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August 17, 2012

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed for filing on behalf of Pennsylvania-American Water Company is an original of its Reply to Exceptions in the above-referenced matter. This document was e-filed at the Pennsylvania Public Utility Commission's website. Copies have been served on the Complainant in accordance with the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Best Regards,

STEVENS & LEE

  
Michael A. Gruin

Encl.

cc: Certificate of Service  
Administrative Law Judge Mary Long  
Cheryl Walker Davis, Director, Office of Special Assistants w/encl. (Hardcopy and CD, via U.S. Mail)

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A PROFESSIONAL CORPORATION

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THOMAS OLUP	:	
Complainant	:	
	:	
v.	:	Docket No. C-2011-2247941
	:	
PENNSYLVANIA-AMERICAN	:	
WATER COMPANY	:	
Respondent	:	

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**PENNSYLVANIA-AMERICAN WATER COMPANY'S  
REPLY TO EXCEPTIONS**

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Pursuant to 52 Pa Code § 5.535, Pennsylvania-American Water Company (“PAWC” or “Company”), hereby replies to the Exceptions filed by the Complainant Thomas Olup. As set forth below, the Complainant’s Exceptions should be denied, and the Initial Decision should be upheld by the Commission. After carefully reviewing the sizable record in the case, the Administrative Law Judge correctly determined that Mr. Olup failed to prove that the Company had violated Section 1501 of the Public Utility Code. Mr. Olup’s Exceptions provide no basis for rejecting the Initial Decision, and instead merely restate many of the same unsubstantiated allegations that have no bearing on the issue of whether PAWC has provided reasonable service.

**I. Reply to Exceptions Regarding Procedural History**

The Procedural History outlined in the Initial Decision is correct, contrary to the Complainant’s Exceptions. This matter involves a Formal Complaint filed by Mr. Olup against PAWC in connection with a water main break that occurred in the vicinity of the Complainant’s in-law’s home at 719 Agnew Road Pittsburgh, PA (“the Agnew Road

Property”) in June 2008. The Complainant did not reside at the Agnew Road Property, but the Complaint sought compensation from PAWC for damages and the cost of repairs to the Agnew Road Property that were allegedly caused by the water main break, in addition to compensation for diminished market value. The Complaint also alleged that PAWC’s actions created continuing health and safety problems within the dwelling at 719 Agnew Road. Mr. Olup’s Complaint also included a protest to PAWC’s proposed residential rate increase.

On July 12, 2011, PAWC filed an Answer and New Matter and Preliminary Objections to the Complaint. PAWC’s Preliminary Objections sought a dismissal of the Counts of the Formal Complaint which related to the Company’s pending request for a rate increase, and the Counts which sought compensation and punitive damages from the Company. The Complainant filed his Answer to New Matter and Reply to Preliminary Objections on July 27, 2011.

By Interim Order dated November 17, 2011, Administrative Law Judge Mary Long (“ALJ Long”) granted PAWC’s Preliminary Objections in part, and dismissed the Complainant’s claims related to PAWC’s proposed rate increase and claim for relief in the form of monetary damages. Thereafter, the Complainant went to great pains to characterize his Complaint as involving “health and safety” concerns with PAWC’s service, but it is obvious that the Complainant is actually seeking a finding that PAWC is financially responsible for water damage to his property. Indeed, the Complainant candidly admitted in his Brief that his ultimate goal is to obtain a judgment against PAWC from the Court of Common Pleas for monetary damages, and that he is seeking a finding of unreasonable service from the Public Utility Commission (“Commission”) in

order to bolster his civil damages claim.<sup>1</sup> Because the Complainant is utilizing this Commission proceeding as a mere pretext for pursuing his civil claim, elements of the Complainant's damages claim permeate the record in this case.

The evidentiary hearing was held in this matter on January 19, 2012. Mr. Olup testified on his own behalf, and also presented the testimony of a neighboring property owner, John Stenglein. Mr. Olup also introduced 12 Exhibits into the Record. PAWC presented the testimony of witnesses Matthew Macek, Jasun Stanton, Giovanni (John) DePaola, and Robert Bielich. PAWC also introduced 10 Exhibits into the Record.

ALJ Long issued the Initial Decision on July 10, 2012, recommending the dismissal of the Complaint. The Complainant filed his Exceptions to the Initial Decision on August 7, 2012.

## **II. Reply to Exceptions Regarding Findings of Fact**

All of the Initial Decision's Findings of Fact are fully supported by the record, and Mr. Olup's Exceptions provide no basis to reject any of the Findings of Fact.

Finding of Fact No. 1 is correct. Mr. Olup apparently believes that the ALJ should have included additional biographical facts about him in the Finding, but such additional information is not pertinent. In any event, the ALJ did note on page 4 of the Initial Decision that Mr. Olup was a registered professional engineer and had experience with water distribution systems in other municipalities before his retirement 30 years ago. But Mr. Olup's assertions about being "called upon by PAWC field forces and supervisors to assist in finding main line breaks and leaks" are not supported by the record.

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<sup>1</sup> See Complainant's Main Brief, at p. 10.

Finding of Fact No. 2 is also correct. The fact that the Company's witness was not present when the main was installed in 1937 does not prevent him from testifying as to the date of installation based on Company records.

Finding of Fact No. 3 is well-established and agreed upon by all parties to the case. Mr. Olup's Exception to this Finding appears to relate to the fact that the hearing was held in-person rather than telephonically.

Finding of Fact No. 4 is based on the direct testimony of the PAWC supervisor who responded to the Agnew Road main break. Mr. Olup does not appear to contest the findings, but instead apparently objects to some of the specific transcript page number references. In any event, all of the statements made in the Finding can be located in the transcript between pages 108 and 133, wherein PAWC's supervisor explains the Company's response to the 2008 Agnew Road water main break in great detail.

Finding of Fact No. 5 is also correct. PAWC's witness Macek was a member of the repair crew that responded to the main break, so the ALJ's reference to "the repair crew" in Finding No. 5 was accurate.

Finding of Fact No. 6 regarding the 70 – 100 year useful life of cast iron pipes is correct and fully supported by the testimony of PAWC witness Jasun Stanton. Mr. Olup's argument that the useful life of the Agnew Road line is "closer to 30 or 40 years" is completely speculative and has no support in the record whatsoever. PAWC's witness explained that there are a variety of factors that contribute to water main breaks, and that just because a main breaks does not mean that the main is beyond its useful life. See N.T., pp. 139-141.

Finding of Fact No. 7 is also correct and undisputed. PAWC and Mr. Olup both acknowledge that the Agnew Road main also broke in 1994. Mr. Olup apparently is objecting to this Finding because it does not reference other, even earlier, main breaks from the 1970's. It was appropriate for there to be no such references to these other alleged breaks, because the record only contains vague and unsubstantiated references to these older alleged breaks, and because they have no bearing on the present case. The ALJ correctly rejected the Complainant's argument that these alleged breaks from the 1970's caused the Agnew water main to be considered "derelict". In doing so, the ALJ properly relied upon the direct testimony of PAWC's Manager of Field Operations, who has fourteen years of experience in water distribution field operations and who has supervised the Company's responses to hundreds of water main breaks in the Pittsburgh District. See N.T. 138-139. Mr. Stanton testified that the line was within its useful life in 2008 (N.T. 140), and a line with only two breaks in 14 years, such as the Agnew Road line, would not be considered troublesome (N.T. 146-148).

Findings of Fact Nos. 8, 9, and 10 provide the acknowledgement of prior main breaks that Mr. Olup appears to be seeking. But as the ALJ correctly noted, these prior breaks do not support the conclusion that the Agnew Road line is derelict. The Company's manager of field operations testified that four or five breaks over a 30-year period would not constitute a troublesome line, and that main breaks occur for a variety of reasons beyond the Company's control. See N.T. 146-148, 139. Mr. Olup disagrees with this conclusion and argues that his expert opinion should be relied upon over the opinion of the Company's witness. But while Mr. Olup held himself out as an expert on water system design and maintenance, the reality is that his experience was limited to

acting as a consulting engineer for a municipal water authority nearly thirty years ago.<sup>2</sup> This experience does not qualify him as an expert on water distribution system maintenance and repair, and certainly does not qualify him to opine on the useful life of the Company's water mains.

Finding of Fact No. 11 is also undisputed. PAWC replaced the entire water main on Agnew Road in 2010. (N.T. 140-141, 146-148). Mr. Olup argues that the fact that the Agnew Road line was replaced in 2010 proves that the line was derelict. The conclusion is meritless, as will be discussed in more detail below.

### **III. Reply To Exceptions: Discussion and Conclusions**

The ALJ correctly concluded that Mr. Olup failed to meet his burden of proving that the Company violated Section 1501 of the Public Utility Code in any way. As the party seeking the intervention from this Commission, Mr. Olup bears the burden of proving that the Company violated provisions of the Public Utility Code or the Public Utility Commission's regulations in some fashion.<sup>3</sup> To establish a sufficient case and satisfy the burden of proof, Mr. Olup is required to show that PAWC is responsible or accountable for the problem described in the Complaint.<sup>4</sup> Such a showing must be by a preponderance of the evidence<sup>5</sup>. Any finding of fact necessary to support the Commission's

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<sup>2</sup> N.T. 50-51

<sup>3</sup> Section 332(a) of the Public Utility Code, 66 Pa. C.S. §332(a).

<sup>4</sup> Patterson v. Bell Telephone Company of Pennsylvania, 72 PA PUC 196 (1990), Feinstein v. Philadelphia Suburban Water Company, 50 PA PUC 300 (1976).

<sup>5</sup> Samuel J. Lansberry, Inc. v. Pa. Public Utility Comm'n, 134 Pa. Commw. 218; 221-222, 578 A.2d 600; 602 (1990), *alloc. den.* in 602 A.2d 863 (1992).

adjudication must be based upon substantial evidence.<sup>6</sup> More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.<sup>7</sup>

Specifically, Mr. Olup bears the burden of establishing, by a preponderance of the evidence, that PAWC violated Section 1501 of the Public Utility Code, which states that:

“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.”

Mr. Olup clearly has not met this burden. The thrust of Mr. Olup’s case is that that PAWC violated Section 1501 because the Agnew Road water main was “derelict” when the break occurred in 2008. But, as the ALJ correctly noted, Mr. Olup’s allegations are not supported by any first-hand knowledge of the actual facilities present on Agnew Road, any investigation, or any specific engineering handbooks, guidelines or industry standards. Instead, his allegations are based on nothing more than his own opinion. Furthermore, his opinion is directly refuted by the opinion of PAWC’s manager of field operations, who does have first-hand knowledge and experience regarding the Company’s lines and engineering practices.

Much of the evidence and testimony submitted by Mr. Olup bears no relation to the 2008 main break at all, and instead either relates to water main breaks from decades ago, or to the purported damage to the house at 719 Agnew Road. His Exhibits consist of two letters to PAWC’s President (Exhibits A-C) which essentially mirror his Complaint and his testimony in this case, diagrams of 719 Agnew Road (Exhibits G-H), a letter from

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<sup>6</sup> Mill v. Comm’w., PA Public Utility Comm’n, 447 A.2d 1100 (Pa. Cmwlth.1982); Edan Transportation Corp. v. PA Public Utility Comm’n, 623 A.2d 6 (Pa. Cmwlth.1993), 2 Pa.C.S. §704

Travelers requesting information in support of his loss claim (Exhibit I), Photos of 719 Agnew Road taken months after the 2008 main break (Exhibit J), an Underground utility report (Exhibit L), an overhead map of Agnew Road (Exhibit N), contractor estimates and invoices (Exhibit O), a property tax assessment appeal stipulation that in no way references the cause of damage to Mr. Olup's house (Exhibit P), and more reports related to the 1994 main break (Exhibit Q). It cannot be reasonably stated that any of these documents in any way support a conclusion that the Agnew Road line was "derelict" or that PAWC's service was unreasonable. Even if these documents proved that Mr. Olup's house sustained water damage as a result of the water main break (which they clearly do not), this alone would not prove that PAWC's service was unreasonable. As PAWC's witnesses testified, main breaks occur regularly, for a variety of reasons. In order to prove his case, Mr. Olup is required to submit some proof that PAWC's service was unreasonable. Mere allegations and suspicions are not sufficient for him to meet his burden of proof.

Mr. Olup's evidence of unreasonable service consists largely of his own self-serving "opinion" testimony that the Agnew Road main was "derelict". But no matter how many times Mr. Olup repeats his lay opinion that the Agnew Road line was "derelict", there simply is no credible evidence in the record which would allow for such a conclusion. First, Mr. Olup admitted that he did not witness the water main break or PAWC's response to the break, because he does not even reside on Agnew Road at the

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<sup>7</sup>Norfolk and Western Ry. v. PA Public Utility Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Compensation Bd. of Review, 166 A.2d 96 (Pa. Super.1960); Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa. Cmwlt.1984).

time of the break.<sup>8</sup> Therefore, any conclusions that he makes about the cause of the main break, the water flow from the main break, and PAWC's response to the main break are pure speculation. Secondly, while Mr. Olup held himself out as an expert on water system design and maintenance, the reality is that his experience was limited to acting as a consulting engineer for a municipal water authority nearly thirty years ago.<sup>9</sup> This experience does not qualify him as an expert on water distribution system maintenance and repair, or on the current condition of PAWC's distribution mains. Third, the record contains no evidence that Mr. Olup conducted an investigation to determine the cause of the 2008 break, and Mr. Olup could not refer to any manuals, design regulations, or codes to support his conclusion that PAWC's main was "derelict".<sup>10</sup> Fourth, Mr. Olup could not provide any independent corroboration or support for his conclusions that PAWC acted unreasonably or that the line was "derelict". Despite seeking corroboration of from numerous sources, including Baldwin Borough, Allegheny County, and the Office of Consumer Advocate, Mr. Olup could not provide any independent report or witness to support his allegation that PAWC's service was unreasonable or that the line was "derelict".<sup>11</sup>

PAWC's witnesses thoroughly rebutted all of Mr. Olup's claims about unreasonable service. The record reflects that the water main in question was approximately 70 years old, and within its useful life.<sup>12</sup> PAWC's witnesses explained that main breaks occur for a variety of reasons beyond the Company's control, including condition of soil, condition of the pipe, ground temperature, water temperature, and other

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<sup>8</sup> N.T. 189

<sup>9</sup> N.T. 50-51

<sup>10</sup> N.T. 70-71

<sup>11</sup> N.T. 56-70

weather-related conditions.<sup>13</sup> As such, water distribution companies expect their mains to break from time to time, and that the breaking of a water main does not indicate that the main was not maintained properly or was beyond its useful life.<sup>14</sup>

PAWC also provided extensive evidence regarding its response to the Agnew Road water main break. PAWC responded to the water main break within an hour of the break occurring, and had the water flow isolated and stopped within another hour.<sup>15</sup> A repair crew arrived on the scene the following morning, and completed the repairs and restored water service by 6 p.m. that day.<sup>16</sup> PAWC's witnesses confirmed that all company protocols were followed, including activation of the customer information system and contact to Emergency One Call.<sup>17</sup> PAWC's witnesses testified that the cause of the break was likely weather and temperature related, and that such breaks are not unusual in a distribution system.<sup>18</sup>

Mr. Olup's Exceptions maintain that the Agnew Road water main was "derelict" because the main experienced a break in 1994, and again in 2008. But, as the ALJ correctly observed, materials and facilities deteriorate over time and water mains fail as well. The fact that the Agnew line broke and caused property damage by itself is not enough to conclude that the Company violated Section 1501.<sup>19</sup> Mr. Olup did not provide any evidence regarding the useful life of distribution lines, or maintenance and repair schedules for such lines, or any probative evidence regarding PAWC's handling of the

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<sup>12</sup> N.T. 132

<sup>13</sup> N.T. 146-148, 139.

<sup>14</sup> N.T. 139.

<sup>15</sup> N.T. 110-111, 131

<sup>16</sup> N.T. 113

<sup>17</sup> N.T. 112, 116, 138

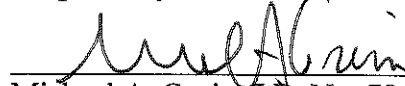
<sup>18</sup> N.T. 149-151

<sup>19</sup> Rodgers v. Pennsylvania-American Water Company, PUC Docket No. C-20066054 (Final Order December 6, 2006).

lines. Mr. Olup's argument is, simply, that the Agnew Road line was derelict because it broke. This is nothing more than a classic bald assertion and personal opinion, and it is well established that mere bald assertions, personal opinions or perceptions do not constitute evidence. Pennsylvania Bureau of Corrections v. City of Pittsburgh, 516 Pa. 75, 532 A.2d 12 (1987).

As the Complainant, Mr. Olup bears the burden of proving the allegations of his Complaint by a preponderance of the evidence. Mr. Olup has not met this burden. Other than Mr. Olup's own statements, there is no evidence that PAWC was negligent in maintaining its water distribution facilities or in responding to the main break. By contrast, PAWC has provided significant evidence and testimony to prove that PAWC's response to the main break was appropriate and timely, and that PAWC acted reasonably in all respects in connection with the maintenance of its facilities and the response to the main break. In short, there is nothing in this record that would allow for a conclusion that PAWC violated Section 1501 of the Public Utility Code by maintaining or furnishing inefficient, unsafe, unreasonable, or inadequate service or facilities, and therefore, Mr. Olup's Complaint must be dismissed.

Respectfully submitted,



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Dated: August 17, 2012

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

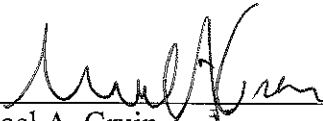
THOMAS OLUP	:	
Complainant	:	
	:	
v.	:	Docket No. C-2011-2247941
	:	
PENNSYLVANIA-AMERICAN	:	
WATER COMPANY	:	
Respondent	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA Electronic Mail and First Class US MAIL

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DATED: August 17, 2012