

COMMONWEALTH OF PENNSYLVANIA



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May 7, 2012

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17101

Re: Utility Workers Union of America System
Local 537

v.

Pennsylvania-American Water Co.
Docket No. C-2012-2287204

Dear Secretary Chiavetta:

Enclosed for filing are the Exceptions of the Office of Consumer Advocate in the above-referenced proceeding.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Sincerely yours,

A handwritten signature in black ink that reads "Shaun A. Sparks".

Shaun A. Sparks
Assistant Consumer Advocate
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Enclosure

cc: Honorable David A. Salapa
Office of Special Assistants
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF THE
OFFICE OF CONSUMER ADVOCATE

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I. INTRODUCTION

On February 7, 2012, System Local 537 of the Utility Workers Union of America (UWUA) filed the above-referenced Formal Complaint against the Pennsylvania American Water Company (PAWC). The Formal Complaint concerns whether the Mon Valley operating division of PAWC has engaged in intentional, systematic, and long-standing violations of 66 Pa.C.S. Section 1406, *Termination of utility service*, and related Commission regulations. On February 28, 2012, PAWC timely filed an Answer and a separate Motion to Dismiss (PAWC Motion) the UWUA Complaint. UWUA timely provided its Answer to the Motion on March 8, 2012. The OCA intervened in the matter on April 13, 2012.

On April 18, 2012, the Commission issued the Initial Decision of Administrative Law Judge David A. Salapa in the above-referenced matter. Pursuant to 52 Pa. Code Section 5.533, the Office of Consumer Advocate now files these Exceptions in response to the Initial Decision.

Residential utility terminations have a direct and serious effect on public health, safety, and welfare. Terminations affect not only customers of record, but may also affect other persons in residence at the terminated address, including children. In recognition of all of this, the Public Utility Code requires multiple customer contacts prior to termination. 66 Pa. C.S. § 1406; 52 Pa. Code § 56 *et seq.* These contacts serve as both notice of the impending termination and an opportunity for payment to avoid

termination. Utility employees performing terminations are in a position to understand the termination practices of PAWC; their allegations of non-compliance with termination laws must be viewed with utmost seriousness by the Commission.

The OCA respectfully submits that the PAWC Motion, and the Initial Decision granting that Motion, do not reflect an appropriate application of Pennsylvania law. Pennsylvania law in general, and this Commission in particular, confer standing to membership organizations like the UWUA based on the direct, immediate, and substantial interests of the members that constitute the organization, not on the organization itself. The ALJ erred by focusing on the isolated interests of System Local 537 as a stand-alone entity apart from the interests of its members.

The Initial Decision, if adopted, could jeopardize the standing of many consumer and industry trade associations with long histories of advocacy on behalf of their members before this Commission. For example, the Pennsylvania Telephone Association should not lack standing to intervene in a matter before the Commission simply because the result of that matter before the Commission might harm its members but not the PTA itself. See I.D. at 11. Experience and long-standing precedent indicate that rejection of the Initial Decision regarding UWUA's standing is appropriate.

The matter at hand is whether PAWC employee members of System Local 537 have standing before the Commission through their organization to complain of violations of the Public Utility Code and Commission regulations. Pennsylvania law

provides that the answer is “yes,” and that UWUA members may proceed before the Commission through their membership organization.

II. EXCEPTIONS

OCA Exception No. 1: The ALJ erred because UWUA System Local 537 has standing to file Formal Complaints before the Commission under the doctrine of representational standing. (I.D. at 8-10; UWUA Answer at 3-4)

A. Introduction.

The OCA acknowledges that the Initial Decision provides the correct legal standard to determine whether a person has standing before the Commission (I.D. at 8-9). What the Initial Decision lacks is an analysis of *representational* standing before the Commission.

B. Erroneous legal basis of the Initial Decision

The PAWC Motion averred that System Local 537 of the UWUA (a membership organization representing PAWC employees) is not itself a PAWC customer. PAWC Motion at ¶ 5. PAWC provides:

The Complainant is not a customer of the Company. Therefore, the Complainant has no aggrieved rights which are noted by the fact that UWUA failed to allege how their rights have been affected.

PAWC Motion at ¶ 5. PAWC provides nothing more than this cursory conclusion in support. In its Answer to the Motion, the UWUA agrees that the membership

organization itself is not a PAWC customer, but correctly points out that this is not determinative with respect to the required standing analysis. UWUA Answer at ¶ 5.

Based on this one issue, the ALJ determined that the System Local 537 had no direct, immediate, or substantial interest at stake because “the Complainant is not a customer of record.” *Id.* at 9. He further concludes that any interest “adversely affected is not the interest of the Complainant, but rather of the Complainant’s members.” *I.D.* at 10. He also concludes that the “Complainant lacks standing to maintain the action as customers, residents or owners.” *I.D.* at 10. The ALJ adds, “[s]ince the Complainant is not a customer of the Respondent, it is not adversely affected by the Respondent’s alleged failure to provide notice of termination of service to its customers.” *I.D.* at 10. Regarding UWUA interests, the ALJ states that non-compliance with Commission regulations “might cause injury to its members, not to it.” *I.D.* at 11. The ALJ thus suggested that while UWUA members might have an interest in the subject of the Complaint, System Local 537 did not.

The OCA submits that the ALJ erred by narrowing his review to System Local 537 as a stand-alone entity, even though PAWC termination practices “might cause injury to its members.” *I.D.* at 11. The Commission and Pennsylvania Courts have repeatedly determined that it is the interests of the members of an organization that count when reviewing whether an organization has standing.

In a 2010 decision dealing with representational standing the Commonwealth

Court determined that:

An association may have standing as a representative of its members. *Tripps Park v. Pa. Public Utility Commission*, 415 A.2d 967 (Pa. Comwlth. 1980). 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. *Parents United for Better Schools v. School District of Philadelphia*, 614 A.2d 689 (Pa. Cmwlth. 1994) (PUBS). For example, in PUBS, this Court held that a group of individuals, including parents of high school students, incorporated to challenge the implementation of a new school district policy making condoms available at school-based health clinics upon request of high school students, had standing because at least one of its members would be aggrieved by the school district's actions. *Id.* Similarly, in *Tripps Park*, we held that an organization of Pennsylvania Gas and Water customers and rate-payers, had standing "even in the absence of injury to itself . . . solely as the representative of its members." *Tripps Park*, 415 A.2d at 970.

Energy Conservation Council of Pennsylvania v. Pa. Public Utility Commission, 995 A.2d 445, 476 (Pa. Cmmw. 2010), reargument denied, 2010 Pa. Commw. LEXIS 318 (Pa. Cmmw. 2010) (ECC). In 2011, the Commission discussed the ECC case when it passed on the issue of representational standing. It wrote:

We find it instructive that the Commonwealth Court in *ECC* discussed both an association (*Tripps Park*) and a not-for-profit corporation (*Parents United for Better Schools*) without distinction regarding whether the entity itself could act in a representational capacity or must have standing independent of its members. This is contrary to the discussion found in the Initial Decision under review. The clear holding of *ECC* is that not-for-profit corporations can act in a representative capacity "if at least one of its members would be aggrieved" by the matter at hand. *ECC*, 995 A.2d 445, 476.

The Commonwealth Court in *ECC* cited *Concerned Taxpayers v. Commonwealth*, 382 A.2d 490 (Pa. Cmwlth. 1978), in reaching its result. *Concerned Taxpayers* involved a not-for-profit corporation which endeavored to act in a representational capacity on behalf of its members. There, the Commonwealth Court also held that a not-for-profit corporation could act in a representational capacity, provided that the requisites for standing, an interest that is direct, substantial and immediate, are present on the part of its members.

This Commission has also addressed the issue of representational standing on the part of not-for-profit corporations. In *Pa. Public Utility Commission v. Columbia Gas of Pennsylvania, et al.*, R-00049783C0001-C0007 (Order entered November 4, 2005), we stated:

NEM contends in its Exceptions that it is an advocacy group that, under its Internal Revenue Service 501(c)(3) non-profit status, functions in a representational capacity. NEM opines that many of its members could not afford to participate in proceedings of this nature due to prohibitive legal costs without NEM. The Commission finds that it is virtually impossible to separate NEM's interest from that of its membership. We further find that since NEM's primary corporate function is to serve as an advocacy group, and since NEM's members are at potential risk of loss by Columbia's request in this matter, there is a direct, substantial and immediate risk of harm if NEM is denied party status

PPL Electric Utilities Corporation Universal Service and Energy Conservation Plan for 2011 through 2013, Docket No. M-2010-2179796, Opinion and Order at 10-12 (May 5, 2011).

The Commission correctly focused on Tripps Park v. Pennsylvania Public Utility Commission, as this decision has served as a foundation for the doctrine of representational standing. Under this doctrine, associations may have standing as the

representative of the interest of their members. Representational standing has a long history of precedential support. See e.g., Manufacturers Association of Erie v. The City of Erie-Bureau of Water, 50 Pa. PUC 43 (1976); Grandview Association, Inc. v. Mount Washington Associates, 434 A2d 796 (Pa. Super. 1981); CEPA v. Philadelphia Water Department Commission, 575 A2d 160 (Pa. Cmmw. 1990), aff'd. 600 A2d 189.

Indeed, the Commission has a long history of acknowledging the standing of consumer and trade associations before it. Examples include the Pennsylvania Telephone Association, the Energy Association of Pennsylvania, and the Retail Energy Supply Association. Commission practice and precedent show that the Initial Decision is in error on this point of law and must be rejected.

C. Conclusion.

Like the organizations discussed in the extended quote above, it is virtually impossible to separate the interests of UWUA System Local 537 from that of its members. In addition, as the ALJ acknowledged, UWUA has alleged that its members are at potential on-going risk because of PAWC's alleged actions. The Complaint alleges that there is a direct, substantial and immediate risk of harm to UWUA members if PAWC is engaging in the alleged conduct. As such, UWUA has standing to file a formal complaint before the Commission.

OCA Exception No. 2: The determination that UWUA System Local 537 lacks standing to file a Formal Complaint before the Commission is not supported by substantial evidence. (I.D. at 10)

The OCA acknowledges that the particular fact on which the Initial decision relies – whether UWUA is a PAWC customer – is not in dispute. Nevertheless, by limiting his inquiry to this one issue, the ALJ did not consider other critical factual averments concerning the direct, immediate, and substantial interests of UWUA members expressed in the Formal Complaint. The Formal Complaint is replete with factual allegations about how UWUA members are (and have been) affected by PAWC’s alleged failure to serve appropriate termination notices in its Mon Valley district. These facts, which must be accepted as true for purposes of the PAWC Motion, are the appropriate focus of any inquiry into UWUA standing.

A. The UWUA averments show that its members have a direct, immediate, and substantial interest in PAWC’s compliance with utility termination law.

The UWUA Formal Complaint contains more than enough relevant facts to show how it has an interest in whether PAWC complies with Pennsylvania utility terminations laws. For example:

the collective bargaining agreement between PAWC and UWUA requires members of UWUA to serve three-day notices on customers. Complaint at ¶ 11.

employees in the Valley district did not serve three-day termination notices on customers whose service was about to be disconnected for non-payment of bills. Complaint at ¶ 10.

a UWUA member in the Valley district office observed a PAWC supervisor shredding documents that appeared to be three-day notices. Complaint at ¶ 15.

The Complaint also avers that an “employee had numerous discussions with customers that stated that they were never provided a three-day notice prior to having water service terminated.” UWUA Complaint at ¶ 14.

In its Answer to the PAWC Motion, UWUA stressed that “UWUA members are being forced to engage in conduct, and otherwise render service to the public, that is in violation of the Commission’s regulations.” UWUA Answer at ¶ 5. Even more telling is UWUA’s statement as to why its members seek compliance with the law – the avoidance of legal liability, preservation of their livelihood, and physical well-being on the job. UWUA Answer at 5. These are significant interests under any reasonable measure. However, the ALJ rejects these interests under the category of “mere conjecture.” I.D. at 10.

Accepting the truth of UWUA’s averments, however, as the Commission must for the purpose of ruling on the PAWC Motion, the OCA submits that UWUA has amply alleged a direct, immediate, and substantial interest on the part of its members. Indeed, a formal complaint is appropriate at this time because UWUA alleges that PAWC management has been unresponsive to UWUA attempts to correct the unlawful

conduct. Formal Complaint at 4-5. Now, the employees seek to exercise their rights under the law to achieve compliance via a Commission order.¹ The UWUA is entitled to an opportunity to be heard on its Formal Complaint through evidentiary hearings.

Regarding the substance of the UWUA complaint, PAWC argues that the Commission should consider the UWUA Formal Complaint as a “report” to the Commission and not a Formal Complaint. PAWC Motion at ¶ 7. The Initial Decision gives weight to this suggestion when it provides that the UWUA filed its Formal Complaint “in order to assure that the Commission addressed the issue” and that the “Commission does not need [the UWUA] to pursue its complaint in order to investigate [PAWC] operations or enforce Commission regulations. I.D. at 11.

The conclusions of PAWC and the ALJ on this point are misplaced. The UWUA has a right, as does any affected member of the public, to complain of inadequate service under the Code. The UWUA directs its own representation before the Commission. Utility employees play a valuable role in assuring that the public receives safe, adequate and reasonable utility service -- as is the right of the public under the law. Public Utility Code Section 3316 encourages utility employees to approach the Commission with concerns. The Commission should seek to foster, not diminish, this statutory goal.

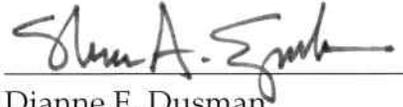
¹ As noted by the UWUA in its Answer, 66 Pa.C.S §1501 provides for the protection of the safety and convenience of utility employees (UWUA Answer at ¶ 9), and that 66 Pa. C.S. §701 provides the mechanism through which the employees may address these issues before the Commission (UWUA Answer at ¶ 7).

B. Conclusion

The UWUA falls within the Commonwealth Court holdings relative to standing; as long as any UWUA members have suffered or will suffer a direct, immediate, and substantial injury to a valid interest, the UWUA has standing to pursue this complaint before the Commission.

III. CONCLUSION

For all of the reasons discussed above the Office of Consumer Advocate respectfully requests that the Commission not adopt the Initial Decision of ALJ Salapa in this proceeding. The OCA respectfully requests that the Commission reject the Initial Decision and remand the matter to the Administrative Law Judge for hearings.



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DATED: May 7, 2012
155933

CERTIFICATE OF SERVICE

Re: Utility Workers Union of America
System Local 537

v.

Docket No. C-2012-2287204

Pennsylvania-American Water Company

I hereby certify that I have this day served a true copy of the foregoing Exceptions of the Office of Consumer Advocate, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

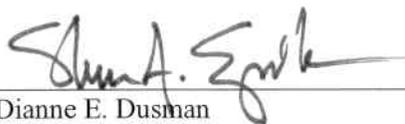
Dated this 7th day of May 2012.

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