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April 19, 2010

**VIA HAND DELIVERY**

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

RECORDED  
2010 APR 19 PM 4:06  
SECRETARY'S OFFICE

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 (3) three copies of Pennsylvania-American Water Company's Motion for Leave to File Reply Brief and an original and nine (9) copies of Pennsylvania-American Water Company's Reply Brief in the above-referenced proceeding. A copy of the Motion and Brief have 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.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THIRD AVENUE REALTY  
LIMITED PARTNERS

Complainant

v.

PENNSYLVANIA AMERICAN  
WATER COMPANY

Respondent

Docket No. C-2008-2072920

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REPLY BRIEF OF RESPONDENT  
PENNSYLVANIA-AMERICAN WATER COMPANY

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Pennsylvania-American Water Company ("Respondent" or "Company"), by and through its attorneys, hereby submits this Reply Brief, in response to the *Reply Brief of Complainant* filed on or about March 29, 2010 by Complainant, Third Avenue Realty Limited Partners.

**I. ARGUMENT**

**A. Complainant's Reply Brief Raises New Facts and Arguments**

The *Reply Brief of Complainant* introduces new facts and arguments never before raised in this proceeding. For example, Complainant's formal complaint against PAWC challenged two high bills, issued in December 2006 and April 2007. At hearing, Complainant limited its evidence to these two bills. On Reply Brief, however, Complainant claims for the first time that all its water bills from March 2003 to October 2009 are inaccurate, and should be reduced to a flat rate of \$300. *Reply Brief of Complainant* at 6. This assertion is not supported by any record evidence and cannot be raised for the first time on Reply Brief.<sup>1</sup>

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<sup>1</sup> Issues raised for the first time on reply brief are deemed waived. *Commonwealth v. Wharton*, 811 A.2d 978, 990 (2002). Further, Courts have termed the practice of reserving arguments for reply briefs as impermissible

**B. Complainant Has Not Met Its Burden of Proof**

To support its newly raised challenges to all water bills issued by PAWC since 2003, Complainant attempts to make out a *prima facie case* under the *Waldron rule* by claiming that the pattern of usage at his rental property has not changed. *Reply Brief of Complainant* at 3. This argument must fail as Complainant's only support for this proposition is that the tenancy in its building has remained stable since it purchased the property seven years ago, a claim that is neither relevant nor credible.<sup>2</sup> *Reply Brief of Complainant* at 3. The fact remains that Mr. Brian Michalovic, the owner of Third Avenue Realty, conceded at hearing that he does not reside at the service address and has no knowledge of the tenants' water usage. There is no validity to Complainant's argument that the pattern of usage has remained constant, and therefore the Formal Complaint should be denied in its entirety.

**C. Complainant's Meter Was Accurate**

In addition, Complainant misinterprets results of a meter test and improperly offers facts and unsupported conclusions that were not admitted at hearing. First, Complainant incorrectly maintains that the meter test results suggest the meter was defective. As explained in PAWC's Main Brief, the meter met the Pennsylvania Public Utility Commission's standards for accuracy, and could have remained in service.<sup>3</sup>

Second, Complainant's argument that PAWC's meter test results are contradicted by PAWC's removal of Complainant's meter in October 2009, and by PAWC's subsequent decision not to put the meter back in service, *see Reply Brief of Complainant* at 5, is simply wrong. As

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"sandbagging." *South Coast Air Quality Management Dist. v. E.P.A.*, 554 F.3d 1076, 1081 (D.C. Cir. 2009). If the Complainant sought to introduce new evidence, the appropriate procedure would have been a petition to reopen the record under 52 Pa. Code § 5.571. Instead, Complainant has offered new evidence and arguments through a Reply Brief. These new evidence and arguments should be disregarded.

<sup>2</sup> Complainant's claim that its number of tenants remained constant was not supported by any lease agreements or other documents or figures that might lend it credibility.

<sup>3</sup> According to Commission regulations, a water meter with less than 4 percent error in registration may remain in service. 52 Pa Code § 65.812. *See Main Brief of Respondent Pennsylvania-American Water Company* at 4-5.

PAWC's witness explained at the hearing, the meter was removed simply for testing. The testing, and Complainant's otherwise consistent level of monthly water usage, indicate that Company's meter was functioning properly and was not the cause of his two high bills. PAWC's witness further testified at hearing that Company policy is not to place a meter in service that is plus or minus 2 percent accuracy. NT at 37. Indeed, the Company witness further explained that a low flow of 97 percent would not register 3 percent of the water consumed, and would in fact result in a *lower* water bill for the customer. NT at 32-33. PAWC suggests that the plumbing issues discussed in its Main Brief were the source of the two high bills, not a meter that tested within Pennsylvania Public Utility Commission regulations.

## II. CONCLUSION

Based on the record evidence, it is clear that Complainant has not met its burden of proof to establish overbilling. The Complainant's alleged two high bills are unrelated to any meter issue and its unsupported allegations of overbilling do not excuse its obligation to pay for utility service at the rental property.<sup>4</sup> For the reasons explained above and in PAWC's *Main Brief*, the Formal Complaint should be denied in its entirety.

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: 

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<sup>4</sup> Even before filing its Formal Complaint in this proceeding in 2008, Complainant has not paid any undisputed charges for water service. In fact, the Complainant's last payment for water service was made on October 23, 2007. See *PAWC Main Brief* at 6.

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Dated: April 19, 2010

Counsel for Pennsylvania-American  
Water Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

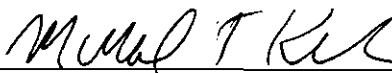
**CERTIFICATE OF SERVICE**

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: April 19, 2010

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

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