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June 5, 2014

Via Electronic Filing

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

In re: Insurance Company of Greater New York v. United Water Pennsylvania Inc.
Docket No. C-2013-2393832

State Farm Fire and Casualty Company v. United Water Pennsylvania Inc.
Docket No. C-2014-2416206

Dear Secretary Chiavetta:

We are counsel for United Water Pennsylvania Inc. ("United") in the above consolidated matters and are submitting via electronic filing United's Preliminary Objection to the Amended Complaint of the Insurance Company of Greater New York. Copies of the Preliminary Objection are being served in accordance with the certificate of service attached to it.

Should you have any questions, please do not hesitate to contact us.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Charles E. Thomas, III

Encl.

cc: Certificate of Service (w/encl.)
James M. Terranova, Esq. (w/encl.)
Brooks R. Foland, Esq. (w/encl.)
John Hollenbach (w/encl.)

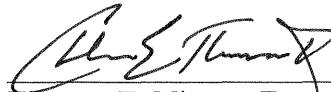
Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Insurance Company of Greater New York :
a/s/o Quail Run Real Estate L.P. d/b/a Quail :
Run Apartments :
: :
v. : Docket No. C-2013-2393832
: :
United Water Pennsylvania Inc. :
: :
State Farm Fire and Casualty Company :
: :
v. : Docket No. C-2014-2416206
: :
United Water Pennsylvania Inc. :

NOTICE TO PLEAD

YOU ARE HEREBY NOTIFIED, pursuant to 52 Pa. Code § 5.101, an answer to the following Preliminary Objection must be filed within ten (10) days of its date of service. Your answer to the Preliminary Objection must be filed with the Secretary of the Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA 17105-3265, with a copy served on the undersigned counsel for United Water Pennsylvania Inc. and the Administrative Law Judge presiding over the matter.

DATED: June 5, 2014



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**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

INSURANCE COMPANY OF	:	
GREATER NEW YORK A/S/O QUAIL	:	
RUN REAL ESTATE LP D/B/A QUAIL	:	
RUN APARTMENTS	:	
	:	
v.	:	Docket No. C-2013-2393832
	:	
UNITED WATER PENNSYLVANIA	:	
INC.	:	
	:	
STATE FARM FIRE AND CASUALTY	:	
COMPANY	:	
	:	
v.	:	Docket No. C-2014-2416206
	:	
UNITED WATER PENNSYLVANIA	:	
INC.	:	

**PRELIMINARY OBJECTION TO AMENDED COMPLAINT
OF INSURANCE COMPANY OF GREATER NEW YORK**

AND NOW, comes United Water Pennsylvania Inc. (“United”), by its attorneys, and, pursuant to 52 Pa. Code § 5.101(a), submits this Preliminary Objection to the Amended Complaint of the Insurance Company of Greater New York A/S/O Quail Run Real Estate LP D/B/A Quail Run Apartments (“Complainant” or “INSCO”) at Docket No. C-2013-2393832 as follows:

I. BACKGROUND

1. This matter comes before the Pennsylvania Public Utility Commission (“Commission”) pursuant to an Order of the United States District Court for the Middle District of Pennsylvania (“PA Middle District”) and concerns an issue of tariff interpretation related to

United's provision of fire protection service at or around the time of a fire which occurred on June 11, 2010 at Quail Run Apartments, located at 4001 Rawleigh Street, Lower Paxton, Pennsylvania 17109 ("Quail Run").

2. On March 23, 2011, Complainant initiated a federal court proceeding in the PA Middle District by filing a complaint against United and several other Defendants. The case was captioned *Insurance Company of Greater New York v. Tina Jefferson, et al.*, No. 11-545 (M.D. Pa.). In the federal court complaint, Complainant set forth a single civil claim against United, in Count II, claiming that United was negligent when it:

- (a) Fail[ed] to provide sufficient water volume to Quail Run to allow the Colonial Park Fire Department to properly fight the fire;
- (b) Fail[ed] to provide increased water volume to Quail Run after Colonial Park specifically requested increased water volume to fight the fire;
- (c) Caus[ed] and/or allow[ed] the fire to spread due to a lack of appropriate water volume at Quail Run;
- (d) Fail[ed] to notice, observe, understand, discern and/or perceived the dangerous condition caused by failing to provide adequate water volume to Quail Run at the time of the fire;
- (e) Fail[ed] to act in a reasonable prudent manner in disregard of the safety of Quail Run in general; [and]
- (f) Fail[ed] to comply with applicable fire codes[.]

INSCO Fed. Ct. Complaint at 6. A copy of INSCO's federal court complaint is attached as Exhibit "B" to the Amended Complaint.

3. On July 17, 2013, the Honorable Lawrence F. Stengel of the PA Middle District issued an Order granting United's Motion to Bifurcate and Stay the federal complaint proceeding and transferring the matter to the Commission. A copy of Judge Stengel's Order is attached as Exhibit "A" to the Amended Complaint. The Order references and incorporates Judge Stengel's

Memorandum and Order of July 17, 2013 in the parallel case of *State Farm Fire and Casualty Company v. United Water Company et al.*, No. 12-1107 (M.D. Pa.), a copy of which is attached hereto as **Exhibit 1**. Pertinent to this Preliminary Objection, Judge Stengel in his Memorandum decision explained that the matter was being transferred to the Commission for the purpose of determining United's compliance with its tariff. Memorandum at 9. In doing so, Judge Stengel framed the issue for Commission determination as follows: "[W]hether United Water supplied 'such volumes of water at such pressures as may be available in the normal operation of the waterworks facilities at the time of use.'" *Id.* at 5-6, 8. Judge Stengel also directed the Commission "to address any other issue within its expertise that will aid in resolving this dispute." *Id.* at 9.

4. By letter dated August 5, 2013, Commission Chief Counsel Bohdan R. Pankiw advised the Complainant that the Commission was prepared to adjudicate the referred issues and that, in order to initiate Commission process, INSCO would need to file a formal complaint. Thereafter, on November 22, 2013, INSCO filed its Complaint with the Commission averring that the "issue of law" to be determined is whether, in violation of Section 1501 of the Public Utility Code, United failed to furnish and maintain adequate, efficient, safe and reasonable water service and facilities necessary or proper for the accommodation and safety of the public continuously and without unreasonable interruptions or delay to Quail Run during a fire on June 11, 2010.¹ In its "WHEREFORE" clause, Complainant requested that the Commission determine the liability issue pursuant to the PA Middle District Order entered July 17, 2013.

¹ At pages 6 and 7 of the Memorandum, Judge Stengel explained that United's alleged duty to provide adequate and sufficient quantities of water is "explicitly defined" in its tariff and it is the matter of tariff examination and interpretation that is being referred to the Commission:

While State Farm disputes that the Commission's expertise is required, I have little trouble concluding that it is. "Public utility tariffs have the force and effect of law, and

5. On December 12, 2013, United filed its Answer to the Complaint with New Matter. The Answer denied that United violated Section 1501 of the Code or that it failed to furnish and maintain adequate, efficient, safe, and reasonable water service and facilities necessary or proper for the accommodation and safety of the public continuously and without reasonable interruptions or delay to Quail Run during the fire on June 11, 2010. Significantly, through its New Matter, United raised affirmative defenses, including, *inter alia*, that it acted at all relevant times in compliance with its Tariff Water – Pa. P.U.C. No. 7 and that its potential liability, if any, is limited pursuant to the rules and regulations in its then-effective Tariff.

6. On or about May 7, 2014, INSCO filed an Amended Complaint with the Commission requesting that, in addition to the issue of law as stated in its original Complaint, the Commission determine whether United's behavior, pattern and practice of failing to supply adequate water pressure to Quail Run and its surrounding areas was wanton, willful, and reckless. This allegation, which is essentially one of gross negligence, was not raised heretofore by Complainant in its federal court complaint, nor is it a matter of tariff interpretation referred to the Commission by Judge Stengel. In its amended "WHEREFORE" clause, Complainant requests that, in addition to the liability issue, the Commission also "award interest, delay damages, costs and any other relief that the Court deems appropriate."

are binding on the customer as well as the utility." PPL Elec. Utilities Com. v. Pennsylvania Pub. Util. Comm'n, 912 A.2d 386, 402 (Pa. Commw. Ct. 2006). United Water's alleged "duty ... to provide adequate and sufficient quantities of water for firefighting purposes," Compl. ¶ 33, is explicitly defined in its tariff. Doc. No. 5-4 at 55, ¶ 53. There is accordingly no doubt that resolving this dispute will require a determination of United Water's compliance with its tariff, even though unmentioned by State Farm in its complaint. Because Pennsylvania courts are uniform in holding that "it is the Commission that has the expertise to examine and interpret tariff language," referral of this question is necessary. PPL Elec. Utilities Corp., 912 A.2d at 403; Teleconcepts, Inc., 71 F.3d at 1105 ("The agency that can best determine [a utility's] compliance with [its] tariff is the [Commission].").

II. PRELIMINARY OBJECTION

A. Standard

7. Section 5.101(a) of the Commission's Rules of Practice and Procedure, 52 Pa. Code § 5.101(a), provides that preliminary objections are available to challenge a complaint for the following reasons:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

B. PRELIMINARY OBJECTION – The Commission Lacks Jurisdiction Over Complainant's Claims Of Gross Negligence

8. Consistent with Section 5.101(a)(1) and pertinent to this Preliminary Objection, United submits that the Commission lacks jurisdiction over Complainant's claim of gross negligence as raised for the first time in the Amended Complaint, as well as the request for interest and damages. There is a significant mismatch between the scope of the issues and allegations set forth in the Amended Complaint and the limited issue of tariff interpretation

transferred by Judge Stengel to the Commission in the PA Middle District Order entered July 17, 2013.²

(i) The Commission Lacks Jurisdiction To Consider Matters Beyond The Limited Issue Transferred By Judge Stengel

9. Commission jurisdiction in this matter is limited to the question of tariff compliance, examination, and interpretation transferred by the PA Middle District. Judge Stengel framed that issue as follows: “[W]hether United Water supplied ‘such volumes of water at such pressures as may be available in the normal operation of the waterworks facilities at the time of use.’” Memorandum at 5-6, 8. As such, any matters or claims raised by Complainant beyond the directive of Judge Stengel are improper and beyond the Commission’s jurisdiction to consider.

10. Gross negligence was not an issue transferred by Judge Stengel. Moreover, it was not an issue or claim raised by Complainant in Count II of its federal court complaint. The Commission, accordingly, lacks jurisdiction to consider the issue or any related allegations.

11. While it is true that Judge Stengel also directed the Commission “to address any other issue within its expertise that will aid in resolving this dispute” (*Id.* at 9), that directive did not open the door to permit Complainant an opportunity to raise new issues or claims that had not been specifically pled by Complainant in the federal court proceeding. This includes the issue raised by Complainant in Paragraph 25 of its Amended Complaint. United recognizes that a complainant is normally allowed free choice to allege whatever claims it wishes to make in a complaint. Such latitude, however, is not warranted in this case where the issue before the Commission has been specifically framed and transferred by order of the PA Middle District.

² United also submits that there is a mismatch between the issues raised in the Amended Complaint and the narrow issue raised by Complainant in Count II of its federal court complaint.

(ii) Complainant Has Fatally Failed To Timely Raise Gross Negligence

12. In addition to being beyond the issue transferred and the issue set forth in Count II of its federal court complaint, Complainant's attempt to raise the gross negligence issue with the Commission through the Amended Complaint is untimely and barred by Section 3314 of the Public Utility Code ("Code"), 66 Pa. C.S. § 3314 (limitations of actions and cumulation of remedies).

13. Section 3314 of the Code provides that an issue must be raised with or an action brought before the Public Utility Commission within three years of the occurrence of the alleged liability. The Section has been held to be a three-year statute of limitations limiting a utility's liability and barring recoveries against the utility for matters occurring outside of the three year period.³ Moreover, the existence of a pending parallel action in another forum does not toll the running of the three year period.⁴

14. Here, the Quail Run fire incident occurred on June 11, 2010, almost four years prior to the filing of the Amended Complaint. Less than a year later, on March 23, 2011, Complainant initiated a complaint action before the PA Middle District in which it raised a single count – Count II – against United claiming United was negligent – but not grossly negligent – in its actions with respect to the Quail Run fire.

15. Complainant had an opportunity to assert a gross negligence claim against United as part of its federal court complaint, but chose not to do so. It also had full and fair opportunity to file a separate complaint with the Commission against United in the three years succeeding the June 11, 2010 fire, but, again, chose not to do so. Complainant's failure to raise the gross negligence issue and allegations in a timely manner – either through its federal court complaint,

³ *Suburban East Tires, Inc. v. Pa. P.U.C.*, 582 A.2d 727 (Pa. Cmwlth. 1990).

⁴ *Id.* at 728.

or in an earlier complaint timely filed with the Commission – now precludes it from pursuing the issue through its Amended Complaint. Consequently, Complainant’s attempt to raise these allegations at this time through its Amended Complaint is inconsistent with and barred by Section 3314 of the Code, and the Commission is without jurisdiction to entertain the additional allegations now being raised by Complainant.

WHEREFORE, for the reasons set forth above, United Water Pennsylvania Inc. requests that the Pennsylvania Public Utility Commission grant this Preliminary Objection and dismiss the Amended Complaint of Insurance Company of Greater New York A/S/O Quail Run Real Estate LP D/B/A Quail Run Apartments at Docket No. C-2013-2393832.

Respectfully submitted,



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Attorneys for United Water Pennsylvania Inc.

DATED: June 5, 2014

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STATE FARM FIRE AND CASUALTY	:	
COMPANY a/s/o Brittany Lehman and	:	
Nathan Becker, Charles K. Powell, Jr., and	:	
Anthony Cuthbertson,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 12-1107
	:	
TINA JEFFERSON, ANDRE	:	
DRAYTON, SYMONE SCOTT,	:	
AND UNITED WATER COMPANY,	:	
Defendants.	:	

MEMORANDUM

STENGEL, J.

July 17, 2013

State Farm Fire & Casualty Co. (State Farm) brings this lawsuit against United Water Pennsylvania, Inc. (United Water), alleging negligence in connection with a fire at the Quail Run Apartment Complex (Quail Run) in Harrisburg, Pennsylvania.¹ United Water moves to dismiss for lack of subject matter jurisdiction or, in the alternative, to bifurcate and stay the case pursuant to the primary jurisdiction doctrine. For the following reasons, I will grant the motion in part and deny it in part.

I. BACKGROUND

State Farm insured the real and personal property of several Quail Run residents. Compl. ¶¶ 9-12. United Water provided domestic water services to Quail Run, to its fire hydrants, and to hydrants in the immediate vicinity. *Id.* ¶ 15. On June 11, 2010, a fire

¹ State Farm also sued Tina Jefferson, Andre Drayton, and Symone Scott, all of whom occupied the unit in which the fire originated. These parties have since been dismissed. Doc. No. 16.

broke out in one of Quail Run's units. Id. ¶ 16. The Colonial Park Fire Department responded but could not obtain adequate water volume from nearby hydrants despite twice requesting that United Water increase the water pressure serving the fire scene. Id. ¶ 33. The fire spread to neighboring units insured by State Farm, causing damage. Id. ¶ 18.

State Farm paid a total of \$109,498.18 to its insureds as a result of the fire. State Farm, as subrogee of its insureds, now alleges that United Water negligently failed to supply Quail Run's fire hydrants with adequate water volume and pressure. Id. ¶¶ 17, 32, 34.

II. DISCUSSION

A. Subject Matter Jurisdiction

United Water contends that the Pennsylvania Public Utility Code (the Utility Code) divests this court of subject matter jurisdiction by placing primary jurisdiction in the Pennsylvania Public Utility Commission (the Commission). Accordingly, it moves pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss State Farm's complaint for lack of subject matter jurisdiction.

A motion under Rule 12(b)(1) may be treated as either a facial or factual challenge to the court's subject matter jurisdiction. Gould Electronics Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). Because United Water contends that State Farm's allegations, accepted as true, fail to invoke this court's jurisdiction, it asserts a facial challenge. M.C. v. Bianchi, 782 F. Supp. 2d 127, 128 (E.D. Pa. 2011). "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents

referenced therein and attached thereto, in the light most favorable to the plaintiff.”

Gould, 220 F.3d at 176.

United Water’s argument is mistaken in two fatal respects. First, the primary jurisdiction doctrine, in both federal and Pennsylvania courts, “has nothing to do with subject matter jurisdiction.” MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1107 (3d Cir. 1995) (Nygaard, J., concurring); Reiter v. Cooper, 507 U.S. 258, 268-69 (1993); White v. Conestoga Title Ins. Co., 53 A.3d 720, 728 n.14 (Pa. 2012). Rather, the doctrine “is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.” U.S. ex rel. Haskins v. Omega Inst., Inc., 11 F. Supp. 2d 555, 560 (D.N.J. 1998); Elkin v. Bell Tel. Co. of Pennsylvania, 420 A.2d 371, 376 (Pa. 1980). Thus, assuming for the moment the Commission does have primary jurisdiction over this dispute, that alone would not deprive this court of its properly invoked subject matter jurisdiction. Second, and more to the point, “state statutes cannot divest federal courts of jurisdiction.” Dolan v. Cmty. Med. Ctr. Healthcare Sys., 500 F. Supp. 2d 503, 509 (M.D. Pa. 2007); Marshall v. Marshall, 547 U.S. 293, 314 (2006). The Utility Code therefore does not and could not, under any circumstances, divest this court of subject matter jurisdiction.

This court has subject matter jurisdiction pursuant 28 U.S.C. § 1332(a). State Farm is a citizen of Illinois, United Water is a citizen of Pennsylvania, and the amount in controversy exceeds \$75,000.00. Compl. ¶¶ 1, 5-6. United Water’s motion is therefore denied insofar as it seeks dismissal of the complaint for want of subject matter jurisdiction.

B. Primary “Jurisdiction”

United Water’s argument that the Commission has primary jurisdiction over this dispute warrants a closer look. As indicated, the phrase “primary jurisdiction” is a misnomer insofar as the doctrine bearing its name “does not involve any question of subject matter jurisdiction.” Ostrov v. I.F.T., Inc., 586 A.2d 409, 413 (Pa. Super. Ct. 1991); Pettko v. Pennsylvania Am. Water Co., 39 A.3d 473, 478 n.9 (Pa. Commw. Ct. 2012) (“In contrast to the primary jurisdiction doctrine, we note that courts have defined subject matter jurisdiction generally as a court’s or tribunal’s power to hear cases of the class to which the case at issue belongs.”). Rather, in Pennsylvania:

[T]he doctrine of primary jurisdiction is jurisprudential, developed by [the Pennsylvania Supreme Court] to accommodate the respective spheres of adjudicatory authority of the Commonwealth’s administrative agencies and the common pleas courts. Under the doctrine, a trial court, which has subject matter jurisdiction over a claim, determines that an agency’s expertise is needed on a particular issue. Accordingly, it refers the question to the agency and stays judicial proceedings, pending the agency’s determination. The agency’s subsequent determination on the issue, when final, is binding and not subject to collateral attack upon the resumption of judicial proceedings.

White, 53 A.3d at 728 n.14 (citations and internal quotation marks omitted).² Referral to a state agency under the primary jurisdiction doctrine is appropriate only “where the subject matter is within an agency’s jurisdiction *and* where it is a complex matter requiring special competence, with which the judge or jury would not or could not be

² Under Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny, a federal court sitting in diversity “must apply the substantive law of the forum state.” Chiu v. Chrysler LLC, 538 F.3d 272, 278 (3d Cir. 2008). The doctrine of “primary jurisdiction is part of the substantive law of Pennsylvania.” MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1110 (3d Cir. 1995) (Nygaard, J., concurring). Accordingly, to the extent a Pennsylvania common pleas court would defer to a state agency’s primary jurisdiction, so must I. Id. at 1112 (Nygaard, J., concurring); see also e.g., Virginia Imports, Inc. v. Kirin Brewery of Am., LLC, 296 F. Supp. 2d 691, 698 n.1 (E.D. Va. 2003) (“Assuming that primary jurisdiction did apply, under the principles established by Erie, Federal courts will defer to the primary jurisdiction of a state agency, if state courts would defer.”).

familiar.” Elkin, 420 A.2d at 377 (emphasis added). In making this determination, courts must look beyond the “form of [the] action or the manner in which is titled” to “the essence of the underlying claims.” DeFrancesco v. W. Pennsylvania Water Co., 453 A.2d 595, 597 n.5 (Pa. 1982).

United Water argues that primary jurisdiction rests with the Commission for two reasons. First, United Water contends that resolving this dispute will require “the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services,” for which the Commission “has long been recognized as the appropriate forum.” Elkin, 420 A.2d at 374; 66 Pa. C.S. §§ 1504-05. And second, United Water contends that State Farm’s claim implicates United Water’s tariff, the interpretation of which is considered to be “peculiarly within the expertise of the . . . Commission.” Bell Tel. Co. of Pennsylvania v. Uni Lite, Inc., 439 A.2d 763, 765 (Pa. Super. Ct. 1982). Regarding “fire hydrant service or private fire hydrant sprinkler and hose service,” the tariff provides that United Water “shall have no greater duty . . . than to supply only such volumes of water at such pressures as may be available in the normal operation of the waterworks facilities at the time of use.” Doc. No. 5-4 at 55, ¶ 53. Regarding its liability for “a loss resulting from failure to supply water or pressure or for any other cause,” the tariff provides that United Water “shall not be held liable for any amount in excess of ten percent of the annual charge for public fire hydrant service or for private fire fighting service.” Id. ¶ 54.

Applying Elkin’s two-part test, and looking to the essence of State Farm’s claims, I find that referral to the Commission is appropriate to determine whether United Water

supplied “such volumes of water at such pressures as may be available in the normal operation of the waterworks facilities at the time of use.” Doc. No. 5-4 at 55, ¶ 53. State Farm appears to concede that the subject matter of its suit is within the Commission’s jurisdiction, Doc. No. 10 at 11, and I agree. The essence of State Farm’s claim is that “United Water failed to provide enough water pressure to allow for a sufficient amount of water to extinguish the . . . fire.” Compl. ¶ 17; see also id. ¶ 33 (“United Water owed a duty Quail Run to provide adequate and sufficient quantities of water for firefighting purposes at the Quail Run Apartment Complex.”); id. ¶ 34 (alleging acts of “negligence and carelessness” such as “[f]ailing to provide sufficient water volume to Quail Run to allow the Colonial Park Fire Department to properly fight the fire,” “[c]ausing and/or allowing the fire to spread due to a lack of appropriate water volume at Quail Run,” and “[f]ailing to notice, observe, understand, discern and/or perceive the dangerous condition caused by failing to provide adequate water volume to Quail Run at the time of the fire”). Surely, these allegations raise issues involving the reasonableness, adequacy, and sufficiency of United Water’s service. While State Farm disputes that the Commission’s expertise is required, I have little trouble concluding that it is. “Public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility.” PPL Elec. Utilities Corp. v. Pennsylvania Pub. Util. Comm’n, 912 A.2d 386, 402 (Pa. Commw. Ct. 2006). United Water’s alleged “duty . . . to provide adequate and sufficient quantities of water for firefighting purposes,” Compl. ¶ 33, is explicitly defined in its tariff. Doc. No. 5-4 at 55, ¶ 53. There is accordingly no doubt that resolving this dispute will require a determination of United Water’s compliance with its tariff, even though

unmentioned by State Farm in its complaint. Because Pennsylvania courts are uniform in holding that “it is the Commission that has the expertise to examine and interpret tariff language,” referral of this question is necessary. PPL Elec. Utilities Corp., 912 A.2d at 403; Teleconcepts, Inc., 71 F.3d at 1105 (“The agency that can best determine [a utility’s] compliance with [its] tariff is the [Commission].”).

In opposition, State Farm focuses on DeFrancesco, 453 A.2d 595, which addressed the primary jurisdiction doctrine on facts seemingly quite similar to those here. The plaintiffs’ properties were destroyed by a fire, which the Pittsburgh Fire Department was unable to contain. They sued the Western Pennsylvania Water Company (West Penn), “alleging that the fire was not controlled because West Penn failed to provide water pressure in the fire hydrant near [their] properties.” Id. at 595. In holding that primary jurisdiction did not rest with the Commission, the court explained that:

The controversy now before us . . . is not one in which the general reasonableness, adequacy or sufficiency of a public utility’s service is drawn into question. Resolution of appellant’s claims depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC. Rather, the gravamen of the allegations at trial was within the prescan authority of the courts, i.e., that the utility *negligently* failed to provide service required.

Id. at 597.

State Farm argues that DeFrancesco controls because, like the plaintiffs there, it alleges that a public utility “acted negligently failing to supply enough water pressure to the subject fire hydrants.” Doc. No. 10 at 10. I find DeFrancesco’s holding to be more nuanced than that. The allegation of negligence before the court was “that West Penn’s

employees had worked on the hydrant the day of the fire and, as a result, the water pressure in the hydrant sputtered off and on, below its normal pressure.” DeFrancesco, 453 A.2d at 596.³ On this point, DeFrancesco is distinguishable. State Farm does not contend that a discrete act of negligence caused the hydrant’s insufficient water pressure; it alleges that the hydrant’s insufficient water pressure was itself negligent. Put another way, State Farm alleges that United Water failed to supply Quail Run’s hydrants with adequate water volume and pressure in the ordinary course of business. This is a categorically different allegation than the one advanced by the DeFrancesco plaintiffs. It is therefore not surprising that resolution of the plaintiffs’ claims in DeFrancesco, confined as they were to an act of negligent repair, “depended upon no rule or regulation predicated on the peculiar expertise of the PUC.” Id. at 597. As explained, State Farm’s claim turns directly on a regulation within the Commission’s peculiar expertise. Doc. No. 5-4 at 55, ¶ 53.

For these reasons, the Commission has primary jurisdiction over whether United Water supplied “such volumes of water at such pressures as may be available in the normal operation of the waterworks facilities at the time of use.” Doc. No. 5-4 at 55, ¶ 53.⁴ In accordance with the bifurcated procedure adopted by the Pennsylvania Supreme

³ The Superior Court clarified the parties’ allegations on remand: “The issue at trial was who was responsible for the inadequate supply of water. The mains that supplied water to the hydrants were owned and maintained by [West Penn]. [The plaintiffs] contended that the inadequate supply of water was caused by [West Penn’s] employees’ negligent repairs on August 10, 1973—the day before the fire. [West Penn] contended that the inadequate supply was caused by the Fire Department’s use of too many pumpers.” DeFrancesco v. W. Pennsylvania Water Co., 478 A.2d 1295, 1298 (Pa. Super. Ct. 1984).

⁴ I note for clarity that while the Commission does have primary jurisdiction, it does not have *exclusive* primary jurisdiction, as United Water appears to contend. “[A]n administrative agency does not have exclusive jurisdiction unless it has the power to award relief that will make a successful litigant whole.” Pettko v.

Court, Elkin, 420 A.2d at 376-77, I will transfer this matter to the Commission for a determination of United Water's compliance with its tariff, as indicated above. The Commission is directed to address any other issue within its expertise that will aid in resolving this dispute. This case will be stayed pending receipt of the Commission's findings and conclusions, at which time it "may continue, guided in scope and direction by the nature and outcome of the agency determination." Elkin, 420 A.2d at 377.

IV. CONCLUSION

United Water's motion is granted in part and denied in part.

An appropriate order follows.

Pennsylvania Am. Water Co., 39 A.3d 473, 484 (Pa. Commw. Ct. 2012); DiSanto v. Dauphin Consol. Water Supply Co., 436 A.2d 197, 202 (Pa. Super. Ct. 1981). State Farm seeks money damages, which the Commission has no power to award. Elkin, 420 A.2d at 375. Because the Commission cannot make State Farm whole, it does not have exclusive primary jurisdiction over this dispute.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STATE FARM FIRE AND CASUALTY	:	
COMPANY a/s/o Brittany Lehman and	:	
Nathan Becker, Charles K. Powell, Jr., and	:	
Anthony Cuthbertson,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 12-1107
	:	
TINA JEFFERSON, ANDRE	:	
DRAYTON, SYMONE SCOTT,	:	
AND UNITED WATER COMPANY,	:	
Defendants.	:	

ORDER

AND NOW, this 17th day of July 2013, upon consideration of Defendant United Water Company's Motion to Dismiss or to Bifurcate and Stay (Doc. Nos. 5 & 6), Plaintiff State Farm Fire and Casualty Company's Response thereto (Doc. No. 9 & 10), and Defendant United Water Company's Reply (Doc. No. 11), **IT IS HEREBY**

ORDERED that:

1. Defendant United Water Company's Motion to Dismiss is **DENIED**;
2. Defendant United Water Company's Motion to Bifurcate and Stay is **GRANTED** as follows;
 - a. This matter is **TRANSFERRED** to the Pennsylvania Public Utility Commission, consistent with my accompanying memorandum;
 - b. The Clerk shall mark this matter **CLOSED** for statistical purposes and place it in the civil suspense file pending receipt of the Pennsylvania Public Utility Commission's findings and conclusions;

- c. Counsel are directed to submit a brief status report every 90 days and upon completion of their proceedings before the Pennsylvania Public Utility Commission.¹

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

¹ The Pennsylvania Public Utility Commission is advised that I am contemporaneously transferring the separate but factually identical matter of Insurance Company of Greater New York v. Jefferson et al., No. 11-545 (M.D. Pa. filed Mar. 23, 2011).

Insurance Company of Greater New York	:	
a/s/o Quail Run Real Estate L.P. d/b/a Quail	:	
Run Apartments	:	
	:	
v.	:	Docket No. C-2013-2393832
	:	
United Water Pennsylvania Inc.	:	
	:	
State Farm Fire and Casualty Company	:	
	:	
v.	:	Docket No. C-2014-2416206
	:	
United Water Pennsylvania Inc.	:	

CERTIFICATE OF SERVICE


I hereby certify that I have this 5th day of June, 2014, served a true and correct copy of the foregoing Preliminary Objection to Amended Complaint of Insurance Company of Greater New York upon the persons and in the manner set forth below:

EMAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

Honorable Joel Cheskis
 Administrative Law Judge
 Pennsylvania Public Utility Commission
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