

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WALTER PAINTER and DONNA	)	
PAINTER, on behalf of themselves and all	)	
others similarly situated,	)	
	)	
Complainants,	)	C-2011-2239556
	)	
v.	)	
	)	
AQUA PENNSYLVANIA, INC.,	)	
	)	
Respondent.	)	

**COMPLAINANTS' EXCEPTIONS TO ADMINISTRATIVE LAW**  
**JUDGE'S INITIAL DECISION OF JANUARY 7, 2014**

Pursuant to 52 Pa. Code § 5.533, Complainants, Walter Painter and Donna Painter, submit these Exceptions to the Administrative Law Judge's Initial Decision of January 7, 2014 in the above matter:

Initially, Complainants incorporate by reference their Complaint, Brief in Opposition to Respondent's Motion for Judgment on the Pleadings, Brief in Opposition to Respondent's Motion for Summary Judgment, and Response to Respondent's Objections to Complainants' Requests for Production of Documents and Notices of Deposition.

**Exception #1:**

Complainants except to the Administrative Law Judge's ("ALJ's") finding that "[a]s a matter of law, Aqua's assessment of the DSIC surcharge upon Complainants on a bills-rendered basis is consistent with the Company's tariff, the rules, regulations and orders of the Commission and the Public Utility Code." ALJ's Initial Decision of January 7, 2014, p. 12.

The crux of Complainants' position is that the Respondent's retroactive application of the Distribution System Improvement Charge ("DSIC") violates the applicable tariff—issued on September 18, 2009 and effective on October 1, 2009 ("Tariff"). Specifically, Respondent, Aqua Pennsylvania, Inc., has engaged in a practice of retroactively billing its customers for DSIC rate increases prior to the effective date of the increases. Complainants assert that the Tariff requires that increases to this usage-based surcharge should simply be pro-rated based upon the "effective portion" language set forth in the Tariff. Respondent's retroactive billing and failure to pro-rate violate the express terms of the Tariff and, as such, the Public Utility 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 concluded that "the Company is permitted to assess the DSIC surcharge on a "bills-rendered" basis." ALJ's Initial Decision of January 7, 2014, p. 8. However, this conclusion ignores the express language of the Tariff, which plainly states that the DSIC Surcharge Amount

" . . . will be applied to the effective portion of the total amount billed to each customer under the Company's otherwise applicable rates and charges, . . ."

This language is clear and consistent with the "services rendered" method of calculating rate changes. Respondent has consistently ignored the language of the Tariff and overbilled Complainants by collecting rate increases using the "bills rendered" method.

It is also critical to note that the phrase “bills rendered” does not even appear in the Tariff. The ALJ’s conclusion that Respondent is permitted to utilize the “bills rendered” method is simply not supported by the language contained in the Tariff. Billing in this manner is in violation of the Tariff and, accordingly, the Public Utility Code.

**Exception #2:**

Complainants except to the ALJ’s reliance upon the Pettko decision, which was wrongly decided.

Respondent’s Motion for Summary Judgment was effectively a renewed Motion for Judgment on the Pleadings, now relying on the Commission’s decision in Pettko v. Pennsylvania-American Water Company, PUC Docket No. C-2011-2226096. Respondent’s reliance upon the Commission’s decision in Pettko is improper for three reasons: (1) the language of the tariff in Pettko is substantially different than the language at issue here; (2) the Pettko decision exceeded its authority at the summary judgment stage; and (3) the Pettko decision misinterpreted Pennsylvania law.

Importantly, the Pettko tariff did not contain the “effective portion” language described when articulating the DSIC calculation. Therefore, because the Commission’s decision in Pettko was regarding a distinct tariff, it cannot control here.

Furthermore, the Pettko decision overreached by resolving numerous genuine issues of material fact that should have properly been resolved by a fact finder.

Finally, the Pettko decision misinterpreted the applicable case law in determining that the utility in that case did not unreasonably discriminate against the complainant.

**Exception #3:**

Complainant excepts to the ALJ's reliance upon the 2012 Final Implementation Order's definition of "bills rendered."

Complainants filed a formal Complaint on April 25, 2011 regarding Respondent's improper billing practices dating back as far as 2009. The ALJ's Initial Decision relies upon the Pettko decision holding that "[t]he Complainant has presented us with no facts or argument which shows that the Company is acting in any way contrary to that [Final Implementation] Order or prior Commission Orders directing the Company to collect the DSIC charge on a bills rendered basis." ALJ's Initial Decision of January 7, 2014, p. 12 (*citing Pettko*). Reliance upon the Final Implementation Order is misplaced in this case, however, because it was not entered until August 2, 2012—over one year after this case was filed. While Respondent may attempt to argue that the filing of the Final Implementation Order cuts off liability, it cannot rely on the filing of the Order to absolve itself from liability for overbilling prior to the date of its filing.

Tellingly, the ALJ does not cite to any specific Commission orders regarding billing practices prior to the August 2, 2012 Final Implementation Order. The reality is that Respondent has been collecting the DSIC surcharge in a manner in violation of its Tariff and the Final Implementation Order was an attempt to rectify that error after the fact.

**Exception #4:**

Complainants except to the ALJ's finding that Respondent's retroactive billing practice and refusal to pro-rate is consistent with the plain meaning of "effective portion" contained in the Tariff.

As described above, the at-issue Tariff expressly states that the DSIC surcharge “. . . will be applied to the *effective portion* of the total amount billed to each customer under the Company’s otherwise applicable rates and charges, . . .” (emphasis added). In rejecting the aforementioned plain language, the ALJ elects to give certain language (“. . . will become effective for bills issued. . .”) included in the Effective Date portion of the Tariff priority over the stated methodology for calculating the DSIC. ALJ’s Initial Decision of January 7, 2014, p. 12. This selective interpretation is not just unreasonable, but patently inconsistent with the Section 1303 of the Public Utility Code, which requires that bills be computed “under the rate most advantageous to the patron.” 66 Pa.C.S.A. § 1303. At the very least, the Tariff language is ambiguous and fact discovery must be permitted.

**Exception # 5:**

Complainants except to the ALJ’s finding that the Respondent’s retroactive billing practice and refusal to pro-rate can be consistent with the plain meaning of “effective date.”

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 date” in the Commission-approved Tariff meaningless. Permitting Respondent to apply rate increases prior to the “effective date” set forth by the Commission is plainly unfair and in 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:**

Complainants except to the ALJ’s finding that the DSIC rate collection practices by Respondent are not unreasonably discriminatory.

The ALJ’s Initial Decision relies entirely upon the Pettko decision in determining that the overbilling practice with respect to DSIC surcharges do not constitute unreasonable discrimination under Section 1304 of the Public Utility Code. ALJ’s Initial Decision of January 7, 2014, pp. 8-9. As indicated in Exception 2 above, the ALJ (and Commission) in Pettko misinterpreted Pennsylvania law in finding that the respondent did not unreasonably discriminate. Additionally, in Pettko, the ALJ made findings of fact which served as the basis of its decision. Rather, these factual findings should have been made by a fact finder following a hearing on the merits. It was an error of law for the ALJ in this case to rely upon the Pettko decision.

**Exception #7:**

Complainants except to the ALJ’s refusal to permit discovery to be taken, despite the fact that Pennsylvania law permits it.

On June 6, 2011, Complainants served upon Respondent a set of Requests for Documents as well as Notices of Deposition for a corporate representative of Respondent and its Manager of

Rates. On June 20, 2011, Respondent served Objections to the Requests for Documents and the Notices of Deposition. To date, no discovery responses have been served and no depositions have been taken.

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 discovery sought by Complainants was reasonably calculated to lead to admissible evidence. Both the documents and depositions requested are imperative to developing evidence on the various factual issues raised in this case, including issues raised by Respondent itself.

The ALJ’s Initial Decision stated that Complainants “have failed to identify any specific area of inquiry that would raise a genuine issue of material fact in dispute.” ALJ’s Initial Decision of January 7, 2014, p. 11. This finding ignores the litany of factual issues raised by Complainants throughout the duration of this case, including: Respondent’s billing practices, interpretation of the Tariff at issue, understanding of the phrases “bills rendered,” “effective date,” and “effective portion,” directives from the PUC, and the damages sustained by Complainants.

In response to a summary judgment motion, the nonmoving party must set forth facts showing there is a genuine issue for trial. The nonmoving party is entitled to do this using affidavits, depositions, and other available means of discovery. However, Complainants been

severely prejudice by the denial of a fair opportunity to gather evidence in this case. This denial constitutes an error of law.

**Exception #8:**

Complainants except to the ALJ's failure to recognize that their due process rights were violated by denying a hearing.

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.

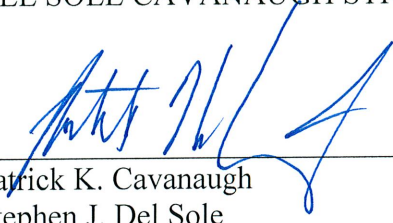
D.Z. v. Bethlehem Area School District, 2 A.3d 712 (Pa.Comm. 2010) (*citing* Kowenhoven v. Allegheny County, 901 A.2d 1003 (Pa. 2006)).

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

WHEREFORE, Complainants, Walter Painter and Donna Painter, respectfully request that the Commission reverse the Administrative Law Judge and remand for hearing.

DEL SOLE CAVANAUGH STROYD LLC

By: \_\_\_\_\_

  
Patrick K. Cavanaugh  
Stephen J. Del Sole  
Justin T. Romano  
*Counsel for Complainants*

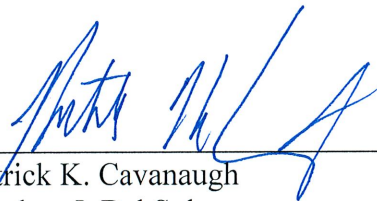
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 18<sup>th</sup> day of February, 2014 a true and correct copy of the foregoing EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION OF JANUARY 7, 2014 was served on the following by Overnight Delivery:

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

Honorable Conrad A. Johnson  
Administrative Law Judge  
Piatt Place  
301 Fifth Avenue, Suite 220  
Pittsburgh, PA 15222

Christopher T. Wright, Esquire  
17 North Second Street  
12th Floor  
Harrisburg, PA 17101  
*Counsel for Respondent*

  
\_\_\_\_\_  
Patrick K. Cavanaugh  
Stephen J. Del Sole  
Justin T. Romano