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VIA FEDERAL EXPRESS

August 10, 2012

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

Re: Pettko vs. Pennsylvania American Water Company
Docket No.: C-2011-2226096

Dear Ms. Chiavetta:

I enclose for filing an original and nine copies of Complainant's Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012, as well as Complainant's Request for Oral Argument Before the Public Utility Commission on Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012. I have also enclosed copies of the cover sheet of each filing. Please date-stamp the copies and return them to me in the self-addressed, stamped envelope I have provided.

Thank you for your prompt attention to this matter.

Very truly yours,

DEL SOLE CAVANAUGH STROYD LLC

By: _____
Stephen J. Del Sole

JTR
Enclosures

cc: Office of Special Assistants (w/ enc.)
Anthony C. DeCusatis, Esquire (w/ enc.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

C. LESLIE PETTKO, on behalf of himself and all others similarly situated,	)	
Complainant,	)	
v.	)	**Docket No. C-2011-2226096**
PENNSYLVANIA AMERICAN WATER COMPANY,	)	
Respondent.	)	

COMPLAINANT'S REQUEST FOR ORAL ARGUMENT BEFORE THE PUBLIC UTILITY COMMISSIONON ON EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION OF JULY 20, 2012

Pursuant to 52 Pa. Code § 5.538, Complainant, C. Leslie Pettko, submits the following Request for Oral Argument Before the Public Utility Commission on Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012:

1. Complainant filed a formal Complaint with the Public Utility Commission on February 8, 2011.

2. The Administrative Law Judge issued an Initial Decision on July 20, 2012 granting summary judgment in favor of Respondent and dismissing Complainant's claims.

3. Complainant has timely filed the attached Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012.

4. Because the issues involved in this case are intricate, Complainant requests oral argument before the Public Utility Commission regarding the Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012.

WHEREFORE, Complainant, C. Leslie Pettko, respectfully requests that the Public Utility Commission grant his request for oral argument and schedule a date for argument on his Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012.

DEL SOLE CAVANAUGH STROYD LLC

By: _____

Stephen J. Del Sole, Esquire
Patrick K. Cavanaugh, Esquire
Counsel for Complainant

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

C. LESLIE PETTKO, on behalf of himself and all others similarly situated,	)	
Complainant,	)	
v.	)	**Docket No. C-2011-2226096**
PENNSYLVANIA AMERICAN WATER COMPANY,	)	
Respondent.	)	

COMPLAINANT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION OF JULY 20, 2012

Pursuant to 52 Pa. Code § 5.533, Complainant submits his Exceptions to the Administrative Law Judge's Initial Decision of July 20, 2012 in the above matter:

Complainant incorporates by reference his Complaint, Brief in Opposition to Respondent's Motion for Judgment on the Pleadings, Brief in Opposition to Respondent's Motion for Summary Judgment, Supplemental Brief in Opposition to Respondent's Motion for Summary Judgment, and Motion to Compel Discovery.

Exception #1:

Complainant excepts to the Administrative Law Judge's ("ALJ's") finding that, as a matter of law, the billing practices of Respondent are just.

The crux of Complainant's position is that the Respondent's retroactive application of the Distribution System Improvement Charge ("DSIC") and the State Tax Adjustment Surcharge ("STAS"), violate the applicable tariff. Specifically, Respondent, Penn American, retroactively bills its customers for DSIC and STAS rate increases prior to the effective date of the increases. Complainant asserts that the tariffs require that increases to the usage-based surcharges should

simply be pro-rated based upon the "effective date" set forth in the tariff. Respondent's retroactive billing and failure to pro-rate violates the express terms of the tariff and, as such, the Public Utilities Code, which states:

> **Adherence to tariffs.**
> No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

66 Pa.C.S. § 1303.

The ALJ sidestepped the specific issues raised by the parties. The ALJ did not determine if, as Respondent asserted in its motion, Respondent was properly applying the DSIC and STAS. Instead, the ALJ focused the majority of his opinion on the "reasonableness" of any discriminatory practices. The ALJ fails to consider the requirement of the Public Utilities Commission ("Commission") that "[e]very rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or order of the commission." 66 Pa.C.S. § 1301.

The ALJ's Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings stated that "[t]he Complainant, therefore, should be given an opportunity to demonstrate whether [Respondent's] implementation of the DSIC and the STAS may violate other provisions of the Public Utility Code that the Commission may not have considered." (Administrative Law Judge's Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings, p. 8). Complainant's overarching position is that Respondent unlawfully charged him increased DSIC and STAS rates prior to the increased rates' effective dates. The

ALJ's decision to narrow the scope of the issues raised by Complainant to the single issue of "reasonableness" is inconsistent with the broad language of the Code. Pursuant to the ALJ's own Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings, Complainant must be given an opportunity to demonstrate whether Respondent's implementation of the DSIC and STAS violates *any* provision of the Public Utility Code—even one not previously considered by the Commission.

Exception #2:

Complainant excepts to the ALJ finding that "[e]ven if we accept as true everything that both Mr. Pettko and Mr. Radigan testified to in their Direct Testimonies, there would still be no violation of the Public Utility Code, a Commission Order or regulation or a Commission-approved Company tariff that warrants proceeding to a hearing . . ." ALJ's Initial Decision of July 20, 2012, p. 24.[1]

To the contrary, the Direct Testimonies of both, Complainant, C. Leslie Pettko, and his expert Frank W. Radigan, set forth numerous factual issues to be resolved at a hearing on the merits. The ALJ's determination that no issues of material fact exist simply ignores the evidence adduced to date. The numerous factual issues remaining include, but are not limited to: whether Respondent is violating its tariff through its retroactive billing of the DSIC and STAS; the

[1] As an initial matter, it should be noted that the ALJ makes reference to whether the Complainant met his burden to prove that Respondent is not complying with the terms of the tariff. In actuality, the burden of proof in this case is on the Respondent:

> In any case involving any alleged violation by a public utility, contract carrier by motor vehicle, or broker of any lawful determination or order of the commission, *the burden of proof shall be upon the public utility*, contract carrier by motor vehicle, or broker complained against, to show that the determination or order of the commission has been complied with.

66 Pa Code 315. Accordingly, the Respondent has the burden to prove that its failure to pro-rate and its retroactive application of a charge to its customers is consistent with its tariff. It has not.

interpretation of the specific language of the tariff; the extent of the harm suffered by Complainant; the meaning of "effective date" as set forth by the Commission; whether Respondent's collections practices are unreasonably discriminatory; whether Penn American really experienced computer programming issues that effected their ability ot comply with their tariff as alleged in the audit, and; whether pro-rating DSIC and STAS charges would create an unreasonable hardship.

The evidence set forth in the Direct Testimonies of Mr. Pettko and Mr. Radigan clearly demonstrates a violation of both the Public Utility Code ("Code") and the Commission-approved Company tariff with respect to both the DSIC and STAS. The ALJ's failure to acknowledge that, at the very least, questions of fact exist with regard to these issues is inconsistent with the evidence in this case, the provisions of the Code, and the common law of Pennsylvania.

Mr. Radigan's Direct Testimony is unequivocal in reaching the conclusion that the failure of Respondent to pro-rate the DSIC and STAS charges at issue violates both the Commission-approved company Tariff and Commission regulations. Indeed, Mr. Radigan explained that "Under the standard and accepted way that rates can appropriately be adjusted, the rate change can only occur on the "effective date." Under the tariff, those dates are the specific quarterly dates identified. ... By disregarding the effective date, Penn American's billing practices create an inherently inequitable system whereby some customers will *always* bear the increased rates more than others." Complainant's expert states unequivocally that Penn American's assertion that it was permitted to bill retroactively and not pro-rate based upon the "effective date" is "a twisted interpretation of a fundamental principle of how utility rates are charged." As such, Penn American's retroactive application of the rates is unlawful. As correctly noted by the ALJ, this testimony *must be accepted as true* at the summary judgment stage of the litigation. Therefore,

Mr. Radigan's conclusions, while they may be subject to challenges to weight and credibility at a hearing, cannot merely be discounted at this stage in the proceedings.

The ALJ was wrong in sidestepping facts legitimately presented in this case by *sua sponte* raising issues not relied upon by Respondent or addressed by the parties and then granting summary judgment on that basis.

Exception #3:

Complainant excepts to the ALJ's failure to recognize that a question of fact exists with respect to the harm caused to Complainant.

In concluding that no harm has been caused to Complainant, the ALJ makes factual assumptions that are not supported by the record and which the Claimant has never had an opportunity to address. Even though Respondent never made the argument in its Motion for Summary Judgment, the ALJ performed his own independent calculations based on hypothetical customer data that is nowhere of record. These calculations demonstrate that the ALJ has attempted to impermissibly assume the role of fact finder prior to a full hearing on the merits. Additionally, the calculations are not based upon evidence of record, but, rather, assumptions made by the ALJ.[2]

The ALJ continues with his improper damage calculations and ultimately concludes that "[c]ertainly [Complainant] cannot be considered prejudiced or disadvantaged by being over charged $0.03." ALJ's Initial Decision of July 20, 2012, p. 22. In making this unsupported finding, the ALJ dismisses Respondent's clear violation of its Tariff and, accordingly, the Public Utility Code. Furthermore, such a finding ignores the obvious possibility that over-charges will

[2] Although the Initial Decision asserts that the Affidavit and Exhibit of Respondent was not considered in the decision (Initial Decision at p. 25), there is no other bases from which the ALJ could have come to his determination regarding the alleged effect to Mr. Pettko from the application of the DSIC and STAS. The purported loss analysis in the affidavit and exhibit is the only source for this information. Complainant excepts to the ALJ's improper consideration of this "evidence" which Complainant was not allowed to address.

continue into the future and increase in amount.

Even assuming that the ALJ can make factual findings at this step in the process—which is disputed—changes in DSIC and STAS rates must be considered because they affect individual customers differently. For example, a DSIC rate increase will must more adversely affect a customer with a billing period beginning earlier in a given month because the retroactive rate increase will encompass a larger portion of the month prior to the effective date. By contrast, a customer with a billing cycle beginning later in the month, though also billed prior to the "effective date," would pay fewer days of the retroactive DSIC increase. Discovery must be conducted to determine whether these factual assumptions can be supported by evidence.

Furthermore, it is important to note that annual reconciliation does not resolve overpayments by individual customers because no rebate or refund is paid back to customers in correlation with the amount they were overbilled prior to the effective date of the DSIC increase. As such, amounts wrongfully billed to Complainant will not be returned to him following reconciliation. Therefore, the reconciliation process does not make aggrieved parties whole.

Exception #4:

Complainant excepts to the ALJ's failure to identify the meaning of the words "bills rendered" specifically as used in the context of the DSIC tariff.

The issue that Respondent made central to its Motion for Summary Judgment is the meaning of the two words "bills rendered" as read in the context of the entire DSIC tariff. It has remained Respondent's position throughout this litigation that Respondent was purportedly authorized to apply changes to DSIC and STAS on a "bills rendered basis". This position is dubious because the phrase "bills rendered" in not included in the language of Respondent's Tariff relating to either DSIC or STAS rates.

Furthermore, no definition of this phrase "bills rendered" has been provided. As such, no meaningful interpretation of the authority purportedly provided by the Commission to Respondent can be ascertained. To the contrary, Complainant offered evidence that bears directly upon the Commission's intent in authorizing the DSIC and STAS. Specifically, that the charges are to be applied for services rendered on or after the effective dates of the increase. As set forth by Claimant's expert, this is the common and universally accepted way that these usage based charges are applied.

Nevertheless, in his Initial Decision of July 20, 2012, the ALJ accepted the "bills rendered" collection practice without providing any authority for the phrase. Rather, the ALJ appears to accept, without authority, the definition proffered by Respondent. Absent explanation of the phrase "bills rendered," or the location of that phrase in the DSIC Tariff language, a determination regarding whether Respondent complied with the intention of the Commission in collecting DSIC and STAS fees from Complainant simply cannot be made. The meaning of "bills rendered" remains a question of fact that must be resolved by way of a hearing on the merits.

Exception #5:

Complainant excepts to the ALJ's failure to determine or even address whether Respondent's retroactive billing practice and refusal to pro-rate can be consistent with the plain meaning of "effective date"—the key issue raised by this litigation.

The ALJ's Initial Decision allows Respondent to ignore the plain language of the Tariff in setting forth an effective date, by consistently applying rate changes in advance of the determined "effective date." These retroactive rates render the "effective dates" in the Commission-approved Tariff meaningless. Permitting Respondent to apply rate increases prior

to the "effective date" set forth by the Commission is patently unfair and a violation of the Public Utility Code. It is Complainant's position that such a finding is not consistent with the intention of the Commission. At the very least, a question of fact exists regarding the interpretation of the phrase "effective date" as set forth in the Tariff and a hearing should be permitted on this issue.

Moreover, failure to provide notice to customers in advance of a rate change is inconsistent with the purpose of the Code—that every rate be just and reasonable, and in conformity with regulations or orders of the Commission. 66 Pa.C.S. § 1301. Retroactive rate increases without notice to customers simply cannot be viewed as just.

Exception #6:

Complainant excepts to the ALJ's narrowing of the issues presented to only whether Respondent's discriminatory practices are unreasonable.

The ALJ's focus and the reasoning for his decision was not an argument even advanced by Respondent. As such, Claimant never even had an opportunity to address the issue.

Complainant's argument is not merely limited to an allegation of discriminatory billing practices. Complainant's position is significantly broader—alleging that Respondent's billing practices, as specifically applied to Complainant, are unfair *and in violation of law*. The language of Section 1304 of the Public Utility Code, prohibiting discrimination against consumers, is applicable to the present case; however, Complainant's allegations are not confined to Section 1304 alone. Therefore, the ALJ's Initial Decision, which is limited to an analysis of "reasonableness" under the case law discussing Section 1304, impermissibly narrows the claims made by Complainant.

Exception #7:

Complainant excepts to the ALJ's finding that the DSIC and STAS rate collections

practices by Respondent are not unreasonably discriminatory.

As discussed at length in Complainant's opposition to the motion, certain customers will consistently end up paying more every time a DSIC rate is increased, due only to the happenstance of their billing cycle. Complainant should be provided a full and fair hearing to be able to prove that this disparity exists.

In determining that billing practices of Respondent are not unreasonably discriminatory, the ALJ cites several Pennsylvania cases. This authority was not cited by Respondent in its Motion for Summary Judgment and, as such Complainant never had an opportunity to even address the argument.

Indeed, the primary case relied upon by the ALJ has no application to the present issue. In Mill v. Pa. P.U.C., 447 A.2d 1100 (Pa.Commw. 1982) a customer challenged a Commission decision requiring that she make full payment on her medical bills despite a medical hardship. The Commonwealth Court reversed the decision of the Commission and remanded. Mill involved Section 52 of the regulations which establish emergency provisions in order to forestall termination of service when such an action would have adverse medical consequences on an occupant of a premises. The regulations also provide that a ratepayer is not relieved of his/her obligation to pay for the service so received in the event of a medical emergency, but also establishes a system by which the ratepayer can "equitably arrange to make payment on all bills." The PUC argued that the language required a ratepayer to make equitable payments on all *arrearages*. The Court, however, disagreed, finding that the regulation plainly states that an equitable arrangement may be reached as to *all bills*, which must necessarily include current monthly charges. In deciding the specific case dealing with a medical emergency the Court interpreted Section 1304 as permitting a person to be given a rate preference so long as it is not

unreasonable. Id. at 1102. However, the responsibility lies with the Commission to determine under what circumstances and in what amount such a preference would be reasonable. Id. Mill did ***not*** hold that utilities are free to disregard the terms of controlling tariffs if they can then show that the difference in rates being charged is not "significant" and, thus, in their opinion "reasonable." Indeed, in the present case, the ALJ made the unilateral determination that the discrepancy between customers arising from the Respondent's failure to pro-rate is a relatively small dollar amount. In the aggregate, however, the practice allows Penn American to improperly bill and collect literally hundreds of thousands of dollars from utility customers.

In Philadelphia Electric Co. v. Pa. P.U.C., the Commonwealth Court held that a surcharge on users of outdoor gas lights was reasonable. 470 A.2d 654 (Pa.Commw. 1984). The court stated that "[b]efore a rate can be declared unduly preferential and therefore unlawful, it is essential that there be not only an advantage to one, but a resulting injury to another. Such an injury may arise from collecting from one more than a reasonable rate to him in order to make up for inadequate rates charged to another, or because of a lower rate to one of two patrons who are competitors in business. There must be an advantage to one at the expense of the other. Citing Alpha Portland Cement Co. v. Public Service Commission, 84 Pa. Superior Ct. 255 (1925). That is precisely the effect of Respondent's application of the DSIC. The failure to pro-rate is always to the advantage of the ratepayer with a billing cycle that is closer to a calendar month and to the disadvantage to other ratepayers with different billing cycles. The retroactive billing of increased DSIC is never adjusted to account for this. In Philadelphia Electric Co. the Commonwealth Court ultimately found that PECO failed to meet its burden of proving discrimination and noted that "the determination of whether a classification is reasonable is a *question of fact* of the Commission." Id. at 657.

In Building Owners and Managers Assoc. v. Pa. P.U.C., the Commonwealth Court held that "mere variation in rates among classes of customers does not violate the Public Utility Code." 470 A.2d 1092, 1095 (Pa.Commw. 1984). Petitioner in Building Owners was a high-tension customer who was seeking a reduced mass transit rate. The basis of the customer's position was a large volume of use. Again, it was stated that "questions concerning reasonableness of rates and the difference between rates are factual questions for the Commission, whose findings must be upheld if supported by competent evidence." Id. at 1094. Petitioner was seeking a separate rate—which would have been different from similarly situated customers. The court refused to allow such a disparate rate.

Complainant submits that retroactive enforcement of rate increases does cause a disparity that is in violation of the Public Utility Code. Depending on the beginning date of a specific customer's billing cycle, a customer may be obligated to pay more for services incurred prior to the effective date, while another customer may be obligated to pay less. In fact, the only customers that are similarly situated are those that have billing cycles that begins on the same day of each month. Questions concerning reasonableness of rates and the difference between rates are questions of fact and consistent with the Commonwealth Court opinions in both PECO and Building Owners must be resolved by the Commission. In consideration of this Commonwealth Court precedent, it is clear that the ALJ does not have authority to resolve such factual disputes at the summary judgment stage.

Exception #8:

Complainant excepts to the ALJ's finding that "[Respondent's] implementation of the DSIC and STAS is done in a manner that does not violate [Respondent's] tariff." ALJ's Initial Decision of July 20, 2012, p. 23.

The ALJ misinterprets the Commonwealth Court's opinion in Mill v. Pa. P.U.C. in finding that Section 1304 permits a variation from a tariff, so long as it is not unreasonable. The Mill opinion simply does not stand for this proposition. Rather, the Commonwealth Court held that "[i]t is true that Section 1303 prohibits a public utility from demanding or receiving a rate less than that established in the applicable tariff, but Section 1304 modifies that prohibition by providing that a utility should not grant any unreasonable preference or advantage to any person." Mill at 1102. Contrary to the ALJ's interpretation, this language does not permit a public utility to violate a tariff. This language merely suggests that in the event that enforcement of a tariff creates a variation in rates among customers, that variation must not be unreasonable. There is absolutely no language in the Mill opinion to suggest that tariffs need not be followed explicitly—as required by 1303.

Simply put, Respondent is not lawfully permitted to increase the DSIC and STAS rates prior to the "effective date" set forth by the Tariff, yet they have chosen to do so. Respondent's actions in ignoring the language of its Tariffs are in direct violation of the Public Utility Code.

Exception #9:

Complainant excepts to the ALJ's finding that "[o]ver the course of time, it is not unreasonable that the increases and decreases would generally offset each other." ALJ's Initial Decision of July 20, 2012, p. 23.

The specific harm caused to Complainant is a question of fact. Complainant should be provided with a full and fair opportunity to present evidence in support of his allegations of harm. The ALJ's finding that, in the aggregate, increases and decreases may offset each other is a question of fact that must be determined based upon evidence of record. Complainant seeks an opportunity to rebut the Respondent's claim that he has not been harmed by Respondent's

collection practices. Furthermore, on a fundamental basis, the fact that Complainant *may* benefit from a rate decrease in the future does not excuse Respondent from billing him in violation of the Tariff right now.

Exception #10:

Complainant excepts to the ALJ's finding that "it is possible that the 'effective date' approved by the Commission only identifies the rate to be applied for the period in which the new rate is to be used, not that the rate cannot be changed prior to that specific date or must be prorated." ALJ's Initial Decision of July 20, 2012, p. 24.

The meaning of the phrase "effective date" is a question of fact. It remains Complainant's position that "effective date" should be interpreted in accordance with its plain meaning; however, the ALJ's Initial Decision ignores that plain meaning in allowing Respondent to ignore the effective dates set forth by the Commission and apply rate increases retroactively. Furthermore, Complainant repeatedly requested discovery in an effort to ascertain Respondent's interpretation of "effective date," but these requests were denied.

Exception #11:

Complainant excepts to the ALJ's finding that "[r]equiring [Respondent] to pro-rate the DSIC charge on a usage basis for every one of its two million customers, as Mr. Pettko desires, would require [Respondent] to read the meter for every one of its customers on the first day the new rate is implemented." ALJ's Initial Decision of July 20, 2012, p. 24.

First, there is no fact of record to support the ALJ's finding that Penn American has over two million customers. See Initial Decision at p.11, finding 29. In addition to the obvious factual question regarding whether pro-rating the DSIC and STAS charges would create an unreasonable burden, it should be noted that this argument has not been raised by Respondent.

Furthermore, no authority has been cited to support the position that a public utility may violate a tariff merely to avoid an increased burden.

It is Complainant's position that other methods may be used to pro-rate charges. In fact, as indicated by Mr. Radigan, other jurisdictions are able to effectively pro-rate similar fees. This finding by the ALJ is another example of his *sua sponte* raising of a defense on behalf of Respondent and then granting summary judgment on those grounds.

Exception #12:

Complainant excepts to the ALJ's failure to recognize that the Tariff for STAS rates is distinct from the Tariff for DSIC rates.

Throughout his Initial Decisions and Order, the ALJ treats the DSIC and STAS similarly; however, it is important to note that each rate has its own Commission-approved Tariff. As such, only the language of the applicable Tariff can be used to determine whether the enforcement of either DSIC or STAS rate is in compliance with the Public Utility Code. Importantly, the Commission documents with respect to the STAS make it clear that it is a "services rendered" charge, stating that "[i]n addition to the next charges provided for in this Tariff, a surcharge of 0.45% will apply to all services rendered." Furthermore, counsel for Respondent has conceded that a "services rendered" charge should be pro-rated:

> "in a 'services rendered' scenario, a rate change is 'pro-rated,' meaning that service rendered before the 'effective' date is priced at the old rate and service rendered after the 'effective date' is priced at the new (higher or lower) rate."

(See Penn American's Application for Reargument, 1061 C.D. 2011 (Commonwealth Court, Jan. 27, 2012) attached as Exhibit J to Complainant's Opposition to Respondent's Motion for Summary Judgment). Therefore, even assuming that the DSIC Tariff does not require that it be pro-rated—which is vehemently disputed—absolutely no evidence exists to suggest that the

STAS should be implemented in the same manner.

Exception #13:

Complainant excepts to the ALJ's failure to acknowledge the Public Utility Commission's May 11, 2012 Act 11 Tentative Implementation Order as evidence of the Commission's position that Respondent's DSIC rate increases were intended to be pro-rated. ALJ's Initial Decision of July 20, 2012, p. 25.

The ALJ dismisses the Tentative Implementation Order because it is "not the final positions of the Commission." ALJ's Initial Decision of July 20, 2012, p. 25. What the ALJ fails to recognize is that the Tentative Implementation Order's Model Tariff language is identical to Respondent's DSIC Tariff, stating that "[t]he DSIC then becomes effective and applicable to rates for services rendered on or after the effective date." Complainant's Supplemental Opposition to Motion for Summary Judgment, Exhibit A. The Order was not offered as a binding Commission Order, but rather, as evidence that the intention in the Commission in authorizing DSIC Tariffs—dating back 15 years—was to have these rates collected on a pro-rated basis. At the very least, the Tentative Implementation Order creates a question of fact regarding whether Respondent's DSIC rates were in compliance with the Commission-approved Tariff.

Exception #14:

Complainant excepts to the ALJ's refusal to permit deposition testimony to be taken, despite the fact that Pennsylvania law permits it.

The ALJ asserts in the Initial Decision that Mr. Pettko "was to be given an opportunity to present his case before the Complaint is dismissed without a hearing. Mr Pettko was given that

opportunity through the serving of his direct case on April 30, 2012." Initial Decision at p.13. In fact, Complainant was not given the opportunity as, despite numerous requests, no depositions were permitted and there was no hearing.

Throughout the course of this litigation before the Commission, Complainant has sought to conduct discovery. As noted in the ALJ's Initial Decision, on June 1, 2012 Complainant filed a Notice of Deposition to take the deposition of a corporate designee of Penn American. ALJ's Initial Decision of July 20, 2012, p. 27. The purpose was to specifically develop the record with respect to the issues in this case and the factual assertions advanced by Penn American in this case.

However, that only tells part of the story. What the ALJ did not explain in the Initial Decision is that the June 1, 2012 notice was not the first time that Complainant sought the deposition. On November 1, 2011, Complainant filed his ***first*** Notice of Deposition of a Penn American corporate designee. Following Penn American's objection, Complainant filed a Motion to Compel the deposition on November 29, 2011. Complainant's request for a corporate deposition was denied by the ALJ in Prehearing Order No.2.

Thereafter, in his Prehearing Conference memorandum of December 9, 2011, Complainant proposed a discovery plan which included the deposition of a corporate representative of Penn American. Following that, in Complainant's submission of his direct testimony and identification of exhibits filed on April 30, 2012, Complainant again reiterated that he "continues to seek the deposition testimony of a representative of Penn American" and reserved the right to supplement. The ALJ denied the Complainant's requests.

The deposition of a corporate designee of Penn American is imperative to provide discovery on the various factual issues raised in this case, including issues raised by Respondent

itself. Penn American has made numerous factual assertions regarding purported "Commission directives" which Complainant never had a chance to address. Also, the Bureau of Audits reports of Penn American's application of the DSIC state repeatedly that Penn American was incorrectly applying the DSIC and that there were discussions with the Company on that issue as well as assertions of computer difficulties that prevented Penn American from properly pro-rating the charge. Complainant was severely prejudiced by being denied the opportunity to simply question a company representative on these issues.

52 Pa. Code § 5.331(a) states plainly that "[a] party to the Commission proceeding may conduct discovery." 52 Pa. Code § 5.331(b) references a party's "right to discovery." 66 Pa.C.S. § 333(b) states that "[a] party to the proceeding shall be able to take depositions of witnesses upon oral examination" subject to certain conditions, all of which have been satisfied here. Despite the clear language of the above statutes, Complainant was not given an opportunity to conduct essential discovery during this litigation.

The ALJ acknowledged in his Initial Decision that in response to a summary judgment motion, the nonmoving party "must set forth facts showing there is a genuine issue for trial." Further, that the nonmoving party must oppose summary judgment with "affidavits, ***depositions***, or the like." Initial Decision at p.13. However, the ALJ denied the Complainant the opportunity to do so. The ALJ concluded that Complainant could not meet his burden to prove non-compliance with the tariff (even though the burden in this case is on the Respondent), however, Complainant was never even provided a full and fair opportunity to gather evidence.

Exception #15:

Complainant excepts to the ALJ's finding that Complainant's due process rights were not violated by denying him a hearing. ALJ's Initial Decision of July 20, 2012, p. 25.

The Pennsylvania Commonwealth Court has recently held:

> Due process principles apply to administrative proceedings, and require an opportunity, among other things, to hear the evidence adduced by the opposing party, cross examine witnesses, introduce evidence on one's own behalf, and present argument. As our Supreme Court explained, there must be notice, an opportunity to present one's cause and proceeding appropriate to the character of the particular case, and an adjudication in the same nature as is present in other causes. Where these things are present there is due process of law.

D.Z. v. Bethlehem Area School District, 2 A.3d 712 (Pa.Commw. 2010) (*citing* Kowenhoven v. Allegheny County, 901 A.2d 1003 (Pa. 2006)).

As indicated above, Complainant has raised numerous issues of material fact that requires determination by way of hearing, consistent with the principles of due process. Complainant merely seeks an opportunity to be heard on the aforementioned issues.

DEL SOLE CAVANAUGH STROYD LLC

By: _____

Stephen J. Del Sole, Esquire
Patrick K. Cavanaugh, Esquire
Counsel for Complainant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of August, 2012 a true and correct copy of the foregoing ***Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012*** was served on the following by Overnight Delivery:

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17101

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Counsel for Respondent

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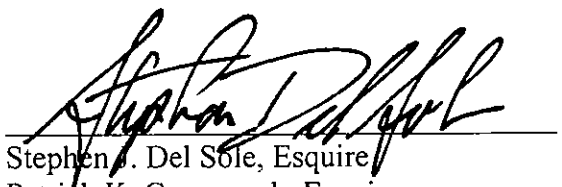
400 North Street, 3rd Floor
Harrisburg, PA 17101



Stephen J. Del Sole, Esquire
Patrick K. Cavanaugh, Esquire

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of August, 2012 a true and correct copy of the foregoing ***Request for Oral Argument Before the Public Utility Commission on Exceptions to Administrative Law Judge's Initial Decision of July 20, 2012*** was served on the following by first class, U.S. mail:

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17101

Anthony C. DeCusatis, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
Counsel for Respondent

Stephen J. Del Sole, Esquire
Patrick K. Cavanaugh, Esquire

FedEx Express **NEW Package US Airbill**

FedEx Tracking Number 8762 6361 9814

0200 Form ID No

FedEx Retrieval Copy

1 From

Date 8/10/12 Sender's FedEx Account Number 270835783

Sender's Name Stephen J. Del Sole, Esq. Phone 412 261-2393

Company Del Sole Cavanaugh Stroyd LLC

Address 200 1st Ave, Ste. 300

Dept./Floor/Suite/Room

City Pittsburgh State PA ZIP 15222

2 Your Internal Billing Reference Pettko

3 To

Recipient's Name Rosemary Chiavetta, Secretary Phone

Company PA Public Utility Commission

Address 400 North Street

We cannot deliver to P.O. boxes or P.O. ZIP codes. Dept./Floor/Suite/Room

Address Keystone Bldg, 2d Floor

Use this line for the HOLD location address or for continuation of your shipping address.

City Harrisburg State PA ZIP 17120

01 ☐ HOLD Weekday FedEx location address REQUIRED. NOT available for FedEx First Overnight.

31 ☐ HOLD Saturday FedEx location address REQUIRED. Available ONLY for FedEx Priority Overnight and FedEx 2Day to select locations.

8762 6361 9814

4 Express Package Service * To most locations.

NOTE: Service order has changed. Please select carefully.

Packages up to 150 lbs.
For packages over 150 lbs., use the new FedEx Express Freight US Airbill.

Next Business Day

06 ☒ FedEx First Overnight — Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

01 ☐ FedEx Priority Overnight — Next business morning.* Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

05 ☐ FedEx Standard Overnight — Next business afternoon.* Saturday Delivery NOT available.

2 or 3 Business Days

49 ☐ NEW FedEx 2Day A.M. — Second business morning.* Saturday Delivery NOT available.

03 ☐ FedEx 2Day — Second business afternoon.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

20 ☐ FedEx Express Saver — Third business day.* Saturday Delivery NOT available.

5 Packaging * Declared value limit $500.

06 ☐ FedEx Envelope* 02 ☒ FedEx Pak* 03 ☐ FedEx Box 04 ☐ FedEx Tube 01 ☐ Other

RECEIVED
AUG 10 2012
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

6 Special Handling and Delivery Signature Options

03 ☐ **SATURDAY DELIVERY**

☒ No Signature Required — Package may be left without obtaining a signature for delivery

10 ☐ Direct Signature — Someone at recipient's address may sign for delivery. Fee applies.

14 ☐ Indirect Signature — If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods? One box must be checked.

☒ No 04 ☐ Yes As per attached Shipper's Declaration ☐ Yes Shipper's Declaration not required. 06 ☐ Dry Ice Dry Ice, 9, UN 1845 ____ x ____ kg

Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box. ☐ Cargo Aircraft Only

7 Payment *Bill to:* Enter FedEx Acct. No. or Credit Card No. below. Obtain recip. Acct. No ☐

1 ☒ Sender Acct. No. in Section 1 will be billed 2 ☐ Recipient 3 ☐ Third Party 4 ☐ Credit Card 5 ☐ Cash/Check

[redacted] [redacted]

Total Packages ____ Total Weight ____ lbs. [redacted] Credit Card Auth. ____

†Our liability is limited to $100 unless you declare a higher value. See the current FedEx Service Guide for details.

612

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