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April 25, 2014

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Re: William J. Sterner (represented by Utility Workers
Union of America System Local 102) v. West
Penn Power Company
Docket No. C-2014-2404304

Martin P. Baronner (represented by Utility
Workers Union of America Branch 180 - System
Local 102 v. Pennsylvania Electric Company
Docket No. C-2014-2404307

Robert T. Whalen (represented by Utility Workers
Union of America System Local 102) v. West
Penn Power Company
Docket No. C-2014-2404308

Dear Secretary Chiavetta:

Enclosed for filing please find the Memorandum of Law of Complainants in the above-referenced proceedings. The document was served on all parties of record as shown on the attached Certificate of Service.

The document was filed electronically with the Commission on this date in each of the dockets listed above.

Sincerely,



Enclosure

cc: All parties of record
Katrina L. Dunderdale, Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

William J. Sterner (represented by Utility	:	
Workers Union of America System Local	:	
102), Complainant	:	
	:	
v.	:	Docket No. C-2014-2404304
	:	
West Penn Power Company, Respondent	:	
	:	
Martin P. Baronner (represented by Utility	:	
Workers Union of America Branch 180 -	:	
System Local 102), Complainant	:	
	:	
v.	:	Docket No. C-2014-2404307
	:	
Pennsylvania Electric Company,	:	
Respondent	:	
	:	
Robert T. Whalen (represented by Utility	:	
Workers Union of America System Local	:	
102), Complainant	:	
	:	
v.	:	Docket No. C-2014-2404308
	:	
West Penn Power Company, Respondent	:	

MEMORANDUM OF LAW OF COMPLAINANTS

In response to the request of Administrative Law Judge Dunderdale at the Prehearing Conference, the Complainants in the above-referenced proceedings file this Memorandum of Law. This Memorandum will address the following legal and procedural issues in these proceedings:

1. The correction of various technical defects in the Complaints;
2. Whether some or all of these matters should be consolidated;

3. Whether the individual Complainants have standing to bring this matter;

4. Whether the Utility Workers Union of America ("UWUA") has standing to bring this matter in a representational capacity on behalf of its members, including the named Complainants; and

5. Whether the Commission has jurisdiction to grant the relief requested in the Complaints.

1. Various technical defects in the Complaints should be corrected.

Respondents correctly state in their Answers that the Complaints incorrectly refer to 52 Pa. Code § 56.262. The applicable meter reading regulation for the Respondents is 52 Pa. Code § 56.12. All references in the Complaints to section 56.262 should be read to refer to section 56.12. The remaining allegations of the Complaints do not change as a result of correcting this incorrect citation.

The First Interim Order notes that the Complaints to which Mr. Sterner and Mr. Baronner are parties did not contain verifications from those individuals. This procedural defect has been corrected. Complainants filed verification forms for those individuals on April 1, 2014.

As noted in the First Interim Order, the Commission's regulations give the presiding officer wide latitude to waive procedural defects in pleadings. 52 Pa. Code § 1.2. In addition, the regulations provide a liberal policy for amending pleadings, either voluntarily or by order of the presiding officer. 52 Pa. Code §§ 5.91 to 5.93. If the Administrative Law Judge would find it helpful for Complainants to file amended complaints that correct any of these defects, Complainants will be happy to do so.

2. Consolidation

Complainants originally filed two complaints: one against West Penn Power Company ("West Penn") and one against Pennsylvania Electric Company ("Penelec"). The Commission's Secretary contacted counsel for Complainants and explained that a separate docket would be opened for each individual named in the complaints, which resulted in two complaints against West Penn and one against Penelec.

Complainants have no objection to consolidating the two complaints against West Penn for all purposes. They originally were filed as a single matter and it would be expedient to treat them in that fashion.

3. The individual Complainants have standing to bring this matter.

The issue of individual standing was addressed in Complainants' Answers to Preliminary Objections that were filed on March 10, 2014, in paragraphs 18-26. Briefly, Commonwealth Court has delineated the standing requirements under the Public Utility Code (66 Pa. C.S. § 701), as follows:

In order to have standing to pursue a formal complaint before the PUC under Section 701 of the Code, the complainant "must have a *direct, immediate, and substantial* interest in the subject matter of the controversy." *Waddington v. Pa. PUC*, 670 A.2d 199, 202 (Pa. Cmwlth. 1995) (emphasis added), *appeal denied*, 544 Pa. 679, 678 A.2d 368 (1996). "The requirement that an interest be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to *his* interest by the matter of which he complains." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 195, 346 A.2d 269, 282 (1975) (plurality) (emphasis added). The requirement that an interest be "immediate" and not a remote consequence of the matter concerns "the nature of the causal connection between the action complained of and the injury to the person challenging it." *Id.* at 197, 346 A.3d at 283. The requirement of a "substantial" interest means that the interest must have substance - *i.e.*, there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. *Id.* at 195, 346 A.2d at 282.

Municipal Authority of the Borough of West View v. Pa. PUC, 41 A.3d 929, 933 (Pa. Cmwlth. 2012) (emphasis in original).

Each of the individual Complainants meets this standard. Each of the individuals is a residential customer of the named utility and alleges that he personally received three or more consecutive estimated bills in violation of 52 Pa. Code § 56.12.

As explained in the Answer to Preliminary Objections, the Commission's regulations in Chapter 56 exist to protect residential customers from billing and metering practices that are unfair or cause inconvenience. See 52 Pa. Code § 56.1. Moreover, monetary harm to a customer is not required in order to have standing. As long as the customer alleges a violation of the regulations that actually occurred to the customer, that is sufficient to establish standing. For example, the Commission has upheld individual customer complaints that do not result in any monetary compensation to the customer, but nevertheless impose a civil penalty on the utility for failing to comply with the regulations. See, e.g., *Schwartz v. Pennsylvania-American Water Co.*, Docket No. C-20031315 (Initial Decision of ALJ Corbett, Aug. 26, 2004), 2004 Pa. PUC LEXIS 59; *Hennon v. The Peoples Natural Gas Company*, F-01612844 (Initial Decision of ALJ Corbett, Sept. 1, 2005), 2005 Pa. PUC LEXIS 49.

4. The Utility Workers Union of America ("UWUA") has standing to bring this matter in a representational capacity on behalf of its members.

UWUA is not itself a residential customer of the Respondents and does not claim in these cases to have standing on its own behalf to litigate alleged violations of Chapter 56 regulations. Rather, UWUA has representational standing to represent its members who are residential customers of the Respondents.

In 2010, Commonwealth Court summarized the law of representational standing, as follows:

An association may have standing as a representative of its members. *Tripps Park v. Pa. Public Utility Commission*, 415 A.2d 967 (Pa. Cmwlth. 1980). Thus as long as an organization has at least one member who has or will suffer a direct, immediate, and substantial injury to an interest as a result of the challenged action, [it] has standing. *Parents United for Better Schools v. School District of Philadelphia*, 614 A.2d 689 (Pa. Cmwlth. 1994) (PUBS). For example, in *PUBS*, this Court held that a group of individuals, including parents of high school students, incorporated to challenge the implementation of a new school district policy making condoms available at school-based health clinics upon request of high school students, had standing because at least one of its members would be aggrieved by the school district's actions. *Id.* Similarly, in *Tripps Park*, we held that an organization of Pennsylvania Gas and Water customers and rate-payers, had standing "even in the absence of injury to itself . . . solely as the representative of its members." *Tripps Park*, 415 A.2d at 970.

Energy Conservation Council of Pennsylvania v. Pa. PUC, 995 A.2d 445, 476 (Pa. Cmwlth. 2010), reargument denied, 2010 Pa. Commw. LEXIS 318 (Pa. Cmwlth. 2010) ("ECC"). In other words, as long as the organization alleges that at least one of its members would have the right to bring the action in his/her own name, the organization can bring the action in a representational capacity.

The Commission has recognized that a labor union, like any other association or organization, can have representational standing to represent the interests of its members, if those members would have individual standing to bring the action on their own. Specifically, the Commission has held: " the Complainant would have representational standing if any of its individual members would have standing to maintain the instant complaint." *Utility Workers Union of America System Local 537 v. Pennsylvania-American Water Company*, Docket No. C-2012-2287204 (June 21, 2012), 2012 Pa. PUC LEXIS 944 (hereafter "*UWUA v. PAWC*"), citing *PPL Electric Utilities Corporation Universal Service and Energy Conservation Plan for 2011 through 2013*, Docket No. M-2010-2179796 (Order entered May 5, 2011).

As Respondents stated in their Preliminary Objections, the Commission held in *UWUA v. PAWC* that the union did not have standing to litigate alleged violations of disconnection regulations. That ruling was made, however, because the union had not alleged that any of its members had personally been subjected to an improper disconnection. The Commission rejected the union's contention that a utility employee asked to engage in conduct that allegedly violated a consumer-protection regulation had standing to challenge that conduct - as an employee - in a complaint before the Commission.

The facts as alleged in the Complaints in the current cases, however, are very different from the facts in *UWUA v. PAWC*. Specifically, in the current cases, UWUA has alleged that its members and retirees, as residential customers of the Respondents, have improperly received consecutive estimated bills from the Respondents. The Complaints also include three named individual members or retirees of UWUA who have received such allegedly unlawful bills.

While UWUA expects to be able to produce evidence, including evidence from one or more of its members, to demonstrate that there is an ongoing pattern and practice by Respondents to fail to read meters in compliance with the regulations, UWUA is not alleging that its members as employees of Respondents are harmed by this conduct. Rather, it is alleging that its members, as residential customers of Respondents, are harmed.

In summary, the facts alleged in this case are very different from the facts alleged in *UWUA v. PAWC*. In that case, the labor union was claiming representational standing on behalf of its members as employees who were being asked to engage in actions allegedly contrary to Commission regulations. The Commission held that the regulations at issue in that case were designed to protect residential customers, not utility employees, and therefore that the union failed to establish standing. In these cases, however, UWUA is claiming representational

standing on behalf of its members as residential customers. UWUA alleges that some of those residential customers, including the named individual Complainants, have received bills that violate Commission regulations and cause direct harm (such as, inconvenience and the receipt of inaccurate bills due to consecutive estimated bills) to those customers. This is precisely what representational standing is designed to do -- allow an organization to bring a single action on behalf of its members, rather than requiring each member to bring its own separate action.

5. The Commission has jurisdiction to grant the relief requested in the Complaints.

The Complaints seek the following relief: civil penalties for each violation of 52 Pa. Code § 56.12,¹ an order that the Respondents hire a sufficient number of meter readers to meet Respondents' obligations to comply with Section 56.12, and such other relief as the Commission finds warranted under the circumstances.

Respondents have averred that the requested relief is not within the Commission's jurisdiction to grant. This is incorrect, as discussed in Complainants' Answer to Preliminary Objections, paragraphs 33-50.

In particular, Complainants have not filed a "class action" against Respondents. Rather, Complainants have filed an action on behalf of themselves and UWUA's members (in UWUA's representative capacity) to seek a remedy specific to them. That remedy does not include any form of monetary damages or compensation to Complainants. Instead, Complainants seek a civil penalty pursuant to 66 Pa. C.S. § 3301, and corrective action pursuant to 66 Pa. C.S. §§ 501, 1501, and 1505.

¹ The Complaints refer to violations of Section 56.262 which, as noted above, is the incorrect citation.

There is no question that the Commission has the authority to levy a civil penalty for violations of its regulations. Section 3301 of the Code specifically authorizes the Commission to do so, stating: "If any public utility ... shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation ... made by the commission ... such public utility ... shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000." 66 Pa. C.S. § 3301(a). The statute further provides that "[e]ach and every day's continuance in the violation of any regulation ... shall be a separate and distinct offense." 66 Pa. C.S. § 3301(b).

Moreover, the Commission's policy statement on civil penalties specifically states that among the criteria it will use to determine the amount of a penalty are "[t]he number of customers affected and the duration of the violation." 52 Pa. Code § 69.1201(c)(5).

Thus, this aspect of the relief requested by Complainants, including an examination of the number of customers affected and over what period of time, are well within the Commission's jurisdiction.

The second specific type of relief requested is that the Commission order Respondents to take specific corrective action, including hiring an appropriate number of meter readers. As Complainants explained in their Answer to Preliminary Objections, the Commission is granted this type of authority in Section 1505 of the Code. That statute authorizes the Commission to "prescribe ... the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed" by the utility. 66 Pa. C.S. § 1505.

Importantly, this authority encompasses the utility's "service." The Code broadly defines "service" to include "any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities ...

in the performance of their duties under this part to their patrons, employees, other public utilities, and the public." 66 Pa. C.S. § 102 (definition of service).

That is, Section 1505 gives the Commission authority to prescribe the service to be furnished by the utility. This is a grant of authority that gives the Commission broad powers to order the utility to take specific actions to ensure compliance with the Commission's regulations and orders.

As noted in the Answer to Preliminary Objections, the Commission has used this authority in other cases to direct utilities to hire specific types of employees, contractors, or consultants; to use only utility employees for certain functions; and to engage in specific types of screening (such as criminal background checks) for employees having direct contact with the public. See Complainants' Answers to Preliminary Objections, pages 8-9 and cases cited therein.

In short, Section 1505 gives the Commission broad powers to order a utility to take corrective actions when the utility has failed to comply with Commission regulations or other requirements. The relief requested in the Complaints is well within that authority.

Finally, during the Prehearing Conference, Respondents' counsel alleged that only the Office of Consumer Advocate ("OCA") would have the authority to represent residential customers in this type of action. Complainants believe that this point is now moot, since the OCA filed a Notice of Intervention in each case on April 24, 2014. Nevertheless, in the event the ALJ decides to address this point, it should be noted that Respondents' claim is legally incorrect. The OCA's enabling statute specifically grants the Consumer Advocate discretion to determine the matters in which the OCA participates. Specifically, the statute states: "The Consumer Advocate may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not to participate in

or initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceeding on the interest of consumers. The Consumer Advocate may refrain from intervening when in the judgment of the Consumer Advocate such is not necessary to represent adequately the interest of consumers." 71 P.S. § 309-4(b).

The enabling statute further provides that the existence of the Consumer Advocate does not affect in any way the rights of consumers or their representatives before the Commission. Specifically, the law states: "Nothing contained herein shall in any way limit the right of any consumer to bring a proceeding before either the commission or a court." 71 P.S. § 309-6(a).

WHEREFORE, for the reasons set forth above and in Complainants' Answers to Preliminary Objections and other pleadings, Complainants respectfully request the Administrative Law Judge to dismiss Respondents' objections and permit this proceeding to move forward to discovery and hearings.

Respectfully submitted,



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Dated: April 25, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served this day a true copy of Answer of Complainant to New Matter upon the parties listed below by electronic mail and U.S. mail, first-class, postage prepaid, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Dated: April 25, 2014



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