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January 26, 2010

Via Regular and Certified Mail
James J. McNulty, Secretary
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor North
Harrisburg, PA 17120

Re: Third Avenue Realty Limited Partners v. Pennsylvania-American Water Company
Case Id: **C-2008-2072920**

Dear Mr. McNulty:

Enclosed please find the original and nine (9) copies of the Brief of Complainant, Third Avenue Realty Limited Partners in the above-referenced matter, a proposed Order and a copy of an unpublished opinion.

I have also provided an additional cover sheet to the brief. Kindly forward a time-stamped cover and return to my attention in the enclosed self-addressed stamped envelope. Please also time-stamp the Certificate of Service and return to same.

Thank you for your anticipated cooperation in this matter, and should you have any additional questions or concerns, please feel free to contact me at your earliest convenience.

Very truly yours,



WILLIAM H. COPPERTHWAITE JR.
For the firm

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Enclosures

SECRETARY'S BUREAU
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Commonwealth of Pennsylvania
Public Utility Commission

Docket No.: C-2008-2072920

THIRD AVENUE REALTY LIMITED PARTNERS,
Complainant

v.

PENNSYLVANIA AMERICAN WATER COMPANY,
Respondent

BRIEF OF COMPLAINANT

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Phila. Suburban Water Co. v. Feinstein, 383 A.2d 997 (Pa. Commw. Ct. 1978)v

Pennsylvania Supreme Court Cases

Burleson v. Pa. Pub. Util. Comm'n, 461 A.2d 1234 (Pa. 1983)6, 7, 9

Pennsylvania Statutes

Title 66 of Pennsylvania Utility Code Section 501iv, v

STATEMENT OF JURISDICTION

According to Chapter 66 of Pennsylvania Consolidated Statutes, the Pennsylvania Public Utility Commission “shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth.”¹ The billing dispute between Third Avenue Realty Limited Partners and PA-American Water Company is rightly before the Pennsylvania Public Utility Commission as a supervisor of Pennsylvania public utilities.

¹ 66 Pa.C.S.A. § 501(b)

SCOPE AND STANDARD OF REVIEW

The Public Utility Commission has the “duty to enforce, execute and carry out, by its regulations, orders or otherwise the provisions of [the Public Utility Code].”² To secure relief from a Pennsylvania utility company bill, Complainant has the burden of proof before the Public Utility Commission (hereafter, Commission).³ Once complainant has established a prima facie case that they have been “over-charged,” the burden shifts to the respondent to produce “co-equal” evidence.⁴

² 66 Pa.C.S.A. § 501(a)

³ Phila. Suburban Water Co. v. Feinstein, 383 A.2d 997, 998-99 (Pa. Cmwlth. 1978)

⁴ Waldron v. Phila. Elec. Co., 1980 WL 140964 (Pa.P.U.C.)

QUESTION PRESENTED

- I. Did Complainant, Third Avenue Realty Limited Partners, carry its burden of establishing a *prima facie* case of overbilling, by showing the disputed bill was abnormally high when compared to prior usage patterns and that the pattern of usage had not changed?

Suggested Answer: Yes.

STATEMENTS OF FACT

Complainant, Third Avenue Realty Limited Partners (hereafter, "Third Avenue" or "Complainant") has owned the property in question: 110-112 North Third Avenue in Coatesville, Pennsylvania (R:6) for over five (5) years (R:18). Service began on January 14, 2003. (R:28). The property has five (5) two-bedroom apartments and two (2) one-bedroom apartments. (Id.). During the time of dispute, no significant repairs to the premises were made. (R:21). The apartments have no dishwashers, sprinklers, lawn or yard, and no external hose. (R:20). During the time of the billing dispute, the number of tenants remained consistent. (R:18).

From March of 2003 up to September of 2005, Complainant's account remained in good standing with PA-American Water Company (hereafter, "PA American" or "Respondent"). The water usage in gallons per thirty (30) day billing cycle averaged 38,000 gallons. (See Ex. R-1). The highest amount of water usage per month until September of 2005 had been 83,000 gallons which resulted in a bill in the amount of \$750.88. (Id.). The lowest amount was 13,000 gallons, resulting in a bill in the amount of \$128.53. (Id.). For the month of October 2005, the PA-American bill to Third Avenue reflected water usage of 177,000 gallons of water usage, resulting in \$1,592.48 due. This was roughly double the amount of the next highest bill to that date and nearly five times the average usage for that time period. This led to inquiries toward PA-American.

In December 2005 Third Avenue contacted PA-American requesting that the meter be re-read, based on the alleged consumption. (See Ex. R-2). No leaks or movement on the meter were detected. (Id.). Service continued until November 2006. From October 2005 through November 2006, the average water usage in gallons was 50,000 gallons. (See Ex. R-1). The highest amount of water usage during that period occurred in August of 2006 and was 156,000

gallons, resulting in a bill of \$1,413.25. (Id.). Additional meter checks were performed in August and October of 2006, and movement on the meter was detected. (See Ex. R-2). The lowest amount of water usage during that period was 26,000 gallons, resulting in a bill of \$247.28. (Id.). Then, without warning, the bill for the month of December 2006, reflected water usage of 340,000 gallons, resulting in \$3,082.49 {*emphasis added*} due. (See Ex. C-6). This amount of water usage was nearly *seven times* the average gallons per thirty days during the time period starting in March of 2003, and during which there were no significant changes to the pattern of usage.

In April 2007 the PA-American bill to Third Avenue reflected water usage of 497,000 gallons. This resulted in a bill in the amount of \$4,495.10 {*emphasis added*}. (See Ex. C-6). The previous three months were 55,000, 49,000 and 57,000 gallons of usage, respectively. A request for a meter check was then ordered in April. (See Ex. R-2). Another meter check occurred in July 2008, indicating the likelihood of a leak. (Id.). From April 2007 through the end of 2009, the amount of water usage never eclipsed more than 103,000 gallons in a billing cycle.

In October of 2009, PA-American removed the meter from North Third Avenue in Coatesville and performed an accuracy test. (See Ex. R-5). Meter number N77439924, which had been installed in January of 2003, failed PA-American's accuracy test. (Id.). The Low Flow reading test revealed only 97.0% accuracy. (Id.). Because the meter was less than 98% accurate, PA-American policy deemed it faulty and replaced N77439924 with a new meter. (R: 44, 42). Testimony was entered that revealed that a leak in a toilet may cause as much as two to three gallons of leakage per minute, often doubling and tripling a customer's bill. (R:39). However,

since the installation of a properly functioning meter the bills for October, November, and December of 2009 were \$256.69, \$257.58, and \$316.67 respectively.

CONCLUSIONS OF LAW

SHORT ANSWER TO QUESTION PRESENTED

Yes, the disputed bills are abnormal compared to previous and subsequent bills considering the occupancy rates during that period of the dispute remained consistent. Complainant has been able to prove that there has been overbilling by PA American. This is especially true given prior usage patterns and the fact that the pattern of use has not changed.

SUMMARY OF THE ARGUMENT

The Complainant has established, under the Waldron rule, prima facie evidence of overbilling by Respondent. The two large disputed bills (of \$4,000 and \$3,000) are exponentially larger than the previous average bill for the months before and after those disputed. The previous average was \$700.00 per month. The lack of fluctuation in occupants as well as a dearth of opportunities (no lawn, no washer/dryer, and no dishwasher) for excessive water usage indicates that the inaccurate water meter was the sole cause of the two exceptionally large bills from PA American. Since the replacement of the water meter, the monthly bills are running to a maximum \$317.00, which is half of the previous monthly average of around seven hundred (\$700.00) from March of 2003 through the replacement of the faulty meter.

ARGUMENT

The Waldron burden on production of evidence to form a prima facie case recognized the difficulty in “that technical expertise to test meter accuracy may not be available to a complainant.”¹ The Commission is therefore empowered to consider, “the billing history of the Complainant, any change in the number of occupants residing at the household, the potential four energy utilization and any other relevant facts or circumstances.”² According to the rule, Complainant may establish a prima facie case by, “(1) showing that the disputed bill was abnormally high when compared to prior usage patterns, and (2) showing that his pattern of usage had not changed.”³

I. Complainant has shown that the disputed bills were nearly seven and ten times the average amount of water used since the start of their account with PA-American.

According to Waldron, there is a burden upon the Complainant in a given case to establish prima facie evidence of overbilling.⁴ Under Waldron, the fact-finder measures the weight of all the evidence so that the mere proof by the utility that its power measuring devices were accurate is no longer the sole determinant as to whether there is a basis to a complaint of overbilling.⁵ In addition to proof that the power measuring devices used by PA-American were faulty, Complainant has also met the first prong of the Waldron test for establishing prima-facie evidence of overbilling by “showing that the disputed bill was abnormally high when compared to prior usage patterns.”⁶

¹ Burleson v. Pa. Pub. Util. Comm'n, 461 A.2d 1234, 1235 (Pa. 1983)

² Waldron 1980 WL 140964, at *3

³ Id.

⁴ Id.

⁵ Pa. Elec. Co. v. Pa. Pub. Util. Comm'n, 473 A.2d 704, 705 (Pa. Commw. Ct. 1984).

⁶ Waldron 1980 WL 140964, at *3

Compared to all of the bills from over five years of water service, the bills for December 2006 and April 2007 were abnormally high. Prior to December 2007, the largest amount of water usage was one hundred and seventy-seven thousand (177,000) gallons in a thirty (30) day period. It could be argued as to whether this amount was abnormal or not. Complainant disputes Respondent's bills as all are subject to the charge of overbilling. Complainant particularly disputes two bills, which registered water usage amounts of three hundred and forty thousand (340,000) and four hundred and ninety-seven thousand (497,000) gallons of water used in separate thirty day periods. There is little argument these amounts are abnormal, compared to a monthly average of around fifty thousand gallons (50,000) used over the time period in question. Further, it is undisputed that the meter which was in place from March 2003 through October of 2009 was faulty.⁷ Since that faulty meter was replaced, the highest monthly water bill has been \$317.00. This is less than *half* of the average \$700.00 water bills charged from March 2003 through October of 2009, when that meter was replaced.

II. Complainant has shown that the number of tenants living at 110-112 North Third Avenue and their utility demands have remained constant.

Complainant has met the second prong of the Waldron test for establishing prima facie evidence of overbilling by showing that there were no significant changes in tenancy at the property in question during the stated time period. The second prong of Waldron states that a Complainant may establish prima facie evidence of overbilling by "showing that his pattern of water usage had not changed"⁸ during the time period in question.

Complainant has shown that 110-112 North Third Avenue was occupied during the period in which bills are disputed. The property is composed of seven (7) units. The record shows that all the units were occupied during the time of dispute. There is little room for a

⁷ See R:44, 42

⁸ Waldron 1980 WL 140964, at *3

dramatic change in the pattern of usage and demand for water. The lack of dishwashers, a lawn or yard and an external hose create very little opportunity for abnormal water usage. The Commission is empowered to accept consumer's testimony of a relatively stable pattern, as evidence of an actual use pattern.⁹ With regard to toilet leaks, a toilet that leaks three (3) gallons per minute, would ultimately use one hundred twenty nine thousand, six hundred (129,600) gallons over thirty (30) days. Even if the water usage was above average for the month, say seventy thousand (70,000) gallons, two (2) toilets out of seven (7) would have had to be leaking, non-stop, during the month of December 2006. Those toilets would then have to stop leaking for three (3) months, and then three (3) toilets out of seven (7) would have had to have been leaking, non-stop, during the month of April 2007 to create the billing irregularities that occurred. Overall, the fluctuation in water usage seems impossible.

⁹ Pa. Elcc. Co. v. Pa. Pub. Util. Comm'n, 473 A.2d 704, 707 (Pa. Commw. Ct. 1984)

CONCLUSION

The Complainant arguably has met the burdens of the Waldron rule in establishing a prima facie case of “overbilling.”¹⁰ It is also important to note that the Waldron rule was established to be applied to situations where the complainant faced evidence that the utility meter was inspected and working properly.¹¹ Here, however, the water meter used during the period of the dispute was removed from service after failing an accuracy test. Since the installation of a new water meter in October 2009, the bills have been \$256.69 for October 2009, \$257.58 for November 2009 and \$316.67 for December 2009. Considering this, Complainant has shown an almost indisputable prima facie case.

¹⁰ Id.

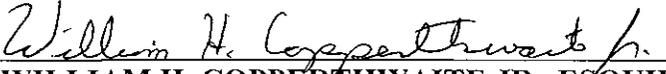
¹¹ Burleson, 461 A.2d 1235-1236.

REQUEST FOR RELIEF

Complainant requests **all bills**, since the purchase of the property in 2003, be revised to \$300.00 per monthly billing cycle. Further, Complainant requests the elimination of the two invoices of \$3,082.49 and \$4,495.10 as well as an award of attorney fees *{emphasis added}*.

Respectfully submitted,

Date: January 26, 2010


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CERTIFICATE OF SERVICE

I do hereby certify that service of true and correct copy of the Brief of Complainant was delivered on the 26th day of January, 2010, to the following via Regular and Certified United States Mail:

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