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February 23, 2012

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building-2 North
P.O. Box 3265
Harrisburg, PA 17105

**Re: Docket No. C-2010-2212641
Aleksy Konovalov v. Aqua PA, Inc.
Main Brief of Aqua Pennsylvania, Inc.**

Dear Secretary Chiavetta:

Enclosed for filing is the original Main Brief of Aqua Pennsylvania, Inc. in the above-captioned matter.

As indicated on the Certificate of Service, a copy of the Main Brief of Aqua Pennsylvania, Inc. has been provided to the Complainant in the matter indicated.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP


Margaret A. Morris, Esquire

Enclosure

cc: Honorable Cynthia W. Fordham [w/enc.]
Aleksy Konovalov [w/enc.]

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Aleksey Konovalov v. Aqua PA, Inc.
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CERTIFICATE OF SERVICE

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

Via First Class Mail

Aleksey Konovalov
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Dated: February 23, 2012

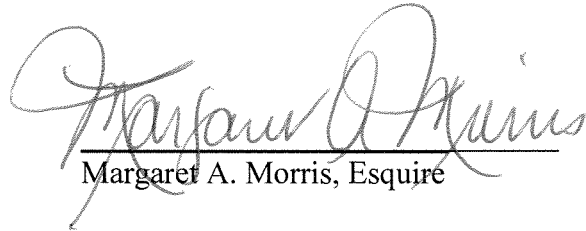

Margaret A. Morris, Esquire

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Introduction

This matter comes before the Commission as a Formal Complaint filed by Aleksey Konovalov (“Complainant”) against Aqua Pennsylvania, Inc. (“Aqua” or “Respondent”). The Complainant objects to the annual testing of his backflow device on his fire line arguing that as a residential customer, it should not be required. The issue is whether the Commission has the jurisdiction to adjudicate a dispute involving the backflow testing requirement set forth in Aqua’s Commission-approved Tariff.

Commission precedent and case law supports the dismissal of the Complaint since the requirement of backflow testing is based on the water quality requirements of the Department of Environmental Protection (“DEP”). Matters affecting water quality such as the testing of backflow devices are within DEP’s jurisdictional not the Commission. Aqua submits this Main Brief in support of its position that the Complaint should be dismissed in its entirety.

History of the Proceedings

On November 23, 2010, the Complainant filed his Formal Complaint alleging that Aqua’s Commission-approved Tariff requirement that he annually test his backflow device should not be applied to him. Complaint ¶ 4A.

On December 20, 2010, Aqua filed its Answer which denied the allegations of the Complaint and explained that its Commission-approved Tariff for its Cross Connection Control Program sets forth the circumstances under which the annual testing of the backflow device is required to comply with both Federal and State Safe Drinking Water Act and regulations.

The Honorable Cynthia Williams Fordham issued Prehearing Order # 2, dated November 16, 2011, directing the parties of the hearing requirements and scheduling the Telephonic Hearing for November 23, 2012 at 10 A.M.

Both parties participated in the hearing and introduced exhibits into the record. The hearing produced a transcript of thirty-eight (38) pages and four (4) exhibits were admitted into the record.

By Order # 3, dated February 1, 2012, Judge Fordham established the schedule for the simultaneous filing of Main and Reply Briefs.

Positions of the Parties

Complainant's Position

Complainant's objects to Aqua's requirement that he annually test the backflow device for his fire service as set forth in Aqua's Tariff. TR 13. He requests that "the Company's Tariff specifically clarify that only non-residential customers are required to run the annual test of the backflow device. And based on that, remove that requirement from me particularly." TR 14.

The Respondent's Position

Aqua's Cross Connection Control Program requires the installation and annual testing of backflow devices for all fire service accounts. The mandatory installation and annual inspection of the backflow devices is required to comply with Federal and State Safe Drinking Water Act regulations. 42 U. S. C. §§ 330j-9 to 330j-10; 36 P. S. §§ 721.1-721.7

Aqua's Commission-approved Tariff, Rule 54, Aqua Exhibit 1, outlines its Cross Connection Control Program as applicable to new and existing customers who connect to its water distribution system. Aqua's Cross Connection Control Program is consistent with both federal and state law and regulations which require a public water provider, such as Aqua, to provide reasonable protection of its potable water supply system against **potential** contamination and/or pollution resulting from backflow through uncontrolled plumbing connections and/or cross connection at any of its customer premises. TR 24. The testing requirement is also set forth in Aqua's Commission-approved Tariff, Rule 54, Aqua Exhibit 1.

Aqua has included the testing requirement for backflow prevention devices in its tariff to comply with DEP mandates. *Polites v. Aqua Pennsylvania, Inc.*, Docket No. C-20055157 (Order entered November 13, 2006). (Aqua Exhibit 2 at 6). Aqua opines that the Commission has addressed the issue of the testing requirement and has found that it lacks jurisdiction to adjudicate a dispute over a requirement of inspecting a cross connection control/backflow prevention device by a certified tester to maintain the purity of the public water supply system.

Polites v. Aqua Pennsylvania, Inc., Docket No. C-20055157, Initial Decision at 5. (Aqua Exhibit 2 at 11). The Commonwealth Court affirmed the Commission's conclusion in *Polites* and found that any matters affecting water quality such as the testing of backflow devices are within DEP's jurisdiction not the Commission. *Polites v. PA PUC*, 928 A.2d 388, (Cmwlth. 2007). (Aqua Exhibit 3 at 4)

Legal Burden

The party filing the complaint bears the burden of proving that he or she is entitled to relief from the Commission. 66 Pa.C.S. § 332(a). "Burden of proof" means a duty to establish one's case by a preponderance of the evidence, which requires that the evidence be more convincing by even the smallest degree, than the evidence presented by the other side. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). To satisfy the burden of proof against a utility, a complainant must show that the utility is responsible or accountable for the problem described in the complaint, *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976), or that the utility has violated either its duty under the Public Utility Code or the orders or regulations of the Commission. 66 Pa.C.S. § 701.

To establish a sufficient case and satisfy the burden of proof, a complainant must show that the respondent public utility is responsible or accountable for the problem described in the complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. PA Public Utility Comm'n*, 134 Pa. Cmwlth. 218, 221-222, 578 A.2d 600, 602 (1990); *alloc. den.*, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Commonwealth, PA Public Utility Comm'n*, 67 Pa. Cmwlth. 597, 447 A.2d 1100 (1982); *Edan Transportation Corp. v. PA Public Utility Comm'n*, 154 Pa. Cmwlth. 21, 623 A.2d 6 (1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. PA Public Utility Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 85 Pa. Cmwlth. 23, 480 A.2d 382 (1984).

Under these principles the Complainant, as the party seeking relief, has the burden of proof. In this case, the Complainant has the burden of proving, by a preponderance of the evidence, that the Respondent is responsible or accountable for the problem described in his complaint. *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976).

Discussion

The sole issue raised by the Complainant is the requirement that he must annually test the backflow device on his fire service. The Commission and Commonwealth Court have ruled that the Commission lacks jurisdiction to entertain complaints regarding the backflow testing requirements of a water utility. *Polites PUC Orders* and *Commonwealth Court Order, supra*.

Aqua's Cross Connection Control Program is in place to satisfy its absolute obligation to provide safe and reasonable service to the general public. The requirement that a customer annually test the backflow device is set forth in its Commission-approved Tariff and is applicable to all customers without exception. A utility's approved tariff has the force of law and is binding on the utility and its customers. *Stiteler v Bell Telephone Co. of PA*, 32 Pa. Cmwlt. 319, 379 A.2d 339 (1977); *Brockway Glass Co. v Pa. PUC*, 63 Pa. Cmwlt., 238, 437 A.2d 1067 (1981); *Penelec v Pa PUC*, 663 A.2d 281 (Pa. Cmwlt. 1995).

The Commission has reviewed the issue of the testing requirement and has concluded that utilities have included the testing requirement in their tariff to comply with DEP mandates. *Polites, supra*. Both the Commission and Commonwealth Court have ruled that the Commission lacks jurisdiction to adjudicate complaints regarding the testing requirement. *Polites PUC Orders* and *Commonwealth Court Order, supra*.

The Complainant has only offered his unsubstantiated opinion that he should not be required to test the backflow device on his fire service and that Aqua's Tariff should not apply to his account. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. PA Public Utility Comm'n*.

Proposed Findings of Fact

1. The Complainant initiated residential customer with Aqua on September 5, 2003. TR 7, 18.
2. The Complainant's residential account has both domestic and fire service. TR 18.
3. The Complainant is required to annually test the back flow device installed on his fire service line. TR 14.
4. The Complainant did test the backflow device as required by Aqua in 2008. TR 7.
5. The Complainant's sole objection is to Aqua's requirement that he annually test the backflow device installed on his fire service line. TR 13.
6. Aqua's Tariff states that a customer with an existing connection to its distribution system will furnish, install and maintain a company approved backflow prevention, cross connection, or other special device at the company's request. Aqua Exhibit 1.
7. The Commission has previously ruled that it does not have jurisdiction to rule on the issue of testing backflow devices. TR 25-26, 34.
8. The Commonwealth Court has affirmed that the Commission does not have jurisdiction to entertain complaint regarding the annual testing requirement for backflow devices. TR 27-29.

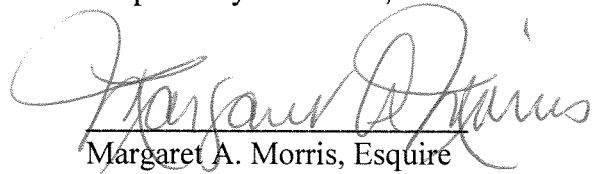
Conclusions of Law

1. The Commission does not have jurisdiction to adjudicate a dispute over a requirement of inspecting a cross connection control/backflow prevention device by a certified tester to maintain the purity of the public water supply system. *Polites v. Aqua Pennsylvania, Inc.*, Docket No. C-20055157. (Order entered November 13, 2006).
2. Water utilities have included the testing requirement for backflow prevention devices in their tariff to comply with DEP mandates. *Polites, supra*.
3. Any matters affecting water quality such as the testing of backflow devices are within DEP's jurisdiction not the Commission. *Polites v. PA PUC*, 928 A2d 388, (Cmmwlth. 2007). (Aqua Exhibit 3 at 4).

Conclusion

WHEREFORE, for the foregoing reasons, Aqua Pennsylvania, Inc. respectfully requests that this Honorable Court dismiss with prejudice the Formal Complaint of Aleksey Konovalov at Docket No. C-2010-2212641 for lack of jurisdiction.

Respectfully submitted,



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Dated: February 23, 2012

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