

BERGER LAW FIRM, P.C.

ATTORNEYS AT LAW

2104 MARKET STREET
CAMP HILL, PA 17011

TELEPHONE: (717) 920-8900
FACSIMILE: (717) 920-8901

EMAIL: publicutilitylaw@bergerlawfirm.net

September 7, 2010

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Pennsylvania Public Utility Commission v. Pennsylvania American
Water Company – Northeast Wastewater Operations
Docket No. R-2010-2166214**

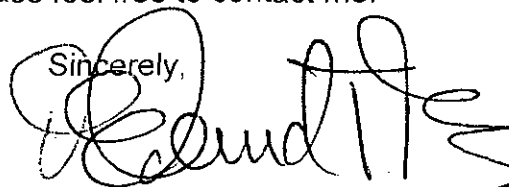
Dear Secretary Chiavetta:

Enclosed please find an original and four (4) copies of the Response of Complainants, Richard and Antoinette Callori, to Pennsylvania American Water Company's Motion to Strike Complaint and Motion In Limine to Exclude Rebuttal Testimony of Patrick Briegel on Complainant's Behalf along with the Certificate of Service.

Please file the original and return one copy to me in the enclosed, self addressed, stamped envelope.

If you have any questions, please feel free to contact me.

Sincerely,



Edmund "Tad" Berger

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Enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PA. P.U.C.
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Pennsylvania Public Utility
Commission

v.

Docket No. R-2010-2166214

Pennsylvania American Water
Company – Northeast Wastewater
Operations

**RESPONSE OF COMPLAINANTS,
RICHARD AND ANTOINETTE CALLORI,
TO PENNSYLVANIA AMERICAN WATER COMPANY'S
MOTION TO STRIKE COMPLAINT
AND MOTION *IN LIMINE* TO
EXCLUDE REBUTTAL TESTIMONY
OF PATRICK BRIEGEL ON COMPLAINANT'S BEHALF**

Pursuant to Section 5.103 of the Commission's Rules of Practice and Procedure, 52 Pa. Code §5.103, Complainants, Richard and Antoinette Callori, file this response to Pennsylvania-American Water Company's (1) Motion to Strike the Calloris' Complaint "to the extent it seeks active party status in this case," and (2) Motion *In Limine* to exclude from the record the written testimony of Patrick Briegel. As more specifically discussed below, Complainants submits that (a) the Commission's Rules permit filing of complaints after suspension and do not limit the participation of Complainants filing after suspension, (b) there is no prejudice to Pennsylvania-American from Complainants filing of its Complaint at this point in time, and (c) the focus of Complainants proposed Rebuttal Testimony is on certain factual information in OCA witness Rubin's Direct Testimony that Complainants believe is in error and would inappropriately shift

additional costs to Blue Mountain Lake customers unless the factual record established by Mr. Rubin is corrected.

In support of this response, Complainants specifically submit as follows:

- A. The Commission's Rules Permit Complaints To Be Filed After Suspension And Do Not Indicate That Complainants Filing After Suspension Are To Have Only Limited Rights of Participation In Rate Proceedings.

PAWC, in its Motion to Strike the Calloris' Complaint to the extent it seeks active party status in this case, argues primarily that the Complaint is submitted too late. PAWC emphasizes that the Complaint is submitted more than four (4) months after the filing of the rate proceeding and nearly two (2) months after the Prehearing Conference. Further, PAWC argues that the Calloris *did not* participate in the Prehearing Conference, did not submit a Prehearing Memorandum, provide notice of witnesses they intended to present or identify the subject matter of witnesses or the issues they believed would be raised by such testimony.

While it is true that the Calloris, although previously filing a rate protest with the Commission, had not previously participated in this proceeding in any way, the Commission's Rules of Practice and Procedure, 52 Pa. Code §5.32, make clear that there is nothing wrong with the Calloris filing a complaint and participating in this proceeding regardless of whether they decided to do so before, or after, suspension. Specifically, 52 Pa. Code §5.32(b) provides that complaints may be filed after suspension, although complainants filing at such time "shall take the record of the suspended rate proceeding as it stands at the time of the complaint's filing."

Complainants would emphasize that there is nothing in the Commission's Rules of Practice and Procedure that indicates that a complainant filing after suspension may

not fully participate in proceedings as an active party and, thus, PAWC's attempt to limit Complainant to inactive status is without basis. Certainly, if the Commission intended to provide such limits to active participation it would have so limited complainants in 52 Pa. Code §5.32(b), but it chose not to do so, thus leaving complainants free to participate fully in proceedings from the date of filing their complaint, as long as the record is still open.

With respect to PAWC's arguments that the Calloris did not participate in the prehearing conference, did not file prehearing memorandum and did not previously indicate their desire to participate as active parties, as the Calloris were not parties to the case at such time, they were not aware of these requirements and such requirements are not appropriately imposed on them when they filed their complaint after the prehearing conference had long passed.

Of course, the purpose of prehearing memorandum is, in part, to apprise parties more specifically of the issues that a party intends to raise in the proceeding. The Calloris' complaint and the proposed Rebuttal Testimony of Patrick Briegel filed two days after the complaint was filed both apprise PAWC and other parties to this proceeding of the specific issues of concern to the Calloris. Thus, by identifying the issues of concern to the Calloris in their complaint and proposed rebuttal testimony, PAWC and other parties were adequately apprised of the Calloris' concerns promptly upon their entrance into this proceeding. Moreover, the identification of issues in prehearing memorandum in a rate proceeding are typically very general in nature. Indeed, Complainants are unaware of any party who has filed a prehearing memorandum in a rate proceeding who has been limited to the issues specified in such

prehearing memorandum, given the broad scope of issues generally being investigated in rate proceedings.

The Calloris would note that, having previously filed an informal rate protest, they decided to enter this proceeding in part because, after reviewing OCA witness Scott Rubin's testimony, they realized that Blue Mountain Lake customers would be harmed if availability charges and revenue were recognized for Winona Lakes and Lehman Pike but were not recognized and credited for the numerous unimproved lots in Blue Mountain Lake. Further, the Calloris, who are familiar with the course of land development in this area, thought it essential that the record correctly reflect the lots to which availability charges could and should be applied if Mr. Rubin's proposal for availability charges were to be adopted.

PAWC argues that the Calloris should have expressed their views at the time of the public input hearings but chose not to do so. However, it is clear that formal complainants are not limited to presenting their testimony at public input hearings, but are entitled to present their views at the scheduled evidentiary hearings. Moreover, at the time of the public input hearings, Complainants would not have been aware of the Direct Testimony of Scott Rubin which presented the issue of focus in Mr. Briegel's proposed Rebuttal Testimony.

PAWC also argues that the Calloris have "not met the requirements for active party status," contending that "[t]hey have not offered an explanation for their belated entrance into this case and still have not complied with the requirements of the Prehearing Order." *PAWC Motion at 2-3*. However, as noted above, there is no "requirement for active party status." Furthermore, a complainant filing after the

prehearing conference could not typically meet the requirements of the Prehearing Order as they would have been too late to meet such requirements.

Complainants submit that there is no basis in the Commission's rules to deny active party status to the Calloris and that they should be permitted to participate actively in this proceeding. PAWC's Motion should be denied.

B. The Rebuttal Testimony of Patrick Briegel Is Directly Responsive to The Direct Testimony of OCA Witness Scott Rubin And, Therefore, Constitutes Appropriate Rebuttal Testimony And Should Be Allowed In This Proceeding.

In its Motion *In Limine*, PAWC argues that the proposed Rebuttal Testimony of Patrick Briegel is not Rebuttal Testimony, arguing that it does not "rebut" anything, nor could it, since they both favor the imposition of availability charges." *PAWC Motion at 3*. PAWC contends that Mr. Briegel's testimony is "case-in-chief" testimony and is being submitted improperly at the rebuttal phase, is prejudicial and unfair, and . *Id.*

Complainants submit that, contrary to the cases cited by PAWC in its Motion, Mr. Briegel's testimony is focused entirely on rebutting testimony presented in OCA witness Rubin's direct. Specifically, Mr. Briegel rebuts Mr. Rubin's proposal not to impose availability charges in the Blue Mountain Lake area while proposing such charges for Lehman Pike and Winona Lakes. Mr. Rubin proposed this distinction because he was uncertain whether there was a substantial number of lots with connections to PAWC's sewer system in the Blue Mountain Lake area. Mr. Briegel's familiarity with land development in the Blue Mountain Lake area makes him able to rebut this testimony by showing that it would be unfair and inappropriate to recognize revenue from availability customers in Winona Lakes and Lehman Pike but not in Blue Mountain Lake.

PAWC focuses on semantics rather than substance. It is typical for witnesses to say in their Rebuttal Testimony that they are “responding,” rather than “rebutting.” While Mr. Briegel does not rebut Mr. Rubin’s proposal to impose availability charges, he does rebut his testimony regarding whether there are sufficient connections in Blue Mountain Lake to warrant such a charge in the Blue Mountain Lake portion of Northeast Wastewater Service area.

Further, while PAWC cites to two cases where parties weren’t permitted to offer testimony in rebuttal that the ALJ or the Commission determined should have been offered in direct, PAWC fails to show how the testimony proposed to be offered in those cases is similar in any way to Mr. Briegel’s testimony in terms of the appropriateness of such testimony for rebuttal testimony.

The narrow focus of Mr. Briegel’s testimony makes clear that it is designed to rebut Mr. Rubin’s Direct Testimony, which would apply his proposed availability charge only to Lehman Pike and Winona Lake. It is not “case-in-chief” testimony as Mr. Briegel would have had no occasion to submit it if Mr. Rubin had not testified that customers in Blue Mountain Lake should be charged differently than customers in other areas.

With respect to the fact that the Calloris retained counsel, are not appearing *pro se*, and are “surrogates” for the homeowners’ association, and that the association’s asserted role in the public inputs does not allow for them to more formally enter the case at this point in time, Complainants submit that the Calloris’ right to enter this proceeding and to participate in the more formal evidentiary aspects of the hearing in accordance with the Commission’s Rules of Practice and Procedure should not and cannot be affected by the homeowner’s association’s previous efforts in the context of

the public input hearings. The reason for the Calloris' entrance in this case is apparent on the face of their Complaint and Mr. Briegel's testimony – they need to be in the formal part of the case to address the factual issue presented by Mr. Rubin's testimony and to more effectively participate than they previously realized was necessary.

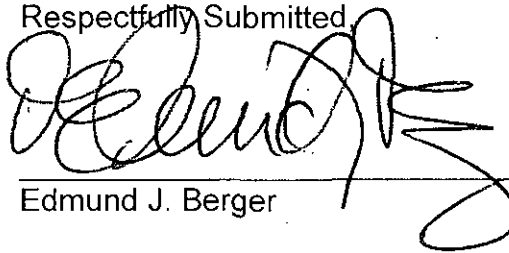
PAWC's argument that they should be "estopped" from doing so is without justification.

The Commission's rules welcome the participation of complainants after suspension and the Calloris intervention is appropriate and consistent with the Commission's Rules and designed to rebut specific testimony offered by OCA's witness in his direct.

PAWC's Motion to Strike the Calloris' Complaint and its Motion *In Limine* should be denied.

September 7, 2010

Respectfully Submitted,



Edmund J. Berger

Berger Law Firm, P.C.
2104 Market Street
Camp Hill, PA 17011

Phone: (717) 920-8900
Fax: (717) 920-8901
E-Mail: publicutilitylaw@bergerlawfirm.net

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, **Response of Complainants, Richard and Antoinette Callori, to Pennsylvania American Water Company's Motion to Strike Complaint and Motion *In Limine* to Exclude Rebuttal Testimony of Patrick Briegel on Complainant's Behalf**, upon the participants, listed below, in accordance with the requirements of § 1.54 (relating to service by a participant):

BY ELECTRONIC AND FIRST CLASS MAIL

Seth A. Mendelsohn, Esquire
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

Dianne E. Dusman, Esquire
Shaun A. Sparks, Esquire
Office of Consumer Advocate
555 Walnut Street
5th Floor, *Forum Place*
Harrisburg, PA 17101-1923

Charles Daniel Shields, Esquire
Carrie B. Wright, Esquire
Office of Trial Staff
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Anthony C. DeCusatis, Esquire
Thomas P. Gadsen, Esquire
Catherine G. Vasudevan, Esquire
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2921

BY FIRST CLASS MAIL

Rod Nevirauskas
Director—Rates and Regulations
Pennsylvania-American Water Company
800 West Hershey Park Drive
Hershey, PA 17033

Vito Manno
1 School House Road
Randolph, NJ 07869

Vinod George
350 Blue Mountain Lake
East Stroudsburg, PA 18301

Myrlene Honore
114 Blue Mountain Lake
East Stroudsburg, PA 18301

Eileen Alexander
David Alexander
136 Blue Mountain Lake
East Stroudsburg, PA 18301

Frank Falcone
120 Blue Mountain Lake
East Stroudsburg, PA 18301


Maria Romero-Tomba
561 Saw Creek Estate
Bushkill, PA 18324

Charles & Agnes Canfield
716 Blue Mountain Lake
East Stroudsburg, PA 18301

Rick Peckham
5 Syme Avenue
West Orange, NJ 07052

Emanuel & Sharon Tuta
598 Hilltop Circle
East Stroudsburg, PA 18301

Dated this 7th day of September, 2010


Edmund J. Berger

BERGER LAW FIRM, P.C.
2104 Market Street
Camp Hill, PA 17011
Phone: (717) 920-8900
Fax: (717) 920-8901
E-Mail: tberger@bergerlawfirm.net

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BERGER LAW FIRM, P.C.
2104 Market Street
Camp Hill, PA 17011

ROSEMARY CHIAVETTA, SECRETARY
PA PUBLIC UTILITY COMMISSION
P.O. Box 3265
HARRISBURG, PA 17105-3265

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