

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John Day	:	
	:	
v.	:	C-2021-3026213
	:	
Aqua Pennsylvania Wastewater, Inc.	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision denies a formal complaint filed by a customer of a wastewater company. The complainant alleged that the company is incorrectly charging him a flat monthly rate for service used at the service address, where he resides only five to ten days per month. The complaint will be dismissed because the complainant failed to satisfy his burden of demonstrating that the company violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the service provided to him.

HISTORY OF THE PROCEEDING

On June 2, 2021, John Day filed with the Pennsylvania Public Utility Commission (Commission) a formal complaint against Aqua Pennsylvania Wastewater, Inc. (Aqua), docket number C-2021-3026213. In his complaint, Mr. Day averred that Aqua is compelling him and his wife to “pay higher wastewater rates, pending the success of its mergers and acquisitions strategy.” Mr. Day added that he is charged a flat fee of \$100 per month for sewer service by

Aqua and that he is being penalized for having an “unmetered” rate from Aqua until such time as the local water system is acquired. Mr. Day complained that he is a “captive customer” and requests a credit on his monthly wastewater bill in the amount that he is already paying for water service from his water service supplier. Mr. Day attached to his complaint a copy of his bill from his water service supplier in support of his position.

On June 23, 2021, Aqua filed an answer with new matter in response to the complaint. In its answer, Aqua admitted or denied the various averments made in the complaint. In particular, Aqua denied that it is compelling Mr. Day to pay higher wastewater rates pending the success of its mergers and acquisitions strategy but that Mr. Day is being charged a monthly surcharge because Aqua does not own Mr. Day’s local water system. Aqua added that Mr. Day is being billed pursuant to Aqua’s wastewater tariff approved by the Commission. Aqua provided additional detail regarding its service to Mr. Day and stated that Aqua’s tariffs have the force and effect of law and are binding on both Aqua and its customers. Aqua reiterated that point in its new matter, which was accompanied by a notice to plead, and attached to the answer a copy of its tariff.

On June 30, 2021, Mr. Day filed an answer to Aqua’s new matter. In his answer, Mr. Day argued, among other things, that he does not receive metered service from Aqua because he does not receive metered service from his water service provider. Mr. Day added that he was amending his requested relief consistent with the rates specified in the Commission-approved tariff. Mr. Day attached several documents to his answer to Aqua’s new matter.

On July 9, 2021, a hearing notice was issued establishing an initial telephonic hearing for this matter for Tuesday, August 31, 2021 at 10:00 a.m. and assigning me as the presiding officer. In anticipation of that hearing, a prehearing order was issued on July 14, 2021 setting forth various rules that would govern the proceeding.

The initial hearing convened on August 31, 2021, as scheduled. Mr. Day appeared *pro se*. Mary McFall Hopper, Esquire appeared on behalf of Aqua. Mr. Day presented oral testimony and three exhibits that were admitted into the record. Ms. Hopper presented one

witness who sponsored four exhibits that were also admitted into the record. A transcript of 55 pages was created.

The record in this case closed on September 23, 2021 when the transcript of the hearing was filed with the Commission. The complaint is ready for disposition. For the reasons discussed below, Mr. Day's complaint will be denied.

FINDINGS OF FACT

1. The Complainant in this case is John Day.
2. The Respondent in this case is Aqua Pennsylvania Wastewater, Inc.
3. The service address is 481 Moseywood Rd, Unit 2, Lake Harmony, PA.
4. Mr. Day lives at the residence at the service address for 5-10 days per month.

Tr. 9.

5. Aqua charges Mr. Day an unmetered \$100 monthly rate for his wastewater service as required by its tariff. Tr. 10, 11, 18.

6. Mr. Day's water service is provided by Village Greens Co-op. Tr. 10.

7. Day Exhibit A is bills from E-ZPass for Mr. Day's account for the months of March 2021 and May 2021. Day Exh. A; Tr. 15.

8. Day Exhibit B is a bill from New Jersey American Water company for Mr. Day's account for water service in New Jersey for the month of April 2021. Day Exh. B; Tr. 16.

9. Day Exhibit C is the formal complaint and public statement filed by the Pennsylvania Office of Consumer Advocate in a proceeding involving Aqua's 2018 base rate case and dated August 28, 2018. Day Exh. C; Tr. 16.

10. The service address is located in Lake Harmony, Kidder Township, Carbon County. Tr. 17-18.

11. William Packer is employed by Central Utilities as the Vice President of Regulatory Accounting and Regional Controller and oversees the accounting functions of Aqua. Tr. 23.

12. Mr. Packer is involved in the rate filings made by Aqua. Tr. 23-24.

13. Mr. Packer has been employed by the company for 17 years. Tr. 24.

14. Aqua's current rates were set following a 2018 rate case that allowed the rates to be effective on May 24, 2019. Tr. 26.

15. Aqua Exhibit Number 1 is the 74-page Opinion and Order of the Commission in the Aqua 2018 base rate case entered May 9, 2019. Aqua Exh. 1; Tr. 27.

16. Aqua Exhibit Number 2 is a Secretarial Letter dated July 10, 2019 accepting Aqua's compliance tariff filing in response to Opinion and Order entered May 9, 2019. Aqua Exh. 2; Tr. 28.

17. Aqua Exhibit Number 3 is Supplement 10 from Aqua Tariff Sewer PA, No. 2. Aqua Exh. 3; Tr. 29.

18. Lake Harmony in Kidder Township, Carbon County is in Rate Zone 4. Aqua Exhs. 3 and 4; Tr. 29, 34.

19. Rate Zone 4 includes both a metered and unmetered rate option which is dictated based on the ownership and operations of the particular system. Aqua Exh. 3; Tr. 30.

20. Aqua acquired the Lake Harmony system in 2012 at which time the flat rate charge was \$62.50. Tr. 31-32.

21. In the 2018 base rate case, the flat rate charge for the Lake Harmony system increased from \$62.50 to \$100. Aqua Exh. 3; Tr. 31.

22. Aqua has many systems in its tariff that are billed under a flat rate, non-metered charge as dictated by the system. Tr. 31-32.

23. Costs to provide service to Mr. Day are both fixed and based on usage. Tr. 32-33.

24. A portion of the cost of service is for the availability of the system at any time regardless of whether it is used. Tr. 33.

25. Aqua Exhibit Number 4 is a copy of the Aqua bill to Mr. Day for the month of December 2020. Aqua Exh. 4; Tr. 34.

26. Mr. Day's total sewer charge for the month of December 2020 is \$100. Aqua Exh. 4; Tr. 34.

27. Public utility rates are set based on a multitude of factors, including the cost of service. Tr. 37-39.

DISCUSSION

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a

complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950). The offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701. In this proceeding, Mr. Day requests that Aqua charge him a lower rate for wastewater service because he also does not receive water service from Aqua but from a different provider. Therefore, Mr. Day has the burden of proof in this proceeding.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa. Cmwlth. 2001) (Milkie); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa. Cmwlth. 1982).

On appeal, the decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa. Super. 1961); and Pa. Dep't of Pub. Welfare, White Haven Ctr., 480 A.2d 382 (Pa. Cmwlth.1984).

In this case, Mr. Day seeks a lower monthly sewer charge because he is only at the service address for approximately 5-10 days per month. He argued that he should not be paying the full monthly charge in light of the limited time spent at the service address. Mr. Day presented evidence in support of his position that he is only at the residence for a limited number

of days each month and the amount of water he uses at his primary residence in New Jersey. In response to Mr. Day's complaint, Aqua presented the testimony of William Packer who is the Vice President of Regulatory Accounting and Regional Controller and oversees the accounting functions of Aqua and is familiar with Aqua's rates. Mr. Packer testified generally regarding the ratemaking process and specifically that Aqua's current rates were set in a proceeding that concluded in 2019. Mr. Packer also testified regarding the specific rates charged to Mr. Day and sponsored exhibits regarding the Commission's approval of Aqua's rates in 2019, the portion of Aqua's tariff pertaining to Mr. Day, and several bills Aqua recently issued to Mr. Day.

Mr. Day's complaint will be denied because he has failed to satisfy his burden of demonstrating that Aqua violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company.

As a preliminary matter, Mr. Day does not argue that Aqua is not charging him the tariffed rate. To the contrary, Mr. Day recognized during the hearing that:

Q. And so the bills that you receive from Aqua show that you are billed a sewer charge of \$100 per month. Correct?

A. That is correct.

Q. So Aqua is charging you the rate that's in the Tariff. Correct?

A. That is in the Tariff, yes.

Tr. 18. In addition, Aqua presented Tariff Supplement 10 from Aqua Tariff Sewer PA, No. 2 which shows a monthly service charge for unmetered service of \$100 and Aqua's bills to Mr. Day that show the total current sewer charges of \$100. *See*, Aqua Exh. Nos. 3 and 4.

It is well accepted that a tariff is a set of operating rules imposed by the Commission that each public utility must follow in order to provide service to its customers. PPL Elec. Utils. Corp. v. Pa. Pub. Util. Comm'n, 912 A.2d 386 (Pa. Cmwlth. 2006). Each public utility must file a copy of its tariff with the Commission setting forth its rates, services, rules,

regulations and practices so that the public may inspect its contents. 66 Pa.C.S. § 1302; 52 Pa.Code § 53.25; Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa. Cmwlth. 2002). Public utility tariffs must be applied consistent with their language. Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. Pa. Elec. Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa. Cmwlth. 1995). The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa. Cmwlth. 2002).

Furthermore, Mr. Day has not presented any evidence demonstrating that Aqua's tariff is unreasonable as applied to him. For example, Mr. Day's primary argument is that he is only at the service address for 5-10 days per month and that, as a result, he should not be required to pay the monthly service charge as if he were at the service address every day of the month. Mr. Day testified: "We are not full-time residents and the rates as it's been implemented are metered rates, is charging us at a higher level, an unequitable level, for the services that we're receiving." Tr. 10-11. This argument is without merit and will be rejected.

Mr. Packer noted on behalf of Aqua the process by which Aqua's rates are determined and that the current rates were set as a result of a base rate case filed in August 2018 that became effective on May 24, 2019. Tr. 25-26; *see also*, Aqua Exh. Nos. 1 and 2. Mr. Packer noted in particular that customers pay to have the sewer service available 365 days a year, 24 hours a day, whether they use the service or not, noting that fixed costs remain that are incorporated into the sewer rate design. Tr. 33. The fact that Mr. Day is present at the service address only 5-10 days a month is irrelevant to whether the \$100 sewer charge is reasonable. Aqua has no control over when its customers are present at the service address. Yet, Aqua still is required to have its sewer service available for whenever the customer desires to use it. Mr. Day is required to pay the monthly sewer charge whether he is present at the service address every day of the month or no days of the month. If Mr. Day were present at the service address every day of every month, he would still pay the \$100 sewer charge. Mr. Day's argument to the contrary will be rejected.

In fact, if Aqua were to do what Mr. Day is requesting, then the company could be giving Mr. Day preferential treatment over other existing customers which could be a violation of the Public Utility Code. *See*, 66 Pa.C.S. § 1303 (“No public utility shall, directly or indirectly, by any device whatsoever, or in any wise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specific in the tariffs of such public utility applicable thereto.”). In addition, if Aqua were to do what Mr. Day is requesting, and Aqua then has to provide the same service to all of its customers, the cost to provide service to all Aqua customers would likely increase exorbitantly. Aqua’s tariffs are in place to enable Aqua to provide a reliable system for all its customers. Aqua must treat all customers consistently to ensure that such service is provided.

Next, Mr. Day testified regarding the exhibits he presented. As noted above, Day Exhibit A is bills from E-ZPass for Mr. Day’s account for the months of March 2021 and May 2021. Day Exh. A; Tr. 15. Mr. Day testified that this exhibit demonstrates how infrequently he is at the service address. Tr. 12. However, as noted above, the number of days per month Mr. Day is at the service address is irrelevant.

Similarly, Day Exhibit B is a bill from New Jersey American Water Company for Mr. Day’s account for water service in New Jersey for the month of April 2021. Day Exh. B; Tr. 16. Mr. Day presented this bill to show his water usage on a metered basis. Tr. 12, 20. Yet, the amount of water that Mr. Day uses, either in New Jersey or at the service address in Pennsylvania, is irrelevant when he is on an unmetered rate from Aqua. Similar to how often Mr. Day uses the system, as noted above regarding Day Exhibit A, regardless of whether Mr. Day is a high-volume user or a low-volume user, his sewer service charge will be \$100. The amount that Mr. Day uses is his prerogative and Aqua cannot design its system to accommodate individual customer’s usage amount on unmetered portions of their system. Mr. Day’s argument to the contrary will be rejected.

With regard to Day Exhibit C, the formal complaint and public statement filed by the Pennsylvania Office of Consumer Advocate (OCA) dated August 28, 2018 in a proceeding

involving Aqua's 2018 base rate case, whether or not the OCA determined to file a formal complaint in Aqua's last base rate case, and for what reasons, has no bearing on whether the service provided by Aqua to Mr. Day is unreasonable or otherwise a violation of the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company. Nor does the fact the OCA filed the complaint with those averments mean that those averments are in fact true. Mr. Day's argument to the contrary will again be rejected.

Finally, Mr. Day testified that Section 56.12 of the Commission's regulations requires that "a public utility shall render bills based on actual meter readings." Tr. 15, *citing*, 52 Pa. Code § 56.12. Section 56.12, however, is entitled "Meter reading; estimated billing; customer readings." 52 Pa. Code § 56.12. As such, Section 56.12 pertains only to metered service. Mr. Day does not receive metered service from Aqua. When a meter is present at the service address, Section 56.12 provides requirements regarding estimates for bills rendered on a monthly basis, applicability to seasonal customers, estimates permitted under exigent circumstances, estimates when utility personnel are unable to gain access to the meter, etc. *Id.* These requirements are not applicable to service Aqua provides to Mr. Day because he is on unmetered service. Therefore, Mr. Day's argument will again be rejected.

As such, Mr. Day has failed to satisfy his burden of proof that Aqua has violated the Public Utility Code, a Commission order or regulation or a Commission approved tariff of the Company with regard to the amount he is charged for wastewater service. As noted above, the burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant *See, Milkie, supra*. Therefore, Mr. Day's complaint must be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. A complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990).

4. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950).

5. The offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701.

6. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa. Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa. Cmwlth. 1982).

7. The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

8. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980); Erie Resistor Corp. v. Unemployment Comp. Bd.

of Review, 166 A.2d 96 (Pa. Super. 1961); and Murphy v. Pa. Dep't of Pub. Welfare, White Haven Ctr., 480 A.2d 382 (Pa. Cmwlt. 1984).

9. A tariff is a set of operating rules imposed by the Commission that each public utility must follow in order to provide service to its customers. PPL Elec. Utils. Corp. v. Pa. Pub. Util. Comm'n, 912 A.2d 386 (Pa. Cmwlt. 2006).

10. Each public utility must file a copy of its tariff with the Commission setting forth its rates, services, rules, regulations and practices so that the public may inspect its contents. 66 Pa.C.S. § 1302; 52 Pa. Code § 53.25; Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa. Cmwlt. 2002).

11. Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. Pa. Elec. Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa. Cmwlt. 1995).

12. The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa. Cmwlt. 2002).

13. No public utility shall, directly or indirectly, by any device whatsoever, or in any wise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specific in the tariffs of such public utility applicable thereto. 66 Pa.C.S. § 1303.

14. Mr. Day has failed to satisfy his burden to demonstrate that Aqua has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the service provided to him. 66 Pa.C.S. § 332(a); 66 Pa.C.S. § 701.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal complaint filed by John Day against Aqua Pennsylvania Wastewater, Inc. on June 2, 2021 at docket number C-2021-3026213 is hereby denied.
2. That this matter be marked closed.

Date: October 28, 2021

/s/
Joel H. Cheskis
Deputy Chief Administrative Law Judge