

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held November 19, 1998

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice-Chairman
David W. Rolka ; Dissenting
Nora Mead Brownell, Dissenting - Statement attached
Aaron Wilson, Jr.

In Re: Tariff Provisions That Limit
the Liability of Utilities for Injury or
Damage as a Result of Negligence or
Intentional Torts

Docket No. M-00960882
M-00981209

POLICY STATEMENT

BY THE COMMISSION:

Before the Commission for consideration is a Staff recommendation for a proposed rulemaking proceeding which would prohibit the inclusion of tariff provisions that limit the liability of utilities for injury or damages as a result of negligence or intentional torts. For reasons which are explained below, we shall not undertake a rulemaking, and instead, issue a Policy Statement expressly recognizing that state law permits utilities to limit their liability for interruption or cessation of service.

Background

In order to explain our action, a synopsis of what has occurred in this proceeding is necessary. By Tentative Order entered February 28, 1995, the

Commission notified all jurisdictional utilities with tariff provisions which limit liability for injury or damage as a result of negligence or intentional torts, that the Commission was considering either rescinding or modifying such tariffs. A copy of the Tentative Order was served on the respective associations of each industry, the Office of Consumer Advocate, and the Office of Small Business Advocate.

The Commission received extensive comments in response to the Tentative Order. A review of those comments indicated that tariffs on file by the various utilities addressed liability limitation in disparate ways that did not necessarily conform to case law or reflect any consistent approach.

On March 17, 1997, the Commission entered a Declaratory Order finalizing our Tentative Order. The Declaratory Order provided the guidelines for approving tariffs of utilities which limit liability for negligent acts or omissions and intentional torts. Specifically, the guidelines stated:

1. There is no justification for the Commission to limit liability for damages that result from events not within peculiar Commission expertise and subject to Commission rate-making. Thus, the Commission has no reason to limit liability for competitive services that are not price regulated. It is more difficult to define in advance whether liability limitations should be permitted under various alternative forms of regulation. However, the same principles should apply, so that tariffs limiting liability would not be permissible if the alternative regulatory scheme did not include costs and rates adopted by the Commission.
2. The limitation may apply in the event of interrupted service or property damage only,

and not personal injury. No consumer should be expected to bear the burden of personal injury or death in order to maintain reasonable rates for all consumers.

3. Loss of service or property damage through an "act of God", perhaps through a lightning strike, in which utility action/inaction has played no part in the harm, imposes no utility liability to begin with. The tariff may make this clear.
4. Tariffs may limit liability for conduct that could be found to constitute "negligence" under tort law. Reckless, willful or other more serious misconduct may not be protected. Large utility companies may not limit liability for negligence to an amount less than \$25,000. Small utility companies may not limit their liability for negligence to an amount less than \$500. For the purpose of this Declaratory Order, a "large" company shall be one with gross intrastate annual operating revenues in excess of \$40 million.
5. Even for reasonable service, the liability may be limited, but not totally exculpated. The courts have specifically rejected any limitation on liability that completely exculpates utility action or inaction from exposure to damage claims.

The guidelines were based upon the following analysis:

Specific to the concern of the Commission in instituting the instant inquiry, was the language of the Court in *DeFrancesco v. West Penn Water Company*, 329 Pa. Superior Ct. 508, 478 A.2d 1295 (1984) ("*DeFrancesco*").

In *DeFrancesco*, the Court determined that a tariff provision purporting to *exculpate* a utility from liability rather than *limit* such liability, was void as against public policy. On consideration of the legal and policy considerations involved, we note the following: The Commission does not have jurisdiction to determine legal liability or to award damages. A utility customer with a damage claim against a fixed utility generally must sue in court to pursue a claim. Thus, it seems rather incongruous at first, that the Commission would consider limiting liability in certain damage actions since such limitations effectively set the amount of recoverable damages.

However, the Commission does have the authority and responsibility to define reasonable service. 66 Pa. C.S. §1501; 1502. The Commission approves the cost of providing a utility system that is designed to provide reasonable service at reasonable rates -- not perfect service without regard to cost. Since reasonable service may result in occasional loss of service or property damage, the Pennsylvania Superior Court has issued two decisions permitting the Commission to limit liability in certain narrowly-defined circumstances. *See DeFrancesco, supra, also Behrend v. Bell*, 242 Pa. Superior Ct. 47, 363 A.2d 1752 (1976), *vacated on other grounds*, 473 Pa. 320, 374 A.2d 536 (1977).²

² In addition, the Commission has the authority to impose fines on a utility for unreasonable service. 66 Pa. C.S. §3301.

The Pennsylvania Supreme Court has not addressed this issue directly and the caselaw does not produce complete and clear directives. Significantly, the caselaw does not suggest any circumstances in which the Commission must adopt tariffs limiting liability. Rather, the existing caselaw provides examples of attempted limitations or liability that will be considered by the courts to be void and unenforceable

as against public policy. See generally, *Poorbaugh v. Public Utility Commission*, 666 A.2d 744 (1995). Unenforceable tariffs should not be permitted to discourage consumers from bringing valid damage claims to court.

The question then becomes what liability limitations are appropriate? The basic principle underlying judicial acceptance of Commission intervention in "damage" actions through liability limitations tariffs is that the Commission can do a better job than the courts in defining the boundary between "reasonable" and unnecessarily expensive, i.e., "gold-plated" service that may have prevented damage. This rationale holds the view that utilities, their shareholders, and ultimately ratepayers, should not be exposed to unlimited liability when the utility is providing reasonable service or damage occurs as a result of other events not within utility control.

For example, an electric utility may be able to spend X dollars to install a distribution system that will experience occasional power surges that could damage property or 10X dollars to install a higher quality system that could prevent almost all damaging power surges, perhaps by installing wire underground. The Commission has the responsibility to determine what quality of service is reasonable under the circumstances, balancing the risk and severity of damage to individual customers and the increased cost to all customers through regulated rates. Such judgments are inherent in Commission decisions concerning reasonable service and rates, even if they also impact claims for damages. When such decisions are made, the Commission makes a determination that the public interest of lower cost service outweighs the potential private harm. This is the underlying rationale to permit tariffs that limit liability in some circumstances, and it is a rationale which imposes a heavy burden on the

Commission to ensure that individual consumers are not unreasonably burdened.

Thus, a utility may file a tariff indicating that it shall endeavor to provide reasonable service to its customers but does not guarantee perfect service without interruption or damage to property. A utility may file a tariff limiting its liability in the event that, while providing reasonable service, a customer experiences service interruption or property damage.

This rationale does not provide justification for a utility to file a tariff that limits liability in the event of unreasonable service, negligence or any other culpable act or omission. In proceedings before the Commission to determine whether a utility act or omission has been reasonable, tort terms such as "negligent", "reckless", or "willful misconduct" are sometimes used. Further, such terms are used in several existing tariffs limiting liability. "Negligence" is defined by Black Law Dictionary as "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs would do, or the doing of something which a reasonable or prudent man would not do." Consequently, a "negligent" act of omission should be "unreasonable" under public utility law. "Reckless", "willful" or other characterizations of more serious misconduct certainly would be unreasonable as well. However, the Commission finds a separate justification in that the time has come to form a majority to resolve this [March 17, 1997 Declaratory Order] docket. It therefore is appropriate to permit limitations on liability for negligent acts in certain cases.

(March 17, 1997 Declaratory Order, slip op., pp. 6-8).

On March 11, 1998, in light of various petitions seeking reconsideration of the Declaratory Order, we vacated said Order and agreed to initiate a rulemaking to address the issue of limitation of liability in utility tariffs. Although we determined to initiate a rulemaking, we did not abandon the above-cited analysis of the March 17, 1997 Declaratory Order.

Discussion

After extensive reflection, we are now of the opinion that this issue should not be addressed by a rulemaking. The proposed rulemaking before us is not consistent with previous findings and conclusions of this Commission which found that utilities can limit their liability. We cannot undertake the promulgation of regulations which contradict those previous findings and conclusions. Moreover, as utilities enter into a new competitive environment, more regulations are not a preferable choice.

A rulemaking has the potential of treating all utilities as "one size fits all" -- depending on whether the utility is classified as large or small. We have carefully reviewed the comments that were filed to the February 28, 1995 Tentative Order and have concluded that each utility should be treated on a case by case basis.¹

By this Order, we shall issue a Policy Statement which recognizes that state law permits utilities to limit their liability for interruption or cessation of service. If a utility seeks to place language in its tariff that limits its liability for interruption or cessation of service, a tariff filing shall be made with the

¹ However, we would note that the same protection that potentially exists for incumbent local exchange companies would also be available to competitive local exchange carriers.

Commission. The dollar amount should be company-specific and the company must substantiate the dollar amount. Also, the tariff filing should be served on the Office of Consumer Advocate and on the Office of Small Business Advocate.

For the foregoing reasons, the Commission, hereby, adopts the attached Policy Statement recognizing that state law permits utilities to limit their liability. Accordingly, pursuant to 66 Pa. C.S. §§501, 1301, the Commonwealth Documents Law, 45 P.S. §§1201, *et seq.*, we hereby adopt the statement of policy in the manner set forth in Annex A; **THEREFORE,**

IT IS ORDERED:

1. That our Order entered March 11, 1998, at this docket is hereby modified and rescinded consistent with the discussion in the body of this Order.
2. That the Policy Statement Re: Tariff Provisions That Limit the Liability of Utilities for Injury or Damage as a Result of Negligence or Intentional Torts, set forth in Annex A to this Order, is hereby adopted.
3. That the Secretary shall duly certify this Order and Annex A and deposit them with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin, as written, pursuant to 45 Pa. C.S. §727 (relating to matter not required to be published).
4. That the Secretary shall serve a copy of this Order and Annex A, and any accompanying statements, upon the Office of Consumer Advocate, the

Office of Small Business Advocate, and all parties who filed comments at this docket.

5. That the Secretary shall submit this Order and Annex A to the Governor's Budget Office for review of fiscal impact.

6. That this Policy Statement shall be effective upon publication in the Pennsylvania Bulletin.

7. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Teri Mathias, Office of Special Assistants, at (717) 787-8039. The contact persons for this matter are Cheryl Walker Davis, Director, Office of Special Assistants, and Alphonso Arnold, (717)-787-1827.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: **NOV 18 1998**

ORDER ENTERED: **JAN 21 1999**

ANNEX A

TITLE 52. PUBLIC UTILITIES
PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION
SUBPART C - FIXED SERVICE UTILITIES
CHAPTER 69 -- GENERAL ORDERS, POLICY STATEMENTS
AND GUIDELINES ON FIXED UTILITIES

**POLICY STATEMENT ON: TARIFF PROVISIONS THAT LIMIT THE
Liability OF UTILITIES FOR INJURY OR DAMAGE AS A RESULT OF
NEGLIGENCE OR INTENTIONAL TORTS**

§69. 87 Tariff provisions that limit the liability of utilities for injury or damage as a result of negligence or intentional torts -- Statement of Policy

The Commission, after review of applicable state law, and on consideration of the various policy considerations relative to the inclusion in tariffs of provisions which limit the liability of utilities for injury or damages as a result of negligence or intentional torts, finds that state law permits utilities to limit their liability for interruption or cessation of service. If a utility seeks to place such language in its tariff, a tariff filing should be made pursuant to 66 Pa. C.S. §1308, and should include: (1) a company-specific dollar amount for the proposed limitation and (2) work papers to substantiate the dollar amount. A copy of the tariff filing should be served on the Office of Consumer Advocate and on the Office of Small Business Advocate.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

PROPOSED RULEMAKING PROHIBITING
TARIFF PROVISIONS THAT LIMIT THE
LIABILITY OF UTILITIES FOR INJURY
OR DAMAGES AS A RESULT OF
NEGLIGENCE OR INTENTIONAL TORTS

PUBLIC MEETING
NOVEMBER 19, 1998

MAY-98-L-35*

DOCKET NO. M-00981209

M-00960882

STATEMENT OF COMMISSIONER NORA MEAD BROWNELL

Limitations on liability in any business or residential context is a difficult issue, deserving of a thorough opportunity for comment and debate. As the Commission reviews this matter, the potential impacts on residential consumers, small business, commercial and industrial customers, as well as the utilities themselves, must be carefully considered. I am particularly concerned about the effects that Commission approved limitations may have on residential customers and the small business community. In addition, the Law Bureau report suggests that there may be a question as to whether such limitations are consistent with the Public Utility Code in the first instance.

All of these concerns demand that this matter should be given full and complete debate. That is what the staff recommendation would accomplish. By advancing this matter in the context of a proposed rulemaking, the staff recommendation moves the issue to publication, comment from all interested persons and review by the Commission's oversight committees in the General Assembly, the Attorney General and the Independent Regulatory Review Commission.

My prior vote in this matter supported the initiation of a proposed rulemaking in order to provide for full debate and review of this very serious issue. Consistent with that action, I respectfully dissent from the Motion.

11/19/98
DATE

Nora Mead Brownell
NORA MEAD BROWNELL
COMMISSIONER