

333 OAK LANE
BLOOMSBURG, PA 17815
SCOTT.J.RUBIN@GMAIL.COM

SCOTT J. RUBIN
ATTORNEY • CONSULTANT

TEL: (570) 387-1893
FAX: (570) 387-1894
CELL: (570) 850-9317

May 7, 2012

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Re: Utility Workers Union of America System Local
537 v. Pennsylvania-American Water Company
Docket No. C-2012-2287204

Dear Secretary Chiavetta:

Enclosed for filing please find the Exceptions of Utility Workers Union of America System Local 537 in the above-referenced proceeding.

The document was filed electronically with the Commission on this date.

Sincerely,



Enclosure

cc: All parties per Certificate of Service
David A. Salapa, Administrative Law Judge
Office of Special Assistants

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Utility Workers Union of America	:	
System Local 537	:	
	:	
v.	:	Docket No. C-2012-2287204
	:	
Pennsylvania-American Water Company	:	

EXCEPTIONS OF
UTILITY WORKERS UNION OF AMERICA
SYSTEM LOCAL 537

Pursuant to 52 Pa. Code § 5.553, Utility Workers Union of America System Local 537 (“UWUA”) hereby files Exceptions to the Initial Decision Sustaining Preliminary Objections and Dismissing Complaint (“Initial Decision” or “I.D.”) of Administrative Law Judge David A. Salapa (“ALJ”), dated April 9, 2012, and served under cover letter of the Secretary on April 18, 2012.

Background

On February 7, 2012, UWUA filed a Formal Complaint against Pennsylvania-American Water Company (“PAWC”) alleging that PAWC unlawfully and repeatedly violated the Commission’s termination regulations. Specifically, UWUA alleged (1) that in certain parts of PAWC’s service area, PAWC failed to deliver notices to customers three days prior to terminating service for non-payment, as required by 66 Pa. C.S. § 1406(b)(ii) and 52 Pa. Code § 56.93; and (2) that, in certain parts of PAWC’s service area, PAWC failed to deliver post-termination notices to customers under certain circumstances, as required by 52 Pa. Code § 56.96.

PAWC filed a Motion to Dismiss the complaint because it alleged that UWUA did not have standing to file a formal complaint concerning these allegations. UWUA timely filed an Answer to the motion to dismiss. This matter is now before the Commission because the Initial Decision holds that UWUA did not have standing to file a formal complaint concerning PAWC's alleged violations of termination requirements.

Exception 1: The ALJ Applied the Incorrect Legal Standard When Determining Whether an Association Like UWUA Has Standing

On pages 9-11 of the Initial Decision, the ALJ discusses the law of standing. He is generally correct about that law as it applies to individuals, which often is referred to as "first person standing." He erroneously failed to recognize, however, that there is a different body of law that applies to the standing of an organization or association, like UWUA, to bring an action in its representational capacity.

A. *Specific Errors in the Initial Decision*

The Initial Decision contains at least two statements that are directly contrary to the law of representational standing, as UWUA will explain below. First, the ALJ states: "the interest adversely affected is not the interest of the Complainant but rather of the Complainant's members." I.D. at 10.

Second, on page 11, the ALJ states: "The Complainant does not allege that the Respondent's alleged failure to comply with the Commission's termination regulations will cause it injury. Rather it alleges that the Respondent's alleged failure to comply with the Commission's termination regulations might cause injury to its members, not to it. This causal nexus is simply too remote to constitute an immediate interest in the subject matter of this proceeding."

B. The Law of Representational Standing

In the seminal case of *Warth v. Seldin*, 422 U.S. 490 (1975), the U.S. Supreme Court recognized that an organization can have standing to bring an action on behalf of its members' interests, even if the organization itself has not been directly injured. This has generally become known as "associational standing," "organizational standing," or "representational standing," depending on the jurisdiction.

Two years after *Warth v. Seldin*, the U.S. Supreme Court adopted a three-part test to determine whether an association has standing. Specifically, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Court held:

Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id., at 343.

A similar, but less specific, requirement was adopted by the Commonwealth Court a few years after *Hunt*. In *Tripps Park Civic Association v. Pa. PUC*, 52 Pa. Commw. 317, 415 A.2d 967 (1980), the court held: "even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Id.*, 52 Pa. Commw. at 320-21, 415 A.2d at 970. Recently, Commonwealth Court described the law of representational standing, under *Tripps Park* and later cases, as follows:

An association may have standing as a representative of its members. Thus, as long as an organization "has at least one member who has or will suffer a direct, immediate, and substantial injury to an interest as a result of the challenged action (i.e., is aggrieved), the organization has standing."

Energy Conservation Council of Pa. v. Pa. PUC, 995 A.2d 465 (Pa. Commw. 2010), rearg. den., 2010 Pa. Commw. LEXIS 318 (citations omitted). In essence, the standard

enunciated by Commonwealth Court in *Tripps Park* and *Energy Conservation Council* is the same as the first element of the *Hunt* test: that at least one member of the organization would have standing to bring the same claim on its own behalf.

Moreover, this Commission previously has recognized that the “*Hunt* test” (as it has come to be known) and the *Tripps Park* standard are applicable to cases before it. See, e.g., *Mid-Atlantic Power Supply Association v. PECO Energy Company*, Docket Nos. P-00981615, et al., Rec. Dec. of ALJ Turner, 1999 Pa. PUC LEXIS 23 (January 11, 1999) (the *Hunt* test was applicable to determinations of representational standing and the challenged party (the Clean Air Council) met the three elements of that test); *PPL Electric Utilities Corp. Universal and Energy Conservation Plan for 2011 through 2013*, Docket No. M-2010-2179796, 2011 Pa. PUC LEXIS 1997 (May 5, 2011) (the Commission relied on *Tripps Park* and *Energy Conservation Council* and held that a non-profit corporation can assert standing in a representational capacity).

C. Labor Unions Have Representational Standing to Bring Actions on Behalf of Their Members

Labor unions often have been recognized as having representational standing to bring legal actions on behalf of their members. For example, in *U.S. v. Local 560 (I.B.T.)*, 974 F.2d 315 (3rd Cir. 1992), the Third Circuit held that a labor union met all of the requirements of the *Hunt* test to challenge the constitutionality of proposed government sanctions against certain members of the union.

Recently, West Virginia’s highest court reviewed the law of representational standing and held that a federation of labor unions had representational standing to challenge the provisions of a state-issued construction contract. *Affiliated Construction Trades Foundation v. W.V. Department of Transportation*, 713 S.E.2d 809 (W.V. 2011).

Interestingly, in that case, the court also noted that 43 states recognize the doctrine of representational standing.

Moreover, this Commission frequently has recognized that labor unions can be parties to cases to represent the interests of their members, as both employees and customers of the utility. As just one example, in its Answer to PAWC's Motion to Dismiss, UWUA cited at length a decision by ALJ Colwell in which a labor union was found to have standing to raise issues related to customer service and reliability. ALJ Colwell held: "Customer service, safety and reliability, network deployment and the financial health of the two Joint Applicants affect not only the customers of the Joint Applicants but the employees who provide the services." See UWUA Answer, page 4, citing Order Disposing of the Preliminary Objections of Commonwealth Telephone Company, CTSI, LLC and CTE Telecom, LLC d/b/a Commonwealth Long Distance Seeking to Limit the Participation of the Communications Workers of America, *Joint Application of Commonwealth Telephone Company*, Docket No. A-310800F0010 (Dec. 14, 2006) (a copy of which is attached to the UWUA Answer) (emphasis added).

ALJ Colwell's decision was exactly right. Utility employees have a strong interest in the provision of service to the public that is safe, reliable, and provided in a lawful manner. This is not some general interest, but a very specific and personal interest, necessary to protect the safety and livelihood of utility employees, as explained in Exception 2, below.

D. UWUA Meets the Standards in Hunt and Tripps Park

There is no question that UWUA meets the standards for representational standing set forth in *Hunt and Tripps Park*. As to the Hunt test:

First, an individual utility employee would have the right to come to the Commission to protect himself or herself from being forced to engage in unlawful conduct. This is explained in greater detail in Exception 2.

Second, UWUA is a labor union that represents the interests of its members. Those interests include not only wages, but also safety and working conditions. Protecting its members from having to engage in unlawful conduct on the job is directly related to the purpose of UWUA.

Third, UWUA is not seeking any relief that would require each affected, individual employee to participate in this case. Rather, UWUA's complaint seeks to have the Commission order PAWC to cease unlawful conduct, penalize PAWC for those violations that have occurred, and institute reporting and other measures to monitor PAWC's future compliance. While individual UWUA members would provide evidence to the Commission, no individual is seeking a special remedy.

Thus, all three elements of the *Hunt* test are met by UWUA in this case.

Similarly, UWUA also meets the *Tripps Park* standard. Indeed, as noted above, it seems that the *Tripps Park* standard is the same as the first element of the Hunt test: that at least one member of the organization would have standing to bring the same claim on his or her behalf. As explained in Exception 2, below, that standard is met in this case.

Exception 2: The ALJ Erred in Finding that Utility Employees Do Not Have Standing to File a Formal Complaint When the Utility is Directing the Employees to Take Unlawful Action

The ALJ held that concerns about a utility employee's safety or loss of livelihood are merely "conjecture about possible future harm" and are not sufficient to support the employee's standing to bring a Formal Complaint to the Commission. I.D. at 10. This is incorrect.

A. Section 1501 of the Code Provides Specific Protections for Utility Employees

The Public Utility Code provides specific protections for utility employees. For example, Section 1501 provides, in part, as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements to service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. ... Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501 (emphasis added).

It should be recalled that the definition of "service" in the Public Utility Code is quite broad. Section 102 of the Code defines service as follows:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities ... in the performance of their duties under this part to their patrons, employees, other public utilities, and the public ...

66 Pa. C.S. § 102 (emphasis added).

In other words, the Code protects the safety of utility employees in the performance of utility "service", which includes all actions taken by a utility in furtherance of its obligations under the Code to the public and its employees.

The ALJ's standard – which has no basis in the law – would prevent a utility employee from seeking redress of an unsafe or unreasonable condition until after the employee suffered injury. Not only is such a result draconian, it is not the law of this Commonwealth.

More than 50 years ago, the Commission and our courts addressed this issue. In *Reading Co. v. Pa. PUC*, 188 Pa. Super. 146, 146 A.2d 746 (1958), the Superior Court rejected a public utility's challenge to the standing of its employees (and their representatives) to file a complaint with the Commission concerning unsafe conditions and other alleged violations of Commission regulations. The court summarized the utility's contention, and the court's holding, as follows:

The main burden of Reading Company's argument, here, is that the Pennsylvania Public Utility Commission does not have jurisdiction to grant relief to employees of a public utility whose personal safety is jeopardized by the conditions under which they work. With this contention we are unable to agree.

Id., 188 Pa. Super. at 149, 146 A.2d at 748 (emphasis added).¹ The court then continued to explain that Section 401 of the Public Utility Law, which is now Section 1501 of the Code, specifically protects the “accommodation, convenience, and safety” of utility employees. *Id.*

B. Section 3316 of the Code Encourages Utility Employees to Bring Before the Commission Allegations of Utility Violations of the Code and Commission Regulations

The need for utility employees to be able to protect themselves is so strong that the Code provides special protections for utility employees who testify before the

¹ The original case at the Commission, which the court affirmed, is reported as *Cooperative Legislative Committee, Railroad Brotherhoods in Pennsylvania v. Reading Co.*, 36 Pa. PUC 59 (1958).

Commission (or otherwise bring utility violations to the Commission's attention). Specifically, Section 3316 of the Code protects utility employees against retaliation by the utility when "the employee or a person acting on behalf of the employee made or was about to make a good faith report, verbally or in writing, to the employer, the commission, the Office of Consumer Advocate, the Office of Small Business Advocate or the Office of Attorney General on an instance of wrongdoing or waste." 66 Pa. C.S. § 3316(a). In other words, the Code encourages utility employees to take action before the Commission to protect themselves and the public from utility violations of the Code and Commission regulations.

C. The Commission has a Special Obligation to Protect the Safety of Utility Employees

Simply stated, the Commission has a special obligation to protect the safety of utility employees. That obligation gives utility employees standing to file a Formal Complaint with the Commission when a utility is directing its employees to engage in conduct that violates the Public Utility Code or Commission regulations, as is the case here.

Moreover, the interest of utility employees – and their standing to come before the Commission – is heightened when the unlawful conduct involves contact between the employees and the public. Utility employees enjoy a special relationship with the public. They are permitted to go on private property to read and service meters, connect and disconnect service, and otherwise ensure that safe and reliable service is being provided to the public. The public has the right to expect that utility employees are doing their job in accordance with the law.

Unfortunately, when utilities direct employees to engage in unlawful conduct (such as terminating service without providing the legally required notice, as UWUA has alleged in this case), that jeopardizes not only the availability of service to the customer, but also the safety of the utility employees performing the unlawful act.

Customers are understandably angry when their service is being disconnected in accordance with the law, and that anger can manifest itself as physical violence against the utility employee.² When the termination is occurring without proper notice, there is an even greater risk to the utility employee's safety.

Moreover, when a utility employee engages in unlawful conduct, his or her livelihood also can be jeopardized. That issue was raised in PAWC's Answer to UWUA's Formal Complaint, when it alleged: "If any failure may have occurred with the posting of the three-day notices, it may involve UWUA members failing to actually post said notices." Answer of PAWC, dated February 28, 2012, ¶ 10.

Conclusion

In conclusion, UWUA respectfully submits that the ALJ erred in holding that a labor union does not have standing to file a Formal Complaint alleging that a utility has

² This risk moved the General Assembly to amend the Crimes Code in 2004. The amendment makes an attack on a utility employee a felony, putting it on par with an attack on a law enforcement officer or fire fighter. 18 Pa. C.S. § 2702(c)(36), added by Act 173 of 2004. In support of that amendment to the law, Senator Tomlinson explained on the Senate floor that the risks faced by utility employees when performing their jobs required this special protection. He stated, in part:

The bill is needed because public utility workers are sometimes threatened on the job. This usually occurs when the utility employee is disconnecting a service due to nonpayment or when workers are responding to emergency situations late at night in unsafe neighborhoods and locations. ... [U]tility representatives submitted case files documenting incidents where employees were shot or threatened by property owners who deliberately unleashed dogs. In one case, an employee was bitten by a consumer who tested positive for hepatitis C. Senate Bill No. 72 would make it a felony to harass or assault a utility worker. ... I think this is important legislation to help protect public utility employees who are asked to go into neighborhoods and are placed in dangerous situations.

Pa. Legislative Journal – Senate (Mar. 3, 2003), p. 162 (emphasis added).

violated the Commission's customer termination regulations. UWUA has the right to bring this action on behalf of its members who have been directed by the utility to terminate service in an unlawful manner. Such unlawful terminations jeopardize the personal safety and livelihood of those members.

UWUA respectfully requests, therefore, that the Commission reverse the Initial Decision, hold that UWUA has standing to bring this action, and return this matter to the Office of Administrative Law Judge so that the parties can proceed to conduct discovery, hold hearings, and otherwise develop a record for the Commission's consideration.

Respectfully submitted,



Scott J. Rubin
333 Oak Lane
Bloomsburg, PA 17815-2036
Phone: (570) 387-1893
Fax: (570) 387-1894
e-mail: scott.j.rubin@gmail.com
(Pa. Supreme Court ID: 34536)

Counsel for:
Utility Workers Union of America System
Local 537, Complainant

Dated: May 7, 2012

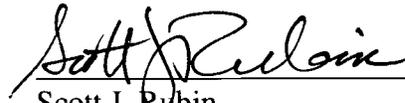
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served this day a true copy of Exceptions of Utility Workers Union of America System Local 537 upon the parties listed below by electronic mail and U.S. mail, first-class, postage prepaid, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Susan Simms Marsh, Corporate Counsel
Seth A. Mendelsohn, Corporate Counsel
Pennsylvania-American Water Company
800 Hershey Park Drive
Hershey, PA 17033
susan.marsh@amwater.com
seth.mendelsohn@amwater.com

Dianne E. Dusman
Shaun A. Sparks
Office of Consumer Advocate
555 Walnut St., 5th Floor Forum Place
Harrisburg, PA 17101-1923
ddusman@paoca.org
ssparks@paoca.org

Dated: May 7, 2012



Scott J. Rubin
*Counsel for Utility Workers Union of
America System Local 537*