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April 1, 2019

Via Electronic Filing


Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: William Towne v. The Pittsburgh Water and Sewer Authority
Docket No. C-2019-3008437

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Pittsburgh Water and Sewer Authority's ("PWSA") Preliminary Objections with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Daniel Clearfield

DC/lww
Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PWSA's Preliminary Objections upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and First Class Mail

William Towne
4243 Glen Lytle Rd
Pittsburgh, PA 15217
Firstpeterfourten@gmail.com

Office of Administrative Law Judge
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Dated: April 1, 2019



Daniel Clearfield, Esc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William Towne,	:		
	Complainant	:	Docket No. C-2019-3008437
	v.	:	
	:	:	
The Pittsburgh Water and Sewer Authority,	:	:	
	Respondent	:	

NOTICE TO PLEAD

To: William Towne
4243 Glen Lytle Road
Pittsburgh, PA 15217

You are hereby notified that an Answer to the enclosed **Preliminary Objections** of The Pittsburgh Water and Sewer Authority (“Authority”) must be filed within 10 days of the date of service.

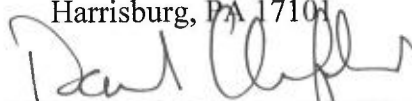
All pleadings, such as an Answer to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for the Authority and the Office of Administrative Law Judge.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Daniel Clearfield, Esquire
Attorney No. 26183
Carl Shultz, Esquire
Attorney No. 70328
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101



Daniel Clearfield, Esquire

Attorneys for
The Pittsburgh Water and Sewer Authority

Date: April 1, 2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William Towne,	:	
	Complainant	: Docket No. C-2019-3008437
	:	
v.	:	
	:	
The Pittsburgh Water and Sewer Authority,	:	
Respondent	:	
	:	

**PRELIMINARY OBJECTIONS OF THE PITTSBURGH
WATER AND SEWER AUTHORITY**

TO: CHIEF ADMINISTRATIVE LAW JUDGE CHARLES E. RAINEY, JR.:

Pursuant to 52 Pa. Code § 5.101(a) of the regulations of the Pennsylvania Public Utility Commission (“Commission”), the Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) submits the following Preliminary Objections to the Complaint of William Towne (“Complainant”) requesting dismissal of the Complaint. Pursuant to 52 Pa. Code §§ 5.61 and 5.101(d) of the Commission’s regulations, PWSA filed an Answer and New Matter to the Complaint on this same date. In support of these Preliminary Objections, PWSA states as follows:

I. INTRODUCTION

1. Through his Complaint, which the Commission served on PWSA on March 12, 2019, the Complainant requests, *inter alia*: (1) class action status if applicable; (2) that the Commission order the PWSA to pay a civil penalty directed to a “fine fund;” and (3) that the Commission order the PWSA to award him full compensation for lost work, legal fees, and other related costs.

2. The Complainant's first request should be dismissed as nothing in the applicable rules allows for a customer to file a complaint on behalf of other similarly situated customers. The Complainant's second request should be dismissed because the Commission lacks the ability to direct the disposition of a civil penalty to a "fine fund," as all fines are paid to the Commonwealth of Pennsylvania in the form of civil penalties. Finally, the Complainant's third request should be dismissed because the Commission lacks jurisdiction to award monetary damages.

3. Moreover, the allegations contained in the Complaint do not amount to a violation of the Public Utility Code. Therefore, the Complaint should be dismissed based on legal insufficiency.

II. ARGUMENT

A. Applicable Legal Standards

3. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections.¹ The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Id.*

4. Under Section 5.101(a) of the Commission's regulations, preliminary objections must specifically state the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding;
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter;
- (3) Insufficient specificity of a pleading;
- (4) Legal insufficiency of a pleading;
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;

¹ 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. P.U.C. LEXIS 69, Docket No. C-00935435 (July 18, 1994).

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution;
and

(7) Standing of a party to participate in the proceeding.

5. The moving party may not rely on its own factual assertions but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.² However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.³

6. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.⁴

B. Dismissal Based on Lack of Commission Jurisdiction, 52 Pa. Code § 5.101(a)(1).

7. Section 5.101(a)(1) of the Commission's regulations permits the filing of a preliminary objection based on a lack of Commission jurisdiction. 52 Pa. Code § 5.101(a)(1).

8. PWSA contends that the Complaint should be dismissed to the extent that the Complainant requests relief on behalf of other customers and seeks relief that goes beyond the Commission's jurisdiction to award, including monetary damages.

9. Paragraph 5 of the Complaint seeks monetary compensation in the form of compensation for lost work, legal fees, service restoration fees, and other related costs. Complaint ¶ 5(3). It is alleged that these items totaled between \$300 and \$1300 as of the time of the Complainant's filing of the Complaint. *Id.*

² *County of Allegheny v. Cmwlth. of Pa.*, 490 A.2d 402 (Pa. 1985).

³ *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007).

⁴ *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

10. It is important to note that, as the Authority explained in its Answer and New Matter in this same proceeding, the Complainant also is not entitled to restoration service fees because the Complainant's service was never shut off, nor was it ever in danger of being shut off.

11. That being said, PWSA submits, pursuant to 52 Pa. Code § 5.101(a)(1),⁵ the Complainant's claim for monetary compensation should be dismissed because the Commission lacks jurisdiction over those issues. Alternatively, PWSA submits that, pursuant to 52 Pa. Code § 5.101(a)(2), the portions of the Complaint raising those issues should be stricken as impertinent matter.

12. The Commission's jurisdiction does not include actions that sound in either contract or tort. The Commission is not permitted to award damages to a specific complainant. Under long-standing law, the Commission lacks authority to award monetary damages. *Elkin v. Bell Telephone Co. of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980) (in spite of the PUC's rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety, and reasonableness of public utility services, the legislature withheld from the PUC the power to award damages, preserving that jurisdiction for the Courts of Common Pleas), citing *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977). It is, therefore, well settled that the courts of common pleas have jurisdiction over suits for damages, including claims against public utilities.⁶

⁵ The regulation at 52 Pa. Code § 5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa. Code § 5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. PUC*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. PUC*, 103 A.2d 502 (Pa. Super. 1954).

⁶ That being said, all local governments in the Commonwealth of Pennsylvania (including PWSA) are afforded sovereign immunity against third party claims for property loss damage under the Political Subdivision Torts Claim Act ("PSTCA"). Some exceptions do apply, but generally conditions are very specific for exceptions to be validated. Any such claims in civil court would be subject to the limitations in the PSTCA.

13. Accordingly, the Commission lacks jurisdiction to grant any monetary compensation to the Complainant, and such issues and claims must be dismissed.

C. Dismissal Based on Lack of Standing and Commission Jurisdiction, 52 Pa. Code § 5.101(a)(7) and 5.101(a)(1).

14. Section 5.101(a)(1) of the Commission's regulations permits the filing of a preliminary objection based on a lack of standing, 52 Pa. Code § 5.101(a)(7) and on a lack of Commission jurisdiction, 52 Pa. Code § 5.101(a)(1).

15. The Complaint, filed by an individual customer, seeks relief on behalf of himself and, if applicable, a broader, unspecified class. Specifically, the Complainant requests that the Commission direct the Authority to pay into a "fine fund protecting the larger class of [similarly situated] consumers," and requests "[c]lass action (or PUC equivalent) status . . . if hearing and evidence show it to be applicable." Complaint ¶ 5(4).

16. The Complainant lacks standing to seek relief on behalf of others. It is well-settled that class actions are not permitted under the Public Utility Code. 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. However, nothing in Section 701 or any other section of the Public Utility Code allows for the filing of class action complaints or allows a customer to file a complaint on behalf of other similarly situated customers. *See Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239556 (Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Interim Order dated October 5, 2011).

18. Therefore, the Complainant may not seek relief on behalf of a larger class of customers and the Commission lacks jurisdiction to direct PWSA to provide relief to any customer other than the Complainant in this proceeding.

19. The Complainant lacks standing to bring a complaint on behalf of others and the Commission lacks jurisdiction to resolve class action complaints brought by an individual on behalf of other. Accordingly, such issues and claims must be dismissed from this proceeding.

D. Dismissal Based on Lack of Commission Jurisdiction, 52 Pa. Code § 5.101(a)(1).

20. Section 5.101(a)(1) of the Commission’s regulations permits the filing of a preliminary objection based on a lack of Commission jurisdiction. 52 Pa. Code § 5.101(a)(1).

21. The Complainant requests that the Authority pay any potential civil penalty into a “fine fund.” Complaint ¶ 5.4. The Commission lacks authority to direct the disposition of any civil penalty to a fund, however, as all fines are paid directly to the Commonwealth of Pennsylvania in the form of civil penalties. The Public Utility Code, in relevant part, states that an entity subject to a civil penalty “shall forfeit and pay to the Commonwealth a sum . . . to be recovered . . . in the name of the Commonwealth.” 66 Pa.C.S. § 3301(a); *see, e.g., Pub. Serv. Water Co. v. Pa. Pub. Util. Comm’n*, 165 Pa. Commw. 463, 478 (1994) (citing § 3301(a) to affirm a civil penalty payable to the Commonwealth); *Pa. Pub. Util. Comm’n, v. PECO Energy Co.*, No. M-2018-2531404, 2019 WL 632255, at *17 (Feb. 7, 2019) (directing PECO to pay a civil penalty to the Commonwealth).

22. Therefore, the Commission lacks the authority to direct the Authority to pay any potential civil penalty to a “fine fund,” as all civil penalties are payable to the Commonwealth.

23. The Commission lacks jurisdiction under the Public Utility Code to direct that civil penalties be paid to any entity or fund, other than the Commonwealth. Accordingly, such issues and claims must be dismissed from this proceeding.

E. Dismissal Based on Legal Insufficiency, 52 Pa. Code § 5.101(a)(4).

24. Section 5.101(a)(4) of the Commission's regulations permits the filing of a preliminary objection based on a Complaint's legal insufficiency. 52 Pa. Code § 5.101(a)(4). PWSA contends that the Complaint should be dismissed because the events alleged in the Complaint do not amount to a violation of the Public Utility Code.

25. The Public Utility Code requires that "[e]very public utility shall furnish and maintain adequate . . . and reasonable service." 66 Pa. C.S. § 1501(a). It is well-established that one mistake, which is promptly corrected, does not constitute unreasonable or inadequate service under the Public Utility Code. *Parker v. Peoples TWP*, (C-2012-2293532), 2012 Pa. PUC LEXIS 1512, *16 ("It is not unreasonable service . . . when a utility makes a[n] . . . error so long as that error is corrected when found.") (Initial Decision). *Initial Decision Adopted*, PUC Order entered Dec. 20, 2012.

26. The Complainant seeks relief based on one telephone call inadvertently placed to Complainant's residence, even though the Authority took prompt corrective action. On March 11, 2019, at 9:45AM, the Complainant mistakenly received one call from the Authority indicating that his service would be terminated if his balance was not satisfied. The Authority promptly recognized its error and at 11:05AM, just 80 minutes after the initial mistake, again called the Complainant apologizing for the mistaken call and informing him to disregard its message about the impending termination of his account. In both instances, the Complainant did not answer the call, so the Authority left a message in his voicemail. The Complainant claims that he "does not

recall” receiving the second call apologizing for the error. The Authority’s call records, however, contradict this position and show that the Authority left a voicemail.

27. The Authority promptly acted to correct its error once it was discovered by placing a second call to the Complainant apologizing for the error and informing him to disregard the previous message. This single error, quickly corrected, does not amount to “inadequate or unreasonable service.”

28. Therefore, the Complaint should be dismissed based on legal insufficiency because the alleged events do not amount to a violation of the Public Utility Code.

IV. CONCLUSION

WHEREFORE, on the basis of the foregoing, the Pittsburgh Water and Sewer Authority respectfully requests dismissal of the Complaint filed by William Towne and such other relief as may be deemed appropriate.

Respectfully submitted,



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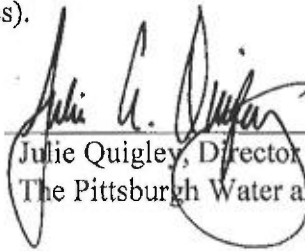
Date: April 1, 2019

Attorneys for
The Pittsburgh Water and Sewer Authority

VERIFICATION

I, Julie Quigley, hereby state that: (1) I am the Director of Administration for The Pittsburgh Water and Sewer Authority ("PWSA"); (2) the facts set forth in the Preliminary Objections are true and correct (or are true and correct to the best of my knowledge, information and belief); and, (3) I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: 4/1/19



Julie Quigley, Director of Administration
The Pittsburgh Water and Sewer Authority