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November 12, 2010

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VIA HAND DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

I have enclosed for filing the original and nine (9) copies of the *Replies of Pennsylvania-American Water Company to the Exceptions of Third Avenue Realty Limited Partners*. A hard copy is being provided to the Complainant in the manner indicated on the attached Certificate of Service.

Very truly yours,



Brian J. Knipe

For BUCHANAN INGERSOLL & ROONEY, P.C.

BJK/jls

Enclosures

cc: The Honorable David A. Salapa (w/encl.)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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PENNSYLVANIA PUBLIC
UTILITY COMMISSION
SECRETARY'S BUREAU

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

**REPLIES OF PENNSYLVANIA-AMERICAN WATER COMPANY
TO THE EXCEPTIONS OF THIRD AVENUE REALTY LIMITED PARTNERS**

I. INTRODUCTION

Pennsylvania-American Water Company ("Pennsylvania-American" or the "Company"), in accordance with 52 Pa. Code § 5.535, submits these Replies to the Exceptions filed by Third Avenue Realty Limited Partners ("Complainant") to the Initial Decision ("I.D.") of Administrative Law Judge David A. Salapa ("ALJ") dated October 4, 2010 and issued October 13, 2010.

Complainant owns a seven-unit apartment building (the "Property") that receives water and wastewater service from Pennsylvania-American. Complainant, whose outstanding balance at the time of hearing was \$22,005.28 and has not made any payments since October 23, 2007, challenges two water and wastewater bills which were issued three (3) months apart.¹ The ALJ properly dismissed the Complaint based upon Complainant's failure to establish by a preponderance of evidence that it had been incorrectly billed.

As explained below, Pennsylvania-American believes that Complainant could not establish a *prima facie* case because it presented absolutely no evidence regarding the level of its tenants' water usage during the billing periods in question. Nevertheless, even assuming, for the

¹ The disputed bills cover: (1) the period from November 16, 2006 to December 22, 2006, and (2) the period from March 20, 2007 to April 19, 2007. N.T. 22.

sake of argument, that Complainant had presented sufficient evidence to establish a *prima facie* case, Pennsylvania-American presented evidence of far greater weight to rebut it. Among other things, the Company presented evidence that its field service representatives ("FSRs") found the leak indicator dial on Complainant's meter spinning on at least three (3) separate occasions, that the level of water usage at the Property returned to normal levels between and after the two disputed bills without any replacement of Complainant's meter, and that a subsequent test of Complainant's meter confirmed its accuracy. In light of all this evidence, the I.D. correctly concludes that Complainant failed to meet its burden of proof, and Complainant's Exceptions should be denied.

II. REPLIES TO EXCEPTIONS²

A. The I.D. Correctly Finds that Pennsylvania-American Presented Ample Evidence to Rebut Any *Prima Facie* Case of High Billing

Complainant contends that "the Initial Decision inappropriately finds that Respondent rebuts Complainant's evidence with co-equal evidence," Exceptions at 3, a reference to *Waldron v. Phila. v. Philadelphia Electric Co.*, 54 Pa. P.U.C. 98 (1980) ("*Waldron*"). Complainant dismisses the Company's evidence of a leak on the Property as a "tired assertion." Exceptions at 3. Once this evidence is discarded, Complainant argues, Pennsylvania-American's only rebuttal evidence is its test demonstrating the accuracy of the meter, which by itself is insufficient to meet the Company's burden of going forward, under *Waldron*. Exceptions at 4.

The first problem with Complainant's argument is that it utterly ignores the other evidence Pennsylvania-American offered in rebuttal. As mentioned, the Company presented

² While Complainant's Exceptions are divided into the categories of "To Findings of Fact" and "Discussion," they are numbered as a single exception, entitled "*Complainant believes it carried its burden of proof under Pennsylvania law and Respondent failed to meet their burden with co-equal or superior evidence,*" and these Replies treat Complainant's filing as a single exception on this single issue.

evidence that when tested, the meter proved to be accurate within the Pennsylvania Public Utility Commission's guidelines at 52 Pa. Code § 65.8(a) (N.T. 38, Ex. R-5), as well as evidence that the Company's FSRs found the leak indicator on Complainant's meter spinning on at least three (3) separate occasions (N.T. 29-32, Ex. R-2). In addition to this evidence, and equally important, the Company presented evidence that between the two billing periods in dispute, and subsequent to the billing periods in dispute, the level of water usage at the Property returned to levels consistent with usage levels prior to the billing periods in dispute, which Complainant deems to be normal levels of usage, and that this return to normal usage levels occurred prior to any replacement of the meter for testing on October 12, 2009. (N.T. 41, Ex. C-7, Ex. R-5). The ALJ correctly noted the improbability that Complainant's meter only malfunctioned intermittently:

[I]t is highly unlikely that the old meter would function properly from the time the Respondent installed it until the billing period from November 16, 2006 to December 22, 2006 when the Complainant alleged the first high bill occurred then resume functioning properly until the billing period from March 20, 2007 to April 19, 2007 when the Complainant alleged the second high bill occurred, then resume functioning properly until the Respondent tested it. It is more likely that if the meter had malfunctioned during the relevant billing periods, it would have continued to malfunction. I conclude that since the meter was functioning properly when it was tested, it was functioning properly for the entire time period from the time that the Respondent installed it.

I.D. at 18. This reasoning is consistent with the Commission's conclusion in its Opinion and Order in *Christman v. PECO Energy Company*, where the Commission stated, "we do not believe that the Complainant's meter could have malfunctioned during alternating years of 2005 and 2007 and not malfunctioned during 2006 and 2008." *See* Docket No. F-2008-2026212 (Opinion and Order entered Aug. 17, 2009), slip op. at 8.

The second problem with Complainant's argument is that the evidence of a leak at the Property cannot be casually dismissed. As mentioned above, the Company's FSRs found the leak indicator on Complainant's meter spinning on at least three (3) separate occasions, both before and after the two billing periods in dispute. (N.T. 29-32, Ex. R-2). Indeed, on one of these occasions, on May 11, 2007, Complainant was to have notified its tenants to turn off all water.³ (N.T. 30-31, Ex. R-2). Complainant challenges that while the Company's service records for each of the three visits to the Property contain a notation to the effect that the leak indicator dial was seen to be spinning (Ex. R-2), the records of a fourth visit to the Property to re-read Complainant's meter on April 17, 2009, which was during one of the two billing periods in dispute, contains no similar notation. Exceptions at 4. Complainant argues that the lack of a notation on this service order must mean there was no leak at that time, and therefore that the entire 497,000 gallons reflected on Complainant's bill for that billing period must be "actual usage," which Complainant submits is a clear sign of a malfunctioning meter. Exceptions at 4. However, in addition to the fact that the FSRs found the leak indicator dial spinning both before and after the April 17, 2009 visit to the Property, there is absolutely nothing in the record to suggest that the lack of a notation on the April 17, 2009 service order means that the dial was not spinning at that time. Certainly, there was no notation on the April 17, 2009 service order to indicate the leak indicator dial was not spinning. All the lack of a notation on the service order

³ In its Exceptions, Complainant for the first time contends that Pennsylvania-American never notified Complainant to instruct tenants to turn off their water in advance of the FSRs' visit to the Property. Presumably this is to suggest that the leak indicator dial may have been spinning as a result of intentional water usage instead of a leak. Exceptions at 2. Notwithstanding the Company's denial of this new allegation, this is yet another instance of Complainant introducing new allegations following the close of the record, without seeking to reopen the record. Another instance of this occurs on page 1 of the Exceptions, where Complainant alleges the meter readings in dispute were "estimated," an allegation directly contrary to the record evidence that the bills in dispute were based upon actual meter readings taken electronically during FSR visits to the Property to execute service orders (N.T. 39, Ex. C-1). *See* 66 Pa.C.S. § 1411 (readings by automatic meter reader devices deemed actual readings). The belated introduction of new allegations has already resulted in the striking off of three pages of Complainant's reply brief, *see* I.D. at 13, and it should be no better received at this later stage of the proceedings.

means is that the FSR did not make a notation. Complainant, who at all times bears the ultimate burden of proof, *Replogle v. Pennsylvania Electric Co.*, 54 Pa. P.U.C. 528 (1980), cannot rebut Pennsylvania-American's evidence of a leak with such a tenuous inference.

Further, Pennsylvania-American's witness Stephen Gibbs testified that a toilet can easily leak one to three gallons per minute. (N.T. 39). While Complainant continues to dispute that any leak could ever result in the loss of as much water as is at issue in this case, Exceptions at 3, this argument ignores the fact that a leak was not the cause of the entire month's water usage. Indeed, the record shows that the Property contains seven (7) apartments which were fully occupied by twelve (12) residents during the periods in question. N.T. 13, 15, 18. The amount of water used at the Property also depends substantially on the amount of water used by these individuals, a critical issue on which Complainant presented absolutely no evidence at hearing, as explained below. Accordingly, the evidence of record provides ample support for the ALJ's conclusion that "it is more likely that a leak or other similar continuous flow of water was responsible for the Complainants' two high bills rather than a malfunctioning meter." I.D. at 19.

B. Complainant's Evidence Does Not Establish a *Prima Facie* Case

While Complainant's Exceptions assume that Complainant established a *prima facie* case at hearing by proving, among other things, that the pattern of water usage at the Property did not change during the disputed billing periods, Exceptions at 3, 4, Pennsylvania-American disagrees. While it was unnecessary for the I.D. to engage in an exhaustive discussion of the elements of a *prima facie* case given the ample evidence Pennsylvania-American had presented in rebuttal, it is important to note that Complainant never presented evidence to establish its purported "stable usage environment." Exceptions at 4. To the contrary, Complainant's only witness, the owner of

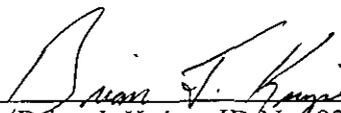
the Property, admitted at hearing that he has never lived at the Property, and that he only visits it on weekends to make small repairs. N.T. 18. Further, Complainant's witness has never investigated the tenants' water usage, even in reaction to the high water bills. (N.T. 19). As the ALJ correctly found, Complainant's witness has no knowledge of the tenants' water usage whatsoever. I.D. at 16. Without any evidence regarding the pattern of water usage at the Property, Complainant failed to establish any *prima facie* case of overbilling, much less one that could withstand rebuttal.

III. CONCLUSION

For the reasons stated above, Pennsylvania-American Water Company respectfully requests that the Commission deny Complainant's Exceptions and adopt the Initial Decision of Administrative Law Judge David A. Salapa without modification.

Respectfully submitted,

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Dated: November 12, 2010

