

February 24, 2021

Via Electronic Filing

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

**Re: Docket No. C-2021-3023999
Kevin C. Spearing v. Aqua Pennsylvania, Inc.
Preliminary Objection of Aqua**

Dear Secretary Chiavetta:

Attached for filing is the Preliminary Objection of Aqua Pennsylvania, Inc. (Respondent) to the Complaint filed by Kevin C. Spearing (Complainant) in the above captioned proceedings.

A copy of the Preliminary Objection has been provided to the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/co
Enclosures

cc: Mary McFall Hopper, Esquire, Aqua Pennsylvania, Inc. [w/encl]
Kevin C. Spearing [w/encl]

**Re: Docket No. C-2021-3023999
Kevin C. Spearing v. Aqua Pennsylvania, Inc.
Preliminary Objection of Aqua Pennsylvania, Inc.**

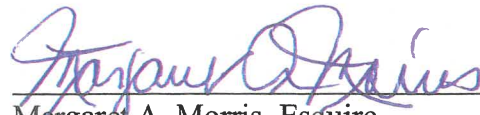
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following person(s) listed below, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Via Electronic Mail

Kevin C. Spearing
kevinumtwp@hotmail.com

Dated: February 24, 2021



Margaret A. Morris, Esquire

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

KEVIN C. SPEARING

v.

AQUA PENNSYLVANIA, INC

:
:
:
:
:

Docket No. C-2021-3023999

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.63, you are hereby notified that if you do not file a written response to the enclosed Preliminary Objection of Aqua Pennsylvania, Inc., within ten (10) days from service of this Notice, the facts set forth by Aqua Pennsylvania, Inc. in the Preliminary Objection may be granted. All pleadings, such as a Reply to the Preliminary Objection, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to Margaret A. Morris, Esquire, counsel for Aqua Pennsylvania, Inc., and where applicable, the Administrative Law Judge presiding over the case.

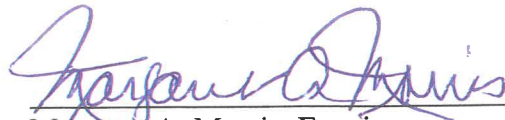
File with:

Rosemary Chiavetta, Esquire
Secretary
Pennsylvania Public Utility Commission
rchiavetta@pa.gov

With a copy to:

Margaret A. Morris, Esquire
Reger Rizzo & Darnall LLP
mmorris@regerlaw.com

Date: February 24, 2021



Margaret A. Morris, Esquire
Attorney ID No. 75048
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524
mmorris@regerlaw.com

Counsel for Aqua Pennsylvania, Inc.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

KEVIN C. SPEARING	:	
	:	
v.	:	Docket No. C-2021-3023999
	:	
AQUA PENNSYLVANIA, INC.	:	

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT
OF KEVIN C. SPEARING**

Aqua Pennsylvania, Inc. (Aqua or Company), by and through its attorneys, Reger Rizzo & Darnall LLP, pursuant to 52 Pa. Code § 5.101, hereby files its Preliminary Objection to the Formal Complaint of Kevin C. Spearing (Complainant) as the President of the Upper Moreland Township Board of Commissioners (Township Board) filed in the above-captioned proceeding.

Aqua avers the subject of the Formal Complaint is beyond the jurisdiction of the Pennsylvania Public Utility Commission (Commission) who is without authorization to grant the Complainant’s request, i.e. order Aqua where to install the sampling station, required under the regulations promulgated by the Pennsylvania Department of Environmental Protection (DEP). Aqua avers that any determination that the selected sampling station violates the Company’s Comprehensive Monitoring Plan, submitted and approved by DEP, must be determined by DEP, not the Commission. The Formal Complaint includes an impertinent matter in its requested relief. Therefore, Aqua moves to have the Formal Complaint dismissed in its entirety.

In support of its preliminary objections, Aqua states as follows:

I. Procedural Background

1. Aqua is a water company certificated as a public utility permitted to operate within the Commonwealth in Pennsylvania and provides water service in Upper Moreland Township, Montgomery County, Pennsylvania (Township).

2. The Complainant, as the President of the Township Board, filed a Formal Complaint alleging “an on-going problem of water quality and poor management regarding the use of rate payer’s monies.” Complaint at ¶ 4. He detailed his objection, as an elected official, to the originally proposed water sampling station on Township property and attached several partial email exchanges between the Township Manager and the Company.

3. In an Answer and New Matter being served contemporaneously with this Preliminary Objection, Aqua denied the material allegations in the Formal Complaint and referenced the letter, dated September 30, 2020, from the Company to the Township Manager, advising that the objections of the Township Board were considered and the sampling station would be located on a commercial property, rather than Township property. Aqua also advised that there was no business record of any water quality complaint from any resident on Butternut Drive.

4. Pursuant to 52. Pa. Code § 5.101, Aqua objects to the Formal Complaint on the grounds that the Commission lacks jurisdiction to determine if the location of the sampling station violates Aqua’s Comprehensive Monitoring Plan (Monitoring Plan) filed consistent with DEP promulgated regulations.¹

¹ 25 Pa. Code § 109.718.

II. Argument

5. The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa. Code § 5.101(a) as follows:

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

6. Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994).

7. The Company avers that the Commission lacks subject matter jurisdiction to entertain and resolve a dispute regarding the location selected by Aqua for a sampling station required under DEP regulations related to its Comprehensive Monitoring Plan (Monitoring Plan). As a creature of legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Code, 66 Pa.C.S. §§ 101, *et seq.* The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 427 Pa. 562, 237 A.2d 602 (1967); *Behrend v. Bell of Pa.*, 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); *Harrisburg Taxicab &*

Baggage Co. v. Pa. P.U.C., 786 A.2d 288 (Pa. Cmwlth. 2001); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978).

8. It is well settled that the Commission has only the powers, and can only consider such matters, as are expressly, or by necessary implication given to it by the legislature. *Behrend v. Bell Telephone Co.*, 363 A.2d 1152 (Pa, Super 1976); *Brockway Glass Company, Inc. v. Aqua Power Co.*, 54 Pa P.U.C. 509 (1980); *Bones v. Bates Taxi, Inc.*, 51 Pa, P.U.C. 346 (1977). The Pennsylvania Public Utility Code, 66 Pa.C.S. § 101, *et seq.* (the Code), gives the Commission supervisory and regulatory power over the rates, service and facilities of public utilities. *Brockway Glass* at 514.

9. Section 501 of the Code, 66 Pa.C.S. § 501, the Commission must “enforce, execute and carry out, by **its** regulations, orders or otherwise” all the provisions of the Code. Section 701 of the Code,² allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law **which the Commission has jurisdiction to administer**. (Emphasis added). *See also*, 52 Pa. Code § 5.21(a). The Company avers that the Commission lacks subject matter jurisdiction to entertain and resolve a dispute involving DEP regulations.

10. Commonwealth Court has ruled that the Pennsylvania Safe Drinking Water Act³ confers jurisdiction to the DEP and limits the Commission’s authority over drinking water. *Rovin, D.D.S. v Pa. PUC*, 502 A.2d 785 (Pa. Cmwlth. 1986) (“water quality in Pennsylvania is statutorily regulated and specifically vested in DEP.”)

² 66 Pa.C.S. § 701.

³ 35 Pa.C.S. §§ 721.1 *et seq.*

11. Precedent makes clear the distinction between water service, which the Commission may regulate, and water quality which may only be regulated by DEP. *Pickford v PUC*, 4 A.3d 707, (Pa. Cmwlth. 2010).

12. The Commission has regulatory authority under 66 Pa.C.S. § 1501 over the quality of public utilities' facilities and services, whereas the DEP has primary jurisdiction over the sampling and compliance monitoring activities under 25 Pa. Code 109.301 *et seq.* and Pennsylvania Safe Drinking Water Act.⁴

13. The Company avers the Commission lacks jurisdiction to entertain a complaint disputing the Company's decision where to locate a sampling station.

14. The Company avers its decision to locate the sampling station on a commercial property is a managerial decision. It is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown. *Emporium Water Company, v Pa. PUC*, 955 A.2d 456 (Pa. Cmwlth. 2008). In the present proceeding, there has been no allegation of abuse or arbitrary actions.

15. The Company avers the Commission lacks jurisdiction to entertain a complaint that alleges the Company's actions in the location of a sampling station violates its Monitoring Plan or DEP regulations. Such authority to interpret and enforce its regulations lies exclusively with DEP. *McGrath Constr., Inc. v Upper Saucon Twp. Bd. Of Supervisors*, 952 A.2d 718 (Pa. Cmwlth. 2008).

16. The Formal Complaint seeks an order from the Commission directing Aqua to locate a sampling station in a residential area rather than the selected commercial property location. Clearly, DEP, not the Commission, is the administrative agency that has the authority to interpret its own lawfully promulgated regulations. *McGrath Constr., Inc., supra*.

⁴ 35 Pa.C.S. §§ 721.1 *et seq.*

17. DEP, not the Commission, is the administrative agency that has authority to interpret its own lawfully promulgated regulations and determine if the selected location of the sampling station violates Aqua's Monitoring Plan submitted and approved by DEP. *McGrath Constr., supra.*

18. The requested relief by the Complainant is not recoverable in the cause of action before this Commission, as the Commission is without authorization to enforce or interpret DEP regulations. *McGrath Constr., supra.* The request for relief is irrelevant to the instant cause of action and therefore an "impertinent matter" within the use and meaning of 52 Pa. Code § 5.101(a)(2).

19. Since the sole issue in the Formal Complaint is the request for an enforcement and interpretation of DEP regulations, the Formal Complaint should be stricken in its entirety pursuant to Pa. Code §5.101(a)(2).

WHEREFORE, the Company, Aqua Pennsylvania, Inc., requests that the Formal Complaint filed by Kevin C. Spearing, as the President of the Upper Moreland Township Board of Commissioners, be dismissed with prejudice or denied in its entirety for lack of subject matter jurisdiction.

Respectfully submitted,



Date: February 24, 2021

Margaret A. Morris, Esq.
Attorney ID No. 75048
Reger Rizzo & Darnall LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 tel.
mmorris@regerlaw.com

Counsel for Aqua Pennsylvania, Inc.