

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

C. LESLIE PETTKO

v.

PENNSYLVANIA-AMERICAN WATER
COMPANY

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DOCKET NO. C-2011-2226096

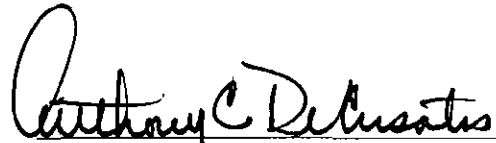
NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.103(b), you are hereby notified to file a written response to the enclosed **Motion Of Pennsylvania-American Water Company Requesting Certification Of A Material Question By The Administrative Law Judge Pursuant To 52 Pa. Code § 5.305** within twenty (20) days of the date of service of such Motion or such earlier date as the Administrative Law Judge may designate.

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU



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Dated: December 9, 2011

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

C. LESLIE PETTKO :
 :
 v. : **DOCKET NO. C-2011-2226096**
 :
 PENNSYLVANIA-AMERICAN WATER :
 COMPANY :

**MOTION OF PENNSYLVANIA-AMERICAN WATER COMPANY
REQUESTING CERTIFICATION OF A MATERIAL QUESTION BY THE
ADMINISTRATIVE LAW JUDGE PURSUANT TO 52 PA. CODE § 5.305**

I. INTRODUCTION

Pursuant to 52 Pa. Code § 5.103, Pennsylvania-American Water Company (“PAWC” or the “Company”) requests that the Administrative Law Judge certify a material question for review by the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) pursuant to 52 Pa. Code § 5.305. The material question to be certified is set forth below together with a statement of the reasons why certification would prevent prejudice to the parties and expedite the conduct of the proceeding.

II. RELEVANT BACKGROUND

1. This case was initiated as a claimed “class action” before the Commission by a Complaint filed by C. Leslie Pettko on or about February 8, 2011.¹ The gravamen of Mr. Pettko’s Complaint is set forth in Paragraph Nos. 25 through 36 of that Complaint. Specifically,

¹ This case originated in the Court of Common Pleas of Washington County where, on March 19, 2010, Mr. Pettko filed a putative “class action” civil complaint alleging that the way PAWC had implemented changes in the Distribution System Improvement Charge (“DSIC”) and State Tax Adjustment Charge (“STAS”) in the past was improper and contrary to law. In that Complaint, he sought to recover, *inter alia*, “refunds, “damages,” “penalties,” and “attorney’s fees” on behalf of a “class” consisting of all of PAWC’s water customers. The Court of Common Pleas granted PAWC’s Preliminary Objections on the grounds that Mr. Pettko’s Complaint challenged PAWC’s rates and billing practices and, therefore, his Complaint was within the primary and exclusive jurisdiction of the PUC. See Order of the Court of Common Pleas of Washington County, August 27, 2010. (A copy of this Order is attached as Appendix A to PAWC’s Answer to the Pettko Complaint.) Thereafter, Mr. Pettko filed his Complaint with the PUC.

Mr. Pettko alleges that PAWC's application of changes in the DSIC and the STAS was not "authorized" (Complaint ¶ 32) because such changes were "levied for the entire billing period" (Complaint ¶¶ 27 and 34) instead of being "pro-rated" based on service rendered before and after the "effective date" (Complaint ¶¶ 31 and 34). In his Complaint, Mr. Pettko seeks "refunds, "damages," "penalties," and "attorney's fees" for himself and the putative "class" that he and his counsel hope to represent.

2. PAWC filed a Motion for Judgment on the Pleadings in which it cited, discussed and provided copies of Commission Orders that authorized PAWC to apply changes in the DSIC and STAS on a "bills-rendered" basis and without "pro-rating" for service rendered before and after the "effective date." See Motion for Judgment on the Pleadings, pp. 6-12, and Appendices A-D. In addition, PAWC provided the Bureau of Audits' Report that the Commission approved and issued on March 5, 1999 at Docket No. D-97S023, which states, at pages 5 and 9 thereof, as follows:

The DSIC is to be expressed as a percentage carried to two decimal places and is applied to the effective portion of the total amount billed to each customer under the Company's otherwise applicable rates and charges . . .

The Commission approved DSIC was on a "bills rendered" basis. Subsequent testing verified that the DSIC was in fact applied as properly approved . . .

3. On October 5, 2011, the Administrative Law Judge issued an *Order Granting In Part And Denying In Part Motion For Judgment On the Pleadings* (the "October 5 Order").

That Order stated, in pertinent part, as follows:

PAWC has responded [to the Complaint] that its implementation of both the DSIC and the STAS is compliant with all applicable Commission Orders and regulations. PAWC attached to both its

Answer and its Motion documents evidencing Commission approval of its implementation of the DSIC and STAS. In particular, PAWC contends that the DSIC and STAS are appropriately issued on a “bills-rendered” basis, not a “service-rendered” basis, and are appropriately not pro-rated based on service rendered before and after the effective date, as the Commission has directed. PAWC concludes that the Complaint should be dismissed based on the pleadings alone.

October 5 Order, p. 4.

PAWC has identified in its Motion some issues which warrant granting the Motion in part. There are other reasons, however, why the Complainant should be allowed to proceed to a hearing and warrant that the Motion be denied in part. As such, as discussed further below, PAWC’s Motion will be granted in part and denied in part.

PAWC has demonstrated in its Motion that the Commission has approved its implementation of the DSIC and the STAS by Commission Orders as well as letters of approval from the Commission’s Bureau of Audits and Fixed Utility Services. PAWC has demonstrated that the process for its collection of the total amount allowed through the DSIC and the STAS has been approved by the Commission.

October 5 Order, p. 5.

4. The *October 5 Order* did not dismiss the Complaint but, instead, afforded Mr. Pettko the opportunity to follow-up on his allegation that “there are incorrect charges on my bill”:

The Complainant alleges that “there are incorrect charges on my bill.” While PAWC has provided extensive discussion demonstrating that its implementation of the DSIC and the STAS comply with existing Commission Orders and regulations with regard to certain issues, the Complainant should be allowed to proceed to a hearing to determine whether PAWC’s existing DSIC and the STAS rates are reasonable and comply with all applicable laws and regulations. The Complainant can challenge these rates by a complaint against an existing rate or tariff pursuant to Section 1309 of the Public Utility Code.

5. The permissible scope of this proceeding and, in particular, the issues that may be pursued by the Complainant became a matter of dispute as a result of discovery issued by the Complainant (“Pettko Discovery”) and PAWC’s Objections to that discovery. Specifically, the Company argued that Section 316 of the Public Utility Code and the doctrine of Commission-made rates foreclosed the Complainant’s claims for refunds and attempts to collaterally attack the Commission’s prior authorization of PAWC’s application of changes in the DSIC and STAS on a “bills-rendered” basis. *See* PAWC Objections and Answer to Motion to Compel Discovery filed on November 17 and December 5, 2011, respectively.

6. Following the submission of Complainant’s Motion to Compel Discovery and PAWC’s Answer to that Motion, the Administrative Law Judge, on December 8, 2011, issued *Prehearing Order #2*, which provided the following explanation of his prior ruling granting in part and denying in part judgment on the pleadings (pp. 10-11):

The Complainant will not be permitted to re-litigate issues that have already been litigated by the Commission. The Complainant, however, is entitled to the opportunity to demonstrate whether PAWC’s implementation of the DSIC and the STAS violate other provisions of the Public Utility Code that the Commission may not have previously considered. If the Company believes that an issue has already been decided by the Commission, it must indicate in its objection to any future discovery when and how the Commission ruled on that particular issue. Therefore, with regards to any issue pertaining to “bills rendered” versus “service rendered,” for example, the Commission may have already determined that a particular bill method complies with certain Commission Orders or regulations. That does not, however, preclude the Complainant from arguing, and taking discovery of, the issue of whether that particular billing method *does not comply with another Commission Order or regulation.* (Emphasis added.)

**III. THE MATERIAL QUESTION OF LAW TO BE
CERTIFIED FOR COMMISSION REVIEW**

7. PAWC moves that the Administrative Law Judge certify the following material question of law for review by the Commission pursuant to 52 Pa. Code § 5.305:

Is PAWC's application of changes in the DSIC and STAS to the effective portion of the total amount billed to each customer under the Company's otherwise applicable rates and charges, without pro-rating such rate changes for service rendered before and after the effective date of such change: (1) in accordance with prior Commission Orders authorizing how changes in DSIC and STAS rates should be applied to customers' bills; and (2) if so, does PAWC's application of changes in such rates in that manner nonetheless violate some other Commission Order or regulation such that the manner in which PAWC applies changes in DSIC and STAS rates is not protected from retrospective review and refund by Section 316 of the Public Utility Code and the doctrine of Commission-made rates?

**IV. THE MATERIAL QUESTION SATISFIES THE CRITERIA
OF SECTION 5.305 FOR CERTIFICATION**

7. The Company respectfully submits that the issue of whether its application of changes in the DSIC and STAS on a bills-rendered basis, while in conformity with the Commission Orders it furnished with its Motion for Judgment on the Pleadings, might, nonetheless, "not comply with another Commission Order or regulation" is a material question of law that most appropriately – and most expeditiously – can be resolved by certification to the Commission for interlocutory review pursuant to 52 Pa. Code §5.305.

8. The Commission is in the best position to explain what its prior Orders authorizing bills-rendered application mean and to determine if such bills-rendered application "does not comply" with any other of its *own* Orders or regulations. Because this is *fundamentally a legal issue that only the Commission can decide with finality, it meets the*

criteria for certification applied by the Commission, namely, to “prevent prejudice to the parties and expedite the conduct of the proceeding.” *E.g. Application Of City Of Lebanon For A Certificate Of Public Convenience*, Docket No. A-220010, 2006 Pa. PUC LEXIS 39 (April 6, 2006); *Application Of Columbia Gas Of Pennsylvania For A Restructuring Plan*, Docket No. R-00994781, 1999 Pa. PUC LEXIS 68 (October 18, 1999).

9. Under Section 5.305, the Commission must act within 30 days of receiving a certified question. Therefore, certification of a material question will not cause an undue delay in this proceeding. Moreover, a decision by the Commission could substantially shorten subsequent litigation.

10. A Commission decision on the material question is necessary to eliminate the prejudice to PAWC of having to try to defend itself against alleged violations of unspecified Commission Orders and regulations, which would contravene dictates of due process as applied in administrative proceedings. *Armour Transportation Co. v. Pa. P.U.C.*, 138 Pa. Super. 243, 248, 10 A.2d 86, 89 (1939) (Due process of law applies to proceedings before administrative tribunals, and “the right to be informed of the nature of the charge [against a utility] is fundamental.”); *West Penn Power Co. v. Pa. P.U.C.*, 174 Pa. Super. 123, 128, 100 A.2d 110, 113 (1953) (“As an administrative body, the Commission is bound by the due process provisions of constitutional law and by fundamental principles of fairness.”) *See also* 66 Pa. C.S. § 701, requiring complaints to set forth “in writing” “any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.”

11. A further compelling reason to grant certification exists because precisely the same legal issue that would be certified in this case is also present in another complaint

proceeding currently before the Commission (*Walter and Donna Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556).

12. On March 24, 2010, Walter and Donna Painter, represented by the same counsel representing Mr. Pettko, filed a Complaint in the Court of Common Pleas of Lawrence County making essentially the same averments against Aqua Pennsylvania, Inc. (“Aqua PA”) that Mr. Pettko has made against PAWC. The Court of Common Pleas granted Aqua PA’s Preliminary Objections and found that the Painters’ Complaint raised issues within the primary jurisdiction of the PUC. On or about April 21, 2011, the Painters filed a Complaint with the Commission at Docket No. C-2011-2239556 containing the same averments set forth in their civil Complaint. On July 22, 2011, Aqua PA filed with the Commission a Motion for Judgment on the Pleadings. Aqua PA’s Motion is pending before Administrative Law Judge Conrad A. Johnson. Accordingly, the certification requested herein would resolve material legal questions presented in two cases currently before the Commission.

13. Certification will also prevent prejudice, expedite the proceeding and eliminate a possible procedural hurdle by assuring that the Commission’s Bureaus of Audits and Technical Utility Services (as successor to the Bureau of Fixed Utility Services) will be able to provide input to the Commission on the implications for auditing, annual review and annual reconciliation of applying changes in rates DSIC and STAS rates on a “bills-rendered” versus “service-rendered” basis. As previously explained, the Commission’s Bureau of Audits has set forth its views on this matter in a PUC-approved audit report. Certification of a material question will allow the Commission to solicit the views of the Bureaus of Audits and Technical Utility Services in their advisory capacities. If certification is not authorized and, instead, a litigated proceeding is the forum for exploring this issue, special arrangements would have to be

made to obtain the participation of those Bureaus without, thereby, casting them in a prosecutory role or having them appear as witnesses on behalf of a particular party.

V. A TEMPORARY STAY SHOULD BE ISSUED

14. Upon certification, this proceeding should be temporarily stayed pending a Commission decision on the certified material question. See 52 Pa. Code § 5.305(a)(2). As previously explained, such a stay would not unduly delay this proceeding. To the contrary, certification will expedite a reasonable resolution of this case by giving the Commission the opportunity to decide the controlling issues of law. After the Commission's decision is rendered, and assuming that the PUC's decision does not dispose of this case, a second prehearing conference could be held to determine what further proceeding might be required, establish a schedule and obtain more definitive responses to the requests for information set forth in Paragraph No. 3 of the Prehearing Conference Order issued on November 16, 2011.

VI. EXTRACTS FROM THE RECORD

15. Pursuant to Section 5.305(a), the extracts that would assist the Commission in deciding the certified material questions should consist of the Complaint, PAWC's Motion for Judgment on the Pleadings, Complainant's Opposition to Respondent's Motion for Judgment on the Pleadings, Complainant's Motion to Compel Discovery, PAWC's Answer to the Motion to Compel, the *October 5 Order* and *Prehearing Order #2*.

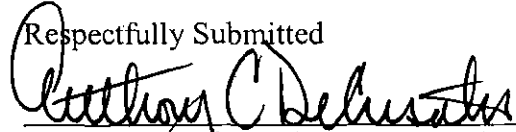
VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Administrative Law Judge should certify the material question of law set forth above to the Commission for its review and decision

pursuant to 52 Pa. Code § 5.305, as provided in the Proposed Order attached hereto as Appendix

A.

Respectfully Submitted



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Dated: December 9, 2011

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APPENDIX A
PROPOSED ORDER
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

C. LESLIE PETTKO :
 :
 v. : **DOCKET NO. C-2011-2226096**
 :
 PENNSYLVANIA-AMERICAN WATER :
 COMPANY :

ORDER CERTIFYING A MATERIAL QUESTION
PURSUANT TO 52 PA. CODE § 5.305

On December 9, 2011, Pennsylvania-American Water Company (PAWC or Respondent) filed a Motion Requesting Certification Of A Material Question By The Administrative Law Judge Pursuant To 52 Pa. Code § 5.305. PAWC's Motion contains sets forth the background of this issue and requests certification of the following Material Question:

Is PAWC's application of changes in the DSIC and STAS to the effective portion of the total amount billed to each customer under the Company's otherwise applicable rates and charges, without pro-rating such rate changes for service rendered before and after the effective date of such change: (1) in accordance with prior Commission Orders authorizing how changes in DSIC and STAS rates should be applied to customers' bills; and (2) if so, does PAWC's application of changes in such rates in that manner nonetheless violate some other Commission Order or regulation such that the manner in which PAWC applies changes in DSIC and STAS rates is not protected from retrospective review and refund by Section 316 of the Public Utility Code and the doctrine of Commission-made rates?

Section 5.305 of the Commission's regulations provides that certification is appropriate where there are compelling reasons why interlocutory review will prevent prejudice or expedite

the conduct of the proceeding. The Commission has recognized that certification is proper where, for example, the controlling issue is one of law or policy that only the Commission can definitely decide and that decision can materially affect or eliminate further proceedings before the Administrative Law Judge. *See, e.g., Application Of City Of Lebanon For A Certificate Of Public Convenience*, Docket No. A-220010, 2006 Pa. PUC LEXIS 39 (April 6, 2006); *Application Of Columbia Gas Of Pennsylvania For A Restructuring Plan*, Docket No. R-00994781, 1999 Pa. PUC LEXIS 68 (October 18, 1999).

For the reasons set forth in PAWC's Motion, certification of the Material Question is proper in this case, will prevent prejudice to the parties and expedite the proceeding. In summary, the principal issue presented by Mr. Pettko's Complaint is whether PAWC's application of changes in its Distribution System Improvement Charge (DSIC) and State Tax Adjustment Charge (STAS) was not "authorized" (Complaint ¶ 32) because such changes were "levied for the entire billing period" (Complaint ¶¶ 27 and 34) instead of being "pro-rated" based on service rendered before and after the "effective date" (Complaint ¶¶ 31 and 34).

As more fully explained in PAWC's Motion and in *Prehearing Order # 2*, which was issued on December 8, 2011, the controlling issue is one of law, namely, whether the Commission has authorized the manner in which PAWC applied changes in its DSIC and STAS rates and, even if it did, whether PAWC's "bills-rendered" application such changes violates any other Commission Order or regulation. *See Prehearing Order #2*, p. 10. Accordingly, the controlling issue can most appropriately and expeditiously be resolved by certification to the Commission for interlocutory review pursuant to 52 Pa. Code §5.305.

The Commission is in the best position to explain what its prior Orders addressing the application of changes in DSIC and STAS rates mean and to determine if PAWC's "bills-

rendered” application complies with, or violates, any other Orders or regulations of the Commission. As previously noted, because this is fundamentally a legal issue that only the Commission can decide with finality, it meets the criteria for certification applied by the Commission.

Additionally, under Section 5.305, the Commission must act within 30 days of receiving a certified question. Therefore, certification of a material question will not cause an undue delay in this proceeding. Rather, a decision by the Commission could substantially shorten subsequent litigation and reduce its complexity.

PAWC also noted that a Commission decision on the material question will prevent prejudice to it because, absent a Commission decision on the Material Question, it would not have reasonable notice of the Commission Orders and regulations it is alleged to have violated, and that lack of notice would be contrary to due process principles that apply in administrative proceedings under prior precedent, such as *Armour Transportation Co. v. Pa. P.U.C.*, 138 Pa. Super. 243, 248, 10 A.2d 86, 89 (1939) and *West Penn Power Co. v. Pa. P.U.C.*, 174 Pa. Super. 123, 128, 100 A.2d 110, 113 (1953), and under 66 Pa. C.S. § 701.

Additionally, PAWC has pointed out that the same issue certified in this case is also present in another complaint proceeding currently before the Commission in *Walter and Donna Painter v. Aqua Pennsylvania, Inc.*, Docket No. C-2011-2239556). In that case, the Painters contend that Aqua Pennsylvania, Inc. (Aqua PA) applied changes in its DSIC on a bills-rendered basis without prior Commission approval and also seek refunds and other relief for themselves and a “class” they contend they represent. On July 22, 2011, Aqua PA filed with the Commission a Motion for Judgment on the Pleadings in that case. Aqua PA’s Motion is pending before Administrative Law Judge Conrad A. Johnson. Accordingly, the certification requested

herein would resolve material legal questions presented in two cases currently before the Commission.

Finally, certification will also give the Commission's Bureaus of Audits and Technical Utility Services the opportunity to provide input to the Commission in their advisory capacities on the implications for auditing, annual review and annual reconciliation of applying changes in rates DSIC and STAS rates on a "bills-rendered" versus "service-rendered" basis. Absent certification, the Material Question would either have to be addressed in an Initial Decision without the input of those Bureaus, or arrangements would have to be made to have Bureau personnel participate without appearing in a prosecutory role or as witnesses for either party. Certification of the Material Question⁴ avoids this procedural difficulty.

This proceeding will be temporarily stayed pending a Commission decision on the certified material question, pursuant to 52 Pa. Code § 5.305(a)(2). Such a stay will not unduly delay this proceeding. Rather, certification will expedite a reasonable resolution by giving the Commission the opportunity to decide the controlling issues of law.

Pursuant to Section 5.305(a), the extracts that would assist the Commission in deciding the certified Material Question should consist of the Complaint, PAWC's Motion for Judgment on the Pleadings, Complainant's Opposition to Respondent's Motion for Judgment on the Pleadings, Complainant's Motion to Compel Discovery, PAWC's Answer to the Motion to Compel, the *October 5 Order and Prehearing Order #2*. By this Order, I am directing the Respondent to file three copies of the documents to the Commission's Secretary with an appropriate transmittal noting that that those submissions are made pursuant to this Order.

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

ORDER

THEREFORE,

IT IS ORDERED:

1. The Material Question set forth in the body of this Order is hereby certified to the Commission for interlocutory review pursuant to 52 Pa. Code § 5.305;
2. Within seven (7) days of the date of this Order, each party may submit a brief directed to the Commission addressing the merits of the Material Question, which shall not exceed fifteen (15) pages in length;
3. This proceeding is stayed pending the issuance of a Commission decision on the Material Question;
4. The extracts that will assist the Commission in deciding the certified Material Question consist of the Complaint, PAWC's Motion for Judgment on the Pleadings, Complainant's Opposition to Respondent's Motion for Judgment on the Pleadings, Complainant's Motion to Compel Discovery, PAWC's Answer to the Motion to Compel, the *October 5 Order* and *Prehearing Order #2*;
5. The Respondent is directed to file three copies of the documents specified in Paragraph 4, above, to the Commission's Secretary with an appropriate transmittal noting that those submissions are made pursuant to this Order.

Date: _____

Administrative Law Judge