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August 10, 2011

VIA FEDERAL EXPRESS OVERNIGHT

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17101

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AUG 10 2011

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Painter v. Aqua Pennsylvania, Inc. (C-2011-2239556)

Dear Ms. Chiavetta:

Enclosed is Complainants' Brief in Opposition to Respondent's Motion for Judgment on the Pleadings in the above-captioned case.

Very truly yours,

DEL SOLE CAVANAUGH STROYD LLC

By: _____


Patrick K. Cavanaugh

Enclosure

cc: Honorable Conrad A. Johnson (w/ enclosure) Via Regular Mail
Christopher T. Wright, Esq. (w/ enclosure) Via Regular Mail

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WALTER PAINTER and DONNA)	
PAINTER, on behalf of themselves and all)	
others similarly situated,)	
)	
Complainants,)	C-2011-2239556
)	
v.)	
)	
AQUA PENNSYLVANIA, INC.,)	
)	
Respondent.)	

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

TO ADMINISTRATIVE LAW JUDGE
CONRAD A. JOHNSON:

Complainants Walter and Donna Painter, on behalf of themselves and all others similarly situated, hereby submit this Brief in Opposition to Respondent's Motion for Judgment on the Pleadings, averring as follows:

I. INTRODUCTION

Walter and Donna Painter ("Complainants") originally brought this action against Aqua Pennsylvania, Inc. ("Respondent") in the Court of Common Pleas of Lawrence County, asserting claims of conversion, breach of contract, and violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL). Specifically, Complainants, whose monthly water billing cycle does not run in lock-step correspondence with the calendar month,¹ contend that Respondents failed to pro-rate increases in the DSIC rate to the portion of the bill following the

¹ For example, the Complainants' billing cycle ran from March 2 to April 1 in one of the bills at issue. As explained herein, of the thirty one days in that particular billing cycle, thirty fell before the April 1 effective date of a DSIC rate increase, but Complainants were charged the higher rate for the entire billing cycle.

effective date of the increase—the effective date which was approved by this Commission and represented to customers such as Complainants. It is Complainants’ position that this failure to pro-rate constitutes charges in violation of the Tariff, in that Respondent is collecting the increased rate for portions of Complainants’ billing periods which occur *before* that increased rate is permitted.

Respondent filed preliminary objections seeking dismissal of the action. In a December 13, 2010 Opinion and Order, the Court of Common Pleas issued a stay of the proceedings and transferred the case to the Commission for its ruling on certain issues within its jurisdiction, particularly whether Respondent’s billing practices violate the Commission-approved Tariff. The Court retained jurisdiction and stated that, in light of the Commission’s eventual ruling, it would rule on remaining matters which fell outside the Commission’s statutorily limited competence. *A copy of the Court’s Opinion is attached as Exhibit A.*

Pursuant to the Court’s ruling, Complainants filed a Complaint with the Commission, asserting conversion, breach of contract, UTPCPL, and refund claims. Complainants specifically allege that Respondent is not authorized to charge them increased rates for parts of bills that fall before the effective dates of rate increases. Respondent has filed the instant Motion for Judgment on the Pleadings, claiming that, as a matter of law, Complainants cannot prevail and that this case should be dismissed because it was permitted to charge increased rates prior to their “effective” date under a “bills rendered” billing approach. Respondent bases this position on its own interpretation of the term “bills rendered” but sets forth no authoritative definition of that term.

Underlying Respondent’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 specifically requires that bills be apportioned in an equitable manner.

Finally, Respondent bases its Motion for Judgment on the Pleadings on its own selection of self-serving documents. Complainants have not yet had the opportunity to proceed to discovery and seek other documents to demonstrate that Respondent was not permitted to bill for increases in the DSIC prior to its effective date, or that, at the very least, put Respondent's documents in context. In short, Respondent has failed to demonstrate that it is entitled to judgment as a matter of law and Complainants should be permitted to proceed in this case. Respondent's Motion for Judgment on the Pleadings should be denied.

II. ARGUMENT

A. Respondent's Motion for Judgment on the Pleadings is actually a premature motion for summary judgment.

While Respondent has styled its Motion as one requesting judgment on the pleadings, its reliance on evidence beyond the face of the pleadings themselves reveals that its Motion is actually one requesting premature summary judgment. A "motion for judgment on the pleadings is exclusively limited to the pleadings themselves; no other outside material may be considered." Giddings v. Tartler, 567 A.2d 766, 767 (Pa.Cmwlth. 1989). The exhibits attached to the Respondent's Motion are outside evidence beyond the pleadings and may not be considered. As Respondent's argument relies on such evidence, it must fail at this stage of the proceedings. *Consideration of Respondent's evidence would be appropriate only at the summary judgment stage, after Complainants have been given an opportunity to take discovery and adduce evidence*

countering that presented by Respondent. Accordingly, Respondent's Motion should be denied as premature.

B. There is a genuine issue of material fact as to whether Respondent 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 Respondent'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. Respondent specifically advertised DSIC rate increases and their approved effective dates in the bills that it sent to its customers. For example, the bill immediately following the July 1, 2009 DSIC increase stated: "*Effective July 1, 2009*, the allowable DSIC charge is 5.00%." The plain language of both the governing Tariff and Respondent's billing statements demonstrate that there is a specific effective date for the rate increases. However, Respondent did not adhere to the effective dates. Its billing practices applied the increased rate to those portions of a customer's bill which occurred *before* the 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 the effective date of the increase. Respondent nevertheless charges the customer the increased rate for the entire period. As such, for those portions of its customers' bills for which Respondent charges the increased rate before the effective date set forth in the Tariff, Respondent is in violation of Section 1303 of the Public Utility Code, which requires both that a utility only charge the rates permitted by the

Commission-approved Tariff and “compute bills under the rate most advantageous to the patron.”² Respondent failed to adhere to either.

Respondent’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, it claims, is permitted on a “bills rendered” rather than “services rendered” basis. Although Respondent 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 approved effective date. While Complainants do not question that the increased DSIC may be collected from customers on the portion of their bill arising after the effective date, Respondent has not demonstrated that it may collect the increased rate for portions of the bill prior to the effective date of the increase permitted by the Tariff. To do so would run counter to the Public Utility Code and the very concept of an “effective date.”

Respondent first cites to the Commission’s August 22, 1996 Order (attached as Exhibit A to Respondent’s Brief) which gave Philadelphia Suburban Water Company authorization to

² “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 lesser rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility 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 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.

begin imposing a DSIC charge on its customers.³ Complainants do not dispute that, pursuant to this Order, the Respondent has the right to charge the DSIC and to periodically raise the rate.

Respondent claims that it is authorized to levy the DSIC charge on a “bills rendered” as opposed to a “services rendered” basis. Neither of these terms are defined in the Public Utility Code, the PUC’s Order or in Respondent’s Tariff. In addition, neither the Order nor the Commission *specifically* states that the DSIC is to be levied on a “bills rendered” basis. Nor does Respondent’s Tariff even use the phrase “bills rendered.” Nevertheless, Respondent is requesting this Commission to sign off on a definition of that term which permits it to charge the increased rate for the period of the customer’s bill which predates the effective date set forth in the tariff (even though for some customers that period could very well be nearly an entire month).

The actual language that Respondent itself represented to its customers in its Tariff underscores the fact that the DSIC charge was to be applied only to the proportional period of the bill that fell on or after the effective date of the rate increase:

DSIC Surcharge Amount: The charge will be expressed as a percentage carried to two decimal places and will be applied *to the effective portion of the total amounts billed* to each customer under the company’s otherwise applicable rates and charges, excluding amounts billed for public fire protection service and the State Tax Adjustment Surcharge (STAS).

Aqua Pennsylvania, August 15, 2009 Tariff, p. 20A (*emphasis added*) (relevant attached hereto as Exhibit B). Respondent’s Motion for Judgment on the Pleadings omitted citation to this language from its own Commission-approved tariff, which demonstrates that the charge is to be

³ It is interesting to note that in the Opinion and Order, the Commission expressly states that “To begin with, the company proposes that the DSIC become effective for *service rendered* on and after July 1, 1996.” Opinion and Order, p. 3 (*emphasis added*). This position undermines Respondent’s contention that the charge is levied on simply the total amount of any bill issued after the effective date of the rate increase, regardless of whether the charges on such bill are for a period of time prior to the PUC-approved effective date of the rate increase.

applied to the *effective portion* of the bill, not the entire bill. Presuming that it intended the phrase “effective portion” to have significance and not just be surplusage, Respondent’s factual argument fails under the language of its own Tariff, which the Commission approved and which the Complainants do not challenge (and, indeed, take for granted).

Further, that Respondent’s Tariff contemplates that customers will not be required to pay an increased rate for their entire billing period where the rate was only in effect for a portion of the period is manifest in the language of the Tariff itself. For example, the Tariff specifically provides for the pro-rating of bills in the case of rate increases:

Pro-ration of Base Rates on Customers’ Bills. During a period of changes to base rates, billing of base rates for metered Customers involves proration of the different base rates based on days of invoice. The consumption for the entire period is divided by the number of service days to develop an average consumption per day for purposes of bifurcating the consumption at the old rate and at the new rate.

Aqua Pennsylvania, August 15, 2009 Tariff, p. 49. Although Respondent contends (perhaps correctly) that the DSIC is not a base rate, the fact that the Commission-approved Tariff states that it was to be applied to the *effective portion* of the bill presupposes, as with base rates, pro-ration.

Respondent’s billing practice also runs afoul of the plain language of the Public Utility Code, which provides that “[a]ny public utility, having more than one rate applicable to 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). To charge patrons the increased DSIC rate for portions of their bills prior to the effective date of that rate is a means of calculating the bill in the manner most favorable to the utility. Further, as explained below, to do so creates arbitrary classes of customers who have to pay more or less based simply upon the

timeframe of their billing period. This is patently unreasonable and contrary to the language of Sections 1301 (requiring rates to be just and reasonable) and 1303.

Further, the March 29, 2000 letter from a Commission auditor attached as Exhibit C to Respondent's Motion does not prove Respondent's claim. The letter recognized that Respondent was collecting the charge on a "services rendered" basis, as opposed to a "bills rendered" basis, although the letter did not define those terms. The letter did not state, as Respondent suggests, that the application of the "services rendered" approach was improper or erroneous. Nor did the letter suggest (much less direct, as Respondent argues) that Respondent was required to change the manner in which it collected the DSIC.⁴ On the contrary, the primary focus of the letter was how and when the prior DSIC shortfall could be recouped.

Thus, even though Respondent's factual argument in support of its preliminary objections is one-sided and premature, the very evidence set forth by Respondent simply fails to demonstrate that Respondent was permitted (or required) to charge customers the increased DSIC rate for portions of their billing period prior to the effective date of that rate increase. The unequivocal language of Respondent's Tariff itself (which Complainants do not call into question) specified that the DSIC is to be calculated on the *effective portion* of the customers' bills. This, among other factors, directly undermines the premature and misleading factual argument set forth by Respondent.

Finally, Respondent cannot rely on its citation from PUC v. Metropolitan Edison Company, 37 P.U.R.4th 77, 96 n.3 (PUC 1980), to support its claim that it is permitted to charge customers the increased DSIC rate for portions of their billing cycle which predate the

⁴ This is underscored by the fact that in Defendant's August 14, 2009 Tariff, more than nine years after the letter, the plain language of Defendant's Tariff specifically advertised that it would charge the DSIC on the *effective portions* of the customer's bill.

Commission-approved effective date of the increase.⁵ First, the portion of that opinion cited by Respondent is from a single footnote addressing a collateral proceeding. The case did not address the definitions of or differences between “bills rendered” and “services rendered.” Rather, it addressed several issues regarding the effects of the shut-down of one of the Three Mile Island reactors following its near-meltdown. As such, the language cited is, at the very best, dicta.

Judgment on the pleadings and/or summary judgment are only permitted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 52 Pa.Code §5.102(d). In this case, it is evident when reviewing the documents attached by the Respondent along with its bills and Tariff (that it did not attach or cite) that there is a genuine issue of material fact as to whether it was permitted to charge its customers increased DSIC rates for the portion of their bills that preceded the Commission-approved effective date—or only (as the Tariff states) on the “effective portion.” As such, the Motion for Judgment on the Pleadings should be denied.

C. Respondent’s DSIC billing methods create an inherently inequitable system whereby increases in rates will always be imposed on some customers in a manner disproportionate to other customers.

Under Respondent’s position, the *effective date of change* set forth in the governing Tariff is rendered meaningless. In actual practice, it begins 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, Respondent’s billing practices create an inherently inequitable system whereby some customers will *always* bear the increased rates more than others.

⁵ The DSIC charge was first approved by the PUC in 1996, sixteen years after the case upon which Respondent relies.

Respondent's position—that it is permitted to bill customers increased DSIC 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. Respondent'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, Complainants' billing cycle for March of 2009 (bill attached as Exhibit C) ran from March 2 to April 1. Therefore, even though the *effective date* of the DSIC increase was April 1, Complainants, and all others with their billing cycle dates, were forced to pay the increased rate for their entire billing cycle even though *all but one day of that period occurred before the effective date of the increase*. For other customers who have billing cycles which begin and end in the first week of the month, those customers 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, Respondent 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 Respondent*, 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. 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.

D. The Court of Common Pleas has already ruled that the Commission's jurisdiction over this case is not exclusive.

Respondent's argument that the Commission has exclusive jurisdiction over all of Complainants' claims disregards the Opinion issued by the Court of Common Pleas in this case, which simply applied the plain language of Section 103(c) of the Public Utility Code.

This case was transferred to the Commission from the Court of Common Pleas of Lawrence County in order for the Commission to rule on certain limited issues. The case remains pending in the Court of Common Pleas and has been stayed. In his December 13, 2010 Opinion, President Judge Dominick Motto stated:

The Court finds that the PUC has initial and primary jurisdiction over the subject matter of this Complaint; to wit, the rates charged by the Defendant and the Defendant's billing practices, but that *the jurisdiction of the PUC is not exclusive* beyond these matters and the remedies allowed by the Public Utility Code... [T]his proceeding shall be stayed pending the transfer of this case to the PUC, with this Court to thereafter proceed on the claims not resolved by the PUC after its eventual rulings on issues relating to rates and billing practices.

Opinion at 2 (emphasis added). Respondent inexplicably argues that the Commission should rule that the Court of Common Pleas has no jurisdiction over any of Complainants' claims when the Court itself has already ruled that it does in fact have jurisdiction. The Commission is not

empowered to determine the jurisdiction of the Court of Common Pleas contrary to the Court's own ruling. Moreover, to do so would violate Section 103(c) of the Public Utility Code.

The Court's retention of jurisdiction over matters outside the Commission's purview is consistent with the plain language of Section 103(c) of the Public Utility Code. Respondent's interpretation, on the other hand, would gut Section 103(c), rendering it virtually meaningless and granting public utilities immunity for a wide range of unlawful conduct. Section 103(c) of states:

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.A. § 103(c) (emphasis added). Thus, the plain language of the Public Utility Code states that the remedies provided to customers by the Commission do not nullify the statutory and common law rights of action also available. Respondent argues that this provision only applies to remedies that are "unrelated to rates and services." Respondent's Brief at 14. This interpretation is unsupported by the language of the statute or by common sense. It is difficult to imagine how a customer could have a claim against a public utility that was "unrelated to" either "rates" or services." Under Respondent's position, public utilities would be immune from all of the remedies that Section §103(c) was enacted to preserve.

The jurisdiction of the Court of Common Pleas in this case has already been determined by the Court itself and is supported by the plain language of Section §103(c). The Commission should rule on those matters within its own jurisdiction and leave the Court to resolve any other matters in a manner consistent with the Court's Opinion.

E. Complainants are entitled to the relief requested in the Complaint.

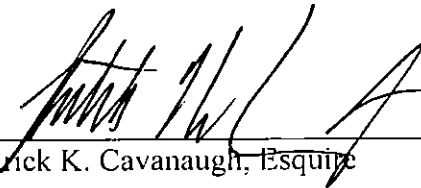
Contrary to Respondent's arguments, Complainants are entitled to the relief requested in the Complaint. Complainants are entitled to a refund for amounts billed to them prior to the effective dates of increased DSIC charges. A refund on this basis would not constitute retroactive rate-making or violate the "Commission-made rates" doctrine because the Commission never authorized Respondent to bill increased charges before their effective dates. On the contrary, Respondent's practice makes a mockery of the very concept of an "effective date."

The other relief requested by Complainants may be awarded by the Court of Common Pleas when it lifts its stay and makes its ruling in light of the Commission's ruling.

III. CONCLUSION

Respondent's Motion, which improperly relies on evidence outside of the pleadings, fails to establish as a matter of law that Respondent is permitted to charge its customers, including Complainants, increased DSIC rates for periods of their billing cycle which occur prior to the effective date of the rate increase. To the contrary, Respondent's billing practices unfairly and disproportionately burden its customers with unauthorized charges in violation of the Commission-approved Tariff, the Public Utility Code, and other Pennsylvania law. Additionally, Respondent's argument that the Commission's jurisdiction is exclusive is contrary to the ruling of the Court of Common Pleas in this case and the plain language of the Public Utility Code. The Commission should award Complainants a refund and transfer this case back to the Court for resolution of the remaining issues. Respondent's Motion for Judgment on the Pleadings should be denied.

DEL SOLE CAVANAUGH STROYD LLC

By: 
Patrick K. Cavanaugh, Esquire

Counsel for Complainants

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Court of Common Pleas has no jurisdiction over this dispute because the General Assembly has delegated to the Pennsylvania Public Utility Commission ("PUC") exclusive authority to regulate the rates, terms and conditions of public utility service in the Commonwealth. The Court finds that the PUC has initial and primary jurisdiction over the subject matter of this Complaint; to wit, the rates charged by the Defendant and the Defendant's billing practices, but that the jurisdiction of the PUC is not exclusive beyond these matters and the remedies allowed by the Public Utility Code. Therefore, for the reasons set forth below, the preliminary objections will be sustained to the extent that this proceeding shall be stayed pending the transfer of this case to the PUC, with this Court to thereafter proceed on the claims not resolved by the PUC after its eventual rulings issues relating to rates and billing practices.

The Plaintiffs' putative class action Amended Complaint alleges that the Defendant Aqua Pennsylvania, Inc. ("Aqua") billed rate increases for the Distribution System Improvement Charge ("DSIC") prior to the effective date set by the PUC. Plaintiffs allege that each and every time that Defendant was authorized to increase the DSIC, it retroactively billed its customers the increased rate for the period of their billing cycle preceding the effective date of increase. As a result, Defendant charged its customers amounts that were not owed, since the billing cycle began prior to the effective date of the increase. The Amended Complaint alleges causes of action consisting of alleged violation of the Unfair Trade Practices

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and Consumer Protection Law ("UTCPL"), Conversion, and Breach of Contract. In addition to compensatory damages, the Amended Complaint seeks punitive damages and the statutory damages authorized by the UTCPL. Defendant contends that the substance of the Plaintiffs' Amended Complaint is the rate being charged by Defendant; that the heart of each count of the Amended Complaint, regardless of how the cause of action is stated, is a challenge to Defendant's billing practices and, therefore, to its rates. Accordingly, Defendant argues that exclusive jurisdiction of the subject matter of the Complaint rests with the PUC pursuant to the Public Utility Code, 66 Pa.C.S.A. §1301 et seq. Defendant cites a number of sections in the Public Utility Code, which set forth specific limitations upon the rates that can be charged by Public Utilities and procedures seeking redress before the Public Utility Commission on a claim that a public utility has charged an unauthorized rate.

Plaintiffs contend that they do not challenge the validity or reasonableness of the rates approved by the PUC, the tariff governing those rates, the authority of the PUC to approve and regulate the tariff or any other issue related to the rates, terms or conditions of public utility services provided by Defendant; but rather, recognize the PUC's exclusive authority to determine such matters. Plaintiffs argue that their claims raise only statutory and common law claims sounding in tort and contract arising from deceptive practices of Defendant in taking money from its customers under false pretenses in violation of their respective contracts. Plaintiffs note that a key

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component of their claim is that the Defendant used deceptive practices to enrich itself in violation of the UTPCPL and the terms of its contract with its customers by charging a rate to its customers prior to the time that it was authorized by the tariff. Plaintiffs argue that in making these claims, they take for granted that the PUC validly approved the tariff which set forth the dates that the DSIC was permitted to be raised.

In determining preliminary objections, the Court must consider as true all well-pleaded material facts and all reasonable inferences that may be drawn from those facts. Sheffield v. Department of Corrections, 894 A.2d 836 (Pa.Cmwlt. 2006). Preliminary objections will be sustained only where defendant's right to relief is clear and free from doubt. Id. McGriff v. Pennsylvania Board of Probation and Parole, 809 A.2d 455 (Pa.Cmwlt. 2002). Where preliminary objections raise a question of subject matter jurisdiction, the function of the court is to determine whether recovery will be barred due to a lack of subject matter jurisdiction. Kimmel Township Taxpayers Association v. Claysburg Kimmel School District, 604 A.2d 1149, 1152 (Pa.Cmwlt. 1992).

It is well established that:

The courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC—not the Courts. Borough of Lansdale v. Philadelphia Electric Company, 403 Pa. 647, 650, 170 A.2d 565, 567 (1961) quoted in Allport Water Authority et al. v. Winburne Water Co., 258 Pa.Super. 555, 558, 393 A.2d 673, 674 (1978).

In Morrow v. Bell Telephone Company of Pennsylvania, 330 Pa. Super. 276, 479 A.2d 548 (1984), the plaintiff brought an action in equity seeking class action certification and challenging the defendant telephone company's rates and service practices. The court found that the action, which was couched in terms of equity, was actually a challenge to the rates and services, therefore, jurisdiction was vested in the PUC. Id. 479 A.2d at 551. The Morrow court held that although the complaint contained averments of breach of contract, the averments were but a cover disguising the real thrust of the complaint.

In County of Erie v. Verizon North, Inc., 879 A.2d 357 (Cmwlth.Ct. 2005) the county had filed its complaint against the defendant service provider contending that the defendant did not fulfill its financial responsibilities regarding the county's 911 emergency communication system. Defendant filed preliminary objections contending that the PUC had primary jurisdiction over the subject matter of the complaint. The complaint included claims for accounting, injunctive relief, breach of fiduciary duty, unjust enrichment and conversion. In determining that the PUC had primary jurisdiction, the court stated that in determining whether the Doctrine of Primary Jurisdiction applies, courts must look beyond the form of the action to the essence of the underlying claims. The court went on to agree with defendant Verizon that the factual issue upon which the claim was based was whether Verizon correctly billed, collected

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and remitted the 911 contribution rate, a matter which related to the tariff. The court quoted Morrow, which stated:

Matters relating to the tariff...are peculiarly within the expertise of the PUC and, as such, are outside the original jurisdiction of the courts. Morrow, 479 A.2d at 550 (quoting Bell Telephone Co. v. Uni-Lite, Inc., 294 Pa.Super. 89, 439 A.2d 763, 765 (1982)).

As set forth in County of Erie, the Public Utility Code defines the term "tariff" as:

All schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of the common carrier, schedules showing the method of distribution of the facilities of such common carrier.

66 Pa.C.S. §102.

Further, the code defines "rate" as follows:

Every individual, or joint fare, toll, charge, rental or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications, contracts affecting such compensation, charge, fare, toll or rental.

66 Pa.C.S. §102 (emphasis supplied).

The Doctrine of Primary Jurisdiction should be invoked to require a court to refrain from hearing a case where protection of the integrity of the regulatory scheme dictates that the parties preliminarily resort to the agency that administers the scheme for the resolution of disputes. Weston v. Reading Co., 445 Pa. 182, 282 A.2d 714 (1971). In Elkin v. Bell Telephone Co., 491 Pa. 123, 420 A.2d 371 (1980), the Supreme Court in

discussing the doctrine stated that one of its purposes is to make use of the agency's special experience and expertise in complex areas and to promote consistency and uniformity in the area of administrative policy. Id. 491 Pa. at 132-33, 420 A.2d at 376. Elkin further noted that the Doctrine of Primary Jurisdiction is principally applied to controversies involving "regulated industries". Id. at 133, 420 A.2d at 376. Where the court in which original jurisdiction was invoked determines that agency has primary jurisdiction, the trial court has the authority to transfer the matter to the appropriate administrative agency. Id.

Here, the allegations of the Amended Complaint involve a challenge to the billing practices of the Defendant. The allegations are that defendant billed its customers a rate for a period of time before that rate became effective. Therefore, it necessarily follows that for the period of time from the beginning of the billing cycle until the effective date of the allowed rate, Plaintiffs are contending that the Defendant charged Plaintiffs an unauthorized rate. Stated another way, the essence of the Amended Complaint is that for a period, Defendant charged and collected an illegal rate not authorized by any tariff of PUC. The Court concludes that the PUC has exclusive jurisdiction over rates that can be charged by a public utility and the billing practices relative to those rates, and thus has primary jurisdiction over the subject matter of this case.

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Section 1303 of the Public Utility Code (66 Pa.C.S.A. §1303) provides that "No public utility...demand or receive from any person...a greater or lesser rate for any service rendered or to be rendered by any such public utility than that specified in the tariffs of such public utility applicable thereto". Section 1312 of the Public Utility Code (66 Pa.C.S.A. §1312) provides for a refund where a public utility has received a rate in excess of the applicable rate contained in an existing and effective tariff, giving the PUC the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron together with interest at the legal rate from the date of such excessive payment. Thus, Plaintiffs have the right to institute and seek a refund action before the PUC pursuant to §1312 for the rate charged that Plaintiffs deem was in violation of the tariff. Although Plaintiffs have couched their claims as being in violation of the UTPCPL, breach of contract and conversion, in each alleged cause of action the heart of the claim is based on the allegation that Plaintiffs were charged rates at the beginning of a billing cycle and for a period of time prior to the effective date from which the rate was authorized, and thus were charged an illegal rate. This is precisely the type of claim that is best suited to the expertise of the PUC.

Once the Court determines that the PUC has primary jurisdiction, the Court must next determine whether the jurisdiction of the PUC is exclusive, thus requiring the dismissal of the proceeding before the Court, or, whether the

jurisdiction of the PUC is not exclusive, in which case the Court may proceed with an action for damages based on the determination of the PUC of the matters within its realm of expertise.

The standard to be applied in determining whether the PUC's jurisdiction is exclusive is set forth in DiSanto v. Daufin Consolidated Water Supply Company, 291 Pa.Super. 440, 450, 436 A.2d 197, 202 (1981) as follows:

Having determined that the instant case involves matters within the normal sphere of the PUC, we must now decide whether the PUC's jurisdiction is exclusive or whether the bifurcated procedure adopted by the Elkin should be followed in the instant case. Such a determination, however, is dependent upon the adequacy of the administrative remedies available to the appellee through the PUC. If the available administrative remedies are complete and adequate to make the complainant whole, then the PUC has exclusive jurisdiction over the controversy and there is no recourse to the courts outside of the normal channels of appeal and to the Commonwealth court. However, where the administrative remedies are not adequate and complete, the PUC's jurisdiction is not exclusive and an action for damages may be brought in a Court of Common Pleas based upon the PUC's initial determination of the matters within its realm of expertise.

In Elkin v. Bell Telephone, 491 Pa. 123, 420 A.2d 371 (1980), the Supreme Court approved a bifurcated procedure where the accommodation of the respective spheres of the adjudicatory authority of the PUC and the Courts of Common Pleas could be accomplished. The bifurcated procedure approved by Elkin provides for a civil suit for damages to be stayed pending a determination by the PUC of the matters that are within its exclusive jurisdiction. Judicial abstention protects the integrity of a regulatory scheme within the jurisdiction of the

PUC, providing for a preliminary resort to the PUC. After a determination of the issues within the exclusive jurisdiction of the PUC, the pending action in the Court of Common Pleas would not be used to re-litigate the questions determined by the PUC, but only to litigate the questions not resolved through administrative channels and to grant relief, if any, including damages that may be appropriate in light of the administrative determination. Once the administrative tribunal has determined the issues within its jurisdiction, then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and the outcome of the agency determination. Elkin, 491 Pa. at 133-314, 420 A.2d at 377, citing Finegold v. Bell of Pennsylvania, 477 Pa. 1, 8, 383 A.2d 791, 794 (1977).

The Court here concludes that this Court must retain jurisdiction subject to deferral of initial jurisdiction to the PUC because the PUC cannot fully address all of the claims for damages set forth in the Amended Complaint. In particular, Plaintiffs raise claims under the UTPCPL which provides a statutory remedy which is not limited to the actual loss. The UTPCPL provides for statutory damages in the amount of the consumer's actual damages, or \$100 per violation, whichever is greater, in addition to attorneys fees and costs. 73 Pa.C.S.A. §201-9.2(a). The statutory damages of \$100 per violation are greater than the amounts that Plaintiffs could obtain on a refund awarded by the PUC. Plaintiffs also seek punitive damages, which are not available as a remedy before the PUC. If

53RD
JUDICIAL
DISTRICT

WYOMING COUNTY
PENNSYLVANIA

PUC. If this Court were to hold that the jurisdiction of the PUC is exclusive, then, by judicial decision, the Court would be abrogating Plaintiffs right to recover under the UTCPTL, even if Plaintiffs are otherwise able to meet their burden of proof as to all of the elements of the claim brought pursuant to that statute. Also, Plaintiffs would be denied the right to recover punitive damages, even if they were able to otherwise meet the burden of proof that would allow for the recovery of punitive damages. Such a result would be directly contrary to §103(c) of the Public Utility Code. As Plaintiffs correctly note, this provision of the code states:

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 the 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.A. §103(c).

Therefore, a conclusion that the jurisdiction of the PUC is exclusive in this matter would run contrary to §103(c) of the Public Utility Code in that Plaintiffs' rights of action and remedies available to them under the UTCPTL, and under common law actions for breach of contract and conversion, to the extent they allow for damages that go beyond a simple refund, would be abrogated. The Court finds that such a conclusion would be contrary to the holdings of the Supreme Court in Finegold and Elkin, which must be followed.

For the reasons above stated, the Court will enter an order which shall grant the Defendant's preliminary objections to the

extent that the Court finds that the PUC has primary jurisdiction of this controversy and all proceedings herein shall be stayed pending the conclusion of proceedings before the Public Utility Commission. Jurisdiction of this case shall be transferred to the Public Utility Commission.

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JUDICIAL
DISTRICT

LAWRENCE COUNTY
PENNSYLVANIA

AQUA PENNSYLVANIA, INC.
RATES AND RULES
GOVERNING THE DISTRIBUTION
OF
WATER
IN PORTIONS OF

RECEIVED

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

ADAMS, BERKS, BRADFORD, BUCKS, CARBON, CHESTER, COLUMBIA, CRAWFORD,
CUMBERLAND, DELAWARE, FOREST, JUNIATA, LACKAWANNA, LAWRENCE, LEHIGH,
LUZERNE, MERCER, MONTGOMERY, MONROE, NORTHAMPTON, NORTHUMBERLAND,
PIKE, SCHUYLKILL, SUSQUEHANNA, SNYDER, WAYNE AND WYOMING COUNTIES

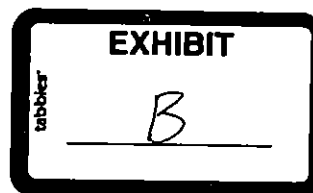
ISSUED: September 18, 2009

Effective: October 1, 2009

by
NICHOLAS DeBENEDICTIS, Chairman
762 Lancaster Avenue
Bryn Mawr, Pennsylvania

NOTICE

**THIS TARIFF INCREASES THE DISTRIBUTION SYSTEM IMPROVEMENT CHARGE
FOR ALL METERED AND UNMETERED CUSTOMERS WITH THE EXCEPTION OF
PUBLIC FIRE HYDRANT CUSTOMERS AND CUSTOMERS WITH SPECIAL
CONTRACTS.**



Water-PA. P.U.C. No. 1
Aqua Pennsylvania, Inc. Third Revised Page No. 20A
Canceling Second Revised Page No. 20A

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE

main cleaning and relining (account 3310) projects; and

un-reimbursed funds related to capital projects to relocate Company facilities due to highway relocations. (account 3310)

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

II. Computation of the DSIC

Calculation: The initial charge, effective January 1, 1997, will 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 Additions Reflected</u>
April 1	February 28/29
July 1	May 31
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 and labeled Distribution System Improvement Charge Return in its Value Line Water Company Group analysis.

DSIC Surcharge Amount: The charge will be expressed as a percentage carried to two decimal places and will be 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 service and the State Tax Adjustment Surcharge (STAS). To calculate the DSIC, one-fourth of the annual fixed costs associated with all property eligible for cost recovery under the DSIC will be divided by the Company's projected applicable revenue for sales of water for the quarterly period during which the charge will be effective.

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE

Formula: The formula for calculation of the DSIC surcharge is as follows:

$$\text{DSIC} = \frac{(\text{DSI} \times \text{PTRR}) + \text{Dep} + e}{\text{PQR}}$$

Where:

DSI= the original cost of eligible distribution system improvement projects, net of accumulated depreciation.

PTRR= the pre-tax return rate applicable to eligible distribution system improvement projects.

Dep= depreciation expense related to eligible distribution system improvement projects.

e= the amount calculated under the annual reconciliation feature as described below.

PQR= projected quarterly revenue including revenue from existing customers plus revenue from any customers which will be acquired by the beginning of the applicable service period.

Quarterly updates: Supporting data for each quarterly update will be filed with the Commission and served upon the Office of Trial Staff, the Office of Consumer Advocate and the Office of Small Business Advocate at least ten (10) days prior to the effective date of the update.

III. Safeguards

Cap: The DSIC will be capped at 7.5% of the amount billed to customers under otherwise applicable rates and charges.

Audits/Reconciliation: The DSIC will be subject to audit at intervals determined by the Commission. It will also be subject to an annual reconciliation based on a reconciliation period consisting of the twelve 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 rate 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.

Water-PA. P.U.C. No. 1
Aqua Pennsylvania, Inc. Third Revised Page No. 20C
Canceling Second Revised Page No. 20C

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE

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 Report (Schedule D-2, line 14) 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 (or, where two years have elapsed since an applicable ROE determination in a rate order, the top of the ROE range as specified in the Commission's most recent Quarterly Report on the Earnings of Jurisdictional Utilities, labeled Market Indicated Common Equity Cost Rate in its Value Line Water Company Group analysis).

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.



Service To:
DONNA/WALTER PAINTER
126 COLONY DR
NEW WILMINGTON, PA 16142

Account Number
001055660 0765013
SHENANGO
1157850 PWSID # PA6430034

Aqua Pennsylvania, Inc.
762 W. Lancaster Avenue
Bryn Mawr, PA 19010-3489

Tel: **877.987.2782**
Fax: **866.780.8292**
e Mail: custserv@aquaamerica.com

Questions about your water service?... Contact us before the due date.
Bill Date **April 03, 2009**
Total Amount Due **\$ 36.56**
Due Date **April 27, 2009**

Meter Data

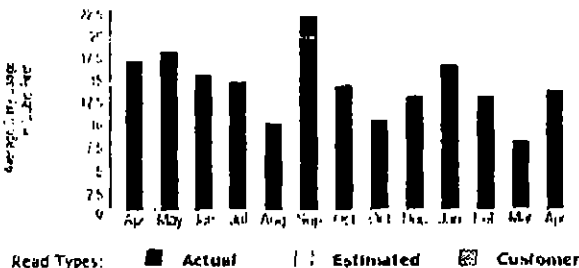
Meter	Size	Billing Period	Days	Read Type	Meter Reading	Usage	Unit
58882059	5/8	04/01/09	30	Actual	28500	400	Cubic Feet
		03/02/09		Actual	28100		
		Total Days	30	Total Usage		400	Cubic Feet

Average Daily Usage = 13 Cubic Feet
1 CF equals 7.48 gallons

Billing Detail

Amount Owed from Last Bill	\$ 10.69
Total Payments Received	10.69
Balance	0.00
Customer Charge	13.15
270 cubic feet @ \$0.052715 per CF	14.23
Next 130 cubic feet @ \$0.060075 per CF	7.81
Total Water Charges	35.19
DSIC Charge	1.37
Amount Due 04/27/09	\$ 36.56

Water Usage History



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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Message Center (see reverse side for other information)

- Please note, your account number is a 16-digit number. The full 16 digits including any zeros must be provided to ensure correct and prompt posting to your Aqua account.
- Effective April 1, 2009 the allowable DSIC charge is 3.88%. This reflects \$ 104 million in system improvements made by the company since June 2008. These improvements include the replacement of aging water pipes and other infrastructure as well as improvements to the quality of the water that we serve.
- If you are a low income customer and you are unable to pay your past-due account, please call 877.987.2782 for more information about Aqua Pennsylvania's low-income customer assistance "Helping Hand" program.

Return this portion with your payment.
Keep top portion for your records.

Service To:
DONNA/WALTER PAINTER
126 COLONY DR
NEW WILMINGTON, PA 16142

AQUA Water Bill

Aqua Pennsylvania, Inc.
762 W. Lancaster Avenue • Bryn Mawr, PA 19010-3489

Account Number
001055660 0765013
Total Amount Due **\$ 36.56**
Amount Enclosed
Due Date **April 27, 2009**

NEW-07/15/09 10:04 Top 7009-11

0765013

*****AUTO**3-DIGIT 161 (63 P 89
DONNA/WALTER PAINTER
126 COLONY DR
NEW WILMINGTON PA 16142 5014



Please make check payable to Aqua PA.
Print your account number on your check,
then mail to address on back.

66007650130000000036567



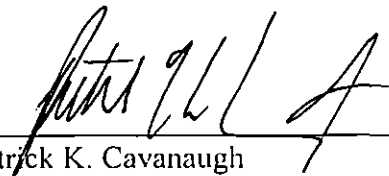
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of August, 2011 a true and correct copy of the foregoing *Brief in Opposition to Respondent's Motion for Judgment on the Pleadings* was served on the following by first class, U.S. mail:

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17101

Honorable Conrad A. Johnson
Administrative Law Judge
301 Fifth Avenue
Suite 220, Piatt Place
Pittsburgh, PA 15222

Christopher T. Wright, Esquire
17 North Second Street
12th Floor
Harrisburg, PA 17101
Counsel for Respondent



Patrick K. Cavanaugh

From: (412) 261-2393
Patrick K. Cavanaugh, Esquire
DEL SOLE CAVANAUGH STROYD
The Waterfront Building
200 First Avenue
Pittsburgh, PA 15222

Origin ID: BTPA



J11201104290225

Ship Date: 10AUG11
ActWgt: 1.0 LB
CAD: 7470359/NET3180

Delivery Address Bar Code



SHIP TO: (000) 000-0000

BILL SENDER

Rosemary Chiavetta
Pennsylvania Public Utility Commiss
400 NORTH ST
2ND FLOOR NORTH
HARRISBURG, PA 17120

Ref # Painter
Invoice #
PO #
Dept #

THU - 11 AUG A1
PRIORITY OVERNIGHT

TRK# 7973 9898 4007

0201

17120
PA-US
MDT

NJ MDTA

