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October 23, 2019

Via Electronic Filing

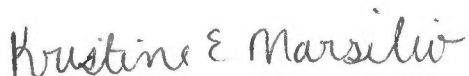
Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Charita Bush v. Pittsburgh Water and Sewer Authority
Docket No. C-2019-3013323

Dear Secretary Chiavetta:

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

Sincerely,



Kristine E. Marsilio

KEM/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 First Class Mail and Email

Charita Bush
1339 Adams St.
Pittsburgh, PA 15233
Charita7@aol.com

Via First Class Mail

Hon. Charles E. Rainey, Jr.,
Administrative Law Judge
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Dated: October 23, 2019



Kristine E. Marsilio, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | | |
|---------------------------------------|---|-------------|---------------------------|
| Charita Bush, | : | | |
| | : | Complainant | : |
| | : | | Docket No. C-2019-3013323 |
| | : | | : |
| v. | : | | : |
| | : | | : |
| Pittsburgh Water and Sewer Authority, | : | | |
| Respondent | : | | |

NOTICE TO PLEAD

TO: Charita Bush
1339 Adams St., Pittsburgh, PA 15223

Pursuant to 52 Pa. Code § 5.101, you are hereby notified that an Answer to the enclosed Preliminary Objections of The Pittsburgh Water and Sewer Authority ("PWSA") must be filed within 10 days of the date of service of the Preliminary Objections.

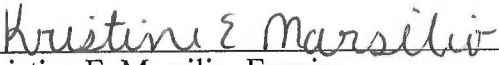
All pleadings, such as an Answer to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for PWSA and the Administrative Law Judge, if any, presiding over this proceeding.

File with:

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

With a copy to:

Kristine E. Marsilio, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101



Kristine E. Marsilio, Esquire

Date: October 23, 2019

Attorney for
The Pittsburgh Water and Sewer Authority

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---------------------------------------|---------------|---------------------------|
| Charita Bush, | : | |
| | Complainant : | Docket No. C-2019-3013323 |
| | : | |
| v. | : | |
| | : | |
| Pittsburgh Water and Sewer Authority, | : | |
| Respondent | : | |

**THE PITTSBURGH WATER AND SEWER
AUTHORITY'S
PRELIMINARY OBJECTIONS**

Pursuant to 52 Pa. Code § 5.101, The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) submits the following Preliminary Objections to the Complaint of Charita Bush (“Ms. Bush” or “Complainant”), seeking dismissal of the Complaint. Pursuant to 52 Pa. Code §§ 5.61, PWSA is also filing an Answer to the Complaint. In support of these Preliminary Objections, PWSA states as follows:

I. INTRODUCTION

1. Ms. Bush filed a Formal Complaint against the PWSA with the Pennsylvania Public Utility Commission (“Commission”), which was served on PWSA on October 3, 2019. In her Complaint, Ms. Bush alleges that PWSA was “negligent” in failing to shut-off water service to her property, allegedly resulting in a pipe bursting on her property and causing damage thereto.

2. Ms. Bush seeks to be: (1) released from payments related to the consumption of water that occurred when the pipe burst; and (2) reimbursed for “loss and damages” that resulted from the alleged pipe bursting incident.

3. Complainant Charita Bush is not the Customer of Record of the subject account.

4. PWSA is filing these Preliminary Objections in an effort to secure the just, speedy and inexpensive dismissal of the Complaint. For the reasons stated herein and in PWSA's Answer to the Complaint (which, as noted below, is incorporated herein by reference), the Complaint should be dismissed by the Commission because: (1) the Commission lacks jurisdiction to determine negligence; 2) the Commission lacks jurisdiction to award monetary compensation for losses and damages; 3) the Complainant lacks standing to bring the subject Complaint; and 4) the Commission lacks jurisdiction in the absence of legal representation.

II. ARGUMENT

A. Applicable Legal Standards

5. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101(a)(1)-(7).

6. Under Section 5.101(a) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1)-(7), 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;
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution; and
- (7) Standing of a party to participate in the proceeding.

7. 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. *County of Allegheny v. Cmwlt. of Pa.*, 490 A.2d 402 (Pa. 1985). However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlt. 2007).

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

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

9. 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).

10. To act on the Complaint, the Commission must have jurisdiction. 52 Pa. Code § 5.101(a)(1). The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Opinion and Order (May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlt. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

11. It is well-settled that the Commission does not have the authority to make a negligence determination. The Commission can only determine whether Complainants' conduct violated the Public Utility Code or Commission regulations. It is the province of the courts, not the Commission, to determine negligence. *See Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371, 375 (Pa. 1980); *see also DeFrancesco v. Western Pennsylvania Water Co.*, 499 Pa. 374 (1982); *see also Moulder v. Pittsburgh Water and Sewer Authority*, Docket No. C-2018-3004729, Order Sustaining Preliminary Objections, In Part (Nov. 5, 2018).

12. Here, Complainant alleges that PWSA was "negligent" in failing to shut-off water service to her property, allegedly resulting in a pipe bursting on her property and causing damage thereto. Complaint at ¶ 4. The Complainant makes no claim that the Authority violated the Public Utility Code or Commission regulations.

13. As such, the Complaint should be dismissed on the grounds that the Commission lacks jurisdiction to make negligent determinations.

C. Dismissal Based on Lack of Commission Jurisdiction to Award Monetary Compensation for Losses and Damages, 52 Pa. Code § 5.101(a)(1).

14. PWSA contends that the Complaint should be dismissed to the extent that the Complainant seeks relief that goes beyond the Commission's jurisdiction to award, including monetary damages.

15. Paragraph 5 of the Complaint seeks monetary compensation in the form of "reimbursement for loss and damages" that allegedly resulted when a pipe allegedly burst at the subject property. Complaint ¶ 5.

16. 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., 420 A.2d 371 (1980) (in spite of the Commission's rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety, and reasonableness of public utility services, the legislature withheld from the Commission 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); *see also Nesinka Benkovski v. Pittsburgh Water and Sewer Authority*, Docket No. C-2019-3012466, Interim Order Granting in Part and Denying in Part Respondent's Preliminary Objections (Oct. 10, 2019). It is, therefore, well settled that the courts of common pleas, and not the Commission, have jurisdiction over suits for damages, including claims against public utilities.

17. Pursuant to 52 Pa. Code § 5.101(a)(1), the Complainant's claim for monetary compensation should be dismissed because the Commission lacks jurisdiction over those issues.

18. It is important to note that, as the Authority explained in its Answer and New Matter in this same proceeding, the Complainant also seeks to be released from water consumption that occurred as a result of this pipe bursting incident. PWSA has already waived all water and sewer conveyance charges, as well as consumption based sewage charges, for the period of high usage from January 23, 2019 through February 5, 2019 that is the subject of Ms. Bush's Complaint. These adjustments were applied to the subject account on February 8, 2019. This waiver resulted in a total credit to Ms. Bush's account in the amount of \$1,883.42. PWSA applied a further credit to the account in the amount of \$257.98 to the account on September 26, 2019. The current account balance is a credit in the amount of \$457.98.

19. Thus, the Authority has already provided the requested relief that is within the Commission's jurisdiction to award. Since the Commission lacks jurisdiction to award the remaining requested relief, the Complaint should be dismissed in its entirety.

D. Dismissal Based on Lack of Standing, 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 standing.

21. The Commission has held that, in general, a complainant must be the customer of the utility in order to have standing to file a complaint about its utility service. *See, Re: Pennsylvania American Water Company*, 85 Pa. PUC 548 (1995); *PUC v. Marietta Gravity Water Company*, 87 Pa. PUC 864 (1997). In other words, a complainant who is not a customer of a utility, generally, does not have the requisite substantial, direct, and immediate interest necessary to confer standing to bring the complaint about the service of that utility.

22. As explained in the Authority's Answer and New Matter,¹ the Complainant's name does not appear as the Customer or Record or as an authorized representative in the PWSA utility account for the Premises. Rather, the Customer of Record for the subject account is Ms. Beatrice Bush.

23. As evidenced from the Complaint, the Complainant does not reside at the service address. Complaint at ¶ 1. Additionally, to PWSA's knowledge and belief, Complainant did not primarily reside at the Premises at any relevant time. *See* Complaint at ¶ 5 (wherein Complainant indicates that the premises have been vacant since September 2018).

24. According to the Allegheny County Real Estate Portal, the Complainant is not the owner of the subject property.²

¹ The Authority's lack of standing allegations are based, in part, on information contained in the Authority's Answer and New Matter. As such, as an alternative to treating this argument as a Preliminary Objection, PWSA requests that the Commission wait for the Complainants' Response to New Matter and then treat this Preliminary Objection as a Motion to Dismiss.

² *See* Allegheny County Real Estate Portal for 1448 Franklin Ave, Pittsburgh, PA 15221, which is available at: <http://www2.alleghenycounty.us/RealEstate/search.aspx>.

25. To the best of PWSA's knowledge and belief, the Complainant's name does not appear on a lease for the Premises.

26. The Complaint asserts issues related to the charges on the PWSA bill sent to the customer of record (Beatrice Bush).

27. As such, the Complainant lacks standing in her own right to challenge the usage at the Premises and any bills for service provided to the Premises. For these reasons, the Complaint should be dismissed.

E. Dismissal Based on Lack of Commission Jurisdiction in the Absence of an Attorney, 52 Pa. Code § 5.101(a)(1).

28. As alleged in the Authority's Answer and New Matter, the Complainant has verbally identified herself as being the Executrix for the estate of the Account Holder, Ms. Beatrice Bush.³ The Complainant has not provided the Authority with any written proof of this representation. In its Answer and New Matter, the Authority has requested that Ms. Bush be required to demonstrate that she is the Executrix of the estate of Ms. Beatrice Bush, to obtain legal representation, and to require the attorney to enter an appearance in this case in accordance with 52 Pa.Code §§ 1.21-1.25 by a date certain.

29. Even if said verbal allegation is true, the Commission should dismiss the Complaint for lack of jurisdiction if Ms. Bush does not obtain legal representation and the attorney does not enter an appearance in accordance with 52 Pa.Code §§ 1.21-1.25 by a date certain.

30. Attorneys are required to represent an estate in proceedings before the Commission. *See e.g. Judy Kemmick v. Metropolitan Edison Company*, Docket No. C-2018-3005528, Final

³ Again, this allegation is based on information contained in the Authority's Answer and New Matter. As such, as an alternative to treating this argument as a Preliminary Objection, PWSA requests that the Commission wait for the Complainants' Response to New Matter and then treat this Preliminary Objection as a Motion to Dismiss.

Order (June 11, 2019), adopting the Initial Decision dated May 6, 2019 (daughter of the decedent failed to obtain legal counsel and was unable to prosecute the Complaint on behalf of her deceased mother); *Lesley A. Scheaffer for Leslie W. Scheaffer v. PPL Electric Utilities Corporation*, Docket No. F-2016-2577647, Opinion and Order (April 3, 2018) (daughter of the decedent was unable to prosecute the Complaint on behalf of her deceased father). Additionally, an individual may not represent someone else, unless he/she is an attorney. *See* 52 Pa. Code §§ 1.21, 1.22. Attorneys are required to enter their appearance in accordance with the provisions of 52 Pa. Code § 1.24(b).

31. In addition, Pennsylvania law prohibits non-attorneys from representing an estate *pro se*. *See* 42 Pa.C.S. § 2521; *see also In re Estate of Rowley*, 84 A.3d 337, 340-342 (Pa. Cmwlth. 2013) (“prohibiting a non-attorney from representing an estate is essential to protecting the interests of the public”) (*citing Harkness v. Unemployment Compensation Board of Review*, 920 A.2d 162, 167 (Pa. 2007)).

32. Upon information and belief, the Complainant is not an attorney admitted to practice before the Supreme Court of Pennsylvania.⁴

31. In addition, in her Complaint, the Complainant did not indicate that she is an attorney for the Estate in this proceeding. *See* Complaint at ¶ 8.

32. The absence of an attorney where one is required deprives the forum of jurisdiction to adjudicate the matter. *See e.g. Adventure Alley CLC, LLC v. PECO Energy Company and Great American Power*, Docket No. C-2014-2430850, Final Order (November 25, 2014), *citing McCain v. Curione, Pa. Board of Probation and Parole*, 527 A.2d 591 (Pa. Cmwlth. 1987) (Commonwealth Court was without jurisdiction to consider arguments and motions made on

⁴ <https://www.padisciplinaryboard.org/for-the-public/find-attorney>. Moreover, if the Complainant is an attorney, she has not entered an appearance as an attorney in this proceeding (as an attorney licensed in Pennsylvania) and/or has not sought permission as an attorney licensed in another jurisdiction to appear *Pro Hac Vice* before this Commission. *See* 52 Pa.Code §§ 1.24, 1.25.

behalf of parolee in a civil action that was filed by another prisoner who was not licensed to practice law).

33. For the reasons explained above, even if Ms. Bush demonstrates that she is the Executrix for the estate of Ms. Beatrice Bush, the Commission should dismiss the Complaint for lack of jurisdiction if Ms. Bush does not obtain legal representation and the attorney does not enter an appearance in accordance with 52 Pa.Code §§ 1.21-1.25 by a date certain.

CONCLUSION

The Pittsburgh Water and Sewer Authority respectfully requests that the Commission: (a) grant these Preliminary Objections so as to dismiss the Complaint; and (b) grant any other relief in favor of PWSA that is deemed to be reasonable, appropriate and in the public interest.

Respectfully submitted,



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Phone: (717) 237-7173
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Date: October 23, 2019

Attorney for
The Pittsburgh Water and Sewer Authority

Verification

I, Kristine E. Marsilio, am counsel for The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”), and I hereby state that the facts set forth in the foregoing Answer are true and correct to the best of my knowledge, information and belief and that I expect the Authority 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 sworn falsification to authorities).

Date: 10/23/2019

Kristine E Marsilio

Kristine E. Marsilio, Esq.
Attorney for
The Pittsburgh Water and Sewer Authority