



THOMAS, NIESEN & THOMAS, LLC

Attorneys and Counsellors at Law

CHARLES E. THOMAS, III
Direct Dial: 717.255.7611
cet3@tntlawfirm.com

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 Answer to the Amended Complaint of the Insurance Company of Greater New York with New Matter. Copies of the Answer and New Matter 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 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.	:	

**ANSWER TO INSURANCE COMPANY OF GREATER
NEW YORK’S AMENDED COMPLAINT WITH NEW MATTER**

AND NOW, comes United Water Pennsylvania Inc. (“United”), by its attorneys, and, pursuant to 52 Pa. Code §§ 5.61 and 5.65, in *seriatim* fashion, answers the Amended Complaint of Insurance Company of Greater New York A/S/O Quail Run Real Estate LP D/B/A Quail Run Apartments (“INSCO”) in the matter at Docket No. C-2013-2393832 as follows:

ANSWER

Factual Allegations

1. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 1 of the Amended Complaint, *viz.* the ownership history of the real property and improvements known as Quail Run Apartments located at 4001

Rawleigh Street, Lower Paxton, Pennsylvania 17109 (“Quail Run”). United, therefore, denies the averments presented in Paragraph 1 and, if relevant, demands strict proof thereof.

2. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 2 of the Amended Complaint, *viz.* the lessee of Apartment 4065 Rawleigh Street in Quail Run (“Unit 4065”) or the terms of the lease purportedly executed May 4, 2007 and purportedly renewed June 1, 2010. United, therefore, denies the averments presented in Paragraph 2 and, if relevant, demands strict proof thereof.

3. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 3 of the Amended Complaint, which are based on the information and belief of INSCO. United, therefore, denies the averments presented in Paragraph 3 and, if relevant, demands strict proof thereof.

4. Admitted in part and denied in part. It is admitted that United provides domestic water services, *i.e.*, residential water services, to Quail Run and fire protection service to a single, privately-owned fire hydrant located in the courtyard adjacent to Quail Run. United, however, denies INSCO’s averment to the extent it attempts to include fire protection service or water service to a hydrant within the meaning of “domestic water services.” United further denies that it provides service to “several other fire hydrants in the immediate area” inasmuch as the “immediate area” is vague and indeterminate.

5. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 5 of the Amended Complaint, which are based on the information and belief of INSCO. United, therefore, denies the averments presented in Paragraph 5 and, if relevant, demands strict proof thereof.

6. Admitted in part and denied in part. United admits that the Colonial Park Fire Company (“CPFC”) Report states that the CPFC responded to a fire call at Quail Run on June 11, 2010 at 4:58 AM and arrived on the scene at 5:05 AM. United is without sufficient knowledge or information to form a response to, nor has it had an opportunity to determine the veracity of, the averments set forth in the remainder of Paragraph 6 of the Amended Complaint and the statements made in the CPFC Report. United, therefore, denies the remainder of Paragraph 6 and, if relevant, demands strict proof thereof. In addition, the second sentence in Paragraph 6 constitutes a conclusion of law to which no response is required. United denies that Exhibit C to the Amended Complaint is a true and complete copy of the Fire Report. Exhibit C has truncated margins and contains illegible text. By way of further response, the CPFC Report states that CPFC, upon its arrival at the scene, observed “heavy fire” with reports of entrapment and connected a supply line to the privately-owned fire hydrant located in the courtyard adjacent to Quail Run. The fire hydrant was fully operational. The Report further states that, after accounting for all firefighting personnel, CPFC moved to defensive operations, which United understands to mean that the structure cannot or will not be saved and the objective is to prevent the fire from spreading.

7. Paragraph 7 of the Amended Complaint is a conclusion of law to which no response is required. If, however, a response is deemed necessary, United admits that CPFC contacted it asking for additional water for fighting what the Report states was a “heavy fire.” United, however, denies all remaining averments presented in Paragraph 7. By way of further response, the privately-owned fire hydrant located in the courtyard adjacent to Quail Run and the public fire hydrant at Locust Lane and Willow Street, Harrisburg, Pennsylvania were fully operational. After fielding the request to increase water pressure, United took steps to maximize

water pressure and volume to Quail Run. Specifically, United shut off its East Park booster pump which transfers water from the “D2” pressure zone, where Quail Run is located, to the “D3” pressure zone. Shutting off the East Park booster pump boosted water pressure and volume to the distribution system serving Quail Run.

8. Admitted in part and denied in part. United admits that there is a privately-owned fire hydrant in the courtyard of Quail Run. United is without sufficient knowledge or information to form a response to, nor has it had an opportunity to determine the veracity of, the averments set forth in the remainder of Paragraph 8 of the Amended Complaint which are based on the statements made in the CPFC Report. United, therefore, denies the remainder of Paragraph 8 and, if relevant, demands strict proof thereof. By way of further response, the Report states that a “line crew waited in the stairway a couple extra seconds until their line was charged which was delayed due to the low water pressure in the complex.” United denies that firefighters encountered “difficulties” or that a delay of a “couple extra seconds,” if it did occur, is at all material.

9. Admitted in part and denied in part. United admits that there is a public fire hydrant at Locust Lane and Willow Street, Harrisburg, Pennsylvania. United further admits that CPFC contacted it asking for additional water for fighting what the Report states was a “heavy fire.” United is without sufficient knowledge or information to form a response to, nor has it had an opportunity to determine the veracity of, the averments set forth in the remainder of Paragraph 9 of the Amended Complaint which are based on the statements made in the CPFC Report or the news article cited in Paragraph 9 and attached to the Amended Complaint as Exhibit “D.” United, therefore, denies the remainder of Paragraph 9 and, if relevant, demands strict proof thereof. By way of further response, United denies that firefighters experienced a persistent lack

of water volume and pressure that prolonged the fire. The Report states that, after accounting for all firefighting personnel, CPFC moved to defensive operations, which United understands to mean that the structure cannot or will not be saved and the objective is to prevent the fire from spreading. Moreover, after fielding the request to increase water pressure, United took steps to maximize water pressure and volume to Quail Run. Specifically, United shut off its East Park booster pump which transfers water from the “D2” pressure zone, where Quail Run is located, to the “D3” pressure zone. Shutting off the East Park booster pump boosted the water pressure and volume to the distribution system serving Quail Run. Furthermore, the public hydrant located at Locust Lane and Willow Street is on the same main as the privately-owned hydrant located in the courtyard adjacent to Quail Run. Attempting to supplement firefighting efforts through the use of a supply line connected to the public hydrant at the same time would cause the pressure and volume of water withdrawn from the private hydrant to decrease regardless of United’s efforts to increase pressure.

10. Paragraph 10 of the Amended Complaint is a conclusion of law to which no response is required. If, however, a response is deemed necessary, United denies all averments presented therein. *See* Answering Paragraph 9, *supra*, which is incorporated by reference.

11. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 11 of the Amended Complaint, which are based on the unspecified documents and records referenced by INSCO. United, therefore, denies the averments presented in Paragraph 11 and, if relevant, demands strict proof thereof.

12. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 12 of the Amended Complaint, which are based on the

unspecified records referenced by INSCO. United, therefore, denies the averments presented in Paragraph 12 and, if relevant, demands strict proof thereof.

13. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 13 of the Amended Complaint which are based on a purported “2006 United Water press release” that Complainant did not provide with its Amended Complaint. United, therefore, denies the averments presented in Paragraph 13 and, if relevant, demands strict proof thereof.

14. Denied. United is without sufficient knowledge or information to form a response to, nor has it had an opportunity to determine the veracity of, the averments set forth in Paragraph 14 of the Amended Complaint which are based on statements made and facts alleged in the news article cited in Paragraph 14 and attached to the Amended Complaint as Exhibit “E.” United, therefore, denies all such averments and statements and facts and, if relevant, demands strict proof thereof. By way of further response, the bowling alley referred to in Paragraph 14 is not in the area of Quail Run. The bowling alley, to the contrary, is approximately 3.67 linear miles or 5.57 road miles from Quail Run and is located in a completely different pressure zone within the United water system than Quail Run. The facts and circumstances pertaining to the bowling alley fire on April 4, 2007 are completely irrelevant and immaterial to the issues in the instant complaint proceeding involving a fire more than three years later. Unlike the Quail Run incident, United did not have a main serving the referenced bowling alley at the time of the 2007 incident.

15. Paragraph 15 of the Amended Complaint is a conclusion of law to which no response is required. If, however, a response is deemed necessary, United denies all averments presented therein.

16. Denied. Paragraph 16 of the Amended Complaint constitutes a conclusion of law to which no response is required. If a response is deemed necessary, United denies that its acts and/or omissions were a direct and proximate cause of the fire destroying Unit 4065 which caused the damage sustained at Unit 4065 and generally throughout Quail Run. The actions of the tenants of INSCO's subrogor and/or the subrogor's own failure to control the tenant's activities were the direct and proximate cause of the fire and any damage to the apartment building.

17. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 17 of the Amended Complaint. United, therefore, denies the averments presented in Paragraph 17 and, if relevant, demands strict proof thereof.

18. Denied. United is without sufficient knowledge or information to form a response to the averments set forth in Paragraph 18 of the Amended Complaint. United, therefore, denies the averments presented in Paragraph 18 and, if relevant, demands strict proof thereof.

19. Denied. United is without sufficient knowledge to form a response to the averments set forth in Paragraph 19 of the Amended Complaint. United, therefore, denies the averments presented in Paragraph 19 and, if relevant, demands strict proof thereof.

Procedural Background

20. Admitted as stated.

21. Admitted in part; denied in part. United admits that INSCO filed a complaint in the United States District Court for the Middle District of Pennsylvania ("PA Middle District Court") setting forth a single civil claim against United. The federal court complaint speaks for itself. United denies all allegations presented in the federal court complaint.

22. Admitted with clarification. United filed a “Motion to Dismiss and/or for Bifurcation and for Stay” with the PA Middle District Court on June 14, 2011. The Motion speaks for itself.

23. Admitted as stated.

24. Paragraph 24 of the Amended Complaint merely sets forth the issue of law and factual determination to be adjudicated by the Pennsylvania Public Utility Commission (“Commission”), and an answer is not required. If an answer is deemed necessary, United denies that it violated 66 Pa. C.S. § 1501 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 a fire on June 11, 2010.

25. Paragraph 25 of the Amended Complaint merely sets forth an additional issue of law which INSCO claims is to be adjudicated by the Commission, and, therefore, an answer is not required. If an answer is deemed necessary, United denies that it failed to supply adequate water pressure to Quail Run during a fire on June 11, 2010 or that its actions were wanton, wilful, or reckless. Moreover, United denies that Paragraph 25 contains an accurate identification of the issues in this complaint proceeding. The issues properly before the Commission have been outlined by the PA Middle District Court in the case of *Insurance Company of Greater New York v. Tina Jefferson, et al.*, No. 11-545 (M.D. Pa.). In the Order and Memorandum decision incorporated in that case, the Honorable Lawrence F. Stengel, citing United’s Tariff, framed the transferred 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.’” Memorandum 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. Copies of the Order and Memorandum decision are attached hereto as **Exhibit 1**. United denies that gross negligence is an issue for Commission determination.

NEW MATTER

Pursuant to 52 Pa. Code § 5.62(b), United submits the following New Matter in the nature of affirmative defenses:

26. Paragraphs 1 through 25 of the Answer are incorporated by reference as if set forth fully at length.

27. United denies that it violated Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, in connection with the June 11, 2010 fire at Quail Run.

28. United denies that it violated any Commission regulations at 52 Pa. Code in connection with the June, 11 2010 fire at Quail Run. In fact, there are no Commission regulations that set forth standards for adequate or reasonable fire protection service.

29. At all times material hereto, United furnished and maintained adequate, efficient, safe, and reasonable fire protection service to Quail Run.

30. United's Tariff Water – Pa. P.U.C. No. 7 ("Tariff") beginning at page 55 presents rules and regulations governing fire protection service. A copy of United's Tariff, pages 55 and 56, which was in effect in June 2010 when the incident occurred at Quail Run, is attached hereto as **Exhibit 2**.

31. Significantly, Paragraphs 53 through 55 of United's then-effective Tariff provided as follows:

53. The Company shall have no greater duty, with regard to fire hydrant service or private fire hydrant sprinkler and hose service, than to

supply such volumes of water at such pressures as may be available in the normal operation of the waterworks facilities at the time.

54. The Company shall not be considered an insurer of property or persons or to have undertaken to extinguish fire or to protect persons or property against loss or damage by fire or otherwise. In consideration of the level of charges for public fire hydrant service and for private fire fighting service, the Company 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, as applicable, because of any claim based upon a loss resulting from failure to supply water or pressure or for any other cause.

55. Where metered service is provided to any customer, the Company shall not be responsible for the quantities of water or pressure which may be available for any fire fighting facilities or purposes where the customer installs such facilities, or makes connection to his water system for such purposes, on the discharge side of the meter in his service line, and shall not be held liable for any claim based upon loss due to fire or fire fighting.

32. It is well settled that public utility tariffs must be applied consistently with their language. Tariffs have the force and effect of law and are binding on the customer as well as the public utility. *PPL Elec. Util. Corp. v. Pa. P.U.C.*, 912 A.2d 386, 402 (Pa. Cmwlth 2006).

33. At all times material hereto, United acted in compliance with its Tariff.

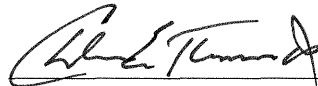
34. United's potential liability, if any, is limited pursuant to its Tariff as set forth above.

35. The Commission has adopted a policy statement that recognizes the permissibility of tariff provisions that limit the liability of utilities for injury or damage as a result of negligence. *See* 52 Pa. Code § 69.87.

36. To the extent INSCO, through its Amended Complaint or otherwise, raises or attempts to raise matters that are beyond the limited issues transferred by the PA Middle District Court, such matters are barred by Section 3314 of the Public Utility Code, 66 Pa. C.S. § 3314 (limitations of actions and cumulation of remedies).

WHEREFORE, for the reasons set forth above, United Water Pennsylvania Inc. respectfully requests that the Pennsylvania Public Utility Commission 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 and grant such other relief as may be just and reasonable and consistent with the Public Utility Code.

Respectfully submitted,



Thomas T. Niesen, Esq. (PA ID # 31379)
Charles E. Thomas, III, Esq. (PA ID # 201014)
THOMAS, NIESEN & THOMAS, LLC
212 Locust Street, Suite 600
P.O. Box 9500
Harrisburg, PA 17108-9500
Tel: 717-255-7600

Brooks R. Foland, Esq. (PA ID # 70102)
MARSHALL DENNEHEY
100 Corporate Center Drive, Suite 201
Camp Hill, PA 17011

James M. Terranova, Esq. (NJ ID # 020461977)
Senior Corporate Attorney – Litigation
UNITED WATER
200 Old Hook Road
Harrington Park, NJ 07640-1799

Attorneys for United Water Pennsylvania Inc.

DATED: June 5, 2014

EXHIBIT 1

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

INSURANCE COMPANY OF	:	CIVIL ACTION
GREATER NEW YORK,	:	
Plaintiff	:	
	:	
vs.	:	NO. 11-545
	:	
TINA JEFFERSON, et al.,	:	
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 (Document #7), the plaintiff's response thereto (Document #10), and Defendant United Water Company's reply (Document #14), IT IS HEREBY ORDERED that:

1. The motion to dismiss is DENIED;
2. The motion to bifurcate and stay is GRANTED as follows:

(a) This matter is transferred to the Pennsylvania Public Utility Commission consistent with my Memorandum and Order in State Farm Fire & Casualty Company, et al. v. Tina Jefferson, et al., 12-cv-1107 (M.D. Pa. filed June 11, 2012).

(b) The Clerk of Court shall mark this matter CLOSED for statistical purposes and place it in the civil suspense file pending receipt of the findings and conclusions of the Pennsylvania Public Utility Commission.

(c) Counsel are directed to submit to the court a brief status report every ninety 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 State Farm Fire & Casualty Company, et al. v. Tina Jefferson, et al., 12-cv-1107 (M.D. Pa. filed June 11, 2012).

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).

EXHIBIT 2

PERSONNEL AVAILABLE TO RESTORE:

45. The Company shall have adequate personnel available between 8:00 a.m. and 4:00 p.m. on each working day, or for the commensurate period of eight consecutive hours, to restore service when required under these Rules and Regulations.

MISCELLANEOUS:

47. Water shall not be turned into any customer's premises by any person who is not an agent of the Company, except temporarily by a plumber, with Company approval, to enable him to test his work, provided it shall be turned off immediately after the test is made.
48. The authorized agents of the Company shall have the right of access, at all reasonable hours, to the premises supplied with water for the purpose of reading meters, examining pipes and fixtures, observing manner of using water, and for any other purpose which is proper and necessary in the conduct of the Company's business. Such agents shall carry proper credentials evidencing their employment by the Company.
49. No customer shall open or close any of the Company's corporation stops or valves in any public or private line.
50. No agent or employee of the Company shall have the right or authority to bind it by any promise, agreement or representation contrary to the letter or intent of these rules and regulations.
51. The Company reserve the right to alter or amend these rules and regulations in the manner provided by law.

FIRE PROTECTION:

52. Water from fire hydrants or other fire fighting facilities shall be used only for fire fighting purposes.
53. The Company shall have no greater duty, with regard to fire hydrant service or private fire hydrant sprinkler and hose service, 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.
54. The Company shall not be considered an insurer of property or persons or to have undertaken to extinguish fire or to protect persons or property against loss or damage by fire or otherwise. In consideration of the level of charges for public fire hydrant service and for private fire fighting service, the Company 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, as applicable, because of any claim based upon a loss resulting from failure to supply water or pressure or for any other cause.

-
55. Where metered service is provided to any customer, the Company shall not be responsible for the quantities of water or pressure which may be available for any fire fighting facilities or purposes where the customer installs such facilities, or makes connection to his water system for such purposes, on the discharge side of the meter in his service line, and shall not be held liable for any claim based upon loss due to fire or fire fighting.
 56. Company will consider installation of public fire hydrants only upon authorization from the political subdivision in which the unit is to be installed which will be responsible for payment or for services rendered.

LIABILITY

1. In the course of furnishing service that needs to be adequate, but not perfect, it is recognized that there will be times when service is subject to interruption or disruption as a result of water main breaks, the failure of equipment or facilities, and for other reasons. Accordingly, the liability of the Company shall be limited to either \$2,000 or a customer's average annual bill whichever is less in any legal action brought against the Company for damages in connection with: 1) a service interruption or delay, or cessation or lack of adequate, efficient, safe and reasonable service and facilities; and/or 2) a failure of equipment or supply, including, but not limited to, a break or leak in a water main, service line or meter owned by the Company.

In any legal action where a court does not recognize, or is being asked to interfere with or hamper, the jurisdiction of the Commission to authorize limitations of liability or to exclusively determine whether the service and facilities of the Company are in conformity with the regulations and Orders of the Commission, the Company may certify to the Commission the question of the appropriateness of such court action by filing a petition for declaratory judgment with the Commission.

Furthermore, the Company shall not be liable in any action where the loss or damage involves an act of God or does not involve a duty of the Company, including, but not limited to, breaks or leaks on facilities that are not owned by the Company, such as breaks, leaks, defects or conditions in the Customer's own service line, meter pit, internal plumbing or fixtures, or due to the materials out of which those facilities are made. Further, the Company shall not be liable in any action where the loss or damage does not involve a breach of a duty of the Company, including, but not limited to, where the Company does not receive actual notice, either written or oral, that a Company facility (located within the public right-of-way, in a sidewalk or on a customer's property) is in need of repair, such as the condition or elevation of a curb box or valve box that is not proven to have been in that condition at the time of installation or that is caused by a plumber, developer, or the person or event.

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 Answer to Insurance Company of Greater New York’s Amended Complaint with New Matter 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
 P.O. Box 3265
 Harrisburg, PA 17105-3265
jcheskis@pa.gov

Matthew D. Matkov, Esq.
 Gary L. Bailey, Esq.
 SALTZ MATKOV P.C.
 998 Old Eagle School Road, Suite 1206
 Wayne, PA 19087
mmatkov@saltzmatkov.com
gbailey@saltzmatkov.com

Jason A. Plaza, Esq.
 WHITE AND WILLIAMS, LLP
 1650 Market Street
 One Liberty Place, Suite 1800
 Philadelphia, PA 19103-7395
Plazaj@whiteandwilliams.com



Charles E. Thomas, III (PA ID # 201014)