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March 20, 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-2011-2271943
Docket No. R-2011-2267958
Petition to Withdraw Motion to Consolidate**

Dear Secretary Chiavetta:

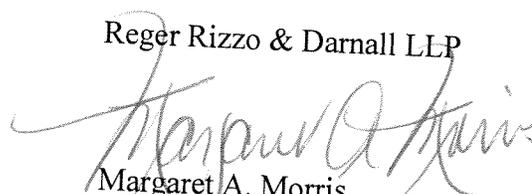
Enclosed for filing, please find two originals of the Petition to Withdraw the Motion to Consolidate the Complaint in Docket No. C-2011-2271943 into the pending rate case proceeding of Aqua Pennsylvania, Inc. at Docket No. R-2011-2267958. I have enclosed two original copies so that an original can be placed in each docket.

As indicated on the Certificate of Service, a copy of the Petition to Withdraw has been provided in the manner indicated.

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

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

enclosures

cc: Anil Kapur
Honorable Kandace Melillo
Honorable Angela Jones
Honorable Darlene Heep
Rate Case Proceeding Service List

Scott J. Rubin, Consulting Attorney
333 Oak Lane

Bloomsburg, PA 17815-2036

Ph: (570) 387-1893

Email: Scott.j.rubin@gmail.com

**Regulatory Consultant for Office of
Consumer Advocate*

Mr. Jerome Linden

201 Cornell Drive

Bryn Mawr, PA 19010

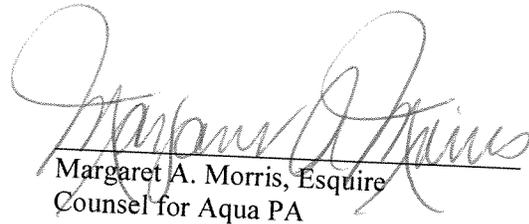
jerrylinden@yahoo.com

Mr. Robert Curtius

949 Foss Avenue

Drexel Hill, PA 19026

Dated: March 20, 2012



Margaret A. Morris, Esquire
Counsel for Aqua PA

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANIL KAPUR

Complainant

v

AQUA PENNSYLVANIA, INC.

Respondent

**PENNSYLVANIA PUBLIC UTILITY
COMMISSION, ET AL**

v.

AQUA PENNSYLVANIA, INC.

Docket No. C-2011-2271943

Docket No. R-2011-2267958

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.94, you are hereby notified that, if you do not file a written response answering the enclosed Petition to Withdraw the Motion for Consolidation of Aqua Pennsylvania, Inc. within twenty (20) days from service of this notice, the facts set forth by Aqua Pennsylvania, Inc. in the Petition may be deemed to be true, whereby requiring no other proof. All pleadings, such as an Objection to the Petition, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Aqua Pennsylvania, Inc., Margaret A. Morris.

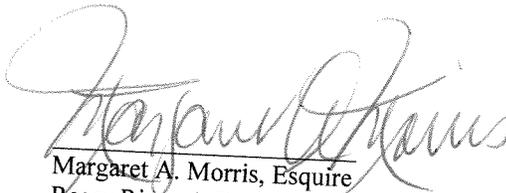
File with:

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

With a copy to:

Margaret A. Morris, Esquire
Reger Rizzo & Darnall, LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104

Dated: March 20, 2012



Margaret A. Morris, Esquire
Reger Rizzo & Darnall, LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 (voice)
(215) 495-6600 (fax)
mmorris@regerlaw.com
Counsel for Aqua Pennsylvania, Inc.

- Company's] existing rates.” *Interim Order* at 6. A copy of the *Interim Order* is attached as Exhibit 2.
3. The *Interim Order* noted that the burden of proof in the Complaint Proceeding “is placed squarely upon the Complainant” and advised of the heavy burden of proof. *Interim Order* at 6.
 4. On November 18, 2011 the Company filed its base rate application seeking proposed changes in rates, rules, and regulations. The application was docketed at Docket No. R-2011-2267958.
 5. By Order dated January 5, 2012, an in-person hearing was scheduled in the Complaint Proceeding for February 22, 2012.
 6. A telephonic conference was held on February 21, 2012 before Judge Melillo wherein it was determined by the Judge that the appropriate course of action was for the Parties in the Complaint Proceeding to seek to consolidate the Complaint regarding the reasonableness of the Company’s water rates with the Rate Case Proceeding.
 8. The parties to the telephonic conference in the Complaint Proceeding had envisioned that the consolidation pleading would be a joint filing. On February 22, 2012, the Respondent circulated to the Complainant a draft Joint Motion to Consolidate for his review and approval. The Complainant advised the Respondent that he had outstanding process questions and was seeking counsel from Shaun Sparks at the Office of Consumer Advocate (“OCA”). The Complainant stated in an email that “...this can only be finalized after I have had a discussion with Mr. Sparks to understand the scope and timing of the other action”.
 9. Since the Respondent was unsure as to when the Complainant’s questions/concerns would be discussed with the OCA, the Respondent filed the Motion to Consolidate on March 1, 2012 so as not to frustrate the presiding administrative law judges in both the Complaint and Rate Case Proceedings.
 10. To date, the Respondent has not been successful in speaking the Complainant to discuss his concerns about the filed Motion or the process.
 11. The last contact with the Complainant was on March 12, 2012 when he advised the undersigned counsel via email that he would contact counsel for

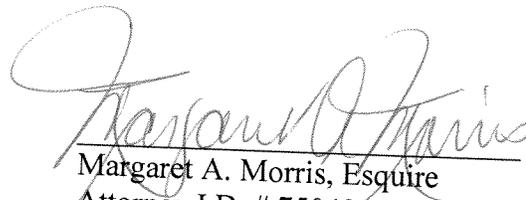
- the Respondent upon his return to his home which was expected the week of March 19, 2012.
12. As a result of being unable to speak directly with the Complainant, on March 19, 2012, counsel for Respondent contacted Mr. Sparks at the OCA to discuss the status of the Complainant's concerns regarding the Motion to Consolidate.
 13. Mr. Sparks advised that the gist of the Complainant's issues with the Respondent dealt with a billing issue related to the conversion from a flat rate to a metered rate for his domestic water service. Mr. Sparks also stated that he advised the Complainant that his position that an Authority or other governmental agency could provide water service cheaper than an investor owned utility was a legislative issue and not within the jurisdiction of the Commission.
 14. The time period to file an answer to the Motion to Consolidate expires on March 21, 2012.
 15. If the Motion to Consolidate is granted, the Complainant is obligated to accept the case status and the procedural schedule as established in the Rate Case Proceeding at the time the consolidation occurs.
 16. The procedural schedule established in the Rate Case Proceeding will not permit the Complainant to participate fully since the time to file Direct Testimony has passed (Non-company direct testimony was due February 17, 2012). The Company's rebuttal testimony was filed March 19, 2012. If the Motion to Consolidate is granted, the Complainant will not be in a position to testify and will not be afforded that opportunity to present his case.
 17. Hearings in the Rate Case Proceeding begin on April 9, 2012.
 18. The grant of the Motion to Consolidate will effectively prohibit the Complainant from presenting his case in either proceeding.
 19. The Complainant has a right under Section 701 of the Public Utility Code, 66 Pa C.S.A. §701 to complain and to be heard about the Respondent's rates.
 20. The Respondent acknowledges that the burden of proof differs depending on where the Complainant's issues are addressed: if heard in the Rate Case Proceeding, the Respondent has the burden of proof; if in the Complaint Proceeding, the Complainant has the burden of proof.

21. The Complainant was made aware of his burden of proof in the Complaint Proceeding and chose to go forward with his complaint. See, *Interim Order* at 6.
22. The Complaint Proceeding will permit the Complainant the venue to fully be heard on his complaint regarding his issues with the Company's water and sewer rates.
23. The public interest is not served in consolidating the Complaint Proceeding into the Rate Proceeding since the litigation schedule in the Rate Case Proceeding is too far along so as to permit the Complainant to file testimony and to be an active party in the Rate Case Proceeding.
24. The Complaint Proceeding should be held in abeyance until after the Rate Case Proceeding is completed. This will provide the Complainant the opportunity to conduct discovery, prepare testimony and testify at the hearing.

WHEREFORE, Respondent, Aqua Pennsylvania, Inc., respectfully requests that its Petition to Withdraw its Motion for Consolidation be granted as in the public interest. The issue regarding the reasonableness of existing water rates should remain in the Complaint Proceeding, Docket No. C-2011-2271943.

Respectfully submitted,

Dated: March 20, 2012



Margaret A. Morris, Esquire
Attorney I.D. # 75048
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 (voice)
(215) 495-6600 (fax)
mmorris@regerlaw.com

Counsel for Aqua Pennsylvania, Inc.

Attachment 1

Formal Complaint of Anil Kapur



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

DATE SERVED: November 9, 2011

IN REPLY PLEASE
REFER TO OUR FILE

C-2011-2271943

AQUA PENNSYLVANIA INC
NICHOLAS DEBENEDICTIS CHAIRMAN
762 WEST LANCASTER AVE
BRYN MAWR PA 19010

Dear Mr. DeBenedictis:

A complaint has been filed against you before the Pennsylvania Public Utility Commission by Anil Kapur. To defend yourself against the claims stated in the complaint, you must respond within twenty (20) days of the above date served by filing with the Commission, in writing, an Answer in accordance with 52 Pa. Code Section 5.61, either personally or through your attorney. Or, you may satisfy the complaint by settling the matter with the Complainant and submitting proof of settlement to the Commission within twenty (20) days of the above date served.

IF YOU FAIL TO ANSWER THE COMPLAINT WITHIN TWENTY (20) DAYS OF THE ABOVE DATE SERVED, THE CLAIMS AGAINST YOU MAY BE DEEMED ADMITTED, THE CASE MAY GO FORWARD IN YOUR ABSENCE, AND A JUDGEMENT MAY BE ENTERED AGAINST YOU BY THE COMMISSION WITHOUT FURTHER NOTICE.

CUSTOMER OF A UTILITY

A payment schedule may be prescribed or a termination of utility services may be authorized. You may lose money or property or other rights important to you.

COMPANY/UTILITY

An Administrative Law Judge may revoke or suspend any certificate or permit held by you, or impose a fine, or any other appropriate penalty or remedy authorized by the Public Utility Code. You may lose money or property or other rights important to you.

Detailed instructions on how to proceed are contained in the attached pages. You are advised to read them carefully.

November 9, 2011

Unless you are a corporation or other organization, you may proceed without a lawyer. However, if you want a lawyer and do not have one or cannot afford one, the office listed below can tell you where you can get legal help:

Pennsylvania Lawyer Referral Service
Pennsylvania Bar Association
P.O. Box 186
Harrisburg, PA 17108
(800) 692-7375

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rosemary Chiavetta".

Rosemary Chiavetta
Secretary

al

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DATE SERVED: November 9, 2011

ANIL KAPUR
Complainant

v.

AQUA PENNSYLVANIA, INC.
Respondent

Complaint Docket
No: C-2011-2271943

FORMAL COMPLAINT NOTICE TO RESPONDENT TO ANSWER OR SATISFY

TO: AQUA PENNSYLVANIA, INC.

TAKE NOTICE:

That a complaint in the above entitled matter, of which the attached is a true and correct copy, has been presented and filed of record with the Pennsylvania Public Utility Commission. Section 702 of the Public Utility Code, 66 Pa. C.S. Section 702, requires the Commission to serve on each party named in a complaint a copy of the complaint and notice calling upon each party to satisfy the complaint, or to answer the same in writing within a specified time; THEREFORE,

1. You have twenty (20) days from the date on which this complaint is served to either satisfy this complaint or to file with the Secretary of the Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265, an answer (original and three copies), in writing, under oath, which, as required by Section 5.61 of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 5.61, either affirms or specifically denies the allegations in this complaint. You must also serve a copy of the answer upon the complainant. **The date served is the mailing date appearing at the top of this Notice.** Section 1.56(a) of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 1.56(a).
2. If you fail to either satisfy or settle this complaint, or to file an answer or other responsive pleading within twenty (20) days of the date served, you will be deemed to have admitted all the allegations in this complaint in accordance with Section 5.61 of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Section 5.61. In that event, the Commission may, without hearing, enter an order which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C.S. Section 101, et seq. If you are a customer of a utility, an order may be entered which prescribes a

payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

3. If you elect to satisfy or settle this complaint, you must file, within twenty (20) days from the date on which this complaint is served, affidavits executed by each complainant that this complaint has been satisfied. Such affidavits must describe the basis on which this complaint was satisfied; any settlement agreement between the parties must be reduced to writing and attached to the affidavit. Such affidavits are to be filed with the Secretary of the Commission at the address set forth in paragraph 1. Upon receipt of affidavits of satisfaction from all complainants, this complaint may be dismissed by the Commission in accordance with Section 703(a) of the Public Utility Code, 66 Pa. C.S. Section 703(a), unless the Commission determines that such dismissal would be contrary to the public interest, in which event the Commission may direct that hearings be held upon the complaint.

4. If you file an answer which admits the allegations in this complaint, or which fails to specifically deny the allegations in this complaint, the Commission may, without hearing, enter an order which either revokes or suspends any certificate held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq. If you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

5. If you file a timely answer which specifically denies the allegations in this complaint, or which raises material questions of law or fact, this matter shall be referred to the Office of Administrative Law Judge for hearing and decision. If, after hearing on the issues raised by that answer, you are found to have committed any of the violations alleged in the complaint, the Administrative Law Judge may render a decision which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq. If you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. In the imposition of a penalty after a hearing the Administrative Law Judge is not bound by the relief sought by the complainant in paragraph 4 of the attached complaint.



Rosemary Chiavetta
Secretary

(SEAL)

Certified Mail
Return Receipt Requested

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Formal Complaint Form

COPY

Please print in ink or type.

4. CUSTOMER (COMPLAINANT) INFORMATION

Your name, mailing address, county, telephone number, utility account number and service address:

Name ANIL KAPUR

Street/P.O. Box 37 WILD PINES DRIVE Apt # 2712 CATHEDRAL AVE. N

City POCONO PINES State PA DC Zip 18350 20008

County _____

Daytime Telephone Number Where We Can Contact You: 570 977 4463

E-mail Address (optional): _____

Utility Account Number 0011180550819963
(from your bill)

If your complaint involves utility service provided to a different address than your mailing address, please list this information below.

Name ANIL KAPUR

Street/P.O. Box 37 WILD PINES DRIVE

City POCONO PINES State PA Zip 18350

2. FULL NAME OF UTILITY COMPANY (RESPONDENT):

AQUA PENNSYLVANIA

3. TYPE OF UTILITY (check one)

ELECTRIC

STEAM HEAT

GAS

WASTE WATER

WATER & SEWAGE

MOTOR CARRIER

(e.g., taxi, moving company, limousine)

TELEPHONE

(local, long distance)

2011 OCT 26 11:10:05
SECRETARY'S BUREAU

79198

4. COMPLAINT (check one)

A. In general, what is your complaint?

- I want to oppose the company's proposed rate increase.
- There are incorrect charges on my bill.
- There is a reliability, safety or quality problem with my utility service.
- I received a notice that my utility service is being terminated.
- I would like a payment agreement.
- Other (explain).

B. State the facts of your complaint.

Include any specific dates, times or places that may be important. If the complaint is about a bill, tell us about any charges that you believe are not correct. Use additional paper if you need more space. Provide copies of all relevant documents you believe will support your complaint.

5. RELIEF

How do you want your complaint to be resolved? Use additional paper if you need more space.

See attached letter

6. PROTECTION FROM ABUSE.

Answer the following question if your complaint is against a natural gas distribution utility, an electric distribution utility or a water distribution utility AND your complaint is about a billing problem, a request to receive service, a security deposit request, termination of service or a request for a payment agreement.

Has a court granted a "Protection from Abuse" order for your personal safety or welfare?

YES

NO

7. PRIOR UTILITY CONTACT

Answer the following question only if you are a residential customer and your complaint is against an electric distribution utility, natural gas distribution utility or a water distribution utility.

Have you spoken to a utility company representative about this complaint?

YES (includes appeals of BCS determinations)

NO

If you tried to, but could not speak to a utility company representative about your complaint, please explain why.

8. LEGAL REPRESENTATION (IF ANY)

If you are represented by a lawyer in this matter you must provide your lawyer's name, address, telephone number, and e-mail address, if known.

Lawyer's Name _____

Street _____

City _____ State _____ Zip _____

Area Code/Phone Number _____

E-mail Address (If Known) _____

9. VERIFICATION AND SIGNATURE

You must print or type your name below on the line provided for the verification paragraph, and you must sign and date (in ink) this form on the lines provided.

Verification:

I ANIL KAPUR

hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

[Signature]
(Signature)

OCTOBER 23, 2011
(Date)

Title of authorized employee or officer

10. FILING

Please return the completed form to one of the addresses listed below:

If using U.S. Postal Service:

If using overnight delivery service:

Secretary Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265	Secretary Pennsylvania Public Utility Commission 400 North Street Commonwealth Keystone Building, 2 nd Floor Harrisburg, Pennsylvania 17120
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Facsimiles and/or electronic filings of the complaint will not be accepted.

If you have any questions about filling out this form, please contact the Secretary's Bureau at 717-772-7777.

Keep a copy of your complaint for your records.

Anil & Martha Kapur
2712 Cathedral Ave. N.W.
Washington, D.C. 20008-4120
570-977-4463; aanilkapur@gmail.com

2011 OCT 26 AM 10:05

SECRETARY'S BUREAU

October 23, 2011

Secretary
The Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pa. 17105-3265

**Re: Formal Complaint – Response on Relief
Aqua Pennsylvania – Water and Sewage Provider
Account No. 001118055 0819963**

Further to previous correspondence with the Pennsylvania Public Utility Commission (BCS No. 2895550), I would like to file a formal complaint in response the investigation concluded by the Bureau of Customer Services.

We are occasional and part time residents of Pocono Pines, Pa. After numerous complaints from residences, Aqua Pennsylvania installed meters in our development in July 2010, as opposed to previously charging a flat rate. Our meter was installed sometime in July 2010 by one of their authorized representatives, after having being told many times they had no record of this information. As a result of these issues, on September 7, 2010, I filed a complaint with the Pennsylvania Public Utility Commission under Case No. 2741605.

However, from my perspective, there seems to be another twist to the matter which does not make much economic sense. In a recent phone call with Aqua Pennsylvania, I now understand that there is a minimum monthly charge of \$70.80 for water and sewage, irrespective of the meter reading. I am not sure I understand the purpose of having installed meters and still having a minimum monthly charge. To me, it seems the entire purpose of installing meters is defeated and this is not common industry practice.

My wife and I were in the Poconos for one day this past month and according to their records they indicate we used 750 gallons of water. However, for our 30 day we stay in Washington, D.C., our water usage was 4,488 gallons or a daily average of 150 gallons, which seems more reasonable for a family of two. As per our actual usage, DCWASA bill was \$55.80 for both water and sewage compared with a minimum charge of \$70.80 in Pocono Pines, Pa.

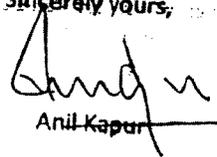
We seek relief in the following areas:

- It seems that the current law allows for utilities to charge a minimum price. However, that may be appropriate for non-meter areas. If that is the case, we seek, the law and regulation should be changed to reflect the installation of meters in private developments and charges should be based on actual charges and not on fixed pre-determined minimum charges;

- The State's pricing structure for public utilities is not nationally competitive. We seek relief that the regulatory body should enforce rates for water and sewage be based on a competitive national average as opposed to some arbitrary "return" for the private utility. I have already given you an example of water and sewage charges in Washington, D.C. which is provided by a public state run utility and not a private utility ; and
- The pricing structure seems to contradict the State government's policy in promoting retirees and senior citizens. We seek relief that all utilities pricing structure should have special pricing provisions for senior citizens which would make it more compatible and coordinated with the State's overall policy.

I look forward to your response and decision on my complaint.

Sincerely yours,



Anil Kapur

Attachment - Formal Complaint

Attachment 2

Interim Order

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Anil Kapur

v.

Aqua Pennsylvania, Inc.

:
:
:
:
:

C-2011-2271943

**INTERIM ORDER GRANTING, IN PART, AND DENYING,
IN PART, PRELIMINARY OBJECTIONS OF
AQUA PENNSYLVANIA, INC.**

I. BACKGROUND

On October 26, 2011, Anil Kapur (Mr. Kapur or Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against Aqua Pennsylvania Inc. (Aqua PA, the Company, or Respondent). Mr. Kapur alleged in his Complaint that Respondent's \$70.80 combined minimum monthly charge for water and sewage service was unjust and unreasonable. As relief, Mr. Kapur sought a change in the law and regulations so that such charges are based on actual usage rather than fixed minimum charges, regardless of usage. He further requested that water and sewage rates be based on a "competitive national average" rather than a "fair rate of return" and that senior citizens and retirees be provided a discount, consistent with the Commonwealth's overall policy of providing discounted services for seniors.

On or about November 29, 2011, Aqua PA filed an Answer and New Matter, with a twenty (20) day Notice to Plead, which denied that its customer charges for services were unjust and unreasonable. It asserted that Mr. Kapur was confusing the customer charge with a minimum charge, and contended that Complainant was being charged, in accordance with its Pinecrest Division tariff, for actual water used under a consumption charge, in addition to the customer charge. Aqua PA also asserted that the water customer charge is part of the monthly basic distribution charge to partially recover the costs for billing, meter reading and equipment,

and service line maintenance and equipment, and that these costs do not vary with usage. The Company indicated that its tariffed sewage charge was still a flat fee regardless of usage.

Aqua PA further denied that Respondent was entitled to the relief requested, and claimed that the Commission does not have jurisdiction to establish rates based upon a “competitive national average” as opposed to “fair rate of return.” It contended that the request for special senior citizen pricing was contrary to law and court precedent which required cost of service-based pricing to customer classes.

In *New Matter*, Aqua PA essentially asserted various conclusions of law. Complainant never filed a reply to *New Matter*, which would have been due on or before December 22, 2011. 52 Pa. Code §§1.56(b) and 5.63. However, as ruled by the Pa. Superior Court in *Landis v. City of Philadelphia*, 438 Pa. Super. 385, 652 A.2d 865 (1995), Complainant’s failure to file a responsive pleading results only in the admission of factual averments, not legal conclusions. In accord, 52 Pa. Code §5.63(b).

Also on November 29, 2011, Aqua PA filed Preliminary Objections, with a ten (10) day Notice to Plead, apparently requesting that Complainant’s requested relief be stricken as unauthorized by law. Curiously, Aqua PA did not request that Mr. Kapur’s Complaint be dismissed but only that the requested relief be dismissed. The Company also did not identify the grounds for the Preliminary Objections, which are set forth in 52 Pa. Code §5.101(a)(1) through (6).

In accordance with 52 Pa. Code §§1.56(b) and 5.101(f)(1), the time for filing an answer to the Preliminary Objections expired on December 12, 2011. No answer or other response was filed, to my knowledge, by the Complainant.

Aqua PA’s Preliminary Objections were assigned to me by Motion Judge Assignment Notice dated December 13, 2011, and are now ready for a ruling. For the reasons set forth below, I will grant the Preliminary Objections in part, and deny them in part, and direct that the remaining issue(s) be set for a hearing.

II. DISCUSSION

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

A preliminary objection seeking dismissal of a complaint, in whole or in part, will be granted only where relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions, but must accept for the purpose of disposition of the motion, all well-pleaded material facts of the other party, as well as every inference fairly deducible from those facts. County of Allegheny v. Commonwealth of Pa. (County of Allegheny), 507 Pa. 360, 490 A.2d 402 (1985). Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual allegations of the Complaint are true. Id. The motion will be granted only if the moving party prevails as a matter of law. Rok v. Flaherty, 106 Pa. Commw. 570, 527 A.2d 211 (1987). Any doubt must be resolved in favor of the non-moving party. Dept. of Auditor General, et al. v. State Employees' Retirement System, et al., 836 A.2d 1053 (Pa. Cmwlth. 2003).

The grounds for preliminary objections, which are set forth in 52 Pa. Code §5.101(a), are as follows:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

As stated previously, the Company did not specifically identify the grounds upon which the Preliminary Objections are based. However, it can be inferred that the grounds are as follows: (1) lack of Commission jurisdiction, under 52 Pa. Code §5.101(a)(1); and perhaps, (2) legal insufficiency of the complaint, under 52 Pa. Code §5.101(a)(4), although it was observed that the Company sought dismissal of the requested relief and not the Complaint itself.

In support of its implied Preliminary Objection that the Commission lacks jurisdiction to grant the requested relief, Aqua PA cited to case authority holding that Commission jurisdiction must arise from the express language of the enabling legislation or by strong and necessary implication therefrom. *See, e.g., Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 1191 (1977). The Company continued with its argument that the requested relief; i.e., a rate which is not based on fair rate of return and provides a special preference for senior citizens at the expense of other classes, is not authorized by the Public Utility Code (Code). *See, National Utilities, Inc. v. Pa. P.U.C.*, 709 A.2d 972 (Pa. Cmwlth. 1998); *Manufacturers' Ass'n of Erie v. Pa. P.U.C.*, 407 A.2d 114 (Pa. Cmwlth. 1979). Thus, the Company is not actually claiming a lack of jurisdiction but a lack of authority to grant the requested relief.

I note that there are no grounds for granting preliminary objections on the basis of lack of authority. However, as stated by Administrative Law Judge Barnes in her Order Denying Preliminary Objections in *Leiby's Mobile Home Community, LLC v. Verizon Pa. Inc.*, Docket No. C-2011-2225151, the correct preliminary objection in this situation is to strike the requested relief as impertinent matter under 52 Pa. Code §5.101(a)(2). Requests for relief which are not legally recoverable in the cause of action

pleaded are “impertinent matter” in the sense that they are irrelevant to the cause of action. See, Legion Ins. Co. v. Doeff, 2001 Phila. Ct. Com. Pl., LEXIS 97 (2001). A preliminary objection in the nature of a motion to strike off impertinent matter is the appropriate means to challenge an erroneous prayer for relief.

I agree with Aqua PA that Mr. Kapur’s requested relief in the nature of a national average rate and a special senior citizen’s discount should be stricken as impertinent matter and therefore, that Preliminary Objection will be granted. Where the issue to be decided is purely one of law or policy, the matter may be disposed of without resort to an evidentiary hearing. Dee-Dee Cab, Inc. v. Pa. P.U.C., 817 A.2d 593 (Pa. Cmwlth. 2003); Diamond Energy, Inc. v. Pa. P.U.C., 653 A.2d 1360 (Pa. Cmwlth. 1995); Lehigh Valley Power Committee v. Pa. P.U.C., 128 Pa. Commw. 276, 563 A.2d 557 (1989). The Company is correct that the setting of rates based upon national averages and ratepayer age is not generally authorized by the Code and therefore, the taking of evidence in support of or in opposition to such relief would be a useless exercise. Philadelphia Gas Works v. Pa. P.U.C., 898 A.2d 671 (Pa. Cmwlth. 2006); National Utilities, Inc., supra.

There is a specific provision in Section 2212(r)(1) of the Code, 66 Pa. C.S. §2212(r)(1), authorizing senior citizen rates and programs for customers of Philadelphia Gas Works, if such rates and programs are otherwise just and reasonable, but there is no other authorization for such rates or programs in the Code. If such rates had been authorized by the Commission’s general rate-setting authority, then 66 Pa. C.S. §2212(r)(1) would have been superfluous. The appropriate forum for Complainant to seek redress in the form of national averages or special rates is with the Legislature and not the Commission.

Complainant has also included a request for relief that rates be based on actual usage rather than minimum charges. In regard to the water rates, Aqua PA accurately stated that such charges are based on consumption and therefore, this request for relief will be stricken as moot. However, as will be further explained, *infra*, to the

extent the complaint is about the water customer charge, that claim will be permitted to go forward. With respect to the sewer charges, that matter will be addressed, *infra*.

Aqua PA's second implied Preliminary Objection is on the grounds of legal insufficiency, pursuant to 52 Pa. Code 5.101(a)(4), also known as a demurrer to the Complaint. *See*, Pa. Rules of Civil Procedure 1028(a)(4). For purpose of its implied Preliminary Objection, the Company would be contending that, even if all of the facts set forth in the Complaint are assumed to be true, the Complainant has failed to set forth grounds upon which relief can be granted and therefore, the Company is entitled to complaint dismissal.

I do not agree with the implication that Complainant has failed to set forth grounds upon which relief can be granted. Complainant has generally alleged that Aqua PA's Pinecrest Division water and sewage rates, *e.g.*, the fixed customer charge for water service and minimum charge for sewer service, are unjust and unreasonable, and therefore in violation of Section 1301 of the Code, 66 Pa. C.S. §1301. I note that, as stated above, the sewage charge is based upon a flat fee, regardless of usage. While the Company is legally required to charge its Commission-approved rate, that does not preclude customers from filing a complaint against existing rates under 66 Pa. C.S. §§701 and 1309. The difficulty associated with satisfying the burden of proof concerning a complaint against existing rates, which burden is placed on the Complainant, is not a factor to be considered in ruling on preliminary objections.

Where there are disputed issues of fact, such as the reasonableness of existing rates, the matter is appropriately referred for a hearing. Accordingly, to the extent Aqua PA filed a Preliminary Objection based upon legal insufficiency, or other grounds that request dismissal of the Complaint, that Preliminary Objection is denied.

As an aside, I would be remiss if I did not elaborate on Complainant's difficulty with meeting his burden of proof in this matter. In complaints about existing rates, that burden is placed squarely upon the Complainant. 66 Pa. C.S. §§315(a), 332(a); *see also*, Cup v. Pa. Public Utility Commission, 124 Pa. Commw. 291, 296, 556 A.2d 470 (1989) (holding that where the

complaint involves an existing rate, the customer has the burden to prove that the charge is no longer reasonable). To meet this burden, Complainant must expect to incur expert witness fees for testimony as to the various costs associated with the challenged rates and the appropriate recovery of these costs through the ratemaking process. Given the complexity of the issues, this matter must be set for an in-person hearing in Harrisburg, PA.

If Mr. Kapur decides not to pursue the matter, he must file a letter of withdrawal of the complaint at Docket No. C-2011-2271943 with the Commission's Secretary's Bureau, and provide a copy of that letter to me and Company counsel. My address for this purpose is as follows:

Kandace F. Melillo, Administrative Law Judge
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 783-5452
Fax: (717) 787-0481

III. ORDERING PARAGRAPHS

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Aqua Pennsylvania, Inc. on November 29, 2011, concerning the Formal Complaint of Anil Kapur at Docket No. C-2011-2092890, seeking the striking of impertinent matter from requested relief as to rates based on national averages and senior citizen discounts, and water rates based upon usage, are hereby granted.

2. That any Preliminary Objections filed by Aqua Pennsylvania, Inc. on November 29, 2011, concerning the Formal Complaint of Anil Kapur at Docket No. C-2011-2092890, on the grounds of legal insufficiency, or otherwise, which requests the dismissal of the Complaint, are hereby denied.

3. That the matter of the justness and reasonableness of Aqua Pennsylvania, Inc.'s existing water and sewage rates be set for an Initial Hearing in an available hearing room in Harrisburg, PA and that all parties be notified of the day, date, time and location of the hearing.

Dated: December 28, 2011

Kandace F. Melillo
Administrative Law Judge

C-2011-2271943 - ANIL KAPUR v. AQUA PENNSYLVANIA, INC.

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