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February 28, 2014

VIA ELECTRONIC FILING

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Walter Painter and Donna Painter v. Aqua Pennsylvania, Inc.
Docket No. C-2011-2239556

Dear Secretary Chiavetta:

Enclosed please find the Reply of Aqua Pennsylvania, Inc. to the Exceptions of Walter and Donna Painter in the above-referenced proceeding. Copies will be provided as indicated on the certificate of service.

Respectfully submitted,

Christopher T. Wright

CTW/skr
Enclosure

cc: Honorable Conrad A. Johnson
Certificate of Service
Kimberly A. Joyce

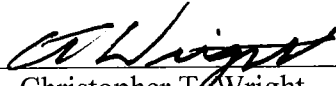
CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

VIA E-MAIL & FIRST CLASS MAIL

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Date: February 28, 2014



Christopher T. Wright

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Walter Painter and Donna Painter,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2011-2239556
	:	
Aqua Pennsylvania, Inc.,	:	
	:	
Respondent.	:	

**REPLY OF AQUA PENNSYLVANIA, INC.
TO THE EXCEPTIONS OF WALTER AND DONNA PAINTER**

I. INTRODUCTION AND BACKGROUND

Aqua Pennsylvania, Inc. (“Aqua”) herein files this Reply to the Exceptions filed by Complainants Walter Painter and Donna Painter (“Complainants”) pursuant to the Secretarial Letter dated January 29, 2014, and Section 5.535 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.535. The sole issue presented in the above-captioned Complaint relates to Aqua’s Distribution System Improvement Charge (“DSIC”) and whether the DSIC should be billed on a “services rendered” or “bills-rendered” basis. In an Initial Decision dated January 7, 2014, Administrative Law Judge Conrad A. Johnson (“ALJ”) concluded that, as a matter of law, Aqua’s assessment of the DSIC surcharge upon the 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. The Complainants take exception to certain findings and conclusions reached in the Initial Decision.

This proceeding was initiated on May 5, 2011, when Aqua was served with the above-captioned Complaint. Attached to the Complaint were separately-numbered paragraphs set forth in the “Statement of Facts and Request for Relief and supporting exhibits.”¹ The allegations set forth in the Complaint relate to Aqua’s DSIC and whether the DSIC should be billed on a “services-rendered” or “bills-rendered” basis. Specifically, the Complaint alleges Aqua implemented increases in its DSIC on a “bills-rendered” basis instead of pro-rating those increases on a “services rendered” basis. (See Complaint, Statement of Facts and Request for Relief, ¶¶ 25-32.) The Complaint contends that Aqua’s practice in implementing increases in its DSIC on a “bills-rendered” basis resulted in an improper billing of an increased rate to Aqua’s customers for the period of their billing cycle preceding the effective date of the increase. (See Complaint, Statement of Facts and Request for Relief, ¶ 33.)

On May 25, 2011, Aqua filed an Answer and New Matter to the Complaint. Importantly, Aqua admitted in its Answer that, consistent with its tariff, it applies its DSIC surcharge increase on a “bills-rendered” basis and adds the DSIC surcharge increase to bills rendered after the effective date of the surcharge increase. (See Aqua Answer, ¶¶ 4.27, 4.31-4.32). Thus, as found by the Initial Decision, there “is no dispute that the Company applies the DSIC surcharge to a bill issued after the effective date of the change in the DSIC surcharge.” (Initial Decision at p. 8.) Stated otherwise, there is no genuine issue or dispute as to whether Aqua applies its DSIC on a “bills-rendered” basis.

¹ The Complaint was styled as a “class action” and asserted the following four claims against Aqua: (1) violation of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, Act of December 17, 1968, P.L. 1224, 73 P.S. §§ 201-1 to 201-9; (2) conversion; (3) breach of contract; and (4) refund pursuant to Section 1312 of the Public Utility Code, 66 Pa. C.S. § 1312. (See Complaint, Statement of Facts and Request for Relief, *passim*.) The Initial Decision dismissed the “Complainants’ claims raising class action status, monetary damages, the Unfair Trade Practices and Consumer Protection Law and attorneys’ fees” for lack of subject matter jurisdiction. (Initial Decision at pp. 6-8.) The Complainants do not take any exceptions to this portion of the Initial Decision or to the dismissal of these claims.

On July 22, 2011, Aqua filed a Motion for Judgment on the Pleadings, requesting that the Complaint be dismissed in its entirety as a matter of law. On August 10, 2011, the Complainants filed a Brief in Opposition to the Motion for Judgment on the Pleadings. On February 28, 2013, the Commission issued an Opinion and Order dismissing, as a matter of law, a complaint against Pennsylvania American Water Company (“PAWC”) that raised the identical claim regarding billing of the DSIC on a “bills-rendered” basis. *See Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Opinion and Order February 28, 2013). Thereafter, on May 7, 2013, Aqua filed a Motion for Summary Judgment that renewed the same arguments set forth in the Motion for Judgment on the Pleadings and asserted that the Commission’s legal conclusion in *Pettko* is dispositive of this proceeding. On May 24, 2013, the Complainants filed a Brief in Opposition to the Motion for Summary Judgment.

The Initial Decision was issued by Secretarial Letter dated January 29, 2014. The Initial Decision found that the sole issue to be decided is the “Complainants claim that there are incorrect charges on their bill because of the manner in which the Company assesses the DSIC surcharge. (Initial Decision at p. 8.) Notably, the Initial Decision found that Aqua admitted that it applies the DSIC surcharge on a “bills-rendered” basis, as alleged in the Complaint, and, therefore, there was no genuine issue of material fact. (Initial Decision at p. 8.) The Initial Decision concluded 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. (Initial Decision at p. 12.) The Initial Decision therefore granted Aqua’s Motion for Summary Judgment and dismissed the Complaint in its entirety as a matter of law.

The Complainants filed eight exceptions to the findings and conclusions reached in the Initial Decision (“Exceptions”). A review of the Exceptions reveals that they are really limited to the following four issues: (1) whether the Initial Decision erred in concluding that Aqua’s tariff provides that the DSIC surcharge is applied on a “bills-rendered” basis (Exception Nos. 1 and 4); (2) whether the Initial Decision erred in concluding that the application of the DSIC surcharge on a “bills-rendered” basis is consistent with the Public Utility Code (Exception Nos. 1, 4, and 5); (3) whether the Initial Decision erred in relying on the Commission’s decision in *Pettko* and *Final Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (Final Implementation Order August 2, 2012) (Exception Nos. 2, 3, and 6); and (4) whether the Initial Decision erred by granting Aqua’s Motion for Summary Judgment without first permitting the Complainants to undertake discovery (Exception Nos. 7 and 8)

For the reasons explained below, as well as those more fully explained in the Initial Decision and in Aqua’s Motion for Summary Judgment, the Commission should deny the Complainants’ Exceptions and adopt the findings and conclusions of the Initial Decision.

II. REPLIES TO EXCEPTIONS

A. Reply to Exception Nos. 1 and 4 – The Initial Decision Properly Concluded that Aqua’s DSIC Surcharge Applies on a “Bills-Rendered” Basis

In their Exceptions, the Complainants argue that the Initial Decision erred in concluding that Aqua’s tariff provides that the DSIC surcharge applies on a “bills-rendered” basis. Specifically, the Complainants contend that the Initial Decision ignored the plain language of Aqua’s tariff that requires the DSIC surcharge to be applied on a “services-rendered” basis. (Exception Nos. 1 and 4.) The Complainants’ Exceptions are without merit and should be denied.

As a preliminary matter, it must be noted that the Complainants' exceptions involve the interpretation of Aqua's Commission-approved tariff provision. When determining the meaning of tariff language, it is appropriate to apply principles of statutory construction. *PPL Electric Utilities Corp. v. Pa. PUC*, 912 A.2d 386 (Pa. Cmwlth. 2006). Thus, as with the construction of a statute, the interpretation of a tariff provision is a question of law. *See Philomeno & Salamone v. Board of Supervisors of Upper Merion Township*, 600 Pa. 407, 411, 966 A.2d 1109, 1111 (2009) (an issue of statutory interpretation is a question of law).

Aqua's DSIC tariff provision provides, in pertinent part, that "[i]n addition to the net charges provided for in this Tariff, a surcharge . . . will apply to all bills issued . . . on or after" the effective date of the surcharge. (Aqua Motion for Summary Judgment, Appendix F.) The plain language of Aqua's Commission-approved tariff clearly indicates that the DSIC surcharge applies to all "bills issued" or bills rendered on or after the surcharge becomes effective. Thus, the plain language of Aqua's Commission-approved tariff clearly supports the conclusion reached in the Initial Decision that the DSIC surcharge applies on a "bills-rendered" basis. (Initial Decision at p. 11.)

Notably, nowhere in the Complainants' Exceptions do they assert that the Initial Decision misinterpreted the plain language of the above-quoted tariff provision. Indeed, the Complainants make no effort to refute or otherwise challenge the interpretation reached by the Initial Decision. Rather, the Complainants argue that the Initial Decision should have disregarded the above-quoted tariff provision and, instead, relied on a different portion of Aqua's DSIC tariff provision that provides as follows:

DSIC Surcharge Amount: The charge will be expressed as a percentage carried to two decimal places and will be applied to the effective portion of the total bill amount billed to each customer under the Company's otherwise applicable rates and charges....

(Exceptions at p. 2.) According to the Complainants, this section of Aqua's DSIC tariff mandates that the DSIC surcharge applies on "services-rendered" basis. The Complainants' argument must be rejected for several reasons.

First, the tariff provision quoted by the Complainants does not, as the Complainants suggest, indicate when the DSIC surcharge shall become effective, *i.e.*, when the bill is issued or when the service is provided. Rather, this provision of Aqua's tariff merely identifies where on a customer's bill the DSIC surcharge will be applied. The Complainants' argument fails to recognize the important difference between when a surcharge becomes effective and where the surcharge is applied once it becomes effective.

Second, as found by the Initial Decision, the Complainants' argument would entirely negate and conflict with the opening sentence of the DSIC tariff provision that clearly provides that the surcharge "will apply to all bills issued" after the effective date of the surcharge. (Initial Decision at p. 11.) "[A] tariff, like a statute, must be construed so as to give effect to all of its terms." *PPL Electric Utilities Corp. v. Pa. PUC*, 912 A.2d 386, 403 (Pa. Cmwlth. 2006). See also 1 Pa.C.S. § 1921(a) (the principles of statutory construction require that all provisions be given effect so that no provision is mere surplusage; *Commonwealth v. Ostrosky*, 589 Pa. 437, 909 A.2d 1224, 1232 (2006) (explaining that a presumption also exists that the legislature placed every word, sentence, and provision in the statute for some purpose and therefore courts must give effect to every word). Therefore, it would be inappropriate to interpret these two tariff provisions to conflict with one another as suggested by the Complainants.

Third, the Complainants' argument is contrary to the history of Aqua's DSIC tariff provisions. On August 26, 1996, the Commission issued an order authorizing Aqua's predecessor, Philadelphia Suburban Water Company ("PSWC"), to establish a DSIC surcharge.

See Petition of Philadelphia Suburban Water Company, Docket No. P-00961036 (August 26, 1996). Included as part of that Order was a sample DSIC surcharge acceptable to the Commission. PSWC filed a DSIC surcharge, which was approved by the Commission.

PSWC's initial DSIC surcharge applied on a "service rendered" basis. (Aqua Motion for Summary Judgment, Appendix C.) However, the form of DSIC surcharge attached to the Commission order authorizing PSWC to establish a DSIC surcharge suggested that the DSIC surcharge apply on a "bills-rendered" basis.² (Aqua Motion for Summary Judgment, Appendix B, Attachment A, p. 1.) Consequently, the Commission's Bureau of Audits recommended that PSWC modify its DSIC from a "service rendered" to "bills-rendered" basis. (Aqua Motion for Summary Judgment, Appendix D.) PSWC complied and filed a tariff supplement to change the application of the DSIC surcharge from a "service rendered" to "bills issued" basis, which was approved by the Commission. (Aqua Motion for Summary Judgment, Appendix E.) It is undisputed in this case that, since the Commission's approval of the change to a "bills-rendered" basis, Aqua's DSIC surcharge has been applied on a "bills-issued" or "bills-rendered" basis, rather than on a "service rendered" basis.

Finally, there are valid reasons for the Commission's decision to adopt a "bills-rendered" procedure for the DSIC. The DSIC surcharge only recovers return and depreciation associated with plant that actually is in-service at least *one month prior to the effective date of the DSIC rate change*. (Aqua's Motion for Summary Judgment, Appendix F.) Stated otherwise, each quarterly change to Aqua's DSIC rate does not become effective until one to four months after the DSIC-qualified plant has been placed in-service. Therefore, customers receiving an increase to a DSIC

² Notably, in the order adopting the DSIC surcharge for Pennsylvania American Water Company, the Commission acknowledged that "the company proposes that the DSIC become effective for service rendered on and after" a specific date; however, the sample tariff language adopted by the Commission specifically provided that the "DSIC will become effective for bills rendered on and after January 1, 1997." *In re Pennsylvania-American Water Co.*, Docket No. P-00961031, 1996 WL 944341 at *1, *9 (Aug. 26, 1996) (emphasis added).

surcharge on a “bills-rendered” basis will have been receiving the benefit of the DSIC-eligible plant throughout the “service period” of their bills, and for several months prior. In addition, because the amount to be recovered through the DSIC is fixed, based upon known plant investment incurred prior to the implementation of a new DSIC rate, and because the DSIC is a fully reconciled charge, customers are paying an appropriate annualized level of costs on a “bills-rendered” basis.

Based on the foregoing, and for the reasons more fully explained in the Initial Decision and Aqua’s Motion for Summary Judgment, the plain and unambiguous language, together with the history of Aqua’s DSIC tariff provisions, clearly provides that the DSIC surcharge is to be applied on all “bills issued” or bills rendered after the effective date of the surcharge. The Initial Decision correctly concluded that Aqua’s Commission-approved tariff requires the DSIC surcharge to be applied on a “bills-rendered” basis and, therefore, the Complainants’ Exceptions should be denied.

B. Reply to Exception Nos. 1, 4, and 5 – The Initial Decision Properly Concluded that Aqua’s DSIC Surcharge does Not Violate the Public Utility Code

In their Exceptions, the Complainants argue that the Initial Decision erred in concluding that Aqua’s DSIC surcharge is consistent with the Public Utility Code. The Complainants argue that applying the DSIC surcharge on a “bills-rendered” basis instead of a “services-rendered” basis violates the Public Utility Code. (Exception Nos. 1, 4, and 5.) The Complainants’ Exceptions are without merit and should be denied.

It is well-established that a utility’s Commission-approved tariff -- list of services, rules for service and rates for service -- has the full force of law and is binding on the utility and its customers. *Pa. Electric Co. v. Pa. PUC*, 663 A.2d 281 (Pa. Cmwlth. 1995); *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Stiteler v. Bell Telephone Co. of Pa.*, 379 A.2d

339 (Pa. Cmwlth. 1977). In the absence of an exception by the Commission, “a public utility may not charge any rate other than that lawfully tariffed.” *Pennsylvania Electric Co. v. Pa. PUC*, 663 A.2d 281, 284 (Pa. Cmwlth. 1995) (quotation omitted).

Here, Aqua increases its DSIC surcharge and bills and collects the DSIC from its customers in accordance with its Commission-approved tariff. As explained above, Aqua’s Commission-approved tariff requires the DSIC surcharge to be applied on a “bills-rendered” basis. Therefore, it would be unlawful and a violation of the Public Utility Code to apply the DSIC surcharge in any manner other than on a “bills-rendered” basis. Importantly, it is undisputed in this case that Aqua applies the DSIC surcharge on a “bills-rendered” basis. (Initial Decision at p. 8.)

Tariff provisions previously approved by the Commission are deemed just and reasonable. *Lynch v. Pa. PUC*, 594 A.2d 816 (Pa. Cmwlth. 1991); *appeal denied*, 529 Pa. 670, 605 A.2d 335 (1992); *Pa. P.U.C. v. Philadelphia Gas Works*, Docket Nos. R-00061931, *et al.*, 2007 Pa. PUC LEXIS 45 at *165-68 (Sept. 28, 2007). A party challenging a previously-approved tariff provision bears the burden to demonstrate the Commission’s prior approval is no longer justified. *Pa. PUC v. Columbia Gas of Pennsylvania, Inc.*, Docket Nos. R-2010-2215623, *et. al.*, 2012 Pa. PUC LEXIS 420 at *28 (Mar. 15, 2012). Other than merely stating that Aqua’s application of its DSIC surcharge violates the Public Utility Code, the Complainants have failed to offer any explanation or analysis of how applying the DSIC surcharge on a “bills-rendered” basis violates the Public Utility Code.

Further, the Commission has recently determined that applying the DSIC surcharge on “bills-rendered” basis is not unjust, unreasonable, or a violation of the Public Utility Code. On or about February 8, 2011, a complaint was filed against the PAWC at Docket No. C-2011-

2226096, challenging, among other things, PAWC's increases in its DSIC. The complainant in *Pettko* asserted that PAWC implemented increases in its DSIC on a "bills-rendered" basis instead of pro-rating those increases on a "services-rendered" basis. The complainant in *Pettko* argued that PAWC's practice in implementing increases in its DSIC on a "bills-rendered" basis resulted in the retroactive billing of an increased rate to PAWC's customers for the period of their billing cycle preceding the effective date of the increase.

On May 29, 2012, PAWC filed a Motion for Summary Judgment. In its Motion, PAWC argued that the complainant in *Pettko* failed to demonstrate that PAWC implements its DSIC inconsistent with any Commission Order, or that the complainant is harmed in anyway by such implementation. Specifically, PAWC asserted that it implements the DSIC consistent with Commission Orders and specific directives of the Commission's Bureau of Audits on a "bills-rendered" basis. An Initial Decision granted PAWC's Motion for Summary Judgment, holding that PAWC is entitled to judgment as a matter of law because the facts averred by the complainant did not give rise to any violation of the Public Utility Code, Commission Order or regulation, or Commission-approved tariff even when the DSIC is implemented on a bills-rendered basis. *See Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096, 2012 Pa. PUC LEXIS 1197 (Initial Decision July 20, 2012). The complainant in *Pettko* filed Exceptions to the Initial Decision.

On February 28, 2013, the Commission issued an Opinion and Order denying the Exceptions and adopting the Initial Decision. *See Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Opinion and Order February 28, 2013). Therein, the Commission held as follows:

We also find that the ALJ properly granted the Motion for Summary Judgment in ruling for the Company. With regard to the

DSIC, we find our recent Order in Implementation of Act 11 of 2012 to be dispositive. We stated the following specifically in response to comments raised by PAWC, among others:

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.

Implementation of Act 11 of 2012, Docket No. M-2012-2293611 (Order entered August 2, 2012) at 28. The Complainant has presented us with no facts or argument which shows that the Company is acting in any way contrary to that Order or prior Commission Orders directing the Company to collect the DSIC charge on a bills rendered basis.

Id. at pp. 18-19. Thus, the Commission in *Pettko* concluded, as a matter of law, that applying the DSIC surcharge on a “bills-rendered” basis is not unjust, unreasonable, or a violation of the Public Utility Code. Notably, no appeal was taken from the Commission’s Opinion and Order.

Importantly, the arguments and allegations made in *Pettko* are the very same arguments raised by Complainant in this case. Indeed, similar to the complainant in *Pettko*, the Complaint here alleges that Aqua violated the Public Utility Code by implementing increases in its DSIC on a “bills-rendered” basis instead of pro-rating those increases on a “services rendered” basis. (*See* Complaint, Statement of Facts and Request for Relief, ¶¶ 25-32.) This argument has summarily been rejected by this Commission in *Pettko*, and the Complainant has failed to offer any change in law or fact that would warrant a departure from the well-reasoned legal conclusions reached by this Commission.

Based on the foregoing, and for the reasons more fully explained in the Initial Decision and Aqua's Motion for Summary Judgment, the Initial Decision properly concluded that Aqua's Commission-approved DSIC surcharge is consistent with the rules, regulations and orders of the Commission and the Public Utility Code. Therefore, the Complainants' Exceptions should be denied.

C. Reply to Exception Nos. 2, 3, and 6 – The Initial Decision Properly Relied on the Commission's Decisions in *Pettko* and *Final Implementation of Act 11 of 2012*

In their Exceptions, the Complainants argue that the Initial Decision erred in relying on the Commission's decisions in *Pettko* and *Final Implementation of Act 11 of 2012*. (Exception Nos. 2, 3, and 6.) The Complainants' Exceptions are without merit and should be rejected.

Initially, and as explained above in Section II.B, *supra*, the *Pettko* decision concludes that "bills-rendered" billing of the DSIC surcharge is not unjust, unreasonable, or a violation of the Public Utility Code. Such conclusion is equally applicable to Aqua's use of "bills-rendered" billing of the DSIC surcharge.

In support of their argument that the Initial Decision erred in relying on the Commission's decision in *Pettko*, the Complainants first argue that the language in the PAWC tariff is substantially different than the language in Aqua's tariff. Specifically, the Complainants note that the PAWC tariff does not contain the language that the "charge will be expressed as a percentage carried to two decimal places and will be applied to the effective portion of the total bill amount" that is provided in Aqua's tariff. (Exceptions at p. 3.) As explained above, this argument ignores that Aqua's Commission-approved tariff expressly provides that the DSIC surcharge will be applied to "bills issued" or bills rendered after the effective date of the surcharge. (See Section II.A, *supra*.) Therefore, the Initial Decision properly concluded that Aqua is billing in accordance with its tariff, without regard to any interpretation of PAWC's

tariff provision. Further, this argument ignores that the “bills issued” or bills rendered language in Aqua’s tariff is substantially similar to the language used in PAWC’s Commission-approved tariff, which provides that the “DSIC will become effective for bills rendered on or after” the effective date of the surcharge. (See Pennsylvania American Water Company Supplement No. 284 to Tariff Water-PA P.U.C. No. 4, 77th Revised Page 12B, Canceling 76th Revised Page 12B.) Given the substantial similarity in language, the Initial Decision appropriately concluded that Aqua’s tariff, like PAWC’s provides for billing the DSIC on a “bills-rendered” basis.

The Complainants next argue that the Initial Decision erred in relying on the Commission’s decision in *Pettko* because the decision resolved “numerous genuine issues of material fact.” (Exceptions at p. 3.) However, as explained above, as with the construction of a statute, the interpretation of a tariff provision is a question of law. (See Section II.A, *supra*.) Similar to this case, there was no dispute that PAWC applied its DSIC surcharge on a “bills-rendered” basis. Although the complainant in *Pettko* may have desired to dispute some unknown facts in an effort to avoid summary judgment, the only “genuine” fact germane and relevant to the question of law before the Commission in *Pettko* clearly was undisputed.

In further support of their argument that the Initial Decision erred in relying on the Commission’s decision in *Pettko*, the Complainants argue that the Commission “misinterpreted the applicable case law [sic]” in *Pettko*. Notably, however, the Complainants have failed to identify any single case that was supposedly misinterpreted by this Commission in *Pettko*. Aqua submits that it is the Complainants, not the Commission or Aqua, that bear the burden to develop arguments and case law in support of their position.

The *Pettko* decision was not appealed and is now final. Notably, counsel for Complainants in this proceeding also was the counsel for the complainant in *Pettko*. The

complainants in *Pettko* should not now be permitted to collaterally attack the Commission's final decision. Notwithstanding, the Complainants have failed to identify any change in law or fact that would warrant a departure from the Commission's well-reasoned legal conclusions in the *Pettko* case.

The Complainants also argue that the Initial Decision erred in relying on the Commission's decision in *Final Implementation of Act 11 of 2012*, because the Final Order was issued one year after the Complainants filed their Complaint. (Exceptions at p. 4.) Despite the Complainants' assertion to the contrary, the Initial Decision did not "rely" on this decision. A review of the Initial Decision clearly indicates that it relied on the plain and unambiguous language of Aqua's tariff provision to conclude that the DSIC surcharge applies on a "bills-rendered" basis. The Initial Decision merely cited to the Commission's decision in *Final Implementation of Act 11 of 2012* to explain the difference between a "bills-rendered" and a "services-rendered" method of collecting a surcharge. (Initial Decision at p. 8.) Further, even assuming, *arguendo*, that the Initial Decision did rely on the Commission's decision in *Final Implementation of Act 11 of 2012*, this was entirely reasonable and appropriate because it results in an initial decision that properly upholds "bills-rendered" billing as legal under the Public Utility Code.

Based on the foregoing, and for the reasons more fully explained in the Initial Decision and Aqua's Motion for Summary Judgment, the Initial Decision correctly Initial Decision properly relied on the Commission's decisions in *Pettko* and *Final Implementation of Act 11 of 2012*. Therefore, the Complainants' Exceptions should be rejected.

D. Reply to Exception Nos. 7 and 8 – The Initial Decision Properly Granted Aqua’s Motion for Summary Judgment without first Permitting the Complainants to Undertake Unnecessary Discovery

The Initial Decision concluded that the Complainants “failed to identify any specific area of inquiry that would raise a genuine issue of material fact in dispute.” (Initial Decision at p. 11.) The Complainants assert that the Initial Decision ignored the factual issues presented by the Complainants throughout the proceeding. (Exceptions No. 7.) The Complainants therefore assert that the Initial Decision erred in granting Aqua’s Motion for Summary Judgment without permitting the Complainants to engage in discovery. (Exceptions No. 8.) The Complainants’ Exceptions are without merit and should be rejected.

In support of their Exceptions, the Complainants assert that in response to a motion for summary judgment, the nonmoving party must set forth facts showing there is a genuine issue for trial. According to the Complainant, the Initial Decision “ignores the litany of factual issues raised by the Complainants throughout the duration of this case.” (Exceptions at p. 7.) Although the Complainants may desire to dispute a “litany of factual issues” in an effort to avoid summary judgment, the only “genuine” fact germane and relevant to the question of law before the Commission is undisputed. Indeed, Aqua fully admitted that it applies the DSIC surcharge on a “bills-rendered” basis. (Initial Decision at p. 8.)

Further, the Complainants overlook that the sole issue presented in the Complaint is whether Aqua’s DSIC should be billed on a “services-rendered” or “bills-rendered” basis. As explained above, the interpretation of Aqua’s DSIC tariff provision is a question of law. (*See* Section II.A, *supra*.) The meaning and validity of Aqua’s DSIC tariff can be determined solely from the plain language of the Commission-approved tariff. Indeed, the Commonwealth Court has explained as follows:

In sum, this Court finds that when a tariff is plain on its face, *the Commission need not and cannot look beyond the four corners* of the tariff to determine its meaning. The intent of the parties comes into play only if and when the Commission, applying its expertise, determines that the tariff is ambiguous. When a tariff is ambiguous, the Commission may look to extrinsic evidence to determine the intention of the parties and the meaning of the tariff. Contrary to PPL Electric's position, *extrinsic evidence should not be used to create an ambiguity.*

PPL Electric Utilities Corporation v. Pa. PUC, 912 A.2d 386, 403 (Pa. Cmwlth. 2006) (emphasis added). Accordingly, the Complainants' attempt to introduce extrinsic evidence to interpret the meaning and validity of Aqua's DSIC tariff is not appropriate and should be rejected.

In further support of their Exceptions, the Complainants assert that they were not given the opportunity to be heard on the "numerous issues of material fact" raised by the Complainants. According to the Complainants, the Initial Decision violated their due process rights by granting Aqua's Motion for Summary Judgment without first permitting the Complainants to engage in discovery. (Exceptions at pp. 7-8.) However, as explained above, the Complainants' so-called "numerous issues of material fact" are, in fact, not material or germane to the question of law pending before this Commission. Although administrative due process requires notice and an opportunity to be heard, this does not mean that a party has the right to present and be heard on immaterial or irrelevant evidence as suggested by the Complainants.

The Complainants' due process theory clearly would lead to nonsensical results. Relevance is one of the essential elements required for admissibility to the record. Under the Complainants' theory, however, any evidence that is not admitted to the record for lack of relevance would constitute a due process violation. The Complainants' due process theory essentially would eliminate the fundamental evidentiary requirement of relevance.

Further, the Complainants' due process theory would preclude courts or administrative tribunals from granting motions to dismiss in the nature of a demurrer, preliminary objections, or motions for judgment on the pleadings because the parties did not have the chance to engage in "pre-motion" discovery. The entire point of such dispositive motions, however, is to test the legal sufficiency of the complaint itself by determining whether the complainant is entitled to relief as a matter of law. Stated otherwise, such dispositive motions test the legal sufficiency of the pleading on its face. Therefore, it cannot reasonably be argued that granting such dispositive motions without first permitting the complainant to engage in discovery violates the complainant's due process rights. The Complainant's due process theory essentially would eliminate the entire purpose of motions to dismiss in the nature of a demurrer, preliminary objections, or motions for judgment on the pleadings.

Based on the foregoing, and for the reasons more fully explained in the Initial Decision and Aqua's Motion for Summary Judgment, the Initial Decision properly granted Aqua's Motion for Summary Judgment without first permitting the Complainants to undertake unnecessary and immaterial discovery. Therefore, the Complainants' Exceptions should be rejected.

III. CONCLUSION

WHEREFORE, Aqua Pennsylvania, Inc. respectfully requests that the Pennsylvania Public Utility Commission reject the Exceptions of Walter and Donna Painter, adopt the findings and conclusions of Administrative Law Judge Conrad A. Johnson, and dismiss the Complaint in its entirety as a matter of law.

Respectfully submitted,



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