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March 29, 2010

*Via Regular, Certified Mail and
Facsimile to Judge Charles E. Rainey, Jr. (215) 560-3133,
Secretary James J. McNulty (717) 783-9526 and
Michael T. Killion, Esquire (717) 233-0852*

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 Reply Brief of Complainant, Third Avenue Realty Limited Partners, in the above-referenced matter and an additional copy of the proposed Order.

I have also provided an additional cover sheet to this Reply 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.

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Very truly yours,

William Copperthwaite

WILLIAM H. COPPERTHWAITE JR.

For the firm

Id #: 77687

WHC/nsj

Enclosures

Cc by fax, regular and certified mail:

Cc by fax and regular mail:

The Honorable Charles E. Rainey, Jr.

Michael T. Killion, Esquire

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IN AND BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION

Third Avenue Realty Limited Partners

v.

Pennsylvania-American Water Company

C-2008-2072920

ORDER

AND NOW, this _____ day of _____, 2010, by this Court, that, after review and consideration of Complainant's Brief, Respondent's Response thereto and Complainant's Reply Brief, Complainant's request for relief is GRANTED.

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. All bills, since the purchase of the property in 2003 be revised to \$300.00 per monthly billing cycle;
2. The two invoices of \$3,082.49 and \$4,495.10 be eliminated; and
3. An award of the Complainant's attorney fees with the amount to be determined upon submission of the Certification by Complainant's counsel.

So Ordered by this Court.

Judge Charles E. Rainey, Jr.

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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

REPLY BRIEF OF COMPLAINANT

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INTRODUCTION

Complainant Third Avenue Realty Limited Partners (hereafter, “Third Avenue” or “Complainant”), owns the property in question, 110-112 North Third Avenue, a seven (7) unit apartment building in Coatesville, PA.¹ Third Avenue filed a formal complaint against PA-American Water Company for overbilling. The action was based on two abnormally high bills. The average water usage per month since the start of the account until the first disputed bill in December 2006 was 46,000 gallons of water usage per month.² The bills ranged from Seven (\$700) and Nine hundred (\$900) dollars.³ The Complainant then received a \$3,082.49 bill for the Month of December 2006, showing usage in the amount of 340,000 gallons and a \$4,495.10 bill for the Month of April 2007, showing usage in the amount of 497,000 gallons.⁴ Once the new meter was installed in October 2009, the monthly average became Two Hundred, Eighty dollars (\$280).⁵ This is the very definition of “abnormally high compared to prior usage.”⁶ Based on the undisputed fact that the number of residents has not changed during the period in question, there is sufficient evidence to infer that a pattern of actual usage has not changed.⁷ Therefore, Complainant has carried its burden in proving a prima facie case of over-billing. Likewise, Respondent has failed to rebut the prima facie case by offering co-equal evidence in response.

¹ (Cmplnt’s Br. 1).

² (See Hearing Ex. R-1).

³ (Cmplnt’s Br. 1-2).

⁴ (Cmplnt’s Br. 2).

⁵ (Id.)

⁶ Waldron v. Phila. Elec. Co., No. C-77100047, 1980 WL 140964, at *2 (Pa.P.U.C. March 19, 1980).

⁷ (R:18).

ARGUMENT

Parties agree that the standard articulated by the Pennsylvania Public Utility Commission in Waldron v. Phila. Elec. Co., governs a claim for overbilling by a utility company.⁸ In the Waldron opinion, the Public Utility Commission concluded that a 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.”⁹ Despite Respondent, PA-American Water’s quibble with Complainant’s argument and supporting facts, the standard for a prima facie case is supported by a preponderance of the evidence and thus shifts the burden of going forward in this matter, to Respondent.¹⁰ Complainant has satisfied the Waldron standard by establishing its burden of proof, the existence of, “a certain fact or set of facts” by evidence which preponderates to the legally required extent.¹¹ Respondent subsequently fails to satisfy its burden going forward by not offering “co-equal” evidence.¹²

I. The Complainant satisfied its burden by showing the disputed bills were abnormally high when compared to prior usage; they went from ranging between Seven (\$700) and Nine Hundred (\$900) dollars, to two (2) disputed bills of Three Thousand (\$3,000) and Four Thousand Five Hundred (\$4,500) dollars, to the meter being replaced and the monthly average dropping to Two Hundred and Eighty dollars (\$280).

Complainant, Third Avenue offered sufficient fact or facts, representing a preponderance of the evidence, to show, “(1) that the disputed bill was abnormally high when compared to prior usage patterns.”¹³ To establish that, “the disputed bill[s] were abnormally high when compared to prior usage patterns,” Complainant can do no more then to draw the Commission’s attention to

⁸ Waldron v. Phila. Elec. Co., No. C-77100047, 1980 WL 140964, at *2 (Pa.P.U.C. March 19, 1980).

⁹ Id. at *2.

¹⁰ Id.

¹¹ Id. at *1 (citing Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950)).

¹² Id. at *2.

¹³ Id.

the mean, previous high and disputed charges.¹⁴ The mean water usage from the start of the account to the first disputed bill in December 2006 was 46,000 gallons of water usage per month.¹⁵ The previous high was 177,000 gallons.¹⁶ The two disputed bills reported a water usage of 340,000 and 497,000 gallons in separate thirty day periods.¹⁷ These bills are more than seven (7) and ten (10) times the prior usage average, respectively. This is the only evidence offered by either Complainant or Respondent. The only evidence must satisfy the burden of proof. Coincidentally, Respondent's Brief does not contest that the bills were abnormally high, choosing only to call into question the pattern of usage.¹⁸

II. The Complainant satisfied its burden by showing that during the dispute period occupation of the building remained stable and the Respondent failed to carry the burden of proof.

Complainant, Third Avenue offered sufficient fact or facts, representing a preponderance of the evidence to show, “2) that his pattern of usage had not changed.”¹⁹ Complainant's witness, Brian Michalovic, testified that during the dispute period occupation of the building remained stable.²⁰ According to Waldron, if this testimony is adequately developed on a formal record, it should be sufficient to establish a prima facie case.²¹ The burden of going forward is therefore shifted to Respondent.

Respondent fails to carry the burden of proof. Respondent attempts to cast “pattern of usage” as personal knowledge of tenant's personal water use.²² Respondent also frequently notes

¹⁴ Id.

¹⁵ (See Hearing Ex. R-1)

¹⁶ (Id.)

¹⁷ (Id.)

¹⁸ (Rspd's Br. 2).

¹⁹ Waldron, 1980 WL 1400964 at *2.

²⁰ (R:18).

²¹ 1980 WL 1400964 at *3.

²² (Rspd's Br. 3-4).

that Mr. Michalovic admitted to making plumbing repairs.²³ Respondent fails to mention that when questioned, Mr. Michalovic stated that he made no plumbing repairs outside of “normal usage.”²⁴ Pennsylvania has held that the Public Utility Commission is empowered to “accept the testimony of a relatively stable pattern of . . . consumption, as evidence of an actual use pattern.”²⁵ This includes when the Respondent offers evidence of a “high usage potential.”²⁶ Without proof of excessive usage by tenants or the existence of a leak caused by faulty toilet plunging, Respondent’s arguments amount to merely speculations of “high usage potential.”²⁷ The Respondents have failed to carry their burden of going forward by offering “co-equal” evidence when they offer only evidence of leak detection spinning on the water meter.²⁸ As the Waldron opinion explicitly states, “In determining whether [Respondent] has presented evidence which is co-equal, the meter test and the question of the accuracy of the meter, are matters to be considered, but not, in our opinion, sufficient *by themselves* [emphasis added] to satisfy [Respondent’s] burden of going forward.”²⁹

Respondent relies on vague and incomprehensible interpretations of facts. Respondent mentions that the property in question is, “heated by forced water.”³⁰ Unfortunately, Respondent fails to clarify that the system is closed loop which does not require additional water. Respondent also cites the Commission’s regulations for allowable error which state, “No water meter which has as 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

²³ (Id.).

²⁴ (R:21).

²⁵ Pa. Elec. Co. v. Pa. Pub. Util. Comm’n, 473 A.2d 704, 706 (Pa. Commw. Ct. 1984) (finding in favor Complainant/Consumer on a claim for over-billing).

²⁶ Id.

²⁷ Id.

²⁸ (Cmplnt’s Br. 3).

²⁹ Waldron, 1980 WL 1400964 at *3

³⁰ (Rspd’s Br. 4)(citing R:21)

service.”³¹ Under this rule, meter No. N77439924, which registered a three percent (3%) error, could not have been placed into service, yet was sufficient to remain in service at the property in question.³² Respondent offers no explanation as to why then, Meter No. N77439924 was removed on October 12, 2009 and Meter No. N087776696 was installed.³³ Certainly if the meter was allegedly “accurate,” it would have remained in service, especially when the Commissions regulations would allow.³⁴ Respondent’s reliance on Milkie v. Pa. Pub. Util. Comm’n, should then be distinguished by noting that in that instance, Appellees, the Pennsylvania Public Utility Commission, presented undisputable evidence that the meter in question was accurate to 99.8%.³⁵ Milkie’s dismissal was upheld based on his reliance on “evidence of little weight.”³⁶ Here, the meter in question registered a 97.0% and 101.7% accuracy level and was immediately replaced.³⁷ Certainly the test results and subsequent removal raise questions as to Meter No. N77439924’s predictability. Lastly, Respondent argues that, “Complainant presented absolutely no evidence to explain how the Company’s meter might self-correct, not once, but twice,” however, based on the removal of the meter from service, Complainant feels that all bills since March of 2003 should be called into question.³⁸ Therefore, Complainant believes the meter never “self-corrected” and that all bills were inaccurate.³⁹

³¹ (Rspd’s Br. 4).

³² (Hearing Ex. R-5).

³³ (Hearing Ex. R-2).

³⁴ (Rspd’s Br. 4).

³⁵ 768 A.2d 1217, 1219 (Pa. Commw. Ct. 2001) (where the electric meter in question was found to be 99.8% accurate.).

³⁶ Milkie, 768 A.2d at 1220.

³⁷ (Hearing Ex. R-5).

³⁸ (Rspd’s Br. 4).

³⁹ (See Cmpl’t’s Br. 10).

CONCLUSION

According to relevant precedent, Complainant has not only satisfied its burden of establishing a prima facie case but also its burden of proof, by showing that the disputed bills were abnormally high when compared to prior usage patterns, and by testifying that his pattern of usage had not changed throughout the dispute period. Subsequently, Respondent has failed to carry its burden of going forward by offering co-equal evidence, outside of a “high usage potential” and a leak detection warning. Finally, it is important to consider the fact that since meter number N77439924, the active meter during the period of dispute, was replaced in October of 2009, Complainant’s bills have averaged \$280.00.⁴⁰ This \$280.00 average compared to the eight (\$800) and nine hundred (\$900) bills from the start of service and the enormous disputed bills, and a serious case can be made in favor of invalidating all bills for the duration of service. Perhaps then, the account balance should be reconfigured to reflect the number of months of usage at a \$280.00 average, minus all amounts paid and any late charges. Also, the Complainant has submitted numerous disputes to PA-American Water, which fell on deaf ears. As a result, the Complainant had to file a formal complaint with the Pennsylvania Public Utility Commission. The Complainant has provided overwhelming evidence of overbilling as demonstrated by the recent low billings after the faulty meter was replaced. PA-American Water has refused settlement offers and installment agreements. Therefore PA-American Water is liable for Complainant’s attorney fees.

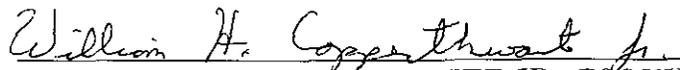
⁴⁰ (Cmplnt’s Br. 2).

REQUEST FOR RELIEF

Complainant requests this honorable Court that **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: March 29, 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 29th day of March, 2010, to the following via Regular United States Mail and Facsimile:

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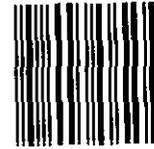
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