

**Reger  
Rizzo  
& Darnall** LLP  
ATTORNEYS AT LAW

CIRA CENTRE, 13<sup>TH</sup> FLOOR  
2929 ARCH STREET  
PHILADELPHIA, PA 19104-2899  
TEL: 215.495.6500  
FAX: 215.495.6600  
[www.regerlaw.com](http://www.regerlaw.com)

MARGARET A. MORRIS, ESQUIRE  
DIRECT DIAL: (215) 495-6524  
E-MAIL: [mmorris@regerlaw.com](mailto:mmorris@regerlaw.com)

November 20, 2009

**VIA ELECTRONIC FILING**

James J. McNulty, Esquire  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
P.O. Box 3265  
Harrisburg, PA 17105

**Re: Docket No. C-2009-2132966  
Edward F. Koehler v. Aqua Pennsylvania, Inc.  
Preliminary Objections of Aqua Pennsylvania**

Dear Mr. McNulty:

Enclosed for filing, please find the original Preliminary Objections of Aqua Pennsylvania, Inc., filed electronically on this date in the above-captioned proceeding.

As indicated on the Certificate of Service, a copy of the Answer has been provided to the Complainant in the matter indicated.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP

  
Margaret A. Morris, Esquire

MAM/jmm  
Enclosure

cc: Mr. Edward F. Koehler [w/enc.]

**Re: Docket No. C-2009-2132966  
Edward F. Koehler v. Aqua Pennsylvania, Inc.  
Preliminary Objections of Aqua Pennsylvania,  
Inc.**

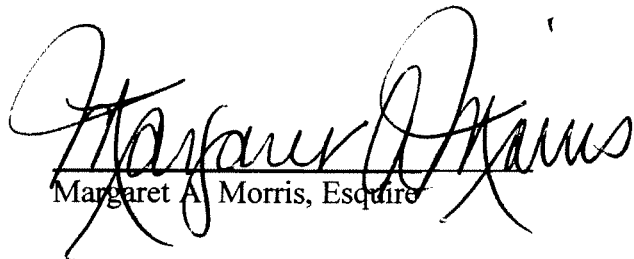
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served upon the following person on the attached service list, in the manner indicated, in accordance with the requirements of §1.54 (relating to service by a participant).

**Via First Class Mail and E-mail**

Edward F. Koehler  
5 Shepherds Way  
Glenside, PA 19038  
[ekoehler@rve.com](mailto:ekoehler@rve.com)

Dated: November 20, 2009

  
Margaret A. Morris, Esquire





330j-330j-10; 36 P.S. §§721.1-72.7. The back flow prevention device at the Complainant's property was installed in 1999.

4. The mandatory installation and annual inspection of the back flow protection device is required to comply with Federal and State Safe Drinking Water Act regulations, Occupations Safety and Health Standards and the Title 25, Chapter 109 of the Pennsylvania Code. The inspection and testing of the back flow prevention device must be performed by a certified tester.

5. The Commission does not have the requisite authority regarding the annual testing regulations developed by DEP to ensure that water quality is not compromised.

B. Procedural History

6. On September 17, 2009, the Complainant filed a formal Complaint with the Commission under Docket No. C-2009-2132966, a copy of which is attached hereto as Exhibit "A".

7. The Complainant seeks a hearing, *inter alia*, before the Commission to object to the mandatory testing requirement of DEP alleging that it is "a *de facto* rate increase of 50%." Complaint at ¶ 4.

C. The Complaint Should Be Dismissed Since The Commission Does Not Possess The Requisite Authority Regarding The Annual Testing Regulations Developed By The DEP To Ensure That Water Quality Is Not Compromised.

8. Since the Commission is a creature of statute, it has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication. *Allegheny County Port Authority v. PA P.U.C.*, 427 Pa. 562, 237 A.2d 602 (1967).

9. The enforcement and remedial powers of the Commission, although formidable, are not those of a court. The Commission is empowered to correct, by regulation or order abuses in the provision of service. *Feingold v. Bell of Pennsylvania*, 447 Pa. 1, 383 A.2d 791, 794 (1972).

10. The remedial and enforcement powers vested in the Commission by the Public Utility Law were designed to allow the Commission to enforce its orders and regulations, but not to empower the PUC to rule on objections to the water quality requirements of the DEP.

11. In the instant matter, the Complainant has improperly objected to the DEP's testing requirements.

12. The Commission has previously held that it did not have jurisdiction over the mandatory testing requirement. In *Polites v. Aqua PA*,<sup>1</sup> a copy of which is attached as Exhibit "B", the Commission adopted the Initial Decision which dismissed the complaint stating that the enforcement of federal and state law is specifically vested in the DEP and the Federal Environmental Protection Agency. (I.D. at 4-5). Specifically the Commission stated:

"The testing requirements the Complainant is challenging in this instance were placed into Aqua's Tariff to implement recommendations of the DEP intended to maintain water quality within Aqua's water distribution system. . . [T]he additional requirements within Aqua's Tariff pertaining to testing are based upon the water quality requirements of the DEP."

*Polites Order* at 6.

13. The *Polites Order* was affirmed by the Commonwealth Court,<sup>2</sup> which stated that "any matters affecting water quality, such as backflow devices, are within [EAP] jurisdiction, not

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<sup>1</sup> Docket No. C-20055157, entered November 13, 2006

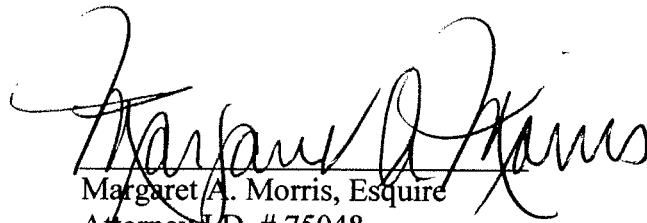
<sup>2</sup> 928 A.2d 388 (2007)

the [PUC's], whose utilities provide water service.” A copy of the Commonwealth Court’s decision is attached as Exhibit “C”.

14. Therefore, the Complaint, which objects to the testing of backflow devices should be dismissed with prejudice in the absence of a hearing.

**WHEREFORE**, for the foregoing reasons, Aqua Pennsylvania, Inc. respectfully requests that this Honorable Court, in the absence of a hearing, dismiss with prejudice the Formal Complaint which objects to the DEP’s requirement for annual testing of back flow devices.

Respectfully submitted,



Margaret A. Morris, Esquire  
Attorney P.D. # 75048  
Cira Centre, 13<sup>th</sup> Floor  
2929 Arch Street  
Philadelphia, PA 19104  
(215) 495-6524 (voice)  
(215) 495-6600 (fax)  
[mmorris@regerlaw.com](mailto:mmorris@regerlaw.com)

Dated: November 20, 2009

Counsel for Aqua Pennsylvania, Inc.

*Edward F. Koehler v Aqua Pennsylvania, Inc.*  
Docket No. Docket No. C-2009-2132966

## **EXHIBIT A**

**Formal Complaint filed September 17, 2009**



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

*Received  
10-5-09*

IN REPLY PLEASE  
REFER TO OUR FILE

**DATE SERVED: SEPTEMBER 30, 2009**

C-2009-2132966

AQUA PENNSYLVANIA INC  
NICHOLAS DEBENEDICTIS CHAIRMAN  
762 LANCASTER AVE  
BRYN MAWR PA 19010

Dear Mr. DeBenedictis:

A complaint has been filed against you before the Pennsylvania Public Utility Commission by Edward F Koehler. To defend yourself against the claims stated in the following pages, you must act within twenty (20) days by filing in writing with the Commission, either personally or through your attorney, your defenses or objections to the claims stated against you. Or, you may satisfy the complaint by settling the matter with the Complainant and submitting proof of settlement to the Commission within twenty (20) days.

IF YOU FAIL TO RESPOND WITHIN TWENTY (20) DAYS, THE CASE MAY GO FORWARD IN YOUR ABSENCE AND A JUDGEMENT MAY BE ENTERED AGAINST YOU BY THE COMMISSION WITHOUT FURTHER NOTICE.

#### **CUSTOMER OF A UTILITY**

**A payment schedule may be prescribed or a termination of utility services may be authorized. You may lose money or property or other rights important to you.**

#### **COMPANY/UTILITY**

**An Administrative Law Judge may revoke or suspend any certificate or permit held by you, or impose a fine, or any other appropriate penalty or remedy authorized by the Public Utility Code. You may lose money or property or other rights important to you.**

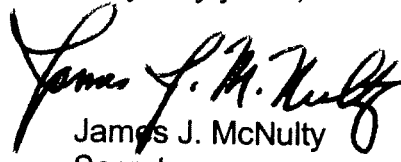
Detailed instructions on how to proceed are contained in the attached pages. You are advised to read them carefully.

SEPTEMBER 30, 2009

Unless you are a corporation or other organization, you may proceed without a lawyer. However, if you want a lawyer and do not have one or cannot afford one, the office listed below can tell you where you can get legal help:

Pennsylvania Lawyer Referral Service  
Pennsylvania Bar Association  
P.O. Box 186  
Harrisburg, PA 17108  
(800) 692-7375

Very truly yours,

  
James J. McNulty  
Secretary

DJ

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**DATE SERVED: SEPTEMBER 30, 2009**

**EDWARD F KOEHLER**  
Complainant

v.

**AQUA PENNSYLVANIA, INC.**  
Respondent

Complaint Docket  
No: C-2009-2132966

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**FORMAL COMPLAINT NOTICE TO RESPONDENT TO ANSWER OR SATISFY**

---

**TO: AQUA PENNSYLVANIA, INC.**

**TAKE NOTICE:**

That a complaint in the above entitled matter, of which the attached is a true and correct copy, has been presented and filed of record with the Pennsylvania Public Utility Commission. Section 702 of the Public Utility Code, 66 Pa. C.S. Section 702, requires the Commission to serve on each party named in a complaint a copy of the complaint and notice calling upon each party to satisfy the complaint, or to answer the same in writing within a specified time; THEREFORE,

1. You have twenty (20) days from the date on which this complaint is served to either satisfy this complaint or to file with the **Secretary of the Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265**, an answer (original and three copies), in writing, under oath, which, as required by Section 5.61 of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 5.61, either affirms or specifically denies the allegations in this complaint. You must also serve a copy of the answer upon the complainant. The date of service is the mailing date as indicated by the date at the top of this Notice. Section 1.56(a) of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 1.56(a).

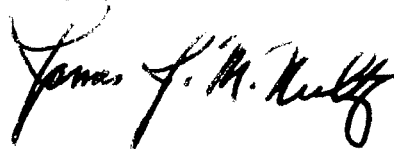
2. If you fail to either satisfy this complaint or to file answer or other responsive pleading within twenty (20) days, you will be deemed to have admitted all the allegations in this complaint in accordance with Section 5.61 of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Section 5.61. In that event, the Commission may, without hearing, enter an order which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C.S. Section 101, et seq.; and, if

you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

3. If you elect to satisfy this complaint you must file, within twenty (20) days from the date on which this complaint is served, affidavits executed by each complainant that this complaint has been satisfied. Such affidavits must describe the basis on which this complaint was satisfied; any settlement agreement between the parties must be reduced to writing and attached to the affidavit. Such affidavits are to be filed with the Secretary of the Commission at the address set forth in paragraph 1. Upon receipt of affidavits of satisfaction from all complainants, this complaint may be dismissed by the Commission in accordance with Section 703(a) of the Public Utility Code, 66 Pa. C.S. Section 703(a), unless the Commission determines that such dismissal would be contrary to the public interest, in which event the Commission may direct that hearings be held upon the complaint.

4. If you file an answer which admits the allegations in this complaint, or which fails to specifically deny the allegations in this complaint, the Commission may, without hearing, enter an order which either revokes or suspends any certificate held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq.; and, if you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

5. If you file a timely answer which specifically denies the allegations in this complaint, or which raises material questions of law or fact, this matter shall be referred to the Office of Administrative Law Judge for hearing and decision. If, after hearing on the issues raised by that answer, you are found to have committed any of the violations alleged in the complaint, the Administrative Law Judge may render a decision which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq.; and, if you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. In the imposition of a penalty after a hearing the Administrative Law Judge is not bound by the relief sought by the complainant in paragraph 4 of the attached complaint.



James J. McNulty  
Secretary

(SEAL)

Certified Mail  
Return Receipt Requested

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Formal Complaint Form

Please print in ink or type.

1. CUSTOMER (COMPLAINANT) INFORMATION

3-2009-2132466

Your name, mailing address, county, telephone number, utility account number and service address:

Name Edward F. Koehler

Street/P.O. Box 5 Shepherds Way Apt #

City Glenside State Pa Zip 19038

County Montgomery

Daytime Telephone Number Where We Can Contact You: (610) 940 1050 x 522

E-mail Address (optional): EKOehler@RVE.COM

Utility Account Number (from your bill)

If your complaint involves utility service provided to a different address than your mailing address, please list this information below.

Name

Street/P.O. Box Same

City State Zip

COPY

2. FULL NAME OF UTILITY COMPANY (RESPONDENT):

Aqua Pa

3. TYPE OF UTILITY (check one)

ELECTRIC

GAS

WATER

TELEPHONE (local, long distance)

STEAM HEAT

WASTE WATER

MOTOR CARRIER

(e.g., taxi, moving company, limousine)

RECEIVED 2009 SEP 17 AM 9:15 PA P.U.C. SECRETARY'S BUREAU

4. **COMPLAINT** (check one)

A. **In general, what is your complaint?**

- I want to oppose the company's proposed rate increase.
- There are incorrect charges on my bill.
- There is a reliability, safety or quality problem with my utility service.
- I received a notice that my utility service is being terminated.
- I would like a payment agreement.
- Other (explain). *The Backflow Preventer Yearly Check is a de facto Rate increase of 50%*

B. **State the facts of your complaint.**

Include any specific dates, times or places that may be important. If the complaint is about a bill, tell us about any charges that you believe are not correct. Use additional paper if you need more space. Provide copies of all relevant documents you believe will support your complaint.

5. **RELIEF**

How do you want your complaint to be resolved? Use additional paper if you need more space.

*Aqua did not live up to our agreement reached last Year -*

6. PROTECTION FROM ABUSE

Answer the following question if your complaint is against a natural gas distribution utility, an electric distribution utility or a water distribution utility **AND** your complaint is about a billing problem, a request to receive service, a security deposit request, termination of service or a request for a payment agreement.

Has a court granted a "Protection from Abuse" order for your personal safety or welfare?

YES

NO

7. PRIOR UTILITY CONTACT

Answer the following question only if you are a residential customer and your complaint is against an electric distribution utility, natural gas distribution utility or a water distribution utility.

Have you spoken to a utility company representative about this complaint?

YES (includes appeals of BCS determinations)  *Email & Phone Message*

NO

If you tried to, but could not speak to a utility company representative about your complaint, please explain why.

8. LEGAL REPRESENTATION (IF ANY)

If you are represented by a lawyer In this matter you must provide your lawyer's name, address, telephone number, and e-mail address, if known.

Lawyer's Name \_\_\_\_\_

Street \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Area Code/Phone Number \_\_\_\_\_

E-mail Address (If Known) \_\_\_\_\_

9. VERIFICATION AND SIGNATURE

You must print or type your name below on the line provided for the verification paragraph, and you must sign and date (in ink) this form on the lines provided.

Verification:

I Edward F. Koehler, hereby state that the facts above set forth are true and correct (or 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).

Edward F. Koehler  
(Signature)

Sept 14, 2009  
(Date)

\_\_\_\_\_  
Title of authorized employee or officer

10. FILING

Please return the completed form to one of the addresses listed below:

If using U.S. Postal Service:

If using overnight delivery service:

Secretary Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265	Secretary Pennsylvania Public Utility Commission 400 North Street Commonwealth Keystone Building, 2 <sup>nd</sup> Floor Harrisburg, Pennsylvania 17120
---	--

Facsimiles and/or electronic filings of the complaint will not be accepted.

If you have any questions about filling out this form, please contact the Secretary's Bureau at 717-772-7777.

**Keep a copy of your complaint for your records.**

FORM UCGD 15 (Rev. 06/09)  
COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265  
HARRISBURG, PA 17105-3265

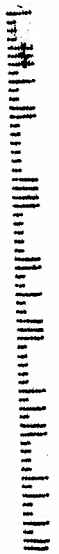
CA



7160 3901 9843 2782 8312  
Return Receipt Requested

AQUA PENNSYLVANIA INC  
NICHOLAS DEBENEDICTIS CHAIRMAN  
762 LANCASTER AVENUE  
BRYN MAWR PA 19010

1901083402 0023



*Edward F. Koehler v Aqua Pennsylvania, Inc.*  
Docket No. Docket No. C-2009-2132966

## **EXHIBIT B**

*Polites v Aqua PA*  
Docket No. C-20055157, entered November 13, 2006

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

Public Meeting held November 9, 2006

Commissioners Present:

Wendell F. Holland, Chairman  
James H. Cawley, Vice Chairman  
Kim Pizzingrilli  
Terrance J. Fitzpatrick

Constantine N. Polites

C-20055157

v.

Aqua Pennsylvania, Inc.

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for consideration and disposition are the Exceptions of Constantine N. Polites (Complainant), filed on May 30, 2006, to the Initial Decision of Administrative Law Judge (ALJ) Ky Van Nguyen, which was issued on May 11, 2006, in the above-captioned proceeding. Reply Exceptions were filed by Aqua Pennsylvania, Inc. (Aqua or Company) on June 12, 2006.

**History of the Proceeding**

On July 18, 2005, the Complainant filed a Formal Complaint (Complaint) against Aqua wherein he challenged the test procedures used by Aqua in regard to the annual inspection of his backflow valve. The Complainant requested that the

Commission require Aqua to amend its tariff to exempt all commercial/industrial users, whose operations and use of water are similar to a residential user, from the annual inspection of their backflow prevention valves by a certified inspector. The Complainant proposes that such customers be permitted to assume personal liability for the maintenance and annual testing of the backflow valves. While Aqua's tariff requires a pressure differential test performed by a certified inspector, the Complainant proposed a visual test that could be performed annually by the customer.

On October 14, 2005, Aqua filed an Answer to the Complaint and New Matter in which it denied the Complainant's allegations. Aqua noted that the Company requires that the testing of the backflow protection device be completed by a certified tester in accordance with requirements of the Pennsylvania Department of Environmental Protection (DEP) and the Company's Tariff. On this same date, Aqua also filed a Motion to Dismiss, wherein it requested that the Complaint be dismissed with prejudice.

By Order issued on December 8, 2005, Chief Administrative Law Judge Veronica A. Smith denied Aqua's Motion to Dismiss.

On February 7, 2006, a hearing was held by the ALJ. The Complainant appeared *pro se*, and Aqua was represented by counsel. Aqua submitted a Brief on March 7, 2006, and the Complainant filed a Response to Brief of Aqua on March 24, 2006.

On May 11, 2006, the ALJ issued an Initial Decision wherein he recommended, *inter alia*, that the Complaint be dismissed because the Commission does not have jurisdiction to adjudicate a dispute over a requirement of inspecting a cross connection control/backflow prevention device by a certified tester to maintain the purity of the public water supply system. The Complainant filed Exceptions to the Initial Decision on May 30, 2006. Aqua filed Reply Exceptions on June 12, 2006.

## Discussion

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a), which provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

As a preliminary matter, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pennsylvania Public Utility Commission*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

The ALJ made five Findings of Fact and reached two Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In his Initial Decision, the ALJ found that the Complainant is a commercial customer and, as such, is required to install and maintain a backflow prevention device approved by Aqua at his business location. (Findings of Fact Nos. 1 and 2). The ALJ noted that the purpose of a backflow prevention device is to isolate within a consumer’s water system contaminants or pollutants which could backflow through the service connection

into the public water supply system. (Finding of Fact No. 3). The ALJ also noted that Aqua's tariff requires an annual inspection of the backflow prevention device by a certified tester. (Finding of Fact No. 4).

The ALJ determined that the requirement of installing a backflow prevention device falls within the Commission's jurisdiction under 66 Pa. C.S. §§ 1501 and 1505 related to hazard to public safety due to use of utility facilities. However, the ALJ further concluded that the Commission does not have jurisdiction to adjudicate a dispute over a requirement of inspecting a cross connection control/backflow prevention device by a certified tester to maintain the purity of the public water supply system. The ALJ noted that the purpose of installing a backflow prevention device is to maintain the purity or quality of the Company's water supply and that water quality in Pennsylvania is statutorily regulated by the provisions of the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1 – 721.17 and the Federal Safety Drinking Water Act, 42 U.S.C. §§ 300j – 330j-10. According to the ALJ, enforcement of these statutes is specifically vested in the DEP and the Federal Environmental Protection Agency. Therefore, the ALJ recommended that the Complaint be dismissed. (I.D. at 4-5).

In his Exceptions, the Complainant reiterates his Complaint that users whose operations are similar to residential users should be treated like residential users and not be required to undergo annual testing of the backflow valve. The Complainant also maintains that for those whose operations require a test, a simple test involving reversing the flow of water should be an acceptable test for the proper functioning of the backflow valve. Additionally, the Complainant states that there should be no qualifications required for the individual performing this test. Finally, the Complainant avers that it is the Commission that approves or disapproves the utilities' tariffs, so this should be the proper forum to modify those tariffs. (Exc. at 1-2).

In reply, Aqua notes that the Complainant's purported Exceptions fail to observe the requirements of 52 Pa.Code § 5.533, including the failure to identify the finding of fact or conclusion of law from which each exception is taken. Aqua submits that, rather than addressing the Initial Decision, the Complainant simply restates arguments he offered at hearing and in his brief. (R. Exc. at 2).

Nevertheless, Aqua does respond to Complainant's purported Exceptions. Aqua maintains that the Complainant's position that he should be permitted to conduct his own inspection and testing of the backflow control device is unreasonable and not supported by fact or law. In support of this position, Aqua states that its Tariff requires the backflow prevention device at a commercial location to be tested on an annual basis by a certified tester. Aqua points out that Part VII of the Public Water Supply Manual published by the DEP mandates that tests of backflow prevention devices must be conducted by certified testers. Aqua opines that it is not appropriate, nor in the public interest, to exempt commercial locations from the annual certification and annual testing requirements of the Company's Tariff. Aqua argues that that the Complainant failed to support his claim that users whose operations are similar to residential users should not be subject to annual testing. Furthermore, Aqua asserts that the Complainant did not demonstrate that the tariff requirement is in any way unreasonable or unjust. (R. Exc. at 3-4).

Next, Aqua responds that a visual test, as proposed by the Complainant that involves reversing the flow of water, is not a permissible or proper test for a backflow prevention device. Aqua avers that the appropriate test for the type of backflow prevention device installed at the Complainant's property is a pressure differential test. It is this test which is recognized by the American Society of Sanitary Engineers and the New England Water Works Association and is also the test recommended by the manufacturer of the backflow prevention device. Aqua maintains that this test is a complex and specialized procedure that should be performed only by a certified tester after proper training. According to Aqua, the Complainant's suggestion that there should be no qualifications for

the testing is contrary to common logic. Aqua avers that customers cannot be relied upon to conduct the testing of devices which are necessary to protect the public water supply and public health. Aqua points out, however, that some customers have taken a course to become certified testers and that the Complainant should not be absolved of the certification process. (R. Exc. at 4-5).

Upon review and consideration of the record evidence, we shall deny the Complainant's Exceptions. We find that the Complainant failed to meet his burden of proof in this matter, and his Exceptions are not supported by record evidence. We are in agreement with the ALJ that this Commission does not have jurisdiction over a matter that affects the quality of the water supplied by Aqua. The testing requirements the Complainant is challenging in this instance were placed into Aqua's Tariff to implement recommendations of the DEP intended to maintain water quality within Aqua's water distribution system. While we agree with the ALJ that this Commission does have jurisdiction over the requirement of installing a backflow prevention device, the additional requirements within Aqua's Tariff pertaining to testing are based upon the water quality requirements of the DEP. In the instant Complaint, the Complainant is not challenging the requirement to install a backflow prevention device, but the annual testing regulations developed by the DEP to ensure that water quality is not compromised. As such, we shall deny the Complainant's Exceptions.

### **Conclusion**

Based upon the foregoing discussion, we shall deny the Complainant's Exceptions and adopt the ALJ's Initial Decision which dismisses the Complaint;  
**THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of Constantine N. Polites to the Initial Decision of Administrative Law Judge Ky Van Nguyen are denied consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Ky Van Nguyen in the above referenced proceeding is adopted.
3. That the Complaint of Constantine N. Polites against Aqua Pennsylvania, Inc. is dismissed.
4. That this proceeding be marked closed.

**BY THE COMMISSION,**

James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: November 9, 2006

ORDER ENTERED: November 13, 2006

*Edward F. Koehler v Aqua Pennsylvania, Inc.*  
Docket No. Docket No. C-2009-2132966

## **EXHIBIT C**

*Polites v Aqua PA*  
**Commonwealth Court Decision**  
**928 A.2d 388 (2007)**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Constantine N. Polites,	:
Petitioner	:
	:
v.	: No. 83 C.D. 2007
	: Submitted: May 11, 2007
Pennsylvania Public Utility	:
Commission,	:
Respondent	:

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION BY JUDGE PELLEGRINI      FILED: June 11, 2007

Constantine N. Polites (Complainant) appeals *pro se* from an order of the Pennsylvania Public Utility Commission (Commission) dismissing his complaint against Aqua Pennsylvania, Inc. (Provider) because it lacked jurisdiction to adjudicate his complaint regarding the testing of backflow devices.

Complainant operated a commercial warehouse and because of his commercial use of water, was required to install and maintain on his main service line a backflow prevention device approved by Provider. This device was used to isolate contaminants or pollutants within Complainant's water system which could potentially backflow through his service connection and into the public water supply system. To ensure the proper functioning of the backflow devices, Provider's tariff (Tariff) required an annual inspection of the devices by a certified

tester at the customer's expense.<sup>1</sup> Although any person could become a tester, to be certified, an individual must have completed a 40-hour training course and passed a written examination and field test.<sup>2</sup>

Disputing the Tariff's testing method, Complainant filed a complaint against Provider and requested that Provider amend the Tariff to exempt commercial consumers, whose operations are similar to residential users, from the annual testing scheme because residential consumers were not required to undergo backflow device testing. In place of the certified testing, Complainant proposed that small commercial consumers assume personal liability for the maintenance and annual testing of the devices. He suggested that testing could be performed by

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<sup>1</sup> The Tariff provision provides, in pertinent part:

[Aqua] shall have the right, upon reasonable notice and at reasonable times, to conduct surveys and investigations of water use and practices at the Customer's premises to determine whether there are actual or potential cross-connections in the Customer's water system through which contaminants or pollutants could back flow into the public water system...The procedure for installation and maintenance of such device shall be in conformance with all federal, state and local municipal ordinances, rules and regulations if such exist and shall be in compliance with the Pennsylvania Safe Drinking Water Act and the regulations promulgated thereunder. In addition, the Customer shall be required, at such Customer's expense, to comply with the testing and overhauling requirements of the Company for such devices. The Company may authorize persons (with appropriate training or certification) to inspect premises, perform installations and testing of such special devices or make corrections of adverse conditions.

<sup>2</sup> Provider did not organize the courses and examination, but rather the American Society of Sanitary Engineering or the New England Water Works Association were responsible for coordinating the tester training.

visually inspecting the function of the backflow valve by reversing the flow of water, thereby eliminating the need for a certified tester. Provider timely filed an answer and new matter wherein it denied the allegations in the complaint and noted that its backflow device testing was required to be completed by a certified tester in accordance with the requirements of the Department of Environmental Protection (Department). After a hearing before an Administrative Law Judge (ALJ) where Complainant testified regarding his disagreement over the Tariff's required testing method, his complaint was dismissed because the Commission lacked jurisdiction.

The ALJ reasoned that although the Commission has jurisdiction over the backflow device itself, 66 Pa. C.S. §§1501 and 1505; *see also Lansdale Borough v. Philadelphia Electric Co.*, 403 Pa. 647, 170 A.2d 565 (1961), what was involved here was not the backflow device, but testing for water purity which was statutorily regulated by the Pennsylvania Safe Drinking Water Act<sup>3</sup> (Act) and the Federal Safe Drinking Water Act.<sup>4</sup> He stated that enforcement of these statutes was vested in the Department and the Environmental Protection Agency. The ALJ further noted that when water purity or quality was compromised, the Commission was only able to certify to the Department a question of fact about the purity of water supplied by a public utility. 66 Pa. C.S. §318(b).<sup>5</sup> Because the Commission

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<sup>3</sup> Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§721.1-721.17.

<sup>4</sup> 42 U.S.C. §§300j – 330j-10

<sup>5</sup> Section 318(b) of the Public Utility Code provides:

**(Footnote continued on next page...)**

lacked jurisdiction, the ALJ dismissed Complainant's complaint, and Complainant filed exceptions with the Commission. The Commission denied Complainant's exceptions and adopted the ALJ's decision that the backflow testing required by the Tariff was based upon water quality requirements of the Department, and the Commission was without jurisdiction to adjudicate issues of water quality. This appeal by Complainant followed.<sup>6</sup>

Without addressing the issue of whether the Commission lacked jurisdiction, Complainant again argues that small commercial consumers should be exempt from backflow device testing, and a visual inspection of the device performed by a non-certified individual with minimum mechanical skills is sufficient to ensure its functionality. However, unless we determine that the Commission erroneously concluded that it lacked jurisdiction, we may not address Complainant's substantive argument. *In re May 15, 2001 Municipal Primary*, 785 A.2d 146 (Pa. Cmwlth. 2001).

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**(continued...)**

PURITY OF WATER SUPPLY - The commission may certify to the Department of Environmental Resources any question of fact regarding the purity of water supplied to the public by any public utility over which it has jurisdiction, when any such question arises in any controversy or other proceeding before it, and upon the determination of such question by the department incorporate the department's findings in its decision.

<sup>6</sup> Our scope of review of a Pennsylvania Public Utility Commission's decision is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, or whether findings of fact and conclusions of law are supported by substantial evidence. *UGI Utilities, Inc.-Gas Division v. Public Utility Commission*, 878 A.2d 186 (Pa. Cmwlth. 2005).

At issue is not whether Provider improperly required Complainant to install a backflow device on his main supply line, but the means in which the device is required to be tested to ensure appropriate functionality. The basis for this testing is to maintain quality and purity in the public water supply system by maintaining proper operation of the backflow valve. It is apparent, then, that Complainant is not objecting to any service of Provider's, but the requirements necessary to provide suitable water quality. *See Rovin v. Pennsylvania Public Utility Commission*, 502 A.2d 785 (Pa. Cmwlth. 1986).

In Pennsylvania, pursuant to Section 5 of the Act, 35 P.S. §721.5, the task of preserving water quality and monitoring for contaminants is within the authority of the Department. Any matters affecting water quality, such as the testing of backflow devices, are within its jurisdiction, not the Commission's, whose utilities provide water service. As such, the Commission properly dismissed Complainant's complaint for lack of jurisdiction.<sup>7</sup>

Accordingly, the order of the Commission is affirmed.

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DAN PELLEGRINI, JUDGE

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<sup>7</sup> Because we have determined that the Commission lacked jurisdiction to adjudicate Complainant's complaint, we will not address his substantive arguments.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Constantine N. Polites,	:
Petitioner	:
	:
v.	: No. 83 C.D. 2007
	:
Pennsylvania Public Utility	:
Commission,	:
Respondent	:

**ORDER**

AND NOW, this 11<sup>th</sup> day of June, 2007, the order of the Pennsylvania Public Utility Commission, No. C-20055157, is affirmed.

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DAN PELLEGRINI, JUDGE