COMMONWEALTH OF PENNSYLVANIA

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May 22, 2024

Via Electronic Filing
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission
v.
Pennsylvania-American Water Company
Docket Nos. R-2023-3043189 (Water)
R-2023-3043190 (Wastewater)

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Notice to Plead and Motion for Relief Regarding Ex Parte Communications by Pennsylvania-American Water Company with a Verification in the above-referenced proceeding.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Respectfully submitted,

/s/ Jacob D. Guthrie
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Assistant Consumer Advocate
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JGuthrie@paoca.org

Enclosures:
cc: The Honorable John M. Coogan (email only)
The Honorable Christopher P. Pell (email only)
Office of Special Assistants (email only: ra-OSA@pa.gov)
Certificate of Service

CERTIFICATE OF SERVICE

Pennsylvania Public Utility Commission	:	
	:	Docket Nos. R-2023-3043189 (Water)
v.	:	R-2023-3043190 (Wastewater)
	:	
Pennsylvania-American Water Company	:	

I hereby certify that I have this day filed electronically on the Commission's electronic filing system and served a true copy of the following document, Notice to Plead and Motion for Relief of the Office of Consumer Advocate Regarding Ex Parte Communications by Pennsylvania-American Water Company, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below.

Dated this 22nd day of May 2024.

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Dated: May 22, 2024

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	Docket Nos.
v.	:	R-2023-3043189 (Water)
	:	R-2023-3043190 (Wastewater)
Pennsylvania-American Water Company	:	

NOTICE TO PLEAD

Per 52 Pa. Code Section 5.103(c), you are hereby advised to file a written response within 20 days to the attached Office of Consumer Advocate's (OCA) Motion for Relief Regarding Ex Parte Communications by Pennsylvania American Water Company in the above-captioned proceeding. If you do not file a written response to OCA's Motion, the Administrative Law Judges may rule in favor of OCA as to the attached Motion.

All pleadings, such as answers to motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

A copy should also be served on the undersigned counsel, the Administrative Law Judges assigned to this proceeding, and all other parties.

Respectfully submitted,

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Dated: May 22, 2024

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	Docket Nos.
v.	:	R-2023-3043189 (Water)
	:	R-2023-3043190 (Wastewater)
Pennsylvania-American Water Company	:	

MOTION FOR RELIEF OF THE
OFFICE OF CONSUMER ADVOCATE
REGARDING EX PARTE COMMUNICATIONS BY
PENNSYLVANIA AMERICAN WATER COMPANY

I. INTRODUCTION

AND NOW, before the Pennsylvania Public Utility Commission (Commission) and its Honorable Members, the Office of Consumer Advocate (OCA) files this Motion for Relief Regarding Ex Parte Communications (Motion), pursuant to 66 Pa. C.S. Section 334(c) and 52 Pa. Code Sections 5.103. In this Motion, the OCA requests that the Commission in its final order in this proceeding or in a separate order: (1) finds that Pennsylvania-American Water Company (PAWC or the Company) engaged in ex parte communications that are strictly prohibited under 66 Pa. C.S. § 334(b)-(c) when it chose to give a video presentation on May 20, 2024 at the annual meeting of the Pennsylvania Chapter of the National Association of Water Companies (NAWC-PA Chapter) to Commission staff invitees and attendees relating to PAWC's receivership of the East Dunkard Water Authority (EDWA); (2) directs PAWC to cure the ex parte communication violation by circulating the video presentation to all the active parties in this proceeding; (3) admonishes PAWC for its attempt to proffer extra-record evidence through strictly prohibited ex parte communications; (4) ensures that the Commission and Commission advisory staff assigned

to this proceeding will not consider the extra-record video presentation as it relates to the issue of PAWC's claim for a management performance adder and its receivership of the EDWA system; and (5) consistent with paragraph 19 of the March 11, 2024 Order on Briefs and Closing of the Record (March 11 Order) issued by the Honorable Deputy Chief Administrative Law Judge Christopher P. Pell and the Honorable Administrative Law Judge (ALJ) John Coogan, assure the parties that the Commission will not consider PAWC's position on its management performance adder claim as it pertains to PAWC's receivership of the EDWA system. In support thereof, the OCA states as follows:

II. BACKGROUND

1. On November 8, 2023, PAWC filed Supplement No. 35 to Tariff Water – PA P.U.C. No 5 and Supplement No. 34 to Tariff Wastewater – PA P.U.C. No. 16, requesting that the Public Utility Commission (Commission) approve its general rate increase requests that would increase the Company's total annual operating revenues by approximately $203.9 million.

2. On December 21, 2023, the Commission suspended the effective date of the proposed tariffs until August 7, 2024, and assigned PAWC's general rate increase requests to the Office of Administrative Law Judge for proceedings and a Recommended Decision.

3. Beginning on March 8, 2024, evidentiary hearings were convened before ALJs Pell and Coogan, where parties identified and moved into the record all evidence supporting their legal and factual claims.

4. On March 11, 2024, ALJs Pell and Coogan issued the Order on Briefs and Closing of the Record, ordering that the record be closed at the conclusion of the evidentiary hearing beginning on March 8, 2024, that parties were advised not to include any extra-record evidence in their briefs, and that parties failing to follow these instructions in the smallest detail will not have their positions considered.

5. Specifically, the ALJs Order stated as follows:

> 17. That the record closed at the conclusion of the evidentiary hearing on March 8, 2024;
>
> 18. That the parties are advised not to include any extra-record evidence in their briefs; and
>
> 19. That if any party fails to follow these instructions in the smallest detail, that party's position will not be considered, regardless of where the record may support it or the position of any other party to this proceeding.

6. Main briefs were filed on March 26, 2024.

7. Reply briefs were filed on April 5, 2024.

8. ALJs Pell and Coogan issued their Recommended Decision on May 7, 2024.

9. Exceptions to the Recommended Decision were filed on May 17, 2024.

10. Reply Exceptions to the Recommended Decision are due to be filed on May 22, 2024.

11. The final order in the instant proceeding is slated to be entered by the Commission at the July 11, 2024, Public Meeting date.

III. LEGAL STANDARD

12. Section 334(b) of the Public Utility Code strictly prohibits "ex parte" communications, stating in relevant part: "No employee, appointee, commissioner or official engaged in the service of, or in any manner connected with the commission shall engage in ex parte communications save to the extent permitted by this part."[1] 66 Pa. C.S. § 334(b).

[1] The phrase "save to the extent permitted in this part" in this sentence does not apply here. That provisions pertains to communications that are permitted under Section 334(c), specifically off-the-record communications " prior to the actual beginning of hearings in a contested on-the-record proceeding when such communications are solely for the purpose of seeking clarification of or corrections in evidentiary materials intended for use in the subsequent hearings." 66 Pa.C.S. § 334(c).

13. Section 334(c) of the Public Utility Code defines "ex parte" communication as "any off-the-record communications to or by any member of the commission, administrative law judge, or employee of the commission, regarding the merits or any fact in issue of any matter pending before the commission in any contested on-the-record proceeding." 66 Pa. C.S. § 334(c).

14. A proceeding is contested and on-the-record if it has been filed and is any "proceeding required by a statute, constitution, published commission rule or regulation or order in a particular case, to be decided on the basis of the record of a commission hearing." 66 Pa. C.S. § 334(c); *Core Communications, Inc. v. Verizon Pennsylvania Inc.*, P-2011-2253650 (Sept. 23, 2011), Order at 7.[2]

15. General rate increase requests brought under Section 1308(d) of the Public Utility Code are required by both statute and the Constitution to be conducted on-the-record and to have hearings. 66 Pa. C.S. § 1308(d); *Barasch v. Pa. PUC*, 546 A.2d 1296, 1302-05 (Pa. Cmwlth. Ct. 1988).

16. The proper remedy for ex parte communications is to circulate all such communications received by the officer in receipt of such communications to all parties to the contested, on-the-record proceeding. *See*, *e.g.*, *Haverstick v. Pa. Office of Att'y Gen.*, 273 A.3d 600, 606 (Pa. Cmwlth. Ct. 2022).

17. Taint or procedural irregularity caused by ex parte communications is "cured" following a hearing before an independent finder of fact who was not tainted by the ex parte communication, as such a hearing does not require deference to the previously tainted finder of fact. *Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1084 (Pa. Cmwlth. 2012), *vacated on other grounds*, 74 A.3d 118 (Pa. 2013).

[2] https://www.puc.pa.gov/pcdocs/1147172.docx.

18. Ex parte communications present procedural due process concerns, as the consideration of *any* evidence provided in an ex parte communication deprives excluded parties of their right to adequate notice that such evidence was being presented and their right to present arguments regarding that evidence. *Picone v. Bangor Area Sch. Dist.*, 936 A.2d 556, 563 (Pa. Cmwlth. Ct. 2007).

19. No evidence can be relied upon or accepted into the record after the record closes, except upon motion made to the presiding officer or Commission which demonstrates good cause shown. 52 Pa. Code § 5.431.

20. It is a vital defect, constituting substantial unfairness, for a party to confer with a finder of fact ex parte and then for the finder of fact to base their conclusion, in part, on that conference without providing other parties the opportunity to know the contents of that conference and present objections to those contents. *Morgan v. U.S.*, 304 U.S. 1, 20, 22 (1938).

21. Consideration of evidence outside the record is an abuse of discretion for a finder of fact when parties had no notice of the consideration of such evidence and no opportunity to respond to that evidence as well as its consideration. *Commonwealth v. Hoover*, 231 A.3d 785, 792-93 (Pa. 2020).

IV. MOTION FOR RELIEF REGARDING EX PARTE COMMUNICATIONS

22. The presentation given by PAWC at the NAWC – PA Chapter annual meeting on May 20, 2024, contained information regarding its managerial performance, capital contributions, operational expenses, and improvements to the EDWA system, which PAWC manages in a receivership appointed by the Commonwealth Court of Pennsylvania, along with asserted improvements to communications to customers served by the EDWA system. The presentation

given by PAWC contained the only video played during the course of presentations throughout the annual meeting.

23. In the instant proceeding, PAWC is requesting up to 25 basis points be added to its cost of equity for management performance and efficiency, including its receivership of EDWA.

24. PAWC did not present any record evidence in this proceeding regarding its management of the EDWA system. Instead, PAWC merely describes the status of the EDWA system prior to PAWC's appointment as receiver and avers that it is committed to assisting troubled systems. PAWC St. 1 at 43-45; PAWC St. 1-R at 14; PAWC St. 15-R at 12.

25. PAWC does not discuss its management of the EDWA system in its Main Brief and mentions that it had been appointed receiver of the EDWA in its Reply Brief. PAWC R.B. at 3, 44. However, such discussion does not include any evidence regarding capital improvements to the system, operational expenses, or compliance of the system or the efficacy of PAWC's management as receiver.

26. However, PAWC cites to EDWA as a reason to award it the 25 basis point adder. Specifically, PAWC states:

> The Commission awarded the same amount in *Aqua 2022* in recognition of that utility's willingness to "answer the call" and provide emergency assistance to various water and wastewater systems that needed substantial improvement, concluding that "it would be inequitable to proceed otherwise" as "there is no provision in the Code that demands utilities exhaust employees or financial resources because of emergencies occasioned by others." Notably, the Commission's Policy Statement on small nonviable water and wastewater systems explicitly endorses rate of return premiums to foster acquisitions of such systems.
>
> …
>
> Most recently, as previously noted, PAWC agreed to act as receiver for the EDWA, after its water treatment plant ceased producing water and all customers were without even nonpotable water for several days for basic sanitary and hygienic purposes, including bathing, dishwashing, and toilet flushing. When PADEP reached out to PAWC, the Company and PADEP jointly applied on an emergency basis for Commission approval for PAWC to be appointed receiver of a municipal

> authority), which the Commission provided, and PAWC has now been appointed receiver.
>
> …
>
> In light of the Company's voluntary actions to address the challenges of small and nonviable water and wastewater systems, its track record of investment and improvement in the systems it has acquired, and its consistently superior performance across a range of service to its customers and the communities in which it operates, the Commission should include an upward adjustment under Section 523 in its ROE determination.

PAWC R.B. at 43-44, 47 (citations omitted).

27. The Recommended Decision in this proceeding only makes mention of the EDWA by way of reference to Public Input Hearing testimony and citation to PAWC's Reply Brief regarding how the Company has been appointed as receiver. R.D. at 48, 174. The Recommended Decision does not discuss capital improvements to the EDWA system or the efficacy of PAWC's management as receiver.

28. The ALJs recommended that the Commission award a 10 basis point adder, in part because: "We also acknowledge PAWC's assertion that it provides service to customers in extraordinary circumstances further supports an upward adjustment." R.D. at 183. At the end of this sentence, the ALJs cited to page 45 of PAWC's Reply Brief. The EDWA project was discussed on page 44 of PAWC's Reply Brief.

29. PAWC's video presentation consisted of factual averments and images regarding PAWC's management of the EDWA water system, including:

a. Claims that EDWA's customers made cries of despair over the state of the system.

b. PAWC made significant capital and operational improvements in the first 60 days to bring the system into compliance with federal and state environmental regulations.

c. PAWC made significant improvements to customer communications.

d. Praise from a Pennsylvania State Senator, referring to PAWC's operations team as a SWAT team.

30. Evidence of the efficacy of PAWC's management of the EDWA system as receiver is not admissible, as it was presented after the close of record and is not otherwise admissible under the Commission's regulations or Pennsylvania Rules of Evidence.

31. The NAWC-PA Chapter annual meeting was, to the best of the OCA's knowledge, open only to those who were invited. Members of the OCA were present by invitation and had to pay a $25 fee to attend.

32. Commission staff were present during the video presentation, including Commission staff who are responsible for advising Commissioners on decisions for proceedings before them, such as the instant proceeding. Such staff included:

a. The Commission's Bureau of Technical Utility Services staff members who provide technical assistance and advice to the ALJs in this proceeding.

b. The Commission's Office of Special Assistance advisors who assist in the preparation of Commission orders and rewrite orders, which are provided to the Commissioners prior to entry at a Public Meeting.

c. Advisors to Commissioners Yanora and Zerfuss and to Vice Chair Barrow.

33. While the OCA was invited and attended during the presentation, not all parties to the instant proceeding were invited to the annual meeting or present for PAWC's presentation.

34. The OCA submits that this presentation constitutes an ex parte communication.

a. PAWC's presentation was given to an invited audience that included employees of the Commission.

b. The presentation pertained to the merits of PAWC's request for a cost of equity adder for management efficiency. *See* PAWC St. 1 at 45 (indicating rate of return premium is appropriate following discussion of receivership of EDWA system and PAWC's voluntary actions to help other systems).

c. The instant proceeding constitutes a contested, on-the-record proceeding, as rate relief requests are quasi-judicial proceedings that involve a substantial property interest and, therefore, entitle all affected parties to a notice and hearing on all matters before the Commission pertaining to the request, once it has been filed. *Barasch*, *supra*.

d. Hearings had been conducted in this proceeding, the record had been closed, and the proceeding is still pending before the Commission. As a result, all factual averments made by any party to this proceeding are off-the-record communications.

35. Ex parte communications are strictly prohibited. 66 Pa. C.S. §§ 334(b)-(c).

36. Absent access to the information provided ex parte to Commission staff at the May 20, 2024 presentation, parties to this proceeding cannot be ensured their opportunity to notice and the presentation of arguments in response to any evidence provided by PAWC in its presentation. *See Hardy*, 38 A.3d at 1084 ("Ex parte communications between a hearing officer and one party, or one party's counsel, are problematic because the excluded party has no reason to be confident that the communication was limited to the [matter stated by the included party].").

37. In prior proceedings before the Commission, Commission staff in receipt of ex parte communications have distributed such communications to the parties to the proceeding to ensure all parties remain appraised of all information provided to Commission staff. *See*, *e.g.*, *Zenmon v. Pa. Power Co.*, C-2022-3030679 (Oct. 27, 2022), Order at n. 1 ("We note that the Complainant sent an email to the Office of Special Assistants on September 16, 2022, which

contained an attachment that the Complainant indicated she had intended to include with her Exceptions when she filed them on September 7, 2022. By email dated September 26, 2022, the Commission's Secretary provided Penn Power's counsel with a copy of the Complainant's email in order to cure an ex parte communication because Penn Power's counsel was not originally included in the Complainant's email correspondence.").[3]

38. In prior proceedings, the Commission has admonished parties who flagrantly violated the Commission's rules of practice and procedure, including inappropriate communications with Commission staff, which deprive participants the full and fair opportunity to litigate their position. *See*, *e.g.*, *App. of Pa. Suburban Water Co.*, A-210025 *et al*., 1993 Pa. PUC LEXIS 143 (Nov. 2,1993), Order at *27 (admonishing a party to the proceeding for sending the ALJ a letter regarding the proceeding, following issuance of their Recommended Decision, for depriving parties an opportunity to participate fairly and fully in the litigation, despite the fact that the letter was not ex parte).

39. Similarly, the OCA submits that the Commission should consider admonishment in this instance given that PAWC is sophisticated legally and technically, and its counsel and management are well versed in the rules of process and procedure. Admonishment would seek to deter similar ex parte communications from occurring in the future. In this regard, the OCA avers that PAWC knew, had reason to know, or should have known that:

a. the instant proceeding was a contested, on-the-record proceeding that was currently pending before the Commission.

b. the information contained in the video and accompanying oral presentation was relevant to the Company's request for a management adder to its rate of return request.

[3] https://www.puc.pa.gov/pcdocs/1762470.pdf.

See PAWC St. 1 at 45 (indicating rate of return premium is appropriate following discussion of PAWC's agreement to enter into a receivership for the EDWA system).

c. PAWC did not present any evidence on the efficacy of its management of or capital improvements to the EDWA system following receipt of receivership. Importantly, the 60-day period referenced in PAWC's video did not elapse until April 8, 2024, after the record had closed in the instant proceeding.

d. PAWC was not obligated to provide a presentation on the EDWA at the NAWC-PA Chapter annual meeting to which Commission staff were specifically invited; PAWC could have elected a myriad of other topics to present on, but elected not to.

e. Commission staff who may influence the outcome of the instant proceeding would be in attendance at the presentation on May 20, 2024 given that such staff were specifically invited to attend and given that the meeting was held in the Commission's Hearing Room 1 of the Keystone Building.

f. presenting information regarding the EDWA system before Commission staff who may influence the outcome of the instant proceeding, and who may consider PAWC's request for a management performance adder in the context of PAWC's receivership of the EDWA system – as PAWC requests in its testimony – constituted an ex parte communication and would be in violation of the Public Utility Code. *See* 66 Pa. C.S. § 334(c).

40. The OCA submits that, to ensure procedural due process is considered for all parties to the instant proceeding, PAWC must be directed to cure the violation by distributing its video presentation to the same, so all parties may have the opportunity to review the information provided to Commission staff who may influence the Commission's decision in this proceeding.

Moreover, other parties besides the OCA may have objections to PAWC's presentation, similar to those of the OCA, and would not have the opportunity to raise such objections absent the ability to review PAWC's presentation.

41. No party filed a request to reopen the record following the close of record on March 8, 2024, and prior to May 20, 2024, the date of PAWC's presentation.

42. The presentation given on May 20, 2024 included evidence beyond the scope of record evidence provided in the instant proceeding. *Supra*.

43. Commission staff were present for the presentation, including staff responsible for the Commission's order on the Exceptions and Reply Exceptions to the ALJs' Recommended Decision in this proceeding. *Supra*.

44. Consideration of extra-record evidence is not permitted under the Commission's regulations and can constitute a due process violation should other parties not have notice of the evidence and consideration of the evidence, as well as the opportunity to present objections to the evidence and its consideration. 52 Pa. Code § 5.431; *Morgan*, *supra*.

45. In prior proceedings, where Commission staff have been in receipt of extra-record evidence offered ex parte, following circulation of the ex parte communication to all parties, the Commission offered in its decision that the information contained in the communication was not considered when reaching the final determination. *See*, *e.g.*, *Zenmon* at n. 1 ("Even if this material had been timely filed, we could not consider it for purposes of rendering a determination herein, because the attachment to the email contains information that is not part of the record before us.").

46. At the threshold of the Commission's ultimate decision in this proceeding, the OCA respectfully requests assurance that no information offered during PAWC's presentation will be

considered by Commission employees when advising the Commission on its decision on the instant proceeding.

47. Such assurance will be consistent with paragraph 19 of the ALJs' March 11 Order issued in this proceeding and fundamental notions of due process. *Supra*.

48. Moreover, ensuring parties to the proceeding that, despite exposure to evidence which was not introduced into the record regarding PAWC's management of the EDWA system, the Commission will rely solely on the record evidence presented prior to the close of record will alleviate concerns that PAWC's presentation has created potential due process violations in the instant proceeding.

49. Furthermore, PAWC's claimed for the management performance adder as premised on its management and receivership of the EDWA should not be considered, which is an appropriate sanction for the attempt to inject extra-record evidence into the instant proceeding through prohibited ex parte communications. *See* March 11 Order, ¶ 19; *Cf.* 52 Pa. Code § 5.372(a)(2) (providing that parties acting in violation of a discovery order can have claims stricken).

V. FURTHER NECESSARY AND PROPER RELIEF

50. The OCA respectfully requests that the Commission consider all further necessary and proper relief as it deems appropriate which will assist the Commission in remedying PAWC's ex parte communication described herein.

VI. CONCLUSION

For the foregoing reasons, the OCA respectfully requests that the Commission grant this Motion and enter an order that (1) finds that Pennsylvania-American Water Company engaged in ex parte communications that are strictly prohibited under 66 Pa.C.S. § 334(b)-(c) when it chose to give a video presentation on May 20, 2024 at the NAWC-PA Chapter annual meeting to Commission staff invitees and attendees at the meeting relating to PAWC's receivership of the EDWA; (2) directs PAWC to cure the ex parte communication violation by circulating said video to all the active parties in this proceeding; (3) admonishes PAWC for its attempt to proffer extra record evidence through strictly prohibited ex part communications; (4) ensures that the Commission and Commission advisory staff assigned to this proceeding will not consider the extra-record presentation as it relates to the issue of PAWC's claim for a management performance adder and its receivership of the EDWA system; and (5) consistent with paragraph 19 of the March 11 Order on Briefs and Closing of the Record (March 11 Order), assure the parties that the Commission will not consider PAWC's position on its management performance adder claim as it pertains to PAWC's receivership of the EDWA system.

Respectfully submitted,

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Dated: May 22, 2024

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	Docket Nos.
v.	:	R-2023-3043189 (Water)
	:	R-2023-3043190 (Wastewater)
Pennsylvania-American Water Company	:	

VERIFICATION

I, Melanie Joy El Atieh, Deputy Consumer Advocate of the Office of Consumer Advocate, hereby state that the facts above set forth in the Motion for Relief of the Office of Consumer Advocate Regarding Ex Parte Communications by Pennsylvania-American Water Company, are true and correct to the best of my knowledge, information, and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

DATED: May 22, 2024

Signature: _*/s/ Melanie Joy El Atieh*_____
Melanie Joy El Atieh

Witness Address:
Office of Consumer Advocate
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