

June 10, 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 Further Prehearing Memorandum in accordance with the Order Granting Motion to Consolidate Complaints of Administrative Law Judge Joel Cheskis, dated May 29, 2014. Copies of the Memorandum 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

Administrative Law Judge
Joel Cheskis, Presiding

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.	:	

**FURTHER PREHEARING MEMORANDUM
OF UNITED WATER PENNSYLVANIA INC.**

AND NOW, comes United Water Pennsylvania Inc. (“United”), by its attorneys, and submits this Further Prehearing Memorandum in accordance with the directive of Administrative Law Judge Joel Cheskis in the Order Granting Motion to Consolidate Complaints, dated May 29, 2014, and in connection with the Further Prehearing Conference scheduled to be held in the above-captioned matter on June 12, 2014.

I. Introduction

The above consolidated proceedings involve formal Complaints filed with the Pennsylvania Public Utility Commission (“Commission”) against United by the Insurance Company of Greater

New York a/s/o Quail Run Real Estate LP d/b/a Quail Run Apartments (“INSCO”) and State Farm Fire and Casualty Company a/s/o Brittany Lehman and Nathan Becker, Charles K. Powell, Jr., and Anthony Cuthbertson (“State Farm”), respectively, concerning 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 4065 Rawleigh Street, Lower Paxton, Pennsylvania 17109 ("Quail Run").

Both matters were transferred to the Commission pursuant to Orders of the United States District Court for the Middle District of Pennsylvania (“PA Middle District”) entered on July 17, 2013 in *Insurance Company of Greater New York v. Tina Jefferson, et al.*, No. 11-545, and *State Farm Fire and Casualty Company v. United Water Company et al.*, No. 12-1107 (M.D. Pa.). Copies of those Orders are attached hereto as Exhibit A. The Orders reference and incorporate The Honorable Lawrence F. Stengel's Memorandum decision in the *State Farm Fire and Casualty Company v. United Water Company* case, a copy of which is attached hereto as Exhibit B. In that Memorandum decision, Judge 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. *Id.* at 9.

By letter dated August 5, 2013, Commission Chief Counsel Bohdan R. Pankiw advised INSCO and State Farm that the Commission was prepared to adjudicate the referred issues and that, in order to initiate Commission process, INSCO and State Farm would each need to file a formal complaint. Thereafter, on November 22, 2013, INSCO filed its formal Complaint. INSCO filed an Amended Complaint on or about May 7, 2014. United timely filed Answers with New Matter to both the Complaint and the Amended Complaint. United also filed a Preliminary Objection to

INSCO's Amended Complaint on June 5, 2014.

State Farm filed its formal Complaint with the Commission on April 5, 2014. On May 5, 2014, United filed an Answer to State Farm's Complaint with New Matter.

On May 22, 2014, United filed a motion to consolidate the proceedings, which was granted by Order dated May 29, 2014. By Notice dated May 30, 2014, a Further Prehearing Conference was scheduled for June 12, 2014 before Administrative Law Judge Joel Cheskis in Harrisburg.

II. Counsel for United

The names, addresses, and contact information of United's counsel for this matter are as follows:

Thomas T. Niesen, Esq.
Charles E. Thomas, III, Esq.
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James M. Terranova, Esq.
Senior Corporate Attorney – Litigation
UNITED WATER
200 Old Hook Road
Harrington Park, NJ 07640-1799
James.Terranova@UnitedWater.com

United requests that all counsel identified above be included on any informal email distribution list established for this proceeding. United designates Thomas T. Niesen and Charles E. Thomas, III of Thomas, Niesen & Thomas, LLC as its counsel for purposes of inclusion on the official service list for this proceeding.

III. Litigation Schedule

United will cooperate with Judge Cheskis and the other parties at the Prehearing Conference to finalize a schedule for litigation in order to facilitate the orderly conduct and disposition of this proceeding. To that end, United proposes the following litigation schedule:

Complainants Direct Testimony	August 14, 2014
Respondent Direct Testimony	October 15, 2014
Complainants Rebuttal	November 14, 2014
Evidentiary Hearings	December 16 and 17, 2014
Main Briefs	February 12, 2015
Reply Briefs	March 6, 2015

IV. Witnesses

United intends to address the foregoing issues through testimony presented by the following potential witnesses:

Company Witnesses

Witness

John D. Hollenbach
General Manager & Vice President
United Water Pennsylvania Inc.
4211 East Park Circle
Harrisburg, PA 17111
(717) 564-3662

Barry Wynn
Plant Operator - Harrisburg
United Water Pennsylvania Inc.
4405 North Sixth Street
Harrisburg, PA 17110
(717) 564-3662

General Subject Matter

The Company and its Tariff Water – Pa. P.U.C. No. 7; Fire Protection Service and Limitation of Liability; Water Volume and Pressure; Normal Operation of the Company’s Waterworks Facilities at the Time of Use; Normal Operation of the Company’s Waterworks Facilities at the Time of the Quail Run Fire

Operation of the Company’s Waterworks Facilities at the Time of the Quail Run Fire

Other Witnesses United May Call

Witness

Chief Thomas I. Swank
Colonial Park Fire Company #33
433 S. Houcks Road
Harrisburg, PA 17109
(717) 652-8378

General Subject Matter

The Quail Run Fire

Jeffrey Enders
Manager of Administration
Dauphin County Emergency
Management Agency/911
911 Gibson Blvd.
Steelton, PA 17113
(717) 558-6800

Communications and Emergency Response for
the Quail Run Fire

United reserves the right to call additional witnesses to address issues that may arise during the course of this proceeding and agrees to notify Judge Cheskis and INSCO should United determine that additional witnesses will be called.

V. Issues

United identifies the following issue consistent with the directive of the PA Middle District Court that the Commission address United's compliance with the fire protection provision of its Tariff and any other issue within the Commission's expertise that will aid in resolving the dispute:

- (1) Did United, in compliance with the fire protection provision of its Tariff Water – Pa. P.U.C. No. 7 supply “such volumes of water at such pressures as may be available in the normal operation of the waterworks facilities at the time of use” to or in the area of Quail Run on June 11, 2010?

Position of United: Answered in the affirmative

United identifies the following possible sub-issues consistent with the PA Middle District Court's directive that the Commission address any other issue within its expertise that will aid in resolving the dispute:

- (2) Was the fire protection service of United adequate and reasonable and consistent with Section 1501 of the Code, 66 Pa.C.S. § 1501, during the Quail Run fire on June 11, 2010?

Position of United: Answered in the affirmative

- (3) Does United's Tariff Water – Pa. P.U.C. No. 7 limit United's liability in the event that it is determined that United did not comply with its Tariff or provide adequate and reasonable fire protection service consistent with Section 1501 of the Code, 66 Pa.C.S. § 1501?

Position of United: Answered in the affirmative

While United does not foresee at this time any other applicable issues or sub-issues, United respectfully reserves the right to raise and address additional issues as may be necessary.

V. Discovery

United is not proposing any modifications to the Commission's discovery regulations at 52 Pa. Code § 5.321 *et seq.*

VI. Evidence

The direct evidence that United expects to submit in the proceeding will consist of the prepared direct testimony and accompanying exhibits of the witnesses identified above. United likewise expects to submit additional information and evidence in testimony and exhibit form prior to the close of the record in this proceeding based on the conduct and development of discovery. United also may present additional evidence including, but not limited to, the following:

- (1) Responses to discovery.
- (2) Documentary materials such as company records, system data, and other documents relevant to the Quail Run fire.
- (3) Revisions to and updates of evidence previously submitted.

Respectfully submitted,



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UNITED WATER
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Harrington Park, NJ 07640-1799

Attorneys for United Water Pennsylvania Inc.

DATED: June 10, 2014

EXHIBIT A

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.	:	

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 B

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.

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 10th day of June, 2014, served a true and correct copy of the foregoing Further Prehearing Memorandum of United Water Pennsylvania Inc. upon the persons and in the manner set forth below:

EMAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

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Administrative Law Judge
Pennsylvania Public Utility Commission
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