Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: 215.963.5000
Fax: 215.963.5001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Anthony C. DeCusatis
Of Counsel
215.963.5034
adecusatis@morganlewis.com

December 5, 2011

VIA FIRST CLASS MAIL

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

Re: C. Leslie Pettko v. Pennsylvania-American Water Company – Docket No. C-2011-2226096

Dear Secretary Chiavetta:

Enclosed for filing in the above-captioned matter are an original and three copies of *Pennsylvania-American Water Company's Answer to the Motion to Compel Discovery of C. Leslie Pettko* ("PAWC Answer"). As evidenced by the Certificate of Service attached to the PAWC Answer, copies thereof have been served upon the Complainant and the presiding Administrative Law Judge. We have also enclosed an additional copy of this letter and the PAWC Answer, which we request that you date-stamp and return to us in the stamped, pre-addressed envelope we are providing.

Very truly yours,

Anthony C. DeCusatis

Anthony C. DeCusatis

cc: Per Certificate of Service
Seth A. Mendelsohn

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

PENNSYLVANIA-AMERICAN WATER COMPANY'S ANSWER TO THE MOTION TO COMPEL DISCOVERY OF C. LESLIE PETTKO

Pursuant to 52 Pa. Code § 5.342(g)(1) Pennsylvania-American Water Company ("PAWC" or the "Company") submits this Answer in opposition to the Motion to Compel Discovery ("Motion to Compel") served by C. Leslie Pettko on November 29, 2011.[1] For the reasons set forth below and in PAWC's Objections submitted on November 17, 2011, the Complainant's Motion to Compel should be dismissed and PAWC's Objections, as well as the other relief requested therein, should be granted.

I. ANSWER

The Complainant still has not identified any issue to which his discovery is properly directed. Instead, the Motion to Compel simply reiterates Complainant's position that his Request for Documents and Notice of Depositions (collectively, the "Pettko Discovery") should

[1] The Commission's regulations do not authorize the submission of an answer to objections to an application for approval to conduct depositions, as Administrative Law Judge Cheskis (the "ALJ") made clear in his November 7, 2011 telephonic conference with the parties. Nonetheless, the Complainant interjected a response to PAWC's objections to his Notice of Depositions in his Motion to Compel. Indeed, most of that Motion discusses Complainant's request for depositions (*see* ¶¶ 10-16). Complainant's unauthorized response lacks merit and simply highlights the deficiencies in his original request for depositions, as PAWC will explain hereafter in this Answer.

be permitted so that he can pursue the issue at the heart of his Complaint (*see* Motion to Compel ¶ 17), namely, whether the Commission had authorized PAWC to implement changes[2] in the Distribution System Improvement Charge ("DSIC") and State Tax Adjustment Charge ("STAS") on a bills-rendered basis (*i.e.*, without "pro-rating" for service before and after the effective date of each change).

The Commission has issued Orders and other directives specifically addressing the issue the Complainant wants to pursue. *See* PAWC Motion For Judgment On The Pleadings, pp. 6-12 and Appendices A, C, D, G and H. In those Orders and directives, the Commission expressly authorized the bills-rendered application of changes in DSIC and STAS rates, as the Administrative Law Judge ("ALJ") acknowledged and affirmed in his *Order Granting In Part And Denying In Part Motion For Judgment On The Pleadings* (the "ALJ's Order").

Additionally – and contrary to Complainant's attempt to distinguish between alleged "macro" and "micro" effects – the Commission has held that the bills-rendered application of rate changes under adjustment clauses requiring mandatory reconciliation – like the DSIC and STAS at issue in this case – "does not place *any* customer at a disadvantage."[3] (Emphasis added.) *See* PAWC Motion for Judgment on the Pleadings, pp. 2-3 and 13-15. In fact, there are many instances where the Commission has expressly approved "bills-rendered" application of changes

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2 As explained in PAWC's Objections, Answer and Motion For Judgment On The Pleadings, changes in the DSIC and STAS include both increases and **decreases** and, as to the STAS, **credits** to customers' bills as well. Complainant's attempt to couch this issue only in terms of "increases" is entirely contrary to the facts. The Complainant's continued attempt to tell only half the story masks the fact that when charges decrease or when credits are implemented, the reduction or credit is also applied to the customer's entire bill and not "pro-rated" based on service before and after the effective date.

3 *Petition of Nat'l Fuel Gas Distrib. Corp. Requesting Permission To File A Tariff Supplement To Become Effective On One Day's Notice Establishing A Recoupment Surcharge*, Docket No. P-850075, 1986 Pa. PUC LEXIS 132 (February 28, 1986).

in surcharge rates for **all** customers of a utility. *See e.g., In re Kentucky Data Link, Inc.*, Docket Nos. A-311413, et al., 2006 WL 4068900 (December 28, 2006) ("The following surcharge rates apply to all customer bills issued on or after July 1, 2006"); *Re North Penn Gas Co.*, 73 P.U.R.4th 63, 65, 61 Pa. P.U.C. 43, 46 (1986) ("North Penn Gas Co. may reflect the reduction in the § 1307(f) rate approved by the commission in bills rendered after the effective date of the tariff."); *Pa. P.U.C. v. Metropolitan Edison Co.*, 37 P.U.R.4th 77, 96 n. 3 (1980) ("If the tariff was made effective for service rendered on or after March 1, 1980, there would have been a lag in the collection of 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.")

Notwithstanding the Commission's prior approval, the Complainant contends he is not precluded from seeking refunds based on allegations that PAWC's historic application of the DSIC and STAS on a bills-rendered basis was "unfair and in violation of law." Motion to Compel, ¶ 9. The Complainant's contentions are themselves contrary to law in two important respects.

First, the Complainant's argument is an unlawful collateral attack on final Commission action, which Section 316 of the Public Utility Code (66 Pa. C.S. § 316) expressly prohibits:

> Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon the parties affected thereby, unless set aside, annulled or modified on judicial review.

The Commission's Orders and other directives authorizing bills-rendered application of the DSIC and STAS are now decades old, have not been appealed and have been reaffirmed many times. *See* PAWC Motion For Judgment On The Pleadings, pp. 6-12 and Appendices A, C, D, G and H. Therefore, all utility action taken in reliance thereon is exempt from an after-the-fact

collateral attack like the one the Complainant is trying to mount against PAWC. Moreover, the Complainant's half-hearted attempt to distinguish an alleged "billing practice" from a "rate" (Motion to Compel ¶ 9) is unavailing because: (1) Section 316 makes no such distinction (*see also Lynch v. Pa. P.U.C.*, 140 Pa. Cmwth. 599, 594 A.2d 816 (1991), appeal denied 529 Pa. 670, 605 A.2d 335); (2) the definition of a "rate" in Section 102 of the Public Utility Code encompasses "any rules, regulations, [and] *practices*" of a public utility affecting any "compensation, charge, fare, toll, or rental" (emphasis added); and (3) the Commission has expressly approved the very same "billing practice" that the Complainant is now attacking.

Second, the Complainant ignores the doctrine of Commission-made rates, which protects a utility from refunds or penalties based on a retrospective review of rates charged, or any other action taken, with prior Commission approval. Simply stated, the doctrine of Commission-made rates prohibits the Commission from ordering refunds or penalties with respect to amounts collected by a public utility under, and pursuant to, rates that the Commission has approved by formal administrative action. *Toll Brothers, Inc. v. Pennsylvania-American Water Co.*, Docket No. C-00934742 (December 15, 1994), 1994 Pa. PUC LEXIS 122 at *33 (citing *Cheltenham and Abington Sewerage Co. v. Pa. P.U.C.*, 174 Pa. Super. 123, 100 A.2d 110 (1953)) (A provision previously approved by the PUC that outlined how to calculate refunds of customer advances for construction was a "rate" protected by the Commission-made rate doctrine, and the complainant would not be permitted to argue that the refund procedure was unfair to it.) *Accord C&D Technologies. Inc. et al. v. Pennsylvania Power & Light Co.*, Docket No. C-00992119 et al. (June 25, 2004), 2004 Pa. PUC LEXIS 57 at *27-28 (Recommended Decision of Administrative Law Judge Wayne L. Weismandel) (Commission-approved provisions for interruptible customers to "buy-through" an interruption were entitled to protection under the Commission-

made rate doctrine.) (Judge Weismandel's holding on this issue was approved and adopted by the Commission at 2005 Pa. PUC LEXIS 1 (February 4, 2005)).

There is no question that PAWC's current and historic implementation of DSIC and STAS rate changes on a bills-rendered basis was authorized by formal administrative action of the Commission, which included Commission Orders and directives as well as periodic reviews, audits and approvals by the Commission's Bureau of Audits. Consequently, any attempt at retrospective review is completely foreclosed by Section 316 and the doctrine of Commission-made rates, and the Complainant cannot pursue any issue in that regard. The Pettko Discovery is directed entirely at **historical** events, actions and bills and, therefore, is improper and should be denied.

The Motion to Compel focuses on language in the ALJ's Order declining to dismiss Mr. Pettko's Complaint outright. The Complainant tries to "spin" this part of the ALJ's Order to preserve his right to retrospectively attack PAWC's bills-rendered implementation of DSIC and STAS rate changes and to collaterally attack the PUC's Orders that approved PAWC's actions. The Complainant's arguments must be rejected for two reasons. First, they are squarely in conflict with the controlling law, as explained previously. Second, they seriously mischaracterize the ALJ's Order.

As explained in PAWC's Objections (pp. 6-9), the ALJ's Order acknowledged and affirmed the PUC's prior authorization of the bills-rendered application of changes in DSIC and STAS rates. With that approval, PAWC is protected from any form of retrospective attack. However, the ALJ generously recognized that the Complainant was not precluded from trying to make a case that the Commission should, in effect, reconsider its prior decisions and, **for the future** (i.e., from and after the entry of a final Commission Order) revise the approved method of

implementing changes in DSIC and STAS rates from bills-rendered to service-rendered. Of course, if the Commission were to enter such an Order, PAWC would comply in all bills subsequently issued to its customers. But, the fact the Commission might change its mind and decide to approve a service-rendered application of DSIC and STAS rates **for the future** would not, in any way, alter the legal consequences of its **prior** orders during the period those orders were in effect. Indeed, Section 316 and the Commission-made rate doctrine would prohibit any such retroactive effect.

The ALJ's Order (p. 8) states: "The Complainant can challenge these rates by a complaint against an existing rate or tariff pursuant to Section 1309 of the Public Utility Code." Section 1309 (66 Pa. C.S. § 1309) provides that the Commission, on its own motion or on "complaint," may find an "existing rate" to be unjust or unreasonable. If that were to happen, the Commission would be authorized to "determine the just and reasonable rates . . . to be *thereafter* observed and in force." (Emphasis added.) In other words, the Commission's action, consistent with Section 316 and the Commission-made rate doctrine, could have **prospective** effect only. This is also clear from the concluding phrase of Section 1309, which provides that any new rates established by the Commission "shall constitute *the legal rates* of the public utility *until changed as provided in this part.*" (Emphasis added.)

The Complainant's discussion of the ALJ's Order – including his attempt to distinguish alleged "macro" and "micro" effects – focuses entirely upon the portion of the Order recognizing his limited opportunity to seek **prospective** changes in existing rates. In so doing, the Complainant tries to twist the ALJ's words into a renunciation of the Order's holding that granted judgment on the pleadings, specifically, the ALJ's finding that prior Commission Orders and directives authorized PAWC's historical and current application of the DSIC and STAS on a

bills-rendered basis. As previously explained, the Commission's prior Orders and directives have on-going legal validity and, therefore, they protect PAWC from any retrospective attack upon, or refund of, amounts its has collected, and continues to collect, pursuant to those Orders and directives. For precisely that reason, the ALJ's Order permits the Complainant a limited opportunity to proceed with his Complaint only to try to convince the Commission that service-rendered application of DSIC and STAS rate changes should be approved **for the future**.

The perversity of the Complainant's position is underscored by his convoluted argument that the Commission has somehow approved the bills-rendered application of the DSIC and STAS at the "macro" level but not at the "micro" level. Motion to Compel, ¶¶ 5-7.[4] If the Complainant's position were accepted, there would be nothing left of either Section 316 or the Commission-made rate doctrine.

The Complainant's argument assumes that the Commission can determine that a rate is just and reasonable as applied to the universe of **all** customers of a utility, yet – after-the-fact and by retrospective review – decide that the very same rate was unjust and unreasonable as applied to an individual customer within that universe. To start with, the Complainant's position is illogical; a rate that is just and reasonable for a class consisting of all customers is, by definition, just and reasonable for the individuals that comprise the class. Moreover, Section 316 and, in particular, the Commission-made rate doctrine, exist for the express purpose of protecting utilities from such after-the-fact, retrospective, collateral attacks on previously-approved rates. Yet, under the Complainant's position, any customer could evade both Section 316 and the

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[4] The ALJ's Order discussed "macro" and "micro" level effects as an example of what the Complainant might argue to try to convince the Commission to adopt a service-rendered application of DSIC and STAS rate changes for the future. The ALJ's Order did not – indeed, could not – offer that distinction as grounds for disregarding the dictates of Section 316 and the Commission-made rate doctrine, as the Complainant seems to think.

Commission-made rate doctrine simply by contending that a retrospective challenge should be permitted if the Commission did not find a rate to be "just and reasonable" with specific reference to **that** customer. Obviously, the Commission does not make findings of just and reasonable rates at the level of an individual customer, nor is it required to do so. *Building Owners and Managers Assoc. and Southeastern Pennsylvania Transport. Auth. v. Pa. P.U.C.*, 79 Pa. Cmwlth. 598; 470 A.2d 1092 (1984) (Rates are to be established on the basis of defined classes of customers, and not on the basis of characteristics alleged to be unique by any particular customer or sub-group of customers within a class.)

The Pettko Discovery – and PAWC's Objections – must be viewed in light of the clear distinction between: (1) a potentially permissible attempt to change the bills-rendered application of DSIC and STAS rates **for the future** (i.e., to try to convince the Commission to alter, **prospectively**, what it has previously approved); and (2) a totally impermissible retrospective attack on PAWC's **current and historic** application of DSIC and STAS rate changes on a bills-rendered basis pursuant to prior Commission authorization. All of the Pettko Discovery is directed at, and pertains to, (2) above – an impermissible retrospective attack on historic and current rate applications that were implemented with Commission approval. Indeed, all of the Pettko Discovery proceeds on the assumption that PAWC has to justify what it did in the past on some basis other than prior authorization by the Commission. The Complainant's request for "depositions" is a particularly egregious example of the Complainant's attempt to evade the ALJ's Order and existing Commission precedent, as evidenced by his claim that a Company deponent needs to be made available to offer "Pennsylvania American Water Company's understanding of whether or not the DSIC and STAS charges should be prorated so that a new rate is not applied to services rendered before the effective date." This issue is not one of

PAWC's "understanding"; it is a matter of law embodied in PUC Orders that the Complainant has before him and which the ALJ's Order has reviewed and found to support PAWC's position. As explained in detail in PAWC's Objections, in addition to its other defects, the Pettko Discovery should not be permitted because it seeks to inquire into matters of law, which the Complainant continues – erroneously – to try to couch as issues of fact.

The Complainant also errs in assuming – contrary to the Public Utility Code, the Commission's regulations and long-standing Commission policy and practice – that he has an unqualified right to conduct depositions and that his application for approval to do so should be treated as a *pro forma* exercise. *See* Motion to Compel ¶¶ 11-12. The Complainant's misguided assumption would relegate the ALJ's role in the discovery process to the ministerial act of granting any request for depositions that is minimally adequate in form.[5] That is not the case, nor has it ever been. Simply stated, there is a reason why the Commission's regulations **require** prior approval before depositions may be conducted. Administrative Law Judges have an important role in determining how discovery can and should be conducted in proceedings over which they preside.

Section 333(b) of the Public Utility Code and the Commission's regulations at 52 Pa. Code § 5.324 impose substantive criteria for the approval of depositions including a "good cause" requirement, consideration of the way testimony will be presented (i.e., by the use of written testimonial statements) and other substantive and procedural factors that can properly be considered only after one or more Prehearing Conferences have been held. *See* PAWC Objections, ¶¶ 11-13. These requirements, as well as Administrative Law Judges' inherent

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[5] Of course, the Complainant's Notice of Depositions was not adequate in form, since he failed to provide a proposed order. *See* PAWC Objections ¶ 10.

authority to control all aspects of the proceedings over which they preside (*see* 66 Pa. C.S. §§ 331(d)(3) and (4)), empower the ALJ to determine whether a request to conduct depositions is reasonable under the circumstances (e.g., given the issues presented; the nature of the proceedings; the proposed topics for inquiry; and whether other, less intrusive, forms of discovery would be more appropriate). In short – and contrary to the Complainant's contentions – the "good cause" requirement of Section 333(b)(5) means what it says.

Administrative Law Judges have authority and discretion to determine the proper manner in which discovery should proceed in cases before them. *See* 66 Pa. C.S. § 331(d)(3); 52 Pa. Code § 5.483(a) (Presiding officers granted authority to "impose reasonable limitations on discovery.") Given the nature of the issues presented in PUC proceedings, depositions are seldom found to be a necessary or appropriate form of discovery and are rarely found to be proper as the **first** form of discovery to be undertaken by a party. In fact, many large, multi-party proceedings involving complex issues – including rate cases, utility merger proceedings and transmission line siting investigations – are regularly litigated before the Commission without **any** depositions being conducted. As explained in PAWC's Objections, nothing about the issues presented by Mr. Pettko's Complaint or the "matters . . . for inquiry" in his Notice of Depositions provides "good cause" for the use of depositions, even if the "matters . . . for inquiry" were permissible subjects for discovery in this case, which they are not, for the reasons previously explained.

II. RESPONSES TO NUMBERED PARAGRAPHS OF THE MOTION TO COMPEL

1. Admitted. Paragraph No. 1 of the Motion to Compel is a summary of the procedural history of the case.

2. Paragraph No. 2 of the Motion to Compel is a request for relief to which an answer is not required. For the reasons explained herein, the Motion to Compel should be denied.

3. Denied, for the reasons set forth in greater detail in Section I, above, which are incorporated herein by reference. Contrary to the Complainant's contention, it is the Complainant – not PAWC – that is misinterpreting the ALJ's Order.

4. Denied, for the reasons set forth in greater detail in Section I, above, which are incorporated herein by reference.

5. Denied, for the reasons set forth in greater detail in Section I, above, which are incorporated herein by reference.

6. Denied, for the reasons set forth in greater detail in Section I, above, which are incorporated herein by reference. In further answer, PAWC does not rely upon "the Commission's past approval of its *overall collection* of the DSIC and STAS." (Emphasis added.) Instead, PAWC relies upon the Commission's Orders and directives **specifically approving** the bills-rendered application of changes in the DSIC and STAS. Notably in this regard, the ALJ's Order acknowledged and affirmed that prior Orders and directives of the Commission approved the manner in which changes in the DSIC and STAS are applied by PAWC. *See* PAWC Objections ¶¶ 3.a. and b. and ALJ's Order (p. 5): "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."[6]

7. Denied, for the reasons set forth in greater detail in Section I and Paragraph No. 6, above, which are incorporated herein by reference.

8. Denied, for the reasons set forth in greater detail in Section I and Paragraph No. 6, above, which are incorporated herein by reference.

9. Denied, for the reasons set forth in greater detail in Section I and Paragraph No. 6, above, which are incorporated herein by reference.

10. Denied. In further answer, the averments of Paragraph No. 10 of the Motion to Compel, read in conjunction with the averments of Paragraph Nos. 8 and 9 thereof, make it clear that the Pettko Discovery is directly **solely** at the issue of whether PAWC's historic and current implementation of the DSIC and STAS on a bills-rendered basis has been previously approved by the Commission. Because the ALJ's Order acknowledged and affirmed that prior Commission Orders and directives approved the bills-rendered application of the DSIC and STAS (*see* Paragraph No. 6, above), the averments of Paragraph No. 10 of the Motion to Compel underscore the impropriety of the Pettko Discovery.

11. Denied, for the reasons set forth in greater detail in Section I, above, which are incorporated herein by reference. As previously explained, the Complainant is trying to read the "good cause" provision out of Section 333(b)(5) of the Public Utility Code and, in so doing,

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[6] For example, on March 5, 1999, the Commission issued the Bureau of Audits' Report at Docket No. D-97S023, which states: "The Commission approved DSIC was on a 'bills rendered' basis." PAWC Motion For Judgment On The Pleadings, ¶ 18. *See also* ¶¶ 23-32.

assumes that Administrative Law Judges have no substantive role in controlling the manner in which discovery can and should be conducted in proceedings over which they preside.

12. Denied. As the proponent of depositions, the Complainant should be required to offer at least *prima facie* "good cause" for insisting on this form of discovery. The fact that the Complainant is trying to shift the burden to the Company highlights the Complainant's total inability to state a "good cause" for seeking depositions. Additionally, and more importantly, the Complainant simply disregards Paragraph Nos. 1-9 of PAWC's Objections, which lay out all the reasons why his Notice of Depositions cannot satisfy the "good cause" requirement imposed by Section 333(b)(5). Even though the Complainant – contrary to the Commission's regulations – used his Motion to Compel to respond to PAWC's Objections, he did not provide anything resembling "good cause" for conducting depositions and did not explain why depositions should be the first form of discovery to be undertaken.

13. Denied. The Complainant's claim that his "Notice of Deposition does not call for the deposition of an expert witness" is not correct and is belied by the "matters . . . for inquiry" listed in the Notice of Deposition itself (*see* Notice of Deposition ¶¶ 1-5 and 8). At the outset, it is well-established that, in proceedings before this Commission, witnesses testifying in their capacity as utility employees about rates; tariffs; utility accounting; Commission regulations, orders and regulatory policies; and utility books, records and business practices are deemed to be "expert" witnesses because they are offering testimony – including opinions – about matters requiring specialized knowledge and expertise.[7] In fact, it is precisely for this reason that such

[7] Although the Pennsylvania Rules of Evidence are not controlling in Commission proceedings, the Commission's long-standing determination of who should be deemed an "expert" witness in cases before it is consistent with Rule 702 thereof. Such witnesses have "technical or other specialized knowledge beyond that possessed by a layperson" and are

witnesses are required to submit their testimony in writing, since the written testimony requirement is specifically directed to expert testimony. 52 Pa. Code §5.412. Contrary to the Complainant's averments, his "matters . . . for inquiry" stretch far beyond mere "facts" within the personal knowledge of the deponent. Rather, the "matters . . . for inquiry" call for the deponent to testify about, for example, his or her "understanding" of (1) regulatory concepts, such as "bills rendered" and "service rendered," that are embodied in Commission Orders and other Commission pronouncements (Motion to Compel ¶ 2); (2) whether DSIC and STAS charges "*should be* prorated" (Motion to Compel ¶ 3) (emphasis added); (3) whether PAWC is "*allowed* to bill its customers [on a bills-rendered basis]" (Motion to Compel ¶ 4) (emphasis added); and (4) the interpretation of "documents," which necessarily include PUC Orders and directives and PUC-approved tariffs and tariff riders that address how the DSIC and STAS should be applied (Motion to Compel ¶ 8). These and other "matters . . . for inquiry" are squarely within the scope of what has consistently been deemed to be "expert" testimony in proceedings before the Commission. Consequently, the Complainant's attempt to evade the application of 52 Pa. Code § 5.324(a) is unavailing and should be rejected. See PAWC Objections, ¶ 12 (Where written testimony is to be submitted, depositions of expert witnesses are generally not appropriate and should not be permitted.)

Furthermore, and as explained in Section I, *supra*, independent of Section 5.324(a) of the Commission's regulations, the ALJ has inherent authority to control the proceeding over which

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"qualified as an expert by knowledge, skill, experience, training or education," which establishes a reasonable basis for them to "testify thereto in the form of an opinion or otherwise." *Pa. Rules of Evidence* § 702.

he is presiding. Therefore, the ALJ can, and should, find that depositions are neither necessary nor appropriate where, as here, written testimony will be presented.

14. Denied. The Complainant's averments misconstrue Section 333(b)(1) of the Public Utility Code, and his position makes no sense. Section 333(b)(1) is clear that depositions should not be authorized until at least one Prehearing Conference has been conducted. Only then will the parties have delineated the issues and sub-issues that demarcate the scope of the proceeding and described the nature of the evidence they expect to present. This information is essential to determining if an application for depositions presents the "good cause" necessary for approval. Moreover, a Prehearing Conference will establish the litigation schedule and the procedures for presenting testimony, including the use of written testimony, which are also necessary to determining the propriety of a request for depositions. *See* Prehearing Conference Order issued November 16, 2011, ¶¶ 3.c.), e.), g.) and h.).

15. Paragraph No. 15 is Complainant's offer to conduct depositions at a location other than Pittsburgh, Pennsylvania. Complainant's offer does not provide any basis for granting his request for depositions, which is improper, unjustified, lacks "good cause," seeks to inquire into matters that are foreclosed by the ALJ's Order and should, therefore, be denied. Moreover, the burden of subjecting the Company's employee(s) to unnecessary depositions is not eliminated by changing the location of such unwarranted interruptions.

16. Denied. The Complainant contends that the Company's "Additional Objections" set forth in Section IV (¶¶ 14-22) of its Objections "are based solely upon Respondent's we-already-won-the-case position." That assertion is incorrect on its face. Every one of PAWC's Additional Objections is, as their title clearly indicates, **in addition to** PAWC's overarching

objection that the Pettko Discovery is improper because it seeks to inquire into matters foreclosed by the ALJ's Order. Each of the Additional Objections states a specific objection on grounds such as "excessive in scope," "require[s] an unreasonable search or investigation," "impose[s] an unreasonable burden," "request[s] legal conclusions that are not appropriate for discovery," requests information that is not "relevant," and seeks documents that are already "in the public domain" and/or "have previously been provided to [the Complainant]."[8] The Complainant has not responded to these specific objections. For that reason alone, PAWC's Objections should be granted.

17. Denied, for the reasons set forth in greater detail in Section I and Paragraph No. 6, above, which are incorporated herein by reference. Complainant's averment that "Respondent has long been on notice of the issue the Complainant intends to pursue" is an admission that "the essential core" of his Complaint is whether PAWC had prior Commission approval to apply changes in the DSIC and STAS on a bills-rendered basis. As discussed in Section I, above, and in PAWC's Objections, the ALJ's Order acknowledged and affirmed that prior Commission Orders and directives expressly granted such approval. Consequently, Complainant's own averments confirm that there is nothing left of his Complaint.

18. Denied, for the reasons set forth in greater detail in Section I and Paragraph No. 6, above, which are incorporated herein by reference. In further answer, Complainant has not identified what "issues" exist for which a "meaningful factual record" should be created or what "evidence [is] necessary to resolve" such issues. If – as the Complainant has now conceded – the

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[8] In Section II of its Objections (¶ 6 and footnote 6), the Company expanded on its Additional Objections by explaining that certain of the Requests for Documents constitute an inappropriate "fishing expedition" of the kind that consistently has been rejected in Commission proceedings.

"essential core" of his Complaint is whether PAWC's implementation of DSIC and STAS rate changes on a bills-rendered basis had prior Commission authorization, then what he intends to pursue is an issue of law, not an issue of "fact" that would require either a "factual record" or the presentation of "evidence." Moreover, that issue has already been resolved. As the ALJ's Order acknowledges and affirms, prior Commission Orders and directives have repeatedly granted the approvals the Complainant erroneously contends is lacking.

WHEREFORE, for the foregoing reasons, the Administrative Law Judge should:

(1) Deny the Complainant's Motion to Compel;

(2) Grant PAWC's Objections in their entirety;

(3) Prohibit the initiation of any discovery until a Prehearing Order is issued following the completion of the Prehearing Conference in this case; and

(4) Issue a further Prehearing Order, as necessary, clarifying and defining the permissible scope of this proceeding and identifying which, if any, of the issues the Complainant intends to pursue have, or have not, been decided by the ALJ's Order.

Respectfully Submitted,

Thomas P. Gadsden
tgadsden@morganlewis.com
Anthony C. DeCusatis
adecusatis@morganlewis.com
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5234
877.432.9652 (fax)

Seth A. Mendelsohn
Attorney ID 77063
seth.mendelsohn@amwater.com
Pennsylvania-American Water Company
800 Hershey Park Drive
Hershey, PA 17033
717.531.3362

Dated: December 5, 2011

Counsel for Pennsylvania-American Water Company

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have, this 5th day of December, 2011, served a true and correct copy of Pennsylvania-American Water Company's **Answer to the Motion to Compel Discovery of C. Leslie Pettko** upon the following persons and in the manner indicated below:

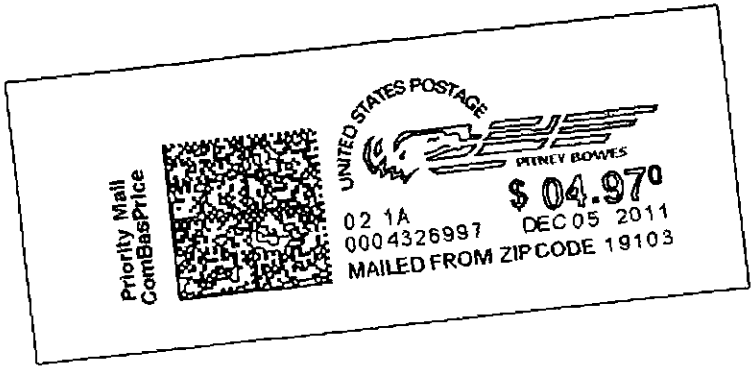
BY ELECTRONIC MAIL AND FEDERAL EXPRESS

Patrick K. Cavanaugh, Esquire
Del Sole Cavanaugh Stroyd LLC
The Waterfront Building, Suite 300
200 First Avenue
Pittsburgh, PA 15222
pcavanaugh@dscslaw.com
Counsel For C. Leslie Pettko

Hon. Joel H. Cheskis
Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street (2 West)
Harrisburg, PA 17120

Anthony C. DeCusatis (Pa. No. 25700)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Phone: 215.963.5034
Fax: 215.963.5001
E-mail: adecusatis@morganlewis.com
Counsel for Pennsylvania-American Water Company

Dated: December 5, 2011



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1701 Market Street
Philadelphia, PA 19103-2921

Morgan Lewis
COUNSELORS AT LAW

TO: Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120