

August 3, 2015

Via UPS Next Day

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

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AUG 03 2015

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**Re: Docket No. C-2014-2450732
Frank Nellom v. Aqua Pennsylvania Inc.
Reply Brief of Aqua PA**

Dear Secretary Chiavetta:

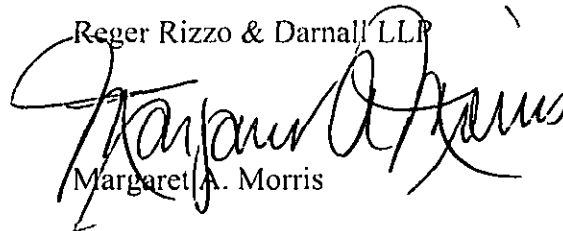
Enclosed for filing are the original and one copy of the Reply Brief of Respondent, Aqua Pennsylvania, Inc. in the above referenced proceeding. Kindly file the original of record, date stamp and return the copy in the enclosed self-addressed, stamped envelope.

A copy of the enclosed Reply Brief has been forwarded to 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
Enclosures

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.]

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FRANK NELLOM

v.

AQUA PENNSYLVANIA, INC.

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Docket No. C-2014-2450732

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

REPLY BRIEF OF RESPONDENT AQUA PENNSYLVANIA, INC.

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Date: August 3, 2015

Counsel for Aqua Pennsylvania, Inc.

Introduction

Aqua Pennsylvania, Inc. (Aqua, Company or Respondent) respectfully files this Reply Brief in response to the allegations/arguments set forth in the Brief filed by Frank Nellom (Complainant or Mr. Nellom), that Aqua violated provisions of Commission regulations at 52 Pa. Code § 56.1 *et seq.* (Chapter 56) in the termination and restoration of his water service. Mr. Nellom appended three Attachments to his Brief: (i) selected admitted exhibits and non-record documents; (ii) proposed Exhibit C-2 which contains selected, edited emails of the parties; and (iii) non-record document which purports to be a voice message from John Kennedy as transcribed by Google Voice. Mr. Nellom seeks a \$25 million fine for the alleged violations.¹

Overview

The dispositive issue is whether Aqua violated provisions of Chapter 56 in terminating Mr. Nellom's service on three separate occasions. Mr. Nellom alleges the following terminations were unlawful for the following reasons: September 25, 2013 (termination occurred before the due date on the monthly bill); December 12, 2013 (*dispute and information request pending*); and November 3, 2014 (*retaliation for filing civil complaint and formal complaint*). He also alleges that service was not timely restored (within 24 hours) upon the presentation of a medical certification (med cert) on two separate occasions: October 1, 2013 (med cert was signed by doctor on September 26, 2013) and December 18, 2013 (med cert was signed by doctor on December 16, 2013).²

The arguments set forth in Mr. Nellom's Brief in support of his position are unsupported by the record evidence. The Complainant improperly offers facts and *unsupported conclusions not raised at hearing and draws unreasonable inferences that have no basis in fact or law*. The Complainant's entire case rests solely on his opinion

¹ Mr. Nellom is also seeking \$1 million in compensatory damages and \$10 million in punitive damages.

² The Complainant does not allege in his Brief that the restoration of service on November 6, 2014 was *untimely*.

testimony and relies on his faulty recollection of the facts, his misapplication of the law and total distortion of the rights and obligations of both the customer and utility set that are forth in Chapter 56 and the Pennsylvania Public Utility Code (Code).

In sharp contrast to Mr. Nellom's unsubstantiated, contradictory opinion testimony, Aqua's position is based on credible, admissible testimony and admitted exhibits. The record evidence clearly supports a finding that the terminations and restorations of the Complainant's service on the three separate occasions were lawful and consistent with the Code and Chapter 56. There is no record evidence to support a finding that Aqua violated the Code, Commission regulations or orders or Aqua's Commission-approved tariff in the terminations or restorations of service which would warrant the Commission sustaining the Complaint or Amended Complaint and the imposition of a \$25 million fine.

Procedural Issues

New issues/arguments

Complainant's Brief contains several arguments that make their first appearance in this litigation at the briefing stage. For example, the entire discussion alleging that Aqua violated the Complainant's statutory and constitutional right to water service appears to be entirely new. Aqua can find no reference to that allegation in the Complaint and/or Amended Complaint or in the Complainant's testimony. Similarly, the claim that Aqua violated a duty of care toward the public that constitutes a tort claim is raised for the first time in his Brief.

Aqua has had no opportunity to respond to these new allegations or, if relevant, to develop a record or cross-examine on any of these arguments. It would be patently unfair to allow those arguments to be introduced into the proceedings at this point of the proceedings. Aqua requests that these issues/arguments be summarily dismissed.

In any event, these arguments fail on their own merit. The Commission lacks subject matter jurisdiction to entertain and resolve a dispute alleging a tort claim or a violation of the United States Constitution. As a creature of legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Code, 66 Pa.C.S. §§ 101, *et seq.* The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 427 Pa. 562, 237 A.2d 602 (1967); *Behrend v. Bell of Pa.*, 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); *Harrisburg Taxicab & Baggage Co. v. Pa. P.U.C.*, 786 A.2d 288 (Pa. Cmwlth. 2001); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978). The parties to an action may not confer jurisdiction upon a tribunal where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). The mere fact that Aqua is a regulated utility does not automatically confer upon the Commission subject matter jurisdiction over Aqua's every action. *DeFrancesco v. Western Pennsylvania Water Co.*, 499 Pa. 374, 453 A.2d 595 (1982).

As directed by Section 501 of the Code,³ the Commission must "enforce, execute and carry out, by its regulations, orders or otherwise" all the provisions of the Code. Section 701 of the Code,⁴ allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law **which the Commission has jurisdiction to administer.**" *See also*, 52 Pa. Code § 5.21(a).

The Commission does not have jurisdiction over alleged tort claims committed by Aqua. This issue should be summarily dismissed.

³ 66 Pa.C.S. § 501.

⁴ 66 Pa.C.S. § 701.

Similarly, the Commission also does not have jurisdiction over the allegations that Aqua violated the First and 14th Amendments. The constitutional protections set forth in those amendments protect citizens from unreasonable government actions. The cases cited in the Complainant's Brief at Paragraphs 18, 19 and 24 address actions involving a governmental agency. Those holdings are not applicable to Aqua since it is not a local, state or federal government but rather a commercial company providing utility service. The argument and cases cited by Mr. Nellom should be summarily dismissed for lack of subject matter jurisdiction.

Non-record evidence

Additionally, the documents appended to the Brief are not record evidence. Attachment I consists of both the Complainant's admitted exhibits (C-3, C-9, C-17, C-14, C-15, C-16, C-10, C-12, C-13) as well as three documents (labeled Exhibit G, J and M) not presented or admitted into the record. The new documents presented as "exhibits" are as follows: Exhibit G is the Order of Delaware County Court of Common Pleas which bifurcated the liability issue to the Commission and stayed the damages claim; Exhibits J and K consist of selected edited email exchanges regarding the filing of the Complaint on October 31, 2014;⁵ and Exhibit M is a med cert signed November 5, 2014.

Mr. Nellom had ample opportunity to present the non-record attachments at hearing and argue for their admission into the record. The Complainant, while appearing *pro se*, cannot be permitted to introduce evidence that is not supported by any testimony and offered **after** the hearing. Commission regulations authorize the presiding officer to exclude such inadmissible evidence. See, 52 Pa. Code § 5.403.

⁵ The Complaint was electronically filed at 4:40 p.m. on October 30, 2014. Consistent with Commission regulations, the Complaint was filed on October 31, 2014. 52 Pa. Code § 1.11(a)(4).

Substantive Issues

The substantive arguments raised by the Complainant are set forth on pages 7-8 of his Brief. Aqua's response to the specific issue/argument is set forth below. The Complainant's entire case is dependent on his opinion testimony which is not reliable and should be given little or no weight. The Complainant offered inconsistent and conflicting testimony in support of his position. Personal opinion, no matter how strongly held, does not constitute evidence. Pennsylvania Bureau of Corrections v. City of Pittsburgh, 532 A.2d 12 (Pa. 1987).

Termination: September 25, 2013

1. Petitioner avers Respondent is clearly demonstrated acting without due care in terminating service six days prior to the October 1, 2013, due date listed on an agreement bill in violations of 52 Pa. Code §56.83.

The Complainant argues that Aqua violated Section 56.83 when it terminated service six days after the due date on the monthly bill. His position is based solely on his opinion testimony.

Section 56.83(6) prohibits termination of service for noncompliance with a PAR prior to the due date of the bill which forms the basis of the PAR.

The Complainant testified that he never had a payment arrangement (PAR), TR 110; yet he argues he was terminated before the September 2013 Bill due date (October 1, 2013) which he alleges contained the PAR terms. The termination of service on September 25, 2013 was for non-payment of undisputed charges in the amount of \$133.33. The 10-day notice, dated September 5, 2013, did not include any amount related to charges that formed the balance for the Company PAR. The payments received on June 7, July 8 and July 26, 2013 satisfied the \$227.05 Company PAR balance. TR 128. 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. Exhibit R-2.

The Complainant has not carried his burden of proof that the termination of his service on September 25, 2013 violated the Code, Commission regulations or orders or Aqua's tariff.

Restoration: October 1, 2013

2. Refusing to provide the due care of contacting Dr. Prado after notice that a medical condition existed with Petitioner and his child too sick to even get to Dr. Prado's office provides evidence of a wanton violation of 52 Pa. Code §56.113 and six day failure to restore service violated 52 Pa. Code §§ 56.111 and 56.115.

The Complainant argues that Aqua had an obligation to contact his doctor to obtain a med cert and that service must be restored within 24 hours of the doctor signing the med cert, not when it is received by the utility. In support of his position, he relies on his opinion testimony and proposed Exhibit C-2 which is selected, edited uncorroborated emails.

The record evidence reflects the following facts. The Complainant never contacted the Respondent after receiving the 10-day notice or the 3-day notice to advise there was a medical situation at the household. Service was terminated September 25, 2013 and a post termination notice was left at the property. The Complainant contacted Aqua on September 26, 2013, the day after service was terminated, and advised of a medical situation. Aqua advised how to submit a med cert for service restoration and the process for review and notification of the status of the med cert. That same day, September 26, 2013, the Complainant faxed a health report, signed April 9, 2013, from the PA Department of Public Welfare. The Complainant was advised the med cert was denied since it was signed more than 30 days ago. On September 30, 2013 at 4:11 p.m., the Complainant faxed a med cert, signed September 26, 2013. The med cert was

approved and an appointment for the restoration was scheduled. Service was restored at 11:00 a.m. on October 1, 2013.

Chapter 56 regulations regarding restoration of service when the med cert presented is clear. The Complainant has misinterpreted the provisions of Chapter 56 regarding the timing for restoration and the obligation of the utility to obtain the med cert.

Section 56.111 specifically places the obligation explicitly on the customer to obtain the med cert, and to promptly forward it to the utility, so that service is not terminated or can be restored. Sections 56.112 and 56.113 are applicable to pending termination situations and stay lawful termination pending the receipt of a med cert. Section 56.112 applies when the utility is notified by the customer and provides that termination will not occur for three days to allow the customer to forward the med cert to the utility. The notification of the med cert **prior** to termination as set forth in Section 56.113, can initially be in writing or orally, subject to the utility receiving confirmation in writing within seven days. Section 56.115 requires that the utility make a diligent effort to have service restored the day the med cert is received but in no event more than 24 hours.

The Complainant's position that Aqua had the obligation to contact his doctor to inquire why the med cert had not been sent to the Company is not supported by the record evidence or the plain language of Chapter 56.

Sections 56.112 and 56.113 are not applicable to restoration of service; those provisions stay termination. Mr. Nellom had never contacted Aqua before his service was terminated; he did not contact the Company before the termination of service on September 25, 2013. TR 209. He first contacted Aqua the day after termination, September 26, 2013, and was advised of the Company's process for the submission, review and notification of med certs. The Complainant submitted a med cert on September 26, 2013 that was signed April 9, 2013. Aqua was not required to restore service upon receipt of that outdated med cert; the Complainant was advised on several

occasions of his obligation to contact his doctor to obtain a med cert signed within the last 30 days or to inquire when it would be sent to the Company. TR 209-217.

Chapter 56 places the obligation on the Complainant to submit the med cert to Aqua. His testimony that he reasonably believed his doctor had sent the med cert since “since she signed it” is not credible. Aqua informed him of the process for med certs. It was completely within Mr. Nellom's control as to when this med cert was submitted to the Company. He chose to fax it on September 30, 2013; any delay in the review and ultimate restoration of service was the result of his actions. TR 211. Aqua is not required to contact a customer's doctor to obtain a timely signed med cert or to inquire when it will be sent.

Section 56.115 requires the utility to restore service restored within 24 hours of receipt of the med cert. The 24 hours is calculated from the time it is received by the utility, not signed by the doctor. The Complainant has offered no support for his position. The record evidence reflects that Aqua timely restored service at 11:00 a.m. on October 1, 2013 after receiving the med cert on September 30, 2013 at 4:11 p.m.

The Complainant has not carried his burden of proof that the restoration of his service on October 1, 2013 violated the Code, Commission regulations or orders or Aqua's tariff.

Termination: December 12, 2013 and November 3, 2014

3. Refusing to prevent notices from being posted on Petitioner's home and terminating service after receiving Petitioner's complaint provides evidence of another wanton violation of 52 Pa. Code. §56.92.

The Complainant alleges that the termination of his service on December 12, 2013 was unlawful because he had a pending dispute and the termination of service on November 3, 2014 was unlawful because his formal complaint and civil complaint were pending.

In support of his allegation that the termination on December 12, 2013 was unlawful, Mr. Nellom relies upon proposed Exhibit C-2 which contains selected edited emails which he alleges substantiates his claim that he provided Aqua notice of his pending “dispute.” As Aqua argued in its Opposition⁶ to the admittance of proposed Exhibit C-2, the document is not reliable and the emails contained in the proposed exhibit clearly indicates that the emails have been edited. Proposed Exhibit C-2 is self-serving and uncorroborated. The document should not be admitted into evidence for the reasons set forth in Aqua’s Opposition. If admitted, it should be given no weight. The record evidence reflects Mr. Nellom's testimony that there was a pending dispute prohibiting the termination of his service is inconsistent, contradictory, and wholly unreliable. This claim has not been made in good faith.

Aqua has acted in good faith and provided reasonable and adequate service in compliance with its Tariff, the Code, Commission regulations and Commission orders. The Complainant, while seeking the protections of Chapter 56 to prevent lawful termination for non-payment, has violated the basic obligation of Chapter 56 on both the residential customer and the utility: “every privilege conferred or duty required under [Chapter 56] imposes an obligation of good faith, honesty and fair dealing in its performance and enforcement.” 52 Pa. Code § 56.1. Chapter 56 specifically states that every privilege conferred or duty required imposes an obligation of good faith, honesty and fair dealing in its performance and enforcement. A reading of the transcript clearly shows that the Complainant has not acted in good faith, honestly, or fair dealing. Mr. Nellom opines that simply stating the phrase “dispute” releases him of the obligation to make any payments on the account. The Company has NEVER been advised of any disputed charges. There never was a good faith dispute. Mr. Nellom states that on November 14, 2014 “in furtherance of his complaint made this request” for a copy of his complete billing history. He also advised the Company that he intended to file a lawsuit against Aqua’s parent company, Aqua America, on or before January 2014. According to Mr. Nellom, this solidified his dispute and therefore the protections of Chapter 56,

⁶ Aqua’s opposition was timely filed on June 24, 2015.

specifically Section 56.92, prevented Aqua from issuing a termination notice or terminating service.

The Complainant's position that by simply stating he disputes all bills without ever advising Aqua of what charges are disputed or the reason for the dispute is sufficient to stay termination under Section 56.92 is without merit. His testimony is self-serving and inconsistent. Mr. Nellom incorrectly asserts he has no obligation to make any payments on his account for present or future delivery of residential water services, because Aqua owes him more in the pending civil lawsuit than he is being billed. His logic is simply "my position is that the damages that I suffered outweigh more than I think the costs that I've incurred to this point." TR 62. The Complainant's position is also inconsistent with the argument in his Brief wherein he refers to the November 14, 2013 email as an "Information Request."

Section 56.92 prohibits termination of service if there is a notice of initial inquiry, dispute, informal or formal complaint and the subject matter of the dispute forms the grounds for the proposed termination.

The record evidence reflects that Mr. Nellom twice entered in to a PAR with the Company. By definition, a PAR is "[a]n agreement in which a customer [sic] who admits liability for billed service is permitted to amortize or pay the unpaid balance of the account in one or more payments." 52 Pa. Code § 56.2. The last Company PAR was entered into on April 18, 2013. On September 30, 2013, Mr. Nellom advised the Company that he intended to pay the entire outstanding amount. TR 103. As of September 30, 2013, no charges were disputed. TR 104. Service was restored on October 1, 2013 without any payment. The delinquent charges that formed the basis for the termination on December 12, 2013 were, per Mr. Nellom's testimony, the same delinquent charges he advised Aqua on September 30, 2013 of his intention to pay. TR 103. The allegation that Aqua was notified of pending disputed charges that were the basis for the termination on December 12, 2013 is not based on record evidence and is *without merit*.

The Complainant's position that his request on November 14, 2014, for a complete account history constituted an inquiry or dispute under Chapter 56 is not supported by the record evidence or the Complainant's own words. In Brief, Mr. Nellom refers to his request as an "Information Request." The November 14, 2013 "Information Request" of the Complainant for a copy of his account was satisfied on November 27, 2013. A request for information does not act as a stay to prevent termination consistent with Section 56.92.

There is no record evidence that Aqua, based on its business record of the contacts with the Complainant, that the termination on December 12, 2013 violated the Code or Chapter 56. Mr. Nellom's allegation that he disputes "all" water charges, "past, present and future" is not made in good faith; he simply recites the refrain to prevent lawful termination for non-payment. His testimony on this issue is not credible. He was unable to identify on the record, any charge on any bill issued, that he disputes and why. TR 60. According to his testimony, he has yet to review the bills to see what charges he disputes. TR 62.

The Complainant has not carried his burden that Aqua was prevented from terminating his service because he notified the Company there was a pending dispute.

Mr. Nellom also alleges that Aqua's posting of notices on November 26, 2013, December 3, 2013 and December 12, 2013 demonstrated retaliation for the fact that he had told Aqua he was going to file a complaint. His position is based completely on his distorted view of the facts, illogical inferences and conclusions he projects.

Section 56.91 specifically authorizes the utility to either mail or deliver the 3-day notice. Section 56.95 requires the utility to deliver the 48-hour notice. Section 56.96 requires the utility to deliver the post-termination. A public utility is entitled to manage its own affairs in the operations of rendering utility service. *Pa Tel. Corp. v PA PUC*, 33 A.2d 765 (1943). The Commission should not interfere with the management

of a utility unless an abuse of discretion or arbitrary action is shown. *Lower Chichester Tp. Pa PUC*, 119 A.2d 674 (1956).

The record evidence reflects that Aqua hand delivered a 3-day notice on November 26, 2013. Aqua, as required, hand delivered the 48-hour notice on December 3, 2013. Aqua, as required, hand delivered the post-termination notice on December 12, 2013.

The Complainant has not carried his burden of proof that the posting of notices before the termination on December 12, 2013 violated the Code, Commission regulations or orders or Aqua's tariff or constituted retaliation for civil complaint.

Termination: November 3, 2014

4. Failure to prevent ten months into litigation the retaliatory act of terminating service eight days after an adverse decision of the Trial Court provides evidence of another wanton violation of 52 Pa. Code. §56.92.

In his Amended Complaint, the Complainant alleges that the termination of his service on November 3, 2014 was in retaliation of the "adverse decision" on his civil complaint, eight days earlier.

The record evidence does not support the Complainant's position. The Court granted Aqua's Preliminary Objection and bifurcated the liability and damage issues. The Complainant's statement that the Court entered an adverse decision has no basis in fact and should be summarily dismissed. Service was lawfully terminated on November 3, 2014 for non-payment of undisputed delinquent charges billed in 2014. The Complainant was specifically notified of his obligation to pay current charges while the complaint regarding the 2013 terminations and restorations were pending. He was specifically advised that the pending termination did not involve any charges that were disputed in the civil or formal complaint. TR 52 and Exhibit R-8. The termination in 2014 was for undisputed delinquent 2014 charges. There is no record evidence that Aqua

was prohibited from terminating service for delinquent charges not subject of the civil or formal complaint.

Restoration: December 18, 2013

5. Admission to the Honorable Judge on June 10, 2015, that the act of restoring service during dispute on December 18, 2013, was not even based upon the Medical Certification received, but rather a business decision having nothing to do with public health and safety also evince a wanton violation of 52 Pa. Code §56.111.

Mr. Nellom argues that the fact that Aqua restored his service as a business decision and not based on the med cert received on December 16, 2013 is evidence of Aqua's violation of Section 56.111.

The record evidence reflects that service was restored on December 18, 2013, not because of a med cert received by the Collections Department, but rather a business decision of John Kennedy (Mr. Kennedy), Manager of the Call Center, to restore service. The record evidence reflects that the med cert submitted on December 16, 2013, was neither approved nor denied. Rather, Mr. Kennedy, who is authorized to make decisions regarding restoration of service, made the business decision to restore service. He contacted Mr. Nellom on December 16, 2013 in an attempt to schedule the restoration of service. There is no record support that Aqua's witnesses admitted that service was terminated when a dispute was pending.

Section 56.111 specifically states that the determination of whether a medical condition exists does NOT lie with the utility. Section 56.112, requires, *inter alia*, that the med cert state the nature of the illness and the specific reason continued utility service is required.

Mr. Nellom argues that the decision as to whether a medical condition exists lies entirely with the physician or nurse practitioner. Aqua agrees. However, what Mr. Nellom fails to mention is that the med cert submitted on December 12 and 13, 2013

specifically stated that there was **no medical reason** and that **termination of service would not be dangerous**. Exhibit R-7. The doctor signing the med cert specifically added those words. It was Mr. Nellom's doctor who stated there was no medical reason and that discontinuation of service would NOT be harmful. Based on the doctor's statement, consistent with Chapter 56.111, the identical med certs submitted on December 12, 2013 and again on December 13, 2013 were denied. A med cert, signed December 16, 2013, was faxed on December 16, 2013 at 2:59 p.m. That med cert was the previously denied med cert with the additional statement added that patient needs water to take medication but the other statements were not crossed out.

Aqua witness, Mr. Kennedy, testified that after receiving notification from Aqua's public affairs department, he made the business decision to restore the service, in good faith and in keeping with the letter and spirit of Chapter 56. He specifically stated his decision was not based on any med cert received by the Company. Aqua witness, Derrick McBride, testified that his department did not rule on the December 16, 2013 med cert, since another department had decided to restore service as a business decision. Restoration of service was not governed by the provisions of Section 56.115.

The Complainant has not met his burden of proof that Aqua violated Section 56.111 by not accepting a med cert signed by a doctor who indicates there was no medical reason to prevent termination.

Restoration: December 18, 2013

6. Making false statement about the date of Respondent John Kennedy's call represents compelling evidence of the deliberateness of Respondent's acts to warrant relief.

Mr. Nellom asserts that Mr. Kennedy is lying that he made the call on December 16, 2013. In support, Mr. Nellom attaches Attachment III, as "true and correct transcribed voicemail copied from Complainant's Google voicemail account where it remains for anyone to review." The actual voice message and/or Attachment III,

although clearly in the Complainant's possession, were not introduced at hearing. Mr. Nellom has presented no argument as to why the transcription, let alone the actual voicemail, was not presented at hearing.

Mr. Kennedy, based on Aqua's business records, testified credibly that he: (1) contacted Mr. Nellom on December 16, 2013 to schedule the appointment to restore service; (2) created a work order so that when Mr. Nellom timely returned his call, an appointment to restore service could be scheduled; and (3) mailed the standard information to the Complainant regarding how to test for leaks. TR 225-227.

The Code⁷ and Commission regulations⁸ require that a litigant must provide the Commission with evidence that is reliable, probative and substantial. Attachment III does not meet that standard. Attachment III is not reliable evidence; the document has not been authenticated. In fact, the document specifically states that the message has been **edited**. Such an uncorroborated document is not relevant or substantial evidence and should not be relied upon. Evidence is deemed relevant if it tends to make a fact at issue more or less probable. *Martin v. Soblotney*, 466 A.2d 1022 (1983). Attachment III is a self-serving, unreliable document presented to impeach the testimony of Aqua witness Mr. Kennedy **after** the hearing.

Section 5.403 of the Commission's regulations⁹ authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence. Section 5.403(b) of the Commission's regulations¹⁰ requires the presiding officers to "actively employ these powers to direct and focus the proceeding consistent with due process." Attachment III was clearly available at the time of the hearing on June 10, 2015. If the Complainant believed that this "evidence" would have assisted in his case, he should have pursued this matter during the hearing. The hearing has

⁷ 66 Pa. C.S. § 332(b).

⁸ 52 Pa. Code § 5.401.

⁹ 52 Pa. Code § 5.403.

¹⁰ 52 Pa. Code § 5.403(b)

concluded and it is now too late to attempt to introduce evidence that was clearly available to the Complainant at the time of hearing.

Attachment III is hearsay, i.e., statements made other than by the Complainant which is offered in evidence to prove that the Company admitted his service was unlawfully terminated. Hearsay is defined as “an out-of-court statement offered in court to prove the truth of the matters therein.”¹¹ The basis for rejecting hearsay evidence is its assumed unreliability because the declarant is not before the trier of fact and cannot be challenged as to the accuracy of the statement.¹² While the statute at 2 Pa.C.S. § 505 provides that Commonwealth agencies are not bound by technical rules of evidence, the hearsay rule is not a technical rule of evidence but a fundamental rule of law which administrative agencies must follow, particularly when facts crucial to the issue are to be placed upon the record.¹³ Therefore, uncorroborated hearsay cannot be used to support a finding of fact.¹⁴

Therefore, even if the Complainant offered this document at the hearing on June 10, 2015, in the fashion reflected in his Brief (i.e., without authenticating the recording or its accuracy), Aqua would have objected to its admission and expected that such evidence would not have been admitted into the record as improper hearsay. Attempting to introduce this evidence now, by way of Brief, is no less egregious or improper than it would have been if done at the evidentiary hearing.

Conclusion

The Complainant has not carried his burden of proof that Aqua’s actions in the termination of his service on September 25, 2013, December 12, 2013 and November 3, 2014 and the restoration of service on October 1, 2013, December 18, 2013 and November 6, 2014, violated the Code, Chapter 56, any Commission or Court Order

¹¹ PA. R.E. 801; *Commonwealth v. Smith*, 647 A.2d 907 (Pa. Super. 1994).

¹² *Commonwealth v. Rush*, 605 A.2d 792 (Pa. 1992).

¹³ *Bleilevens v. Commonwealth of Pa. State Civil Service Comm’n*, 312 A.2d 109 (Pa. Cmwlth. 1973).

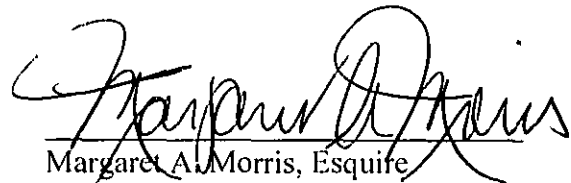
¹⁴ *Walker v. Unemployment Compensation Bd. of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976).

or Aqua's tariff. His testimony is inconsistent, contradictory and unreliable. Mr. Nellom's position is based on unreasonable inferences that he admittedly stated could be wrong, alleged facts that he knows to be untrue and provided conflicting and contradictory self-serving testimony. Aqua's testimony is based on its business records and should be given greater weight. The Complainant's request that the Commission fine Aqua \$25 million should be summarily dismissed.

WHEREFORE, for the foregoing reasons, Aqua Pennsylvania, Inc. respectfully requests that this Honorable Court dismiss with prejudice the Formal Complaint and Amended Complaint of Frank Nellom at Docket No. C-2014-2450732 in its entirety for the reasons set forth in its Brief and Reply Brief in this proceeding.

Respectfully submitted,

Dated: August 3, 2015



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Reply Brief of Aqua PA**

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

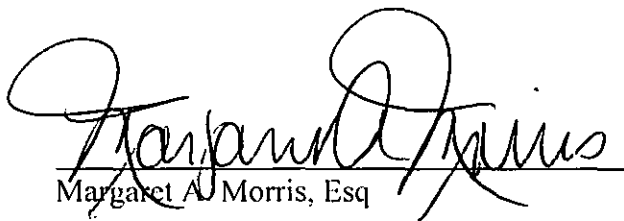
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Dated: August 3, 2015


Margaret A. Morris, Esq

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