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Via e-filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Bldg.
400 North St., 2nd Floor
Harrisburg, PA 17120

**IN RE: Thomas Olup v. Pennsylvania American Water Co.
Docket No. C-2011-2247941**

Dear Secretary Chiavetta:

Pursuant to 52 Pa. Code §5.502(b)(2)(i), I am including herewith for filing the main Brief of the Complainant in the above-captioned matter, which I ask be filed today.

Copies of the Brief are concurrently being forwarded to Michael A. Gruin, Counsel for Pennsylvania American Water Company, and the Honorable Mary D. Long, Administrative Law Judge, both via e-version and hard copy mailing.

Very truly yours,

Bassi, McCune & Vreeland, P.C.

Jeffrey T. Olup
Attorney at Law

JTO/dda
Enc.

cc: The Hon. Mary D. Long (w/enc.)
Michael A. Gruin, Esq. (w/enc.)
Thomas V. Olup (w/enc.)

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

THOMAS OLUP

-vs-

PENNSYLVANIA-AMERICAN WATER
COMPANY

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No. C-2011-2247941

STATEMENT OF CASE

Thomas Olup filed a formal Complaint with the Pennsylvania Public Utility Commission opposing Pennsylvania American Water Company's proposed rate increase, and raised safety and health issues at Olup's dwelling at 719 Agnew Road due to PAWCO's faulty water main facility along Agnew Road in Baldwin Borough, Allegheny County.

Mr. Olup's objection to the rate increase was overruled in the Recommended Decision of the Administrative Law Judges dated October 27, 2011, in the matter of *PUC v. PAWCO*, Docket No. R2011-2232243, et al.

The safety and health issues are the result of continuous water main breaks and water inundations to Olup's dwelling at 719 Agnew Road – most recently in 2008. These issues have also given rise to: a civil suit for damages, a loss in market value to the property since 2008, and an inability to rent, sell or occupy the structure.

Olup's previous overtures to PAWCO to fix the derelict main line along Agnew fell on deaf ears. Mr. Olup's pleas to PAWCO to repair the dwelling were stonewalled.

The same scenario occurred in 1994-1996: water main break in the line on Agnew Road, deluge, PAWCO fixes other dwellings and settles all other claims, ignores owners at 719 Agnew, forces lawsuit. Delay, deny, defend.

Olup maintains that PAWCO is vindictive or abusive toward him. Olup also maintains that PAWCO cavalierly disregarded its responsibilities to provide safe facilities and to address the damage it has caused.

It is Olup's sincere wish that the PUC can finally get PAWCO's attention.

PROPOSED FINDINGS OF FACT

1. Thomas Olup owns the real estate at 719 Agnew Road, Baldwin Borough, PA 15227. (Tr., 11).
2. 719 Agnew Road was previously owned by Olup's in-laws, the Klawinskis (Tr., 11).
3. Over the course of 40 years, Olup observed water intrusions in the basement areas of 719 Agnew Road (Tr., 13). Previous documented breaks occurred in April 1975 and December 1978 (Tr., 43, Ex. Q), and possibly 1988 (Tr., 148, Ex. Q).
4. Prior to 1994, Olup gave notice to Pennsylvania American Water Company (PAWCO) that the main line along Agnew Road was derelict and faulty, in terms of water leakage (Tr., 14).
5. The original cast iron main along Agnew Road was installed in 1937, having a useful life of 70 years (Tr., 70, 123, Ex. 2).
6. PAWCO had then undertaken no extensive repairs to the main line along Agnew Road – only placing a clamp on the main (Tr., 14).

The 1994 Break

7. The dwelling at 719 Agnew suffered two major water deluges from water main breaks along Agnew Road. Both water main breaks were located in or around 745 and 741 Agnew Road. 719 Agnew Road sits at a downgrade elevation from the location of the breaks. The first deluge was in March 1994 (Tr., 13, 40, 108-109, Ex. N).

8. Prior to this break, the dwelling at 719 Agnew was in excellent shape; the basement was in good shape (Tr., 97).

9. The 1994 water main break resulted in an emergency situation such that the elderly Klawinskis were removed from their home (Tr., 13).

10. Approximately 194,000 gallons was released from the break into the house at 719 Agnew Road and the surrounding areas (Tr., 14, 45, Ex. Q).

11. PAWCO paid damages or settled the claims of six to eight residents as a result of the 1994 break, except for the Klawinski damages (Tr., 14).

12. The house at 719 Agnew had then suffered approximately \$30,000 to \$40,000 in damages as a result of the break, with damage to the French drain, basement areas, personal items, washer and dryer, and personal data and information (Tr., 14-15).

13. The Klawinskis had to file suit against PAWCO to recover for their losses suffered in the 1994 deluge (Tr., 15-16).

14. The Klawinskis settled their 1994 water damage suit in 1996 for \$30,000. That sum did not cover all of the repair costs (Tr., 16-17, 53-54).

15. Following settlement, the money was used for repairs and upgrades to 719 Agnew Road, including installation of a new French drain system, and repairs to the basement area (Tr., 17, 55).

16. The dwelling was in good condition following these repairs (Tr., 97).

1996-2008

17. PAWCO field forces repaired the 1994 break by installing a section of 8-inch ductile iron pipe on the existing cast iron main (Tr., 120)

18. From 1996 through 2008, the dwelling at 719 Agnew and next-door neighbors along Agnew Road continued to suffer water intrusions in the basement areas (Tr., 17).

19. In that same time frame, Olup continued to petition PAWCO field forces to have the main line repaired on Agnew Road. *Id.*

The 2008 Water Main Break

20. In June 2008, a second major water main break occurred in the water main in Agnew Road (Tr., 17).

21. The 8-inch cast-iron main line “split” leaving a gash of 18-20 inches long. One to two inches of deposits had built up inside that line (the line had “tuberculated”) (Tr., 114, 122, 124, 129, 133).

22. Water was coming out of the break in the line “pretty hard” (Tr., 133).

23. The street was blown out due to the pressures of the break (Tr., 134).

24. Water inundated the dwellings upslope of 719 Agnew (Tr., 173).

25. The flow of water from this break cascaded down Agnew Road, into the yard and driveway of 741 Agnew Road, around the house, into the adjoining downgrade yards and house, and into the environs of 719 Agnew (Tr., 40, 110-111, 134, Ex. N).

26. The grade of Agnew Road down slope from the break area is 13-16%. 719 Agnew Road sits at a point 205 feet away from the 2008 (and 1994) break down slope and in a direct line along the path of water flow (Tr., 188).

27. Twelve to eighteen inches of water entered the basement area of 719 Agnew. Most of the water exited via the floor drain. Water did not enter the adjoining garage (Tr., 185-186).

28. Approximately 300,000 to 350,000 gallons were released from this break (Tr., 46).

29. The total elapsed time from the main break to shut down is not known (Tr. 130-131).

30. As a result of the 2008 flood, the dwelling at 719 Agnew Road again suffered damage – to the French drain, basement areas, and furnace (Tr., 41-42, Ex. N, O).

31. The water intrusion in 2008 resulted in terrible damage to the structure: black basement walls, water stains, stained tile, water marks and dirt (Tr., 98-99, 101, 186).

32. Two months later, in August 2008, a Travelers Insurance representative, Mr. John DePaola, and a representative of Disaster Restoration Services, Mr. Robert Bielich, then made a site visit to 719 Agnew, simply taking photographs of the structure (Tr., 21, Ex. J).

33. Shortly after the site visit, Mr. DiPaola merely sent a follow-up letter to Mr. Olup advising of a two-year statute of limitations relative to any claim for damages, and requesting that Mr. Olup provide a statement as to the loss (Tr., 35-36, Ex. I).

34. Thereafter, Olup sent two contractors' estimates to Travelers for the cost of a new French drain and for repairs to the basement of the dwelling, as a result of the 2008 water inundation (Tr., 22, Ex. O).

35. Olup spent the next several years contacting and writing certified letters to PAWCO personnel to request PAWCO address the damage to 719 Agnew as a result of the 2008 break, without response, or stonewalled, as Mr. Olup testified (Tr., 18, Ex. A, B, C).

36. In his letters, Olup clearly advised PAWCO that he did not want any money for the damages, but simply wanted the house fixed (“in-kind” – prior to the 2008 break) – and to remedy what was now a hazard, as well as a safety and health problem (Tr., 18-19).

37. Fifteen to twenty homeowners were affected by the 2008 main break (Tr., 19, 109).

38. Restitution or in-kind services were provided for five other properties, except for 719 Agnew (Tr., 19, 169).

39. Olup was required to file a civil suit, and also present his complaints to the PUC, having received no recourse or remedy (Tr., 22).
40. Olup contested PAWCO's rate increase request (Tr., 19).
41. Olup testified at the eighth public hearing on the rate case at Dravosburg, PA, also then testifying of his problems in getting anyone to respond to the issues at 719 Agnew Road (Tr., 23).
42. Olup also filed this Complaint with the Pennsylvania PUC due to concerns over safety, quality of service, and continual water trespasses to 719 Agnew Road (Tr., 19, 31).
43. Olup also petitioned Baldwin Borough and asked them to contact PAWCO to have a representative assess the damages and issues at 719 Agnew (Tr., 19, 65).
44. On August 23, 2011, the Allegheny County (Assessment Office) classified the dwelling at 719 Agnew as a having suffered a Catastrophic Loss (over a 50% loss in market value to dwelling) due to damages incurred in the 2008 water main break (Tr., 20, 42, Ex. P).
45. In the summer of 2011, Travelers Insurance, their counsel, and their expert made a site visit to 719 Agnew Road (Tr., 21).
46. Olup also petitioned the Allegheny County Health Department, initially on November 3, 2011, to assess safety and health issues with the dwelling. Mr. Olup continued to follow-up with the Health Department, without response (Tr., 20, 57-58, 65, 80).
47. The condition of 719 Agnew Road is presently unsafe, unsanitary and in bad shape (Tr., 47). Water still enters the basement area: worms are found in the basement areas (Tr. 78, 99).
48. The cast iron main along Agnew Road was replaced in 2010 with ductile iron piping (Tr., 24-25, 121, 128, 140, 146, Ex. 2). The old 1937 main was left in place (Tr., 140)

The Rate Increase Case

49. PAWCO lied in its rate increase settlement documentation when it stated/wrote that “Pennsylvania American Water Company has compensated [Olup], either in cash or in-kind, approximately \$34,000.” The source of this false statement appears to be a Mr. William Kelvington (Tr., 28, 29, 31, 72-73, 75-76, Ex. 9, 10, 11) (Appendix “D”).

50. Olup received no money nor anything in-kind from PAWCO as a result of the 2008 main break (Tr. 29-30).

PROPOSED CONCLUSIONS OF LAW

1. In the Recommended Decision of the Office of the Administrative Law Judge dated October 27, 2011, Docket No. R-2011-2232243 et al., that Court wrote:

The underlying ALJ are concerned about the allegations raised by Mr. Olup regarding the safety and health at the Olup service address that may have given rise to a water damage claim, which in turn has not been resolved to Mr. Olup’s satisfaction. While the parties may be privy to the facts surrounding these allegations, we agree with PAWC that the record of this proceeding has not developed these facts. We have confirmed that there is a separate formal complaint by Mr. Olup that remains pending at Docket No. C-2011-2247941 (footnote omitted). Consequently, the damages, safety and health issues regarding the Olup’ service address at Docket No. C-2011-2247943 will be addressed at Docket No. C-2011-2247941 (Opinion at 31).

2. This Court takes judicial notice of the aforementioned concerns of that Court (Tr., at 67-68).

3. As this Court noted in its November 17, 2011, Interim Order on Preliminary Objections, the Commission retains the jurisdiction to rule on Mr. Olup’s service and safety issues and may order other relief as appropriate.

4. As per this Court's November 17, 2011, Order, the Commission has broad powers to supervise and regulate all public utilities doing business within the Commonwealth and is empowered to determine whether a public utility is providing safe, adequate and reasonable service.

5. 66 Pa.C.S. §501 provides: (a) – Enforcement of Provisions of Part – In addition to any powers expressly enumerated in this part, the Commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the Commission in this part shall not exclude any power which the Commission would otherwise have under any of the provisions of this part.

6. 66 Pa.C.S. 1501 provides:

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 shall also 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. Subject to the provisions of this part and the regulations or orders of the Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the Commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The Commission shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supplied by a public utility (emphasis added)

7. Pursuant to this Court's Order of November 17, 2011, the Commission may impose civil penalties upon a utility which is found to be in violation of a statute, regulation or order of the Commission. See 66 Pa.C.S. §3301 – Civil Penalties for Violations.

8. This Court's November 17, 2011, Order concludes: "Utility service is not limited to the provision of service and includes 'any and all acts' related to that function and includes the maintenance practices of the utility regarding its facilities in a right-of-way. See 66 Pa.C.S. §102

(Defining “service”); *West Penn Power Co. v. Pa.P.U.C.* 578 A.2d 75 (Pa. Commw. 1990); *McCall v. Pennsylvania Electric Co.*, PUC Docket No. C-2009-2105240 (Initial Decision issued February 25, 2010).

9. 66 Pa.C.S. §3309 provides:

- a) General Rule – If any person or corporation shall do or cause to be done any act, matter, or thing prohibited or ***declared to be unlawful by this part***, or shall refuse, neglect, or omit to do any act, matter or thing enjoined or required to be done by this part, ***such person or corporation shall be liable to the person or corporation injured thereby in the full amount of damages sustained in consequence thereof***. The liability of public utilities, contract carriers by motor vehicles, and brokers for negligence, as heretofore established by statute or by common law, shall not be held or construed to be altered or repealed by any of the provisions of this part (emphasis added).

10. Continuous breaks in the main along Agnew Road over a 34-year timeframe put PAWCO on notice of a derelict main line nearing the termination of its useful life.

11. The 2008 main line break was the end result of PAWCO’s negligence in not previously replacing the line nor undertaking any significant repairs to guard against continuous leaks or failure.

12. The damages, safety and health issues presented at 719 Agnew Road are the direct result of the 2008 break and derelict main line (see also Tr., 188).

13. PAWCO stands in violation of 66 Pa.C.S. §1501.

14. This Court assesses a civil penalty against PAWCO consistent with 66 Pa.C.S. §3301 as follows:

15. As per 66 Pa.C.S. §3309(a), this Court declares PAWCO’s conduct unlawful, and as such, PAWCO is liable to Olup in the full amount of damages sustained in consequence thereof, to be assessed in the Court of Common Pleas.

SUMMARY OF ARGUMENT

This Court is singularly statutorily empowered to make adjudications relative to violations of 66 Pa. C.S. §1501. *Why* this Court is *without* the power to grant conclusive, *affirmative* relief merely underscores -- to this writer -- the lack of legislative insight.

Accordingly, this Court cannot award Olup damages. Undersigned counsel is unaware of any statutory or decisional authority that would permit this Court to mandate PAWCO undertake repairs of 719 Agnew Road.

However, PAWCO most assuredly stands in violation of §1501. As such, this Court must enter a civil penalty against PAWCO consistent with 66 Pa.C.S. §3301.

This Court must also declare PAWCO to have violated §1501, and that PAWCO is “liable to [Olup]” as the person “injured thereby.” In that manner, Olup may then proceed in Common Pleas Court for the “full amount of damages sustained in consequence [of the violation].” Accordingly, this Court will have at least afforded Olup some affirmative, if not conclusive, relief.

ARGUMENT

By any reasonable objective standard, PAWCO stands in violation of §1501. It is PAWCO’s mandatory duty to maintain safe, reasonable facilities and make repairs and improvements so to ensure continuing safety.

Continuous breaks in the main along Agnew [note: four to five documented major breaks at the *same location*] over a 34-year timeframe put PAWCO on notice of a derelict main line nearing the termination of its useful life.

The 2008 main line break was the end result of PAWCO’s negligence in not previously replacing the line nor undertaking any significant repairs to guard against continuous leaks or failure.

The damages, safety and health issues presented at 719 Agnew Road are the direct result of the 2008 break and derelict main line (see also Tr., 188).

Of course, the main itself was *bad* – that is why the *entire line* along Agnew Road was replaced in 2010.

Why Olup's overtures toward PAWCO all those years prior to 2008 went unanswered is a mystery to this writer.

Accordingly, Olup maintains that this Court must assess a civil penalty against PAWCO consistent with 66 Pa.C.S. §3301. This Court, sitting as the trier of fact as well as law has the discretion to order such a penalty.

Most importantly, under 66 Pa.C.S. §3309 (a), a declaration by this Court that PAWCO's actions were unlawful will allow Olup to proceed to Common Pleas Court for an assessment of the "full amount of damages sustained" as a result of the 2008 main line break. Undersigned counsel understands that the Court cannot assess damages or compel PAWCO to make an in-kind replacement at 719 Agnew Road. However, Common Pleas can award damages. Armed with the declaration by this Court that PAWCO engaged in unlawful conduct, this Court will afford Olup some interim affirmative relief that will greatly assist in his related claim for damages.

The Court will also recall that the dwelling at 719 Agnew Road suffered a "catastrophic loss," resulting in a substantial assessment reduction downward to \$22,000 (see Ex. P). Pursuant to 72 Pa.C.S.A. §5452.10(g) and Allegheny County Code §5-207.09, a homeowner suffering a catastrophic loss, or damage to a dwelling resulting in a loss in value of 50% or more, is entitled to a substantial reduction in the dwelling's assessed valuation. Should PAWCO argue that there is no nexus between the 2008 break and the damage to 719 Agnew, the Court may be guided by the afo-

resaid reduction and assessment in eliminating any concerns it may have with respect to the damages to 719 Agnew Road resulting from the 2008 break.

Finally, a word about Exhibit 11. PAWCO's Exhibit 11 is the "Appendix D" which was submitted as a larger document in the related rate increase case. Olup offers there cannot remain any reasonable misunderstanding relative to his 1994 damage settlement, and the misrepresentations set forth in Exhibit 11. The \$30,000 payment was made *over 15 years ago*. He has never received cash or in-kind anything approximating \$34,000. He certainly never testified to that in the public hearings related to the rate increase case. The source of this purported information in Exhibit 11 appears to be "the rebuttal testimony of Mr. Kelvington." (Ex.11, last page). This Court must keep Exhibit 11 first and foremost in its mind when assessing PAWCO's relative credibility in this matter.

OBSERVATIONS ABOUT THE WITNESSES CALLED AT TRIAL

Olup's Witness: John Stenglein

Mr. Stenglein is the quintessential disinterested witness with no "ax to grind," in the case. Mr. Stenglein offered pointed, dispassionate testimony about the condition of 719 Agnew Road before and after the 1994 and 2008 breaks.

PAWCO's Witnesses

Mr. Matthew J. Macek

Mr. Macek was apparently tasked with the unknowing responsibilities of sacrificial lamb: toeing the company line all the while attempting to authenticate documentary evidence that proved to be fanciful. [There are clear factual errors in PAWCO Exhibit 4: the split was not two inches (Tr., 124); PAWCO did not arrive on site at 9:00 a.m. (Tr., 130); the leak shut-down time of 9:30 is in-

correct (*Id.*); the main shut-off time was not 24 hours (Tr., 132)] The sheer number of errors in this document makes this writer pause to wonder if the document is nothing more than a fabrication.

Jasun Stanton

That PAWCO would call a witness that was never in the field for the 2008 break is dumbfounding. Beyond this, Mr. Stanton's imprimatur of his company's response protocol – based partly on a record which is clearly wrong – rings hollow. In other words, it's not okay to look at bad paper and conclude that all is right as rain.

John DePaola

Mr. DePaola was called merely to assassinate Thomas Olup: His testimony does little to help the Court resolve the issues before the Court. The fact that Mr. DePaola was not in the dwelling at 719 Agnew until a few months after the water main break renders any of his conclusions or opinions lacking in foundation.

Robert R. Beilich

As with Mr. DePaola, his visit to the dwelling, also a few months later, should give the Court pause to conclude that his opinions and conclusions also are without foundation.

CORRECTIONS TO TRANSCRIPT

- Page 27, line 22: The word “influence” is incorrect. It should read: “magic wands.”
- Page 37, line 24 reads: “I’m not good.” It should read: “I’m not that good.”
- Page 69, line 22: The word “eliminate” should be “enumerate.”
- Page 74, line 25: Reference to the year “2000” is incorrect. The correct reference is “2011.”

- Page 76, line 9 reads: “J. Olup: thank you your Honor.” This is incorrect. The line “thank you your Honor” was spoken by Mr. Gruin.¹

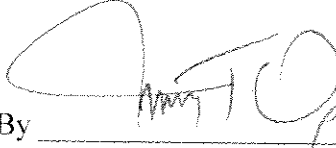
CONCLUSION

For all of the foregoing reasons, Thomas V. Olup respectfully prays this Honorable Court render a decision finding:

- (i) PAWCO to be in violation of 66 Pa.C.S. §1501;
- (ii) Assessing a civil penalty under 66 Pa.C.S. §3301 against PAWCO;
- (iii) Issuing a declaration under 66 Pa.C.S. §3309(a) that PAWCO’s actions are unlawful and that PAWCO is liable to Olup in the full amount of damages sustained in consequence thereof.

Respectfully submitted,

Bassi, McCune & Vreeland, P.C.

By 

Jeffrey T. Olup
Counsel for Thomas V. Olup

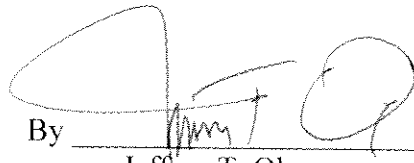
¹ Undersigned counsel has been trying cases for nearly 25 years now. Counsel has never “thanked” any tribunal for adverse decisions on objections or rulings during trial.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was forwarded to the following by
electronic and first-class mail, postage prepaid as of this date, March 22, 2012:

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By 
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Counsel for Thomas V. Olup