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August 24, 2012

VIA HAND DELIVERY

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

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

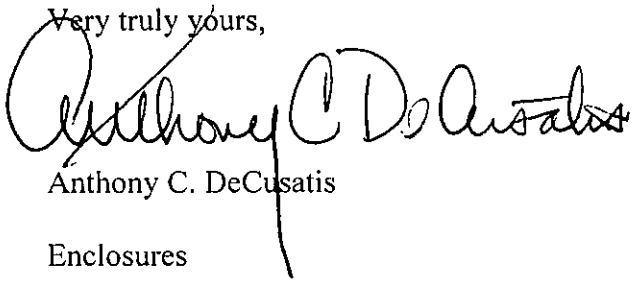
Dear Secretary Chiavetta:

Enclosed for filing in the above-captioned matter is an unbound original of Pennsylvania-American Water Company's (PAWC) Repy to the Exceptions of C. Leslie Pettko.

As evidenced by the original Certificate of Service enclosed herewith, copies of the enclosed document have been served upon counsel for C. Leslie Pettko, the presiding Administrative Law Judge, and the Office of Special Assistants, to whom we have also provided a CD containing the document in WORD 2007 format as requested.

If there are any questions concerning the enclosures or any matters discussed herein, please feel free to contact the undersigned.

Very truly yours,



Anthony C. DeCusatis

Enclosures

c: Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF PENNSYLVANIA-AMERICAN WATER COMPANY TO THE EXCEPTIONS OF C. LESLIE PETTKO

To The Initial Decision Of
Administrative Law Judge Joel H. Cheskis
Issued July 25, 2012

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August 24, 2012

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I. INTRODUCTION

On July 25, 2012, Administrative Law Judge Joel H. Cheskis ("ALJ") issued his Initial Decision granting Pennsylvania-American Water Company's ("PAWC" or the "Company") Motion for Summary Judgment and dismissing the Complaint of C. Leslie Pettko ("*Initial Decision*"). In his 29-page *Initial Decision*, the ALJ provided a thorough and thoughtful analysis of the relevant issues as the basis for his determination that:

> Mr. Pettko has failed to raise a genuine issue of material fact in his direct case or Answer to PAWC's Motion for Summary Judgment, even when examining all well-pleaded facts, and reasonable inferences from those facts, in the light most favorable to Mr. Pettko. Even if we accept as true everything that both Mr. Pettko and [Mr. Pettko's expert witness] Mr. Radigan testified 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 and PAWC is entitled to judgment as a matter of law.

Initial Decision, p. 26.

Mr. Pettko has filed Exceptions to the *Initial Decision*. For the most part, Mr. Pettko's Exceptions repeat the principal averments he made in his Complaint and in other pleadings he filed in this case. Those averments were, in large part, addressed in PAWC's Motion for Summary Judgment and, therefore, a detailed response to each Exception is not necessary. Nonetheless, as an aid to the Pennsylvania Public Utility Commission ("PUC" or the "Commission"), PAWC will address the more significant errors and inaccuracies in Mr. Pettko's Exceptions. In addition, in light of the page limitation imposed on this Reply, PAWC urges the Commission to review its Motion for Summary Judgment, which discusses in detail all of the reasons that summary judgment in this case is warranted.

II. SUMMARY AND OVERVIEW

On or about February 8, 2011, Mr. Pettko, by his counsel, filed a Complaint with this Commission purporting to initiate a "class action" on behalf of himself and "all others similarly situated." In relevant part, that Complaint alleged that: (1) PAWC improperly implemented changes in its Distribution System Improvement Charge ("DSIC") and State Tax Adjustment

Surcharge ("STAS") without "pro-rating" for service rendered before and after the "effective dates" established by the Commission for such rate changes; and (2) as a consequence of the manner in which PAWC applied changes in the DSIC and STAS, Mr. Pettko was "harmed" by paying more than he would have paid if such changes had been "pro-rated." Based on those contentions, Mr. Pettko averred that PAWC's application of changes in the DSIC and STAS violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law, constituted unlawful "conversion," and breached an alleged but unspecified "contract." Mr. Pettko and his counsel, therefore, sought, on behalf of the putative "class": (1) "statutory" damages under the Unfair Trade Practices and Consumer Protection Law of $100 "per occurrence" per "class member"; (2) compensation for alleged "losses;" (3) "punitive damages;" (4) "all permissible fees, costs and other relief;" (5) a "refund" on behalf of the entire putative "class;" (6) "interest" from the date of the allegedly wrongfully-imposed charges; (7) a "penalty of 50% of the amount of the "refund;"[1] (8) "court costs;" and (9) of course, "attorney's fees." *See* Complaint, pp. 8-11.

On March 9, 2011, PAWC filed and served its Answer to Mr. Pettko's Complaint in which it explained that Mr. Pettko is not permitted to bring his Complaint as a "class action;" is not entitled to the relief he requested; and, most importantly, his averment that the Commission had not authorized PAWC to implement changes in the DSIC and STAS on a "bills rendered" basis (i.e., without "pro-rating" for service before and after the "effective date") was demonstrably incorrect, as evidenced by prior Commission Orders and specific directives to PAWC from the Commission's Bureau of Audits.

Additionally, on March 23, 2011, PAWC filed a Motion for Judgment on the Pleadings in which it, *inter alia*, cited, quoted and provided copies of Commission Orders and other relevant Commission documents that authorized PAWC to apply changes in the DSIC and STAS on a "bills rendered" basis without "pro-rating" for service rendered before and after the "effective

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[1] Mr. Pettko erroneously assumed, contrary to law, that he and the putative "class" he sought to represent would be the recipients of any "penalty" that might be imposed. Obviously, that is not the case. Even in cases where a penalty might be justified – and this is clearly not such a case – penalties are payable to the Commonwealth and not to the complainant. *See* 66 Pa.C.S. § 3315.

date." Mr. Pettko filed an Answer in opposition to PAWC's Motion and, on October 5, 2011, the ALJ issued an *Order Granting In Part And Denying In Part Motion For Judgment On The Pleadings* (hereafter "*Order – Judgment On The Pleadings*"). In the *Order – Judgment On The Pleadings*, the ALJ affirmed that the Commission had approved PAWC's implementation of changes in the DSIC and STAS on a "bills rendered basis:"

> PAWC has responded [to the Complaint] that its implementation of both the DSIC and the STAS is compliant with all applicable Commission Orders and regulations. PAWC attached to both its Answer and its Motion documents evidencing Commission approval of its implementation of the DSIC and STAS. In particular, PAWC contends that the DSIC and STAS are appropriately issued on a "bills-rendered" basis, not a "service-rendered" basis, and are appropriately not pro-rated based on service rendered before and after the effective date, as the Commission has directed. PAWC concludes that the Complaint should be dismissed based on the pleadings alone.

Order—Judgment On The Pleadings, p. 4.

> PAWC has identified in its Motion some issues which warrant granting the Motion in part. There are other reasons, however, why the Complainant should be allowed to proceed to a hearing and warrant that the Motion be denied in part. As such, as discussed further below, PAWC's Motion will be granted in part and denied in part.
>
> PAWC has demonstrated in its Motion that *the Commission has approved its implementation of the DSIC and the STAS by Commission Orders as well as letters of approval from the Commission's Bureau of Audits and Fixed Utility Services.* PAWC has demonstrated that the process for its collection of the total amount allowed through the DSIC and the STAS has been approved by the Commission.

Order—Judgment On The Pleadings, p. 5 (emphasis added).

However, as noted above, the ALJ did not dismiss Mr. Pettko's Complaint but, instead, afforded the Complainant an opportunity to follow up on his broad and unsubstantiated allegations that "there are incorrect charges on my bill." *See Order—Judgment On The Pleadings*, pp. 8-9. Nonetheless, in a subsequent ruling on PAWC's Objections to certain discovery issued by Mr. Pettko, the ALJ made it clear that the Complainant would not be permitted to "re-litigate" issues that the Commission may have previously decided, including

"any issue as to 'bills rendered' versus 'service rendered.' " *Prehearing Order #2* (December 8, 2011), pp. 10-11. Accordingly, the ALJ allowed the case to progress so that Mr. Pettko would have "an opportunity to make his case" by presenting direct testimony. *Order Denying [PAWC's] Motion Requesting Certification Of A Material Question* (January 6, 2012), p. 9. In so doing, the ALJ also cautioned the Complainant that, after he submitted direct testimony, "PAWC may also decide ***at that point*** that a Motion for Judgment on the Pleadings or Motion for Summary Judgment is appropriate" and "[any] such pleading would be duly considered at that time." *Id.* at 9 (emphasis in original).

On May 1, 2012, the Complainant submitted his own written direct testimony and the written direct testimony of Frank W. Radigan, a principal in the Hudson River Energy Group. In neither of those statements did the witnesses offer anything to suggest that the Commission had revoked, altered or diminished the authority permitting – indeed, in the case of the DSIC, requiring – changes in the DSIC and STAS to be made on a bills rendered basis. In fact, the Commission has never done so. *See* Motion for Summary Judgment, pp. 20-28. Additionally, the Complainant's testimony made it clear that the averment he was "harmed" was based on the legally unsupportable premise that his preferred "pro-rating" method should apply only to **increases** in the DSIC and STAS while allowing him to benefit from the bills-rendered application of **decreases** in those charges. *See* Motion for Summary Judgment, p. 29.

Mr. Pettko's testimony recited what he perceived to be the relevant facts, i.e., that he is a customer of PAWC, that he has been billed charges under the DSIC and STAS, that changes in those rates were applied on a bills rendered basis (i.e., without "pro-rating"), and he believes he was overcharged. *See* Motion for Summary Judgment, p. 20. Mr. Radigan's direct testimony consisted of nothing more than his "opinion" that the application of changes in the DSIC and STAS – indeed, the application of **any** rate or charge – on a bills rendered basis is inherently improper and, therefore, allegedly contrary to the Public Utility Code. Radigan Direct Testimony, pp. 8-13. Mr. Radigan did not purport to base his "opinion" on any Commission regulation, order or other ruling and studiously avoided even mentioning the Commission Orders and Commission-approved Bureau of Audits' reports cited by PAWC that approved the bills

rendered application of changes in the DSIC and STAS.

Mr. Radigan's "opinion" that the bills rendered application of changes in rates and charges is inherently improper and unlawful is contrary to longstanding Commission precedent, as PAWC explained in detail in its Motion for Summary Judgment. *See* pp. 21-22 and cases cited therein. *See also*, J.H. Cawley and N.J. Kennard, *Rate Case Handbook: A Guide To Utility Ratemaking Before The Pennsylvania Public Utility Commission* (1983), p. 135 ("The new rates will apply either to service rendered on and after a certain date, or for bills rendered on and after a certain date.") (Emphasis in original.)

On May 29, 2012, PAWC filed its Motion for Summary Judgment directed to Complainant's contentions that: (1) PAWC improperly implemented changes in its DSIC and STAS on a "bills rendered" basis instead of pro-rating those rate changes for "service rendered" on and after the "effective date" (Radigan Direct Testimony pp. 9-13); and (2) as a consequence of the manner in which PAWC applied changes in the DSIC and STAS, Mr. Pettko was somehow "harmed." *Id.* at 11-12).

As to (1), above, PAWC once again demonstrated that prior Commission Orders authorized it to apply changes in the DSIC and STAS on a bills rendered basis, *i.e.*, without "pro-rating," and that the Complainant had not demonstrated that such prior authorizations have been revoked, amended or otherwise cease to apply to PAWC. Motion for Summary Judgment, pp. 10-18.[2] Accordingly, PAWC cannot be subject to refunds or other liability with respect to the manner in which it applied changes in its DSIC and STAS because doing so would be a direct violation of Section 316 of the Public Utility Code, 66 Pa.C.S. § 316, which provides:

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[2] Furthermore, since the Initial Decision was issued, the Commission, on August 2, 2012, entered its Final Implementation Order in *Implementation of Act 11 of 2012* at Docket No. M-2012-229361 ("*Final Act 11 Implementation Order*"). In its final Order, the Commission expressly found that water companies have been authorized to bill their customers for changes in the DSIC "on a bills rendered basis." Additionally, now that gas and electric utilities are also authorized to employ a DSIC, the Commission further directed that "all utilities bill their customers for DSIC on a bills rendered basis." *Final Act 11 Implementation Order*, p. 28. And, contrary to Mr. Pettko's claim that there is not a well-established understanding of "bills rendered," the Commission provided a concise definition in the *Final Act 11 Implementation Order* (p. 27, n. 3), which fully conforms to the manner in which PAWC has been applying "bill rendered" charges consistent with the Commission's and the Bureau of Audits' prior directives. *See* Motion for Summary Judgment, pp. 10-15.

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

Moreover, the Complainant's claims are an unlawful collateral attack on prior Commission Orders and, therefore, such claims are barred by the doctrine of "Commission-made rates," which protects a utility from refunds or other liability based on a retrospective review of rates it charged with the Commission's prior approval.[3] *See* Motion for Summary Judgment, pp. 25-26.

As to (2), above, Mr. Pettko has not demonstrated that he was "harmed" by the manner in which PAWC has applied changes in the DSIC and STAS. Averments in Mr. Radigan's testimony (pp. 11 and 13) purport to show "harm" based solely on **one** monthly **increase** in the DSIC (June 18 to July 16, 2009) and STAS (January 2010). As previously explained, however, Messrs. Pettko and Radigan tried to impute "harm" by simply assuming that their proposed "service rendered" approach should apply only to **increases** in the DSIC and STAS and not to **decreases** even though the DSIC and STAS are adjustment clauses that reflect **both** increases **and** decreases in their respective charges. Therefore, decreases in those charges cannot simply be ignored as Messrs. Pettko and Radigan ask the Commission to do. (Notably, five of the eight changes in the STAS that have occurred since January 1, 2006 have been **decreases**. *See* Motion for Summary Judgment, p. 16.) Thus, as PAWC demonstrated in Exhibit 1 to its Motion for Summary Judgment,[4] a comparison of amounts PAWC actually billed to Mr. Pettko versus the amounts he would have been billed under the "pro-rating" method he favors shows that, for the period from January 1, 2006 to the present, Mr. Pettko paid **less** under the Commission-approved "bills rendered" application of changes in the DSIC and STAS than he would have paid under his

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[3] *E.g., Toll Bros., Inc. v. Pennsylvania-American Water Co.*, Docket No. C-00934742, 1994 Pa. PUC LEXIS 122 at *33 (December 15, 1994) (citing *Cheltenham and Abington Sewerage Co. v. Pa. P.U.C.*, 174 Pa. Super. 123, 100 A.2d 110 (1953)) (a provision previously approved by the PUC that outlined how to calculate refunds of customer advances for construction was a "rate" protected by the Commission-made rate doctrine, and the complainant would not be permitted to argue that the refund procedure was unfair to it).

[4] PAWC Exhibit 1 was verified by the affidavit of Jo Anne Lontz, a Senior Financial Analyst employed by PAWC.

preferred "pro-rating" method.[5] *See* Motion for Summary Judgment, p. 18. For the STAS, Mr. Pettko paid $0.05 less, and, for the DSIC, he paid $1.37 less. *Id.*

In short, when both increases and decreases are considered, Mr. Pettko has not been "harmed" by the manner in which PAWC has applied changes in the DSIC and STAS, and, therefore, PAWC cannot be liable for any retrospective refund or other liability as Mr. Pettko claims in his Complaint. Although the ALJ chose not to rely upon Exhibit 1 to support his grant of summary judgment, nothing precludes the Commission from considering and relying upon the simple, transparent and easily reproduced arithmetic calculations set forth in Exhibit 1 as an additional, valid basis for affirming the ALJ's *Initial Decision.*[6]

PAWC, therefore, has furnished two, independent bases for summary judgment. First, Mr. Pettko is simply wrong as a matter of law. PAWC has been authorized to implement changes in the DSIC and STAS on a bills-rendered basis. Mr. Pettko's attempt to challenge that approval is an improper collateral attack on prior Commission Orders and, therefore, is legally barred by Section 316 of the Public Utility Code and the doctrine of Commission-made rates. Second, Mr. Pettko's attempt to show "harm" by focusing only upon increases in the DSIC and

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5 January 1, 2006 was used as the starting date for the calculation because it encompasses a period of four years prior to the date (March 19, 2010) that Mr. Pettko filed a complaint against PAWC in the Court of Common Pleas of Washington County (the "civil complaint") alleging that he was improperly billed. As explained in the Company's Answer (p. 3) to Mr. Pettko's Complaint in this case, the Court of Common Pleas granted the Company's Preliminary Objections to Mr. Pettko's civil complaint on the grounds, *inter alia*, that Mr. Pettko was asserting a claim within the primary jurisdiction of the Commission. Mr. Pettko subsequently filed essentially the same complaint with the Commission to initiate this case on February 8, 2011. Consequently, even if the four-year refund period established by 66 Pa.C.S. § 1312(a) could be measured from the date Mr. Pettko filed his civil complaint, he would not be entitled to any retrospective relief prior to four years from that date, i.e., March 19, 2006. The Company used January 1, 2006 rather than March 19, 2006 as the starting point for Exhibit 1 so that the calculation would begin on the first day of a calendar year.

6 Mr. Pettko's contention (Pettko Exc., p. 5 and note 2) that the Commission is precluded from considering Exhibit 1 to PAWC's Motion for Summary Judgment is wrong as a matter of law. The Commonwealth Court has explicitly held that administrative agencies are permitted to rely on affidavits submitted on behalf of a party seeking summary judgment. *Snyder v. Dept. of Envtl. Res.*, 138 Pa. Cmwlth. 534, 541, 588 A.2d 1001, 1004 (1991), citing *Peoples Natural Gas Co. v. Pa. P.U.C.*, 123 Pa. Cmwlth. 481, 554 A.2d 585 (1989). *See* Motion for Summary Judgment, p. 19. Moreover, Mr. Pettko had ample opportunity to respond to Exhibit 1 by submitting one or more affidavits of his own, which he did not do. In fact, anyone with a pocket calculator can easily verify the accuracy of the "pro-rating" shown in Exhibit 1. The fact that neither Mr. Pettko nor his expert witness responded to Exhibit 1, even though they had more than enough time and every incentive to do so, should be seen for what it is, namely, a clear concession that the Complainant has no valid basis to dispute anything shown in that exhibit.

STAS and ignoring decreases is also erroneous as a matter of law. When both increases and decreases are considered, Mr. Pettko suffered no "harm." Therefore, on either of the two bases set forth by PAWC in its Motion for Summary Judgment, it is entitled to have judgment entered in its favor as a matter of law.

III. REPLIES TO EXCEPTIONS

Mr. Pettko has lodged a total of fifteen Exceptions to the Initial Decision. The bulk of Mr. Pettko's Exceptions are simply a variation on a single theme. *See* Pettko Exc. 1, 2, 4-8, 10 and 15. That is, they all say essentially the same thing but in a slightly different way, namely, that the Commission's prior authorization of the bills rendered method to implement changes in the DSIC and STAS should be ignored; that, in the opinion of Mr. Radigan, the bills rendered method is *per se* improper and "discriminatory"; based solely on Mr. Radigan's "opinion," the Commission should reverse its prior decisions and, in the context of this case, deem **any** use of the bills rendered method a violation of Section 1304 of the Public Utility Code; and, applying that newly-established principle, PAWC should be retrospectively penalized for having implemented changes in the DSIC and STAS on a bills rendered basis notwithstanding its reliance upon the Commission's prior approval. Of course, simply stating Mr. Pettko's argument clearly and succinctly – which Mr. Pettko did not do anywhere in his Exceptions – underscores the fundamental errors of law and logic in his position. Because of the overlap – and redundancy – of these Exceptions, they will be addressed as a group.

The rest of Mr. Pettko's Exceptions purport to make a big deal out of matters that are tangential to the core issue of whether summary judgment was properly granted. Thus, in addition to being largely inaccurate, they do not raise any issue that could form a valid basis for disturbing the *Initial Decision*. E.g., whether "pro-rating" imposes materially more administrative burdens than using the bills rendered approach (Pettko Exc. 11); whether the Commission's Tentative Order on the implementation of Act 11, which has now been superseded by the *Final Act 11 Implementation Order*, was somehow inconsistent with the *Initial Decision*

(Pettko Exc. 13); and whether Mr. Pettko should have been permitted to conduct "depositions" notwithstanding the extensive discovery he had already undertaken (Pettko Exc. 14).[7] These largely irrelevant matters will be discussed only briefly.

A. Contrary To Complainant's Exceptions 1, 2, 4-8, 10 and 15, The Commission Has Previously Determined That Applying Changes In The DSIC And STAS Without "Pro-Rating" For Service Rendered Before And After The "Effective Date" Is Just, Reasonable And Non-Discriminatory

Mr. Pettko's contentions – and Mr. Radigan's "opinion" – that the bills rendered application of changes in rates and charges is *per se* improper, discriminatory and a violation of Section 1304 are totally inconsistent with the law of this Commonwealth. This is best evidenced by the well-accepted treatise on the ratemaking process in Pennsylvania, *Rate Case Handbook: A Guide To Utility Ratemaking Before The Pennsylvania Public Utility Commission (1983)*, published by the PUC, which explains that changes in rates may properly and lawfully be applied either on a "service rendered" or "bills rendered" basis:

> When the Commission's final order is adopted in time for a compliance filing to be prepared, examined, and approved before the end of the suspension period, then the date of approval of the compliance filing (or some other date up to the end of the suspension period) can be the effective date of the new rates. The new rates will apply either to service rendered on and after a certain date, or for bills rendered on and after a certain date.

Id. at 135. (Emphasis in original.)

Consistent with the state of the law described in the *Rate Case Handbook, supra*, there are many instances where the Commission has expressly approved the "bills rendered" application of changes in surcharge rates for all customers of a utility.[8] Additionally, and

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[7] Moreover, Mr. Pettko's demand for depositions was a clear misuse of the discovery process, as explained in detail in Objections of Pennsylvania-American Water Company to Notice of Deposition Issued by C. Leslie Pettko on June 1, 2012, which PAWC filed on June 11, 2012.

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

contrary to Complainant's contentions that the bills rendered application of rate changes is somehow "discriminatory," the Commission has determined that the opposite is the case and, in fact, that the bills rendered application of rate changes under reconcilable adjustment clauses "does not place *any* customer at a disadvantage:"

> 10. NFGD proposed to institute the proposed surcharges on a *bills-rendered basis* for bills on and after November 4, 1985. *NFGD stated that application of the applicable surcharge on a bills-rendered basis does not place any customer at a disadvantage, because each surcharge is designed to recover the recoupment amount over a one-year period. We agree.*

Petition of Nat'l Fuel Gas Distrib. Corp. Requesting Permission To File A Tariff Supplement To Become Effective On One Day's Notice Establishing A Recoupment Surcharge, Docket No. P-850075, 1986 Pa. PUC LEXIS 132 (February 28, 1986). (Emphasis added.) *See also* Motion for Judgment on the Pleadings, pp. 13-15; Motion for Summary Judgment, pp. 22-24.

1. The DSIC

The Commission authorized PAWC to implement a DSIC by its Order entered August 26, 1996 at Docket No. P-00961031 ("*DSIC Order*").[9] Motion for Summary Judgment, Appendix A. As part of the DSIC Order, the Commission approved "Sample Tariff Language," which set forth the terms of the DSIC. Contrary to Mr. Pettko's contentions, the Sample Tariff Language made it clear that the "effective date" would be the date on which DSIC charges would be applied on a "bills rendered" basis:

> ***Effective Date:*** The DSIC will become *effective for bills rendered* on and after January 1, 1997.

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service rendered on or after March 1, 1980, there would have been a lag in the collection of revenues in March and April 1980. Thus Met-Ed was allowed to increase its energy cost rate effective for bills rendered on and after March 1, 1980.")

9 *Petition of Pennsylvania-American Water Co. for Approval to Implement a Tariff Supplement Establishing a Distribution System Improvement Charge*, Docket No. P-00961031 (August 26, 1996), 26 *Pa. Bulletin* 4485.

II. Computation of the DSIC

Calculation: The initial charge, *effective January 1, 1997,* shall be calculated to recover the fixed costs of eligible plant additions that have not previously been reflected in the Company's rate base and will have been placed in service between September 1, 1996, and November 30, 1996. Thereafter, the DSIC will be updated on a quarterly basis to reflect eligible plant additions placed in service during the three-month periods ending one month prior to the *effective date* of each DSIC update. Thus, changes in the DSIC rate will occur as follows:

Effective Date of Change	Date to which DSIC-Eligible Plant Additions Reflected
April 1	February 28
July 1	May 31
October 1	August 31
January 1	November 30

The Commission's approval of the bills rendered application of changes in the DSIC was also evidenced in another provision of the Sample Tariff Language, which provided as follows:

> ***DSIC Surcharge Amount*:** the charge will be expressed as a percentage carried to two decimal places and will be *applied to the total amount billed to each customer* under the Company's otherwise applicable rates and charges, excluding amounts billed for public fire protection service and the State Tax Adjustment Surcharge (STAS). (Emphasis added.)

The Commission reinforced its earlier authorization of the bills rendered application of DSIC changes when, on March 5, 1999, it approved the release of the Bureau of Audits' *Report on the Distribution System Improvement Charge for the Year Ended December 31, 1997*, which was filed at Docket No. D-97S023. In that report, a copy of which was provided as Appendix C to PAWC's Motion for Summary Judgment, the Bureau of Audits stated (p. 9) as follows:

> The Commission approved DSIC was on a "bills rendered" basis. Subsequent testing verified that the DSIC was in fact applied as properly approved and that the wording on all of the quarterly filings was incorrect.
>
> **RECOMMENDATION:**
>
> We recommend that the Company's future quarterly filings have the proper wording reflecting DSIC application on a bills rendered basis.
>
> The Company agrees with this recommendation.

The Company implemented the Bureau of Audits' recommendation and, in its subsequent Report on the operation of the DSIC for the years 1998 and 1999, the Bureau of Audits determined that PAWC had properly complied with its recommendation: "The Company agreed with this recommendation and changed the wording to reflect DSIC application on a bills rendered basis, starting with its quarterly filing effective July 1, 1999." *See* Appendix E (Finding No. 2) to Motion for Summary Judgment. Additionally, in response to a recommendation in a subsequent Report of the Bureau of Audits, as of April 1, 2003, PAWC made a further refinement in its tariff language to more explicitly set forth the bills rendered application of changes in the DSIC. Specifically, that language, which remains in effect today, provides that DSIC charges "will apply to all bills rendered with an ending read date equal to or greater than the effective date." The Bureau of Audits and the Commission accepted and approved this tariff language. *See* Motion for Summary Judgment, pp. 12-13.

Finally, in its *Final Act 11 Implementation Order*, the Commission acknowledged its prior authorization of the bills rendered application of DSIC charges for water utilities and extended the bills rendered approach to all utilities that employ the DSIC:

> **Bills Rendered or Service Rendered**
>
> As to the issue of whether utilities will bill their customers for the DSIC on a "bills rendered" basis versus a "services rendered" basis, the Tentative Implementation Order noted PAWC's and Aqua's proceedings before the Commission where we directed both companies to bill their customers for the DSIC on a bill rendered basis.[3]
>
> [PUC Footnote 3. Bills calculated under the "bills-rendered" basis are computed based on the effective tariff rate at the time of the bill. Bills calculated under the "service-rendered" basis are prorated based on service rendered before and after a tariff rate change.]
>
> **Comments**: PAWC and Aqua both state that the Tentative Implementation Order's directive that the DSIC becomes applicable to rates for service rendered on or after the effective date of the DSIC is inconsistent with the manner in which the Commission has expressly directed water utilities to implement the DSIC since its inception over fifteen years ago, which is on a "bills rendered" basis. PAWC notes that when the Commission authorized it to implement its DSIC, at Docket No. P-00961031, the Commission approved a sample tariff with language that provided that "the DSIC will become effective for bills rendered..."

Additionally, PAWC notes that our Bureau of Audits recommended three separate times that PAWC's future quarterly filings should reflect that PAWC properly applied the DSIC on a bills rendered basis. The Commission subsequently adopted all three separate recommendations. *See* Audit of PAWC's DSIC, Docket Nos. D-97S023, D-99DSC029, and D-01DSC009. PAWC asserts that this is one of the "practices and procedures" that should continue in effect. Likewise, Aqua makes a similar assertion regarding the manner in which it bills its customers for the DSIC. Accordingly, pursuant to our directive, both companies have been billing their customers for the DSIC on a bills rendered basis. PAWC at 5-10; Aqua at 5-7.

OCA states that it does not oppose the use of either the service rendered or bills rendered approach. However, OCA acknowledges that water companies currently using a DSIC mechanism employ the bills rendered approach. OCA at 8.

Resolution: The current practice and procedure is for water companies to bill their customers for DSIC on a bills rendered basis. We note that Act 11 directed that the current practices and procedures remain in place for those water companies that have an approved DSIC. *See* 66 Pa.C.S. § 1358. Given this clear statutory mandate and since there is no reason or compelling evidence requiring a change from this requirement, we will modify our determination in the Tentative Implementation Order and direct that all utilities bill their customers for DSIC on a bills rendered basis.

2. The STAS

The Commission authorized all Pennsylvania utilities to implement a STAS pursuant to its Order titled *State Tax Adjustment Procedure*, entered March 10, 1970. The Commission expanded and clarified its order on the state tax adjustment procedure in its Secretarial Letters issued on December 18, 1986, August 15, 1991 and June 2, 1992. PAWC and its corporate predecessors have had a STAS provision in their respective tariffs since the STAS was authorized.

On December 18, 1986, the Commission issued a Secretarial Letter concerning state tax adjustment procedures to reflect a decrease in state tax rates to become effective January 1, 1987. (A copy of the Commission's Secretarial Letter was provided as Appendix G to PAWC's Motion

for Summary Judgment.) By its Secretarial Letter, the Commission made it clear that utilities that employed monthly billing were not required to "pro rate" changes in the STAS.

> For utilities with billing cycles of more than one month, the tax shall be applied on a pro-rata basis.

PAWC employs monthly billing, as defined in 52 Pa. Code § 56.2. During the entire period that Mr. Pettko asserts is relevant to his Complaint, Mr. Pettko has been billed on a monthly basis, as he admitted (Complaint, ¶ 21). Accordingly, the Company's application of changes in its STAS (increases and decreases, charges and credits) to Mr. Pettko's bill on a bills rendered basis is consistent with the Commission's prior authorization.

By Secretarial Letter issued August 15, 1991 at Docket No. M-910296, the Commission directed Pennsylvania utilities "to maintain records that are adequate to provide a reconciliation of the STAS revenues collected." (A copy of this Secretarial Letter was provided as Appendix H to the Motion for Summary Judgment.) And, by its Secretarial Letter issued June 2, 1992 at Docket No. M-910296, the Commission directed Pennsylvania utilities: (1) to file, each year that a STAS charge or credit is in effect, an annual reconciliation of costs that were eligible for recovery under their STAS Riders and the revenues billed for the recovery of such costs; and (2) to adjust their prospective STAS charge to refund any over-collection or recoup any under-collection. (A copy of this Secretarial Letter was provided as Appendix I to the Motion for Summary Judgment.)

During the period commencing January 1, 2006, and continuing through November 11, 2011 (its last STAS filing) PAWC made eight changes in its STAS of which six were either zero or a credit and five represented a **decrease** in the amount billed to customers, as shown below:

EFFECTIVE DATE	STAS RATE
11/11/11	0.00%
01/01/11	0.32%
01/01/10	0.45%
01/01/09	-0.15%
11/30/07	0.00%
01/01/07	-0.44%
08/14/06	-0.33%
01/01/06	-0.29%

Each of the changes referenced above was made pursuant to a tariff supplement filed with the Commission, and those filings are public documents under 52 Pa. Code § 5.406. The changes that became effective on November 30, 2007 and November 11, 2011 were made to "zero-out" the STAS pursuant to the Commission's Orders entered November 29, 2007, at Docket No. R-00072229, and November 10, 2011, at Docket No. R-2011-2232243, establishing new base rates for PAWC. Those changes were reflected in the Company's compliance tariffs, which were also approved by the Commission's Orders entered November 29, 2007 and November 10, 2011 at the above-referenced docket numbers.

For each of the changes in the STAS that were made outside of a base rate case, the Company filed with the Commission: (1) a computation of the STAS rate proposed to be placed into effect; and (2) a reconciliation of costs the Company was permitted to recover under the STAS and revenues actually billed under the STAS during the historic reconciliation period, such that over-collections were refunded to customers and under-collections were recouped from customers. (Copies of the filings made by PAWC with the Commission, which are public documents, were also provided as Appendix J to the Motion for Summary Judgment.) At the same time such filings were made with the Commission, they were served upon the Commission's Bureau of Fixed Utility Services (now the Bureau of Technical Utility Services),

the Commission's Bureau of Audits, the Pennsylvania Office of Consumer Advocate and the Pennsylvania Office of Small Business Advocate. And, as to each such filing, the Commission issued a Secretarial Letter accepting the filing and permitting the tariff changes stating the new STAS rate to go into effect. (Copies of all such Secretarial Letters, evidencing official action of the Commission, were provided as Appendix K to the Motion for Summary Judgment.)

In each of PAWC's STAS filings referenced above, the revenues *used in the* reconciliation statements reflected revenues billed to customers on a bills rendered basis. In none of PAWC's STAS reconciliation dockets nor in any base rate proceeding has PAWC's application of changes in the STAS on a bills rendered basis been challenged as unauthorized or otherwise improper or unlawful. In short, the Commission's authorization of the use of a bills rendered approach to applying changes in the STAS, as set forth in its December 18, 1986 Secretarial Letter, has remained in effect and has not been disputed since that time. Furthermore, because five of the eight changes in the STAS since January 1, 2006 have been **decreases**, the bills rendered approach has resulted in slightly lower bills to Mr. Pettko over that period, as Exhibit 1 accompanying the Motion for Summary Judgment clearly shows.

3. In Addition To Ignoring And Misstating The Law, Mr. Pettko Is Attempting To Assert Claims That Are Barred By Section 316 And The Doctrine Of Commission-Made Rates

As noted in Section II, *supra*, PAWC is entitled to judgment in its favor as a matter of law because the Complainant is, in effect, attempting to collaterally attack prior rulings of this Commission, which is prohibited by Section 316 of the Public Utility Code. Section 316 provides, in relevant part, that "[w]henever the commission shall make any rule, regulation, finding, determination or order, the same . . . shall remain conclusive upon the parties affected thereby, unless set aside, annulled or modified on judicial review." The Commission's Orders and other directives authorizing bills-rendered application of the DSIC and STAS are now decades old, have not been appealed and have been reaffirmed many times, as explained

previously. Therefore, all action taken by utilities in reliance on those Commission determinations is exempt from after-the-fact collateral attacks like the one the Complainant is trying to mount against PAWC.

Similarly, as noted in Section II, *supra*, the Complainant's collateral attack is also prohibited by the doctrine of Commission-made rates, which protects a utility from refunds or any other liability based on a retrospective review of the rates it charged with the Commission's prior approval.[10] The doctrine of Commission-made rates prohibits the Commission from ordering refunds or penalties with respect to amounts collected by a public utility pursuant to rates and terms of service that the Commission has approved by formal administrative action. *Toll Bros., Inc. v. Pennsylvania-American Water Co.*, *supra*. *Accord C&D Tech., Inc. et al. v. Pennsylvania Power & Light Co.*, Docket No. C-00992119 et al., 2004 Pa. PUC LEXIS 57 at *27-28 (June 25, 2004) (Recommended Decision of Administrative Law Judge Wayne L. Weismandel) (Commission-approved provisions for interruptible customers to "buy-through" an interruption were entitled to protection under the Commission-made rate doctrine). (Judge Weismandel's holding on this issue was approved and adopted by the Commission at 2005 Pa. PUC LEXIS 1 (February 4, 2005)).

There is no question that PAWC's current and historic implementation of DSIC and STAS rate changes on a bills-rendered basis was authorized by formal administrative action of the Commission, which included Commission Orders and directives as well as periodic reviews, audits and approvals by the Commission's Bureau of Audits and other offices within the Commission. Consequently, any attempt at retrospective review is foreclosed by Section 316 and the doctrine of Commission-made rates, and PAWC is entitled to judgment in its favor as a matter of law.

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[10] For purposes of the Commission-made rate doctrine, the manner in which rates and charges are applied (*i.e.*, on a bills rendered basis) is not legally distinguishable from a "rate" because the definition of a "rate" in Section 102 of the Public Utility Code encompasses "any rules, regulations, [and] practices" of a public utility affecting any "compensation, charge, fare, toll, or rental" (emphasis added). *See also Lynch v. Pa. P.U.C.*, 140 Pa. Cmwth. 599, 594 A.2d 816 (1991), appeal denied, 529 Pa. 670, 605 A.2d 335) (tariff rules on customer contributions for main extensions constitute a "rate").

B. Contrary To Contentions In Complainant's Exceptions 3 and 9, There Is No Genuine Issue Of Material Fact Regarding "Harm" To Mr. Pettko

Mr. Pettko contends that an evidentiary hearing is necessary to assess whether he was "harmed" by the application of DSIC and STAS changes on a bills rendered basis (Pettko Exc. 3) and, by implication, to assess the off-setting effects of increases and decreases in those charges that the ALJ referenced at page 23 of the *Initial Decision* (Pettko Exc. 9). At the outset, the issue of "harm" does not even arise because, as explained in Section III.A. above, the manner in which PAWC applies changes in the DSIC and STAS has been authorized by the Commission and is not subject to retrospective review or collateral attack. In short, the Commission has already determined that the bills rendered approach is just, reasonable and non-discriminatory and, therefore, it has been conclusively established that Mr. Pettko has not experienced any legally cognizable harm from PAWC's conformance to prior Commission Orders.

Even if "harm" were a relevant consideration at this stage of the proceeding, and assuming the "harm" Mr. Pettko alludes to is the difference between what he was actually billed during the relevant period and what he would have been billed under his preferred "pro-rating" method, the Complainant had ample opportunity to make that showing, yet failed to do so. In fact, Mr. Pettko demanded in discovery that PAWC produce all of his water bills back to 2004. PAWC complied and provided those bills in December 2011. As the "proponent of a rule or order" (*see* Section 332(a)) and as a complainant challenging an existing rate (*see* Section 315(a)), it was incumbent on Mr. Pettko to furnish some evidence to support his averment that he suffered "harm."[11] He failed to do so either in his case-in-chief or through affidavits in response to PAWC's Motion for Summary Judgment. Mr. Pettko cannot "sandbag" the respondent, the ALJ and the Commission by failing to produce evidence when he had the chance – indeed, the

[11] Mr. Pettko's contention that Section 315(b) placed the burden of proof on PAWC is untenable because today, almost eighteen months after he filed his Complaint in this case, Mr. Pettko has yet to identify any "determination or order of the commission" that he alleges PAWC has violated. In contrast, PAWC has identified and cited various Commission orders and other determinations approving the billing practice that Mr. Pettko is challenging. Mr. Pettko's complaint unquestionably is attacking an existing rate of PAWC and, therefore, pursuant to Sections 315(a) and 332(a), the burden of proof is squarely on the Complainant.

obligation – to do so and then, when the glaring deficiencies in his case are identified in a Motion for Summary Judgment, claim that an evidentiary hearing is needed to plug those holes.

Furthermore, Mr. Pettko's assertions of "harm" are based on a premise that poses a legal question, not a factual one, namely, whether the Commission can and should approve the "service rendered" application of increases in the DSIC and STAS while maintaining a bills rendered application of decreases. *See, e.g.*, Pettko Exc. at 6 (purporting to illustrate how a customer might be harmed solely by reference to "a DSIC increase"). Indeed, Pettko Exception 3 takes the ALJ to task for suggesting that because charges under the DSIC and STAS both increase and decrease, the potentially off-setting effect was likely considered by the Commission in approving the bills rendered application of those rates.

Finally, there is no need to speculate about "harm" because the impact of Mr. Pettko's preferred method, i.e, to pro-rate changes in the DSIC and STAS, can be calculated from Mr. Pettko's own bills through simple arithmetic. This is exactly what PAWC did in Exhibit 1 to its Motion for Summary Judgment. Exhibit 1 shows that the bills rendered application resulted in Mr. Pettko's bills being **lower** by $0.05 cents for the STAS and **lower** by $1.37 for the DSIC over the period from January 1, 2006 to the present. Thus, not only did the bills rendered approach provide a small benefit to Mr. Pettko, Exhibit 1 shows that, no matter how one looks at it, the difference between the bills rendered and service rendered application is *de minimus*.

As previously explained, the Commission is entitled, as a matter of law, to rely on Exhibit 1, consistent with express Commonwealth Court precedent. *Snyder v. Dept. of Envtl. Res.*, 138 Pa. Cmwlth. 534, 541, 588 A.2d 1001, 1004 (1991); *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission*, 123 Pa. Cmwlth. 481, 554 A.2d 585 (1989) (administrative agencies may lawfully rely upon affidavits and other evidence submitted by the proponent of a dispositive motion to find in that party's favor). *See* Motion for Summary Judgment, p. 19. Moreover, the Commission's own regulations authorize it to rely upon "affidavits" to support granting summary judgment. 52 Pa. Code § 5.102(d)(1). The Complainant had ample opportunity to review and respond to Exhibit 1 in his answer to the Motion for Summary Judgment including submitting his own affidavit or that of his expert

witness, as 52 Pa. Code § 5.102(d)(1) permits. He chose not to do so. Accordingly, at this late date – and after sandbagging on this issue – Mr. Pettko cannot credibly contend that his simple expression of disagreement is enough to raise a genuine issue of fact. It is not. If there were any inaccuracies in Exhibit 1, they could have – and should have – been pointed out before now. Mr. Pettko's total lack of specificity in claiming to disagree with what Exhibit 1 plainly shows simply underscore the obvious – he has no credible basis for contesting that exhibit.

C. Contrary To The Criticism Expressed In Pettko Exception 7, The ALJ Did Not Engage In Any Impermissible Fact-Finding In His Analysis Of Why The Complainant's Allegation Of "Discrimination" Fails The Commonsense Test

Throughout this case, including in his Answer to the Motion for Summary Judgment, the Complainant has asserted that applying changes in the DSIC and STAS on a bills rendered basis somehow results in unreasonable "discrimination" because some customers might pay more (or less) than other customers in the month a change goes into effect. *See, e.g.,* Pettko Exc. 2 and 6. Of course, even under the service rendered approach, some customers would pay more or less than others in the month of a rate change – a point Mr. Pettko chose to ignore. Moreover, Mr. Pettko never explained how to discern whether a particular customer might be paying "more" or "less" than Mr. Pettko believes to be the correct amount. However, on closer examination, Mr. Pettko's convoluted argument dissolves into the same basic contention he has made since this case was initiated, namely, that the sole benchmark for determining whether PAWC billed any particular customer too much or too little in the month a rate change occurred is the amount that customer would have paid if the rate change were applied on a "pro-rated" basis. Thus, starting from Mr. Pettko's premise, any deviation from the "pro-rated" amount constitutes, in his view, unreasonable "discrimination." Mr. Pettko's discrimination "argument" is no argument at all; it simply assumes what it sets out to prove. More importantly, the Commission has already determined that the bills rendered approach is just, reasonable and non-discriminatory, and those decisions bar any retrospective examination of PAWC's billings.

The Complainant, ignoring both Commission precedent and the logical fallacy that lay at the heart of the argument, has tried to dress up his discredited contentions with references to the allegedly disparate impact the bills rendered method may have on customers whose meters are

read on different "cycles." *See, e.g.*, Pettko Exc., p. 9. However, "cycle billing" is irrelevant to the issue, as the ALJ demonstrated by means of a simple, commonsense explanation. *See Initial Decision*, pp. 20-25. While the ALJ used assumed (but reasonable) values to illustrate his point (*see* Initial Decision, p. 21), he certainly did not engage in impermissible fact-finding. To the contrary, the point the ALJ was making, namely, that "cycle billing" does not cause the bills rendered application of changes in DSIC and STAS rates to be "discriminatory," could just as readily have been established without an illustrative quantification. Simply stated, because the DSIC and STAS are both returned to zero when new base rates go into effect, over the period from the initiation of a charge or credit to its "zeroing out," customers will pay the same amount (or receive the same credit) regardless of the "cycle" on which their meters are read. And, even if any differences did exist, they would not rise to the level of "unreasonable discrimination" as that concept is expressed in Section 1304 of the Public Utility Code and has been defined in the applicable precedent cited by the ALJ. *Mill v. Pa. P.U.C.*, 447 A.2d 1100, 1102 (Pa. Cmwlth. 1982); *Philadelphia Elec. Co. v. Pa. P.U.C.*, 470 A.2d 654, 657-659 (Pa. Cmwlth. 1984); *Bldg. Owners and Managers Ass'n v. Pa. P.U.C.*, 470 A.2d 1092, 1095-1096 (Pa. Cmwlth. 1984). *See Initial Decision*, pp. 13-15. Indeed, any such differences would necessarily be *de minimis.* And differences that not only are *de minimis* but change direction from one period to the next could not constitute unreasonable discrimination for purposes of Section 1304. *See* Initial Decision, pp. 22-24.

The ALJ, to his credit, engaged Mr. Pettko's "discrimination" argument on its own terms and provided a detailed analysis of why that argument is meritless. The ALJ's efforts, although extremely useful in illuminating the errors at the heart of Mr. Pettko's position, are not essential for justifying the dismissal of Mr. Pettko's Complaint. As previously explained, the Commission's prior approval of the bills rendered application of changes in the DSIC and STAS – with full recognition that utilities employ "cycle" billing[12] – bars any claim that the bills

[12] *See* Secretarial Letter issued December 18, 1986 (Appendix G to the Motion for Summary Judgment) authorizing utilities to forego pro-ration of the STAS unless they have "billing cycles of more than one month."

rendered approach resulted in unreasonable discrimination or that PAWC could be found liable for using that method.

D. Pettko Exceptions 12-15 Are Meritless And Should Be Rejected

Complainant's Contention That PAWC Is Not Applying The STAS In Conformity With Its Tariff (Pettko Exc. 12). Mr. Pettko contends that the bills rendered application of the STAS is somehow contrary to the Company's tariff. That contention is a misreading of PAWC's STAS rider, which provides that the STAS will apply "to all services rendered." The Complainant attempts to interpret that language as meaning the same thing as "for service rendered on and after [effective date]" when it clearly does not. Contrary to Mr. Pettko's strained interpretation, the phrase "for all services rendered" is designed to clearly indicate that the STAS applies to all forms of service provided by PAWC (e.g., general water service, private fire protection service and public fire protection service), unlike the DSIC, which does not apply to "all services rendered" because public fire protection is specifically exempted from its application. Moreover, Mr. Pettko would have the Commission believe that PAWC has been applying its STAS in direct contravention of its tariff for more than two decades without the Commission (including its Bureau of Audits, Bureau of Consumer Services, and Bureau of Technical Utility Services) or anyone else ever noticing. Given the numerous reviews of PAWC's STAS billings and the terms of its tariffs that have occurred over those approximately 20 years, that could never have happened.

Complainant's Contention That The Commission's Tentative Order On The Implementation of Act 11 Is Inconsistent With The Initial Decision (Pettko Exc. 13). As explained in Section III.A.1, *supra*, the *Final Act 11 Implementation Order* affirms the Commission's prior and continuing authorization for utilities to apply the DSIC on a bills rendered basis.

Complainant's Contention That He Was Improperly Deprived Of The Opportunity To Depose PAWC's Witness (Pettko Exc. 14). Pursuant to the litigation schedule established at the Prehearing Conference, as subsequently modified with the ALJ's approval, Mr. Pettko submitted his direct testimony on April 30, 2012. PAWC filed its Motion for Summary

Judgment on May 29, 2012. Because its Motion was pending and the litigation schedule had not yet been suspended by the ALJ, PAWC, in conformity with the litigation schedule, submitted the direct testimony of its witness, Ms. Jo Anne Lontz, on May 30, 2012. On June 1, 2012, Mr. Pettko filed his Notice of Deposition seeking to depose Ms. Lontz, which PAWC received by first class mail on June 5, 2012.

On June 11, 2012, PAWC filed and served its Objections to Notice of Deposition Issued by C. Leslie Pettko on June 1, 2012 (hereafter, "Objections to Deposition"). PAWC objected to Complainant's Notice of Deposition on two grounds. First, the "matters" for "inquiry" set forth in the Notice of Deposition were not appropriate for discovery. The Notice of Deposition, by its terms, sought to inquire into matters fundamentally legal in nature. E.g., the meaning and import of the Commission's prior Orders implementing the DSIC and the STAS. Second, the Complainant sought a deposition merely to duplicate the extensive discovery he had **already** conducted, which was evidenced by comparing his Notice of Deposition to the prior discovery he had issued in November 2011 and in January and March 2012.[13] *See* Objections to Deposition, pp. 5-7 and 9-12. And, as to the calculation of what Mr. Pettko's bills would have been if his preferred "pro-rating" method had been used, the Company produced all of the information the Complainant could conceivably have needed to make those calculations, which are a matter of simple arithmetic applied to Mr. Pettko's own bills – bills that he introduced into evidence. Clearly, such repeated rounds of duplicative discovery are an improper use of the discovery process. *See generally* 52 Pa. Code § 5.361.

Because the ALJ suspended the litigation schedule and subsequently granted PAWC's Motion for Summary Judgment, it was not necessary for the ALJ to rule on PAWC's Objections to Deposition. However, as the Objections to Deposition establish, Mr. Pettko was not entitled to take the deposition of Ms. Lontz (whose testimony, in any event, did not form the basis for the *Initial Decision*), and Mr. Pettko's request for a deposition was a clear misuse of the discovery

[13] Complainant issued a Request for Documents on November 9, 2011, informal discovery (in a letter from counsel dated January 30, 2012), and Interrogatories and Second Request for Documents on March 14, 2012. PAWC provided extensive documents and answers in response to each set of discovery, as detailed in its Objection to Deposition, pp. 4-7 and Appendices C-D thereto.

process. Mr. Pettko's Exception 14 is another example of the approach to discovery he has taken throughout this case, namely, if he asks for something and does not get the answer he desires, he keeps asking the same questions over and over again in the hope he might get a different response at some point. That is not a proper use of the discovery process.

Complainant's Contention That His "Due Process Rights" Were Somehow Abrogated Because An "Evidentiary Hearing" Was Not Held (Pettko Exc. 15). The ALJ preempted this argument based on solid appellate court precedent. *See Initial Decision*, p. 28 (Ordering Paragraph 10). A complaint may be dismissed without conducting an evidentiary hearing where, as here, there are no disputed questions of fact and the moving party is entitled to judgment as a matter of law:

> This court recently reaffirmed the fundamental proposition of law that a hearing or trial procedure is necessary only to revolve disputed questions of fact and is not required to decide questions of law, policy or discretion. *Lehigh Valley Power Committee v. Pa. P.U.C.*, 128 Pa. Commonwealth Ct. 259, 563 A.2d 548 (1989) (citing K. Davis, *Administrative Law Treatise*, Vol. 2 § 12:2 (1979) and Vol. 3 §§ 14:1-14:3 (1980). *See also White Oak Borough Authority v. Pennsylvania Public Utility Commission*, 175 Pa. Superior Ct. 114, 103 A.2d 502 (1954).

Lehigh Valley Power Comm'n v. Pa. P.U.C., 128 Pa. Cmwlth. 276, 289-90, 563 A.2d 557, 564 (1989). *Accord Lehigh Valley Power Comm'n v. Pa. P.U.C.*, 128 Pa. Cmwlth. 259, 275, 563 A.2d 548, 556 (1989); *U.S. Steel Corp. v. Pa. P.U.C.*, 69 Pa. Cmwlth. 134, 140, 450 A.2d 1073, 1076 (1982)) (the Commission has "discretion to hold hearings on a complaint, and a decision to dismiss a complaint without a hearing will be reversed only if there was an abuse of discretion.")

As explained above, in the *Initial Decision* and in PAWC's Motion for Summary Judgment, there is no genuine issue as to any material fact in this case, and PAWC is, therefore, entitled to judgment in its favor as a matter of law. Accordingly, consistent with long-standing appellate precedent, the Complainant was not entitled to an evidentiary hearing and, therefore, his "due process rights" were not abrogated in any respect.

IV. CONCLUSION

For the reasons set forth above, in the Company's Motion for Summary Judgment, and in the *Initial Decision* issued by Administrative Law Judge Cheskis on July 25, 2012, Complainant's Exceptions should be denied and judgment should be entered in favor of Pennsylvania-American Water Company as a matter of law.

Respectfully Submitted

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Dated: August 24, 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of August, 2012, served true and correct copies of Pennsylvania-American Water Company's Reply to Exceptions upon the following person(s) in the manner indicated below:

VIA HAND DELIVERY

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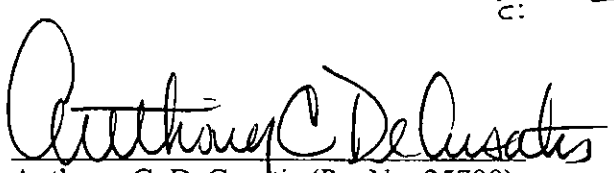

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Dated: August 24, 2012