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August 17, 2017

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**RE: Lorraine & John Barczynski v. Pennsylvania-American Water Company**  
**Docket No. C-2017-2591928**

Dear Secretary Chiavetta:

Enclosed for filing on behalf of Pennsylvania-American Water Company is its Brief in Support of Objection to the Admissibility of Evidence. A copy has been served on the Complainant in accordance with the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Best Regards,

STEVENS & LEE

  
Michael A. Gruin

Enclosure

cc: Certificate of Service  
Administrative Law Judge Benjamin Myers (via email and first class U.S. Mail)

Philadelphia • Reading • Valley Forge • Allentown • Harrisburg • Lancaster • Scranton  
Wilkes-Barre • Princeton • Charleston • New York • Wilmington

A PROFESSIONAL CORPORATION

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

LORRAINE & JOHN BARCYNski	:	
Complainant	:	
	:	
v.	:	Docket No. C-2017-2591928
	:	
PENNSYLVANIA-AMERICAN	:	
WATER COMPANY	:	
Respondent	:	

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**PENNSYLVANIA-AMERICAN WATER COMPANY'S  
BRIEF IN SUPPORT OF OBJECTION TO ADMISSIBILITY OF EVIDENCE**

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Pennsylvania-American Water Company (“PAWC” or “Company”), by and through its attorneys Stevens & Lee, P.C., files the Brief in support of its objection to the admissibility of an Engineering Investigation Report and accompanying appendices which the Complainant offered into evidence in this proceeding. As discussed below, the Report in question is hearsay evidence that cannot be admitted into the record without the sponsoring testimony of a qualified witness, and is not relevant to the issues before the Commission in this proceeding.

**I. BACKGROUND AND INTRODUCTION**

On March 6, 2017, the Company was served with a notice of the Formal Complaint (“Complaint”) filed by the Complainants Lorraine and John Barcynski against the Company. The Complaint alleged that the Complainants’ residence has been damaged by water main breaks that occurred on February 16<sup>th</sup> and 17<sup>th</sup>, 2016. For relief, the Complainants requested a finding that PAWC was responsible for repairing their house. On March 27, 2017, PAWC filed an Answer to the Complaint, as well as Preliminary Objections seeking dismissal of the Complaint for legal insufficiency.

By Order dated May 9, 2017, Administrative Law Judge Benjamin Myers (“ALJ Myers”) sustained PAWC’s preliminary objections in part and denied them in part. ALJ Myers ruled that the Public Utility Commission does not have the authority to award monetary damages, and therefore struck or dismissed the portions of the complaint relating to monetary damages as impertinent matter. ALJ Myers also held that since the Complaint appeared to raise allegations which questioned, in part, the reasonableness of time that it took PAWC to correct the water main breaks and potentially whether PAWC could have taken steps to prevent the break. As such, PAWC’s preliminary objections were denied in part and a hearing was scheduled to resolve disputed facts regarding the Complainant’s potential claims of unreasonable service.

A telephonic hearing in the matter was held on July 18, 2017. Lorraine Barcynski appeared as the sole witness for the Complainants and she offered no exhibits into evidence. However, at the conclusion of the evidentiary hearing, Ms. Barcynski referenced the fact that she had an engineering report that she intended to submit.<sup>1</sup> ALJ Myers noted that he had not received any exhibits from the complainant prior to the hearing and therefore the exhibits could not be moved into the record in the case.<sup>2</sup> Following the hearing, however, ALJ Myers scheduled a further evidentiary hearing for July 28, 2017 to allow the Complainants the opportunity to submit exhibits in support of her claim. At the further hearing on July 28, 2017, the Complainants submitted an engineering report prepared by Yingst Engineers on November 10, 2016 regarding the foundation damage sustained by the Barcynskis and requested that it be admitted into the record. The report was prepared by Stephen M. Yingst, P.E. and included accompanying Appendices A-G (collectively, “the Yingst Report”). PAWC objected to the

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<sup>1</sup> N.T., pp. 47-48

<sup>2</sup> N.T. pp. 51-55

admissibility of the Yingst Report on multiple grounds, and requested the opportunity to submit this brief in support of its objection, and ALJ Myers granted PAWC's request to submit this brief.

## II. ARGUMENT

### A. The Yingst Report is inadmissible hearsay

Unauthenticated written statements such as Yingst Report constitute inadmissible hearsay under Pennsylvania law, plain and simple. Pennsylvania Rule of Evidence 801 defines "Hearsay" as a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

The Yingst Report clearly meets this definition. It is a written statement, being made by a declarant (Stephen Yingst), who did not testify at the hearing, and it being offered into evidence to prove the truth of the matters asserted therein.

Pennsylvania Rule of Evidence 802 generally prohibits the admission of hearsay into evidence. It has long been recognized in Pennsylvania that hearsay rules are not mere "technical rules of evidence" but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. See, e.g., Loudon v. Viridian Energy, PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012), Gibson v. W.C.A.B., 861 A.2d 938 (Pa. 2004); and Anthony v. PECO Energy Co., PA PUC No. C-2014-2408057 (Order entered July 30, 2014). A finding based solely on hearsay cannot

support a legal conclusion by an administrative agency. Walker v. Unemployment Compensation Board of Review, 367 A.2d. 366 (Pa. Cmwlth 1976).

While the Commission is not bound by the technical rules of evidence, the Commission nevertheless has consistently refused to allow hearsay evidence to be admitted. See, e.g., Pa. P.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh, No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013) (“[a]lthough the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence.”).

Because the Yingst report is clearly hearsay, and no exceptions to the rule against Hearsay apply to it, it is inadmissible in this proceeding.

**B. The Commission’s regulations require expert testimony to be moved into the record by a sponsoring witness who is subject to cross-examination.**

The legal grounds for disallowing the Yingst Report into the record are even stronger due to the fact that the Yingst Report purports to make expert conclusions regarding the cause of damage to the Barcynskis’ home. The Commission’s regulations mandate that expert witnesses who submit written testimony into the record be available for cross-examination. Because the author of the Yingst report did not appear to authenticate the report or to be cross-examined, the report cannot be admitted into the record.

Rule 901 of the Pennsylvania Rules of Evidence provides for the necessity of authentication of documentary evidence. Section 5.402 of the Commission’s regulations (52 Pa. Code § 5.402) requires that evidence shall be admitted into the record upon presentation of the sponsoring witness, and after opportunity for other parties to examine

the witness. In this instance, no sponsoring witness testified regarding the Yingst Report, or the two other engineering reports attached to the Yingst Report as Appendices.<sup>3</sup> Under Commission's regulations, written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony is called to authenticate the testimony as a witness with knowledge of the authenticity of the document pursuant to P.R.E. 901(b)(1). Without such authentication and cross examination, written statements such as the Yingst Report, the Cordaro Report, and Donan Report are inadmissible as hearsay. This not merely a technical or procedural argument. Permitting these Reports into the record would raise serious due process issues and would be highly prejudicial to PAWC, as discussed below.

**C. The Yingst Report has no probative value, and admitting it into the record would prejudice PAWC and confuse the issues in this case.**

Under the Commission's regulation at 52 Pa. Code 5.401, evidence will be excluded if:

- (1) It is repetitious or cumulative, or .
- (2) Its probative value is outweighed by:
  - (i) The danger of unfair prejudice.
  - (ii) Confusion of the issues.
  - (iii) Considerations of undue delay or waste of time.

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<sup>3</sup> Appendix A to the Yingst Report was a letter report from Stephen J. Cordaro, P.E. ("Cordaro Report), and Appendix B was a report from Donan Engineering Company, Inc. ("Donan Report"). For purposes of this Brief, the Cordaro Report and Donan Report are treated as being part of the Yingst Report, and all arguments made with respect to the Yingst Report apply equally to the Cordaro and Donan Reports

In addition, the Commission's Regulation at 52 Pa. Code § 5.483(a) gives a presiding officer the power to exclude irrelevant, immaterial, and unduly repetitive evidence. In this case, the Yingst Report has no probative value, it is irrelevant to the issues in the proceeding, and admission of the Report into the record unfairly prejudices PAWC and confuses the issues in the case.

The Yingst Report should not be admitted into the record because it is not relevant to the sole issue before the Commission in this case, which is the reasonableness of PAWC's service under Section 1501 of the Public Utility Code, and it would serve to confuse the issues before the Commission. ALJ Myers has already clearly ruled that the issue of responsibility for the damages to the Barcynski home is beyond the Commission's jurisdiction. Neither the Yingst Report nor the two engineering reports attached to it provide any conclusions regarding the reasonableness of PAWC's service. The reports are strictly limited to providing opinions of the nature and causes of damage to the Barcynski home. They add nothing to the record on the issue of reasonableness of service. Indeed, the authors of the reports do not profess to provide any conclusions regarding the reasonableness of PAWC's service, and do not hold state that they have expertise in the area of utility operations. The reports therefore have no probative value, and their admission would only unnecessarily expand and confuse the record by including purported conclusions regarding an issue (i.e. – the nature and cause of damages to the Barcynski home) that is not before the Commission.

Admission of the Yingst Report and appendices into the record would clearly prejudice PAWC. The Yingst report constitutes the opinion testimony that cannot be admitted unless the author of the report appears for cross-examination. By its very nature (i.e. an investigative report prepared by a professional engineer months after an event to

provide conclusions related to that event), the Yingst Report qualifies as written opinion evidence. The Report itself acknowledges that it is providing an opinion. The Report's "Conclusion" prefaces its substantive conclusion by stating "*Based on my investigation, the following opinions are presented to a reasonable degree of engineering certainty*" (emphasis added).

Because the author of the Yingst report did not appear at the hearing to authenticate his report, PAWC was not provided with any opportunity to cross-examine him regarding his qualifications, the scope of his conclusions, his familiarity with water utility operations, the extent of his investigation, and the reliability of the second-hand and third-hand statements on which he relied. The right to cross-examine the author of an expert opinion is a fundamental due process right that has been confirmed repeatedly by the Pennsylvania Supreme Court. See, e.g., Ganster v. Western Pennsylvania Water Co., 349 Pa. Super. 561, 568, 504 A.2d 186, 189 (1985), citing Commonwealth v. Shirey, 333 Pa. Super. 85, 151, 481 A.2d 1314, 1350 (1984). ("Cross-examination," it has been said, "is a vital and fundamental part of a fair trial.")

Beyond its conclusions, the Yingst report also includes multiple factual conclusions that are based on solely on hearsay. The Yingst report makes references to statements made by other individuals who also did not testify in this proceeding. Such statements themselves are hearsay under Rule of Evidence 801, and they are inadmissible for the same reasons that the Yingst Report itself is inadmissible.

**D. The attachment of the Cordaro Report to the Complaint in this case does not make it admissible.**

The Cordaro Report was attached as an Exhibit to the Complaint filed by Mr. and Mrs. Barcysnski. The same procedural and due process issues that apply to the entirety

of the Yingst Report apply equally to the Cordaro Report. The Cordaro Report is hearsay, and purports to provide expert conclusions, but no sponsoring witness appeared to authenticate the report or be available for cross-examination. The fact that the Cordaro Report was attached to the Complaint does not nullify these prohibitions on the report's admissibility. Section 5.405 of the Commission's regulations (52 Pa. Code § 5.405.) directs that pleadings are considered as part of the record as pleadings only, and that a pleading, or any part thereof may not be considered as evidence of a fact other than that of filing thereof unless offered and received into evidence. The Cordaro report was not separately offered into evidence, and therefore it is improper to consider it as a fact other than its filing with the Complaint.

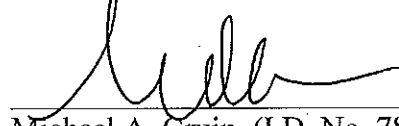
### **III. CONCLUSION**

There is simply no legal basis or precedent which would allow a written statement that purports to make expert conclusions to be admitted into the record in a Commission proceeding without the author of the report authenticating the report under oath and being subject to cross examination. This reason alone mandates the exclusion of the Yingst Report from the record. Even if the Yingst Report was not barred by the hearsay rules and the Commission's regulations regarding expert statements, the Yingst Report would be inadmissible because it is simply not relevant to the sole issue in this case, which is the reasonableness of PAWC's service. Admission of the Yingst Report would violate the rule against hearsay, and it would unfairly prejudice PAWC and confuse the issues in the case while providing no probative value.

For these reasons, Pennsylvania American Water Company respectfully requests that its objection to the admissibility of the Yingst Report be sustained, and that the Yingst Report and its appendices be excluded from the record in this matter.

Respectfully submitted,

STEVENS & LEE



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COUNSEL FOR PENNSYLVANIA  
AMERICAN WATER COMPANY

DATE: August 17, 2017

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Respondent

Docket No. C-2017-2591928

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing Brief upon the party listed below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

VIA First Class U.S. Mail

Lorraine and John Barcynski  
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Michael A. Gruin

DATED: August 17, 2017