

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Lorraine & John Barcynski	:	
	:	
v.	:	C-2017-2591928
	:	
Pennsylvania-American Water Company	:	

**INITIAL DECISION**

Before  
Benjamin J. Myers  
Administrative Law Judge

**INTRODUCTION**

Customers filed a complaint against their water utility alleging that a water main break caused a sinkhole which resulted in damage to their home. The complaint also raised an issue as to whether the utility had failed to provide reasonable service during its response to the water main break. The portion of the complaint relating to an award of monetary damages for damage to the customers' home was previously stricken from the complaint as impertinent matter in response to preliminary objections filed by the utility. This decision denies the remainder of the complaint as the customers have failed to demonstrate that the utility violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff with regard to the service provided.

**HISTORY OF THE PROCEEDING**

On March 2, 2017, Lorraine and John Barcynski (Complainants) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania-American Water Company (Respondent), Docket Number C-2017-2591928.

In this complaint, Complainants averred that their residence had been damaged as a result of two water main breaks and resulting sinkhole on February 16 and February 17, 2016 near their home at 1312 South Prince Street in Palmyra, Pennsylvania. The Complainants sought monetary damages from the Respondent for the structural damage to their home.

On March 27, 2017, Respondent filed an answer with new matter, with attached notice to plead, to the complaint. In its answer, Respondent either admitted or denied the various averments of the complaint. The Respondent acknowledged the events of February 16 and 17, 2016 in its answer, but averred in its new matter that the Complainants had failed to state a claim upon which relief could be granted and that the Commission was without the power or jurisdiction to award the monetary damages sought in the complaint.

Also on March 27, 2017, Respondent filed preliminary objections with attached notice to plead. Respondent averred that the sole relief sought by the Complainants was monetary damages for the repair of their home, and because the Commission does not have jurisdiction over such issues, the complaint was legally insufficient. Respondent requested that the complaint therefore be dismissed for legal insufficiency.

Complainants' answer to the Respondent's new matter was due on or before April 19, 2017. 52 Pa.Code §§ 5.63(a), 1.12(a), 1.56(a)(1) and (b). Complainants did not file an answer to this new matter.

Complainants' answer to the Respondent's preliminary objections was due on or before April 10, 2017. 52 Pa.Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). Complainants did not file an answer to these preliminary objections.

On May 5, 2017, the Commission issued a telephonic hearing notice scheduling this matter for hearing on June 20, 2017 and thereby assigning this matter to the undersigned to resolve any issues which had arisen during the preliminary phase of this proceeding.

A prehearing order was issued on May 8, 2017, addressing, *inter alia*, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

On May 9, 2017 Respondent's preliminary objections were addressed via an order which sustained, in part, the preliminary objections relating to monetary damages. That order held that the portions of the complaint requesting relief in the form of monetary damages were requests for relief that were not legally available through the Commission and were therefore stricken from the complaint as impertinent matter. This order however also held that while portions of the complaint relating to monetary damages were stricken, when viewed liberally, the complaint also raised an issue as to reasonable service which would be addressed at the June 20, 2017 hearing in this matter.

On June 13, 2017, a hearing cancellation/reschedule notice was issued to the parties cancelling the June 20, 2017 hearing and rescheduling it for July 18, 2017.

The hearing was conducted as scheduled on July 18, 2017. One of the Complainants, Lorraine Barcynski, appeared *pro se*, and presented testimony. The Complainant did not initially sponsor any exhibits at the time of hearing. Michael Gruin, Esquire represented the Respondent, which presented two witnesses who sponsored five exhibits that were admitted into the record. The initial July 18, 2017 hearing resulted in a transcript of 80 pages.

At the very conclusion of the hearing, the Complainant raised an issue as to the admission of her own exhibits. The Complainant indicated that she had previously submitted documents to the undersigned via email and wished to confirm that they had become a part of the record in this matter. It was determined that the Complainant had not submitted these documents via mail as directed by the prehearing order, but instead had attempted to forward them by email. Because these documents totaled more than 100 pages, it was concluded that they had not been received by the Office of Administrative Law Judge due to Commonwealth email restrictions relating to the size of emails and their attachments. Because the Complainants had not properly submitted the documents in advance of the hearing as directed by the prehearing order, and the

hearing had reached its conclusion, the Complainant was advised that her documents could not be made a part of the record at that time.

After the conclusion of the hearing, and upon further consideration, it was determined that the Complainants would be given an additional opportunity to provide the documents in question for consideration and inclusion in the record in this matter. A notice of hearing dated July 18, 2017 was issued scheduling this matter for additional hearing on July 28, 2017. This notice indicated that the sole purpose of the additional hearing was to afford the Complainants an additional opportunity to properly submit exhibits into the record.

Prior to July 28, 2017, the Complainants properly forwarded their proposed exhibits to the Office of Administrative Law Judge. The additional hearing was conducted as scheduled on July 28, 2017. At that time the Complainants sponsored one exhibit which, after objections raised by the Respondent, was admitted into the record.

On August 17, 2017, the Respondent submitted a brief in support of its objections to the admission of Complainants' exhibit.

The record closed on August 18, 2017, the date the transcript from the additional hearing was filed with the Secretary's Bureau. For the reasons set forth below, the complaint will be denied.

#### FINDINGS OF FACT

1. The Complainants are Lorraine and John Barczynski.
2. The Respondent is Pennsylvania-American Water Company.
3. The Complainants reside at 1312 South Prince Street, Palmyra, Pennsylvania. N.T.
- 4.

4. At approximately 12:36 p.m. on February 16, 2016, the Respondent received a customer call reporting a drop in water pressure near South Prince Street. N.T. 24.
5. A repair crew dispatched by the Respondent arrived in the area of South Prince Street within 45 minutes of the customer call. N.T. 25.
6. The repair crew had isolated a water main break and completed a controlled shutdown in the area of South Prince Street by approximately 1:20 p.m. N.T. 25.
7. The Respondent initiated a PA One Call which required the Respondent's repair crew to wait a period of two hours before excavation of the water main break could begin. N.T. 27-28.
8. Once excavation on the water main could begin, it took the Respondent's repair crew 3.5 to 4 hours to restore full water service along South Prince Street. N.T. 28.
9. This water main break affected 13 customers within a one block area of South Prince Street. N.T. 28.
10. The water main that broke on February 16, 2016 had been installed in 1971 and had never experienced any prior leaks or breaks. N.T. 29, 31-32.
11. The break that occurred on February 16, 2016 was the result of ground shifting and sudden earth movement after a week of extreme temperature change. N.T. 31-32.
12. At approximately 11:00 a.m. on February 17, 2016, the Respondent received a call from North Londonderry Township regarding a water main break. N.T. 32.
13. The Respondent located a second water main break on South Prince Street approximately 20 to 25 feet south of the February 16, 2016 break. N.T. 32.

14. It took the Respondent approximately four hours to repair this second break. N.T. 33.

15. The February 17, 2016 break was caused by further ground settling and shifting. N.T. 33.

16. On February 17, 2016, a corner of the foundation of the Complainants' home began to separate with the wall separating from the floor and the floor beginning to sink. N.T. 11.

17. On February 22, 2016 the Complainants contacted their homeowner's insurance carrier to file a claim. N.T.11.

18. On February 22, 2016 the Complainants also contacted the Respondent about the issue with their foundation. N.T. 46.

19. A claim was opened with the Respondent's insurance carrier on February 23, 2016. N.T. 46.

20. Both the Complainants' and the Respondent's insurance carriers denied the Complainants' respective claims. N.T. 12, 39.

21. As a result of these breaks, the Respondent initiated a replacement of the entire water main on South Prince Street between Harry Avenue and Leon Avenue. N.T. 33.

22. The material to begin this replacement was delivered on February 25, 2016 and the replacement of the water main was completed in March 2016. N.T. 33.

23. This replacement included 800 feet of water main as well as restoration of paving, sidewalks, driveways and grass affected by the line replacement and within the Respondent's right-of-way. N.T. 34.

24. The Respondent restored any paving, sidewalks, driveways or grass affected by their water main repairs or the replacement of the water main within the Respondent's right-of-way. N.T. 42-43.

## DISCUSSION

### Burden of Proof – Reasonable Service

As previously noted, the portions of the complaint relating to monetary damages were stricken from the complaint pursuant to an order dated May 9, 2017 sustaining, in part, Respondent's preliminary objections. The only outstanding issue to be resolved is whether the Respondent, in its response to the water main breaks or its repair or replacement of the water main along South Prince Street, provided reasonable and adequate service to its customers.

The Complainant in this proceeding has the burden of proof to show that the Respondent is responsible or accountable for the problem described in the complaint. Patterson v. Bell Telephone Co. of Pennsylvania, 72 Pa. PUC 196 (1990), Feinstein v. Philadelphia Suburban Water Co., 50 Pa. PUC 300 (1976). The Complainant must establish his case by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992). To meet his burden of proof, the Complainant must present evidence more convincing, by even the smallest amount, than that presented by the Respondent. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950). In this case, the sole issue to be decided is whether Respondent failed to provide reasonable service in its response to the water main breaks or its repair or replacement of the water main along South Prince Street.

The statute at 66 Pa. C.S. §1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa. C.S. §1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. Elkin v. Bell Telephone Co., 372 A.2d 1203 (Pa. Super. 1977) aff'd 420 A.2d 371 (Pa. 1977); Behrend v. Bell Telephone Co., 243 A.2d 346 (Pa. 1968). As a general proposition, neither the Public Utility Code nor the Commission's

regulations require public utilities to provide constantly flawless service. The Public Utility Code at 66 Pa. C.S. §1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. Analytical Laboratory Services, Inc. v. Metropolitan Edison Co., Docket No. C-2006608 (Order entered December 21, 2007); Emerald Art Glass v. Duquesne Light Co., Docket No. C-00015494 (Order entered June 14, 2002); Re: Metropolitan Edison Co., 80 Pa. PUC 662 (1993).

Here, the undisputed facts indicate that two water main breaks occurred along the Complainants' street on February 16 and 17, 2016. N.T. 24, 32. The breaks occurred within 20 to 25 feet of each other. N.T. 32. While this water main had been installed in 1971, it had not experienced any leaks or breaks prior to February 16, 2016. N.T. 29, 31-32. The breaks which occurred in February of 2016 were the result of extreme temperature differences and sudden ground shifting and earth movement. N.T. 31-33. As a result of these breaks, the Respondent replaced the entire 800 feet of the water main along South Prince Street between Harry Avenue and Leon Avenue. N.T. 33.

The mere fact that two water main breaks occurred along the Complainants' street does not in and of itself evidence unreasonable or inadequate service by the Respondent. Neil R. Rahn, David Singerling, et al. v. Pennsylvania-American Water Company, Docket No. C-20054919 (Final Order entered July 27, 2007). While two breaks in such close proximity in time and distance certainly seem unusual, the evidence of record indicates that the breaks were the result of extreme temperature fluctuations and sudden ground shifting. N.T. 31-33. The Respondent's witness testified that although the water main had been installed in 1971, it had not experienced any leaks or breaks prior to these incidents. N.T. 29, 31-32. Unforeseeable variations in temperature and the resulting ground shift could not reasonably have been anticipated by the Respondent. Likewise, sudden and unexpected breaks as a result of those conditions do not evidence unreasonable or inadequate service.

While the Complainants also raised an allegation with respect to the amount of time it took the Respondent to repair these breaks, there is no evidence of record to indicate that such response times rose to the level of unreasonable service. The Respondent's witness

credibly testified that once a report of a water main break was brought to the Respondent's attention, a repair crew was on scene and conducting a controlled shutdown of the break within 45 minutes. N.T. 25. Likewise, the mere fact that it required approximately four hours for each of the breaks to be repaired and water service to be restored does not evidence unreasonable or inadequate service by the Respondent.

Last, the Complainants argued that the respondent had not made the necessary restorations to the Complainants' property after the repair of these water main breaks. Specifically, the Complainants argued that a grassy area of their yard near the street had sunk and not been restored. The Respondent's witness again credibly testified that during the repairs to the two breaks in February, the repairs had been excavations limited to the street adjacent to Complainants' property and did not necessitate any type of restoration to surrounding properties. N.T. 37-38. It was admitted however that the replacement of 800 feet of water main along South Prince Street did require restoration to surrounding properties. The Respondent's witness however credibly testified that proper restoration of paving, sidewalks, driveways and grass affected by the water main replacement and within the Respondent's right-of-way was completed – including on the Complainants' property. N.T. 42-43. There is no evidence that the Respondent failed to adequately and properly complete property restorations within its right-of-way at the time the water main was replaced along the Complainants' street.

#### Admission of Exhibits - Objections

As previously indicated, the Complainants sponsored an exhibit which was admitted into the record at the time of the further hearing in this matter on July 28, 2017. While admitted to the record, it was properly objected to at the hearing by the Respondent.

First, it is agreed that the overarching purpose of the exhibit is to establish liability on behalf of the Respondent and to support an award of monetary damages for the structural issues with the Complainants' home beginning on February 17, 2017. The question of monetary damages was previously addressed and is therefore not at issue for the purposes of this initial decision.

Second, the Respondent properly lodged a hearsay objection with respect to this exhibit. The Walker rule relating to hearsay evidence provides that hearsay which has been properly objected to is not competent evidence to support a finding of fact. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). While the Complainants' exhibit was admitted into the record for the purposes of providing the Complainants with every opportunity to present their case, it cannot, and has not, been used or cited to support any finding of fact.

### Conclusion

It is therefore concluded that the Complainants have failed to establish by a preponderance of the evidence that the Respondent violated the Public Utility Code or Commission regulations. The sudden and unforeseeable water main breaks and their repair on February 16 and 17, 2016, and the subsequent replacement of the 800 feet of water main along the Complainants' street in February and March of 2016, do not evidence instances of unreasonable or inadequate service by the Respondent. The complaint is therefore denied and the following order will be entered.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa. C.S. §701.
2. Pursuant to 66 Pa. C.S. §332(a), the burden of proof in this proceeding is on the Complainants.
3. Pursuant to 66 Pa. C.S. §1501, public utilities must provide reasonable and adequate service.
4. The water main breaks and their repair on February 16 and 17, 2016, and the subsequent replacement of the water main along South Prince Street between Harry Avenue

and Leon Avenue in February and March of 2016, do not evidence instances of unreasonable or inadequate service by the Respondent under 66 Pa. C.S. §1501.

5. The Complainants have failed to show that the Respondent has violated the Public Utility Code, Commission order or regulation. 66 Pa. C.S. §332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of Lorraine and John Barcynski against Pennsylvania-American Water Company at Docket No. C-2017-2591928 is hereby denied.
2. That the docket at Docket No. C-2017-2591928 is marked closed.

Date: August 31, 2017

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/s/  
Benjamin J. Myers  
Administrative Law Judge