

January 7, 2015

**Via Electronic Filing**

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

**Re: Docket No. C-2014-2450732  
Frank Nellom v. Aqua Pennsylvania Inc.  
Answer of Aqua PA, Inc. to Motion for Summary Judgment**

Dear Secretary Chiavetta:

Attached for filing is the Answer of Respondent, Aqua Pennsylvania, Inc. (Aqua), to the Motion for Summary Judgment of Frank Nellom (Complainant).

A copy of the Answer has been forwarded the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/njh  
Enclosures

cc: Frances P. Orth, Esquire, Aqua Pennsylvania Inc. [w/enc.]  
Frank Nellom [w/enc.]

**Re: Docket No. C-2014-2450732  
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Answer of Aqua PA, Inc. to Motion for Summary Judgment**

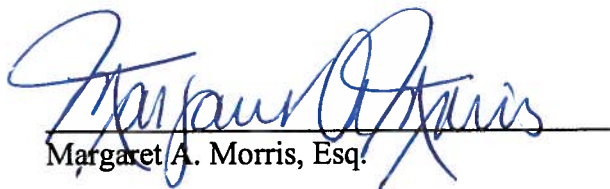
**CERTIFICATE OF SERVICE**

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

**Via Electronic Mail**

Frank Nellom  
520 Keystone Avenue  
Darby, PA 19023  
[franknellom@gmail.com](mailto:franknellom@gmail.com)

Dated: January 7, 2015

  
Margaret A. Morris, Esq.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FRANK NELLOM	:	
	:	
v.	:	Docket No. C-2014-2450732
	:	
AQUA PENNSYLVANIA, INC.	:	

**ANSWER OF AQUA PENNSYLVANIA, INC.  
TO MOTION FOR SUMMARY JUDGMENT OF FRANK NELLOM**

Aqua Pennsylvania, Inc. (Respondent or Aqua), by and through its attorneys, Reger Rizzo & Darnall LLP, pursuant to 52 Pa. Code § 5.102(b), hereby submits its Answer to the Motion for Summary Judgment (Motion) filed by Frank Nellom (Complainant or Mr. Nellom) on December 17, 2014, with the Pennsylvania Public Utility Commission (Commission). This Motion seeks, without an evidentiary hearing, a summary determination that Aqua violated the Commission’s regulations in: (1) terminating service twice in 2013 for non-payment of 2013 charges; and (2) terminating service once in 2014 for non-payment of 2014 charges. As relief, the Motion requests imposition of a \$25 million fine. The Complainant asserts that “the Aqua documents and the medical certificates” (med certs) attached to the Motion constitute the “record of evidence in this case” warranting summary relief.

The Motion does not meet the legal standards for summary relief and therefore should be denied. The Motion merely restates the Complainant’s version of the facts surrounding the three terminations and subsequent restorations. Aqua properly

denied the material allegations in its responsive pleadings based on the information contained in its business records, presented the facts concerning the terminations, receipt of valid med certs and the timely restoration of service. As set forth in the attached affidavits of Derrick McBride and Barry N. Doyle, the Respondent disputes the facts alleged by the Complainant in the Motion. An evidentiary hearing is required to: (1) establish the underlying facts of both the Complaint and Amended Complaint; (2) determine if Aqua violated the Pennsylvania Public Utility Code (Code), Commission regulations or orders; and (3) determine whether a civil penalty is warranted (and the amount of any such penalty) if the Commission determines that a violation occurred. Due process mandates that the Respondent be permitted, at a hearing, to present its defense to the Complainant's request for a \$25 million fine and to address the factors used by the Commission in assessing civil penalties pursuant to the Code, 66 Pa.C.S. § 3301.

This matter comes before the Commission pursuant to the Order filed on October 17, 2014, by Delaware County Court of Common Pleas Judge Christine Fizzano Cannon (October 17, 2014 Court Order), which bifurcated the liability claims asserted in the Second Amended Complaint (requesting compensatory damages in the amount of \$1 million and punitive damages in the amount of \$10 million) filed by the Complainant (Civil Complaint). The October 17, 2014 Court Order stayed the proceeding as to the requested damages and properly bifurcated for determination by the Commission of the Complainant's allegation that the Company's termination and subsequent restoration of

his water service twice in 2013 was in violation of specific provisions of the Commission Regulations at 52 Pa. Code § 56.1, *et seq.* (Chapter 56).

The instant Motion should be denied because in his Formal Complaint, Mr. Nellom alleged his water service was unlawfully terminated on September 25, 2013, and again on December 12, 2013. Aqua denied the material allegations and alleged that the termination was due to non-payment of undisputed charges billed in calendar year 2013. Aqua's Answer clearly raised a dispute as to material facts that must be determined at a hearing.

In his Amended Formal Complaint, Mr. Nellom further alleged that the termination of his service on November 3, 2014, was unlawful since Aqua did not obtain permission from the Court or Commission. Aqua denied the material allegations and alleged that the 2014 termination was due to non-payment of undisputed delinquent 2014 charges (2014 Termination).<sup>1</sup> Again, Aqua's Answer clearly raised a dispute as to material facts that must be determined at a hearing.

As most recently stated by the Commission in *Zack v. Service Electric Telephone LLC*, Docket No. C-2013-2388009, Opinion and Order entered December 18, 2014, the Commission's Rules of Administrative Practice and Procedure permit parties to file preliminary motions. 52 Pa. Code §§5.101 - 5.103. The Commission's Regulation, at 52 Pa. Code § 5.102(a), permits any party to move for summary judgment after the

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<sup>1</sup> The undisputed 2014 delinquent balance included only charges billed after January 8, 2014 and does not include any 2013 charges.

pleadings are closed, but within such time as not to delay a hearing. A motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa. Code § 5.102(c). The presiding officer will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

The moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pa., v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlth. 1976). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thomson Coal Co. v. Pike Coal Co.*, 412 A.2d 466 (Pa. 1979). Summary judgment will be granted only where the right is clear and free from doubt.

The Commission has interpreted 52 Pa. Code § 5.102(c) in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure. *South River Power Partners, L.P. v. West Penn Power Co.*, Docket No. C-00935287 (Commission Opinion and Order entered November 6, 1996). Accordingly, a non-moving party may not rely solely upon denials in its pleadings, but must submit some materials to establish that a genuine issue of material fact exists. *Nicastro v. Cuyler*, 467

A.2d 1218 (Pa. Cmwlth. 1983); *Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc.*, 467 A.2d 330 (Pa. Super. 1983); *Geriot v. Council of Borough of Darby*, 457 A.2d 202 (Pa. Cmwlth. 1983).

The provision at 52 Pa. Code § 5.102(c) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Comm. v. Pennsylvania Pub. Util. Comm'n.*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. 54. Pennsylvania Pub. Util. Comm'n.*, A.2d 1006 (Pa. Cmwlth. 1988).

The instant Motion does not meet the above legal standards and therefore must be denied. Based on the pleadings, there are genuine material issues of fact in controversy and the Complainant is not entitled to judgment as a matter of law. As the right to relief is not clear and free from doubt, summary judgment cannot be granted. In addition, the Respondent has a due process right to a hearing to respond to the requested \$25 million civil penalty.

In response to the specific numbered paragraphs in the Motion, Respondent avers and represents as follows:

1. The Complainant merely restates the allegation in Count One of the Complaint; Aqua incorporates by reference its specific denial of this allegation as set

forth in its Answer. The 10-day notice, dated September 5, 2013, did not include any amount related to charges that formed the balance for the Company payment arrangement (PAR). The payments received on June 7, July 8 and July 26, 2013, satisfied the \$227.05 Company PAR balance. The September 5, 2013 10-day notice was for the delinquent undisputed amount of \$133.33, which represented the delinquent monthly charges for the bills issued in April, May, and June 2013. See, attached affidavits of Derrick McBride and Barry N. Doyle. This matter presents genuine material issues of fact in controversy; a hearing is therefore required.

2. The Complainant merely restates the allegation in Count Two of the Complaint; Aqua incorporates by reference its specific denial of this allegation as set forth in its Answer. The med cert, dated September 26, 2013, was not faxed to Aqua until September 30, 2013, at 12:40 PM; at 4:11 PM, the med cert was approved. Service was restored at 11:00 AM on October 1, 2013, within the required timeframe established by 52 Pa. Code § 56.115. See, attached affidavits of Derrick McBride and Barry N. Doyle. This matter presents genuine material issues of fact in controversy; a hearing is therefore required.

3. The Complainant merely restates the allegation in Count Three of the Complaint; Aqua incorporates by reference its specific denial of this allegation as set forth in its Answer. A 10-day notice, dated November 5, 2013, was issued for termination on or after November 18, 2013. Aqua's in-person service of the 3-day and 48-hour notices is authorized by Chapter 14 of the Code, 66 Pa.C.S. § 1406(b) and 52 Pa.

Code § § 56.93 and 56.95. Aqua's service of the post-termination notice on December 12, 2013, is authorized in 52 Pa. Code § 56.94. The Complainant filed an informal complaint<sup>2</sup> after his service was terminated. See, attached affidavits of Derrick McBride and Barry N. Doyle. This matter presents genuine material issues of fact in controversy; a hearing is therefore required.

By way of further response, the Respondent specifically denies that the *new allegation* that the termination notices posted at the property were done in retaliation of the informal complaint; the informal complaint was filed after service was terminated. Strict proof substantiating this allegation, if deemed relevant, is demanded at hearing.

4. The Complainant merely restates the allegation in Count Four of the Complaint; Aqua incorporates by reference its specific denial of this allegation as set forth in its Answer. The med cert, dated December 12, 2013, was denied on December 13, 2013 because it specifically stated "no medical reason" and that it "would not be especially dangerous" to have water service discontinued (Emphasis in original). On December 16, 2013, the same med cert, was revised to also include the statement "patient needs water to take medication" and to indicate the revised date of December 16, 2013. Aqua made the business decision on December 16, 2013 to restore service while it investigated the conflicting statements on the med cert and attempted to contact the Complainant. On December 18, 2013, the Complainant contacted Aqua to schedule an appointment for the restoration of his service which occurred later that day. The

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<sup>2</sup> BCS Decision No. 3179316 was opened by BCS on December 12, 2013; Aqua was notified by BCS of the informal on December 13, 2013.

provisions of 52 Pa. Code § 56.115 were never relevant since the Complainant's service was not restored because of valid med cert. See, attached affidavits of Derrick McBride and Barry N. Doyle. This matter presents genuine material issues of fact in controversy; a hearing is therefore required.

By way of further response, the Respondent specifically denies the new allegation that the validity of the med cert is "not an issue." The specific restoration of service provisions set forth in 52 Pa. Code § 56.115 becomes operational upon the presentation of a valid med cert as defined in 52 Pa. Code § 56.113.

5. The Complainant merely restates the allegation in Count Five of the Complaint and concludes that his allegations "warrant summary judgment." Aqua incorporates by reference its specific denial of his underlying allegation as set forth in its Answer. Clearly, Aqua must be given the opportunity to present its case to the Commission for its determination based on the record evidence. The Complainant reached factual conclusions *on his own* outside the context of such an evidentiary hearing; his own "exhibits" on their face reflect inconsistencies with his "facts" and arguments. See, attached affidavits of Derrick McBride and Barry N. Doyle. This matter presents genuine material issues of fact in controversy; a hearing is therefore required.

6. The Complainant merely restates the allegation in his Amended Complaint that the 2014 Termination was unlawful and that Aqua was required to seek prior permission from the Court and Commission; Aqua incorporates by reference its

specific denial of this allegation as set forth in its Amended Answer. The termination of service on November 3, 2014 for delinquent charges accrued in 2014 was lawful and proper under the Code and Chapter 56. Permission was not required from either the Court or Commission. The delinquent 2014 amount did not include any disputed charges from the two terminations in 2013. See, attached affidavits of Derrick McBride and Barry N. Doyle. This matter presents genuine material issues of fact in controversy; a hearing is therefore required.

By way of further response, Aqua avers it has a due process right to a hearing to not only contest the requested fine, but to also address the factors set forth in the Commission's Policy Statement for Civil Fines.<sup>3</sup>

In conclusion, the documents attached both to the Motion and this Answer make clear that this case contains genuine issues of contested material facts and the Complainant is not entitled to judgment as a matter of law. Contested material issues of fact may not to be summarily dismissed based on pleadings but rather must be developed on the record. Aqua has a due process right to a hearing at which the Complainant must sustain his burden of proof regarding the contested material facts as well as the requested fine. For these reasons, the Complainant's right to summary judgment is not clear and free from doubt and the Motion must be denied.

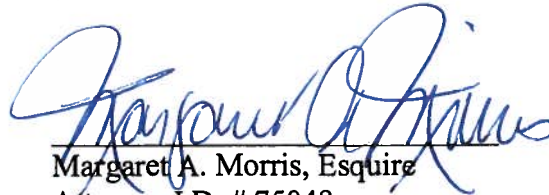
**WHEREFORE**, for the foregoing reasons, Aqua Pennsylvania, Inc.,

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<sup>3</sup> Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations, 52 Pa. Code § 69.1201 *et seq.*

respectfully requests that the Motion for Summary Judgment filed by Frank Nellom be denied and an in-person hearing be scheduled as expeditiously as possible.

Respectfully submitted,



Margaret A. Morris, Esquire  
Attorney I.D. # 75048  
Cira Centre, 13<sup>th</sup> Floor  
2929 Arch Street  
Philadelphia, PA 19104  
(215) 495-6524 (voice)  
(215) 495-6600 (fax)

Dated: January 7, 2015

[mmorris@regerlaw.com](mailto:mmorris@regerlaw.com)

Counsel for Aqua Pennsylvania, Inc.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FRANK NELLØM :  
 :  
 :  
 v. : Docket No. C-2014-2450732  
 :  
 :  
 AQUA PENNSYLVANIA, INC. :

**Affidavit of Derrick McBride**

1. My name is Derrick McBride. I am the Manager National Cash and Collections for Aqua Pennsylvania, Inc.
2. I have reviewed the Motion for Summary Judgment filed by Frank Nellom in this proceeding.
3. The 10-day notice, dated September 5, 2013, did not include any amount related to charges that formed the balance for the Company payment arrangement (PAR).
4. The payments received on June 7, July 8 and July 26, 2013 satisfied the \$227.05 Company PAR balance.
5. The 10-day notice, dated September 5, 2013, was for the delinquent undisputed amount of \$133.33, which represented the delinquent monthly charges for the bills issued in April, May, and June 2013.
6. The med cert, dated September 26, 2013, was not faxed to Aqua until September 30, 2013 at 12:40 PM; at 4:11 PM, the med cert was approved.
7. Service was restored at 11:00 AM on October 1, 2013 within the required timeframe established by Section 56.115.
8. A 10-day notice, dated November 5, 2013 was issued for termination on or after November 18, 2013.
9. Aqua's in-person service of the 3-day and 48-hour notices is authorized in Chapter 14 of the Code, 66 Pa.C.S. § 1406(b) and 52 Pa. Code §§ 56.93 and 56.95.
10. Aqua's service of the post termination notice on December 12, 2013, is authorized in 52 Pa. Code § 56.94.
11. The med cert, dated December 12, 2013, was denied on December 13, 2013, because it specifically stated "no medical reason" and that it "would not be especially dangerous" to have water service discontinued.
12. On December 16, 2013, the same med cert, was revised to also include the statement "patient needs water to take medication" and to indicate the revised date of December 16, 2013.

13. The termination of service on November 3, 2014, for delinquent charges accrued in 2014 and did not include any disputed charges from the two terminations in 2013.

**Verification**

The statements made in this Affidavit are true and correct to the best of my knowledge, information, and belief. The above statements are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

*Derrick McBride*

\_\_\_\_\_  
Derrick McBride

*January 7, 2015*

\_\_\_\_\_  
Date

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

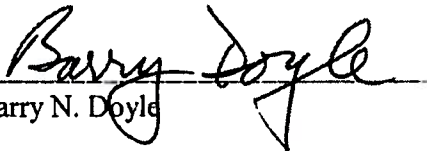
FRANK NELLUM :  
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 v. : Docket No. C-2014-2450732  
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 AQUA PENNSYLVANIA, INC. :

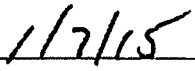
**Affidavit of Barry N. Doyle**

1. My name is Barry N. Doyle. I am the Eastern Call Center Supervisor for Aqua Pennsylvania, Inc.
2. I have reviewed the Motion for Summary Judgment filed by Frank Nellom in this proceeding.
3. The Commission's Bureau of Consumer Service advised on December 13, 2013, that Frank Nellom had filed an informal complaint on December 12, 2013 alleging his service had been unlawfully terminated.<sup>1</sup>
4. Aqua made the business decision on December 16, 2013 to restore service while it investigated the conflicting statements on the med cert and attempted to contact the Complainant.
5. On December 18, 2013, the Complainant contacted Aqua to schedule an appointment for the restoration of his service which occurred later that day.

**Verification**

The statements made in this Affidavit are true and correct to the best of my knowledge, information, and belief. The above statements are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

  
Barry N. Doyle

  
Date

<sup>1</sup> BCS Decision No. 3179316 was opened by BCS on December 12, 2013 and closed on December 18, 2013.