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March 1, 2010

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

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SECRETARY'S BUREAU

Re: **Third Avenue Realty Limited Partners v. Pennsylvania American Water Company, Docket No. C-2008-2072920**

Dear Secretary McNulty:

I have enclosed for filing an original and (9) nine copies of the Brief of Pennsylvania American Water Company in the above-referenced proceeding. A copy of the Brief has been provided to the Complainant's counsel in the manner indicated on the attached Certificate of Service.

Please contact me if you have any questions.

Very truly yours,

Michael T. Killion

MTK/jlf

cc: Honorable Charles E. Rainey, Jr.
William H. Copperthwaite, Jr., Esq.

tested in compliance with Commission regulations. Since October 2007, Complainant has not made any payments toward the outstanding water and wastewater bill of \$23,405.72.

II. BURDEN OF PROOF

In Commission proceedings, the proponent of a rule or order bears the burden of proof. 66 Pa. C.S. § 332(a). To satisfy that burden, the proponent of a rule or order must prove each element of its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is established by presenting evidence that is more convincing than that presented by the other parties to the case. *Se-Ling Hosiery v. Marquilies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

III. SUMMARY OF ARGUMENT

Complainant has not met its burden of proof in this proceeding. Complainant alleges overbilling for his January 18, 2007 bill in the amount of \$3090 and his May 14, 2007 bill in the amount of \$4500. While the Complainant's witness Mr. Michalovic testified that he does not reside at the service address and that he has no knowledge of the tenants' water usage (N.T. 21), he contends that a meter malfunction caused two high bills five months apart. Complainant does not dispute any other bills.

In response to Complainant's billing inquiries, Respondent investigated the meter and determined there was a probable leak at the service address. Further, Respondent conducted a

meter test which revealed that the meter was operating in accordance with Commission regulations. Complainant has offered no record evidence to establish a prima facie case for overbilling.

IV. ARGUMENT

Under *Waldron v. Philadelphia Elec. Co.* 54 Pa. P.U.C. 98 (1980), the Commission provided the following rule concerning complaints of high bills; specifically, that a Complainant must establish that the pattern of water usage has not changed. In the instant matter, Complainant's witness is simply unaware of any water usage patterns at the service address, and has never inquired about the tenants' water usage. In addition, he admits that he has had to perform various plumbing repairs at the service address, including repairs to toilets. (N.T. 18, 21). Complainant's argument of high billing is based on nothing more than the fact that two bills were considerably higher than others. He offers no other support and cannot meet his burden in this matter.

This case is analogous to *Milkie v. Pa. PUC*, 768 A. 2d 1217 (Pa. Cmwlth. 2001). In *Milkie*, the Commonwealth Court affirmed the Commission's decision to dismiss a consumer's high bill complaint. The Court reasoned that substantial evidence supported the Commission's implicit finding that the consumer's general and conclusory testimony regarding usage was outweighed by evidence that the meters had been checked and found to be accurate and that the potential energy use in the home was greater than the use billed.

In the instant case, Complainant's unfounded assumptions of overbilling are outweighed not only by the accuracy of the meter test, but other relevant facts brought to light at hearing. Most notably, that Complainant's witness Mr. Michalovic not only lacks any knowledge of water usage, but he admits to performing plumbing repairs, including repairs to toilets at the service

address, as well. (N.T. 18, 21). In fact, Respondent investigated high bills on three separate occasions, and found the leak detector on its meter spinning, which indicates a probable leak. (N.T. 29-32, Exh. R-2.). Mr. Michalovic asserts that the running toilet would only result in a "slight modification" for usage. (N.T. at 21). However, Respondent's witness Mr. Gibbs presented uncontroverted testimony that toilets can leak two to three gallons per minute depending on the malfunction. (N.T. 39). In addition, the first floor of the service address is heated by forced water. (N.T. 21).

In addition, the Company's meter was functioning properly and was not the cause of his two high bills. The Commission's regulations at 52 Pa Code § 65.8 provide:

(a) Allowable error. No water meter which has an error in registration of more than 2% may be placed in service, nor may a water meter which has an error in registration of more than 4% be allowed to remain in service.

On October 13, 2009, Respondent tested Complainant's meter. (N.T. 38, Exh. R-5.). The test results indicated 97% accuracy for low flow and 101% accuracy for high flow. Under the Complainant's theory, the meter malfunctioned in January and again in May of 2007, but otherwise registered water usage accurately.¹ Under the Commission's regulations, the meter tested accurately under Commission regulations and Complainant cannot establish otherwise. Further, to the extent there was less than absolutely perfect accuracy in the metering of water service, the 97 percent accuracy meant that Complainant received a *lower* bill, as 3 percent of the water used would not register. (N.T. 38).

While the Complainant has no plausible theory for two high bills, Respondent's records indicate that on or about July 28, 2008, a Company field associate went to the service address to obtain another actual meter reading and investigate a possible leak. The field associate

¹ Complainant presented absolutely no evidence to explain how the Company's meter might self-correct, not once, but twice.

discovered a possible leak on the customer's side of the curb stop. (Exh. R-2). The record evidence suggests that a leak, not a meter malfunction, accounts for the two high bills. At all times, Respondent provided adequate, efficient, safe and reasonable service in compliance with the Public Utility Code, the Commission's Regulations, and the Company's tariff.

V. PROPOSED FINDINGS OF FACT

1. Complainant is the owner of a property at 110-112 North Third Avenue in Coatesville, Pa. (N.T. at 6).

2. Complainant's witness Mr. Michalovic does not reside at the property, but manages the property for the landlord of five (5) two bedroom apartments and two (2) one-bedroom apartments. (N.T. 18).

3. A total of 12 tenants occupied the apartment units during the disputed bill period. (N.T.18).

4. Complaint is billed for both water and wastewater at this service address. (N.T. 7).

5. Complainant disputes only two bills. The first bill in the amount of \$3090 was dated January 18, 2007. The second bill in the amount of \$4500 was dated May 14, 2007. (N.T. 17).

6. Complainant never questioned any of the tenants about water usage and has no knowledge of water consumed at the service address. (N.T. at 19).

7. During the disputed bill period, Mr. Michalovic has performed plumbing work, including work on toilets, at the service address. (N.T. 21)

8. The bottom floor of the seven unit building is heated with forced water. (N.T. at 21).

9. Respondent investigated high bills on three separate occasions. During the investigations, the leak detector was spinning which indicated a probable leak at the service address. (N.T. 29-32, Exh. R-2.).

10. On October 13, 2009, Respondent preformed a test on Complainant's meter which revealed 97% accuracy for low flow and 101% accuracy for high flow. (N.T. 38, Exh. R-5.).

11. According to Commission regulations, a water meter with less than 4 percent error in registration may remain in service. 52 Pa Code § 65.812. 97% accuracy for low flow would result in a lower bill for the Complainant as 3% of the water used in not registered. (N.T. 38).

13. The Complainant's last payment for water service was made on October 23, 2007. (N.T. 28).

14. At the time of the hearing, the outstanding balance on Complainant's account was \$22,005.28. (N.T. 28).

VI. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa. C.S. 102, 701.

2. As the party seeking affirmative relief from the Commission, the Complainant has the burden of proof. 66 Pa. C.S. 332(a).

3. Commission regulations provide for a allowable error of up to 4 percent for a meter to remain in service. 52 Pa Code § 65.8.

4. The Complainant has not met his burden of proof to establish overbilling and therefore his complaint is properly denied.

VII. PROPOSED ORDERING PARAGRAPHS

1. The Formal Complaint of Third Avenue Realty Limited Partners at Docket No. C-2008-2072920 is dismissed with prejudice; and
2. The Commission's Secretary shall mark the docket closed.

VIII. CONCLUSION

Based on the record evidence, it is clear that Complainant has not met its burden of proof to establish overbilling. The Complainant's witness admitted to plumbing issues at the service address. The Complainant's witness also testified that the service address is heated by forced hot water. The Complainant's alleged two high bills are unrelated to any meter issue. The evidence clearly demonstrates that Respondent provided adequate, efficient, safe and reasonable service in compliance with the Public Utility Code, the Commission's Regulations, and the Company's tariff.

WHEREFORE, Respondent, Pennsylvania American Water Company, respectfully requests that this Honorable Commission dismiss the Formal Complaint of Third Avenue Realty Limited Partners at Docket No. C-2008-2072920 in its entirety.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY, P.C.

By: Michael T. Killion

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Dated: March 1, 2010

Counsel for Pennsylvania American
Water Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THIRD AVENUE REALTY	:	
LIMITED PARTNERS	:	
Complainant	:	
	:	
v.	:	Docket No. C-2008-2072920
	:	
	:	
PENNSYLVANIA AMERICAN	:	
WATER COMPANY,	:	
	:	
Respondent	:	

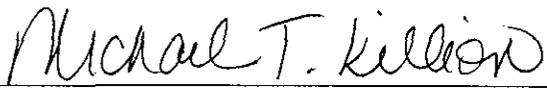
CERTIFICATE OF SERVICE

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

Via Electronic Mail and Overnight Mail

William H. Copperwaite, Jr.
111 Greenbriar Drive
West Chester, PA 19382

Dated: March 1, 2010



Michael T. Killion, Esquire
Counsel for Pennsylvania American Water Company

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