

**STEVENS & LEE**  
**LAWYERS & CONSULTANTS**

17 North Second Street  
16th Floor  
Harrisburg, PA 17101  
(717) 234-1090 Fax (717) 234-1099  
www.stevenslee.com

Direct Dial: (717) 255-7365  
Email: mag@stevenslee.com  
Direct Fax: (610) 988-0852

May 28, 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 Reply to Exceptions 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: Kelly Marian, 511 Cress St., Carnegie, PA 15106 (via US Mail)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

---

**PENNSYLVANIA-AMERICAN WATER COMPANY’S  
REPLY TO EXCEPTIONS**

Pursuant to 52 Pa Code § 5.535, Pennsylvania-American Water Company (“PAWC” or “Company”), hereby replies to the Exceptions filed by the Complainant Kelly Marian (“Ms. Marian”, or “Complainant”). As set forth below, the Complainant’s Exceptions should be denied, and the Initial Decision should be upheld by the Commission. The Complainant’s Exceptions make it clear that the Complaint’s primary purpose is to seek monetary damages for issues that are completed unrelated to any actions by PAWC, and the Exceptions provide no factual or legal basis to overturn any of the Initial Decision’s Findings of Fact or Conclusions of Law.

**I. Background and Procedural History**

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 it 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.

The Complainant filed her Brief on February 14, 2020, and PAWC filed its Brief on February 17, 2020. On April 28, 2020, Administrative Law Judge Katrina Dunderdale issued an Initial Decision dismissing the Complaint in its entirety. The Initial Decision included 38 Findings of Fact and 4 Conclusions of Law. The Initial Decision correctly concluded that the Commission has no jurisdiction to resolve issues related to PAWCs actions that took place in 2013, and that the Complainant did not meet her burden of proving that PAWC did not provide reasonable or adequate service.

The Complainant filed her Exceptions to the Initial Decision on May 13, 2020.

## **II. Reply to “Statement of Issues Involved”**

The first section of the Complainant’s Exceptions is entitled “Statement of Issues Involved” and contains a discussion of various topics such as Breach of Contract, Negligence, Breach of Warranty, Standard Form Construction Contracts, Recoverable Damages, Insurance Coverage for Construction Contracts and Uniform Construction Code. The fact that the discussion of these issues forms the leading argument of Complainant’s Exceptions demonstrates PAWC’s position throughout this proceeding, which is that the Complaint is clearly alleging claims for damages and negligence that are not within the Commission’s jurisdiction.

The Initial Decision generously characterized the Complainant’s claims as relating to whether PAWC provided reasonable or adequate service, but the totality of the record clearly demonstrates that the Complainant sole goal was to recovery monetary damages from PAWC for a paving project done by a contractor in 2013. 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. The Complainant’s Exceptions outline theories of damages under a variety of legal theories, but Commission lacks the authority to hear a tort claim or make a determination that a utility company was negligent, or adjudicate construction code, insurance, or breach of contract claims. 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 or whether contract breaches occurred. 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).

To the extent that Ms. Marian is seeking a ruling that she is entitled to damages under any one of the theories included in the first section of her Exceptions, such a claim is not within the Commission's jurisdiction.

### **III. Replies to Exceptions**

The next section of the Exceptions includes a variety of un-numbered observations about various aspects of the Initial Decision, but provide no basis whatsoever for altering the Initial Decision's very thorough and well supported Findings of Fact or Conclusions of Law. The Exceptions do not include any references to the record in this proceeding and consist mainly of unsubstantiated allegations that have no relevance to any of the issues addressed in the Initial Decision. PAWC will briefly respond to each of the "Exceptions" in the order they are presented.

Reply to Exception to Finding of Fact 6.

Finding of Fact 6 merely states a well-established fact regarding the contractor that repaved the road in front of Ms. Marian's road in 2013. The contractor, Casper Colosimo & Sons is referred to as "CCSI" or "Colosimo" throughout the Initial Decision. The Complainant uses this as a jumping off point to make unsubstantiated assertions that appear nowhere in the record, which cannot and should not be considered, and which change nothing about the Initial Decision's determinations even if they were true. Ms. Marian had the burden of proving her case, she was given two full hearing days to do so, and the Initial Decision correctly concluded that she did not meet her burden.

Reply to Exception to Finding of Fact 7

Finding of Fact 7 is taken straight from the testimony of PAWC witness Jason Costa. The Complainant objects to this finding by stating that "evidence proves that elevation of the street was raised as it was not milled properly", but no such evidence exists. To the contrary, PAWC provided extensive evidence which demonstrates that the roadway surface was never raised, which are set forth in Finding of Fact 11 and the record references contained therein.

Reply to Exception to Finding of Facts 8 -10

Finding of Facts 8 through 10 are taken straight from the testimony of Jason Costa, and explain that PAWC requires its paving contractors to ensure the roadway is the same elevation before and after a road project and for the township to monitor elevation. The Complainant re-states her disproven belief that the roadway elevation was raised and makes assertions about someone name Tom Kelley (who did not testify), and an unnamed engineer (who also did not testify). Neither of these references can be given

any weight, and the Complainant's belief about the elevation of the roadway has been clearly disproven as explained in Finding of Fact 11 and associated record references.

Reply to Exception to Finding of Fact 11

Finding of Fact 11 is a clear and unequivocal finding that the roadway in front of Ms. Marian's house was the same elevation before and after the paving project in 2013, and is based on multiple passages of testimony and visual evidence. The Complainant does not point to any evidence in the record to contradict this finding, and instead just asserts it is false. This is not a basis to reverse this finding.

Reply to Exception to Finding of Fact 13

Finding of Fact 13 explains how the municipality (Scott Township) was responsible for inspecting the paving to ensure it satisfied the Township's requirements. The Complainant criticizes Witness Randy Lubin, who was a Scott Township official at the time of the project and who had first hand recollection of the project. But she does not point to any evidence to dispute that the Township was responsible for inspecting the project. Her assertion about PAWC calling CCSI was explained by PAWC's witness as an attempt to address Ms. Marian's concerns, and does not change the correct conclusion that the Township is responsible for inspecting paving projects. Her last assertion that Scott Township repeatedly claimed that PAWC was negligent is simply false and unsupported by any evidence whatsoever.

Reply to Exception to Finding of Fact 22

Finding of Fact 22 was confirmed by the very credible testimony of Mr. Lubin based on his in-person inspection of Ms. Marian's property and the photographs entered into the record. Ms. Marian references a new photograph in her Exceptions but obviously

that photograph is not in the record, it is unauthenticated, it is undated, and it cannot be relied upon in any way.

Reply to Exception to Finding of Fact 23

Finding of Fact 23 is based on the clear and direct testimony of PAWC witness Jason Costa, who credibly and accurately testified that PAWC had not received any other complaints or concerns from Scott Township or any other local authority about the paving done by its contractor on Cress Street. The Exceptions make numerous un-related allegations that do nothing to contradict the finding as stated.

Reply to Exception to Finding of Fact 29

Finding of Fact 29 explains the remediation work that Colosimo voluntarily did to attempt to satisfy Ms. Marian's concerns. Ms. Marian asserts that Colosimo admitted to damaging the foundation, but this is clearly false and directly contradicted by the evidence in the record. As PAWC's testimony and evidence overwhelmingly demonstrates, Ms. Marian's theory about paving in front of her house damaging the rear of her foundation is physically impossible.

Reply to Exception to Finding of Fact 30

Finding of Fact 30 explains that at some point Colosimo informed Ms. Marian that it would not make any further repairs. Rather than accepting Colosimo's work for what it was ( a good faith attempt to address her concerns ), Ms. Marian attempts to twist Colosimo's efforts as amounting to a statute of limitations tolling agreement. First, the statutory section she references has nothing to do with tolling agreements. Secondly there is no evidence that any tolling agreement was ever executed because, of course, no such agreement exists. And, as explained in more detail below, the Exceptions provide no

reason to change the Initial Decision's clearly correct conclusion that the events that took place in 2013 are beyond the three-year statute of limitations in 66 Pa. C.S. §3314.

Reply to Exception to Finding of Fact 34

Finding of Fact 34 summarizes the visits that PAWC made to the Marian property to investigate her concerns when they were first submitted to PAWC in 2019 (six years after the paving), and notes that no roadway measurements were taken. Ms. Marian alleges this violates some aspect of the Public Utility Code's requirements to keep records of distribution system. But clearly, the roadway surface is not part of PAWC's distribution system, so this provision would not apply.

Reply to Exception to Finding of Fact 36

Finding of Fact 36 summarizes Ms. Marian's description of the condition of her basement. Ms. Marian's Exception refers to hydrostatic pressure as causing damage to foundations, but provides no basis for determining that hydrostatic pressure caused damage to her house, or that any action of PAWC or anyone else caused hydrostatic pressure to such an extent that foundation walls bowed.

With respect to Ms. Marian's "parting shots" on page 14 of her Exceptions, it must be clarified that PAWC's witnesses were not paid to testify, neither PAWC nor its witnesses withheld any information from Ms. Marian, and it was her obligation to call witnesses to prove her case. With respect to the issue of damages and statute of limitations, she is correct that PAWC did not file preliminary objections on those issues. Instead, PAWC raised those issue in its New Matter, and preserved the right to raise them at any time, and it is well settled that issues of jurisdiction can never be waived.

**IV. Ms. Marian's Complaint is Barred by the Statute of Limitations**

Ms. Marian's Exceptions provide no basis for overturning the Initial Decision's clearly correct conclusion that the events that took place in 2013 are beyond the three-year statute of limitations in 66 Pa. C.S. §3314. This 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. Ms. Marian's Exceptions do not dispute this fact. 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.

**V. Conclusion**

PAWC respectfully submits that the Complainant's Exceptions should be denied and the Initial Decision upheld in its entirety 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.

For the foregoing reasons, Pennsylvania American Water Company respectfully requests that the Exceptions of Complainant Kelly Marian be dismissed, and the Initial Decision upheld in its entirety.

Respectfully submitted,

STEVENS & LEE



---

Michael A. Gruin, (I.D. No. 78625)  
17 N. 2<sup>nd</sup> St., 16<sup>th</sup> Fl  
Harrisburg, PA 17101  
Tel. (717) 255-7365  
Fax (610) 988-0852

COUNSEL FOR PENNSYLVANIA  
AMERICAN WATER COMPANY

DATE: May 28, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 Reply to Exceptions 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: May 28, 2020