

July 27, 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.
Aqua PA Reply to Motion for Summary Judgment**

Dear Secretary Chiavetta:

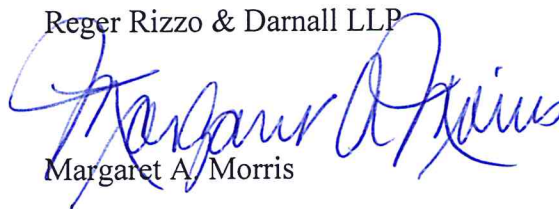
Attached for filing is the Reply of Respondent, Aqua Pennsylvania, Inc. (Aqua), to the Motion for Summary Judgment of Frank Nellom (Complainant).

A copy of the Reply 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/jmm
Attachment

cc: The Honorable Darlene D. Heep, PA Public Utility Commission [w/enc.]
Frances P. Orth, Esquire, Aqua Pennsylvania Inc. [w/enc.]
Frank Nellom [w/enc.]

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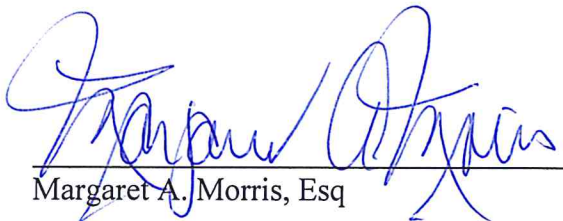
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the 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

Dated: July 27, 2015



Margaret A. Morris, Esq

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**ANSWER OF AQUA PENNSYLVANIA, INC.
TO JULY 6, 2015 MOTION FOR SUMMARY JUDGMENT OF FRANK NELLUM**

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 most recent Motion for Summary Judgment filed by Frank Nellom (Complainant) on July 6, 2015 (July Motion). The request for summary judgment is substantively flawed and procedurally improper and the July Motion should be denied in its entirety.

An evidentiary hearing was held in this matter on June 10, 2015, before the Honorable Darlene D. Heep (Judge Heep). Both parties appeared and presented evidence on the issues raised in the Complaint and Amended Complaint. At the conclusion of the hearing, Judge Heep established a late-filed exhibit schedule by which the Complainant was to file proposed revised Exhibit C-2 on June 19, 2015 (Tr. 273). The revised briefing schedule required main briefs to be filed on July 24, 2015 and reply briefs on August 3, 2015. The Complainant filed a Main Brief, with various appendices, on June 19, 2015; proposed revised Exhibit C-2 was included in the appendices. Aqua timely filed its Objection to proposed revised Exhibit C-2 on June 24, 2015. Aqua timely filed its Main Brief on July 24, 2015.

Although somewhat difficult to follow, the July Motion seeks summary judgment alleging that as the result of Respondent's failure to "challenge the claims," contained in his Main Brief, summary judgment was warranted. The Complainant also challenged Aqua's policy for the delivery of termination notices, specifically the cost associated with personal delivery as

compared to first class mail. In addition to the request for summary judgment, the Complainant seeks “. . . an order staying judgment until Respondent provides a list of all notices personally delivered, absent Shut Off, from September 25, 2013 to date an appropriate amount derived from recommended.”¹

The request for summary judgment is substantively flawed and should be denied. Commission case precedent is clear. The Complainant bears the burden of showing that no genuine issue of material fact exists and that he is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the Respondent, the non-moving party, giving Aqua 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 Complainant, 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.

At the evidentiary hearing, Aqua presented testimony and exhibits, all which were admitted into the record, which established that a genuine issue of material facts 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 parties are in the briefing stage where the disputed material facts and applicable law will be argued. The Complainant’s right to relief is not clear and free from doubt, and he is not entitled to judgment as a matter of law.

The request for summary judgment is also procedurally improper and should be denied. Motions for summary judgment must be filed “after the pleadings are closed, but within a time so that the hearing is not delayed” pursuant to 52 Pa. Code § 5.102(a). Here, the evidentiary hearing was held and therefore the matter is ripe for a ruling by Judge Heep on the merits. Aqua was under no obligation to depart from Judge Heep’s schedule by filing any pleading in immediate response to the Complainant’s Main Brief.

¹ Aqua has done its best to respond to this Motion, as it has to the numerous other pleadings submitted by Complainant in this proceeding. However, to the extent that there may be other issues not apparent through a reasonable reading of the July 6 Motion, Aqua reserves the right to respond appropriately.

Simply because the Complainant chose to file his Main Brief before the due date does not result in the conclusion that Respondent has waived any rights by not immediately responding. Aqua timely filed its Objection to the Complainant's proposed revised Exhibit C-2 attached as an appendix to his Main Brief. Aqua timely filed its Main Brief on July 24, 2015 and will timely file its Reply Brief on August 3, 2015 responding to the arguments raised in the Complainant's Main Brief. To grant summary judgment in the Complainant's favor based on Aqua's failure to reply to a prematurely filed brief, would be a violation of Aqua's due process rights. Furthermore, it would be a gross perversion of the Commission's litigation procedure that carefully balances the rights of the various parties appearing before it. There can be no question that given the procedural posture of the case and the disputed material facts, the July Motion is improper and should be denied.

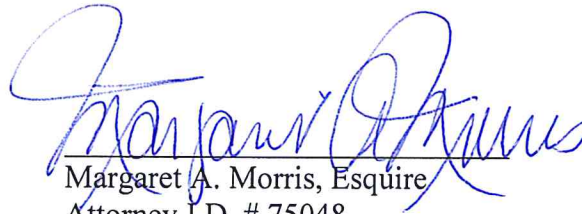
The July Motion also requests discovery responses related to the cost and dates of delivered termination notices from September 24, 2103 to the present. The discovery request is untimely. The Complainant had many opportunities to conduct discovery, from the filing of the Complaint on October 31, 2014, through the evidentiary hearing held on June 10, 2015. The discovery request is inappropriate. Any response to the untimely discovery cannot be used in this proceeding since the hearing has been concluded. In addition, Aqua objects to the untimely discovery on the grounds that, pursuant to 52 Pa. Code § 5.361(a)(2) and (4), to compile the information: "[w]ould cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party . . . and . . . [w]ould require the making of an unreasonable investigation by the deponent, a party or witness."

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

requests that the July 6, 2015 Motion for Summary Judgment filed by Frank Nellom, be denied in its entirety.

Respectfully submitted,

Dated: July 27, 2015



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