BEFORE THE
COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

TANYA J. MCCLOSKEY, ACTING CONSUMER ADVOCATE,	**Docket No. C-2014-2447138**
vs.	
HIDDEN VALLEY UTILITY SERVICES, L.P. (Water)	
AND	
TANYA J. MCCLOSKEY, ACTING CONSUMER ADVOCATE	**Docket No. 2014-2447169**
vs.	
HIDDEN VALLEY UTILITY SERVICES, L.P. (Wastewater)	

EXCEPTIONS OF INTERVENORS, ROBERT J. KOLLAR AND KELLIE A. KUHLEMAN, TO THE INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JEFFREY A. WATSON DATED AUGUST 23, 2016 AND MAILED BY THE PENNSYLVANIA PUBLIC UTILITY COMMISSION ON SEPTEMBER 9, 2016

AND NOW, come Intervenors, Robert J. Kollar and Kellie A. Kuhleman (hereinafter collectively "Intervenors"), and files their Exceptions to the Initial Decision issued by Administrative Law Judge Jeffrey A. Watson ("ALJ") on August 23, 2016 and mailed by the Pennsylvania Public Utility Commission ("PUC") on September 9, 2016 (hereinafter "Initial Decision" or "I.D.") in accordance with 52 Pa. C.S. § 5.533.

INTERVENOR'S FIRST EXCEPTION:

The Initial Decision Fails to Impose Appropriate Civil Penalties against Respondent as Authorized by the Public Utility Code for Respondent's Failure to Comply with the 2005 Settlement Agreement

On February 12, 2004, Respondent, Hidden Valley Utility Services, L.P. (hereinafter "HVUS") filed two (2) applications for approval to begin to offer, render, furnish or supply water and wastewater services to the public in Hidden Valley, Pennsylvania at Docket Nos. A-00210117 and A-00230101. Protests were filed to the applications, and the parties subsequently reached a settlement agreement that addressed the issues raised by the parties in the application proceedings. The Settlement was approved by a PUC Order entered on July 15, 2005 (hereinafter "2005 Settlement Agreement"). Pursuant to the terms of the 2005 Settlement Agreement, HVUS was required to implement changes and improvements to provide adequate, safe and reasonable service and to address various issues including, *inter alia*, brown or rust colored water, low water pressure, and high levels of unaccounted for water by July 15, 2015.

The ALJ correctly determined that at the time of the hearing in the above captioned matters on November 17, 2015, HVUS had failed to comply with 2005 Settlement Agreement in the following respects:

> 1. Respondent has not complied with the provision which required that it submit a report to FUS and all parties reassessing the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese. OCA St. 2 at 9; OCA St. 2S at 8; Tr. 381
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> 2. Respondent has not replaced 1,500 feet of 3-inch line to the "Heights" neighborhood, as well as 1,000 feet of2-inch line to the "Valley View" neighborhood in Hidden Valley, which was required to be completed by July 2015. 2005 Settlement (ALJ

Exh. 2), Paragraph A.16; OCA St. 2 at 15.

3. Respondent has failed to hold semi-annual customer meetings. HVUS St. 3-R at 3.

4. Respondent has failed to timely submit its report to FUS[1] reassessing the need, size and cost of treatment plant to permanently solve the problems caused by the level of iron and manganese in its water and to replace the mains smaller than 6-inch or larger pipe.

5. Respondent discontinued semi-annual customer meetings.

6. Respondent never petitioned to the Commission for an extension or waiver of the deadlines imposed by the 2005 Settlement.

I.D. at 8.

Upon reaching the conclusion that HVUS had failed to comply with the 2005 Settlement Agreement the ALJ should have then proceeded to impose civil penalties specifically authorized by the Public Utility Code against HVUS. Nevertheless, and apparently relying on the fact that "No party requested the assessment of a civil penalty in this proceeding," (I.D., pg. 35, FN 14), coupled with the ALJ's summary conclusions that (a) "Respondent's resources would be best used in order to comply with the 2005 Settlement and implementing the remedies proposed by this decision;" (b) "no other evidence or circumstances in this case warrant the imposition of a civil penalty,"[2] the ALJ declined to impose a civil penalty against HVUS. I.D.36. Respectfully, Intervenors believe that this was an error of law and abuse of discretion warranting review on exceptions for the reasons set forth herein.

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[1] The functions previously performed by the Commission's Bureau of Fixed Utility Services (FUS) are now performed by the Bureau of Technical Utility Services (TUS).

[2] Intervenor's exceptions to the alternative "remedies" proposed by the ALJ in the Initial Decision will be discussed at length herein, *seriatim*.

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a. The Imposition of a Civil Penalty For Failure to Comply With a Commission Order Is Mandatory, Not Discretionary Under the Statute.

In the Initial Decision, the ALJ concludes "Section 3301 of the Public Utility Code ("Code") authorizes the Commission to assess a civil penalty for violations of the Code, regulations or orders of the Commission in an amount up to $1,000.00 per violation," as if to suggest that the decision to invoke this provision was discretionary. I.D. 35. A plain reading of Section 3301 of the Code, in relevant part, reveals that the imposition of such penalty is not discretionary but in fact is mandatory, to wit:

> If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part . . . or [fail] 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.
>
> 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 final judgment, order or decree made by any court, shall be a separate and distinct offense.

66 Pa. C.S. §3301(a)-(b). (Emphasis added).

In light of the ALJ having concluded that as of the hearing date HVUS had "failed to comply with the 2015 settlement agreement," and further that "[HVUS] failure to comply...constitutes a violation of Section 501(c) of the Public Utility Code giving use to liability under 66 Pa. C.S. § 3301(a)-(b)", the ALJ was statutorily bound to impose civil penalties against HVUS in the minimum amount of $1,000.00 x 125 days[3] or $125,000.00, regardless of whether any party requested the assessment of a civil

[3] July 15, 2015 until November 17, 2015.

penalty. This is especially true when HVUS was put on notice of the fact that fines could be imposed by virtue of the Commission's notice that accompanied the complaint at the time of service by OCA.

In Executive Transportation Company, Inc. v. Alexa Limo, Inc., Docket A-00118448C0201 (Order entered December 2, 2003), the Commission addressed a similar issue regarding the decision to impose a fine when the formal complaint did not specifically request the same. In Executive, the Commission concluded that although the formal complaint did not request the imposition of a fine, the respondent had adequate notice that fines could be imposed by virtue of the Commission's notice which accompanied the complaint at the time of service. Citing its authority under Section 3301 of the Code to impose a civil penalty of $1,000 per day against any individual or entity that violates [Commission] rules, regulations or directives, the Commission *sua sponte* determined that a $3,000 fine should be imposed due to the gravity and seriousness of the violation.

Assuming *arguendo* that the imposition of fines for failure to comply with the 2005 Settlement Agreement that was approved by Commission Order is a discretionary function (which Intervenors do not concede), the ALJ should have properly exercised his discretion, disregarded the fact that the Complaint filed by OCA did not request the imposition of fines, and imposed said fines pursuant to the clear language of Section 3301 of the Code. *See* 52 Pa. Code §1.2(a)("The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties"). *See also,* Re Port Authority of Allegheny County, 82 Pa PUC 600 (1994) ("Commission has discretionary authority

to disregard an error or defect of procedure which does not affect substantive rights of the parties in order to secure just, speedy and inexpensive determination of every action").

Finally, it should not be lost on anyone that HVUS had ten (10) years to comply with the terms of the 2005 Settlement Agreement yet failed to do so by the July 15, 2015 deadline. HVUS's President, James Kettler ("Kettler") admitted under oath during the November 17, 2015 hearing that during the past six (6) years the company had "free cash flow," and that he distributed an average of $105,000.00 per year to the partners (or 80% of the free cash flow). *See* November 17, 2015 N.T ("N.T.") 394, *ll.* 14-22, When specifically asked by Intervenor Kollar why, if given the fact his explanation for non-compliance was that "the company had been experiencing losses," and he knew that he had an agreement to comply with, he was distributing so much cash to the partners, Kettler boldly stated "Because I had a capital investment of millions of dollars and wanted to get a little return on my money." N.T. 395, *ll.* 3-4. Such an admission clearly demonstrates the willful and wanton disregard that HVUS/Kettler has for Commission Orders, and further highlights the fact that there should have been no question on the ALJ's part that mandatory penalties should have been imposed against HVUS.

Under Pennsylvania law, every public utility, its officers, agents and employees, and every other person or corporation subject to the provisions of the statute, "shall observe, obey and comply with such regulations or order, and the terms and conditions thereof. " 66 Pa. C.S. §501(c). The rate paying customers who are supposed to be served by HVUS want and have a right to expect HVUS' compliance with the 2005

settlement agreement that permitted HVUS to operate as a public utility in the first instance.

Despite the fact that HVUS had a clear legal obligation to use available cash flow generated by its utility to satisfy its obligations under the 2005 Settlement Agreement, HVUS/Kettler chose instead to distribute approximately 80% of the available cash flow of HVUS to its owners, principally Kettler who admitted this during the hearing on November 17, 2015. N.T. 394-395. This self-dealing has been going on for at least the past six (6) years. Id. In light of these undisputed facts, the ALJ's conclusion of law that "A civil penalty under the circumstances is not necessary as Respondent's resources would be best used in order to comply with the 2005 settlement and in implementing the remedies imposed by this decision," (I.D. 36), is simply without evidentiary or factual support in the record, and further paves the way for HVUS/Kettler to continue using the utility for personal gain without affording the rate payers any relief, or reasonable assurance that compliance with the 2005 Settlement Agreement (that has yet to be achieved during the past ten (10) years) will ever be achieved.

INTERVENOR'S SECOND EXCEPTION:

The ALJ Improperly Concluded That HVUS Should Not Be Placed Into Receivership When the Record Is Replete With Evidence That HVUS Does Not Possess the Requisite Technical, Managerial and Financial Fitness to Operate As Public Utility

Sections 501(a), 1103 and 1501 of the Public Utility Code impose an on-going responsibility on certificated public utilities to maintain managerial, technical and financial fitness. 66 Pa. C.S. §§501(a), 1103, 1105; Re Mobilfone of Northeastern Pa, Inc., 54 Pa. PUC 521, 523 (1980). In the context of water utilities, the Commission defines a "viable system" as "one which is self-sustaining and has the commitment and

financial, managerial and technical capabilities to reliably meet Public Utility Commission and [DEP] requirements on a long-terms basis." *Policy Statement Re: Small Drinking Water System Viability and Memorandum of Understanding between Department of Environmental Resources and Pennsylvania Public Utility Commission*, 52 Pa Code §69.701.

Case law describes the examination of technical and financial fitness of a public utility company, finding "that an applicant for a certificate of public convenience is required to demonstrate its fitness to render the proposed service. Fitness encompasses the technical capacity to meet the need in a satisfactory fashion, financial capacity to obtain the equipment needed to perform the proposed service in a reliable and responsible fashion, and a propensity to operate safely and legally. Application of Evansburg Water Company, 1992 Pa. PUC LEXIS 176. A public utility must have the ability to "give reliable and respectable service to the public. [The public utility] should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service." Application of Samir Ouaqerrouch, 2012 Pa. PUC LEXIS 1027.

In his Initial Decision, the ALJ concludes "Based on the evidence presented, OCA has not demonstrated that [HVUS] is insolvent or that [HVUS] lacks the fitness to manage the utility in a manner that provides adequate service to its customers," and further "that the losses sustained by [HVUS] most likely result from the lack of growth in residential customers and the fact that [HVUS] has never obtained a rate increase." I.D. 28. Respectfully, a mere cursory review of the record in this matter belies such a conclusion. Indeed, not only does the overwhelming weight of the evidence

demonstrate that the HVUS is not a viable utility (lacking both the technical and managerial fitness), it further demonstrates that the company is insolvent.

a. The Record Demonstrates that HVUS Has Failed to Demonstrate Technical Fitness

The record establishes that HVUS is unable to provide adequate services to the public by virtue of its technical deficiencies. Those multiple technical deficiencies are identified herein, *seriatim*.

i. HVUS is Not Providing Adequate Water Service

In terms of water quality, the record is replete with the sworn testimony of customers complaining of brown or rust-colored water which requires them to purchase water for cooking, and further requires them to install and replace water filtration systems in their home at unusually short intervals of time because the filters become heavily soiled due to the levels of iron and manganese in the water. *See* I.D. at 18. The poor quality of the water has ruined clothes and sheets. Id. Flushing or running of water "for hours" results in higher water use and resulting higher water bills for the customers. *See N.T.* 263. Indeed, the ALJ made the specific legal finding that "while [HVUS'] water may not violate primary drinking water standards such that it is unsafe to drink, the evidence in this case demonstrates that, at certain times, the water is brown or rust-colored and is not suitable for basic household purposes . . . [and that] under the circumstances, HVUS is not consistently providing adequate water service under Section 1501.

The fact that HVUS is not providing adequate water service could not have been made any clearer than by the fact that the ALJ himself made the following legal conclusion:

> Although the design and use of the water system certainly may contribute to the water discoloration, the inability or unwillingness to drink the water by some customers as well as the burden to run water until it becomes clear, renders the water service provided by [HVUS] unreasonable, in violation of 66 Pa. C.S. §1501.

I.D. 19-20.

Finally and as previously discussed, the ALJ determined that HVUS failed to comply with the Commission-approved 2005 Settlement Agreement, which included, *inter alia*, HVUS's failure to replace 1,500 feet of 3-inch line to the "Heights" neighborhood, as well as 1,000 feet of 2-inch line to the "Valley View" neighborhood in Hidden Valley. I.D. 14. *See also,* Paragraph A.16; OCA St. 2 at 15.

There can be no clearer indication of a technical inability to sufficiently provide services to the public than HVUS's failure to comply with the terms of the 2005 Settlement Agreement after having a decade to do so. Simply put, if HVUS possess the technical ability to provide adequate services to the public, the requirements of the 2005 Settlement Agreement would have been timely satisfied, and the instant matter would not be before the Commission.

It is axiomatic that if the evidence led to the conclusion that the water service provided by HVUS was in violation of 66 Pa. C.S. §1501, that one cannot conclude that HVUS has the requisite technical fitness to operate a water utility. This is especially true in light of the fact that HVUS was supposed to have addressed and corrected this problem within two (2) years of the Effective Date of the Settlement Agreement (or by July 2007) and further implemented a plan of testing its water source for iron and manganese levels three (3) times per year. *See* 2005 Settlement Agreement ¶21. The fact that HVUS has obviously failed to do this during the past ten (10) years begs the

question of why the ALJ would have given HVUS "ninety (90) days from the date of the final commission order entered in this proceeding to submit a proposed remedy to reassess the need, size and cost of a treatment plant to permanently solve the problems caused by iron and manganese," and then an additional year to comply with the engineer's recommendations. August 23, 2016 Order ("Order") at ¶¶4-6. Giving HVUS another year plus 90 days to accomplish what it was supposed to have accomplished nine (9) years ago is certainly not going to facilitate anything except further prejudice to the customers who have already been dealing with this situation for the past decade, and who were appropriately looking to the PUC to enforce its own Order and immediately address the problem. This is especially true in light of the fact that the Order is absolutely silent on the issue of what the penalties will be for future non-compliance!

ii. HVUS is Not Providing Adequate Waste Water Service

It is undisputed that at the date of the hearing, the project to install or maintain backup pumps at the pumping stations and working alarms had not been completed by HVUS. I.D. 22. *See also* OCA St. 2 at 3- Waste Water. It is further undisputed that by operating pumping stations without back up pumps and with inoperative alarms, HVUS has "taken unnecessary risks of sewage contaminating the ground or backing up into customer's buildings or homes." OCA St. 2 at 9- Waste Water. Finally, Treatment Plant 1 has rusty tankage that requires repainting, and a blower that has been missing for more than a year." OCA St. 2 at 9- Waste Water.

It is axiomatic that if the evidence led to the conclusion that HVUS "violated that Public Utility Code by failing to provide safe, adequate and reasonable wastewater

service as required by Section 1501", *See* I.D. at 22, that one cannot logically conclude that HVUS has the requisite technical fitness to operate a waste water utility.

b. The Record Demonstrates that HVUS Has Failed to Demonstrate Managerial Fitness for the Past Ten Years

In his Initial Decision, the ALJ concluded that "OCA has not demonstrated that [HVUS] lacks the fitness to manage the utility in a manner that provides adequate service to its customers" I.D. at 28. It is hard to comprehend how this decision could be reached however, when the record is replete with evidence that clearly demonstrates that for the past ten years (10) years HVUS has clearly been unable to appropriately manage and operate as a public utility in accordance with the Commission requirements regarding billing, customer service/relations and PUC annual reporting requirements. Those managerial deficiencies are identified herein, *seriatim*.

i. HVUS Has a Demonstrated History of Deficient Billing Practices

56 Pa. Code §56.15(12) and (13) sets forth the billing information required to be included in a utility's bills to its customers. The 2005 Settlement Agreement specifically provided that HVUS was to correct its billing practices so that they were in line with said requirements. This clearly did not happen.

As noted by the ALJ in his Initial Decision, "[HVUS] uses a legacy billing system that does not display all the information required by the regulations." I.D. 23. Moreover, the bills do not provide:

a. a rate schedule;

b. an explanation of how to verify the accuracy of the bill, and that an explanation of various charges are available for inspection at [HVUS's] local business office, as required by 52 Pa. Code §56.15(12);

c. a description of the applicable rate schedule, as required by 52 Pa. Code §56.15(13);

d. the bills are vague, less than informative, and do not provide all information required by the Commission regulations;

e. the bills display water usage in hundreds of gallons, but the units are not stated on the bill; and

f. that, in calculating the bill, [HVUS] drops the last two digits of usage

I.D. at 22-23.

Despite the fact that the ALJ determined that "HVUS' bills do not comply with all Commission regulations at 52 Pa Code §56.15(12) and (13)," (I.D. 24), and further given the fact that the proper bill preparation was a specific condition of the 2005 Settlement Agreement, the ALJ failed to properly conclude that HVUS does not manage the utility in a manner that provides adequate service to its customer.

Finally, it should not be ignored that an additional condition of the 2005 Settlement Agreement related to customer billing was the requirement that HVUS hold a customer meeting each spring and fall for the purpose of having a representative of HVUS with authority and knowledge to speak and answer questions related to service and billing, and that said meetings had to commence on the Effective Date of the Agreement, or July 15, 2005. *See* 2005 Settlement Agreement at 11, ¶37. It is undisputed that HVUS did not follow through with this contractual and legal obligation.

ii. HVUS Has A Demonstrated History of Delinquent and Inaccurate Financial Filings With the PUC

The record in this matter is clear. HVUS has a demonstrated history of its inability and/or unwillingness to file required financial reports with the PUC in a timely manner and with complete and accurate information. *See* I.D. 25 *citing* OCA St. 1 at 7.

Indeed, HVUS filed its 2014 Annual Reports more than six (6) months after the filing deadline, to wit: they were due on April 30, 2015 but were not filed until November 4, 2015. The 2015 Annual Reports that were due on April 30, 2016 were filed on May 4, 2016 (this despite the fact that HVUS knew that this was one of the key issues being considered in the above captioned litigation commenced by OCA!). Without timely and accurate reports, it is difficult, if not impossible, for the Commission and interested parties to monitor HVUS, its financial position, and any investments in the system. OCA St. 1 at 7. Moreover, failure to timely submit Annual Reports and the fact that there are discrepancies from year-to-year and even within the same year's report indicate that [HVUS] lacks the managerial fitness that is necessary for the provision of safe and adequate service. *See* Direct Testimony of Everette, OCA Statement 1 at pg. 7.

Intervenors would ask that the Commission take judicial notice of the fact that during the hearing on November 17, 2015, Kettler testified that he was going to correct prior year annual reports within 90 days of the proceeding with the assistance of his "consultant", Paul Herbert. *See* N.T. 371. A review of the docket in this matter reveals that this still has not been done as of the date and time of the filing of the within Exceptions. Moreover, a review of the delinquently filed 2015 Annual Reports reveals that no such line entry for accountant and/or consultant fees associated with the "preparation or correction of Annual Reports" in Docket Nos. 210117 and 230101 is included in the 2015 Annual Reports (yet counsel fees incurred by HVUS in defending against OCA's Complaint are included, thereby illustrating the fact that if HVUS did in fact follow through with Kettler's testimony that Paul Herbert was going to be hired to correct the annual reports that the cost for that service would have been included in the

2015 Annual Reports filed on May 4, 2016). The simple fact remains that HVUS has failed and continues to fail to properly carry out its statutorily mandated filing requirements with the PUC as set forth in Section 61.28 of the Code. 52 Pa. C.S. §61.28, and further has a demonstrated history of providing the PUC with inaccurate financial information when it does get around to filing the statutorily mandated annual reports. This logically begs the question of how the PUC can even begin to properly monitor the financial strength of HVUS if the financial information being provided by HVUS is inaccurate, as admitted by Kettler during the hearing on November 17, 2015. N.T. 364.

It stands to reason that if HVUS has historically failed to comply with Commission requirements regarding the timely filing of its Annual Reports, and further if its President was willing to testify falsely during the proceeding regarding his plans to correct previously late filed and incorrect Annual Reports, that HVUS is not going to follow the directive that "it use all reasonable efforts to timely file correct information in its annual reports to the Commission and shall amend any prior reports that contain inaccurate or incorrect information within 180 days of the date of the final Commission Order entered in this proceeding,"(Order at 12), especially when the Order proposed by the ALJ is totally silent on what the consequences will be if HVUS fails to abide by the same.

iii. The Evidence Supports a Finding HVUS Is Insolvent

In the Initial Decision, the ALJ summarily dismissed the testimony of Intervenor Kollar and specifically the conclusion he reached regarding HVUS being insolvent citing, *inter alia*, the fact that "Kollar is a partner in a small business accounting and tax service firm that does not perform utility accounting." I.D. at 26. Respectfully, this

summary dismissal of Intervenor Kollar's testimony demonstrates a less than careful review of Intervenor Kollar's credentials, and general misunderstanding of basic accounting principles.

As a preliminary matter, Intervenor Kollar has been a licensed, certified public accountant for the past 32 years. In addition to being a shareholder in the CPA firm of *Kuhleman Kollar & Associates, CPAs*, Intervenor Kollar has held a faculty appointment as an assistant professor of accounting at the Duquesne University Palumbo-Donahue School of Business Administration where he teaches a variety of introductory, senior level and graduate accounting classes. From 2004 until 2013, he served as the Director of the school's Master of Accountancy degree program. *See* July 6, 2015 Written Testimony of Robert J. Kollar, CPA. *See also,* Surrebuttal Testimony of Robert J. Kollar dated November 3, 2015.[4] Clearly, Intervenor Kollar has the credentials necessary to proffer an opinion regarding the viability of a company – regardless whether the company is a public utility or not. Moreover, Intervenor would point out that Kettler testified that he uses a CPA to prepare and file HVUS' PUC Annual Reports (N.T. 388) and the ALJ apparently had no issue with that based on the fact that neither the Initial Decision or Order suggests that HVUS must prepare, file or amend its Annual Reports with the assistance of a Public Utility Accountant. *See* Initial Decision, *passim.*

In the Initial Decision, the ALJ summarily concluded that "no evidence was presented to establish how HVUS is insolvent in the context of being operated as a public utility." I.D. at 26. Not only is this an inaccurate statement based on the sworn

[4] To the intervenor's knowledge, information and belief there is no distinction to be made between "utility accounting" and basic accounting principles when it comes to assessing whether or not a company is insolvent. Indeed, a review of OCA's analyst reveals that she is not a licensed CPA, and possesses no further training in "public utility accounting" (assuming that such a specialty exists) than Intervenor Kollar. *See* Direct Testimony of Ashley Everette dated July 8, 2015, OCA Statement No. 1.

and verified testimony of both Intervenor Kollar and OCA's accounting expert, Everett, the fact that Intervenor Kollar holds the title of certified public accountant and professor of accounting rather than a "public utility accountant" (if such an accounting discipline even exists) is a distinction without a difference. Indeed, the fundamental principles of accounting would have to be applied regardless of the title of the accountant applying them. This would include the basic accounting principle of what is meant by "insolvent".

The generally accepted definition of insolvency is where the liabilities of a person or firm exceed its assets. *See* www.meriam-webster.com In practice, however, insolvency is the situation where an entity cannot raise enough cash to meet its debts and obligations as they become due for payment. Properly called technical insolvency, it may occur even when the value of an entity's total assets exceeds its total liabilities. Applying this generally accepted definition, the PUC has found a public utility to be insolvent where its current liabilities exceed its current assets. *See e.g.,* John Harris v. National Transit Company, 1976 Pa. PUC LEXIS 50, 10 (holding National Transit's balance sheet as of November 19, 1975, indicates its current liabilities exceed it current assets by a ratio which approaches two to one; at the present time, National is considered insolvent). *See also*, Application of Community Central Energy Corporation, 1993 Pa. PUC LEXIS 105 ("the question before us is whether a public utility which has been operating at a big annual loss, which has liabilities which greatly exceed its assets, is worthy of a certificate of public convenience, especially in light of the fact that at least one million dollars of its debt is owed on a 'demand' basis . . . We have concluded that Applicant is not financially or technically fit to provide public utility service to anyone other than Steamtown.").

The undisputed testimony of Intervenor Kollar on the issue of HVUS' insolvency is set forth in his written direct testimony submitted on July 6, 2016, Kollar Statement No. 1, Exhibit "A", and his surrebuttal testimony submitted on November 3, 2015, Kollar Statement No. 1-S, both of which were admitted into evidence at N.T. 242.[5] Contrary to the ALJ's conclusion that "no evidence was presented as to the measure of solvency for a public utility or a water and waste water facility, the ability to obtain loans or the cost of what is needed to improve the system," (I.D. at 26), the record is clear that this evidence is not only in the record, it was also not disputed by Kettler.

To be clear, and so that there is no misunderstanding of any kind, the conclusion regarding HVUS' insolvency was reached by way of Intervenor Kollar's review of the combined HVUS financial statements included in Exhibit "B" attached to his written direct testimony. Based on his review of this information, Intervenor Kollar then prepared Financial Summary and Ratios for HVUS which he set forth in a chart attached as Exhibit "A" to his written direct testimony. Kollar Statement No. 1, N.T. 327. Based on this approach, Intervenor Kollar concluded that HVUS was financially insolvent based on the fact that its current ratio has consistently been less than 1.0 for the past 5 years, and for the most recent year for which financial information was available, December 31, 2013, its current ratio was 0.4. Id, at 3. This indicates that HVUS' current assets are insufficient to meet its current liabilities. Id. Financial analysts, lenders and other creditors rely on the current ratio as an indicator of a

[5] A review of the record in this matter plainly reveals that HVUS never proffered the testimony of any accountant to combat or rebut the accounting conclusions reached by either Intervenor Kollar or Everette. Instead, HVUS relied on the testimony of its President Kettler who admitted, under oath, that he engaged in self-dealing to the financial detriment of the Company. Specifically, Kettler admitted to taking $630,000, or 80% percent of the free cash flow of the business as a personal distribution over the course of the last six (6) years. *See* N.T. 394, 395.

company's solvency. Id. Intervenors incorporate Intervenor's previously submitted and admitted written testimony by reference as if more fully set forth at length herein.

Intervenor Kollar is not alone in his assessment that HVUS is insolvent. Indeed, OCA witness Everette testified that in the six years between 2007 and 2013, HVUS experienced losses each year. Specifically HVUS experienced a cumulative total of $589,470.00 of Net Operating Losses, which equaled 28% of HVUS' revenues for the same period. OCA Statement 1 of Everette at 7. Indeed, Kettler himself testified, in HVUS Statement No. 2-R, that "increased costs continue to make it challenging for [HVUS] to meet its long term financial and capital requirements" (page 4, line 21 through page 5, line 1). Everette and Intervenor Kollar both testified that the precarious financial situation that HVUS finds itself in now is attributable, (at least in part), to the fact that much of the free cash flow generated by HVUS has been distributed to the partners of HVUS, principally Kettler, rather than being used to satisfy the terms of the 2005 Settlement Agreement or be reinvested into the utility. Kollar Statement No. 1, at page 4, N.T. 327. *See also,* OCA Statement 1 of Everette at 15. Additionally, HVUS obtained a loan in the amount of $750,000.00 during 2014, which during cross examination by Intervenor Kollar, Kettler admitted was a three (3) year loan bearing interest at 10% per annum, but had not further specific information on how HVUS was going to be able to repay that loan, and further admitted that HVUS had incorrectly reported the same as being "current" in its 2014 Annual Report. N.T. 391-392.[6]

Finally, it should not be lost on anyone that HVUS had ten (10) years to improve service and yet it continues to provide inadequate service. OCA Statement 1 of Everette

[6] It should be noted that based on HVUS history of net operating losses and insolvency, there is no clear indication of how HVUS could possibly repay this loan- especially when the annual interest payment on the loan is $75,000.00!

at 13. Based on Kettler's explanation that "insufficient revenues or increasing costs are the cause of HVUS' financial situation," HVUS Statement 1 and 2, coupled with the fact that HVUS has failed to improve service even with full rates and has no long-term investments which HVUS can use for future property, plant and equipment replacement, that there was more than sufficient evidence in the record to support a finding by the ALJ that HVUS is insolvent. As noted by Intervenor Kollar, and unchallenged by HVUS, "since [HVUS] has no long-term investments, a current ratio of significantly less than one, there is serious question regarding how [HVUS] will replace its equipment at the end of its useful life." Kollar Statement No. 1, at page 5, N.T. 327.

iv. The Record Supports the Immediate Transfer of HVUS to A Receiver

As previously set forth at length herein, the evidence in the record clearly supports a finding that HVUS cannot properly operate its water and waste water utility and indeed is not technically or financially fit to operate as a public utility. Intervenors believe that since the evidence required by Section 529 of the Public Utility Code has already been provided during the proceedings, that the Commission should immediately order the acquisition of HVUS by a viable utility. 66 Pa. C.S. § 529(a).

In Application of North Heidelberg Water Co., Docket No. A-2009-2117241, 2010 Pa. PUC LEXIS 919 (Order issued June 7, 2010), the Commission approved the imposition of a receivership where it was demonstrated that the company could no longer properly operate a water system. The facts in North Heidelberg are strikingly similar to the facts in the above captioned matters.

In North Heidelberg, the utility was found "not fit" to operate a water system, had a poor record of meeting public health standards, subjected customers to mandatory

water use restrictions, and on more than one occasion, customers were without water altogether. Id at 23. The utility was unable to borrow needed capital; its employees were unpaid; and the company could not afford a new chlorine system and monitor. Id. at 24. In that case, a receiver was necessary, and a transfer of the company to another operator was proper because the former owner was unable to operate the water company in any sort of normal way.

In his Initial Decision, the ALJ concluded that "there is nothing in the record in the instant case that indicates similar circumstances at HVUS. Respectfully, the overwhelming weight of the evidence in the record, coupled with the ALJ's own findings of fact and conclusions of law belies this conclusion. Indeed, the evidence in the record in the above captioned matters is strikingly similar to the circumstances at HVUS, to wit: the evidence demonstrates that, at certain times, the water is brown or rust-colored and is not suitable for household purposes (I.D. at 19); HVUS is not consistently providing adequate water service under Section 1501 (I.D. at 19); the inability or unwillingness to drink the water by some customers as well as the burden to run water until it becomes clear, renders the water service provided by [HVUS] unreasonable, in violation of 66 Pa. C.S. §1501 (I.D. 19-20); as of the date of the hearing (and more than 10 years after the effective date of the 2005 Settlement Agreement), HVUS had failed to install or maintain backup pumps at the pumping stations and working alarms as required by the Settlement Agreement (I.D. 22); HVUS' bills do not comply with Commission regulations at 52 Pa Code §(12) and §(13); HVUS's current assets are insufficient to meet its current liabilities, has insufficient working capital, has no long-term investments; and any available free cash flow has been distributed to the owners of HVUS, principally

Kettler. Kollar Statement No. 1, at page 4-5. *See also,* N.T. 327. Finally, and as previously stated herein, based on HVUS' history of net operating losses and insolvency, there is no way that HVUS could possibly repay the three year loan for $750,000 that HVUS took when the interest payments alone are $75,000 per year. N.T. 391-392.

A mere cursory review of the record reveals that Intervenor Kollar ("Kollar") provided ample testimony and documentation establishing that HVUS's current financial status indicates that HVUS is insolvent. Similar to HVUS's lack of technical fitness, it is axiomatic that if HVUS were financially sound enough to provide adequate services to the public, the terms of the 2005 Settlement Agreement would have been satisfied. The undisputed fact remains that it was not.

HVUS's failures stretch over ten (10) years. Its inability to fully comply with the 2005 Settlement Agreement has already been acknowledged by the ALJ. Moreover, HVUS has not produced an adequate excuse for its noncompliance. Without excuse, it is simple to conclude that HVUS either lacks the technical and financial ability to provide services to the public, or has deliberately chosen to disregard the Commission-approved 2005 Settlement Agreement. Given HVUS's technical and financial inadequacies, coupled with its demonstrated willingness to defy Commission Orders, rules and regulations, HVUS must be placed into receivership in order to ensure services are properly provided to the public.

Finally, and as noted by OCA Witness Everette in her Surrebuttal testimony at 14 (C-2014-2447138), HVUS has itself acknowledged that another entity could better meet the community's needs in 2008. Joint Application of Hidden Valley Public Utility

Services, LLC and Hidden Valley Utility Services, L.P. for the Transfer of Service, Customers and Assets (Joint Application). The Joint Application stated, "The public interest and need will be served by allowing HVPUS, in lieu of HVUS, to provide water service in Hidden Valley, Pennsylvania, to address the issues of regulatory requirements, capital expenditures, and future supply and demand." (Joint Application pages 5-6). A 2008 Order by the Commission noted that there was "substantial evidence of affirmative public benefit from the transfer of ownership to a better financially positioned/operationally efficient organization. (Order at 6-7). Although the Joint Application was withdrawn in 2010, the conclusion reached by the Commission in its 2008 Order remains true today. The ALJ should have properly considered the judicial admission made by HVUS in evaluating the need to appoint a receiver in this matter.

In the ten years since the 2005 Settlement Agreement was reached HVUS has not only failed to comply with the compliance requirements, the quality of service being provided by HVUS has continued to deteriorate and its financial situation is now in a deplorable condition. If ever there was a time for the ALJ to direct the transfer of HVUS to a receiver, the time is clearly now!

INTERVENOR'S THIRD EXCEPTION:

The Order Issued By the ALJ Is Inconsistent With the ALJ's Conclusions of Law, Provides Unreasonable Extensions of Time For Compliance with the 2005 Settlement Agreement, and Fails to Set Forth Clear Penalties And/or Consequences For Future Non-Compliance

With the exception of Conclusions of Law Nos. 14 and 15 (pertaining to the imposition of civil penalties or refunds, and for all of the reasons set forth in their First Exception set forth above which is incorporated by reference as if more fully set forth at

length herein) Intervenors do not disagree with any of the Conclusions of Law reached by the ALJ as are set forth on pages 37-39 of the Initial Decision. Intervenors do however take exception to the Order included in the Initial Decision for several reasons, each of which will be discussed, *in seriatim*.

a. Exception to Paragraph 3 of the Order Which Grants an Additional Extension of Time to HVUS to Comply With the Requirements Set for in the 2005 Settlement Agreement

It is undisputed that HVUS has failed to comply with the terms and conditions set forth in the 2005 Settlement Agreement which was approved by a Commission Order entered on July 15, 2005 at Docket nos. A-00210117 and A-00230101 by the July 15, 2015 deadline. Despite the fact that HVUS had 10 years to comply with the Order, HVUS was either unable (or unwilling) to comply with the terms of the same.

Rather than impose appropriate and non-discretionary civil penalties against HVUS as a consequence for its non-compliance, and further Order the immediate transfer of HVUS to a receiver (given Kettler's testimony that insufficient revenues or increasing costs are the cause of HVUS' financial situation that has allegedly prevented HVUS's compliance with the 2005 Settlement Agreement," (HVUS Statement 1 and 2), the ALJ's Order inexplicably provides HVUS an additional amount of time to comply with the conditions of the 2005 Settlement Agreement, to wit: "on or before September 1, 2017." Moreover, the Order is completely silent on what the penalties are for HVUS should HVUS not comply with the unsolved issues of the 2005 Settlement Agreement by the new September 1, 2017 "deadline" set forth in the Order. Effectively, the ALJ's Order enables HVUS to continue to operate in the same manner it has since 2005 without any consequences to HVUS or its owners.

It stands to reason that if HVUS could not (or would not) comply with the terms of the 2005 Settlement Agreement within the original 10 year compliance deadline that HVUS will similarly fail to comply with the additional period of time extended to HVUS by virtue of the ALJ's Order. Indeed, if one is to believe the reasons offered by HVUS' principal, Kettler for HVUS' original non-compliance, to wit: "insufficient revenues or increasing costs," then an extension of an additional two (2) years and almost two (2) months beyond the original deadline is certainly not going to solve the problem, especially when the financial forecast for HVUS has not improved in any appreciable way over the past now eleven (11) years since the Commission approved the Settlement Agreement (as most recently evidenced by the delinquently filed 2015 Annual Reports). Moreover, what happens if HVUS again fails to comply? The Order is totally silent on what consequences HVUS will face for future non-compliance and as such affords the customers little or no relief, and further serves to prejudice HVUS customers who were looking to the PUC to enforce its Order and insure that the customers were provided the quality water and waste water services that they are statutorily entitled to receive under the Code.

Finally, and to the extent that there is any rational reason for extending HVUS an additional period of time to comply with the terms and conditions 2005 Settlement Agreement (which Intervenors do not concede), Intervenors believe and therefore aver that the ALJ committed an error of law and abuse of discretion by not following the clear recommendations and implementation schedules set forth by OCA witnesses Terry L. Fought ("Fought") and Everette in their testimony and surrebuttal testimony, which include, *inter alia*, the recommendation of a 50% rate reduction being imposed against

HVUS until HVUS complies with ALL of the provisions of the 2005 Settlement Agreement, as well as the recommendations promulgated by OCA. *See e.g.*, OCA Witness Everette Surrebuttal testimony at 16-19 (C-2014-2447138); OCA Witness Fought Direct Testimony at 9-10 (C-2014-2447169); and OCA Statement 2-S, Testimony of Fought at 17-18 (C-2014-2447138).

b. Exception to Paragraph 12 of the Order Which Affords HVUS Additional Rights Concerning the Filing of Annual Reports Not Otherwise Provided For By Statute, and Further Additional Time to Correct Previously Filed Annual Reports

Under 66 Pa.C.S. § § 504 and 3301 (relating to reports by public utilities; and civil penalties for violations), the Commission may require a public utility to file, and invoke penalties for failure to file, certain reports. In this regard, the following apply:

> (1) Unless prior permission to do otherwise is granted, a public utility, other than transportation, subject to the jurisdiction of the Commission, shall file annual financial reports with the Commission by April 30 immediately following the reporting year, for reports based upon the calendar year; or by July 31 immediately following the reporting year, for reports permitted to be based upon the fiscal year ending May 31. A request for an extension of time for filing an annual report shall be submitted to the Commission prior to the filing dates specified in this paragraph.
>
> (2) If a public utility, other than transportation, fails to file its annual report in compliance with this section, the public utility may be subject to a penalty as provided under 66 Pa. C.S. § 3301. Continued failure to file annual reports may result in additional penalties.

Paragraph 12 of the Order as presently written provides, *inter alia*, that HVUS "shall make all reasonable efforts to timely file correct information in its annual reports to the Commission." Respectfully, and as evidenced by the language above, there is nothing in the statute which makes reference to "reasonable efforts" to file. It is mandatory. It is not discretionary. Intervenors believe and therefore aver that Order

should be revised to properly reflect that mandatory reporting requirements set forth in the statute, and further make reference to the fact that penalties WILL BE imposed for any future late filings that are made without leave of the Commission to file beyond the April 30 deadline.

Paragraph 12 of the Order further affords HVUS the opportunity to "amend any prior reports that contain inaccurate or incorrect information within 180 days of the date of the final Commission Order entered in this proceeding." Intervenors would point out however, that during the hearing on November 17, 2016, Kettler specifically testified that he was going to file amended reports within ninety (90) days of the hearing. *See* N.T. 371, *ll.* 8-20. By virtue of Kettler's testimony, the PUC should have received the amended reports by February 15, 2016. A review of the relevant dockets plainly reveals that this did not occur. This begs the question of why, when the ALJ knew or had reason to know that Kettler had testified untruthfully regarding his intention to file amended reports, the ALJ would have provided HVUS considerably more time to file amended reports. Indeed, by doing so the Order as presently written has the practical effect of rewarding false swearing. Intervenors believe and therefore aver that HVUS should be Ordered and directed to immediately amend and file any prior reports that contain inaccurate or incorrect information, and further impose monetary penalties on HVUS for its failure to timely file its Annual Reports. Intervenors would further ask the Commission to examine the issue of the false swearing that took place on November 17, 2015 by Kettler.

c. Exception to Paragraph No. 17 of the Order Which Has The Practical Effect of Further Extending the Compliance Deadline Beyond The September 1, 2017 Extension Afforded by the Order to HVUS

In paragraph 17 of the Order, the ALJ directs HVUS as follows:

> That on or before September 10, 2017, or as soon as all repairs, modifications and improvements have been made, as ordered herein, [HVUS] shall file a final detailed status report with the Secretary of the Commission, along with a verification from its engineer outlining the details of what is has and has not completed, and provide copies to the Office of Consumer Advocate and to the Commission's Office of Technical Utility Services, in writing, at the time of filing, identifying in detail the extent of compliance and any incomplete matters as ordered herein. If matters ordered herein have not been completed, [HVUS] and its engineer shall state in said report, in detail, the reasons for the same.

August 23, 2016 Order at 17. (Emphasis added).

As written, paragraph 17 of the Order contemplates that HVUS will STILL not be in compliance with the 2005 Settlement Agreement. Moreover, in the event that HVUS once again fails to comply with the revised deadline, the only apparent penalty imposed by paragraph 17 of the Order is that HVUS has to file a written report stating why matters have not been completed. Then what? Where is the penalty? The Order is completely silent on this issue, and thus the customers of HVUS are once again victimized by HVUS' non-compliance with Commission Orders, and further prejudiced by the Commission's apparent unwillingness to enforce its own Orders by way of the imposition of real penalties and consequences for non-compliance. Indeed, it is simply a continuation of the "kick the can" game that has been going on for the past eleven (11) years as demonstrated by the following paragraph of the Order, to wit: Paragraph 18.

d. Exception to Paragraph No. 18 of the Order Which Directs The Scheduling of Yet Another Evidentiary Hearing To Address Future Non-Compliance With Commission Orders by HVUS

Paragraph 18 of the Order provides in relevant part that in the event with HVUS continued non-compliance with the extension of time to comply with the 2005 Settlement Agreement afforded by the ALJ in paragraph 3 and "all completed rehabilitative measures by [HVUS] and its engineer", the ALJ directs that an "evidentiary hearing shall be forthwith be scheduled . . . for the purpose of addressing one or more of the following issues: the adequacy of the water distribution system, the adequacy of the wastewater system, the quality of the water, the appropriateness of penalties to be imposed against [HVUS], the appropriateness of ratepayer refunds, and any other issue relative to these ordering paragraphs." Respectfully, this was supposed to have been the purpose of THIS proceeding! As of the date of the hearing, more than 10 years had passed since HVUS had been ordered by the PUC to implement technical and financial improvements which they had failed to do. Again, and has previously stated herein, it is logical to conclude that if HVUS could not (or would not) comply with the terms of the 2005 Settlement Agreement within the original 10 year compliance deadline that HVUS will similarly fail to comply with the additional period of time extended to HVUS by virtue of the ALJ's Order. Indeed, if one is to believe the reasons offered by HVUS' principal, Kettler, for HVUS' original non-compliance, to wit: "insufficient revenues or increasing costs," then an extension of an additional two (2) years and almost two (2) months beyond the original deadline is certainly not going to solve the problem especially when the financial forecast for HVUS has not improved in any appreciable way (as evidenced by the delinquently filed 2015 Annual Reports). If this Order is allowed to stand as

presently written, HVUS will have once again successfully dodged having to comply with PUC Orders, rules or regulations. Such folly cannot and should not be countenanced, especially when it is being done at the customers' considerable time and expense.

Rather than continue to allow HVUS to play "kick the can," Intervenors believe and therefore aver that the Order should be revised to direct the immediate filing by HVUS of an Application to Transfer the Water and Waste Water System to a viable entity within thirty days in accordance with Section 529. In the alternative, and in the event that the direct appointment of a receiver will not be Ordered by the Commission (which Intervenors believe would be a grave error and abuse of discretion), Intervenors request that a minimum the Order be revised to include the number of improvements and quarterly status reports OCA witness Fought and Everette have recommended in order to allow OCA to monitor HVUS status of compliance, and further include a provision that prohibits all cash distributions to Kettler (or any other principal of HVUS) until all requirements that flow from the OCA's recommendations have been completely and appropriately satisfied. Intervenors would further urge the Commission to accept OCA's recommendation that a rate reduction be imposed against HVUS until such time that the recommendations made by OCA have been completely satisfied. Finally, given the urgent need for improvements and the years that have already passed with no relief for customers, the

Order should be further revised to include a provision that if two (2) consecutive status reports show HVUS' failure to comply with the deadlines set forth in the charts included in their written testimony applicable to the water or wastewater system or service, HVUS will be required to file an Application to transfer the water and waste water utilities to a viable entity capable of making all necessary improvements within 30 days from the filing date of the seconds status report.

Respectfully submitted,

Date: September 29, 2016

Robert J. Kollar, Intervenor
Kellie A. Kuhleman, Intervenor

CERTIFICATE OF SERVICE

I, Robert J. Kollar, hereby certify that on this 29th day of September, 2016, I served a true and correct copy of the foregoing Exceptions Of Intervenors, Robert J. Kollar And Kellie A. Kuhleman, To The Initial Decision Of Administrative Law Judge Jeffrey A. Watson Dated August 23, 2016 And Mailed By The Pennsylvania Public Utility Commission On September 9, 2016 via first class U. S. mail and email, upon the following:

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