

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held August 25, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Patricia Shaver

C-2020-3022088

v.

Suez Water Pennsylvania, Inc.

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Suez Water Pennsylvania, Inc. (Suez or Company) on June 14, 2022, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Dennis J. Buckley served on May 25, 2022, in the above-captioned proceeding. Replies to Exceptions were not filed. For the reasons stated below, we shall grant, in part, and deny, in part, Suez's Exceptions and modify the ALJ's Initial Decision consistent with this Opinion and Order.

I. History of Proceeding

On September 3, 2020, Patricia Shaver (Ms. Shaver or Complainant) filed a Formal Complaint (Complaint) against Suez, alleging that the Company failed to render safe and reliable service. Specifically, Ms. Shaver averred that on and around July 2-3, 2020, the water at her residence was discolored (brown) and that Suez did not return messages about the discoloration issue. The Complainant also averred that as a result of the discoloration problem, she purchased bottled water to use. The Complainant requested that Suez reimburse her for the expenses related to purchasing the bottled water, for the cost of a water analysis performed by Pennsylvania State University Agricultural Analytical Services Laboratory (PSU Laboratory), and that Suez apologize for failing to provide a timely response to the Complainant's concerns.

On October 13, 2020, Suez requested an extension of time to file an Answer to the Complaint, which was granted by the Commission's Secretary on October 14, 2020. On October 23, 2020, Suez filed an Answer to the Complaint, denying that the discoloration in the Complainant's water was caused by a main break or any other systemic failure and denying responsibility for any safety or quality of service problem. Suez averred that there was no safety issue because during the time period when the water discoloration occurred, the mandatory water test conducted by Suez met all primary and secondary water quality standards. Suez denied the relevancy and questioned the evidentiary value of the PSU Laboratory testing. Suez contended that it did not immediately return the Complainant's calls because the problem occurred over the July 4, 2020, weekend but stated that a Suez representative spoke with the Complainant's husband on July 7, 2020. Suez submitted that the Commission has no authority to order the reimbursement the Complainant requested.

On January 29, 2021, Suez filed an Amended Answer to Ms. Shaver's Complaint. In the Amended Answer, Suez averred that on July 2, 2020, fire hydrant

testing occurred at a location near the Complainant's residence, and the testing may have resulted in the disturbance of sediment, potentially causing the discoloration in the Complainant's water. Suez continued to deny that any safety or health issue had been created and that any violation of the Public Utility Code (Code) or the rules and Regulations of the Commission occurred.

An evidentiary telephonic hearing was held on February 18, 2021. The Complainant appeared *pro se* and presented her own testimony and that of her husband, John Shaver. The Complainant produced three exhibits that were admitted into evidence. Suez was represented by counsel, who presented the testimony of four witnesses and six exhibits that were admitted into evidence. The record consists of a transcript of ninety-four pages along with the exhibits admitted into the record. An Order was issued on March 25, 2022, closing the record in this case.

In the Initial Decision served on May 25, 2022, the ALJ granted the Complaint, in part, and denied the Complaint, in part. The ALJ denied the Complainant's requests for damages, an apology, and the Commission's supervision of Suez. The ALJ granted the Complainant's claims for the issuance of a civil penalty, finding that the Complainant proved by a preponderance of the evidence that Suez violated Section 1501 of the Code, 66 Pa. C.S. § 1501, by failing to render adequate service and imposing a \$5,000 civil penalty.

II. Background

The Company's Exceptions in this case focus on the ALJ's determination to impose a \$5,000 civil penalty on Suez based on Suez's failure to provide reasonable service because it took five days for the Company to respond to the Complainant's concerns about her discolored water. The Company is arguing against the amount of the

civil penalty that was imposed and is not debating that a Section 1501 violation occurred.¹ The relevant facts pertaining to this issue are set forth below.

The Complainant's husband called Suez on July 2, 2020, and reported the discolored water problem, leaving a message for the Company on voicemail. Tr. at 37. On July 3, 2020, the Complainant's husband called Suez again about the discoloration issue and reached a Suez representative who told him that he would be called back, but no one called back. Tr. at 39. Suez customer records indicate that the Shavers called Suez on July 2, 2020, in the evening, on July 3, 2020, in the early morning, and on July 7, 2020 in the afternoon. Tr. at 53. The call on July 2, 2020, was routed to the Suez answering service, and the call on July 7, 2020, was received by a Suez customer service representative. Tr. at 53.

Suez Exhibit 2 is a record of the call made by Mr. Shaver on July 2, 2020, and confirms the report of discolored water made by Mr. Shaver. Tr. at 54; Suez Exh. 2. Suez Exhibit 1 is a record of the July 7, 2020, phone call by Ms. Shaver, which was answered by a Suez customer service representative, Maria Gonzales. Tr. at 54; Suez

¹ The ALJ did not reach any conclusions on the discoloration of the Complainant's water, but, rather, the ALJ's focus was on the Company's customer service and its level of responsiveness to the Complainant regarding her concerns about the water discoloration. The ALJ stated the following:

In this sense, Suez's extensive testimony about water quality and water quality testing is largely irrelevant because no evidence of harm was presented. Unquestionably, the water was discolored for a time, and that is likely to recur when system maintenance and testing takes place. In its Amended Answer to Ms. Shaver's Complaint, Suez averred that on July 2, 2020, fire hydrant testing had occurred at a location near Complainant's residence, and that the testing may have resulted in the disturbance of sediment that could have caused the discoloration in Complainant's water.

I.D. at 11, n.1.

Exh. 1. Ms. Gonzalez spoke with Mr. Shaver on July 7, 2020, five days after the Complainant first reached out to Suez, by which time the discoloration had cleared from the Complainant's water. Tr. at 57. Ms. Gonzalez told Mr. Shaver that Suez Water Quality would follow up on the matter. Tr. at 58; 60. The request for a callback on the July 7, 2020 call from Mr. Shaver was not returned by Suez because Suez personnel mis-identified the party to be called. Tr. at 82-83.

III. Discussion

A. Legal Standards

ALJ Buckley made thirty-six Findings of Fact and reached seven Conclusions of Law. I.D. at 5-8, 15-16. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Additionally, any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Company is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*,

72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Company. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982). More is required 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. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, also referred to as the burden of persuasion, to rebut the evidence of the customer shifts to the Company. If the evidence presented by the Company is of co-equal value or "weight," the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of the Company. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

B. Initial Decision

Initially, the ALJ noted that the Complainant alleged that Suez failed to render safe and reliable service, because on and around July 2-3, 2020, the water at Ms. Shaver's residence was discolored (brown) and Suez did not return her messages complaining about the discoloration issue. The ALJ also noted that the Complainant

averred that as a result of the discoloration problem, she purchased bottled water to use. For relief, the ALJ stated that the Complainant requested that Suez reimburse her for the expenses related to purchasing the bottled water and for the cost of a water analysis performed by the PSU Laboratory and that Suez apologize for failing to provide a timely response to the Complainant's concerns. The ALJ concluded that such a quality of service issue is within the Commission's jurisdiction under Section 1501 of the Code.² I.D. at 9-10.

In evaluating the evidence in this case, the ALJ concluded that Suez failed to provide reasonable service as required by Section 1501 of the Code. The ALJ found the Complainant's and her husband's testimony credible. The ALJ stated that the Complainant did not aver that there was a contamination issue but complained that Suez's lack of response compelled her to have her water independently tested for contaminants. The ALJ also stated that the Complainant was under the impression that someone from Suez would come to her residence to test the water, though no proof was established on the record that Suez made such a commitment. The ALJ noted that Suez stated that it did not immediately contact the Complainant about her problem because the problem occurred on the Independence Day weekend, but that Suez responded to the Complainant's concerns when her husband finally connected with a Suez representative

² Section 1501 of the Code, 66 Pa. C.S. § 1501, provides the following, in pertinent part:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

on July 7, 2020. The ALJ also noted that Suez admitted that it received the Complainant's July 2, 2020, call. I.D. at 11.

The ALJ concluded that the fact that Suez did not respond to the Complainant for five days concerning her discolored water is not acceptable service. The ALJ found that Suez did not adequately explain on the record why its failure to respond to the Complainant occurred and determined that this, in itself, is a failure to provide reasonable service. The ALJ reasoned that aggravating the matter is the fact Suez did not reach out to the Complainant, but, instead, the Complainant was required to make a further call to Suez in order to elicit a response from the Company. *Id.*

Finding that Suez violated Section 1501 of the Code, the ALJ next analyzed the Commission's policy statement at 52 Pa. Code § 69.1201, which sets forth the specific factors and standards the Commission uses in determining if a fine for violating a Commission Order, Regulation, or Statute is appropriate. The ALJ's analysis was as follows:

Applying the factors in Section 69.1201, I find the following: the conduct at issue was of a serious nature. *Id.* Having experienced a water discoloration problem with no explanation and without a return of her husband's phone calls to Suez, Complainant was left to her own devices to attempt to ascertain the seriousness of the problem. 52 Pa. Code § 69.1201(c)(1). While the consequences were not serious in that no threat to life or property occurred and the situation resolved itself, that does not minimize the deficiency complained of. 52 Pa. Code § 69.1201(c)(2). The conduct complained of was occasioned by negligence on the part of Suez. 52 Pa. Code § 69.1201(c)(3). There was no evidence presented that would support a finding that the regulated entity has made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). In this instance, the conduct complained of affected the Complainant and her husband and another party whose case is the subject

of another formal Complaint. 52 Pa. Code § 69.1201(c)(5). These appear to be isolated incidents. 52 Pa. Code § 69.1201(c)(6). No investigation was conducted. 52 Pa. Code § 69.1201(c)(7). The civil penalty is limited by the terms of the Code and is reflective of culpability. No amount that it would be possible to assess in this matter would, in itself, compel corrective action by the utility. That action must be based on the utility's understanding of the seriousness of this matter. 52 Pa. Code § 69.1201(c)(8). Past Commission actions in similar matters would not affect the assessment of the penalty. 52 Pa. Code § 69.1201(c)(9). There are no other factors to consider though it does not appear that any sort of apology was afforded to the Complainant by Suez. 52 Pa. Code § 69.1201(c)(10). In light of these factors, and the five-day duration of failure to provide adequate service, a \$5,000 civil penalty will be imposed on Suez.

I.D. at 13-14.

C. Exceptions and Disposition

1. Suez Exception No. 1 and Disposition

In its Exception No. 1, Suez disagrees with the ALJ's imposition of a \$5,000 civil penalty. Suez argues that Section 3301(a) of the Code provides for a maximum civil penalty of \$1,000 for a violation of Section 1501 of the Code. Exc. at 1. Suez also argues that Section 3301(b) of the Code, which applies to continuing offenses, does not apply in this instance, because that provision applies only in instances where the utility has violated a "regulation or final direction, requirement, determination or order of the Commission," and, according to the Company, this proceeding does not involve such a violation. Exc. at 1-2. Suez contends that because the ALJ found the Company violated Section 1501 of the Code, and not a regulation or final Commission direction, requirement, determination, or order, there is no statutory authority in this case for

imposing a civil penalty exceeding \$1,000. Suez believes that the civil penalty should be reduced to no more than \$1,000. Exc. at 2.

Upon review, we disagree with Suez that the provisions in Section 3301(b) of the Code concerning continuing offenses do not apply to violations of Section 1501 of the Code. The pertinent provisions of Section 3301 in this case are as follows:

§ 3301. Civil penalties for violations.

(a) *General rule.* — If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$ 1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth. ...

(b) *Continuing offenses.* — Each and every day's continuance in the violation of any regulation or final direction, requirement, determination, or order of the commission, or of any order of the commission prescribing temporary rates in any rate proceeding, or of any final judgment, order or decree made by any court, shall be a separate and distinct offense. ...

66 Pa. C.S. § 3301(a),(b).

The Commission has interpreted Section 3301(b) as applying to violations of the Code, including Section 1501. *See, e.g., Pamela Arnold v. Verizon LLC*, Docket

No. C-2019-3014304 (Order entered February 3, 2022) (*Arnold*) (finding that a civil penalty was warranted for a violation of Section 1501 in the amount of \$850 per day, or a total of \$17,000, for the twenty days the customer was without telephone service); *Melinda Fisher v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2020-3019942 (Order entered October 7, 2021) (imposing a \$5,000 civil penalty on Columbia Gas of Pennsylvania, Inc. for failing to provide reasonable service to a customer in violation of Section 1501 of the Code, 66 Pa. C.S. § 1501, while excavating her property to install its gas main); *Lawrence Jones v. Philadelphia Gas Works*, Docket No. C-2019-3007984 (Order entered July 16, 2020) (*Jones*) (assessing a civil penalty of \$250 for a violation of Section 1501 for each year, over an eight year period (for a total of \$2,000), that Philadelphia Gas Works failed to attempt to reclaim a gas meter and determine unauthorized use at a service address); *Application of Consolidated Rail Corporation*, Docket No. A-00115212 (Order entered January 12, 2001) (assessing a civil penalty of \$100 per day, under Section 1301(b) of the Code, for a railroad company's alteration of a crossing without Commission authority in violation of Section 2702 of the Code, 66 Pa. C.S. § 2702).

To interpret the provisions of Section 3301 in any other manner would prohibit the Commission from assessing civil penalties for continuing violations of Section 1501 or any other provisions of the Code and, consequently limit the Commission's authority over enforcement of the Code provisions. Such a result would be unreasonable and, therefore, would conflict with the Statutory Construction Act, which states that a statute is to be interpreted so as to avoid an absurd or unreasonable result. *See* 1 Pa. C.S. § 1922(1); *Newcomer Trucking, Inc. v. Pa. PUC*, 531 A.2d 85, 87 (Pa. Cmwlth. 1987). For these reasons, we shall deny Suez Exception No. 1.

2. Suez Exception No. 2 and Disposition

In the alternative, Suez avers that the civil penalty should be reduced to \$250 per day for a five-day period because the Company's delay in responding to the Complainant was unintentional. Exc. at 2. Suez argues that because the ALJ concluded that the Company's conduct was negligent, rather than intentional, the presumptive starting point for a determination on a penalty is in the range of zero dollars to \$500 per day. *Id.* at 3. Suez relies on the Commission's recent decision in *Arnold* and quotes the following language from that decision:

We also agree with Verizon in its Exceptions that the violations in this case were caused by negligence and the penalty assessed by the ALJ is not consistent with the penalties in prior cases where the violations resulted from negligence rather than being intentional. As noted, the ALJ found that the violations in this case were caused by negligence; nevertheless, the ALJ decided to assess the maximum penalty of \$1,000 per day. In accordance with our rulings in *Rosi* and *Meder*, the maximum penalty of \$1,000 violation per day allowed under Section 3301 of the Code normally should be applied only for the most egregious violations that were found to be intentional by the utility. In *Rosi, supra*, we stated:

If the violation is intentional, the Commission should start with the presumption that the penalty will be in the range of \$500.00 to \$1,000.00 per day. If the violation is negligent, the Commission should start with the presumption that the penalty will be in the range of zero dollars to \$500.00 per day. The precise penalty amount per day will be arrived at by applying the following additional standards, while recognizing that the Commission retains broad discretion in determining a total civil

penalty amount that is reasonable on an individual case basis.

Exc. at 2-3 (citing *Arnold* at 34-35 (quoting *Joseph A. Rosi v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00992409 (Order entered March 16, 2000) at 10).

Suez avers that as the ALJ discussed, the circumstances in this proceeding concerned an isolated incident over the Fourth of July holiday weekend involving the Complainant and a neighboring property,³ and there was no threat to life or property. Suez states that since this proceeding does not involve an egregious violation of the Code or intentional conduct, the civil penalty should be reduced consistent with prior Commission decisions. Suez submits that the penalty determination should be based on a mid-range amount of \$250 per day for negligent conduct over a five-day period, for a total of \$1,250. Exc. at 3.

In examining this issue, we emphasize our discretion in determining an appropriate civil penalty amount based on the specific circumstances of each case. Based on our review of the relevant facts in this case, the factors in the Policy Statement, including similar prior Commission decisions, we find that the civil penalty the ALJ recommended should be reduced under the circumstances in this case. While we generally agree with the ALJ's analysis of the factors in the Policy Statement, we find that this case is akin to our prior decisions in which civil penalties for negligent conduct have fallen in the range of zero to \$500 per day. *See, e.g., Jones* (\$2,000 civil penalty, determined by \$250 per year for eight years for negligent violation of Section 1501 for the company's failure to follow up on meter reclamation activity, resulting in large balance); *Michael Morales v. Philadelphia Gas Works*, Docket No. C-2018-3002466, (Order entered May 21, 2020) (\$2,000 civil penalty for negligent violation of

³ The neighboring property is the subject of a separate Commission proceeding, *Kathleen Jones v. Suez Water Pennsylvania, Inc.*, Docket No. C-2020-3022094 (Initial Decision served May 31, 2022).

Section 1501 by failing to timely address meter tampering); *Jack Bleiman v. PECO Energy Company*, Docket No. F-2012-2284038 (Order entered June 13, 2013) (\$3,680 civil penalty, calculated as \$20 per day for each of the 184 days that PECO Energy Company was in violation of Section 1501 the Code, for negligently billing an incorrect residential heating rate). While there are some instances in which we have found it appropriate to impose a higher civil penalty per day, even when negligence is involved, the instant case does not have aggravating factors that would warrant such a result. *But, see, Arnold* (finding that a penalty in the amount of \$850 per day, or a total of \$17,000, for the twenty days the customer was without telephone service, was warranted).

Accordingly, we conclude that a \$1,250 civil penalty, based on \$250 per day for the Section 1501 violation, is more appropriate here. We agree with the ALJ that the Company's customer service in this case constituted conduct of a serious nature and should be taken seriously. The Shavers contacted Suez about a water discoloration problem, and the Company failed to respond to multiple telephone calls from them over a five-day period, leaving the Shavers to figure out on their own how to address the problem. Nevertheless, the conduct did not rise to the level of willful conduct or misrepresentation. 52 Pa. Code § 69.1201(c)(1). Some of the factors that support a lower civil penalty and are also included in the ALJ's analysis are as follows: (1) the resulting consequences were not serious in that there was no threat to life or property due to the Company's late response, as the water discoloration issue resolved itself and was likely attributable to fire hydrant testing near the Complainant's residence, 52 Pa. Code § 69.1201(c)(2); (2) the customer service conduct complained of was occasioned by negligence on the part of Suez, 52 Pa. Code § 69.1201(c)(3); (3) the conduct complained of affected the Complainant and her husband and a neighboring property, 52 Pa. Code § 69.1201(c)(5); (4) this seems to be an isolated incident, 52 Pa. Code § 69.1201(c)(6); and (5) past Commission decisions in similar matters, as we discussed herein,

52 Pa. Code § 69.1201(c)(9). For these reasons, we shall grant Suez Exception No. 2 and modify the ALJ's Initial Decision accordingly.

IV. Conclusion

Upon review, we shall grant, in part, and deny, in part, Suez's Exceptions and modify the ALJ's Initial Decision, consistent with this Opinion and Order;

THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by Suez Water Pennsylvania, Inc. on June 14, 2022, are granted, in part, and denied, in part.
2. That the Initial Decision of Administrative Law Judge Dennis J. Buckley, served on May 25, 2022, is modified consistent with this Opinion and Order.
3. That the Complaint of Patricia Shaver against Suez Water Pennsylvania, Inc. at Docket No. C-2020-3022088 is granted, in part, and denied, in part.
4. That within thirty (30) days of the entry date of this Opinion and Order, Suez Water Pennsylvania, Inc., shall pay a civil penalty of \$1,250, payable by certified check or money order payable to "Commonwealth of Pennsylvania" and sent to:

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

5. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

6. That after Suez Water Pennsylvania, Inc. remits the \$1,250 civil penalty as required by Ordering Paragraph No. 4, above, the Secretary's Bureau shall mark this proceeding closed.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 25, 2022

ORDER ENTERED: August 25, 2022