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April 28, 2014

VIA UPS OVERNIGHT DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

RECEIVED

APR 28 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Utility Workers Union of America System Local 102 and Robert T. Whalen v.
West Penn Power Company
Docket No. C-2014-2404308

Utility Workers Union of America System Local 102 and William J. Sterner v.
West Penn Power Company
Docket No. C-2014-2404304


Utility Workers Union of America 180 – System Local 102 and Martin P.
Baronner v. Pennsylvania Electric Company
Docket No. C-2014-2404307

Dear Secretary Chiavetta:

Enclosed for filing please find the Memorandum of Law of West Penn Power Company and Pennsylvania Electric Company, in the above-captioned matters.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Brian C. Wauhop

BCW/tlg
Enclosure

cc: Katrina L. Dunderdale, Administrative Law Judge
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**UTILITY WORKERS UNION OF
AMERICA SYSTEM LOCAL 102,
AND
ROBERT T. WHALEN** :

v. :

WEST PENN POWER COMPANY :

Docket No. C-2014-2404308

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**UTILITY WORKERS UNION OF
AMERICA SYSTEM LOCAL 102,
AND
WILLIAM J. STERNER** :

v. :

WEST PENN POWER COMPANY :

Docket No. C-2014-2404304

**UTILITY WORKERS UNION OF
AMERICA 180 - SYSTEM LOCAL 102,
AND
MARTIN P. BARONNER** :

v. :

PENNSYLVANIA ELECTRIC COMPANY :

Docket No. C-2014-2404307

**MEMORANDUM OF LAW SUBMITTED BY WEST PENN POWER COMPANY AND
PENNSYLVANIA ELECTRIC COMPANY**

TO ADMINISTRATIVE LAW JUDGE KATRINA DUNDERDALE:

West Penn Power Company (“West Penn”) and Pennsylvania Electric Company (“Penclec,” collectively the “Companies”), by and through their attorneys John F. Povilaitis, Alan Michael Seltzer, Brian C. Wauhop, and Buchanan Ingersoll & Rooney PC, hereby file this Memorandum of Law in response to the request of the presiding Administrative Law Judge

(“ALJ”) made at the April 17, 2014 Prehearing Conference attended by the parties¹ and their respective counsel.

The submission of this consolidated Memorandum of Law on behalf of both Companies does not constitute their support for or acquiescence in any consolidation of these disparate proceedings.

I. STATEMENT OF ISSUES PRESENTED

- A. Have the Individual Complainants pled facts sufficient to establish their *standing to participate in this proceeding*?**
- B. Has UWUA pled facts sufficient to establish its standing to participate in this proceeding?**
- C. Is consolidation of the Whalen and Sterner matters appropriate?**
- D. Is the Commission authorized to grant the relief requested?**

II. SHORT ANSWERS

None of the Individual Complainants have pleaded facts sufficient to establish that they were harmed by the Companies’ actions. Therefore, the Individual Complainants have failed to establish their standing in these matters because they have not shown that they are “aggrieved.”

UWUA has failed to establish that it has the right to represent its individual members in utility service complaints its members may have with their utility providers, and therefore, UWUA does not have representational standing to participate in this proceeding. In addition, UWUA has failed to plead that any of the Individual Complainants are members of its

¹The capitalized names of the various parties specified in this Memorandum shall be as identified in the Companies’ Preliminary Objections to the Formal Complaint.

organization. Moreover, the Individual Complainants do not have standing in the first place, because they are not aggrieved.

The ALJ stated on April 17, 2014 that the matter involving Penelec would be separated from the two West Penn cases involving Whalen and Sterner. The remaining West Penn cases must be litigated separately from the Penelec case because they involve different parties, implicate different facts, and will require the presentation of different witnesses and exhibits.²

Finally, the Commission has the authority to direct a utility to correct unsafe, unreasonable, inadequate or insufficient service. The Commission, however, is not a “super board of directors” empowered to supplant a utility’s management decisions with its own. The Complainants’ demand that the Commission order the Companies to hire a “sufficient number of meter readers” is an impermissible intrusion into management decisions of the Companies and is beyond the jurisdiction of the Commission to grant.

² As noted below, any purported agreement among the Individual Complainants to waive the confidential protections typically afforded customer specific usage and utility billing data should not be permitted for policy reasons to authorize consolidation where one is not supported by the operative facts and law.

III. DISCUSSION

A. **The Individual Complainants Failed to Plead They Are Aggrieved**

The facts alleged in the Formal Complaints³ fails to establish that any of the Individual Complainants have standing to prosecute claims before the Commission. Simply put, none of the pleadings filed by the Individual Complainants establish that they are “aggrieved” by any Company action or inaction. Therefore, the Formal Complaints should be dismissed for lack of standing.

As explained in the Preliminary Objections,⁴ in order to bring a complaint before the Commission, a complainant must first demonstrate that she/he has standing to maintain the action. *Nye v. Erie Insurance Exchange*, 470 A.2d 98, 100 (Pa. 1983). Standing requires that a party have an interest in the matter that is substantial, direct and immediate. *William Penn Parking Garage, Inc. et al. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975) (emphasis added).

These criteria are defined as follows:

A “substantial” interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A “direct” interest requires a showing that the matter complained of caused harm to the party’s interest. An “immediate” interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question.

³ See *Utility Workers Union of America System Local 102, and Robert T. Whalen v. West Penn Power Company*, Docket No. C-2014-2404304 (“Sternner Complaint”); *Utility Workers Union of America System Local 102 and William J. Sternner v. West Penn Power Company*, Docket No. C-2014-2404308 (“Whalen Complaint”); and *Utility Workers Union of America 180 – System Local 102 and Marin P. Baronner v. Pennsylvania Electric Company*, Docket No. C-2014-2404307 (“Baronner Complaint”) (collectively “Formal Complaints”).

⁴ See *West Penn Power Company’s Preliminary Objections to Sternner Complaint*, dated February 26, 2014; *West Penn power Company’s Preliminary Objections to Whalen Complaint*, dated February 26, 2014; *Pennsylvania Electric Company’s Preliminary Objections to Baronner Complaint*, dated February 26, 2014.

George v. Pennsylvania PUC, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1999). The standard set by *William Penn Parking Garage* is applicable to Commission cases. *Courier Express, Inc. v. F.L. Shaffer Company, Inc.*, Docket No. C-892462 (Order entered August 30, 1990, petition for reconsideration denied December 3, 1990). The Individual Complainants do not dispute that they must establish standing to prosecute the Formal Complaints.⁵

Yet, none of the Formal Complaints allege that the Individual Complainants suffered any harm whatsoever. Nor do they plead facts showing that the Individual Complainants were harmed by, for example, receiving an inaccurate bill that was caused by the alleged estimated meter readings. Instead, the Formal Complaints identify a potential technical violation of a Commission regulation.⁶ Even if proved, the allegation of a technical violation—by itself—is not an allegation or proof that the Individual Complainants ever suffered any injury. Because all of the Individual Complainants failed to allege they were harmed by the Company’s conduct, they are not “aggrieved” and do not have standing to bring a claim before this Commission.

In their Answers to Preliminary Objections, and again during the Prehearing Conference, counsel for the Individual Complainants attempted to rehabilitate the flawed pleadings with new facts and legal argument. As explained below, these new arguments and tactics do not convey or establish the Individual Complainants’ standing to maintain these actions before the Commission.

⁵ See *Answer of William J. Sterner to Preliminary Objections*, dated March 10, 2014 (“Sterner Answer to POs”), ¶ 22; *Answer of Robert T. Whalen to Preliminary Objections*, dated March 10, 2014 (“Whalen Answer to POs”), ¶ 22; *Answer of Marin P. Baronner to Preliminary Objections*, dated March 10, 2014 (“Baronner Answer to POs”), ¶ 22.

⁶ The Formal Complaints allege that the Companies provided too many estimated meter readings to them in 2013, which could be a violation of 52 Pa. Code 56.12(2), which provides “[i]f a public utility bills on a monthly basis, it may estimate usage of service every other billing month, so long as the public utility provides a customer with the opportunity to read the meter and report the quantity of usage in lieu of the estimated bill.”

1. The Individual Complainants Have Neither Pled Nor Established Any Harm

In their Answers to Preliminary Objections, the Individual Complainants argue they were “inconvenienced” by the Companies’ actions because they were “denied the proper price signal that Commission regulations require.”⁷ They argue that “inconvenience is all that is required to establish standing.”⁸ But the Individual Complainants never pled in the Formal Complaint that they experienced “inconvenience” or any other type of injury. Instead, allegations of harm appear for the very first time in the unverified Answers to Preliminary Objections.

At the threshold, it is inappropriate to assert facts in Answers to Preliminary Objections, which are not pleadings in an action before the Commission, and crucially, are not verified. *See* 52 Pa. Code § 5.1(a).⁹ Unverified responses to Preliminary Objections cannot cure the fundamental failure that the Formal Complaints do not allege an actual harm, which must be shown to establish that the Individual Complainants are aggrieved. *Id.* The ALJ should ignore the fact allegations about “inconvenience” that surface for the first time in the Answers to Preliminary Objections.

Moreover, there is no statutory standard defining “inconvenience.” The Complainants rely on the single reference to “inconvenience” found in *Montgomery v. T-Netix, Inc., et. al*, Docket No. C-20031203 (Final Order entered September 29, 2008), where the Commission held that a technical violation of a regulation is not a *per se* violation of Section 1501 of the Public Utility Code. The Commission explained its reasoning as follows:

We agree with T-Netix that a violation of a regulation is not necessarily a *per se* violation of Section 1501. We can envision situations where a utility might

⁷ *See* Whalen Answer to POs ¶¶18-19; Sterner Answer to POs ¶¶18-19; Baronner Answer to POs ¶¶18-19.

⁸ *Id.*

⁹ *See* 52 Pa. Code § 5.1(a), providing in pertinent part, that the pleadings in an action before the Commission include a formal complaint, answer, new matter and reply to new matter, and preliminary objections. “Answer to preliminary objections” is not included in the list of pleadings.

commit a regulatory violation, which would be minor and infrequent. If that violation does not result in inconvenience, interruptions in service or expense to the customer or have safety implications, the violation might not be so unreasonable as to rise to the level of a Section 1501 violation.

Id. (emphasis added). Clearly, the Commission's holding on this issue is that it is not enough to aver and prove that a violation of a regulation occurred; the regulatory violation must create some kind of injury or harm to be actionable. "Inconvenience" means "the state or quality of being inconvenient," and "inconvenient" is defined as "not accessible; hard to reach; not suited to one's comfort, purpose or needs; inopportune." *See* AMERICAN HERITAGE COLLEGE DICTIONARY 688 (3d ed. 1997).

Even assuming their assertion of inconvenience in their response to the Companies' Preliminary Objections is legally permissible (which, as noted above, is not the case) such a claim is not defensible. The Individual Complainants argue in their Responses to Preliminary Objections that their "inconvenience" was being "denied the proper price signal that Commission regulations require." But they never explain what the "proper price signal" is or how they were denied that price signal. Nor do the Individual Complainants provide any legal authority for their reference to the "proper price signal." In contrast, the Formal Complaints contain allegations about meter readings, which deal with the consumption of electricity, not the price per kilowatt-hour. Indeed, the Formal Complaints never identify a specific electric service bill that caused them any "inconvenience" because of an estimated meter reading. Accordingly, they failed to establish standing in this proceeding even when applying their own newly-created "inconvenience" standard.

At the Prehearing Conference, counsel for the Individual Complainants again proclaimed that alleging "inconvenience" is sufficient to confer standing. Counsel claimed that a customer could be inconvenienced by receiving high or low bills. Not only was no legal support provided

for these allegations, the ALJ properly observed that no such assertions are present in the Formal Complaints, the Individual Complainants' Answers to New Matter, or in their Answers to Preliminary Objections.

The Individual Complainants' argument that "inconvenience" can confer standing is an afterthought. The truth is that the Individual Complainants have failed to plead (and cannot show) that they suffered any inconvenience. They have provided no legal or factual support for their newly-conjured "inconvenience" allegations. They have failed to plead that they suffered any harm at all and therefore have no standing to prosecute the Formal Complaints.

2. The Legal Authority Cited by the Individual Complainants Does Not Establish Their Standing In This Case

The Individual Complainants cite some Commission decisions and the Commission's Policy Statement concerning violations of regulations to explain their failure to establish their standing in these proceedings. The Individual Complainants' reliance on these authorities is completely inappropriate for a number of significant factual and legal reasons.

First, the Individual Complainants cite to the initial decision in *Schwartz v. Pennsylvania-American Water Co.*, Docket No. C-20031315 (August 26, 2004) for the proposition that "the Commission frequently addresses complaints where customers allege that a utility's actions (or inactions) to the customer violated a law or regulation."¹⁰ But the Individual Complainants ignore that in *Schwartz*, the utility successfully petitioned the Commission for reconsideration of the initial decision, essentially voiding its substantive conclusions. See *Schwartz v. Pennsylvania-American Water Co.*, Docket No. C-20031315 (Initial Decision Upon Remand entered November 2, 2005, approving mediated settlement). As a result, any holdings contained in the initial decision entered in *Schwartz* are without legal force because the Commission

¹⁰ See Sterner Answer to POs, ¶¶ 18-19; Whalen Answer to POs, ¶¶ 18-19; Baronner Answer to POs, ¶¶ 18-19.

approved settlement of that case. The rehearing was not conducted, and no final order on the merits was ever entered.

The Individual Complainants' reliance on *Hennon v. The Peoples Natural Gas Company*, Docket No. F-01612844 (Initial Decision entered September 1, 2005) is similarly misplaced.¹¹

In *Hennon*, the utility admitted to the regulatory violations giving rise to civil penalties:

Peoples [the utility] admits that its failure to bill this account for the period of September 26, 2002 to February 22, 2004 violated the requirements for billing a residential account found in Chapter 56 of the Commission's regulations.

Id., Finding of Fact No. 17.

It is completely disingenuous to equate the Individual Complainants' unproven allegations of regulatory violations in this case to the findings of fact and conclusions of law in *Hennon* that were reached after an evidentiary hearing. The fact that the utility in *Hennon* admitted to regulatory violations says nothing about whether the Individual Complainants in this matter have standing to maintain this action based on their unsupported assertions of regulatory violations and with no factual allegations of harm. *Schwartz* and *Hennon* are factually and legally distinguishable from this proceeding, and do not support the Individual Complainants' standing claims.

Finally, in a last-ditch effort to argue that the Individual Complainants have standing in this case, the Individual Complainants cite to the Commission's Policy Statement regarding civil penalties at 52 Pa. Code § 69.101(c)(1) for the proposition that "violations of Commission regulations specifically recognize that technical violations can give rise to civil penalties."¹² Again, the fact that the Commission recognizes that a technical violation, if proven by a complainant who has already established their standing in the matter, may warrant a smaller civil

¹¹ *Id.*

¹² See Sterner Answer to POs ¶ 24; Whalen Answer to POs ¶ 24; Baronner Answer to POs ¶ 24.

penalty says absolutely nothing about the Individual Complainants' standing in this case. There is no legal basis to consider elements of the Commission's Policy Statement on civil penalties when evaluating whether or not the Individual Complainants have standing. On the contrary, and as noted by the Companies previously, the Commission recognizes and employs the standards set forth in *William Penn Parking Garage* and its progeny when addressing standing issues in cases before it. See, i.e., *Ricks v. PECO Energy Company*, Docket No. C-2012-2321440 (Initial Decision entered November 4, 2013); *Minto v. Aqua Pennsylvania, Inc.*, Docket No. C-2013-2369043 (Initial Decision entered August 20, 2013); *Coggins v. PPL Electric Utilities Corporation*, Docket No. C-2012-2312785 (Initial Decision entered April 22, 2013).

3. Code Section 3316 Cannot Confer Standing Upon A Complainant

The Individual Complainants assert that they are bringing this “good-faith report of wrongdoing to the Commission with the understanding and expectation that [Company] employees who have first-hand knowledge of these violations, and who are members of UWUA, will be protected against retaliation by [the Company] under the provisions of 66 Pa.C.S. § 3316 (Protection of public utility employees).”¹³ Code Section 3316 operates to protect utility workers who make a good-faith report of an instance of wrongdoing or waste from retaliation from their utility employer.

As the Individual Complainants never allege that they are employees of the Companies, Code Section 3316 does not apply to them in this instance. In addition, the Commission has expressly held that Code Section 3316 is not a basis for establishing standing to maintain a complaint against a utility.

In *Utility Workers Union of America System Local 537 v. Pennsylvania-American Water Company*, Docket No. C-2012-2287204 (Final Order entered June 21, 2012) (“PAWC”), the

¹³ Sterner Complaint ¶ 10; Whalen Complaint ¶ 10; Baronner Complaint ¶ 9.

Commission affirmed ALJ Salapa's Initial Decision dismissing a complaint filed by UWUA System Local 537 against Pennsylvania-American Water Company. ALJ Salapa concluded that the union lacked standing to bring the action. He reasoned that the entire focus of the complaint was on the allegation that Pennsylvania-American Water Company had failed to comply with the Commission's regulations requiring utilities to serve customers with pre-and post-termination notices. The union also argued Code Section 3316 encourages utility employees to bring allegations of utility regulation and Code violations before the Commission. The water utility objected that the union did not have standing to maintain the action because it failed to establish any "direct" and "immediate" interest its members would have in the Company's actions.

The Commission agreed with ALJ Salapa that the union did not establish its standing to maintain the action, and specifically held that the pleadings failed to establish that the union's members had any "direct" and "immediate" interest in the water utility's alleged failure to comply with Commission regulations regarding termination notices. The Commission also addressed the union's argument about Code Section 3316:

We also find that Section 3316 protects whistleblowers from retaliation by their utility-employers, but it does not give whistleblowers an independent basis for establishing standing to maintain a complaint against a utility in this Commission.

PAWC. Here, the Commission is unambiguously stating that while Code Section 3316 protects employees from retaliation, it cannot form the basis for utility employees to launch complaints against their utility employer before the Commission. Like the complaint in *PAWC*, the Individual Complainants claim to be reporting alleged regulatory violations for which they should be shielded by Code Section 3316. The outcome here should be no different than in *PAWC*. Code Section 3316 does not create a basis for conferring standing upon the Individual

Complainants in this case, just as the Commission held Code Section 3316 could not create standing for the complainant in *PAWC*.

The Individual Complainants' have failed to plead facts establishing their standing. While it is apparent that the Individual Complainants have a direct interest in their electric bill, all three elements of standing must be established for a party to participate in a proceeding. The Individual Complainants have failed to establish the other two required elements. The Individual Complainants' interests are not substantial, because they have no discernible interest in the Company's meter reading policies other than the general interest of the public in seeking the Company's compliance with the law. The Individual Complainants' interest is not immediate, because they have utterly failed to establish, in the pleadings, that they suffered any harm. As a result, the Formal Complaints should be dismissed with prejudice.

B. UWUA Does Not Have Representational Standing and Must Be Dismissed As A Complainant

Like the Individual Complainants, UWUA has failed to establish its standing to participate in these proceedings in several key ways. First, UWUA has not established that it is authorized to prosecute before the Commission or elsewhere the claims of its members or other non-UWUA customers. Second, the Formal Complaints do not establish any connection between the Individual Complainants and UWUA. Finally, the Individual Complainants have failed to establish their individual standing to participate in this matter. As a result, UWUA must be dismissed as a party in this matter.

1. UWUA Is Not Authorized to Represent Individual Customers' Interests

a. UWUA has failed to establish that it can represent its members in individual utility-service complaints before the Commission.

UWUA asserts it is “the authorized collective bargaining representative for certain employees of [the named utility]”¹⁴ and is bringing these complaints in its “representative capacity on behalf of hundreds of members...who are residential customers of [the named utility], many of whom are also employees of [the named utility],” and “in its capacity as the representative of meter readers and other...employees who are being directed by [the named utility] to...violate the Commission’s meter reading regulations”¹⁵ UWUA also asserts that the Companies “routinely estimate bills for thousands of residential customers...when there are no exigent circumstances” and that the Companies fail “to read meters as required because it has failed to fill vacant meter-reading positions and has failed to properly staff its meter reading function.”¹⁶

Clearly, by making these allegations, UWUA is purporting to represent the interests of its members regarding utility service they receive from the Companies. UWUA, however, has not established that the agreement between it and its members grants it any authority to represent its members in utility service complaints. There has been no showing that the Individual Complainants – or any other member of UWUA – have authorized UWUA to represent them in matters unrelated to labor disputes and collective bargaining. No basis has been provided to show how UWUA is authorized to represent the Individual Complainants (or any other UWUA members) regarding the service they receive from the Companies.

¹⁴ Sterner Complaint ¶ 1; Whalen Complaint ¶ 1; Baronner Complaint ¶ 1.

¹⁵ Sterner Complaint ¶¶ 7, 8; Whalen Complaint ¶¶ 7, 8; Baronner Complaint ¶¶ 6, 7.

¹⁶ Sterner Complaint ¶¶ 14, 15; Whalen Complaint ¶¶ 14, 15; Baronner Complaint ¶¶ 13, 14.

b. Class actions are not permitted before the Commission.

Next, UWUA alleges that the Companies estimate bills for “thousands of residential customers.”¹⁷ UWUA requests that the Commission levy a fine against the Companies “for each violation of 52 Pa. Code § 56.262 [sic] that occurred in the three years prior to the date of this Complaint.”¹⁸ As such, UWUA is purporting to assert claims and seek civil penalties against the Companies on behalf of customers other than those that are UWUA members. UWUA provides no legal basis supporting its assertion of claims on behalf of these non-UWUA customers.

There is no provision in the Code authorizing UWUA to assert claims on behalf of customers and seek penalties for service the Company provides to other customers. On the contrary, to the extent UWUA is purporting to assert claims on behalf of a class of West Penn or Penelec customers, the Commission has specifically held that those types of claims are barred. *See Pettko v. Pennsylvania American Water Co.*, Docket No. C-2011-2226096 (October 5, 2011 Order Granting in Part Motion for Judgment on the Pleadings; Final Order entered February 28, 2013) (holding that “class actions are not permitted under the Public Utility Code and, therefore, the Complainant cannot represent the interests of any other customer.”).

2. The Individual Complainants Have Not Established They Are Members of UWUA

The Commission has held that an organization has representational standing if any of its individual members have standing to maintain the complaint. *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). If the organization’s members do not have standing in their own right to prosecute a claim because they have not suffered a direct, immediate and substantial harm, the organization does not have representational standing to

¹⁷ Sterner Complaint ¶ 14; Whalen Complaint ¶ 14; Baronner Complaint ¶ 13.

¹⁸ Sterner Complaint ¶ A; Whalen Complaint ¶ A; Baronner Complaint ¶ A.

maintain an action on behalf of its members. *Id.* Thus, two things must be shown for an organization to have representational standing: (i) a person is a member of the organization claiming representational standing; and (ii) that member must have standing to maintain the action in their own right.

Here, the Formal Complaints fail to establish that any of the Individual Complainants are members of UWUA. The Formal Complaints do not contain a single reference to Whalen, Sterner or Baronner being a member of UWUA. The failure to aver membership in UWUA supports dismissing UWUA from these proceedings, because there is no allegation that a UWUA member is involved in these actions before the Commission. Indeed, at the Prehearing Conference, counsel for the Individual Complainants could not answer whether they (i) were still active members of UWUA; (ii) if they could still vote on UWUA matters; or (iii) whether they still paid dues to UWUA. UWUA has absolutely no interest in the utility service received by Whalen, Sterner or Baronner, and as a result, it has no representational standing in this matter. *See PAWC, supra.*

3. The Individual Complainants Have Not Established They Have Standing

Not only is there no connection between UWUA and the Individual Complainants alleged in the Formal Complaints, the Formal Complaints fail to establish that the Individual Complainants have standing. *See* Section III-A, *supra*. As such, UWUA does not have representational standing either, because there is no individual member of UWUA that has established its standing to maintain these actions. In *PAWC*, the Commission held that an organization would have representational standing only if any of its individual members have standing to maintain the instant action. *PAWC*.

Here, the Formal Complaints do not identify an individual member of UWUA or establish that the member has standing to maintain the instant action. As a result, it is impossible for UWUA to have representational standing in this matter. Accordingly, for the reasons stated above, UWUA should be dismissed as a party in this action for failing to establish it has representational standing.

C. Consolidation Is Improper

At the Prehearing Conference, the ALJ ruled that the Baronner Complaint will not be consolidated with the other two Formal Complaints. The remaining two matters should not be consolidated and should remain separate actions. There are no common facts, transactions or occurrences in the Whalen Complaint and the Sterner Complaint that supports their consolidation.

Section 5.81(a) of the Commission's regulations provides that "[t]he Commission or presiding officer, with or without motion, may order proceedings involving common questions of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs of delay." 52 Pa. Code § 5.81(a).

In addition to the presence of common questions of law or fact, other factors must be evaluated in ruling on a request consolidation. These other considerations are:

1. Will the presence of additional issues cloud a determination of the common issues?
2. Will consolidation result in reduced costs of litigation and decision-making for the parties and the Commission?
3. Do issues in one proceeding go to the heart of an issue in the [*10] other proceeding?
4. Will consolidation unduly protract the hearing, or produce a disorderly and unwieldy record?

5. Will different statutory and legal issues be involved?
6. Does the party with the burden of proof differ in the proceedings?
7. Will consolidation unduly delay the resolution of one of the proceedings?
8. Will supporting data in both proceedings be repetitive?

Mishler v. The Peoples Natural Gas Co., Docket No. C-2008-2041160 (Final Order entered May 18, 2009) (citing *Applications of Philadelphia Electric Co.*, 43 PA PUC 781 (1968), *Pa. Public Utility Comm'n v. Bell Telephone Co. of Pennsylvania*, 46 PA PUC 568 (1973), and *Pa. Public Utility Comm'n v. Butler Twp. Water Co.*, 52 PA PUC 442 (1978)). “No single consideration, nor group of these considerations, is dispositive of a consolidation, any more so than the presence of a common question of law or fact. Rather, the evaluation of all of them and a balancing of those favoring and disfavoring consolidation is required.” *Id.*

Applying these factors here, there are compelling reasons why consolidation of the Whalen and Sterner complaints is improper. First, there is no transaction or occurrence common to all actions, and trying these matters together will inevitably cloud determination of the issues. The facts alleged regarding consecutive estimates are not identical and could not be proved by the same witnesses or exhibits. For example:

- The timeframes at issue are different. Sterner alleges he received three consecutive estimated bills for the months of July, August and September 2013.¹⁹ Whalen alleges he received estimated bills for the months of January, February, April, June, July, August, October, November and December 2013.²⁰ Discrete factual circumstances caused each of these estimates.
- The physical addresses are different. Sterner lists his address as 333 State Street, Charleroi, Pennsylvania 15022,²¹ which is served by West Penn’s Charleroi meter shop. Whalen lists his address as 203 Reservoir Road, Mount Pleasant, Pennsylvania, 15666,²² which is served by the Latrobe meter shop. Whalen and Sterner are not served by the same meter shop; they are not on the same meter reading route; they are

¹⁹ Sterner Complaint ¶ 16.

²⁰ Whalen Complaint ¶ 18.

²¹ Sterner Complaint ¶ 2.

²² Whalen Complaint ¶ 2.

subject to different meter reading schedules; and their meters are not read by the same teams of employees.

Because of these different facts, the Company's evidence at hearing will require different witnesses and exhibits. It is not possible for West Penn to defend Whalen's claims using the same evidence required to defend Sterner's claims, and attempting to try these matters together will create a confusing record. *See Mishler, supra.*

In addition, consolidation would not reduce the costs of decision-making for the parties and the Commission because it is not possible to resolve both complaints with one decision. The Commission's decisions would have to be separated to address the specific claims and facts presented in each individual matter. *Id.*

Moreover, different parties have the burden of proof. Whalen cannot carry Sterner's burden of proof for him, nor vice versa. Each has the burden of proving their individual case. *Id.*

Importantly, these cases are totally unlike the type that the Commission regularly consolidates. The Commission has generally consolidated cases where the parties are identical and involve the same physical address, account, and time period. *See, Azer v. PPL Electric Utilities Corp.*, Docket Nos. F-2011-2248345, C-2011-2272185 (Order entered January 12, 2012 consolidating complaints involving the same parties, the same physical property and the same time period); *Mishler, supra* (consolidating complaints that involved the same parties, involved similar questions of fact and law, and witnesses and evidence would have been the same in both complaints); *Mazza v. Peco Energy Company*, Docket No. C-2009-2120401, C-2009-2118230 (Order entered October 16, 2009 consolidating complaints involving the same parties, the same service address, the same account and raising identical questions of fact and law). As explained above, none of these similarities exist between the Whalen and Sterner complaints.

Finally, there is no provision in the Code or the Commission's regulations authorizing the Company to share sensitive customer information among different customers, which would inevitably occur through discovery and in a consolidated hearing. Each Complainant, including UWUA, is represented by the same attorney. It is likely under these circumstances that sensitive customer information (e.g., customer account numbers, billing, and payment history) provided to one complainant will be shared among the other parties. And, even if the Individual Complainants waive the confidential nature of their customer information, the Company is not in a position to acquiesce to this waiver. *It is highly problematic for one customer to be given another customer's private and confidential data (e.g., account numbers, billing, and payment history) in the context of a proceeding with other complainants participating.* Consolidation of these matters would force the Company to breach its duty to keep sensitive customer data confidential.

The Whalen and Sterner Complaints must remain separate. Consolidation would not result in judicial economy, and could force the Company to compromise sensitive customer information.

D. The Commission Cannot Grant the Relief Demanded in the Formal Complaints

The Formal Complaints request that the Commission order the Companies to "hire a sufficient number of meter readers in each portion of its service area" to enable the utility to comply with the Commission's meter reading requirements.²³ The Formal Complaints cite to 66 Pa.C.S. §§ 501, 1501 and 1505 as the legal authority justifying this request.²⁴ Contrary to the Individual Complainants' assertion, their demand for relief cannot be granted for two compelling reasons.

²³ Sterner Complaint ¶ B; Whalen Complaint ¶ B; Baronner Complaint ¶ C.

²⁴ *Id.*

First, under Chapters 13 and 15 of the Code, the Commission has jurisdiction to adjudicate matters involving rates, services and facilities of public utilities. *See Duquesne Light Co. v. Borough of Monroeville*, 298 A.2d 252 (Pa. 1972). To the extent the issue of a public utility's obligation to hire employees is addressed by the collective bargaining agreement, it is a labor dispute, and the Commission's jurisdiction does not encompass disputes between employee and employer. *Ciabattini v. Rounsville t/a Schuylkill Valley Airport Shuttle*, 2009 Pa. PUC LEXIS 259 (June 16, 2009) (Opinion by CALJ Smith on Preliminary Objections holding that "[t]he Commission is not the appropriate forum for the adjudication of claims regarding labor law violations."). Any directive to hire or not hire meter readers is not one that the Commission can order or modify, and to do so would trammel upon the existing labor agreements between the Company and UWUA and violate the law surrounding those agreements.

Second, for the Commission to direct the Companies to hire a sufficient number of additional meter readers would also violate existing and well-established law that the Commission is not a "super board of directors" that can order a public utility to manage its business in any particular way. *See Brian M. Rudnick v. Verizon Pennsylvania Inc.*, C-2009-2142052 (Final Order entered April 1, 2011) (quoting *Northern Pennsylvania Power Co. v. Pa. Publ. Util. Comm'n*, 5 A.2d 133, 134-35 (Pa. 1939): "The Public Utility Commission is not a super board of directors for the public utility companies of the state and it has no right of management of them. Its sole power is to see that in matters of rates, service and facilities, their treatment of the public is fair. . . . while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothe[d] with the general power of management incident to ownership.").

The Individual Complainants argue that the Commission’s order in *Just Energy Pennsylvania Corp.*, Docket No. A-2009-2097544 (Order entered August 15, 2013)²⁵ supports the proposition that the Commission has ordered utilities to undertake specific actions such as “hir[ing] a sufficient number of people to read meters.” This is another misleading statement that utterly mischaracterizes the Commission’s actions. In *Just Energy*, a company (Just Energy) had applied for a license authorizing it to operate as an electric supplier, broker/marketer and aggregator. The Commission reviewed and ultimately granted the application subject to conditions, some of which related to proposed door-to-door solicitation methods. The Commission’s order specified that *Just Energy* had to hire a compliance officer to make sure the sales offices and employees adhered to the license conditions. There was no finding that *Just Energy* had provided (or was going to provide) unreasonable service and had to hire an employee to correct that problem – these items were conditions of the license approval designed to protect consumers in the Commonwealth. It is a complete mischaracterization of the Commission’s holding in *Just Energy* to say that it is an example of the Commission ordering a utility to hire employees to correct a service problem. In fact, the identical set of conditions was imposed on another company seeking the same type of license approval. *See License Application of Hudson Energy Services LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Broker/Marketer, Aggregator and Supplier*, Docket No. A-2010-2192137 (Final Order entered February 11, 2011). These conditions were not imposed in either case in response to a service complaint filed with the Commission.

There is no legal basis supporting the Individual Complainants’ unlawful request that the Commission order the Companies to hire additional employees. The Commission is without

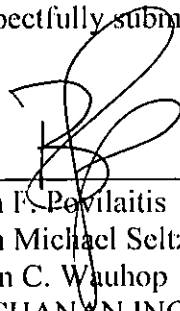
²⁵ Whalen Answer to POs ¶¶ 46-50; Sterner Answer to POs ¶¶ 46-50; Baronner Answer to POs ¶¶ 46-50.

jurisdiction to make such an order. The Preliminary Objections should be granted and this request for relief stricken from the Formal Complaints.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, West Penn Power Company and Pennsylvania Electric Company respectfully request that the Commission grant the Preliminary Objections and: (i) dismiss the Formal Complaints with prejudice because the Individual Complainants have failed to establish their standing in this matter; or in the alternative, (ii) dismiss UWUA for lack of standing; (iii) if the Formal Complaints proceed to hearing, issue an Order directing that all three of the Formal Complaints remain separate from each other for all purposes, including discovery, hearing and Recommended Decision; (iv) strike the requests for relief in the form of Orders directing the Companies to hire additional employees; and (v) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,



Dated: April 28, 2014

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Attorneys for
West Penn Power Company and
Pennsylvania Electric Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**UTILITY WORKERS UNION OF
AMERICA SYSTEM LOCAL 102, AND
ROBERT T. WHALEN** :

v.

WEST PENN POWER COMPANY :

**UTILITY WORKERS UNION OF
AMERICA SYSTEM LOCAL 102, AND
WILLIAM J. STERNER** :

v.

WEST PENN POWER COMPANY :

**UTILITY WORKERS UNION OF
AMERICA 180 - SYSTEM LOCAL 102, AND
MARTIN P. BARONNER** :

v.

PENNSYLVANIA ELECTRIC COMPANY :

Docket No. C-2014-2404308

Docket No. C-2014-2404304

Docket No. C-2014-2404307

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I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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Harrisburg, PA 17101-1923

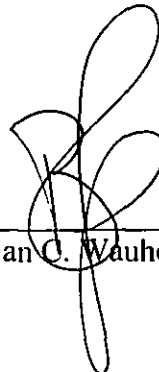
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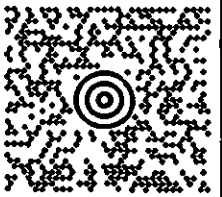

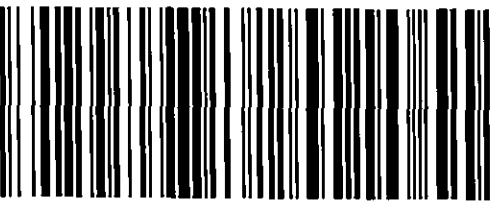

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