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February 17, 2020

VIA ELECTRONIC FILING

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

Re: Kelly Marian v. Pennsylvania-American Water Company
Docket No. C-2019-3011595

Dear Secretary Chiavetta:

Enclosed for filing on behalf of Pennsylvania-American Water Company is an original of its Main Brief in this matter. A copy has been served on the Complainant in accordance with the attached Certificate of Service.

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

Best Regards,

STEVENS & LEE



Michael A. Gruin

Enclosure

cc: Administrative Law Judge Katrina Dunderdale, PA Public Utility Commission, Piatt Place, Suite 220, 301 5th Avenue, Pittsburgh, PA 15222 (via Federal Express)

Kelly Marian, 511 Cress St., Carnegie, PA 15106 (via Federal Express)

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KELLY MARIAN	:	
Complainant	:	
	:	
v.	:	Docket No. C-2019-3011595
	:	
PENNSYLVANIA-AMERICAN	:	
WATER COMPANY	:	
Respondent	:	

**BRIEF OF RESPONDENT,
PENNSYLVANIA-AMERICAN WATER COMPANY**

In accordance with the January 31, 2020 Briefing Order issued in this matter, Pennsylvania-American Water Company (“PAWC” or “Company”), by and through its attorneys Stevens & Lee, P.C., files its Brief in the above-referenced matter.

I. STATEMENT OF THE CASE

The Complainant in this case is alleging that PAWC should be held responsible for damages to her home that were allegedly caused by paving done by PAWC’s subcontractor following a main replacement project in 2012. While the Complainant states that she is not seeking monetary damages, she is asking for PAWC to be responsible for repairing the damages to her home.

On or about July 17, 2019, PAWC was served with a notice of the Formal Complaint (“Complaint”) filed by the Complainant Kelly Marian. The Complaint described the reason for the Complaint as:

“PA Water Company Contractor CCSI (Casper Colosimo & Son) to repave road. They paved leaders of our closed resulting in extensive water damage.”

For the Relief Requested, the Complaint states as follows:

“Foundation walls of house need to be repaired/replaced. Cellar door installed. Water drainage fixed to code. Leaders working properly.”

PAWC filed an Answer to the Complaint on August 6, 2019. PAWC’s Answer denied that PAWC or its contractor damaged Ms. Marian’s home, and stated that the Commission does not have jurisdiction to award monetary damages.

The evidentiary hearing in this matter was held on November 21, 2019 and January 14, 2020. Ms. Marian testified on her behalf, and submitted 15 Exhibits into the record. PAWC presented the testimony of two witnesses: Jason Costa, Senior Superintendent of Operations for PAWC, and Randy Lubin, former Director of Public Services for Scott Township, and submitted 15 exhibits into the record.

At the hearing, the following facts were established:

1. Ms. Marian currently resides at 511 Cress Street, Pittsburgh, Pennsylvania, a single family home. N.T. 16
2. Ms. Marian’s home was built in 1915. PAWC Exhibit 2.
3. Ms. Marian became the deed owner of the home in 2017 or 2018, but has resided at the property continuously since August of 2013. N.T. 18, 52.
4. In 2012, PAWC undertook a water main replacement project on Cress Street, between Magazine Street and Locust Street. N.T. 121 and PAWC Exhibit 1.
5. The Cress Street main replacement project began in June of 2012. N.T. 129 and PAWC Exhibit 1.
6. The street cutting permit for the Cress Street main replacement project was obtained on April 13, 2012. N.T. 134 and PAWC Exhibit 1.

7. The replacement project was completed on October 16, 2012 and the main was placed back into service on October 17, 2012. N.T. 133, PAWC Exhibit 1.
8. PAWC made its final payment for work on the project on May 22, 2013. N.T. 135.
9. PAWC does not perform street paving, and it did not perform any paving in connection with the Cress Street main replacement. N.T. 135.
10. PAWC contracted with Casper Colosimo & Sons to perform the street repaving work following the Cress Street main replacement. N.T. 135-137.
11. Water service was placed in Ms. Marian's name on October 19, 2017, approximately five years after the Cress Street main replacement was completed. N.T. 139.
12. PAWC relies on its paving subcontractor to rectify issues and complaints related to paving. N.T. 146
13. Colosimo did perform restoration work at Ms. Marian's property following its paving work, however, the damages that Ms. Marian is now claiming were not caused by paving. N.T. 139.
14. The street elevation of Cress Street was not raised in connection with the Cress Street main replacement or subsequent paving. N.T. 150.
15. Only one side of Cress Street was opened and repaved in connection with the main replacement project. N.T. 176
16. It is the paving contractor's responsibility to make sure that paving is done in accordance with the township's specifications. N.T. 155-156.
17. Ms. Marian believes that the 511 Cress Street home began experiencing water drainage problems in the winter of 2015-2016. N.T. 32, 59.

18. Ms. Marian alleges that water damaged the rear wall of her house, on the opposite side of her house from Cress Street. N.T. 41-42. See also N.T. 188.
19. Ms. Marian estimates that distance from the front wall of her basement (nearest Cress Street) to the rear wall of her basement where the damage allegedly occurred is 50 feet. N.T. 46.
20. Pennsylvania American Water Company sent personnel on site to Ms. Marian's property two to three times from October of 2017 -2019. N.T. 162.
21. PAWC does not have a paving expert on its staff. N. T. 166.
22. Typically municipalities such as Scott Township give verbal approvals that paving work has met applicable specifications. N.T. 170-171.
23. PAWC has no reason to believe that PAWC caused any damage to Ms. Marian's home. N.T. 179.
24. Randy Lubin was the director of public services for Scott Township for 18 years, until September of 2019. N.T. 186.
25. Mr. Lubin personally investigated Ms. Marian's concerns with the paving on Cress Street, beginning in August of 2016. N.T. 186-187.
26. Ms. Lubin investigated the downspouts at Ms. Marian's property and determined that the spouts on the left side of the home ran towards the back of the home, away from Cress St. N.T 189, 204-216, PAWC Exhibits 5-15.
27. Ms. Lubin also saw that the terra cotta pipe that led to the Cress Street curb from Ms. Marian's other downspout was disconnected from the downspout. N.T. 202-203.
28. When Scott Township last paved Cress Street in 2003, it was paved from curb to curb. N.T. 192.

29. When PAWC's subcontractor paved Cress Street in 2013, only one side of Cress Street was paved. N.T. 192, 197, and PAWC Exhibit 3.
30. Google Earth photographs indicate that as of 2016, the paving on both sides of Cress Street was level with the manhole on the center of the street. N.T. 198.
31. Based on Mr. Lubin's personal observations, the curb height in front of 511 Cress Street was the same before and after the 2012 main replacement project. N.T. 199 and PAWC Exhibit 4.

II. SUMMARY OF ARGUMENT

PAWC respectfully submits that the Complaint in this matter should be dismissed because:

- 1) It is well settled that the Commission does not have the authority to award monetary damages or the jurisdiction to resolve negligence claims against utility companies.
- 2) To the extent that Ms. Marian is claiming that PAWC violated the Public Utility Code or the Commission's regulations or orders, such claims are barred by the three-year statute of limitations set forth in 66 Pa. C.S. §3314.
- 3) Even if Ms. Marian's complaint against PAWC was timely and within the Commission's jurisdiction, there is no evidence in the record to support a finding that PAWC was in any way responsible for the damage to her home or acted unreasonably in connection with the water main replacement project.

III. ARGUMENT

A. **The Commission does not have the authority to award monetary damages to the Complainant or the jurisdiction to resolve negligence claims.**

It is well-settled law that the Commission lacks authority to award monetary damages. Terminato v. Pa. National Insurance Company, 645 A.2d 1287 (Pa. 1994); Feingold v. Bell Telephone Company of Pennsylvania, 383 A.2d 791 (Pa. 1977); Poorbaugh v. Pa. PUC, 666 A.2d 744 (Pa. Cmwlth. 1995).

The fact that the Ms. Marian has characterized her claim for relief as not seeking monetary damages makes no difference. As a practical matter, requiring PAWC to hire a contractor to repair her home is no different than requiring PAWC to pay Mr. Marian so she can hire a contractor to repair her home. Regardless, it is equally well-settled that the Commission lacks the authority to hear a tort claim or make a determination that a utility company was negligent. The Commission can only make a determination as to whether the Respondent's conduct violated the Public Utility Code or Commission regulations, not whether its conduct was negligent. The courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts. Behrend v. Bell Telephone Company, 242 Pa.Super. 47, 363 A.2d 1152 (1976). It is the province of the courts, not the Commission, to make determinations of negligence or other causes of action that do not require the Commission's specialized knowledge. Such cases can be fully and adequately addressed before the courts. DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374 (1982). See also, Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371 (Pa. 1980).

As set forth above, to the extent that Ms. Marian is seeking a ruling that PAWC was negligent or is making a claim for damages, such a claim is not within the Commission's jurisdiction.

B. Ms. Marian's claim against PAWC is barred by the three-year statute of limitations

To the extent that Ms. Marian's complaint is characterized as a claim for a violation of the Public Utility Code or the Commission's orders or regulations, the three-year statute of limitations in 66 Pa. C.S. §3314 would apply. That provision states:

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.

In this case, PAWC's mainline replacement project was completed in October of 2012, and project was considered closed in May of 2013. N.T. 133, 135 PAWC Exhibit 1. Ms. Marian's formal complaint was filed with the Commission on July 8, 2019, and served on PAWC on July 17, 2019, which is more than six years after PAWC's work was completed. Even if the statute of limitations was interpreted as beginning to run when Ms. Marian first developed her belief that PAWC's main project caused damage to her house, her claim would still be time barred. Ms. Marian testified that she first noticed her drainage problem in the winter of 2015-2016. See N.T., pages 32-33. The period of time between the winter of 2015-2016 and the filing of her complaint in July of 2019 is still greater than three years, so under the provisions of 66 Pa. C.S §3314, Ms. Marian's claim is time-barred.

C. There is no factual basis to support a finding that PAWC caused damage to Ms. Marian's home or acted unreasonably in responding to her allegations.

Even if it were assumed that the Commission has jurisdiction over Ms. Marian's claims, and the statute of limitations was ignored, the record evidence does not justify any findings of responsibility or wrongdoing by Pennsylvania American Water Company.

Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. The Pennsylvania Supreme Court has held that when a litigant has the "burden of proof," it means that his claim will not be accepted until he offers sufficient proof to support it. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 48, 70 A.2d 854, 856 (1950). In matters before the Commission, the burden of proof is met when the party establishes the necessary facts by a preponderance of the evidence. A preponderance of the evidence is that degree of proof which "fairly out-weighs the probative value of any proof offered against the claim." Se-Ling Hosiery, 364 Pa. at 48-49.

In addition to determining whether the Complainant has satisfied her burden of proof, care must be exercised to insure that the Commission's decision is supported by substantial evidence. 2 Pa. C.S. §704. The term "substantial evidence" has been defined by various Pennsylvania courts as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Substantial evidence is more 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. P.U.C., 489 Pa. 109, 413 A. 2d 1037 (1980); Murphy v. Dept. of Public Welfare, 85 Pa. Commonwealth Court 23, 480 A.2d 382 (1984).

First, Ms. Marian is mistaken about the water flow at her property that she believes has damaged her rear basement foundation. Ms. Marian testified that the rear wall of her home was damaged by water that was blocked from exiting her downspouts. N.T. 41-42. PAWC witness Lubin has testified credibly based on his first-hand investigation that the two downspouts on the left side of property and the spout at the rear of the property (where the alleged water damage is located) do not exit towards Cress Street. N.T. 205-215, PAWC Exhibits 5-15. Ms. Marian's theory of the case is that the outlets of the downspouts were blocked by paving on Cress Street, and this caused water to back-up into her property. However, she is not claiming any water damage to the front of her house facing Cress Street, but rather is claiming that the water damages occurred in the back of the house. N.T. 41-42, 188. This claim is simply not physically possible. As Ms. Lubin testified, two of the downspouts in question do not run towards Cress Street, but instead run toward the back of the house, so there is no way that paving on Cress Street could have caused them to back up. Mr. Lubin's testimony explained the likely cause of water damage at the rear of the house was the normal water flow from the left side and rear downspouts which directed water into the foundation of the home. See N.T. 205-220, and PAWC Exhibits 5-15.

Furthermore, the theory that curb leaders on Cress Street were paved over in 2012-2013 is not supported by the evidence. Ms. Lubin explained that only one side of Cress Street was repaved after the 2012 main replacement project, as shown by the Google Earth photos. N.T. 192, 197, and PAWC Exhibit 3. The roadway was paved level, with no lip at the seam of the paving, which demonstrates that the road was restored to the same level that existed prior to the paving. N.T. 198. That paving work was not done by PAWC, but rather by its subcontractor (Colosimo), so there is no basis

for Pennsylvania American Water Company to be held accountable or responsible for those actions. N.T. 135-137.

Ms. Marian's theory of the case is based on the assumption that Colosimo raised the height of the street, but this is simply not supported by the facts of record. Mr. Costa and Mr. Lubin both testified to this issue and there is photographic evidence which demonstrates that only one side of the street – the side closest to Ms. Marian's house - was repaved. PAWC also provided visual evidence and testimony testimony that there was never any difference in height between the two sides of the street, and that the paving brought the street surface back up to the level that it was prior to the water main replacement project. The street is level with the center line, and there is no lip or pothole visible. N.T. 198-199 and PAWC Exhibit 4.

To the extent that downspout outlets on Cress Street became blocked, there are many other possible causes of the blockage. They could have been blocked by debris, they could have been blocked by another unrelated paving job between 2013 and 2016, or the terra cotta pipes could have sunk or deteriorated with age. But there is no evidence to support Ms. Marian's allegations that the street was raised. And in fact, all of the evidence shows that the street was not raised and it was restored to the exact same level that it was prior to the main replacement project in 2013.

PAWC did attempt to investigate Ms. Marian's concerns, and sent personnel on site on multiple occasions to investigate. Because the claims related solely to work done by its subcontractor, PAWC directed its subcontractor to investigate and remedy the situation as needed. Colosimo did do extensive sidewalk restoration work at Ms. Marian's request. But the damage to the back of her home that she is now claiming cannot reasonably be blamed on any paving work on Cress Street. As such, it was not

unreasonable for Colosimo or PAWC to deny responsibility for the damage to the rear foundation of her home.

IV. CONCLUSION

In summary, there is no factual, legal, or jurisdictional basis to hold Pennsylvania American Water Company responsible for any water damage that has occurred to the back of Ms. Marian's house. There is simply no connection between Pennsylvania American Water Company's water main project in 2012 to any water damage that Ms. Marian's experienced in 2016, 2017, 2018 or 2019. The Complainant has not met the burden of proving any entitlement to relief, and her claims are barred by both the statute of limitations and the Commission's lack of jurisdiction over negligence claims which seek damages. For the foregoing reasons, Pennsylvania American Water Company respectfully requests that the Complaint of Kelly Marian be dismissed, with prejudice.

Respectfully submitted,

STEVENS & LEE



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COUNSEL FOR PENNSYLVANIA
AMERICAN WATER COMPANY

DATE: February 17, 2020

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KELLY MARIAN	:	
Complainant	:	
	:	
v.	:	Docket No. C-2019-3011595
	:	
PENNSYLVANIA-AMERICAN	:	
WATER COMPANY	:	
Respondent	:	

CERTIFICATE OF SERVICE

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

VIA FEDERAL EXPRESS

Kelly Marian
511 Cress Street
Carnegie, PA 15106



Michael A. Gruin

DATED: February 17, 2020