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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:

I am including herewith for file the Reply Brief of the Complainant in the above-docketed matter, which I ask be filed today.

Copies of the Brief are concurrently being forwarded to Michael A. Guin, counsel for Pennsylvania-American Water Company and the Honorable Mary D. Long, Administrative Law Judge, both 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. Guin, Esq. (w/enc.)
Thomas V. Olup (w/enc.)

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

THOMAS OLUP :
 :
-vs- : No. C-2011-2247941
 :
PENNSYLVANIA-AMERICAN WATER :
COMPANY :

REPLY BRIEF

The issue before the Court is not whether PAWCO: timely responded to the June 2008 break, had enough men or equipment on site, timely notified affected property owners, shut off the valves, repaired the break, observed its protocols, or provided inadequate “service.” Rather, the issue is whether PAWCO maintained adequate *facilities* along Agnew Road.

Some of PAWCO’s arguments cannot remain unanswered: At the top of Page 2, “Main Brief,” PAWCO notes: “Because the Complainant is utilizing this Commission [proceeding] as a mere pretext for pursuing his civil claim...” There is nothing pretextual about this proceeding. This Court is clearly vested with the power to determine whether PAWCO failed to provide safe, adequate and reasonable *facilities*. In the related Rate case, that Court wrote: “The underlying ALJs are concerned about the allegations raised by Mr. Olup regarding the safety and health of 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.” (Olup Brief, at 7) Therefore, at least two other judges wrote of their concerns for what PAWCO considers “mere pretext.”

Also, Main Brief, Page 2 bottom: “This matter was initiated by the filing of a Formal Complaint by Mr. Olup. The Complaint sought compensation from PAWC for damages and the cost of repairs to the Agnew Road Property that were alleged caused by the water main break, in addition to compensation for diminished market value.”

A cursory reading of the filed Formal Complaint on record reveals that Olup wanted: “Pennsylvania American Water Company – should make any or all *repairs/fixes/etc.* to the pre-existing major deluge on or about June 14, 2008, to the dwelling/environment and French drain (storm system).” (Emphasis added)

The next paragraph of the record Complaint notes: “*Absent the above*, the owner(s) should be fully compensated for these damages, including punitive damages against PAWCO...”

Thus, first and foremost, Olup wanted the property repaired. Still does.

Statute of Limitations

Invoking the three statute of limitations of 66 Pa.C.S.A. §3314, PAWCO offers:

To the extent that Mr. Olup is asserting other claims against PAWC, such other claims also have no merit. Mr. Olup spent considerable time at the hearing, and in his Brief, discussing the 1994 PAWC water main break. Similar to the 2008 break, Mr. Olup provided no evidence that the 1994 water main break constituted unreasonable service by PAWC. In any event, the statute of limitations for bringing a claim against PAWC as a result of the 1994 main break has long since expired. The statute of limitations for actions seeking finding of a violation of the Public Utility Code is three years. 66 Pa.C.S.A. §3314. Therefore, Mr. Olup’s allegations regarding the 1994 main break are irrelevant to the disposition of his Complaint. (Brief at 15-16)

First, Olup has not here filed any “claim against PAWC *as a result of the 1994 main break.*” Any claims for damages *as a result of the 1994 break* filed against PAWC – 16 years ago – were settled in 1996 by PAWCO paying the Klawinskis \$30,000. (Olup Brief, at 3)

Next, the Complaint before this Court was triggered by the 2008 main break – the latest in a series of main breaks [read 1975, 1978, possibly 1988, 1994, and 2008] occurring in the *same location* on Agnew Road. (*Id.*, at 2-3)

These previous main breaks – in the same location – are *entirely* relevant to this Court’s consideration of whether PAWCO’s line along Agnew Road was inadequate. On this point, this

Court should find the Pennsylvania Public Utility Commission published Opinion and Order in *Scott v. Pennsylvania-American Water Company*, Docket No. C-20054741, 2006 WL 6611395 (entered November 2, 2006), both helpful and surprisingly factually similar to the case at bar.

Ms. Scott filed a Formal Complaint alleging foundation and landscaping damage that occurred to her property as a consequence of repairs that Pennsylvania-American Water Company performed to repair a water main break on her property. Ms. Scott's Formal Complaint initially consisted of two issues. The first issue involved her dissatisfaction and continued problems after repair work was done on her property due to a PAWCO water main break in the vicinity of her property in August of 2000. The second issue was a high bill complaint, which had been settled and subsequently severed from the case.

Ms. Scott's Complaint was filed on July 21, 2005, approximately five years after the water main break which caused the foundation and property damage, as well as basement flooding. PAWCO hired a contractor to make repairs to her dwelling. However, Ms. Scott complained that her foundation was separating, that water and rodents came through her basement when it rained, that all of her landscaping was gone, and that her yard had subsided.

Ms. Scott testified that a previous water main break occurred in front of her house in 1984. At that time, PAWCO advised her that it was *her responsibility* and she spent approximately \$10,000 to excavate and replace the piping, etc. Water was still leaking into her basement and she later learned that it was PAWCO's main which caused the initial problem.

PAWCO's main broke again 10 years later in 1994, and again, there was flooding in her basement. Although PAWCO repaired the main in 1994, it broke again six years later in August 2000, and it was this water main break that caused the most damage to the foundation as well as basement flooding.

In the spring of 2001, after the winter thaw, water was again coming into Ms. Scott's basement, but this time it was on the other side where it had never flooded before. Ms. Scott indicated she made a *number* of calls to PAWCO and that she was *waiting* for their response. Ms. Scott also alleged that PAWCO *hung up on her* and eventually PAWCO employees *refused to speak to her*. In her words, "It became a three-ring circus." [Mr. Olup called his experiences with PAWCO as being "stonewalled" (Tr. 18) Same thing.]

The ALJ dismissed Ms. Scott's Complaint for her failure to meet her burden of proof that PAWCO was responsible or accountable for the issues raised in her Complaint, pursuant to 66 Pa.C.S. §332, and by reason that her Complaint was time barred, pursuant to 66 Pa.C.S. §3314. (All she wanted was her house repaired and "the job done right." – Same thing Olup wants here (Tr. 18-19).

Regarding the statute of limitations issue, the Commission directed the ALJ:

The complainant's assertion that the initial water main break repairs in 2000 were not adequately reviewed and must be addressed. *Since this appears to be a continuing problem from 2000* and the record is not dispositive of these issues, we cannot agree with the ALJ that the complainant's claim is time barred as proposed by PAWC.

In like fashion, the problems with the Agnew Road line were ongoing and a continuing problem for decades. In the words of the Commission's Opinion in Scott, these repeated main breaks "must be addressed."

Exhibit 11 (Appendix D)

A "reply" about Exhibit 11 [Exhibit 11 (Appendix D)]:

[Exhibit 11] does not reference a date of the compensation paid to Mr. Olup. If the Exhibit had stated that payment was made to Mr. Olup for the 2008 main break, it would be inaccurate. But the Exhibit does not contain any date reference, and is accurate in all respects, except for the technicality that the compensation was paid to Mr. Olup as power of attorney for his in-laws. (Brief, at 15)

Let's be intellectually honest. Exhibit 11 is simply wrong. First, Olup *never* received any in-kind compensation from PAWCO at any time; the sum of \$30,000 was received in 1996; the 1994 break claim was settled; no "larger damage award" could have been obtained in 1996, and no amount of money has been paid for the 2008 break. Exhibit D further reads: "Mr. Olup has filed a separate Formal Complaint with the PUC, at a different docket, about his dissatisfaction with the company's response to his damage claim." That Formal Complaint is now before this Court *as a result of the 2008 break*. Accordingly, Mr. Olup's conclusion that Exhibit 11 constitutes a "lie" is spot-on.

The context in which Exhibit 11 emerges is important in all of this. Exhibit 11 is Appendix D: "Pennsylvania-American Commitments (per Paragraph 8.i. of the Joint Petition), a part of a larger document of public record with the PUC at Docket No. R-2011-2232243 entitled "Joint Petition for Settlement of Rate Investigation."¹ Olup's testimony "summary" appears under heading: II. OTHER MATTERS, F. Dravosburg, 2.²

Appendix E to the "Joint Petition for Settlement of Rate Investigation" is titled: "Pennsylvania-American's Statement in Support of the Joint Petition for Settlement of Rate Investigation" and reads at Paragraph 14, Page 7:

In addition, Section II of Appendix D summarizes what the Company has done to address specific service or billing matters that were raised at the public input hearing. As noted in Appendix D, all of the issues and inquiries made by witnesses at the public input hearings were fully addressed by Mr. William C. Kelvington, the Company's Vice-President for Operations, in PAWC's Statement No. 2-R (pp. 29-53).³

Thus, the source of the company's "response" to Olup's testimony was provided by William C. Kelvington, in PAWC's Statement No. 2-R.

¹ This Joint Petition is of record with the PUC on its website.

² The transcript and testimony of the Dravosburg public meeting of August 10, 2012, is not available on the PUC website.

³ It appears that Statement 2-R was served on the various parties/counsel in the rate case or about September 2, 2011, but Statement 2-R does not appear on the PUC website at Docket Number R-2011-2232243.

A parting word or two must be aired concerning PAWCO's mischaracterization of Mr. Olup's "self-serving opinion testimony about the cause of the 2008 water main break" as being the "only" evidence that the subject main was derelict. (Brief, at 13-14)⁴ Let's again employ intellectual honesty and cast aside rhetoric and look to the undisputed physical facts of this matter:

- The Agnew Road main suffered four to five breaks in the same location resulting in water inundations to the residents along Agnew Road as well as the house and environs of 719 Agnew (Olup Brief, at 2);
- Damage occurred to 719 Agnew in 1994 to the degree that PAWCO paid \$30,000 to settle the Klawinskis' claims (Olup Brief, at 3);
- The *same* line split in 2008 in the *same* location, which line had one to two inches of deposits built up inside the line – the line had tuberculated (Olup Brief, at 4).

Tuberculated lines are evidently of some concern to the courts of this Commonwealth:

- See *Pennsylvania Public Utility Commission v. Pennsylvania Gas & Water Co.*, 79 Pa. PUC 349, 193 W.L. 601896 (June 10, 1993: "A significant proportion of PG&W's distribution system is nearing the end of its useful life. Moreover, the deleterious effects of decades of corrosion are not to be denied. The photographic evidence of the tuberculated condition of the Company's mains is powerful proof on that score.")

See also *Yeziuro v. North Fayette County Municipal Authority*, 193 Pa. Super. 271, 164 A.2d 129 (Pa. Super. 1960).

And, of course, the entirety of the Agnew Road main was replaced in 2010.

⁴ The last refuge when one has exhausted their legal arguments is to "attack the victim."

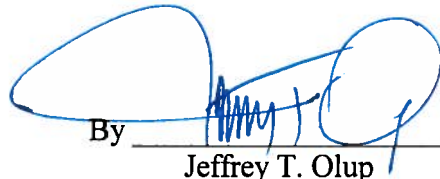
This “independent” physical evidence reinforces Mr. Olup’s opinion testimony that the line was derelict.⁵

Conclusion

Mr. Olup’s modest request remains: to grant the relief requested in his Formal Complaint, and as is set forth in Olup’s Brief, at 14.

Respectfully submitted,

Bassi, McCune & Vreeland, P.C.



By _____

Jeffrey T. Olup
Counsel for Thomas Olup

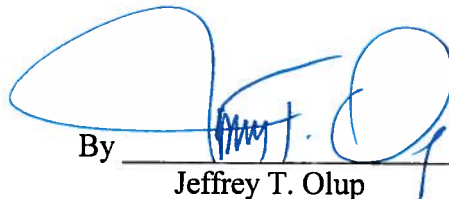
⁵ On this point, PAWCO’s Proposed Finding of Fact No. 46 reads: “Mr. Olup cannot identify any independent report that states that the PAWC water main on Agnew Road was derelict before it was replaced in 2010.” (Brief, at 8 See also Brief, at 14) This amounts to so much sound and fury, signifying nothing. This Court must be persuaded by the objective physical facts that the main along Agnew Road was well past its useful life and in a deteriorated condition.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief was forwarded to the following by electronic and first-class mail, postage prepaid as of this date, May 3, 2012:

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