account 325) installed as in-kind replacements for customers;

(C) Indicates Change

Issued: December 20, 1996

-10-

EFFECTIVE: January 1, 1997

Appendix C



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

March 29, 2000

IN REPLY PLEASE
REFER TO OUR FILE

Mr. Robert M. Griffin
Manager of Rates
Philadelphia Suburban Water Company
762 West Lancaster Avenue
Bryn Mawr, PA 19010-3489

RE: Philadelphia Suburban Water Company
Distribution System Improvement Charge (DSIC)

Dear Mr. Griffin:

The Bureau of Audits has reviewed the Company's quarterly updated DSIC filing proposed to become effective April 1, 2000. We have found the proposed DSIC rate of 5.00% to be appropriate for application to billings commencing April 1, 2000.

During our review we noted that the estimated December 31, 1999, DSIC undercollections of \$35,458 had not been incorporated into the April 1 DSIC rate. Second revised page 20B to Supplement No. 14 to the Company's Tariff provides for the recognition of each year's over or undercollections in the DSIC rate commencing April 1 of each year. It is our understanding that recognition of the actual over or undercollections in the April rate is not possible due to the Company's application of the DSIC on a service, rather than a bills rendered, basis. We understand, based on discussions with the Company, that it will investigate this matter and, if appropriate, file a revised tariff supplement to remedy the situation. Any revised tariff supplement will be filed no later than June 20, 2000.

The Bureau of Audits appreciates the Company's cooperation and assistance regarding any DSIC rider modifications. The DSIC is subject to continuous Commission review and audit.

Sincerely,

Glenn W. Bartron, CPA
Director
Bureau of Audits

Contact Person: Dennis Dougherty
(717) 787-7234

Appendix D

R I D E R
STATE TAX SURCHARGE APPLICABLE TO ALL RATES

(C) (D)

In addition to the net charges provided for in this Tariff, a surcharge of 0.00% will apply to all bills issued on and after January 8, 2002

The above surcharge will be recomputed, using the same elements prescribed by the Commission:

- (a) Whenever any of the tax rates used in the calculation of the surcharge are changed;
- (b) Whenever the utility makes effective increased or decreased rates; and
- (c) On March 31, 1971, and each year thereafter.

The above recalculation will be submitted to the Commission within 10 days after the occurrence of the event or date which occasioned such recomputation; and if the recomputed surcharge is less than the one in effect, the utility will, and if the recomputed surcharge is more than the one in effect, the utility may, submit with such recomputation a tariff or supplement to reflect such recomputed surcharge, the effective date of which shall be 10 days after filing.

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE (DSIC)

(C) (D)

In addition to the net charges provided for in this Tariff, a surcharge of 0.00 % will apply to all bills issued, excluding public fire hydrants, on or after January 9, 2002.

I. General Description

Purpose: To recover the fixed costs (depreciation and pre-tax return) of certain non-revenue producing, non-expense reducing distribution system improvement projects completed and placed in service and to be recorded in the individual accounts, as noted below, between base rate cases and to provide the Company with the resources to accelerate the replacement of its aging water distribution infrastructure, to comply with evolving regulatory requirements imposed by the Safe Drinking Water Act and to develop and implement solutions to regional water supply problems. Company projects receiving PENNVEST funding are not DSIC - eligible property.

Eligible Property: The DSIC-eligible property will consist of the following:

services (account 323), meters (account 324) and hydrants (account 325) installed as in-kind replacements for customers;

mains and valves (account 322) installed as replacements for existing facilities that have worn out, are in deteriorated condition, or upgraded to meet Chapter 65 regulations of Title 52;

main extensions (account 322) installed to eliminate dead ends and to implement solutions to regional water supply problems that have been documented as presenting a significant health and safety concern for customers currently receiving service from the Company or the acquired Company;

- (C) Indicates Change
- (D) Indicates Decrease

Appendix E

R I D E R
STATE TAX SURCHARGE APPLICABLE TO ALL RATES (I)

In addition to the net charges provided for in this Tariff, a surcharge of 0.0189% will apply to all bills issued on and after April 1, 2011.

The above surcharge will be recomputed using the elements prescribed by the Commission in its policy at 52 PA Code section 69.51 et seq.:

- On or before March 31 of each year; and/or
- Whenever the Company experiences a material change in any of the taxes used in calculation of the surcharge due to a change in the applicable tax rates, or in the basis of calculating such tax rates, or due to changes in the state tax liability arising under the law.

The recalculation will be submitted to the Commission within 10 days after the occurrence of the event which occasions such recomputation or as prescribed in the Commission's regulations or orders. If the recomputed surcharge is less than the one in effect, the utility will, or if the recomputed surcharge is more than the one in effect, the utility may, submit with such recomputation a tariff or supplement to reflect such recomputed surcharge. The effective date of such tariff or supplement shall be 10 days after filing or as prescribed in the Commission's regulations or orders. In the event that the Company files an increased surcharge subsequent to 10 days after the occurrence of an event which occasions a recomputation, the effective date of such tariff or supplement shall be 60 days after filing in accordance with section 1308(a) of the Public Utility Code, 66 C.S. section 1308(a)(regarding voluntary changes in rates) unless otherwise directed by the Commission.

The surcharge shall be rolled into base rates when increased or decreased base rates are made effective

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE (DSIC) (I)

In addition to the net charges provided for in this Tariff, a surcharge of 3.23% will apply to all bills issued, excluding public fire hydrants, on or after April 1, 2011.

I. General Description

Purpose: To recover the fixed costs (depreciation and pre-tax return) of certain non-revenue producing, non-expense reducing distribution system improvement projects completed and placed in service and to be recorded in the individual accounts, as noted below, between base rate cases and to provide the Company with the resources to accelerate the replacement of its aging water distribution infrastructure, to comply with evolving regulatory requirements imposed by the Safe Drinking Water Act and to develop and implement solutions to regional water supply problems. Company projects receiving PENNVEST funding are not DSIC - eligible property.

Eligible Property: The DSIC-eligible property will consist of the following:

services (account 3330), meters (account 3340) and hydrants (account 3350) installed as in-kind replacements for customers;

mains and valves (account 3310) installed as replacements for existing facilities that have worn out, are in deteriorated condition, or upgraded to meet Chapter 65 regulations of Title 52;

main extensions (account 3310) installed to eliminate dead ends and to implement solutions to regional water supply problems that have been documented as presenting a significant health and safety concern for customers currently receiving service from the Company or the acquired Company;

(I) Indicates Increase