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May 17, 2012

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

On behalf of Pennsylvania-American Water Company, I have attached for filing the Reply of Pennsylvania-American Water Company to Exceptions filed by the Utility Workers Union of America System Local 537 and the Office of Consumer Advocate in the above-captioned matter. This is a qualified document permitted to be filed electronically.

As evidenced by the attached Certificate of Service, all parties to this proceeding have been duly served.

Respectfully,


Susan Simms Marsh
Corporate Counsel

Enclosure

cc: David A. Salapa, Administrative Law Judge w/Enclosures
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

UTILITY WORKERS UNION OF AMERICA :	:	
SYSTEM LOCAL 537 :	:	
Complainant :	:	
	:	
v. :	:	DOCKET NO. C-2012-2287204
	:	
PENNSYLVANIA-AMERICAN WATER :	:	
COMPANY :	:	
Respondent :	:	

PENNSYLVANIA-AMERICAN WATER COMPANY
REPLY EXCEPTIONS

NOW COMES Respondent, Pennsylvania-American Water Company (“PAWC” or “Respondent”), by and through its undersigned attorneys, and files pursuant to 52 Pa. Code § 5.535 its reply to the Exceptions of Utility Workers Union of America System Local 537 (“Complainant’s Exceptions”) and Office of Consumer Advocate (“OCA’s Exceptions”). In support thereof, PAWC states as follows:

I. BACKGROUND

On February 7, 2012, Utility Workers Union of America System Local 537 (“Complainant”) filed its Complaint with the Pennsylvania Public Utility Commission (“Commission”) against Respondent PAWC alleging violations of the Public Utility Code at 66 Pa. C.S. § 1406 related to the timely delivery of notices of termination.

On February 28, 2012, Respondent filed an answer to the complaint, as well as motion to dismiss. The answer, among other things, denied the violations of the Public Utility Code. The motion to dismiss asserted that the Complainant lacks standing to bring the present complaint. On March 8, 2012, the Complainant filed an answer to PAWC’s motion (“Complainant’s

Answer”), stating that Respondent’s alleged violations exposed the Complainant’s membership to the possibility of legal liability, loss of livelihood and physical harm. On April 13, 2012, the Office of Consumer Advocate (“OCA”) intervened in the matter.

On April 18, 2012, the Commission issued the Initial Decision of Administrative Law Judge David A. Salapa in the above-captioned matter (“Initial Decision”). The Initial Decision recommended the dismissal of Complainant’s complaint for lack of standing.

On May 7, 2012, Complainant filed Complainant’s Exceptions, alleging errors in the Initial Decision. On the same day, OCA filed its exceptions on substantially the same grounds as Complainant’s Exceptions.

II. REPLY TO COMPLAINANT’S EXCEPTIONS

Reply to Complainant’s Exception 1

Complainant’s first exception contends that the Initial Decision failed to apply the law of representational standing when determining that Complainant was without standing. Regardless of whether the Initial Decision addressed representational standing, its ultimate legal conclusion that Complainant is without standing is correct and should be adopted by the Commission.

When an organization or association such as Complainant fails to meet the requirements for individual standing, it still may have standing to sue as a representative of its individual members “if it alleges an immediate, direct and substantial injury to any one of [its members]” such that the member would have independent standing to sue. 1000 Grandview Ass’n v. Mt. Wash. Assoc., 290 Pa. Super. Ct. 365, 368, 369, 434 A.2d 796, 798 (1981). To be “immediate,” there must be a close causal nexus between the injury and the action challenged and the injury must be within the zone of interest sought to be protected by the applicable law; to be “direct,” the injury must not result but for the action challenged; to be “substantial,” the injury must be

unique from the common interest all citizens have in securing proper compliance with the law.

See George v. Pa. Public Utility Commission, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1999).

At present, Complainant has failed to allege a harm to the interests of its members that is sufficient to establish representational standing. Specifically, Complaint asserts that Respondent's alleged failure to comply with the Commission's termination of service regulations has the potential to expose Complainant's members to legal liability, loss of livelihood and increased risk of physical injury. However, this "parade of horrors" would not be the direct or immediate result of Respondent's alleged regulatory violations. Rather, and as discussed more fully in Respondent's reply to Complainant's Exception 2, these injuries are pure speculation. As the Initial Decision correctly states, "[m]ere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding." Initial Decision at 9 (citing Official Court Reporters v. Pa. Labor Relations Bd., 502 Pa. 518, 532, 467 A.2d 311, 318 (1983)). This is true as applied either to Complainant's direct interests or the interests of its individual members. Because Complainant's individual members are not at risk of direct or immediate injury (these speculative claims being essentially unripe for determination), none would have individual standing to bring suit. As such, Complainant cannot establish the prerequisites for representational standing, and the present action must be dismissed.

In addition, Complainant and its individual members have effectively waived their right to bring the present complaint before the Commission. Specifically, they are obligated to pursue all grievances arising under the Collective Bargaining Agreement between the parties through specified procedures outlined in said agreement. The Complainant and PAWC are signatories to a Collective Bargaining Agreement entered into as of November 18, 2004 for an initial term of five years. Complainant has acknowledged that it continues to work under the terms of the

Collective Bargaining Agreement and alleges that it is this agreement that compels its members to serve customers with termination notices. Complaint ¶ 11; Complainant's Answer to PAWC's Motion to Dismiss ¶ 6. The injuries alleged by Complainant relate to working conditions, which are governed by the Collective Bargaining Agreement. As a result, any grievances with respect to terminations of service must be brought pursuant to Section 3 of the Collective Bargaining Agreement and not through a complaint to the Commission. The appropriate forum for addressing the issues presented by the Complainant, and has been underscored in its Exception, is through the Collective Bargaining Agreement grievance procedure and not by burden the Public Utility Commission administrative process.

Reply to Complainant's Exception 2

Complainant's second exception contends that the Initial Decision erred in finding that the individual members of Complainant do not have individual standing. However, as discussed below, none of Complainant's members can establish an injury that is immediate and direct, both of which are required in order to establish individual standing. As a result, the Commission must dismiss Complainant's complaint.

"There are three requirements for a party to have standing to litigate an issue: the party must have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence." George v. Pa. Public Utility Commission, 735 A.2d at 1286 (citing Ken R. ex rel. C.R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267 (1996)). An injury is immediate if it shares a close causal nexus with action challenged and falls within the "zone of interest" sought to be protected by the applicable law; an injury is direct if it would not have resulted but for the action challenged. See id.

Contrary to Complainant's allegations, the risk of personal legal liability, if any, is neither immediate nor direct. Complainant has alleged that Respondent has violated 66 Pa. C.S. § 1406(b) (ii) and 52 Pa. Code §§ 56.93, 56.96, and in doing so has directed Complainant's members to engage in unlawful conduct. However, even if this averment is accepted as true, the factual allegation does not compel the legal conclusion that potential liability will result. Indeed, the requirements imposed by these provisions specify actions that a "public utility" shall take prior to service termination. Except to the extent Complainant's individual members may be intentionally violating these requirements, Respondent would be the party principally responsible for actions taken (or not taken) by its employees in the course of their employment. See 66 Pa. C.S. § 3301(a) (violation by employee deemed to be violation of public utility). Moreover, Complainant has not alleged that its members are faced with actual or threatened claims of civil or criminal liability under the Public Utility Code. Even if claims were threatened, not only must such claims first be brought before the Commission, but full opportunity for hearings and a determination of liability also must be provided. See 66 Pa. C.S. §§ 3301, 3302. Finally, the alleged interests of Complainant's members are not within the "zone of interests" to be protected by the regulations on service termination. The requirements of Chapter 14 of the Public Utility Code are provided expressly for the protection of utility customers. See 66 Pa. C.S. § 1401. As a result, Complainant's members cannot claim to be faced with "immediate" harm. The risk of personal legal liability is so attenuated by intervening sequences of events that it is neither immediate nor direct and does not provide adequate grounds for standing.

Any risk posed to the livelihood of Complainant's members is likewise remote, and cannot be considered so direct or immediate that it confers standing to bring the present challenge. Complainant conjures a scenario in which Respondent, having "forced" its employees

to take unlawful action, subsequently fires or otherwise disciplines them for taking such action. But any such risk to its members' livelihoods necessarily depends first on Respondent actually undertaking disciplinary action, which might or might not be based on separate and justifiable grounds. As above, Complainant has not alleged that its members have faced, or been threatened with, disciplinary action. Again, the potential harm alleged by Complainant depends entirely on the possibility of subsequent, independent actions. Such speculative and remote risks of harm simply cannot form the legal basis for standing.

Finally, though the safety of its employees is a high priority for PAWC, Complainant's attempt to argue that Respondent's alleged failure to follow proper termination of service procedures might incense customers to heightened levels of violence, thereby increasing the risk of physical assaults on utility employees fails to pass the straight face test, particularly when there have been no allegations of actual or threatened assaults resulting from the alleged violation. To draw the line of legal causation from an alleged regulatory violation to potential future physical assaults by private individuals would be unprecedented. Utilities simply cannot be held responsible for the willful and criminal actions of individual customers, which clearly are outside a utility's scope of control. Moreover, the Complainant's suggestion that its members would be harmed is without merit as the very complaint itself clearly states, in Paragraph 14, that PAWC has provided training.

III. REPLY TO OCA'S EXCEPTIONS

Reply to OCA Exception No. 1

The OCA exception is substantially the same as the Complainant's Exception 1. Specifically, the OCA's in its first exception contends that the Initial Decision is in error because the Complainant has representational standing to bring a formal complaint. This is incorrect. As

pointed out in our response to the Complainant's exceptions, regardless of whether the Initial Decision addressed representational standing, its ultimate legal conclusion that Complainant is without standing remains correct and should be adopted by the Commission. For the reasons previously stated herein in response to the Complainant's Exception 1, the OCA exception should be denied.

Reply to OCA Exception No. 2

OCA's second exception contends that the Initial Decision's conclusion that Complainant is without standing was not supported by substantial evidence. However, as discussed below, Complainant's factual allegations, even if accepted as true, do not provide a sufficient legal basis to establish standing. Because Complainant has not established any threat of injury that is immediate or direct under Pennsylvania law, the Commission must dismiss Complainant's complaint.

"There are three requirements for a party to have standing to litigate an issue: the party must have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence." George v. Pa. Public Utility Commission, 735 A.2d at 1286 (citing Ken R. ex rel. C.R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267 (1996)). An injury is immediate if it shares a close causal nexus with action challenged and falls within the "zone of interest" sought to be protected by the applicable law; an injury is direct if it would not have resulted but for the action challenged. See id.

Contrary to Complainant's allegations, the risk of personal legal liability, if any, is neither immediate nor direct. Complainant has alleged that Respondent has violated 66 Pa.C.S. § 1406(b) (ii) and 52 Pa. Code §§ 56.93, 56.96, and in doing so has directed Complainant's members to engage in unlawful conduct. However, even if this averment is accepted as true, the

factual allegation does not compel the legal conclusion that potential liability will result. Indeed, the requirements imposed by these provisions specify actions that a “public utility” shall take prior to service termination. Except to the extent Complainant’s individual members may be intentionally violating these requirements, Respondent would be the party principally responsible for actions taken (or not taken) by its employees in the course of their employment. See 66 Pa. C.S. § 3301(a) (violation by employee deemed to be violation of public utility). Moreover, Complainant has not alleged that its members are faced with actual or threatened claims of civil or criminal liability under the Public Utility Code. Even if claims were threatened, not only must such claims first be brought before the Commission, but full opportunity for hearings and a determination of liability also must be provided. See 66 Pa. C.S. §§ 3301, 3302. Finally, the alleged interests of Complainant’s members are not even within the “zone of interests” to be protected by the regulations on service termination. The requirements of Chapter 14 of the Public Utility Code are provided expressly for the protection of utility customers. See 66 Pa. C.S. § 1401. As a result, Complainant’s members cannot claim to be faced with “immediate” harm. The risk of personal legal liability is so attenuated by intervening sequences of events that it is neither immediate nor direct and does not provide adequate grounds for standing.

Any risk posed to the livelihood of Complainant’s members is likewise remote, and cannot be considered so direct or immediate that it confers standing to bring the present challenge. Complainant conjures a scenario in which Respondent, having “forced” its employees to take unlawful action, subsequently fires or otherwise disciplines them for taking such action. But any such risk to its members’ livelihoods necessarily depends first on Respondent actually undertaking disciplinary action, which might or might not be based on separate and justifiable grounds. As above, Complainant has not alleged that its members have faced, or been threatened

with, disciplinary action. Again, the potential harm alleged by Complainant depends entirely on the possibility of subsequent, independent actions. Such speculative and remote risks of harm simply cannot form the legal basis for standing.

Though the safety of its employees is a high priority for PAWC, Complainant's suggestion that Respondent's alleged failure to follow proper termination of service procedures might incense customers to heightened levels of violence, thereby increasing the risk of physical assaults on utility employees fails to pass the straight face test, particularly when there have been no allegations of actual or threatened assaults resulting from the alleged violation. To draw the line of legal causation from alleged regulatory non-compliance to potential future physical assaults by private individuals would be unprecedented. Utilities simply cannot be held responsible for the willful and criminal actions of individual customers, which clearly are outside a utility's scope of control.

To establish standing, it is not enough that Complainant alleges potential harm to its membership; the harm must be legally determined to be immediate, direct and substantial. In its discussion of the Initial Decision, OCA erroneously suggests that ALJ Salapa agreed that Respondent's alleged non-compliance with the law "might cause injury to [Complainant's] members." OCA's Exceptions at 4. A closer read of the Initial Decision's text reveals, however, the important distinction between Complainant's allegations of fact and the sound legal determinations made by the ALJ. As the Initial Decision recognizes, Complainant does not allege that injury to its members will occur, but that it might occur. The Initial Decision therefore concludes that due to the remoteness of the alleged potential injuries, they cannot legally be considered an "immediate interest" in support of standing.

IV. CONCLUSION

In light of the foregoing, none of the individual members of Utility Workers Union of American System Local 537 can establish standing to bring this action. Therefore, Utility Workers Union of American System Local 537 cannot meet the requirements for representational standing. Wherefore, in consideration of the foregoing, Pennsylvania-American Water Company respectfully requests that the Pennsylvania Public Commission reject the Utility Workers Union of American System Local 537 and Office of Consumer Advocate exceptions and dismiss the Formal Complaint in accordance with Administrative Law Judge David A. Salapa's Initial Decision.

Respectfully submitted,



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Dated: May 17, 2012

