

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Frank D. Kitzmiller	:	
	:	
v.	:	C-2014-2435567
	:	
City of Lancaster Water Department	:	

**INITIAL DECISION**

Before  
Joel H. Cheskis  
Deputy Chief Administrative Law Judge

**INTRODUCTION**

This decision dismisses a complaint filed by a customer of a water company alleging that there are incorrect charges on the customer's bill because the customer is being charged a customer charge for customers with a one-inch meter when the customer only has a 3/4-inch meter. The complaint is dismissed because the complainant has failed to demonstrate by a preponderance of the evidence that the company violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the service provided. The complainant is properly charged based on a one-inch meter because his 3/4-inch meter is connected to a one-inch service line that is required by his township via an adapter.

**HISTORY OF THE PROCEEDING**

On July 10, 2014, Frank D. Kitzmiller filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against City of Lancaster Water Department (Lancaster), docket number C-2014-2435567. In his complaint, Mr. Kitzmiller averred that there are incorrect charges on his bill and provided a detailed explanation in an

attachment. The explanation, in part, complained about an overcharge of customers caused by billings based on a one-inch meter instead of the ¾-inch meter that is actually being used by customers. Mr. Kitzmiller provided several attachments to his complaint in support of his position that he is being overcharged.

Mr. Kitzmiller's complaint was served on Lancaster by the Commission's Secretary's Bureau on August 4, 2014.

On August 11, 2017, a certificate of satisfaction was filed by Lancaster.<sup>1</sup> However, on August 16, 2017, Mr. Kitzmiller filed an objection to the certificate of satisfaction.

As a result, on August 29, 2017, a telephonic hearing notice was issued setting an initial telephonic hearing for this case for Tuesday, October 17, 2017 and assigning me as the presiding officer. A prehearing order dated September 7, 2017 was issued setting forth various rules that would govern that hearing.

On October 4, 2017, Mr. Kitzmiller requested a continuance of the hearing scheduled for October 17, 2017. That request was unopposed and, therefore, it was granted. On October 16, 2017, a hearing cancellation/reschedule notice was issued rescheduling the October 17, 2017 hearing for January 4, 2018.

On November 30, 2017, Mr. Kitzmiller made a second request for a continuance. In the request, Mr. Kitzmiller stated that the continuance is necessary because he needs additional time to properly prepare the exhibits and testimony which will be based in part on information obtained through discovery. Mr. Kitzmiller added that the discovery will not be answered by Lancaster until after January 4, 2018 and, at that point, time will be needed for Mr. Kitzmiller to review the answers and possibly issue additional discovery. Mr. Kitzmiller specifically requested that the hearing be continued until March 22, 2018. Mr. Kitzmiller noted

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<sup>1</sup> It is unclear what happened to this complaint during the period August 4, 2014 through August 11, 2017. At the time Mr. Kitzmiller filed his complaint, as discussed below, Lancaster also had a formal proceeding requesting an increase of its base rates. It is unclear why this complaint was not consolidated with that proceeding or proceeded on its own at that time.

that, again, the request is unopposed. Mr. Kitzmiller's request was granted via order dated December 12, 2017. A hearing notice dated December 15, 2017 was issued formally scheduling the hearing for March 22, 2018.

On February 12, 2018, Lancaster filed a motion to file an answer *nunc pro tunc* in response to Mr. Kitzmiller's complaint.<sup>2</sup> Mr. Kitzmiller filed an answer to the motion on February 20, 2018.

On March 10, 2018, Mr. Kitzmiller filed an additional request for a continuance of the hearing scheduled for March 22, 2018. Mr. Kitzmiller explained that the continuance is necessary to allow him to complete the review of information to be received from Lancaster in response to unanswered discovery. By hearing notice dated March 27, 2018, the initial hearing for this matter was rescheduled to April 18, 2018.

The evidentiary hearing in this matter convened as scheduled on April 18, 2018. Mr. Kitzmiller appeared pro se. John Gallagher, Esquire appeared on behalf of Lancaster. A transcript of 59 pages was created. During the hearing, a discussion was held regarding outstanding discovery. It was determined at that time that the hearing would proceed, and a determination would be made regarding how the outstanding discovery would be addressed. It also became clear that a further hearing would be required and that the outstanding motions to compel would be addressed prior to the further hearing. Tr. 52-55.

An order disposing of the outstanding motions to compel was issued on June 15, 2018 and a hearing notice dated June 19, 2018 was issued scheduling a further hearing for Thursday, July 26, 2018. On June 20, 2018, prehearing order #2 was issued providing details regarding the hearing scheduled for July 26, 2018.

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<sup>2</sup> Had Mr. Kitzmiller's complaint been made a part of the proceeding involving Lancaster's requested increase of its base rates, the company could have filed an answer to the complaint but it would not have been required to do so, as is the case in base rate proceedings. When the complaint proceeded outside of the rate case proceeding, Lancaster filed the answer *nunc pro tunc*.

On July 5, 2018, counsel for Lancaster filed a request for a continuance of the hearing scheduled for July 26, 2018, noting that he has an unavoidable conflict with his schedule and those of the City of Lancaster. Mr. Kitzmiller did not oppose the request. Lancaster's request was granted informally. As a result, a hearing notice was issued rescheduling the further evidentiary hearing for Tuesday, August 28, 2018 at 10:00 a.m. in person in hearing room 3 in the Commonwealth Keystone Building in Harrisburg. By order dated July 6, 2018, Lancaster's request was formally granted, and the parties were again reminded of the purpose of the further hearing.

The hearing scheduled for August 28, 2018 was rescheduled for September 20, 2018 by hearing notice dated August 23, 2018.

Finally, a hearing notice was issued on October 30, 2018 scheduling a further evidentiary hearing for Wednesday, December 19, 2018 beginning at 10:00 a.m.

The hearing convened on December 19, 2018, as scheduled. Mr. Kitzmiller again appeared pro se. Mr. Kitzmiller presented four exhibits that were admitted in to the record. John Gallagher, Esquire again appeared on behalf of Lancaster and presented one witness who sponsored two exhibits that were both admitted in to the record.

An additional 44 pages of transcript were created during the hearing and submitted to the Commission on January 9, 2019. The record in the case closed on January 9, 2019 when the second transcript was submitted to the Commission.

On February 5, 2019, Mr. Kitzmiller filed a Petition to Reopen the Record and Admission of Late-Filed Exhibits. In his petition, Mr. Kitzmiller stated that after he reviewed the transcript of the December 19, 2018 hearing, he noticed that certain evidence was missing. Mr. Kitzmiller sought to admit Kitzmiller Exhibits E, F and G in to the record. Lancaster's response to Mr. Kitzmiller's petition was due on February 15, 2019 but the company did not

provide a timely answer.<sup>3</sup> As a result, Mr. Kitzmiller's petition was granted via order dated February 22, 2019 and Kitzmiller Exhibits E, F and G were admitted in to the record.

On March 1, 2019, Mr. Kitzmiller filed a second petition to reopen the record and admit late-filed exhibits. This request primarily sought the admission of what had been previously marked as Kitzmiller Exhibit H that comprised 19 specific changes to the April 18, 2018 written testimony, among other things. Mr. Kitzmiller's second petition was granted via order dated March 15, 2019.

The record closed again on March 15, 2019, the date Mr. Kitzmiller's second petition to reopen the record was granted. This complaint is now ready for disposition. For the reasons discussed below, Mr. Kitzmiller's complaint will be dismissed.

#### FINDINGS OF FACT

1. The Complainant in this case is Frank D. Kitzmiller.
2. The Respondent in this case is City of Lancaster Water Department.
3. The service address is 1041 Preston Road, Lancaster, PA.
4. Mr. Kitzmiller has lived in his house at the service address since 1972. Tr. 9.
5. Mr. Kitzmiller's house was built in 1965. Tr. 9.
6. Mr. Kitzmiller first became a customer of Lancaster on March 15, 1988. Tr. 9-10.

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<sup>3</sup> Lancaster filed an answer to Mr. Kitzmiller's petition dated February 21, 2019 that was received by the Presiding Officer on February 22, 2019, after the order granting the petition was issued.

7. Lancaster sought an increase in its base rates from the Commission in both 2010 and 2014. Tr. 11.
8. Lancaster's customer charge varies based upon the required size of the water meter needed to render adequate service. Tr. 14.
9. Mr. Kitzmiller has a  $\frac{3}{4}$ -inch meter. Tr. 17.
10. Lancaster Exhibit Number 1 is a copy of the complaint Mr. Kitzmiller filed in response to Lancaster's 2014 rate case at docket number C-2014-8243554. Lancaster Exh. No. 1; Tr. 28.
11. Mr. Kitzmiller's  $\frac{3}{4}$ -inch meter has a one-inch port on it and therefore has the capability of connecting to a one-inch service line. Tr. 37.
12. Mr. Kitzmiller has a one-inch service line. Tr. 37, 86.
13. Mr. Kitzmiller has a one-inch service line based on an agreement between Lancaster and Manheim Township where Mr. Kitzmiller lives. Tr. 38.
14. In order to supply service to a customer, customers are charged a customer charge for the amount of capital and expense required to maintain a water system, pumps, treatment plants, etc. to supply water through various size pipes. Tr. 40.
15. A one-inch service line has an assigned cost of service to it which is used to determine the customer charge. Tr. 40.
16. Mr. Kitzmiller was assigned a customer charge for a one-inch meter because his  $\frac{3}{4}$ -inch meter has a one-inch port on it allowing an inlet for a one-inch service line. Tr. 40.

17. Lancaster Exhibit Number 2 is a copy of the complaint Mr. Kitzmiller filed in this case. Lancaster Exh. No. 2; Tr. 43.

18. Kitzmiller Exhibit A is a seven-page, single-spaced, typewritten document entitled “Brief for Hearing” dated March 15, 2018 that Mr. Kitzmiller provided which includes sections entitled “Concise Statement of the Case,” “Summary of Argument,” “Argument” and “Conclusion” pertaining to service provided to Mr. Kitzmiller, service provided to other Lancaster customers and Lancaster’s most recent request for an increase in base rates. Kitzmiller Exh. A; Tr. 68.

19. Kitzmiller Exhibit B is a compilation of various documents, including a Lancaster Water tariff page, a chart summarizing Mr. Kitzmiller’s proposed overbillings, a municipal connector’s agreement dated September 30, 1985, a letter from Lancaster to its customers dated August 27, 2010, a notice of proposed rate changes dated August 27, 2010, Mr. Kitzmiller’s bill from Lancaster dated March 6, 2018, a chart demonstrating the application of the rate increases to Lancaster customers outside of the city for the year ended December 31, 2013 and a certificate of satisfaction previously filed in this docket. Kitzmiller Exh. B; Tr. 68-69.

20. Kitzmiller Exhibit C is 14-page, single-spaced, typewritten document entitled “Testimony at hearing” dated April 18, 2018 that is substantially similar to Kitzmiller Exhibit A with additional argument and a section entitled “Legal Standard.” Kitzmiller Exh. C; Tr. 70-72.

21. Kitzmiller Exhibit D is a compilation of various documents including a chart entitled “PA PUC notes and references on rates and rate increases, 3/15/88 to 3/15/18,” “Extension of Municipal Connector’s Agreements” dated December 4, 2008 and pages 1 and 25 of 67 of a listing of 3,071 water customers located in Manheim Township who are billed for a one-inch size water meter but use a ¾” size water meter. Kitzmiller Exh. D; Tr. 70-72.

22. Patrick Hopkins is employed by the City of Lancaster as Business Administrator and has held that position since January, 2006. Tr. 73.

23. Mr. Hopkins has a degree in Government from Franklin and Marshall College with a minor in Economics. Tr. 73.
24. Mr. Hopkins is responsible for all City budget issues, including the City's general fund and sewer and water funds, and oversees the City's capital budget, labor relations and negotiations with police, fire and unions, among other things. Tr. 74.
25. Mr. Hopkins was involved in both the water and sewer rate cases filed at the Commission by Lancaster in 2010 and 2014. Tr. 74.
26. Lancaster Exhibit Number 3 is the answer and new matter filed by Lancaster on February 6, 2018 in response to Mr. Kitzmiller's complaint at docket number C-2014-2435567. Lancaster Exh. No. 3; Tr. 75.
27. Lancaster Exhibit Number 4 is a portion of the Manheim Township Code. Lancaster Exh. No. 4; Tr. 77, 81.
28. The Manheim Township Code requires residential properties in the township to be served by a one-inch service line to the property. Tr. 77.
29. Lancaster determines the customer demand charge based on the requirements of the local municipality. Tr. 78.
30. A one-inch service line requires more capacity and pressure in the system than a 5/8-inch service line. Tr. 78.
31. The consumption charge is based on what flows through the customer's meter. Tr. 79.
32. Lancaster does not have any purview over the actual installation of the service lines in Manheim Township. Tr. 80.

33. Kitzmiller Exhibit E is a compilation of various documents including additional pages to the municipal connector's agreement date September 30, 1985, a dear water service customer letter dated June 6, 2014, a notice of proposed rate changes dated June 6, 2014, pages 1-4 of the extension of municipal connector's agreement dated December 4, 2008, and a print out of frequently asked questions from Lancaster's website regarding the 2014 rate increase request, among other things. Kitzmiller Exh. E.

34. Kitzmiller Exhibit F is a two-page, single-spaced, typewritten document entitled "Water Case Addendum to Written Testimony Exh FDK 18" dated December 19, 2018 which provides additional argument from Mr. Kitzmiller regarding the municipal connector's agreement and the specifications of Manheim Township. Kitzmiller Exh. F.

35. Kitzmiller Exhibit G is a three-page, single-spaced, typewritten document entitled "Footnote to Exhibit Exh FDK 18" dated December 19, 2018 which provides further additional argument from Mr. Kitzmiller regarding the municipal connector's agreement and the specifications of Manheim Township. Kitzmiller Exh. G.

36. Kitzmiller Exhibit H is a compilation of 19 specific changes to the April 18, 2018 written testimony as well as elaborations to prior testimony. Kitzmiller Exhibit H.

## DISCUSSION

### Legal Standard

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). The offense must

be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701. In this proceeding, Mr. Kitzmiller complained that there are incorrect charges on his bill and provided a detailed explanation regarding his belief that he has a ¾-inch meter but is being charged by Lancaster as if he has a one-inch meter. Mr. Kitzmiller requested that he be refunded the amount he has overpaid and to be billed at the ¾-inch rate. Mr. Kitzmiller, therefore, has the burden of proof in this proceeding.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001) (Milkie); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

In addition, on appeal, the decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

Mr. Kitzmiller's complaint will be dismissed because he failed to demonstrate by a preponderance of the evidence that Lancaster violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the service provided to him.

### **Mr. Kitzmiller's complaint**

In his complaint, Mr. Kitzmiller checked the box indicating that there are “incorrect charges on my bill.” In his explanation attached to his complaint, and throughout this proceeding, Mr. Kitzmiller averred various additional issues. These issues relate to Lancaster’s prior requests for an increase to its base rates, issues related to service provided by Lancaster to other customers, issues related to service provided by Lancaster to Mr. Kitzmiller and issues that are beyond the statute of limitations.

For example, Mr. Kitzmiller stated in his complaint that he is being over charged because his billings are based on a one-inch meter instead of the  $\frac{3}{4}$ -inch meter he uses. Mr. Kitzmiller provided information that he believes demonstrates that he has been overcharged by Lancaster \$2,016 from 1988 to 2014. Mr. Kitzmiller asked that he be refunded this amount and be billed at the correct rate. Mr. Kitzmiller also raised in his complaint averments regarding the notice of proposed rate change Lancaster provided as part of its last request for an increase to its base rates and his ability to get information in that proceeding. Mr. Kitzmiller also raised averments regarding other customers of Lancaster who might be affected by an incorrect customer charge, noting, among other things, that there are about 5,122 residential customers who are in the one-inch meter customer charge category. Mr. Kitzmiller noted that he experienced increased water pressure on his one-inch line that required him to install a pressure reducing valve in 2004.

Mr. Kitzmiller also attached various documents to his complaint in support of his position. These documents include a spreadsheet Mr. Kitzmiller created to determine the amount he believes he was overcharged and the effect of the purported overcharge on 5,000 customers. Mr. Kitzmiller also attached other supporting documents from Lancaster’s then-pending requested increase of its base rates.

During the hearing, Mr. Kitzmiller presented four exhibits in support of his complaint. The exhibits provided by Mr. Kitzmiller are essentially a written recitation of his

avertments in the complaint with some elaboration. In addition, the testimony provided by Mr. Kitzmiller during the hearing is essentially an oral recitation of the exhibits.<sup>4</sup>

For example, in Kitzmiller Exhibit C, which comprises, in whole or substantial part, the evidence presented in Kitzmiller Exhibit A, Mr. Kitzmiller provided background information on Lancaster's last two base rate increases and his perceived lack of adequate customer notice. Mr. Kitzmiller also explained how he formed his belief that he was being overcharged and steps that he took to address his concerns both with Manheim Township supervisors and at the Commission through filing complaints. Next, Mr. Kitzmiller stated various portions of the Public Utility Code he believed supported his arguments as the legal standard to be applied to his complaint.

In his argument section of Exhibit C, Mr. Kitzmiller stated that he believes Lancaster is deliberately overcharging customers who use a ¾-inch meter directly in conflict with a municipal connector's agreement dated September 30, 1985. Mr. Kitzmiller argued that Lancaster is increasing the customer charge to customers who use a ¾-inch meter by 265% which he believes is unjust and unreasonable. Mr. Kitzmiller explained the financial windfall Lancaster realizes from overbilling all of its customers who use a ¾-inch meter. Mr. Kitzmiller discussed the difficulties he experienced in raising this issue in Lancaster's most recent base rate case, noting that "it appears that the overbilling was never noticed by the professional consultants hired by the OCA or the OSBA" or "by the highly skilled employees of the PUC investigating" the rate increase request. Mr. Kitzmiller also explained his difficulties in finding out information through discovery.

Kitzmiller Exhibit C concludes with Mr. Kitzmiller's request that all overbillings be refunded going back to 1988, with interest, and that he be billed going forward at the ¾-inch rate. As noted above, Kitzmiller Exhibit D, which comprises, in whole or substantial part, the evidence presented in Kitzmiller Exhibit B, Mr. Kitzmiller included the documents supporting his complaint, such as his calculations that determined how much he has been overbilled, the municipal

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<sup>4</sup> Mr. Kitzmiller was given the opportunity to read from his prepared statement as his testimony during the hearing. When the oral testimony became lengthy, Mr. Kitzmiller's prepared statement was then admitted into the record in support of his complaint in lieu of further oral testimony and in agreement of the parties in an attempt to expedite the hearing. *See e.g.*, Tr. 68.

connector's agreement dated September 30, 1985 and additional information discussed further below.

Finally, after the hearing, Mr. Kitzmiller filed two petitions to reopen the record where he sought the admission of Kitzmiller Exhibits E, F, G and H. These exhibits provide additional documentation and argument in support of Mr. Kitzmiller's position that Lancaster is incorrectly overcharging him for a one-inch meter when it should only be charging him for a ¾-inch meter. Kitzmiller Exhibits E, F and G pertain primarily to the September 30, 1985 municipal connector's agreement and Manheim Township Code. Kitzmiller Exhibit H makes changes to Mr. Kitzmiller's prior testimony with some moderate elaborations on certain issues.

### **Issues related to Mr. Kitzmiller's customer charge**

With regard to Mr. Kitzmiller's averment in this case that there are incorrect charges on his bill because Lancaster charged him a customer charge based on a one-inch meter instead of a ¾-inch meter, this argument will be rejected because the evidence presented by Mr. Kitzmiller is outweighed by the evidence presented in response by Lancaster.

Throughout this proceeding, Mr. Kitzmiller presented the following documents that were all admitted into the record as part of Kitzmiller Exhibit B, Kitzmiller Exhibit D and Kitzmiller Exhibit E:

- Supplement No. 45 to Tariff Water No. 6 – 25<sup>th</sup> Revised Page No. 4 (Exh FDK 1)
- Summary of Overbill and Statutory Interest to 3/15/88 (Exh FDK 2)
- PA PUC Notes and References on Rates and Rate increases 3/15/88 to 3/15/18 (Exh FDK 2.1)
- Municipal Connector's Agreement dated 9/30/85, pages 1 and 2 (Exh FDK 3)

- Municipal Connector's Agreement dated 9/30/85, pages 3 and 4 (Exh FDK 3.1)
- Dear Water Service Customer Letter dated 8/27/10 (Exh FDK 4)
- Dear Water Service Customer Letter dated 6/6/14 (Exh FDK 4.1)
- Notice of Proposed Rate Changes to our Customers dated 8/27/10 (Exh FDK 5)
- Notice of Proposed Rate Changes to our Customers dated 6/6/14 (FDK 5.1)
- Example of City of Lancaster Water Department quarterly water bills (Exh FDK6)
- Residential quarterly billing information indicating that 5,122 outside the city customers were billed for a 1" size water meter for the year ended 12/31/13 (Exh FDK 7)
- Certificate of Satisfaction, filed 8/11/17 (Exh FDK 8)
- Page 1 (of 3) of Extension of Municipal Connector's Agreements dated 12/4/08 (Exh FDK 9)
- Pages 1-4 of Extension of Municipal Connector's Agreements dated 12/4/08 (Exh FDK 9.1)
- Pages 1 of 67 and 25 of 67 of listing of 3,071 water customers located in Manheim Township who are billed for 1" size water meter use a 3/4-inch size water meter (Exh FDK 10)
- Information from Frequently Asked Questions (FAQ) information located on Lancaster City Water Department website related to 2014 rate increase which compares the Lancaster City - Outside proposed rate to other rates charged by other providers to Lancaster County customers (FDK 11)
- Example of a Water Tariff shown on PA PUC website in the Rates and Tariffs section of consumer information, water/wastewater (FDK 12)
- Pages 1-3 of Extension of Municipal Connector's Agreements dated 6/28/04 (FDK 13)

- Pages 1-4 of Municipal Connector's Agreement dated 12/18/84 (FDK 14)
- Municipal Connector's Agreement dated 12/18/84, Exhibit A (FDK 15)
- Manheim Township right-to-know response indicating the water customer service line pipe size for various locations in the Fox Chase community (FDK 16)
- City of Lancaster Water Utilities Exhibit D IX-5 "Response to Quality of Service Filing Requirements" with respect to its complete and current mapping of the entire distribution or collection system in connection with the 2014 rate request proceeding (FDK 17)
- Information on water line connections required by provisions of the 12/18/84 and 9/30/85 Municipal Connector's Agreements between City of Lancaster Water Department and Manheim Township/General Municipal Authority (FDK 18)

*See, Kitzmiller Exhs. B, D and E.*<sup>5</sup>

Most notably, in Supplement No. 45 to Tariff Water No. 6 – 25<sup>th</sup> Revised Page No. 4 (Exh FDK 1), it is clear that the customer charge per quarter for customers with 5/8" or 3/4" meters is \$16.55 and the customer charge per quarter for customers with a one-inch meter is \$44.70. This tariff is effective March 5, 2015. Certainly, the difference between \$16.55 and \$44.70 is considerable. Furthermore, Mr. Kitzmiller presented a copy of his bill from July 6, 2015 as an example of Lancaster's quarterly water bills (Exh FDK 6). This bill shows the size of Mr. Kitzmiller's meter as "1x3/4". In Kitzmiller Exhibit C, Mr. Kitzmiller noted that he is being charged as if the size of his meter was one-inch. Mr. Kitzmiller added that "the meter department technician examined the meter and the customer service line and said it was a 3/4-inch meter connected to a one-inch service line."

Mr. Kitzmiller averred that Lancaster is "deliberately overcharging" him and noted that there are many other similarly situated customers resulting in significant benefits to

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<sup>5</sup> Mr. Kitzmiller pre-marked his exhibits FDK 1 through FDK 18. The packets of exhibits, however, were admitted in to the record as Exhibits A through Exhibits G.

Lancaster. In support of his position that Lancaster is deceptively overcharging him and other customers, Mr. Kitzmiller added that “during the period in which the rate increase is requested by [Lancaster], there is enormous amounts of information generated as [Lancaster] and the parties opposed to the rate increase present their sides on the matter.” Mr. Kitzmiller noted his difficulty in obtaining related material as part of his own investigation of the matter. Mr. Kitzmiller added:

As noted above, the customer’s quarterly bill information is not sufficient to prevent an overbilling from occurring and being concealed (Exh. FDK 6).

It appears that the overbilling was never noticed by the professional consultants hired by the OCA, the OSBA and [Lancaster] and its employees and by the highly skilled employees of the Commission investigating the various rate increase requests made by [Lancaster] from 1985 to present date.

Kitzmiller Exh. C. Mr. Kitzmiller further stated that “the independent public accountants auditing the financial statements of [Lancaster] apparently did not notice this overbilling in their annual audits” and that he “has never seen any reporting of this overbilling in the local newspaper.” *See* Kitzmiller Exh. C.

Mr. Kitzmiller also relied on a “municipal connector’s agreement” dated September 30, 1985, and an “extension of municipal contractor’s agreements” dated December 4, 2008, in support of his position that he is being overcharged.

In contrast, in response to the evidence presented by Mr. Kitzmiller on this issue, Lancaster presented the testimony of Patrick Hopkins, who has been employed by Lancaster as the Business Administrator since 2006 and in that role is responsible for all matters involving the rates that Lancaster charges for its water. Tr. 73-74. During the hearing, Mr. Hopkins testified that the Manheim Township Code requires residential properties in Manheim Township to be connected to the water system through a one-inch service line to the property. Tr. 77. Mr. Hopkins testified that the ordinance has been in effect for several decades. He sponsored Lancaster Exhibit Number 4 that was admitted into the record that comprises Section 202-8 of

the International Plumbing Code amendment. Lancaster Exh. No. 4; Tr. 77. Section 202-8 specifically amended the plumbing code to replace one-inch water service pipe with ¾-inch service pipe.

Mr. Hopkins also testified that “a one-inch service line requires more of the entire water system than does a 5/8-inch service line” and that, therefore, the customer charge is higher. Tr. 78. Mr. Hopkins concluded that this is “a fairly simply issue” and that “Mr. Kitzmiller has a one-inch line into his property, a residential property which is required by Manheim Township Code and we charge accordingly.” Tr. 80. Mr. Hopkins concluded:

Q. And [Lancaster] has no option but to comply with that requirement that, since Manheim Township has a one-inch service line ordinance, that the fixed charge for that should be for a one-inch line?

A. Correct, because [Lancaster] doesn't have purview over the actual installation of those lines. Those are established by Manheim Township Code.

Tr. 80. I agree.

Mr. Kitzmiller's averment that there are incorrect charges on his bill because Lancaster charged him a customer charge based on a one-inch meter when he only has a ¾-inch meter will be rejected because the evidence presented by Mr. Kitzmiller is outweighed by the evidence presented in response by Lancaster.

Record evidence demonstrates that Mr. Kitzmiller has a ¾-inch meter with a converter that allows him to be served by his one-inch service line. The one-inch service line was mandated by Manheim Township. As a result, Lancaster charges Mr. Kitzmiller a customer charge of \$44.70 because that is the customer charge for customers who are served by a one-inch service line. It is not unreasonable that Mr. Kitzmiller is charged the \$44.70 customer charge because he receives service through a one-inch service line, even though his meter is suitable for a ¾-inch meter and has an adapter. Nor is it a violation of the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the Company. While it may

be confusing that Mr. Kitzmiller is served by a one-inch service line that is connected to his  $\frac{3}{4}$ -inch meter, it is not unreasonable. It is more appropriate to use an adapter to connect the  $\frac{3}{4}$ -inch meter to the one-inch service line than to replace the  $\frac{3}{4}$ -inch meter with a one-inch meter that can connect to the one-inch service line or to change the one-inch service line to a  $\frac{3}{4}$ -inch service line to connect to a  $\frac{3}{4}$ " meter. Mr. Kitzmiller's bill from Lancaster demonstrates that he is charged for the one-inch meter and, therefore, there are no incorrect charges on his bill.

During the hearing, counsel for Lancaster questioned Mr. Kitzmiller regarding his specific meter:

Q. Are you aware, Mr. Kitzmiller, that your three-quarter inch meter is capable – has a one-inch port on that meter?

A. Well, it's a one-inch by three-quarters they show on the bill.

Q. Well—

A. Actually, there is no such thing like that. It was actually a three-quarter inch, with this one-inch port. It's a three-quarter inch meter.

Q. With the capability of utilizing a one-inch service line?

A. That's what it seems to be, yes.

Q. Yes.

A. But, it is a three-quarter inch meter.

Q. That has the capability of utilizing a one-inch service line?

A. It must, yes, it must, and I –

Q. And you do have a one-inch service line, correct?

A. Yes.

Tr. 36-37.

Similarly, Mr. Kitzmiller's reliance on a "municipal connector's agreement" dated September 30, 1985, and an "extension of municipal contractor's agreements" dated

December 4, 2008, in support of his position that he is being overcharged is also without merit. These documents do not demonstrate that Mr. Kitzmiller is being overcharged by Lancaster. Neither of the documents are complete. The 1985 agreement merely provides that Lancaster will “operate said water line as a part of its water supply system and serve water to all consumers connected thereto at the rates for water use established by [Lancaster] in effect from time to time in such area.” It is otherwise unclear what relevance the 2008 document has to Mr. Kitzmiller’s complaint. To the extent that Mr. Kitzmiller has concerns about any agreements or actions of Manheim Township with regard to his water service, he should consider raising those arguments with the Township. The Commission lacks jurisdiction to hear such arguments.

Dismissing the complaint is further supported by Mr. Kitzmiller’s own assertion that none of the staffs of the Office of Consumer Advocate (OCA), Office of Small Business Advocate (OSBA) or Commission, or any independent auditor, have raised concerns regarding Lancaster’s practice of charging customers the customer charge for one-inch meters even though they have a  $\frac{3}{4}$ -inch meter that is connected to a one-inch service line. The OCA, the OSBA and the Commission staffs are independent parties with the statutory authority to intervene in base rate proceedings on behalf of consumers, small businesses and the public, respectively. They all generally were involved in Lancaster’s base rate cases, as they have been involved in countless other companies’ base rate cases. To the extent that these parties have not raised concerns regarding Lancaster charging customers who have  $\frac{3}{4}$ -inch meters but are connected to a one-inch service line via an adapter as if they had a one-inch meter, that further supports dismissing Mr. Kitzmiller’s complaint here.

This conclusion does not change based on the other arguments that Mr. Kitzmiller raises. As discussed below, Mr. Kitzmiller’s arguments regarding the past rate cases and service to other similarly situated customers do not change the fact Lancaster is correctly billing Mr. Kitzmiller based on the one-inch meter. Instead, Lancaster witness Hopkins’ testimony is more compelling. Manheim Township required one-inch service lines and Mr. Kitzmiller therefore has a converter on his meter that allows his  $\frac{3}{4}$ -inch meter to connect to the one-inch service line. Mr. Kitzmiller’s service via the one-inch service line warrants the higher customer charge. As Mr. Hopkins testified: “Mr. Kitzmiller has a one-inch line into his property, a residential property,

which is required by Manheim Township Code and we charge him accordingly.” As noted above, the burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie. Mr. Kitzmiller has failed to satisfy his burden of proof on this issue.

As a result, Mr. Kitzmiller’s argument that he is being incorrectly billed by Lancaster because he has a ¾-inch meter but is being charged the one-inch customer charge is without merit and will be rejected.

### **Issues related to past rate cases**

In Kitzmiller Exhibit C, Mr. Kitzmiller raised issues with regard to Lancaster’s rate case filings in 2010 and 2014. These arguments, however, are untimely and are not properly raised in this complaint. The Commission acted on Lancaster’s rate increase filings in Pa.P.U.C., et al. v. City of Lancaster – Bureau of Water, Docket Nos. R-2010-2179103, *et al.* (Opinion and Order entered July 14, 2011) and Pa.P.U.C., et al. v. City of Lancaster – Bureau of Water, Docket Nos. R-2014-2418872, *et al.* (Order entered January 15, 2015). These decisions are both final. To the extent that Mr. Kitzmiller would like to contest issues addressed in those proceedings, he could file a petition to rescind or amend the Commission’s prior orders approving those increases pursuant to Section 703(g) of the Public Utility Code.<sup>6</sup> He cannot, however, have those issues heard in a complaint proceeding held years after the base rate case is final.

Therefore, Mr. Kitzmiller’s concern that Lancaster’s characterization of its proposed rate increase request as “modest” is misleading is without merit and will be rejected. Similarly, Mr. Kitzmiller also questioning the need for the rate increase as not being sufficiently specific, or that the Notice of Proposed Rate Changes was somehow insufficient, are also without

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<sup>6</sup> Section 703(g) provides: “**(g) Rescission and amendment of orders.**—The Commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.” 66 Pa.C.S. § 703(g).

merit and will be rejected. For example, Mr. Kitzmiller stated that there is no mention on the customer notices in the rate case that the billing to the customers is based on the consumption charge and the customer charge. Mr. Kitzmiller also stated that the customer notice in the rate case does not state where additional information can be obtained and the location of the documents that can be examined. Mr. Kitzmiller also discussed the difficulty he had in dealing with Lancaster in trying to obtain information related to the rate increase request, including attending a Manheim Township Commissioner's meeting. Mr. Kitzmiller also raised additional issues pertaining to the 2014 rate case. All of the issues pertaining to the 2010 and 2014 rate cases, however, will be denied in this proceeding.

Counsel for Lancaster questioned Mr. Kitzmiller during the hearing regarding the concerns he raised regarding the prior rate cases. *See e.g.*, Tr. 41-42. As noted above, it is unclear why Mr. Kitzmiller's complaint, filed during the time of the 2014 rate increase request, was not consolidated with that proceeding, as most consumer complaints of that nature generally are. This is what led to Lancaster having to file an answer to Mr. Kitzmiller's complain *nunc pro tunc* as companies are not required to file answers to consumer complaints filed during base rate proceedings. As Lancaster witness Hopkins testified when asked why Mr. Kitzmiller's complaint was not resolved as part of the 2014 rate case, "typically anything related to the actual charges, whether it's an individual customers or group of customers, would be handled through the rate case." Tr. 87.

As a result, to the extent that Mr. Kitzmiller still contests any matters regarding Lancaster's 2010 or 2014 rate increase requests, those issues will be dismissed. The appropriate way to raise those issues now is through a petition for rescission or amendment. In the alternative, of course, Mr. Kitzmiller could raise these issues in Lancaster's next base rate case, to the extent the issues continue to exist.

### **Issues related to other customers**

With regard to Mr. Kitzmiller's arguments regarding Lancaster's treatment of other similarly situated customers, these arguments will also be rejected.

As noted in the order denying Mr. Kitzmiller's motions to compel answers to interrogatories, it is well settled that individuals may represent themselves in proceedings before the Commission. 52 Pa.Code § 1.21(a). Otherwise, persons in adversarial proceedings shall be represented by an attorney licensed to practice law in Pennsylvania. *See*, 52 Pa.Code §§ 1.21(b) and 1.22(a). As a result, Mr. Kitzmiller cannot represent the interests of other people in matters before the Commission because he is not a licensed attorney. Similarly, class actions are not permitted under the Public Utility Code and, therefore, Mr. Kitzmiller cannot represent the interests of "all others similarly situated," as is possible in proceedings brought before a Court of Common Pleas. Section 701 of the Public Utility Code provides that any person may complain in writing to the Commission regarding the acts or omissions of a public utility. 66 Pa.C.S. § 701. Nothing in Section 701 or any other section of the Public Utility Code, however, allows for the filing of class action complaints. In the absence of statutory authority, the Commission cannot entertain class action complaints.

As stated in Kitzmiller Exhibit C, Mr. Kitzmiller has, among other things, questioned the "deliberate decision to overbill the Manheim Township customers hooking up with Lancaster's water system after September 30, 1985 [that] resulted in significant benefits for Lancaster." Mr. Kitzmiller also stated "Perhaps the annual amount of overbilling of \$109.80 for each of the 5,122 (\$562,395 total annual overbilling) water customers was not material enough to arouse suspicion" and it "would appear that the 5,000+ group of Manheim Township water customers who were overbilled would have been the ones to have discovered the overbilling." Furthermore, Mr. Kitzmiller testified during the hearing held on April 18, 2018 that "part of my discovery, though, was to see if my neighbors are in the same situation, and I've checked the neighbors and they are still charged as if they have a 5/8ths, even though they hooked up the new system after 1985. Now I don't have the answers to that, but that's part of the Set Two Discovery, which should be very easy to come up with, and I'm wondering why that is." Tr. 41.

The service Lancaster provided to the other customers who were located in Manheim Township is not relevant to whether there are incorrect charges on Mr. Kitzmiller's bill from Lancaster. As noted above, it is well settled that the Commission does not entertain class action law suits and, as a non-attorney, that Mr. Kitzmiller cannot bring his complaint on behalf

of others. While it is commendable that Mr. Kitzmiller is concerned about other customers of the company, he cannot represent them in this proceeding. Mr. Kitzmiller's claims with regard to other customers will be dismissed.

### **Issues beyond the statute of limitations**

Finally, it is noted that Mr. Kitzmiller's request for relief is limited by the statute of limitations. As noted above, Mr. Kitzmiller seeks reimbursement for overbilling dating back to September 30, 1985. Section 1312 of the Public Utility Code provides, in pertinent part:

#### **§ 1312. Refunds**

**(a) General rule.**—If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. . . .

66 Pa.C.S. § 1312(a). Therefore, any claims for refunds brought by Mr. Kitzmiller for service provided earlier than July 10, 2010 – four years prior to when he filed his complaint on July 10, 2014 – are prohibited by the statute of limitations.

Similarly, Section 3314 of the Public Utility Code limits the period in which Mr. Kitzmiller can complain about service related issues. This section provides, in pertinent part:

#### **§ 3314. Limitation of actions and cumulation of remedies**

**(a) General rule.**-- No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from

the date at which the liability therefor arose, except as otherwise provided in this part.

66 Pa.C.S. § 3314(a). Therefore, any claims for service issues brought by Mr. Kitzmiller for service provided earlier than July 10, 2011 – three years prior to when he filed his complaint on July 10, 2014 – are prohibited by the statute of limitations.

Mr. Kitzmiller has raised claims for service and billing dating back to 1988 and has asked for refunds of the purported overbilling going back to that date. To the extent that Mr. Kitzmiller would have been meritorious in his underlying claim – which he is not – any relief granted would be limited by the statute of limitations.

### **Conclusion**

In conclusion, the evidence presented by Mr. Kitzmiller that Lancaster violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the Company is outweighed by the evidence presented by Lancaster in response. Mr. Kitzmiller was given ample opportunity to present evidence in this case in support of his complaint, including multiple hearings, the admission of multiple exhibits and the grant of multiple petitions to reopen the record.

However, it is not unreasonable for Lancaster to charge Mr. Kitzmiller a customer charge based on a one-inch meter because he has a one-inch service line even though that one-inch service line is connected to a  $\frac{3}{4}$ -inch meter via an adapter. Mr. Kitzmiller has failed to adequately rebut the evidence presented by Lancaster in response to the complaint presented through the testimony of its business administrator who testified, among other things, that the one-inch services were required by Manheim Township. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Milkie, supra*. Mr. Kitzmiller has not adequately rebutted Lancaster's response to his complaint. Furthermore, Mr. Kitzmiller's complaint will be dismissed because his averments regarding past Lancaster requests to increase base rates are untimely. Mr. Kitzmiller is also not entitled to represent the interests of others he believes are

similarly situated and, therefore, his claims regarding Lancaster's service to others are also dismissed. Finally, Mr. Kitzmiller has raised issues that are barred by the statute of limitations.

Mr. Kitzmiller has raised no other issue that warrants a finding of a violation of the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the Company. As a result, Mr. Kitzmiller's complaint will be dismissed in its entirety.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. A complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990).

4. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

5. The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701.

6. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift

from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

7. On appeal, the decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

8. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa.Super. 278, 166 A.2d 96 (1961); and Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

9. The Commission acted on Lancaster's last two base rate increase filings in Pa.P.U.C., et al. v. City of Lancaster – Bureau of Water, Docket Nos. R-2010-2179103, *et al.* (Opinion and Order entered July 14, 2011) and Pa.P.U.C., et al. v. City of Lancaster – Bureau of Water, Docket Nos. R-2014-2418872, *et al.* (Order entered January 15, 2015).

10. Individuals may represent themselves in proceedings before the Commission. 52 Pa.Code § 1.21(a).

11. Persons in adversarial proceedings shall be represented by an attorney licensed to practice law in Pennsylvania. *See*, 52 Pa.Code §§ 1.21(b) and 1.22(a).

12. Any person may complain in writing to the Commission regarding the acts or omissions of a public utility. 66 Pa. C.S. § 701.

13. If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an

existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. 66 Pa.C.S. § 1312(a).

14. No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise provided in this part. 66 Pa.C.S. § 3314(a).

15. Mr. Kitzmiller has failed to satisfy his burden to demonstrate by a preponderance of the evidence that Lancaster violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company in any way.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal complaint filed by Frank D. Kitzmiller at docket number C-2014-2435567 against City of Lancaster Water Department and dated July 10, 2014 is hereby dismissed.
2. That this matter be marked closed.

Date: March 18, 2019

\_\_\_\_\_/s/  
Joel H. Cheskis  
Deputy Chief Administrative Law Judge