

COMMONWEALTH OF PENNSYLVANIA  
Public Utility Commission  
October 18, 2006

**SUBJECT:** C-20054919, C-20054746, C-20055371 – Neil R. Rahn, David Singerling, et al. v. PA-American Water Co., Township of Spring, and Wilson School District v. PA- American Water Co.

**TO:** James J. McNulty  
Secretary

**FROM:** Cheryl Walker Davis, Director  
Office of General Assistants

**DOCUMENT  
FOLDER**

Pursuant to the requirements of Act 294, (66 Pa. C.S. §332(h)), Vice Chairman Cawley and Commissioner Pizzingrilli have requested full review of the Administrative Law Judge's Initial Decision in the above captioned proceeding. The second request for review was dated October 17, 2006.

Please notify the Office of Administrative Law Judge to prepare the case for consideration at a future Public Meeting.

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**BTL**

Act 294

Case Identification:

C-20054919, C-20054746, C-20055371;  
Neil R. Rahn, David Singerling, et al. v.  
PA-American Water Co., Township of  
Spring, and Wilson School District v. PA-  
American Water Co.

Initial Decision By:

ALJ Wayne L. Weismandel

Deadline for Return to OSA:

October 17, 2006

This decision has not been reviewed by OSA.

\* \* \* \* \*

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

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Commissioner

*10/17/06*  
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Date

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Act 294

Case Identification:

C-20054919, C-20054746, C-20055371;  
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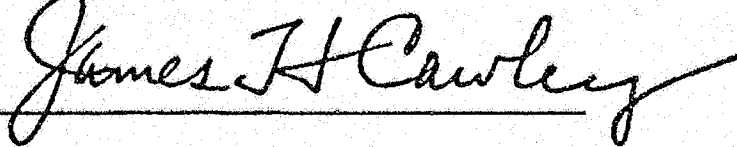
Deadline for Return to OSA:

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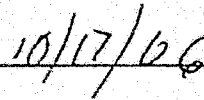
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I want full Commission review of this decision.



Commissioner



Date

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Commissioner

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Act 294

Case Identification:

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Neil R. Rahn, David Singerling, et al. v.  
PA-American Water Co., Township of  
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Initial Decision By:

ALJ Wayne L. Weismandel

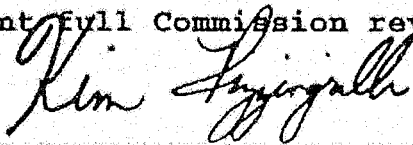
Deadline for Return to OSA:

October 17, 2006

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\_\_\_\_\_  
Commissioner

10/18/06

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Commissioner

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Act 294

Case Identification:

C-20054919, C-20054746, C-20055371;  
Neil R. Rahn, David Singerling, et al. v.  
PA-American Water Co., Township of  
Spring, and Wilson School District v. PA-  
American Water Co.

Initial Decision By:

ALJ Wayne L. Weismandel

Deadline for Return to OSA:

October 17, 2006

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\_\_\_\_\_  
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Terrence J. Fitzpatrick  
\_\_\_\_\_  
Commissioner

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Date



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Consumer Advocate

ORIGINAL

October 24, 2006

James J. McNulty, Secretary  
PA Public Utility Commission  
Commonwealth Keystone Bldg.  
400 North Street  
Harrisburg, PA 17120

DOCUMENT  
FOLDER

RE. Spring Township v.  
Pennsylvania American Water Company  
Docket No. C-20054746

Neil R Rahn and David Singerling v.  
Pennsylvania-American Water Company  
Docket No. C-20054919

Wilson School District v.  
Pennsylvania American Water Company  
Docket No. C-20055371

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Exceptions on behalf of Roberto Soto and Anna K. Stubenrauch-Soto, formal complainants in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

Dianne E. Dusman  
Senior Assistant Consumer Advocate  
Attorney I.D. # 38308  
[DDusman@paoca.org](mailto:DDusman@paoca.org)

Enclosures

cc: Hon. Wayne L. Weismandel, ALJ  
All parties of record

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I am completely unsatisfied with the ruling that was made. I can't believe what little we were asking to have done could not be granted. I do not understand how someone could conclude that one and a half million gallons of water released through a water main break could not cause substantial damaged beneath the surface. Especially for those of us who reside so close to Ground Zero. I will use that term only because I am sure at some point someone will get hurt. After every heavy rain, I listen to the sump pump run, and wonder where the next weak spot will open. I just hope it doesn't happen when the kids are riding their bicycles, or scooter, or walking to school. It is completely appalling! But, I guess someone has to get hurt before anything is done, and why not put it on the little guy who has to work, just to pay the bills, or maybe the senior citizens who live on a fixed income. I just don't get it.

We recently had yet another weak spot open, by the sidewalk which the children use to walk to school. Please explain to me, what happens when someone gets hurt?

PLEASE RECONSIDER.

Regards,

Roberto Soto  
Anna K Stubenrauch-Soto  
3130 South Wagner Circle  
Reading, PA 19608

*Roberto Soto*  
*A.K. Stubenrauch-Soto*

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CERTIFICATE OF SERVICE

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Re: Spring Township :  
v. : Docket No. C-20054746  
Pennsylvania American Water Company :  
  
Neil R Rahn and David Singerling, *et al.* :  
v. : Docket No. C-20054919  
Pennsylvania-American Water Company :  
  
Wilson School District :  
v. : Docket No. C-20055371  
Pennsylvania American Water Company :

I hereby certify that I have this day served a true copy of the foregoing document, Exceptions on behalf of Roberto Soto and Anna K. Stubenrauch-Soto, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 24<sup>th</sup> day of October, 2006.

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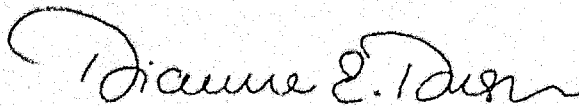
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Stonegate Community  
Wagner Farms Homeowners Association  
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Sinking Spring, PA 19608

David Singerling  
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Wagner Farms Homeowners Association  
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COMMONWEALTH OF PENNSYLVANIA



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RE: Spring Township v.  
Pennsylvania American Water Company  
Docket No. C-20054746

Neil R Rahn and David Singerling v.  
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Docket No. C-20054919

Wilson School District v.  
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Docket No. C-20055371

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Office of Consumer Advocate's Exceptions in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

*Dianne E. Dusman*  
Dianne E. Dusman  
Senior Assistant Consumer Advocate  
Attorney I.D. # 38308  
[DDusman@paoca.org](mailto:DDusman@paoca.org)

Enclosures

cc Hon. Wayne L. Weisman, ALJ  
All parties of record

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Spring Township :  
v. : Docket No. C-20054746  
Pennsylvania American Water Company :

Neil R Rahn and David Singerling, et al. :  
v. : Docket No. C-20054919  
Pennsylvania-American Water Company :

Wilson School District :  
v. : Docket No. C-20055371  
Pennsylvania American Water Company :

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EXCEPTIONS  
OF THE  
OFFICE OF CONSUMER ADVOCATE

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Dated: October 24, 2006

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. EXCEPTIONS ..... 6

EXCEPTION NO. 1. THE ALJ BASES HIS DECISION ON THE INCORRECT PREMISE THAT MAIN BREAKS ARE INEVITABLE AND THAT WATER UTILITIES SHOULD NOT BE REQUIRED TO INVESTIGATE AND REMEDIATE. I.D. at 18..... 6

EXCEPTION NO. 2: THE ALJ ERRED BY FAILING TO GIVE WEIGHT TO THE CONTINUING CONCERN FOR ENSURING THE SAFETY OF THE PUBLIC. I.D. *passim* ..... 9

EXCEPTION NO. 3. THE COMMISSION SHOULD CORRECT FOR THE ALJ'S FAILURE TO PROPERLY CONSIDER THE COUNTERVAILING EVIDENCE PRESENTED BY EXPERT WITNESSES FOR THE COMPLAINANTS AND THE OCA. I.D. at 11-12..... 12

EXCEPTION NO. 4. THE ALJ ERRED BY FAILING TO FIND THAT PAWC'S INADEQUATE INVESTIGATION, FAILURE TO REPORT, FAILURE TO RESPOND TIMELY TO TANK ALARMS AND FAILURE TO ENGAGE IN LEAK DETECTION CONSTITUTED UNREASONABLE, UNSAFE, INEFFICIENT AND INADEQUATE SERVICE. I.D. at 17, 19-23 ..... 17

III. CONCLUSION ..... 20

Appendix A -- Proposed Findings of Facts

Appendix B -- Proposed Conclusions of Law and Ordering Paragraph

**TABLE OF AUTHORITIES**

**Cases**

AT&T Comm. of Pa. v. Pa. P.U.C., 130 Pa. Commw. 595, 568 A.2d 1362 (1990) ..... 9

Barone v. Pa.P.U.C. , 86 Pa. Commw. 393, 485 A.2d 519 (1984), *petition for rehearing of order on remand denied sub. nom.*, 61 PaPUC 385 (1986)..... 8

Pittsburgh Railway Company v. Pa. P.U.C., 198 Pa. Super. 415, 182 A.2d 80 (1962) ..... 16, 17

West Penn Power Co. v. Pa. Public Utility Comm'n, 84 Pa. Commw. 157, 478 A.2d 947 (1984).. ..... 2

West Penn Power Company v. Pa. P.U.C., 578 A.2d 75 (Pa. Cmwlth. 1990) ..... 9

**Administrative Decisions**

Application of Pennsylvania Power & Light Company, 1991 PaPUC LEXIS 86 (April 5, 1991) ..... 12

Ashbaugh v. Fitz Henry Water Co., 51 PaPUC 287 (1977) ..... 8

Bell v. Cowanshannock Water Co., 49 PaPUC 238 (1975) ..... 8

Cohen v. West Penn Power, 56 PaPUC 528 (1982) ..... 9

Dongelewicz and Rizzo v. Oneida Water Co., 1994 Pa. PUC LEXIS 76 ..... 7

Investigation Upon Commission Motion For the Purpose of Ascertaining Whether There Is An Inadequacy of Service of Nokomis Water Co., 43 PaPUC 276 (1967)..... 8

Moscow Borough Council v. City of Scranton, 1987 Pa. PUC LEXIS 89 (1987)..... 17

Phone Talk, Inc. , 126 PUR4th 179 (1991)..... 19

Re Consolidated Rail Corp., 1982 Pa. PUC LEXIS 31 ..... 9

Re Investigation Upon the Commission's Own Motion Into the Extended Outages of the Beaver Valley I Nuclear Generating System, 1992 PaPUC LEXIS i7, (Feb. 14, 1992)..... 13

Schuylkill Township v. Borough of Phoenixville, 1996 Pa. PUC LEXIS 125 ..... 8

Vertis Group, Inc. v. Duquesne Light Co., Docket No. C-00003643 (Order February 24, 2003) ..... 19

**Statutes**

66 Pa. C.S. §102..... 9

66 Pa.C.S. §703(e)..... 13

66 Pa.C.S. §1501, *et seq.* ..... 1, 2, 7

## I. INTRODUCTION

The OCA respectfully submits that the Initial Decision ("I.D.") in the above-captioned case recommending dismissal of the Formal Complaints against Pennsylvania American Water Company (PAWC or the Company) is plainly wrong, in multiple respects. The Commission should reject the Initial Decision because it fails to give appropriate weight to the utility's obligation to provide service and to operate and maintain its facilities in a safe and reasonable manner, pursuant to 66 Pa.C.S. §1501, *et seq.* Simply put, the Administrative Law Judge (ALJ) failed to consider that the utility has the ongoing obligation to ensure that the operation of its system, currently and prospectively, does not jeopardize the safety of members of the public who come in contact with its system.

Section 1501 does *not* say that public utilities are responsible for safe, adequate, efficient and reasonable service, unless an "act of God" causes damage to a utility property and interrupts service. "Act of God" clauses are exceptions to insurance policies, *not* to a utility's obligation to serve. Therefore, even if the Commission were to accept all of the ALJ's Findings of Fact on this record suggesting that the Company maintained its system adequately in all respects (which the OCA does not believe is at all justified), the Conclusions of Law and the result are wrong, because PAWC will not be held to its statutory duty to ensure the ongoing safe operation of its system in the Sinking Springs community.

The Complainants have sought an order from the Commission requiring PAWC to conduct a study to determine whether the catastrophic main break of February 2005, that caused the emergency evacuation of the nearest household and rendered the home uninhabitable, has created new voids under the adjacent area surfaces that may need to be remediated.<sup>1</sup> The

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<sup>1</sup> The chlorinated water from PAWC's broken main traveled underground for more than 300 yards, Tr. 356, 366-67, through several residential blocks, underneath customers' homes. OCA M.B. at 8. It

Complainants have sought no damages, nor penalties; in essence, they are merely seeking the peace of mind for themselves and their neighbors that would be associated with the knowledge that they and their children are safe in their homes and on their streets. They have sought an order directing PAWC to study the results of the February 2005 main break to determine whether any remediation (repair of newly created voids beneath roads and structures) would be called for. A study is certainly justified on this record; a preponderance of the expert evidence supports an order requiring a geophysical study<sup>2</sup> of the area in the path of the high-pressure water that was released from the broken main, as will be more fully set forth below.

The following erroneous premises, among others, led to the wrong result:

1. The ALJ concludes that "absent proof by a preponderance of the evidence that respondent violated the provisions of 66 Pa.C.S. §1501, the Commission has no authority to require any action by respondent," citing West Penn Power Co. v. Pa. Public Utility Comm'n, 84 Pa. Commw. 157, 478 A.2d 947 (1984). I.D. at 16. If this were literally true, the PUC could never act to prevent unsafe service under the Public Utility Code, as it most certainly has authority to do with respect to regulated utilities.

2. The ALJ concludes that the "consequences of the main break insofar as respondent's liability for damages goes, are beyond the jurisdiction of the Commission." I.D. at 17. All parties understood this principle; however, the Formal Complainants did not seek relief in the way of damages – they sought a Commission Order to require this utility to conduct a study to determine the extent of the consequences of the main break and remediation, if called

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flooded customers' basements, causing one customer's 25 gallon-per minute sump pump to run continuously for about 30 hours before it began to cycle on and off. OCA M.B. at 9; Tr. 82-83, 106-107, 353-61.

<sup>2</sup> The estimated total cost of a geophysical study of 19 homes, portions of three streets and an open lot is \$29,000. OCA M.B. at 53-54; OCA St. 2 and Hoskins Exhibit 2 (admitted by September 15, 2006 Order of ALJ Weismandel)

for. OCA M.B. at 20-26. No party to the proceeding was asking for an assessment of damages and the Commission has the full panoply of equitable and regulatory powers over public utilities

3. The ALJ poses the question, "Does the mere fact that the water main broke constitute inadequate, inefficient, unsafe, or unreasonable service by respondent?" and answers the question, "no." I.D. at 18. In so doing, however, the ALJ has placed the proverbial "rabbit in the hat." The OCA and the Complainants offered much evidence beyond the "mere fact" of the break to support the allegations of inadequate, unsafe, unreasonable and inefficient service. It bears repeating that even without all of that evidence, PAWC still bears the responsibility of operating its system in a manner that does not present a threat to the safety of the public – and if it fails to do so, the PUC should require it to do so.

Furthermore, among the findings and conclusions amply supported by the record evidence and missing from the Initial Decision are those that follow:

- PAWC had failed to adhere to its own policy of regular, systematic leak detection in the Sinking Springs system for many years.
- PAWC failed to create, maintain and preserve the written, electronic and physical evidence associated with this disaster.
- PAWC failed to notify the PUC of this unusual event consistent with PUC regulations.

The OCA urges the PUC to carefully review the record in this case and reject the Initial Decision in its entirety.<sup>3</sup> To accept it would send a message to all water utilities that their obligation to provide safe and reasonable service ends at the edges of their rights of way, which

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<sup>3</sup> For the convenience of the Commission, the OCA has attached to these Exceptions its Proposed Findings of Fact, Conclusions of Law and Proposed Ordering Paragraphs as Appendices A and B. The OCA's Proposed Findings are replete with specific record references. The OCA urges the Commission to substitute them for those contained within the Initial Decision, many of which are unsupported by substantial evidence.

has never been the case. Electric utilities are responsible for fallen poles; wastewater utilities are responsible for back-ups in their systems; natural gas companies are responsible for explosions; and water utilities are responsible for main breaks. This water utility should be accountable for ascertaining the results of water escaping from its distribution system due to a main break, even where the damage may not be visible above ground. Such damage could jeopardize the safety of the public.

The OCA would also urge the Commission to keep in mind that PAWC customers pay rates to PAWC that include all types of insurance premiums as routine operation and maintenance expenses. To the extent that the result of a main break may not be covered by insurance, PAWC's cost of equity is set to reflect all other risks, both financial *and* business risk. The ALJ expressed concern over the potential impacts on ratepayers, but failed to consider the OCA's arguments that customers already cover the costs of this type of event in rates. OCA R.B. at 9-11. It is true that "accidents happen"; human beings and utility systems are not perfect.<sup>4</sup> When they do result in damage and risks to public safety, however, a utility should not be permitted to simply walk away without investigating whether damage has resulted that is not visible above ground and to provide remediation, if necessary.

The ALJ failed to apply relevant law correctly and to acknowledge the *magnitude* of the impact of this main break. This main break and the resulting underground flow of 1.5 million gallons of high-pressure water caused an emergency evacuation of a family from the nearest house. Because of this main break, the adjacent school closed for a day and required bottled water for a day when it opened. Because of this main break, new voids occurred that have led to collapses in the areas that coincide with the underground path of the water. The only way to

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<sup>4</sup> The OCA would note, however, that substantial evidence supports that this event would have been avoided had systematic long-term leak detection procedures been followed in the years and months before the actual break. OCA M.B. at 36-42.

pinpoint further danger is to perform a ground-penetrating radar study in the path of the water that escaped from the main. This was the conclusion and recommendation of the first consultant who investigated the incident, Travelers, PAWC's insurer. Each expert who investigated the Iroquois Avenue main break corroborated the result and Travelers' recommendation.

Nonetheless, the ALJ accepted the Company's "theory of the case," *i.e.* that the sinkhole spontaneously appeared and had nothing to do with the operation of the water system. Yet, neither the video in evidence nor any of the photographs show any voids at all at the bottom of the trench, beneath the area of the broken main. If, in fact, a sinkhole had spontaneously collapsed *beneath the main*, causing the loss of support and the subsequent break, the water from the main would have followed the path of least resistance—downward, into the earth, not sideways into the ground beneath the neighboring homes. The only voids that appeared were in the side of the trench—indicating that the water had been escaping from the main for a sufficient amount of time at pressures high enough to force the supporting *adjacent material* away and open up the "throats" or channels that allowed the water to flow beneath the adjacent residential areas.<sup>5</sup>

The Initial Decision is not supportable under the Public Utility Code, nor is it well-grounded in the facts and expert opinions presented. The Commission should reject it. In order to ensure the safety of the public, including the neighboring families, PAWC should be ordered to have ground penetrating radar studies performed and to remediate newly created voids, if the study demonstrates that it is necessary.

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<sup>5</sup> Indeed, in the ALJ's Findings of Fact Nos. 40 and 41, the ALJ correctly found that when the site of the water main break was excavated, (1) the bottom of the trench under the water main appeared solid and (2) a throat of a sinkhole was found adjacent and laterally oriented to the broken pipe. I.D. at 13.

## II. EXCEPTIONS

EXCEPTION NO. 1. THE ALJ BASES HIS DECISION ON THE INCORRECT PREMISE THAT MAIN BREAKS ARE INEVITABLE AND THAT WATER UTILITIES SHOULD NOT BE REQUIRED TO INVESTIGATE AND REMEDIATE. I.D. at 18.

The ALJ wrote the following in the Initial Decision:

Complainants have not presented a single example of the Commission finding that the mere breakage of a water main, in and of itself, constitutes inadequate, inefficient, unsafe or unreasonable service. My own research has, likewise, failed to discover such a Commission holding. The reason for this dearth of authority is fairly clear. water mains break on a regular basis in a state such as Pennsylvania where the ground is subject to freezing and thawing with resulting shifts, where the man-made changes in topography resulting from construction (including utility construction) change the amount of support provided to previously placed mains, where the incessant vibration and shock of vehicular traffic on roadways above the water mains reduce their support and where large areas of the sub-surface are prone to the development of sinkholes.

I.D. at 18. The OCA offered a lengthy discussion in Main Brief of civil cases in Pennsylvania and other states involving water main breaks. OCA M.B. at 26-31. The OCA does not agree with the ALJ's theory on why there is a "dearth" of Commission cases involving water main breaks. The reason is, in actuality, that water utilities' insurers generally pay claims made by customers with properties damaged by the flows of water resulting from main breaks.<sup>6</sup> If a utility's insurer compensates customers with money damages for disrupted landscaping or lost basement contents, they would generally have no need to file a complaint with the Commission. Those that experience huge losses resulting from main breaks that would necessitate an assessment of damages

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<sup>6</sup> In response to the OCA's discovery, PAWC provided a 600-page log of claims made and paid for damages resulting from water utility operations over the past three years, consisting of about 3,000 entries. Travelers, PAWC's liability insurer, created this log. See discussion at tr 755-758 and 506-508. The vast majority of these claims had to do with minor losses of landscaping, basement contents and damage to sidewalks and porches, for example.

often go to Common Pleas court, rather than file a complaint with the PUC. This is an unusual case, in that for one customer, the damages are extensive and readily visible, but for others, no one knows the extent of the damage the main break caused.

As argued extensively in the OCA's Main Brief, the Commission has ample authority to order that the utility conduct a study. The Commission's ability to order a GPR study does not hinge upon determining what caused the main break, but upon whether a GPR study is necessary and prudent to ensure public safety under Section 1501. 66 Pa. C.S. § 1501. The record evidence supports that the Commission should exercise its authority to require such a study in the instant case. OCA M.B. at 20-26. The Commission has a duty to ensure that a utility operates and maintains its facilities in a safe manner pursuant to Section 1501 of the Code, 66 Pa. Code §1501. To accept the ALJ's notion that "main breaks happen" and that utilities need not investigate and remediate, if necessary, would be to ignore that statutory duty.<sup>7</sup>

The Initial Decision errs by failing to consider the ongoing health and safety risks presented by the release of pressurized water underground, beneath roads and residential structures.<sup>8</sup> The prudent course to take following the loss of 1.5 million gallons of water is to investigate, using the ground-penetrating radar techniques now available. Because PAWC has failed to investigate the effects of the water released beyond the Creveling property, neither the Commission, the ALJ, nor any party can know what necessary repairs, changes, and

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<sup>7</sup> The ALJ noted that the Commission has found inadequate service where customers experienced "five interruptions of service in fifteen months," I.D. at 18 (citing Dongelewicz and Rizzo v. Oneida Water Co., 1994 Pa. PUC LEXIS 76). Based on this Commission precedent, a finding of inadequate service should have been made in the instant case, because PAWC customers experienced at least seven main breaks in the Penn Water District alone within a 3.5-week period. OCA St. 1S at 14.

<sup>8</sup> This issue of the continued risk to health and safety is raised throughout, and underlying, the briefs of all of the Complainants and Intervenor OCA. *See e.g.*, OCA M.B. at 1-7, 28; OCA R.B. at 3, 10, 20; OCA St. 2S at 4; Township M.B. at 4, 11, 13; Township R.B. at 8-9; Wilson School District M.B. at 15; Wilson School District R.B. at 3, 10.

improvements to the Company's facilities and adjacent properties are required to ensure the safety of its customers, employees and public in the adjacent development.<sup>9</sup>

Inherent in the Commission's power to ensure safe, reasonable and efficient service is the power to order studies to determine how best to accomplish that objective. OCA M.B. at 24. As noted in the OCA's Main Brief, the Commission has previously exercised this power when it (1) directed an engineering feasibility study, Balla v. Redstone Water Co., Docket No. C-992270, Order of June 28, 2005; (2) approved a corrosion study, Schuylkill Township v. Borough of Phoenixville, 1996 Pa. PUC LEXIS 125, \*5-6; (3) ordered the submission of engineering reports, Ashbaugh v. Fitz Henry Water Co., 51 PaPUC 287 (1977), Bell v. Cowanshannock Water Co., 49 PaPUC 238 (1975); and (4) ordered the submission of a report and cost estimates be performed by a competent engineer to support the provision of satisfactory water at adequate pressure, Investigation Upon Commission Motion For the Purpose of Ascertaining Whether There Is An Inadequacy of Service of Nokomis Water Co., 43 PaPUC 276 (1967), *see also* Barone v. Pa P.U.C., 86 Pa. Commw. 393, 485 A.2d 519 (1984), *petition for rehearing of order on remand denied sub. nom.*, 61 PaPUC 385 (1986). OCA M.B. at 25.

The OCA submits that the ALJ erred by not recommending an order requiring the Company to perform a ground-penetrating radar study in the areas that coincide with the underground path of the water and to remediate, if necessary, in the instant case.

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<sup>9</sup> The OCA notes that its intervention in this matter is in support of the group of residential customers in the adjacent development so the arguments and evidentiary presentation of the OCA focus on the relief sought by that group. The OCA's arguments apply with equal force, however, to the adjacent areas owned by the Township of Spring and the Wilson School District, who are also Complainants in this case. The record evidence supports that areas on both sides of Iroquois Avenue were in the path of the water that escaped the main and likely compromised the substrata. *See* Township M.B. at 25-27 Proposed Findings of Fact Nos. 25, 29, 33 - 37, Wilson School District M.B. at 10-12.

EXCEPTION NO. 2: THE ALJ ERRED BY FAILING TO GIVE WEIGHT TO THE CONTINUING CONCERN FOR ENSURING THE SAFETY OF THE PUBLIC  
*I.D. passim.*

The Initial Decision errs in dismissing Complainants' request because, without a ground-penetrating radar study, the question of whether PAWC is providing safe and adequate service under Section 1501 following the main break, simply cannot be reasonably determined. The Commission's jurisdiction to enforce a utility's provision of adequate service under Section 1501, is "irrefutable" in the case of a risk to public safety. OCA M.B. at 23, citing Re Consolidated Rail Corp., 1982 Pa. PUC LEXIS 31, \*5-\*6 (Oct. 1, 1982); *see also* Cohen v. West Penn Power, 56 PaPUC 528 (1982). Under Section 1501, "service" and "facilities" are broadly defined. OCA M.B. at 18, citing 66 Pa. C.S. § 102; OCA M.B. at 21, citing AT&T Comm. of Pa. v. Pa. P.U.C., 130 Pa. Commw. 595, 599, 568 A.2d 1362, 1364 (1990). As argued in the Main Brief of Formal Complainant Wilson School District, "a public utility's 'service' is not merely confined to the distribution of the utility service, but includes 'any and all acts' related to that function and does not stop at the edge of the utility's right of way." Wilson School District M.B. at 7, citing West Penn Power Company v. Pa. P.U.C., 578 A.2d 75 (Pa. Cmwlth. 1990);.

As Complainant Township of Spring argued:

In the instant case, the requested relief is part and parcel to the duty of a public utility to repair and make improvements to provide safe and adequate service under Section 1501 of the Code, *supra*, and under Section 1505 of the Code, 66 Pa.C.S.A. 1505, which requires that a public utility make all repairs, changes, alterations, extensions, and improvements to its facilities as necessary and proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Id.

It is axiomatic that a utility cannot make needed repairs and improvements unless and until it knows that they are needed. PAWC is, based upon the testimony and evidence adduced, familiar with methods of strengthening and supporting lines in areas containing and prone to voids (as it has done so at Franklin Place and in Wyomissing Hills, both of which are in the Penn Water District). Such sub-surface testing is necessary to determine if any voids have developed in an area in which there has been a below ground loss of

1.5 million gallons of water, which is and was sinkhole prone. Accordingly, under Sections 1501, 1504, and 1505 of the Public Utility Code, *supra*, the Public Utility Commission has the power to order the testing requested by the Township, its residents, and the Wilson School District.

Township M.B. at 20-21, Township R.B. at 8. The OCA echoed this argument:

To be more specific, experts called by the Township and the OCA agreed that the damage caused by the main break and the flow of high-pressure water in all probability caused more damage than has become visible on the ground surface. *To ensure the safety of the public and the residents, the only method to discern whether in fact such subterranean damage has occurred presenting the risk of collapse under the streets, the homes, or PAWC's distribution system, is a GPR study.* In fact, PAWC's own geophysical expert, Dr. Chung, was the first to draw this conclusion. [footnote deleted]<sup>10</sup>

OCA M.B. at 46 (emphasis added).

The preponderance of the evidence shows that the prudent and necessary course to protect the public health and safety is for PAWC to conduct a detailed analysis of the effects of the sudden release of 1.5 million gallons of water into a known sinkhole-prone area. Three expert witnesses, two of whom were professional geologists and one a professional engineer having many years of expertise with water distribution systems, testified in favor of such a study.

OCA M.B. at 12-14 (Mr. Fought and Dr. Hoskins conclude that additional geophysical studies should be done); Diesinger Exh. 2 at 7; Diesinger Exh. 1 at 17-24 (Ms. Diesinger recommends such study); OCA St. 1 at 9; OCA St. 1S at 17; OCA St. 2 at 9, OCA St. 2S at 3-4. The two professional geologists explicitly based their testimonies in part upon the conclusions of the American Geotech study *commissioned by PAWC's own insurance company.*<sup>11</sup> OCA St. 1 at 2;

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<sup>10</sup> PAWC named Dr. Chung, the author of the American Geotech report, as its own witness in its February 2006 Prehearing Memorandum. OCA M.B. at 46, n.16. However, PAWC subsequently removed Dr. Chung from its witness list.

<sup>11</sup> The ALJ sustained an objection by PAWC counsel to admission of the American Geotech study by Dr. Chung into the record. OCA M.B. at 15, n.4; *see tr.* 246. Judge Weisman ruled that the expert witnesses were entitled to rely upon, refer to, and quote relevant portions of Dr. Chung's American Geotech report in their testimonies, however. OCA M.B. at 15, n. 4, *tr.* 246-47. Enviroscan reached a

Diesinger Exh. 1 at 19 (noting that American Geotech was "the expert retained by Pennsylvania-American Water Company's insurer"). American Geotech made the following recommendations that the four expert witnesses either explicitly or implicitly supported<sup>12</sup>:

By experience, this large quantity of water will worsen the existing sinkhole conditions underneath the existing houses in the path of our estimated sinkhole routing as shown in Figure 1. Because of this accident, *chance of future sinkhole activity has greatly increased in this area.* It is, therefore, recommended that additional investigation by an experience[d] geotechnical engineer using additional geophysical investigation, engineering borings and small drill holes through the basement slabs for several residential houses immediately to the west of the broken mains be performed. *The sinkhole investigation for the safety of the school building and the parking lot is also recommended.*

Diesinger Exh. 1 at 19-10 (quoting American Geotech conclusion) (emphasis added); OCA St. 2 at 9-10; OCA St. 2 at 3-4 (Dr. Hoskins supporting American Geotech in favor of a geophysical study). After reviewing the report from PAWC's insurer, the three expert witnesses agreed with American Geotech's conclusion that an additional geophysical investigation is called for because the release of the large quantity of water from this main break would increase future sinkhole activity and raise safety issues in the surrounding area. OCA St. 1 at 17, Exh. TLF-8 (testimony of Mr. Fought and attached Enviroscan report); OCA St. 2 at 8-9 (testimony of Dr. Hoskins); Diesinger Exh.1 at 19-24. The risk to the public health and safety outweighs any arguments made by PAWC against such testing. *Cf.* OCA M.B. at 18-26, 31-37 and OCA R.B. at 7-11 with PAWC M.B. at 15-17.

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similar conclusion as the American Geotech report, finding that PAWC's main break caused the sinkhole activity observed in the area. Bechtel Exh. 1 at 42-43

<sup>12</sup> A separate study by Enviroscan, commissioned by the Creveling's insurance company, also recommended that future remediation should be performed where ground penetrating radar profiling in the Creveling's basement detected several mass-deficient zones (voids) in the study area. See Bechtel Exh. 1 at 42; OCA St. 1 at TLF Exh. 8 (Enviroscan report).

EXCEPTION NO. 3. THE COMMISSION SHOULD CORRECT FOR THE ALJ'S FAILURE TO PROPERLY CONSIDER THE COUNTERVAILING EVIDENCE PRESENTED BY EXPERT WITNESSES FOR THE COMPLAINANTS AND THE OCA. I.D. at 11-12.

The ALJ apparently placed sole weight upon the testimony of PAWC's expert metallurgical engineer, Mr. Clauser, finding that he presented "uncontradicted, credible evidence establishing that the water main suffered a single catastrophic event," and "a one-time bending overload failure." I.D. at 11-12, Findings No. 22-26. First, Mr. Clauser's testimony was far from "uncontradicted" as the ALJ stated; but also, the ALJ apparently gave no weight at all to the other highly credible and competent expert witnesses on behalf of the OCA, the Complainants and the Township. The Commission should not accept these erroneous conclusions. On the subject of reviewing an ALJ's Initial Decision, the Public Utility Code states:

When the commission does not preside at the reception of evidence, the presiding officer shall initially decide the case, unless the commission requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding officer makes an initial decision, that decision then shall be approved by the commission and may become the opinion of the commission without further proceeding within the time provided by commission rule. **On review of the initial decision, the commission has all the powers which it would have in making the initial decision,** except as it may limit the issues on notice or by rule...

66 Pa.C.S. § 335(a)(emphasis added). In other words, it is the Commission and not the ALJ that is the ultimate finder of fact. Application of Pennsylvania Power & Light Company, 1991 PaPUC LEXIS 86 (April 5, 1991) at \*10. Furthermore, assessments of fact made by an administrative law judge that is contrary to a fact found by the Commission is of no legal significance. Id. at \*10-\*11.

The OCA urges the Commission to review this extensive evidentiary record, to make its own determinations regarding the facts of this case.<sup>13</sup> In deciding complaint cases after hearings, it is incumbent upon the Commission pursuant to Section 703(e) of the Code:

...to make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding and **whether proper weight was given to the evidence.**

66 Pa.C.S. §703(e)(emphasis added). In the instant case, the ALJ gave excessive weight to the testimony of PAWC witness Clauser, a metallurgical engineer. This witness's testimony was refuted by the surrebuttal testimony of the Complainants' witnesses and his conclusions successfully challenged by all counsel on cross-examination. OCA M.B. at 48-53. The OCA urges the Commission to review the record on this point and to reject the ALJ's findings based upon the conclusions of this PAWC witness.

Where an ALJ summarily dismisses highly relevant and competent testimony in favor of other testimony for insubstantial reasons, the Commission may reject the ALJ's recommendation due to inconsistencies in the weight accorded various expert witnesses. *See* Re Investigation Upon the Commission's Own Motion Into the Extended Outages of the Beaver Valley 1 Nuclear Generating System, 1992 PaPUC LEXIS 17, \*24-\*27 (Feb. 14, 1992).

In the instant case, the ALJ did not offer a reason for his rejection of the competent testimonies of the OCA and the Township's expert witnesses. The ALJ failed even to mention in any meaningful way the highly competent testimony of Township witnesses Jeri Diesinger, Professional Geologist (P.G.), and Jay Vaughn, Township Roadmaster; OCA witnesses Terry L. Fought, Professional Engineer, and Dr. Donald Hoskins, P.G. Witnesses Diesinger, Fought and Hoskins echoed the recommendation of PAWC's insurer's consultant Dr. Chung of American

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<sup>13</sup> As noted earlier, the OCA's Proposed Findings are attached hereto for the convenience of the Commission as Appendix A.

Geotech, that ground penetrating radar (GPR) is necessary to determine the continuing risk of voids and collapses of the surface in the immediate vicinity. The Township expert Felicia Bechtel of Enviroscan, in written testimony, echoed the American Geotech recommendation as well and had already performed an independent GPR study on the Creveling property, corroborating the American Geotech results. This is clearly a case of the ALJ giving inordinate and undeserved weight to a single Company witness where the preponderance of the factual and technical evidence clearly weighs in favor of the relief sought by the Formal Complainants.

On the issue of leakage, Mr. Clauser admitted that he had not been able to examine the entire length of pipe that PAWC had removed from the main break area, nor the position of the pipe in the trench and his conclusions as to the absence of leakage were not substantiated. OCA M.B. at 48-50; tr. 420-444, 434-435. On the other hand, OCA witness Terry L. Fought specifically testified in Surrebuttal as follows:

A. I provided [direct] testimony on the acceptable leakage of water mains to show that properly installed water mains are not 100% water tight even at the time of initial installation. It is my position that leakage from the water main over time eroded areas adjacent to the pipe and thus is responsible for the water main break. Leak detection test records submitted by the Company indicate that the Company did not have (or did not follow) a routine leak detection program in the Sinking Springs area until a month before the water main break. And, even then, the Company did not perform any leak detection tests in the vicinity of the Iroquois Avenue water main break.

**Q. IS IT IMPORTANT FOR A WATER COMPANY TO HAVE A ROUTINE LEAK DETECTION PROGRAM?**

A. Yes. A routine leak detection program is desirable in all areas, but especially in karst<sup>14</sup> areas, to detect leaks early in order to prevent the type of damage that occurred here. In fact, after the water main break, the Company installed Permalog units as part of a new leak detection program throughout this service area.

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<sup>14</sup> A karst area is one characterized by soluble carbonate geology bedrock such as limestone that results from erosion of the rock over time, causing cavities and channels to open underground. I.D. at 12-13.

It is my opinion that leakage from the water main both prior to and after the main break caused the collapse of the karst structures in the areas adjacent to the main and the resulting damages to customers' properties.

**Q. DO YOU BELIEVE THAT THE PIPELINE WAS LEAKING PRIOR TO THE PIPELINE BREAK?**

A. Yes. If installation specifications include "allowable leakage" at the time of installation, this 35-year old pipeline with its 35-year old gaskets was leaking.

**Q. WHAT OTHER INFORMATION LEADS YOU TO CONCLUDE THAT THE PIPELINE WAS LEAKING PRIOR TO THE PIPELINE BREAK?**

A. The pipeline was leaking prior to the pipeline break because, as Mr. Clauser agrees, lack of support caused the pipe to break. Leakage from the water main was the only available source of water of sufficient quantity and pressure to wash away the material supporting the pipe.

**Q. HOW CAN A PIPELINE LEAK WITHOUT THE PIPE METAL CRACKING?**

A. As stated above, pipelines can leak at the joint even when first installed and leaks tend to increase over time. As mentioned in my Direct Testimony, water can leak at the joint if the joint is improperly assembled during construction or if the joint becomes overly deflected. See Exhibit TLF-11, pages 4-6 & 17 for assembly instructions and deflection data. The increasing washing away of the pipe bedding and support at one or more pipe joints, resulted in a gradually greater joint deflection(s) and a gradually increased leakage(s) until the water main broke.

OCA St. 1S at 3-4, 10-11.<sup>15</sup> Mr. Fought also did an extensive analysis of the system throughput using the Operators Logs before and after the main break and concluded that the weekly system usage was 9.46% less *after the repair of the Iroquois Avenue main*; yet, no other main breaks or changes in the system (lost customers, e.g.) accounted for that substantial a drop in usage in Sinking Springs. *Id.* at 11-13.<sup>16</sup> This analysis therefore supported his ultimate conclusion that substantial leakage from the Iroquois Avenue main break had gone undetected for a long time, because the Company had not performed any leak detection tests and the water failed to surface.

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<sup>15</sup> This testimony refutes the ALJ's proposed Finding of Fact No. 28. *Id.* at 12.

<sup>16</sup> See also OCA St. 1S at Schedule TLF-1, page 4 of 4. Usage for the week prior to the main break was 23,768,400 gallons, as compared to 21,519,700 gallons after the break, a difference of 2,248,700 gallons or 9.46%.

Id. at 15. This testimony was competent, probative, and uncontradicted. The Company did not cross-examine Mr. Fought on this testimony.

Professional geologist Felicia Bechtel also testified as an expert witness for the Township of Spring competently and persuasively on the issue of the cause of the main break, *i.e.*, the lack of leak detection and resulting sinkhole collapses:

[S]inkholes are inherently driven by the movement of water. Where there is a leak or loss of water to occur, with sinkholes appearing at the same location or in the approximate path of the water..., it is highly unlikely that sinkholes in this circumstance would be a pre-existing condition.

I further disagree with Mr. Kanaskie's point that the occurrence of sinkholes is an inherent risk of building in areas prone to geologic hazards, with the implication that this should be accepted as a risk and really no one's fault, like a tsunami or hurricane if you live on the coast. This is actually more akin to forest fires. Just like sinkholes, yes, there are naturally occurring forest fires caused by lightning strikes. Most, however, are caused by human carelessness, such as not putting out forest fires, or improper disposal of cigarettes. No one says, though, that forest fires have to be a natural consequence of human enjoyment of nature. People can camp and hike in the woods, but they just have to do so carefully, and with respect for the surrounding environment, topography, and naturally occurring conditions (including drought and conditions ripe for forest fires). It is the same with development, with its concomitant need for utilities, in areas where there are conditions ripe for sinkhole development. When installing utilities that can leak water, this requires care, such as support of lines, prevention of water leakage, and monitoring and remediation where there is leakage. Sinkholes caused by man's activity do not have to occur.

Bechtel Exhibit 2 at 5-6.

When the testimony of expert witnesses in a case conflicts, it is incumbent upon the Commission to determine which should be accepted or given predominant weight. *See Pittsburgh Railway Company v. Pa. P.U.C.*, 198 Pa. Super. 415, 428, 182 A.2d 80, 86-87 (1962) (Pittsburgh Railway). In so doing, the Commission may consider the length and variety of the witness's relevant experience, the amount of detail offered and the degree of the testimony's probative force. Id. The PUC may also consider the degree of care taken in the expert's

observations of the area in question, including the length of time taken to make inspections and study the issues involved in his or her conclusions. See Moscow Borough Council v. City of Scranton, 1987 Pa. PUC LEXIS 89 (1987). In PUC proceedings, an expert's conclusions may be considered more competent, relevant and probative if reached with regard for the need to prevent accidents and promote the safety of the public. Pittsburgh Railway, *supra*. The Initial Decision reflects no meaningful weighing of the various expert testimonies in any of these respects and should be rejected.

Beyond doubt, the OCA and Complainants' witnesses' testimony was probative, competent and should be given predominant weight. The OCA urges the Commission to review the record in the instant case and to correct the errors of the ALJ in placing sole reliance upon a Company witness and failing to give appropriate weight to the OCA and Complainants' witnesses.

EXCEPTION NO. 4. THE ALJ ERRED BY FAILING TO FIND THAT PAWC'S INADEQUATE INVESTIGATION, FAILURE TO REPORT, FAILURE TO RESPOND TIMELY TO TANK ALARMS AND FAILURE TO ENGAGE IN LEAK DETECTION CONSTITUTED UNREASONABLE, UNSAFE, INEFFICIENT AND INADEQUATE SERVICE. I.D. at 17, 19-23.

As noted earlier, the ALJ commented that evidence of a "mere main break" is insufficient under Commission precedent to demonstrate "unsafe, unreasonable, inefficient and inadequate service" under Section 1501 of the Code. While this may be correct, the OCA and Complainants offered ample evidence of multiple acts or omissions to act on the part of the utility that run contrary to its statutory duties under Section 1501. OCA M.B. at 31-44.

In summary, the OCA argued that PAWC violated its duty under Section 1501 when it:

- failed to respond timely and competently to low tank alarms (OCA M.B at 43-45);

- failed to perform leak detection procedures in accord with well-established Company standards and to keep records for locating and repairing leaks in a sinkhole-prone area (OCA M.B. at 37-43; OCA R.B. at 11-12, 13-14);
- failed to report the main break and associated damage to PUC and DEP, thus depriving those agencies of an opportunity to order a prompt investigation (OCA M.B. at 31-37);
- failed to create, maintain and preserve documentary evidence that would have been material to the issues raised in this proceeding (OCA M.B. at 19-20); and
- failed to engage in a reasonable investigation into possible damage and hazards that may have been created from the release of 1.5 million gallons of water under pressure into the ground in the span of 20 minutes.

The Initial Decision failed to address the fourth issue, relating to the various highly relevant written, electronic and physical items that PAWC failed to produce in this case. OCA M.B. at 19-20. Among the missing evidence was complete electronic SCADA<sup>17</sup> data which would have revealed tank levels and pressures at fifteen-minute intervals from the period January through March 2005, before, during and after the main break; the 72 feet of pipe segments that were scrapped because Company employee John Rothwell, a lay witness with no expertise in metallurgy, saw "nothing wrong with them"<sup>18</sup>; witness statements from the workers who were first able to observe the condition of the pipe and areas surrounding it when first uncovered; video footage or photographs of the pipe excavation that would have shown the condition of the pipe bed and the position of the pipe at the time it was first uncovered, and paper pen register

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<sup>17</sup> "SCADA" stands for "System Control and Data Acquisition." Tr. 623. SCADA updates every 15 minutes. Tr. 624. The ALJ ordered PAWC to provide this electronic data after concluding that PAWC's answers to OCA Set IV that it "was unable to access SCADA data" were "incomplete and non-responsive, verging on bad faith." Order Granting Motion to Compel (June 6, 2006) at 7-9. Even after the ALJ's Order compelling that the data be provided for January through March 2005, only handwritten Operator Logs (with two tank levels per day) were provided for the critical period. See Rothwell Exhibit 2. PAWC provided actual SCADA data, downloaded onto a compact disc, only for the period *June 2005 through 2006*

<sup>18</sup> Tr. 736 (Mr. Rothwell's oral testimony).

records from the tanks upon which the tank level information manually recorded on the Penn District Operator Logs was taken.

This Commission has stated that a party is obligated to preserve records that may be relevant, notwithstanding the existence of a regular program that would purge them on a regular bases; periodic "purging" of electronic records is the functional equivalent of destroying relevant data. Phone Talk, Inc., 126 PUR4th 179, 189-190 (1991) (Phone Talk), *citing In re Agent Orange Product Liability Litigation*, 506 F. Supp. 750, 751 (E.D.N.Y. 1980); *see also Vertis Group, Inc. v. Duquesne Light Co.*, Docket No. C-00003643 (Order February 24, 2003) (Vertis Group) (ALJ and Commission recognized the "spoliation of evidence" doctrine that enables the factfinder to draw negative inferences where relevant documents are not produced, but concluded that Complainants had not raised the issue timely.) OCA M.B. at 19.<sup>19</sup> The Commission noted in the Phone Talk case that, at the very least, a party responsible for destroying or failing to produce data or information which is or was in its hands, will be subject to any adverse inference which can be drawn from the failure to produce. Phone Talk, *supra* at 190. Complainants in the present case were entitled to access to the portions of the pipe that were scrapped and the purged SCADA data, among other records, and PAWC had an obligation to retain them, but did not. The OCA submits that the Commission should also draw any and all adverse inferences that can be drawn from PAWC's failure to produce these highly material physical and documentary items of evidence.<sup>20</sup>

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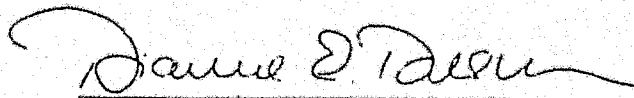
<sup>19</sup> The Initial Decision and the Final Order in the Vertis Group are lengthy and only a short portion of each deals with "spoliation of evidence," so copies have not been attached to these Exceptions. Print copies will be provided upon specific request and the OCA would also note that the documents are available on the PUC website at [www.puc.state.pa.us/PcDocs/379069.doc](http://www.puc.state.pa.us/PcDocs/379069.doc) and [www.puc.state.pa.us/PcDocs/342073.doc](http://www.puc.state.pa.us/PcDocs/342073.doc).

<sup>20</sup> The final section of the OCA's proposed findings of fact relate to the missing physical evidence and documents. OCA M.B., App A, Findings of Fact No. 86-90.

### III. CONCLUSION

In conclusion, the ALJ's Findings and Conclusions are not supported by probative evidence and reflect a misapplication of relevant statutory law and Commission precedent. The Commission should reject it and substitute the Proposed Findings of Fact, Conclusions of Law and Proposed Ordering Paragraphs attached hereto as Appendices A and B, respectively.

Respectfully Submitted,



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October 24, 2006

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APPENDIX A

PROPOSED FINDINGS OF FACT

Proposed Findings of Material Fact  
(Rev. 8/28/06)

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BACKGROUND

1. Pennsylvania-American Water Company (PAWC) is a certified public utility serving, among other areas, Sinking Springs, Spring Township, Berks County, Pennsylvania, and the service area in question in the present case is the Stonegate Neighborhood Development known as Wagner Farms and the Wilson Southern Junior High School/Cornwall Terrace Elementary Complex (School). Tr. at 14, 46, 214.
2. PAWC began servicing the Sinking Springs area in 2001 upon the acquisition of Citizens Water Company, who formerly provided water service to the area. Tr. at 5,12.
3. Spring Township, Berks County is known as a sinkhole prone area. OCA St. 1 at 5; Tr. at 538.
4. The PAWC system includes an 8-inch cast iron water main located beneath Iroquois Avenue in Spring Township. This main serves Wagner Farms and the School. The 8-inch main connects to a 10-inch ductile iron pipe on Iroquois Avenue, which connects to a 12-inch ductile iron pipe on Martins Road. OCA St. 1 at 7.
5. On February 5, 2005 the 8-inch water main in Iroquois Avenue broke releasing 1.5 million gallons of water into the earth. OCA St. 1 at 12.
6. The release of the large amount of pressurized water caused sinkholes to form in the area surrounding the water main break, resulting in severe damage to homes and property in the vicinity. The main break also led to the activation of sump pumps as far away as two blocks from the main break. OCA St. 1.
7. The failure of PAWC to incorporate company-wide leak detection policies in the Spring Township area and the failure to respond to the SCADA warning devices, intended to alert the company to large amount of water drainage, resulted in the massive amount of water being released into a known sinkhole prone area. Tr. at 301, 516-20, 720.
8. The Formal Complainants who began this case are current customers of PAWC who reside in the Sinking Springs area of the system. Tr. at 14, 46.

PROPOSED FINDINGS BASED UPON CUSTOMERS' TESTIMONY,

9. On February 5, 2005 between 10:00 p.m. and midnight, the residents of Wagner Farms began experiencing low water pressure. Tr. at 15, 47, 81, 105, 354.
10. At approximately 10:00 p.m. on February 5, 2005 the Crevelings, who reside in Wagner Farms at 3123 Wagner Circle, began hearing creaks and popping noises in the walls. Tr. at 15.
11. The following morning February 6, 2005 before 7:00 a.m. the residents of Wagner Farms found that there was no running water in their homes. Tr. at 16, 69-70, 47-8, 81, 106, 149, 354.
12. On the morning of February 6, 2005, the Crevelings found that a crack had formed above the basement door. Tr. at 17.
13. The morning of February 6, 2005 many residents of Wagner Farms went to stores to buy water and noticed others doing the same. Tr. at 48, 356.
14. Residents' sump pumps activated the morning of February 6, 2005 and continued to run until the following morning. Tr. at 18, 70, 106, 353, 355, 360, 578.
15. At 12:30 p.m. on February 6, 2005 the Crevelings were approached by representatives from PAWC at their home. The PAWC representative accompanied Creveling through his home where water was found in the basement, cracks were found in the stairway and doorway, and trees on the property had sunken into the ground. Tr. at 18-9.
16. Ms. Rose Ann Ruggiero and Mr. Neil Rahn received a phone call from the Crevelings on February 6, 2005 around 1:00 p.m. explaining that there was water in the basement of the Creveling home and asking if Ms. Ruggiero and Mr. Rahn would come to the Creveling home and help to watch the children. Tr. at 82, 106-7.
17. Ms. Ruggiero went to the Crevelings home the afternoon of February 6, 2005 where she entered the basement and saw cracks in the basement floor and water squirting and seeping through the cracks. Tr. at 83, 106-7.
18. From 12:30 p.m. until 4:00 p.m., water continued to enter the basement and cracks continued to form throughout the Crevelings house. The fence and trees in the Crevelings' yard had sunken into the ground and there was a hole forming in the yard. Tr. at 20, 83, 86, 107.

19. At 5:00 p.m. on February 6, 2005 the Crevelings were told by PAWC to vacate their house. PAWC paid for the Creveling family to stay in a hotel. Tr. at 20, 83, 530.
20. By 2:00 p.m. February 6, 2005 the water pressure had returned to the residents' homes. Tr. at 74, 86.
21. PAWC was unable to locate the break for at least twelve hours from the evening of February 5, 2005 when they began searching until the afternoon of February 6, 2005 when the break was discovered. Tr. at 81, 154-5, 576, 689.
22. Approximately 2:45 p.m. on February 6, 2005, Wagner Farms residents went to the site of the excavation of the pipe on Iroquois Avenue where they were told by John Rockwell, a PAWC employee, that main breaks were common at this time of the year and that PAWC had already repaired twelve breaks. Tr. at 85.
23. Township employees also went to the excavation site. It appeared that there was no depth below the pipe and that the ground underneath was solid. Tr. at 198-9, 164-5, 279, 285.
24. After the February 6, 2005 incident PAWC made test holes on the school parking lot. Tr. at 219-20, 227, 561-2.
25. The Creveling property suffered a total of six sinkholes on the property that engulfed trees and a fence. Additionally, it appeared that the foundation of the house had risen or the ground had depressed. Tr. at 22-3, 89-90, 157, 162.
26. On April 6, 2005 a sinkhole appeared on the property of Ms. Ruggiero and Mr. Neil Rahn located at 3119 South Wagner Circle. The sinkhole was repaired by the township. Tr. at 97, 112, 175.
27. On April 8, 2005 a sinkhole formed under the sidewalk and curb of Mr. Singerling's property located at 3128 South Wagner Circle. Mr. Singerling paid for the reparations of the sinkhole. Tr. at 50-1, 113, 175.
28. On September 4, 2005 a sinkhole formed under a fire hydrant in Wagner Farms Tr. at 113, 115, 175.
29. There are three sinkholes located behind the Cornwall Terrace Southern Junior High School that formed within fourteen months of a leaking storm sewer that was installed by the school. Tr. at 235-6.

30. The residents of Wagner Farms received no information from PAWC concerning this event. When they called the company, customers received a prerecorded message explaining that the company was aware of the problem and was in the process of fixing it. There was no opportunity to leave a message with PAWC. Tr. at 29, 48, 70-1, 105.
31. At a meeting on April 20, 2005 representatives from PAWC informed residents of Wagner Farms, including Mr. Singerling, that the company would do nothing further for any of residents of Wagner Farms affected by the main break except for the Crevelings. Tr. at 54, 57-8.
32. For the most part, residents of Wagner Farms were unaware of sinkhole activity in Berks County prior to the February 6, 2005 incident. Only after the incident did they become aware of a sinkhole on a neighbor, Anne Farina's, property. Tr. at 34, 63-4, 76, 173-5.
33. Township records for Wagner Farms for the last ten years revealed no records of repaired sinkholes. Tr. at 144-5, 186-7, 199.

#### **PROPOSED FINDINGS OF FACT BASED UPON EXPERT TESTIMONY**

34. Sinking Spring Borough is an area of carbonate geology and karst topography. Carbonate geology is characterized by soluble carbonate bedrock such as limestone. Karst topography is the result of erosion in the carbonate bedrock occurring over time. OCA St. 2 at 6; Diesinger St. 1 at 9; Twp. St. 2 at 34.
35. Sinkholes are depressions in a karst area, or a hole in the underlying bedrock that is not visible at the land surface. Closed depressions are indicators of sinkholes below the land surface. A sinkhole becomes visible when the land surface above it has collapsed. OCA St. 1 at 5-6.
36. There were no closed depressions on the 1975 and 1988 maps of the area affected by the main break: South Wagner Circle, Nash Road, and Shelley Drive. OCA St. 2 at 2, 6.
37. Based on aerial photography, there were no closed depressions, or other karst related surface features, at the time that Wagner Farms was developed. There were no voids or uncollapsed sinkholes. If sinkholes existed in the development at this time, they were stabilized. OCA St 1S at 4.
38. Sinkholes occur when water dissolves the carbonate bedrock causing cavities and channels to open up underground. A collapsed sinkhole or soil piping occurs

when water washes the soil covering the bedrock down into the cavity of the sinkhole. A solution channel is an opening in the bedrock that can transfer water from one location to another. OCA St. 1 at 8; OCA St. 2 at 5; Bechtel Exh. 1 at 34.

39. Sinkholes are formed in karst areas by the force of fluid flow and dissolution of limestone over time, characterized by the localized, gradual, or rapid sinking of the land surface. OCA St. 1 at 5, 8; OCA St 2 at 6-7; Diesinger Exh. 1 at 9.
40. Sinkholes are common along public transportation routes because water mains and other service piping generally run along the same route. OCA St 2 at 6-7.
41. The PAWC Iroquois Avenue water main broke as a result of gradual incremental removal of supporting material by a water source. OCA St. 2 at 8; OCA St. 1 16-17; Tr. at 299, 313-4.
42. An estimated 1.5 million gallons of water was released by PAWC's broken main. OCA St 1 at 12.
43. Because the water released by the Iroquois Avenue main break never surfaced at the site of the break, it must have entered an existing solution channel and was able to travel for some distance along the Wagner Circle water main. OCA St. 1 at 13, 17.
44. Water from the main break surfaced approximately 300 to 400 feet away from the site of the break. OCA St. 1 at 13.
45. Water from the Iroquois Avenue main flowed into the Wagner Farms subdivision. Some water followed a portion of the water main installed in South Wagner Circle and caused a fire hydrant and the connecting pipeline the hydrant to sink. Pipeline settling under an impervious paved road must have been caused by leakage from the water main. OCA St. 1 at 13, 17.
46. The direction of the water flow from the main break was initially west south westerly along controlled subsurface channels and flowed toward Wagner Farms development. The water eroded the stabilized infilling material. OCA St. 2S at 3.
47. Free/thaw cycles would not cause the pipe to move, lose support, and break, because the Iroquois Avenue main is buried 5 feet deep, below the area's extreme depth of frost penetration level of 1 meter, or 3.28 feet. OCA St. 1S at 2-3 and Exh. TLF-9.

48. The 1.5 million gallons of water from the main break was released at high pressure, causing nearby uncollapsed sinkholes to collapse. The water from the main break enhances the occurrence of additional sinkholes to collapse throughout the area of Wagner Farms. OCA St. 1 at 17; OCA St 2S at 3.
49. The water main break caused the damage to the Creveling home and property at 3123 South Wagner Circle. OCA St. 1 at Exh. TLF-8; Tr. 467.
50. The sinkhole activity in the Wagner Farms subdivision is attributable to the main break because 1.5 million gallons of pressurized water were released into the area, resulting in the scouring of bedrock and an overburdened substructure, which activated the subsequent sinkhole development. Additionally, it was only after the main break that there was an increase in the level of sinkhole activity. OCA St. 1 at 17; OCA St. 2 at 9; Diesinger Exh. 1 at 23; Bechtel Exh. 1 at 43; Tr. at 458-9, 469.
51. A geophysical survey by a geotechnical investigation firm with experience in identifying and mapping karst topography and identifying open cavities is necessary to determine if the land structures has been compromised by the main break and resulting release of high pressure water and the location and extent of other sinkholes in the area. It should delineate potential areas where surface collapse may occur. OCA St. 1 at 17 and Exh. TLF-8; OCA St. 2 at 8-9; OCA St. 2S at 3; Twp. St. 1 at 23-24.
52. The geophysical survey should encompass the area along South Wagner Circle, Nash Road, and Shelly Drive. OCA St. 2 at 10.
53. The Sinking Springs area contains limestone solution features that have little inherent strength and is easily eroded by water flow. OCA St. 2 at 8.
54. Water mains are not 100% tight, even at the time of initial installation. OCA ST. 2 at 3.
55. PAWC had not performed any leak detection tests in the vicinity of the Iroquois Avenue main break. OCA St. 1S at 3-4 and Exh. TLF-4.
56. PAWC experienced at least seven different main breaks within a three and a half week period. OCA St. 1S at 14.
57. Routine leak detection would have allowed for early detection of leaks before they caused greater problems such as the main break. OCA St. 1S at 3-4 and Exh. TLF-4.

58. Since the main was located beneath an impervious paved road, the only source of water which could have eroded the supporting material was water leaking from the main itself. OCA St. 1 at 16-17; OCA St. 1S at 4-7; OCA St. 2 at 8; OCA St. 2S at 2-3; Tr. at 308-309.
59. The lack of supporting material caused bending stresses on the main, which in turn caused the main to break as a result of wedge splitting. Wedge splitting occurs when a wedge of the pipe at the bell is split off to relieve bending stresses. OCA St. 1 at 14-15; Tr. at 299-300.
60. Cast iron pipe is more prone to wedge splitting than ductile iron. Ductile iron is approximately twice the strength as cast iron pipe in tensile, beam, and ring bending tests and many times the strength of cast iron pipe in elongation. Cast iron has not been manufactured for use as water mains since the mid 19070's. The PAWC main which broke was made of cast iron. After the break, PAWC used ductile iron pipe to replace the cast iron pipe in the broken main. Ductile iron pipe was available when the Iroquois Avenue main was laid in the 1970s, and has been available and accepted in Pennsylvania since 1965. OCA St. 1 at 13-15 and Exhs.TLF-5, TLF-6, TLF-7; Tr. at 522-3, 595-96, 692.
61. PAWC's Iroquois Avenue cast iron main broke due to "wedge splitting" where a wedge of the pipe at the bell is split off to relieve bending stresses. The wedge splitting occurred when the deflection of the pipe exceeded the allowable bending stress of the cast iron material. OCA St. 1 at 14-15 and Exh. TLF-6
62. Supporting material was removed from beneath the Iroquois Avenue main due to a leak in the main that washed supporting material away. OCA St. 1 at 16.
63. A portion of PAWC's broken water main that PAWC removed and replaced was never inspected by Mr. Clauser, the Company's metallurgist. Mr. Clauser only inspected 48 feet of pipe while 125 feet of pipe was removed and replaced. Tr. 433; OCA St. 1S at 10.
64. Water could leak from improper joint formation or from a deflected joint when the pipe is not laid in a straight line. Leaking water could have been detected by PAWC if proper leak detection procedures were performed and records retained. OCA St. 1 at 9-11 and Exh. TLF-4; OCA St. 1S at 11-14; OCA St. 2 at 7.
65. Because the surface beneath the pipe, when excavated, was solid, the water from the leaking pipe must have run into the throat of a nearby sinkhole or laterally along a solution channel. Water washed away the material supporting the pipe into an existing but uncollapsed sinkhole. OCA St. 1 16-17; OCA St. 2 at 8; Twp. St. 1 at 14; Tr. at 294-95.

66. Failure of the water main had to have been associated with water leaking from the main because there are no other water sources that reasonably could have caused the break. OCA St. 1 at 16-17; OCA St. 1S at 4-9; OCA St. 1S at 3.
67. The bottom of the detention pond that abuts the Wagner Farms development is on ground that is lower in elevation than the Iroquois water main break location. OCA St. 1S at 7.
68. There was no evidence of a sinkhole forming beneath the pipeline to cause the main to break. Rather, the surface beneath the pipe appeared to be solid and intact. The only visible voids were along the side walls of the excavation site. OCA St. 1 16-17; OCA St. 2 at 8; Twp. St. 1 at 14-15; Tr. at 279, 285, 300.
69. PAWC's main pipeline distribution system that lies above limestone of Spring Township should be surveyed for leaks to determine potential areas of failure so that preventative measures can be designed, installed and maintained. The recurrence of the February 5, 2005 PAWC Iroquois main break should be prevented. OCA St. 2 at 10.

**PROPOSED FINDINGS OF FACT BASED UPON PENNSYLVANIA-AMERICAN  
WATER RESOURCE MANAGEMENT POLICIES**

70. At least since 1993 PAWC has had a team of Leak Detection Specialists who survey three or more miles of distribution main per day. OCA Exh. A Tab 2 pg. 7; OCA Exh. A Tab 6 pg. 5; OCA Exh. A Tab 8 pg. 5.
71. Witness Hassinger of PAWC was unable to confirm or deny whether three or more miles of distribution main are surveyed per day for leaks in the Penn District. Tr. at 516-7.
72. At least since 1993 PAWC has had a policy requiring that 100% of fire hydrants be sounded each year. OCA Exh. A Tab 1 pg. 4; OCA Exh. A Tab 2 pg. 7; OCA Exh. A Tab 6 pg. 5; OCA Exh. A Tab 7 pg.4; OCA Exh. A Tab 8 pg. 5.
73. Witness Hassinger of PAWC was unable to confirm or deny whether 100% of hydrants were sounded per year in the Penn District. Tr. at 517, 587.
74. At least since 1993 PAWC employs a Water Loss Audit Handbook within each of its operations to analyze all potential sources of water loss. OCA Exh. A Tab 1 pg. 4; OCA Exh. A Tab 8 pg. 63; OCA Exh. A Tab 6 pg.: 63.

75. Witness Hassinger of PAWC explained that though water loss audits are carried out, the Water Loss Handbook is not utilized in the Penn Water District. Tr. at 523.
76. Witness Rothwell of PAWC was unsure of what a water loss audit is. Tr. at 674.
77. At least since 1993 PAWC has had a policy requiring sounding for leaks on 20% of all system valves each year. OCA Exh. A Tab 2 pg. 7; OCA Exh. A Tab 6 pg. 5; OCA Exh. A Tab 8 pg. 5.
78. Witness Hassinger of PAWC was unable to confirm or deny whether 20% of system valves are sounded for leaks each year in the Penn Water District. Tr. at 518, 587.
79. At least since 1993 PAWC has had a policy requiring the sounding of 33% of all service line control valves annually. OCA Exh. A Tab 2 pg. 7; OCA Exh. A Tab 6 pg. 5; OCA Exh. A Tab 8 pg. 5.
80. Witness Hassinger of PAWC was unable to confirm or deny whether 33% of all service line control valves are sounded annually in the Penn District. Tr. at 518, 588.
81. At least since 1993 PAWC has represented that it was using high quality materials in its distribution system to minimize leakage potential. OCA Exh. A Tab 2 pg. 13; OCA Exh. A Tab 6 pg. 9; OCA Exh. A Tab 8 pg. 9.
82. Since 1993 PAWC has employed seven or more maintenance service employees who travel the state in state-of-the-art electronic leak detection vans to detect and locate problem transmission and distribution mains. OCA Exh. A Tab 6 pg. 4; OCA Exh. A Tab 5 pg. 5; OCA Exh. A Tab 7 pg. 4.
83. Witness Hassinger of PAWC was unable to confirm or deny whether the PAWC leak detection team ever visited the Penn Water District. Tr. at 519-20.
84. At least since 1999, Citizens Utility Water Company of Pennsylvania, the predecessor to PAWC, employed a comparable leak detection and repair program comprised of sounding fire hydrants, valves, and curb stops. OCA Exh. A Tab 9 at. 4.

PROPOSED ADVERSE FINDINGS BASED ON PHYSICAL EVIDENCE AND  
DOCUMENTS PAWC FAILED TO PRODUCE

86. The portions of pipe that were scrapped showed evidence of leakage at the joints which caused or contributed to the erosion of the pipe bed and the fracture.

87. The SCADA data for the months requested, January to March 2005, showed that tank alarms occurred repeatedly, which would have put PAWC on notice of a substantial leak in the distribution system.

88. The records from the gauges from which the tank level data were manually recorded in the Penn District Operator Log (Rothwell Exhibit 2) would have shown that PAWC was on notice that there were substantial leaks in the distribution system.

89. Witness statements of those present at the time of the excavation, when the fractured main was first visible, would confirm that no sinkhole appeared beneath the Iroquois Avenue main and that leakage from the main eroded the pipe bed, causing the main to break.

90. A video recording that included continuous footage of the excavation when the fractured main was first visible would show that no sinkhole appeared beneath the Iroquois Avenue main and that leakage from the main eroded the pipe bed, causing the main to break.

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

PROPOSED CONCLUSIONS OF LAW

Rev. 8/28/06

1. The Commission has jurisdiction over the parties and the subject-matter of this proceeding.
2. Pursuant to 66 Pa.C.S. §332(a), the Formal Complainants and Intervenor OCA, as the proponents of a rule or order, have the burden of proof. 66 Pa.C.S. §332(a).
3. Formal Complainants and Intervenor OCA have borne their burden of proving that PAWC has failed to furnish and maintain adequate, efficient, safe and reasonable service and facilities to the customers of Sinking Springs, PA in contravention of Section 1501 of the Public Utility Code, 66 Pa.C.S. §1501. More specifically, Complainants and Intervenor have proved that PAWC was and is in violation of Section 1501 because of the following actions or inactions on the part of Company personnel:
  - a. PAWC failed to perform a prompt and thorough investigation of the events surrounding the main break. No statements were taken from those who were present when the area of the broken main was unearthed. No photos or videos were taken of the broken main at the time that it was excavated.
  - b. PAWC failed to retain records associated with the events surrounding the main break. Parts of the pipe that were removed in the area of the break were discarded. No chain of custody records associated with the part of the pipe that was removed were produced. The electronic SCADA records that would have shown the tank levels at 15 minute intervals and the issuance of tank alarm calls were allowed to be purged.
  - c. PAWC failed to report the main break and destruction of the residential structure adjacent to the main, an occurrence of an unusual nature, pursuant to 52 Pa. Code. §65.2.
4. It would be unjust and inequitable to allow PAWC to permit Respondent PAWC to reap any benefit from its failure to comply with pertinent provisions of the Public Utility Code and relevant regulations.
5. Pursuant to Section 1504, 66 Pa.C.S. §§1504, the Commission has authority, after notice and hearing upon complaints, to prescribe as to service and facilities, just and reasonable standards and practices to be imposed, observed and followed by a public utility.

PROPOSED ORDERING PARAGRAPHS

WHEREFORE, Pennsylvania American Water Company is HEREBY ORDERED to take the following actions consistent with Sections 1504 and 1505 of the Public Utility Code, 66 Pa.C.S. §1504-1505:

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SECRETARY'S BUREAU

a. Within thirty (30) days of this Order, begin the process of remediating the subsurface damage and the damage to the former Creveling residence, located at 1323 South Wagner Circle, Sinking Springs, PA;

b. PAWC shall provide monthly status reports to the parties, the PUC's Bureau of Fixed Utility Services<sup>1</sup> and the Bureau of Safety and Compliance;

c. Within one year, PAWC shall have completed the remediation of the damage done to the residence at 1323 Wagner Circle, Sinking Springs, PA and shall provide a full report to the parties and to the Commission;

d. Within thirty (30) days of this Order, PAWC shall cause a Ground Penetrating Radar (GPR) test to be performed in the areas of South Wagner Circle, Shelly Drive and Nash Road to determine the existence of any voids that may put the residents, their homes, the streets and PAWC's infrastructure in jeopardy of damage or collapse;

e. Upon completion of the GPR test by a competent geophysical engineering firm, PAWC shall provide the documentary results of the test, together with a proposed timetable and remediation plan to deal with any voids discovered through the GPR testing, to the parties, the parties' consultants, the PUC's Bureau of Fixed Utility Services and the Bureau of Safety and Compliance;

f. For a period of two years, ten days following the end of each quarter, PAWC shall provide to the OCA, its engineering experts and to the Commission's BFUS, leak detection reports and records to demonstrate that all areas of its service territory are maintained consistent with PAWC's longstanding leak detection and repair policy as set forth in OCA Exhibit A and with the PUC's Water Conservation Policy Statement, codified in 52 Pa. Code §53.20. These records will consist of the following:

1. PAWC's Water Audit Master Plan;
2. Records of water audits and annual updates to the audits;
3. Records of compliance with Chapter 65 of the Pennsylvania Code and the American Water Works Service Operations Manual;
4. An Action Plan, consistent with PAWC's Water Resource Management Program, to detect leaks and control non-revenue water specifically in the Penn Water District that encompasses Sinking Springs, PA.
5. Monthly records that demonstrate that the Action Plan is being carried out.

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<sup>1</sup> The OCA has been requested by a representative of the BFUS to include the Commission's BFUS as an entity to be served with any documentation of compliance with a Commission Order.

CERTIFICATE OF SERVICE

Re: Spring Township :  
v. : Docket No. C-20054746  
Pennsylvania American Water Company :  
  
Neil R Rahn and David Singerling, *et al.* :  
v. : Docket No. C-20054919  
Pennsylvania-American Water Company :  
  
Wilson School District :  
v. : Docket No. C-20055371  
Pennsylvania American Water Company :

I hereby certify that I have this day served a true copy of the foregoing document, Office of Consumer Advocate's Exceptions, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 24<sup>th</sup> day of October, 2006.

SERVICE E-MAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

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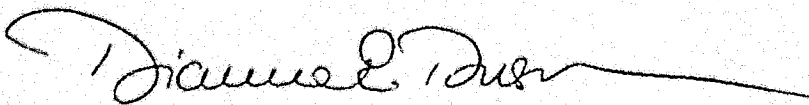
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86762 doc. 1/DED



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IRWINA POPOWSKY  
Consumer Advocate

FAX (717) 783-7152  
consumer@paoca.org

October 24, 2006

James J. McNulty, Secretary  
PA Public Utility Commission  
Commonwealth Keystone Bldg.  
400 North Street  
Harrisburg, PA 17120

DOCUMENT  
FOLDER

SECRETARY'S BUREAU  
PA PLC

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RE: Spring Township v.  
Pennsylvania American Water Company  
Docket No. C-20054746

Neil R Rahn and David Singerling v.  
Pennsylvania-American Water Company  
Docket No. C-20054919

Wilson School District v.  
Pennsylvania American Water Company  
Docket No. C-20055371

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Exceptions on behalf of Neil Rahn and David Singerling, formal complainants in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

Dianne E. Dusman  
Senior Assistant Consumer Advocate  
Attorney I.D. # 38308  
[DDusman@paoca.org](mailto:DDusman@paoca.org)

Enclosures

cc: Hon. Wayne L. Weismandel, ALJ  
All parties of record

86761 doc. /DED

27

REFERENCE: PUC DOCKET NUMBER C-20054919 - INTIAL DECISION BY WAYNE L. WEISMANDEL, ADMINISTRATIVE LAW JUDGE FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Exceptions from Neil Rahn and David Singerling, Formal Complainants.

We strongly take exception to Judge Weismandel's decision in this manner for the following reasons. Since we do not have access to the transcripts of the proceedings conducted during the week of July 26, 2006, we are using personal notes from the hearings for our comments.

1) The Judge apparently did not consider it pertinent that the Water Company's lawyers choose not to call their own identified witnesses to testify. The OCA lawyers had to subpoena these hostile witnesses. In both cases, during questioning, it was determined that the higher level manager basically knew nothing about the details surrounding the incident. The other witness, John Rothwell, who was the front line supervisor of the Water Co. system in the area of the break, admitted that he had indications of a water leak problem much earlier then the reporting of the problem by customers. The ALJ chose not to address this issue in his initial findings for the Water Co.

**DOCUMENT  
FOLDER**

**DOCKETED**  
NOV 01 2006

2) During questioning of the Water Co.'s expert witness concerning geophysical conditions of the local area the Judge asked him what were the odds of the sinkholes that occurred after the water main break being caused by other conditions then the water loss itself. Without an immediate response the Judge suggested "a million to one?" The witness smiled and agreed with this question. Why didn't the Judge in his findings consider this response? If the water loss caused visible damage in the immediately adjacent property, the experts agreed that other damage, not yet visible, could have been caused under our properties and the streets. The evidence showed that PAWC water showed up in basements 300 feet or more from the break.

4) In his discourse on the rationale for his findings, he weighed heavily on the testimony of the metallurgical expert provided by the Water Co. During rebuttal questioning by the Wilson School District's lawyer, it was obvious that he had done very little investigation of the pipe condition to determine actual cause of the failure. Again, it is hard to recognize how the Judge put so much weight on his decision based on this witness's testimony.

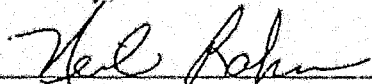
SINCE THE ACTION WE TOOK RELATIVE IN THIS CASE WAS TWOFOLD;

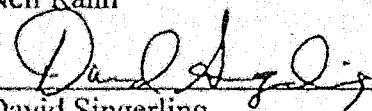
A) WE DID NOT NOR DO WE KNOW THE EXTENT OF THE DAMAGE CAUSED BY THE 1.5 MILLION GALLONS OF WATER LOST DURING THE WATER MAIN LEAK.

B) SINKHOLES THAT HAVE APPEARED SINCE THE MAIN BREAK ARE NOT COVERED BY HOMEOWNER INSURANCES IF THE PROBLEM IS NOT ASSOCIATED WITHIN THE FOOTPRINT OF PERMAMENT STRUCTURAL PROPERTY.

WE STRONGLY BELIEVE THE JUDGE DID NOT GIVE ADEQUATE CONSIDERATION TO THE SITUATION THAT FACES THE COMMUNITY OF THE STONEGATE DEVELOPMENT, IN THE WAGNER FARMS SUB-DIVISION RELATIVE TO THE ACTUAL AND POTENTIAL DAMAGE CAUSED BY THE 1.5 MILLION GALLIONS OF WATER THAT IMPACTED THE PROPERTIES AND INFRASTRUCTURE OF THIS DEVELOPMENT.

Sincerely,

  
\_\_\_\_\_  
Neil Rahn

  
\_\_\_\_\_  
David Singerling

CERTIFICATE OF SERVICE

Re: Spring Township :  
v. : Docket No. C-20054746  
Pennsylvania American Water Company :  
  
Neil R Rahn and David Singerling, *et al.* :  
v. : Docket No. C-20054919  
Pennsylvania-American Water Company :  
  
Wilson School District :  
v. : Docket No. C-20055371  
Pennsylvania American Water Company :

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P. O. P. U. C.

I hereby certify that I have this day served a true copy of the foregoing document. Exceptions on behalf of Neil Rahn and David Singerling, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 24<sup>th</sup> day of October, 2006.

SERVICE FIRST CLASS MAIL, POSTAGE PREPAID

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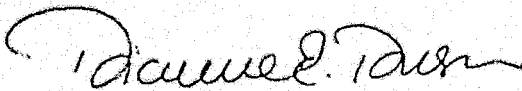
Neil Rahn  
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Wagner Farms Homeowners Association  
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Sinking Spring, PA 19608

David Singerling  
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Wagner Farms Homeowners Association  
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OCT 24 2006

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

ORIGINAL

October 24, 2006

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James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

DOCUMENT  
FOLDER

Re: Township of Spring  
v. Pennsylvania-American Water Co  
Docket No. C20054746  
Neil R. Rahn and David Singerling, et al.  
v. Pennsylvania-American Water Co.  
Docket No. C-20054919  
Wilson School District  
v. Pennsylvania-American Water Co.  
Docket No. C-20055371  
Our File No. 100744-388

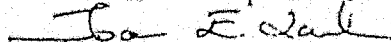
Dear Secretary McNulty:

Enclosed please find an original and ten (10) copies of the Exceptions of Complainant, Township of Spring, to Initial Decision of the Administrative Law Judge, for filing. Kindly time stamp and return one copy to me in the enclosed, self-addressed stamped envelope. Also enclosed is U.S. Postal Service Form 3817 - Certificate of Mailing, attached to the cover of the original document.

Thank you for your assistance in this matter.

Very truly yours,

KOZLOFF STOUDT  
Professional Corporation

  
Joan E. London

JEL/kab

Enclosure

cc: The Honorable Wayne L. Weismandel (w/enclosure)  
Diane E. Dusman, Senior Assistant Consumer Advocate (w/enclosure)  
Kenneth Zielonis, Esquire (w/enclosure)  
Harry D. McMunigal, Esquire (w/enclosure)  
Mark M. Bridge, Esquire/Nancy Longo, Esquire (w/enclosure)  
Seth A. Mendelsohn, Esquire (w/enclosure)

Kozloff Stoudt, Professional Corporation

2640 Westview Drive | P.O. Box 6286 | Wyomissing, PA 19610 | Tel 610.670.2552 | Fax 610.670.2591 | Web [kozloffstoudt.com](http://kozloffstoudt.com)

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EX-111-111

OCT 24 2006

PA PUBLIC UTILITY COMMISSION

SOLICITORS FOR COMPLAINANT,  
TOWNSHIP OF SPRING

---

BEFORE THE COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION

TOWNSHIP OF SPRING, : Docket No. C-20054746  
Complainant :  
vs. :  
PENNSYLVANIA-AMERICAN :  
WATER COMPANY, :  
Respondent : Assigned to:  
: Wayne L. Weismandel, A.L.J.

DOCUMENT  
FOLDER

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NEIL R. RAHN and DAVID : Docket No. C-20054919  
SINGERLING, *et al.*, :  
Complainant :  
vs. :  
PENNSYLVANIA-AMERICAN :  
WATER COMPANY, :  
Respondent : Assigned to:  
: Wayne L. Weismandel, A.L.J.

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WILSON SCHOOL DISTRICT, : Docket No. C-20055371  
Complainant :  
vs. :  
PENNSYLVANIA-AMERICAN :  
WATER COMPANY, :  
Respondent : Assigned to:  
: Wayne L. Weismandel, A.L.J.

---

EXCEPTIONS OF COMPLAINANT, TOWNSHIP OF SPRING, BERKS COUNTY TO  
INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

---

Complainant, Township of Spring, through its undersigned Solicitors, Joan E. London, Esquire and Kozloff Stoudt, Professional Corporation, sets forth the following as Exceptions to the Initial Decision of Administrative Law Judge Wayne L. Weismandel, in accordance with 52 Pa.Code Section 5 533, and, in support thereof, avers as follows:

1. Complainant, Township of Spring, adopts as its own, and incorporates by reference as though the same were set forth herein at length, the Exceptions to the Initial Decision filed by the Office of Consumer Advocate.

2. Complainant, Township of Spring takes exception to Conclusions of Law No. 19, 20, 21 and 23, and the portion of the Discussion located at Page 19 of the Decision, which state that PAWC did not violate applicable statutes or regulations in the detection of and response to the water main break of February 5, 2005. The Administrative Law Judge failed to take into account substantial evidence in the record of the failure of Respondent, Pennsylvania-American Water Company, to provide adequate, efficient, safe, and reasonable service as required by 66 P.S. Section 1501. Notably, there was testimony in the record that PAWC failed to take readily available measures to detect and remediate the water main break and catastrophic loss of water. There was testimony offered by PAWC that it has "leak detection teams," but that no such teams were called or deployed. (N.T., Page 573, Line 20 to Page 576, Line 19; Page 591, Line 11). PAWC representatives admitted that it was not until approximately thirteen (13) hours after the loss that the break was discovered, and this was only because a PAWC employee, responding to the wrong location, saw the sunken trees on

the Creveling property. The Administrative Law Judge disregarded evidence of a readily available measure which was not utilized, in violation of PAWC's duty to provide safe service.

3. The Administrative Law Judge failed to take into account substantial evidence in the record of the need for, and reasonable availability of, minimally invasive testing of the subsurface surrounding its lines in order to provide the safe service required under Sections 1501 and 1505 of the PUC Code, and the power of the PUC to order such testing. The Administrative Law Judge erred in failing to even address the issue of the necessity for and feasibility of such testing. Felicia Kegel Bechtel, P.G., testified in her in-person sur-rebuttal expert testimony regarding the value of such testing:

Q. I would like to call your attention to the portion of Mr. Kanaskie's testimony on Pages 12 and 13, where Mr. Kanaskie offers the opinion that there is no geological basis for Pennsylvania American Water Company to perform testing and identify subsurface features throughout the Wagner Farms development as a response to the subject water main break. Have you reviewed this portion of Mr. Kanaskie's testimony?

A. Yes, I have.

Q. Do you have an opinion as to whether this is correct?

A. Yes, I do. I do not agree with his conclusion.

Q. What is the basis for your disagreement?

A. To give an example, Enviroscan performed sub-surface testing in Millersville, Pennsylvania in a case where a sinkhole opened after a water main break. The borough repaired the sinkhole, and then hired Enviroscan to perform non-invasive subsurface testing using Ground Penetrating Radar (GPR) over the water lines, to show where there were potential sinkholes forming, but not yet opened. This survey was able to show where there was incipient activity.

To explain further, sinkholes are inherently driven by the movement of water. Where there is a leak or loss of water to occur, with sinkholes appearing at the same location or in the approximate path of the water (which we know to be toward the farthest point down-gradient at which the water table intersects with the ground surface), it is highly unlikely that sinkholes in this circumstance would be a pre-existing condition.

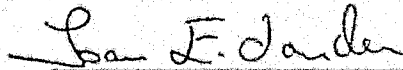
(N.T., 6/28/06, Bechtel Sur-Rebuttal Testimony, Page 5, Line 4 to Page 6, Line 2).

The Commission, under Section 1504, may, "after reasonable notice and hearing, upon its own motion or upon complaint... (2) Prescribe adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of service of any and all public utilities. [and] (3) Prescribe reasonable regulations for the examination and testing of such service, and for the measurement thereof. 66 Pa.C.S.A. Section 1504. Section 1504 affords the Commission broad powers to order quantitative, objective measurement and testing relating to services rendered by public utilities such as PAWC. Such testing in this case is critical not only to the peace of mind of Township residents, as stated by the Office of Consumer Advocate in its Exceptions, but also to the Township itself. The Township, as the body with responsibility for the maintenance and repair of its streets, needs to know as a matter of budgeting, and as a matter of protection of public safety, whether there are voids or weak areas created by the events of February 5, 2005 which will require remediation, or even temporarily blocking or closing streets. Such testing, as a matter of equity, should be performed at the expense of PAWC, as the for-profit business which maintained water lines under public streets. PAWC is required to

provide safe service, which includes protection of the safety of the public from loss of the water its supplies as a public utility.

WHEREFORE, it is respectfully requested by Complainant, Township of Spring, Berks County, that the Pennsylvania Public Utility Commission reject the Initial Decision of Administrative Law Judge Wayne L. Weisman in the above-captioned consolidated proceedings, and substitute the proposed Findings of Fact, Conclusions of Law, and Orders of the Office of Consumer Advocate, Township of Spring, and Wilson School District.

KOZLOFF STOUT  
Professional Corporation



Joan E. London, Esquire  
2640 Westview Drive  
P.O. Box 6286  
Wyomissing, PA 19610  
(610) 670-2552

CERTIFICATE OF SERVICE

I, Joan E. London, Esquire, hereby certify that I have this day served a true copy of the foregoing document (Exceptions of Township of Spring to Initial Decision of Administrative Law Judge) upon the parties listed below, in accordance with the requirements of 52 Pa. Code Section 154 (relating to service by a party):

Dianne F. Dusman, Esquire  
Darlene Wong, Esquire  
Commonwealth of Pennsylvania  
Office of the Consumer Advocate  
555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, PA 17101-1923

Kenneth Zielonis, Esquire  
1786 Autumnwood Drive  
Mechanicsburg, PA 17055  
(via first class mail and e-mail to [KZIELONIS@AOL.COM](mailto:KZIELONIS@AOL.COM))

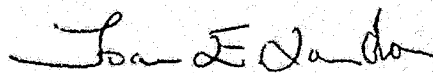
Harry D. McMunigal, Esquire  
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Mark M. Bridge, Esquire  
Nancy Longo, Esquire  
101 East Lancaster Avenue, Suite 304  
Wayne, PA 19087

Seth Mendelsohn, Esq.  
Pennsylvania American Water Co.  
800 West Hershey Park Drive  
Hershey, PA 17033

Dated this 24<sup>th</sup> day of October, 2006.

KOZLOFF STOUT  
Professional Corporation



Joan E. London, Esquire  
Solicitor for Complainant, Township of Spring

FILED

OCT 24 2006

PA. PUBLIC UTILITY COMMISSION

# BINGAMAN HESS

ATTORNEYS AT LAW

DAVID E. TURNER  
MARK G. YODER  
KURT ALTHOUSE  
LYNNE K. DEUST  
HARRY D. McMUNIGAL  
PATRICK T. BARRETT  
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ELIZABETH D. McMUNIGAL  
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THOMAS A. ROTHERMEL\*  
*\*Also admitted in NJ*

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November 3, 2006

RALPH J. ALTHOUSE, JR.  
RETIRED

LLEWELLYN R. BINGAMAN  
1907-1996  
RAYMOND K. HESS  
1919-2005  
J. WENDELL COBLENTZ  
1911-2003  
JAMES F. BELL  
1921-1988

VIA HAND DELIVERY

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building, 2nd Floor  
400 North Street  
Harrisburg, PA 17120

RE: Neil R. Rahn, David Singerling, et al v. PA American Water; No.: C-20054919  
Township of Spring v. PA American Water; No.: C-20054746  
Wilson School District v. PA American Water, No. C-20055371  
Our File No.: 10176-1041

Dear Secretary McNulty:

Enclosed please find for filing an original and ten (10) copies of the the Reply of Respondent Pennsylvania American Water Company to Exceptions of Complainants Office of Consumer Advocate, Township of Spring, Wilson School District, Neil R. Rahn, David Singerling, Robert Creveling, Thomas Schmidt, Roberto Soto and Anna Stubenrauch-Soto. Kindly file the originals, time-stamp the extra copy and return one copy to the undersigned

Should you have any questions or comments, please feel free to contact me.

Very truly yours,

BINGAMAN HESS

  
Harry D. McMunigal

DOCUMENT  
FOLDER

HDM/cjb  
Enclosures

cc(w/enc.) (via email/reg. mail): Dianne E. Dusman, Esquire (ddusman@paoca.org)  
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Joan E. London, Esquire (jlonon@kozloffstoudt.com)  
Mr. Neil Rahn (neilr@comcast.net)  
Mr. David Singerling (davidsingerling@netzero.net)  
Kenneth Zielonis, Esquire (kzielonis@aol.com)  
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PA PUC

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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TOWNSHIP OF SPRING,  
Complainant

v.

Docket No. C-20054746

PENNSYLVANIA AMERICAN WATER  
COMPANY,  
Respondent

NEIL R. RAHN, DAVID SINGERLING, ET AL  
Complainants

v.

Docket No. C-20054919

PENNSYLVANIA AMERICAN WATER  
COMPANY,  
Respondent

WILSON SCHOOL DISTRICT,  
Complainant

v.

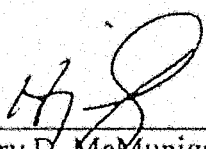
Docket No. C-20055371

PENNSYLVANIA AMERICAN WATER  
COMPANY,  
Respondent

REPLY OF RESPONDENT  
PENNSYLVANIA AMERICAN WATER COMPANY  
TO EXCEPTIONS OF COMPLAINANTS  
OFFICE OF CONSUMER ADVOCATE, TOWNSHIP OF SPRING,  
WILSON SCHOOL DISTRICT, NEIL R. RAHN, DAVID SINGERLING,  
ROBERT CREVELING, THOMAS SCHMIDT, ROBERTO SOTO  
AND ANNA STUBENRAUCH-SOTO

DOCUMENT  
FOLDER

BINGAMAN, HESS, COBLENTZ & BELL, P.C.



Harry D. McMunigal, Esquire  
Attorney for Respondent,  
Pennsylvania American Water Company

**DOCKETED**  
NOV 09 2006

TABLE OF CONTENTS

Table of Citations.....ii

I. STATEMENT OF THE CASE .....1

II. INTRODUCTION.....3

    A. Standard of Review..... 3

    B. The Decision of Judge Weisman del Should Be Adopted.....4

III. LEGAL ANALYSIS..... 5

    A. The Commission Has No Authority Under the Circumstances of  
    This Case to Order Respondent to Undertake Testing and Remediation.....5

    B. Judge Weisman del's Decision Was Supported By Substantial Evidence.....13

    C. All Other Aspects Of PAWC's Service Were In Compliance With §1501.....15

IV. CONCLUSION.....20

CERTIFICATE OF SERVICE.....21

## TABLE OF CITATIONS

### Cases

<u>Allegheny Center Associates v. Commw. PA Public Utility Commission</u> , 131 Pa.Comm. 352, 570 A.2d 149 (1990).....	3, 15
<u>Commonw., Pa Public Utility Commission v. Purolator Courier Corp.</u> , 24 Pa.Comm. 301, 355 A.2d 850 (1976).....	3
<u>Consolidated Rail Corp. v. Commw. PA Public Utility Commission</u> , 155 Pa.Comm. 537, 625 A.2d 741 (1993).....	15
<u>Danovitz v. Portnoy</u> , 399 Pa. 599, 161 A.2d 146 (1960).....	3, 13
<u>DeFrancesco v. Western Pennsylvania Water Company</u> , 499 Pa. 374, 453 A.2d 595 (1982) .....	8
<u>Metropolitan Edison Company</u> , Pa. PUC 662 (1993).....	8, 13
<u>Mill v. Commw., PA Public Utility Commission</u> , 67 Pa.Comm. 597, 447 A.2d 1100 (1982) .	13
<u>Morrow v. Bell Telephone Company of Pennsylvania</u> , 330 Pa.Super. 276, 479 A.2d 548 (1984)	8
<u>Ostrov v. IFT, Inc.</u> , 402 Pa.Super. 87, 586 A.2d 409 (1991)..	8, 13
<u>West Penn Power Company v. PA Public Utility Commission</u> , 84 Pa.Comm. 157, 478 A.2d 947 (1984).....	5, 6, 7, 13

### Statutes

52 Pa.Code §65.2.....	17
66 Pa. §1501.....	5
66 Pa.C.S. §§332(b), 703(e).....	3
66 Pa.C.S. §332(a).....	4
66 Pa.C.S. §332(b).....	3

I. STATEMENT OF THE CASE

Over the course of the evening of Saturday, February 5, 2005 to Sunday, February 6, 2005, a water main under the control of PAWC ruptured at the intersection of Iroquois Avenue and South Wagner Circle in Sinking Spring, Spring Township, Berks County, Pennsylvania.

John Rothwell, the network supervisor for PAWC in the district servicing Township of Spring, was first notified of the existence of a problem at approximately 10.45 p.m. on Saturday, February 5 when he received an alarm call on his cell phone from the tank alarms and was further notified by the call center reporting some customer complaints. He immediately initiated an investigation to locate the source of the rupture. As no complaints had been logged of flooding on customer properties or of the presence of surface water on the roadways, PAWC acted first to test all of the systems in the district to isolate the source of the leak. By early morning, on Sunday, February 6, PAWC believed it had found the source of the problem located on Shelley Drive, near Iroquois Avenue, because the sump pumps of some customers in that area were operating. PAWC located the actual source of the leak, the water main break, at approximately 1:00 on that Sunday afternoon underneath Iroquois Avenue at its intersection with South Wagner Circle. Excavation efforts were immediately undertaken, and the breach in the pipe was clamped and subsequently replaced.

The rupture of this break lead to the formation that day of sinkholes on the property of Complainant Robert E. Creveling. Complainants now allege that this water main break caused not only those sinkholes to develop on the Crevelings' property, but also other sinkholes that developed some months later, some distance away from the site of the water main break. However, investigation on behalf of all parties to these proceedings has yielded the uniform, consistent result that Spring Township as a whole, including the neighborhood where these Complainants reside, sits on a geological formation of limestone that is heavily prone to the

development of sinkholes. In fact, evidence has established that a sinkhole developed less than five months prior to this water main break only several houses down the street from the source of that break. Furthermore, excavation at the site of the break revealed a large mass of concrete immediately adjacent to the site of the main break that had been previously poured into that underground area, which all sources agree represented remediation efforts from a prior sinkhole. Additional evidence has determined that it was not the water main break that caused the sinkhole, but instead, the development of the sinkhole in this sinkhole-ridden area that caused this water main to rupture.

Creveling and other property owners in that development, along with Township of Spring and the Wilson School District which owns nearby property, filed Complaints seeking the assessment of fines and penalties against PAWC for this water main break. In addition, they also sought an Order compelling PAWC to undertake geological testing on all of the properties in that subdivision to determine the existence of sinkholes underlying their property that may be attributable to this water main break, and to undertake remediation efforts to prevent future damage that may be caused by those sinkholes.

The Honorable Wayne L. Weismandel presided over four days of hearings on these Complaints, and issued an Initial Decision on September 25, 2006, dismissing all Complaints. Complainants filed timely Exceptions to that Initial Decision, and this filing serves as PAWC's Reply to those Exceptions. For the reasons that follow, it is respectfully submitted that the Commission should dismiss all Exceptions and adopt the Initial Decision of Judge Weismandel.

## II. INTRODUCTION

### A. Standard of Review.

In his Initial Decision, Judge Weismandel correctly set forth the appropriate standard of review for the Commission - the findings of fact must be supported by substantial evidence, which is such relevant and competent evidence having a rational probative force as a reasonable mind might accept as adequate to support a conclusion. Commonw., Pa Public Utility Commission v. Purolator Courier Corp., 24 Pa. Commw. 301, 355 A.2d 850 (1976). Similarly, as concerns public utility hearings, it is expressly stated that no rule or order shall be issued "except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence." 66 Pa.C.S. §332(b) (emphasis added).<sup>1</sup> Additionally, it is the administrative law judge who has the opportunity to personally see, hear and evaluate the witnesses who are testifying, and as such is the sole arbiter of credibility determinations. Danovitz v. Portnov, 399 Pa. 599, 161 A.2d 146 (1960). Furthermore, the presiding judge is not required to address or summarize all of the evidence and testimony presented by all witnesses for all parties; instead, he is bound only to base his findings of fact on those portions of the record that constitute the "reliable, probative and substantial evidence." Allegheny Center Associates v. Commw. PA Public Utility Commission, 131 Pa. Comm. 352, 570 A.2d 149 (1990); 66 Pa.C.S. §§332(b), 703(e). A full review of the record in this case clearly demonstrates that the Initial Decision is indeed supported

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<sup>1</sup> The OCA incorrectly relies upon Section 703(e) of the Code for the proper standard of review, at page 13 of its Exceptions. To the contrary, 66 Pa.C.S. §703(e) sets forth the requirements for a Decision issued by the Commission itself, for proper review by an appellate court; it does not set forth the level of review of an Initial Decision by an ALJ.

by reliable, probative and substantial evidence, such that it should be accepted and adopted by this Commission.

**B. The Decision of Judge Weismandel Should Be Adopted.**

For four full days on June 26, 27, 28 and 30, 2006, Judge Weismandel presided at the hearing on the Complaints filed in the three consolidated actions at issue herein.<sup>2</sup> During these four days, Judge Weismandel heard the testimony of 16 live witnesses and undertook his own detailed questioning of those witnesses. The parties also submitted direct testimony in written form from expert witnesses that Judge Weismandel reviewed as well, as evident from the nature of his questioning of those witnesses,. He also reviewed 23 extensive and detailed exhibits. Following the hearing, Judge Weismandel reviewed a transcript of these proceedings consisting of almost 800 pages. (Initial Decision at 7)

During the course of these extensive proceedings, Judge Weismandel accepted into evidence the testimony of all of Complainants' witnesses and almost all of Complainants' exhibits, including an affidavit and photograph submitted by the OCA two months after the hearing concluded.<sup>3</sup> Judge Weismandel also granted Complainants' request and ordered the issuance of subpoenas to compel the testimony of two representatives of PAWC as of cross, although PAWC agreed to produce those witnesses voluntarily.<sup>4</sup>

---

<sup>2</sup> Judge Weismandel also served as administrative law judge for the extensive pretrial proceedings in the case, which included presiding at three prehearing conferences.

<sup>3</sup> The only evidence rejected by Judge Weismandel were copies of 21 photographs that Complainant Wilson School District attempted to introduce into evidence on August 31, 2006.

<sup>4</sup> In their Exceptions, Complainants Neil Rahn and David Singerling point out that PAWC "chose not to call their own identified witnesses to testify" and that the OCA "had to subpoena these hostile witnesses". (Exception 1 at page 2) It bears mentioning at this point that PAWC did not have to call any witnesses, that it is the burden of the Complainants to prove their case. 66 Pa.C.S. §332(a).

He then prepared a 27 page Initial Decision consisting of an extensive history of the proceeding, findings of fact, discussions, conclusions of law and an order. This Initial Decision contains extensive factual determinations and legal analyses that demonstrate that Judge Weismandel undertook a thorough, sober and reasoned analysis of the extensive evidence submitted in this case, that his decisions on credibility are reasonable, logical and consistent with the evidence, and that his factual determinations are clearly supported by substantial evidence. It is respectfully submitted, therefore, that this Initial Decision should be adopted by the Commission.

### III. LEGAL ANALYSIS

#### A. The Commission Has No Authority Under the Circumstances of This Case to Order Respondent to Undertake Testing and Remediation.

The entire crux of this case is contained within a single sentence written by Judge Weismandel at page 16 of his Initial Decision:

Absent proof by a preponderance of the evidence that respondent violated the provisions of 66 Pa.C.S. §1501 the Commission has no authority to require any action by respondent. West Penn Power Company v. PA Public Utility Commission, 84 Pa.Comm. 157, 478 A.2d 947 (1984).<sup>5</sup>

All parties agree that 66 Pa. §1501 is the controlling rule of law governing the obligations imposed on PAWC arising out of the water main break at issue herein. It provides as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees and the public. Such service also shall be

<sup>5</sup> The OCA disagrees with this premise, reasoning that if it were "literally true, the PUC could never act to prevent unsafe service under the Public Utility Code". (OCA Exceptions at 2) This begs the question – if it were determined that unsafe service was being provided, then the PUC would indeed have the authority to act, under Section 1501.

reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the Commission.

66 Pa.C.S. §1501. West Penn Power Company is a leading Commonwealth Court case analyzing the scope of §1501, and merits further analysis herein. West Penn involved a Complaint filed with the Commission by dairy farmers, alleging that stray voltage from West Penn's transformer was adversely affecting their cows. Id., 478 A.2d at 948. The farmers eventually were required to purchase and install isolation transformers which substantially reduced the stray voltage levels. Complaints were brought to require the power company to reimburse them for these purchase and installation costs. Id. The Commission did find that the Complainants had sustained their burden of proof, and ordered West Penn to reimburse the Complainants for 75% of their costs. The Commission went on to specifically state, however, "that its decision should not be interpreted as a finding that West Penn had rendered inadequate or unreasonable service in contravention of its duty under §1501 of the Code." Id. at 949 (emphasis in original). Instead, the Commission intended its Order to be interpreted as merely a policy decision regarding the allocation of costs. Id.

The Commonwealth Court reversed, noting that the Commission decision was internally inconsistent. After setting forth the language of §1501, the Court reasoned as follows:

This section sets forth the utility's duties to its customers and is the basis of the Complaints filed in this case. We hold that in order for the PUC to sustain a Complaint brought under this section, the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.

Id. (footnote omitted). The Court went on to conclude that the Commission's decision had specifically stated that the power company had not violated its duty, such that the Complaints could not be sustained in any fashion. Id. at 950.

The same reasoning should be applied to the facts of the present case. The substantial evidence of record establishes that Complainants herein did not prove that PAWC failed to furnish or maintain adequate, efficient, safe or reasonable service and facilities, or that it violated any of its obligations as set forth in §1501. Absent such a determination, the Commission is simply powerless, under West Penn, to issue any order or directive against PAWC.

In its Exceptions, the OCA complains that Judge Weismandel ignored the recitation of civil cases from Pennsylvania and other jurisdictions that impose damages involving water main breaks, and explains that there are no similar cases decided by the PUC because "water utilities' insurers generally pay claims made by customers with properties damaged by the flows of water resulting from main breaks."<sup>6</sup> (OCA Exceptions at 6) This acknowledgement is telling for two reasons. First, it again attempts to introduce into these Commission proceedings principles of negligence which are completely inapplicable to an administrative analysis under §1501, as was clearly explained by Judge Weismandel in his Initial Decision.<sup>7</sup> The issues of duty, breach, causation and damages that are the roots of a negligence cause of action have no place in "an administrative agency hearing where tort law is not controlling and no jury is involved." (Initial Decision at 17)

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<sup>6</sup> In its Exceptions, the OCA references a 600-page log of insurance claims generated from damages apparently caused by water utility operations. (OCA Exceptions at 6, fn. 6) It bears mentioning that this claim log was never introduced into evidence and is not part of the record in this case. In fact, counsel for the OCA specified during these proceedings that "[e]verybody will be happy to hear that I'm not going to move [that claim log] into evidence". (NT 506) It is therefore improper to reference this claim log in these Exceptions as it is not part of the record, and that portion of the OCA's Exceptions should be disregarded.

<sup>7</sup> Judge Weismandel also clearly explained at the outset of the four day hearing that this proceeding is not a negligence trial, that damages cannot be awarded to the individual complainants, and that the purpose of this hearing was only to determine if PAWC rendered service that was unreasonable, inadequate or unsafe. (NT 6-7)

Second, OCA's reference to insurance claims for property damage caused by water main breaks reminds this Commission that Robert Creveling, the Complainant who apparently suffered the most damage to his property from this water main break, currently has pending in the Court of Common Pleas of Berks County a civil action brought for this property damage against seven defendants, including the developer of that residential development, as well as PAWC. That Complainant can assert his claims for damages in that civil action, not in this administrative proceeding.

The error of applying negligence principles in Commission proceedings was succinctly addressed in Ostrov v. IFT, Inc., 402 Pa.Super. 87, 586 A.2d 409 (1991), as follows:

Thus, matters involving not what service the utility owed to the general public, but rather whether the service provided to a particular litigant was negligently provided are for the courts to resolve. ... On the other hand, matters involving the general reasonableness or adequacy of a utility's service to the public are within the primary jurisdiction of the Commission.

Id. at 415 (citing, DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); Morrow v. Bell Telephone Company of Pennsylvania, 330 Pa.Super. 276, 479 A.2d 548 (1984)).

In addition to misconstruing §1501 by attempting to read a negligence analysis into it, Complainants also misinterpret the import of this section as somehow establishing PAWC as an insurer or guarantor of the condition of Complainants' properties. However, it is clear that the contrary is true: Section 1501 only requires a public utility to furnish reasonable service; most certainly, a public utility is not a guarantor of either perfect service or even the best possible service. Re Metropolitan Edison Company, Pa. PUC 662 (1993). Even §1501 itself underscores this point: It obligates a public utility to "furnish and maintain" - not promise or guarantee -

service and utilities that are "adequate, efficient, safe and reasonable" - not perfect, not 100% safe.

The OCA, in its Exceptions, follows through with this "strict liability" analysis, by arguing that "[e]lectric utilities are responsible for fallen poles; wastewater utilities are responsible for back-ups in their systems; natural gas companies are responsible for explosions, and water utilities are responsible for main breaks." (OCA Exceptions at 4) PAWC would agree with the OCA that it is responsible for this main break itself, and followed through on that responsibility by locating the source of the main break, excavating the site, immediately clamping the area of the break and subsequently replacing that portion of the main. However, without any substantial evidence having been submitted of unreasonable or inadequate service furnished by PAWC, it cannot, as a matter of law under Section 1501, be ordered to undertake any further action in connection with this main break.

Complainants attempt to emphasize the minimal nature of the testing that they are requesting, to add support to their argument that this testing should be ordered, with the OCA pointing out that the estimated total cost to conduct a geophysical study of the 19 homes at issue would amount to \$29,000 (OCA Exceptions at 2, fn. 2) and with Township of Spring describing the testing as "minimally invasive". (Township of Spring Exceptions at 3) Complainants' argument in this regard is disingenuous - it should go without saying that Complainants would demand that PAWC pay for the remediation work that any such testing would identify as necessary, an overwhelmingly large burden for PAWC to pass onto its ratepayers. PAWC incorporates herein by reference pages 16 - 20 of its Reply Brief for further support for the proposition that the Commission has no authority to compel any such testing or remediation work under these circumstances.

Additionally, this Commission should be reminded of the testimony of PAWC's expert geologist, Richard L. Kanaskie, about just what these subsurface conditions are like. Any testing that would take place would reveal extensive limestone geology formations riddled with sinkholes, some of which have existed for thousands of years, and some of which were caused simply by the nature of urbanization. Simply because of the nature of this geological formation, it would be impossible to identify what, if any, sinkhole conditions are attributable to the water main break and what conditions are simply pre-existing, or what are attributable to other man-made sources. (PAWC Exhibit 2 at 12, 13; NT 6/28/06 at 467) Additionally, the further removed in time and distance any such sinkholes are from the Iroquois Avenue main break, the more difficult it is to identify their causes. (467-68)

In their Exceptions, Complainants Neil Rahn and David Singerling raise the Judge's questioning of Richard Kanaskie about the source of the subsequent sinkholes that developed in the area, describing the Judge as asking "what were the odds of the sinkholes that occurred after the water main break being caused by other conditions then [sic] the water loss itself", with Kanaskie agreeing with Judge Weismandel's proffered answer of "a million to one". (Exceptions at 1) On the contrary, the actual testimony has Kanaskie agreeing with Judge Weismandel that "the odds would have to be astronomical" and "a heck of a coincidence" if "the sinkholes that appeared on February 6, 2005, in the Creveling property . . . wasn't attributable to" the water main break. (N.T. 468-69) (emphasis added)

This line of questioning underscores all parties' acknowledgment that the water main break caused the sinkhole that immediately thereafter developed on the Crevelings' property.<sup>8</sup>

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<sup>8</sup> The record clearly establishes, however, for the reasons set forth in Judge Weismandel's Initial Decision, that the development of a sinkhole adjacent to the water main caused this water main break; it was not the main break that caused the sinkhole to occur.

The impossibility of relating this water main break as the cause of all of the other sinkholes in the area was the subject of much more of Kanaskie's testimony. In fact, Kanaskie had just previously explained to Judge Weismandel that the other sinkholes that later developed in that general area cannot be linked to the water main break: "[T]here's no way to date these features because . . . the area is riddled with sinkholes. . . It just gives you an idea that the area itself is sinkhole prone and they're there, that there is [sic] conduits for water to go to. But in order to date them, to say that this is the cause of what happened as Iroquois, as you move away from Iroquois, there are many more features that exist that you can't date." (N.T. 467-68) The Exceptions of Complainants Neil Rahn and David Singerling that attempt to assert, therefore, that Kanaskie testified that all of the sinkholes in the entire area can be attributed to the water main break at the probability of a million to one is incorrect, misleading and should be disregarded.

Along that line, Complainant Wilson School District challenges Judge Weismandel's refusal to admit into evidence 21 photographs that the District attempted to introduce into evidence by motion on August 31, 2006, photographs taken nearly a month after the hearing on these proceedings had concluded. (See September 15, 2006 Order Denying Motion to Admit Post-Hearing Exhibit). The District complains that these "pictures of other enormous damage on the Wilson property [were] ignored by the ALJ". (Exceptions at 3, 12) The District further argues that the development of all of the subsequent sinkholes mandate that PAWC "should be required to perform a geophysical study of the entire area." (Exceptions at 11)

As to the photographs, Judge Weismandel explained in an extensive analysis that the objection to allowing these photographs into evidence would be sustained because "[e]ven if these photographs were properly authenticated and sponsored for introduction into evidence,

further testimony relating their occurrence to the water main break that is the subject of this consolidated case would be required to demonstrate their relevance. These photographs do not constitute after discovered evidence relevant to the issues litigated in this case. At best, they may be evidence of some new claim." (September 15, 2006 Order at 9-10) Regarding the after-occurring sinkholes, the testimony of Kanaskie is powerful in its simplicity, namely, that, due to the numerous other potential sources of sinkholes in a heavily sinkhole ridden area, it would be just impossible to identify any sinkholes directly caused by this water main break.

Judge Weisman's reasoning in this regard exemplifies the burden on Complainants that was impossible to prove – that not only is there no basis under the law for this Commission to order such a study as Complainants request, but that it would be impossible for any such study to delineate what conditions were caused by the water main break and what were pre-existing or caused by other sources. PAWC incorporates herein by reference the portions of its Reply Brief, at page 20, that more fully address this issue as to why a ground-penetrating radar study should not be ordered under the circumstances of this claim.

In its Exceptions, the OCA argues that "without a ground-penetrating radar study, the question of whether PAWC is providing safe and adequate service under Section 1501 following the main break, simply cannot be reasonably determined". (OCA Exceptions at 9) In so doing, the OCA is putting the cart before the horse. The testing that the Complainants seek would not determine whether PAWC is providing safe and adequate service in compliance with §1501. To the contrary, substantial evidence has established that PAWC has provided reasonable, safe and adequate service under the circumstances of this case, so that the Commission is powerless to order any such testing. Once again, it is reasonable and adequate service that a utility is obligated to furnish, not perfect service.

The Complainants take great issue with Judge Weismandel's determination that PAWC had no responsibility to determine in which direction the 1.5 million gallons of water traveled, or to undertake efforts to remediate any damage caused by that escape of water. With these thoughts, Complainants are missing the very fundamental point that PAWC is not legally responsible for this escape of water and any ensuing damage that may occur, simply because the water main broke. That would be a strict liability analysis, making PAWC the guarantor of the safety of the residents and the condition of their properties. This is not, however, the law. Ostrov v. IFT, Inc., *supra*; Re Metropolitan Edison Company, *supra*. PAWC is bound only to ensure that its service is adequate, efficient, safe and reasonable, under §1501. Simply because the water main broke does not render PAWC automatically liable; instead, substantial evidence has to be presented of a failure to provide such adequate, efficient, safe and reasonable service. Judge Weismandel correctly found that Complainants failed to present sufficient substantial evidence of such a violation of §1501, and he was therefore precluded under the law from imposing any obligation for testing or remedial efforts on PAWC.

**B. Judge Weismandel's Decision Was Supported By Substantial Evidence.**

As stated above, each finding of fact necessary to support a Commission adjudication must be supported by substantial evidence. Mill v. Commw., PA Public Utility Commission, 67 Pa.Commw. 597, 447 A.2d 1100 (1982); West Penn Power Company v. Commw., PA Public Utility Commission, *supra*. Additionally, as Judge Weismandel pointed out in his Initial Decision, it is the province of the ALJ, as the only individual in these proceedings to personally hear the witnesses testify and to assess their credibility, their overall demeanor and the weight that should be accorded their testimony. See Danovitz v. Portnoy, *supra*. It was Judge

Weisman del who had the only opportunity to hear each witness and to "consider his appearance, general bearing, conduct on the stand, demeanor, manner of testifying, such as candor or frankness, or the clearness of his statement, and even the intonation of his voice." *Id.*, 161 A.2d at 149. His findings, therefore, are worthy of acceptance by this Commission.<sup>9</sup>

Complainants argue that improper weight and acceptance was given to the testimony of Craig Clauser, and that the testimony of Complainants' witnesses was given no serious attention by Judge Weisman del. The theory espoused by Complainants in this case is that the water main leaked, which lead to the erosion of the subsurface surrounding the water main, causing it to break. However, the only witness in the entire proceeding to present any expert metallurgical testimony on the integrity of the water main at the site of the break was Craig Clauser.<sup>10</sup> He is the only expert to have undertaken a failure analysis on the pipe itself. Not only did his testing yield the conclusion that the pipe broke in one single overload failure, but it also determined conclusively that there was no leakage from the pipe. This opinion went uncontradicted.<sup>11</sup> No other expert performed any sort of failure analysis or metallurgical evaluation on the pipe itself. Considering that the issue of whether the pipe leaked was the crux of Complainants' theory, Judge Weisman del was correct in accepting the undisputed expert metallurgical opinion that in

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<sup>9</sup> A full analysis of the testimony of the witnesses and the significance of that testimony on the issues involved in these proceedings is set forth in detail in PAWC's Main Brief at pages 5-10, which are incorporated herein by reference as though fully set forth at length.

<sup>10</sup> Clauser holds a Masters of Science in metallurgical engineering and material science from Lehigh University, and is a registered professional engineer in Pennsylvania and New Jersey. (Clauser Ex. 1 at 2)

<sup>11</sup> None of the Complainants objected to the qualifications of Clauser as an expert in metallurgical engineering. Moreover, all of the Complainants certainly had sufficient advance notice that PAWC had retained the services of an expert in metallurgical engineering, yet none elected to retain an expert with similar qualifications for their own cases.

fact the pipe did not leak and that it broke in one single event.<sup>12</sup>

The guidelines governing how an ALJ is to decide a Complaint, namely, by issuing findings based upon substantial evidence, and by being the sole determiner of credibility, do not further require that a judge summarize the testimony of every witness and explain why such testimony is accepted or rejected. Consolidated Rail Corp. v. Commw. PA Public Utility Commission, 155 Pa. Commw. 537, 625 A.2d 741 (1993); Allegheny Center Associates v. Commw. PA Public Utility Commission, *supra*. Instead, it is incumbent upon an ALJ only to issue a decision in which the findings of fact are supported by substantial evidence. This Judge Weismandel clearly did in the present proceedings. His determinations should be accepted in their entirety.<sup>13</sup>

### C. All Other Aspects Of PAWC's Service Were In Compliance With §1501.

In addition to the theory that the water main break, in and of itself, was a violation of §1501 of the Code, Complainants, in their Exceptions, raise other aspects of PAWC's service which they contend was a violation of §1501. However, these arguments are equally as meritless.

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<sup>12</sup> In its Exceptions, the OCA cites controlling case law for the proper weight to be given to expert testimony, where consideration should be given to "the length and variety of the witness' relative experience, the amount of detail offered and the degree of the testimony's probative force" as well as "the degree of care taken in the expert's observations of the area in question, including the length of time taken to make inspections and study the issues involved in his or her conclusions." (OCA Exceptions at 16-17) Judge Weismandel's acceptance of the testimony of Craig Clauser fits directly within these guidelines. He was the only metallurgical expert who testified, and was the only expert who personally conducted a failure analysis on the area of the pipe that had broken. His conclusions that the pipe did not leak, and broke in one sudden event, are not only uncontradicted but are sound and credible.

<sup>13</sup> In its Exceptions, the OCA repeatedly referred to a report prepared by American Geotech - once on page 5, twice on page 10, once on page 11 and again on pages 13 and 14. The OCA's Exceptions repeatedly refer to and even cite portions of this American Geotech report. However, this report was not accepted into evidence, although Complainants' witnesses did testify as to their review of that report. For the OCA to repeatedly refer to this report as if it were part of the record is highly improper and these repeated references to that report should be immediately disregarded.

Specifically, Complainants allege that PAWC failed to respond timely and competently to low tank alarms. The OCA highlights low tank alarms that PAWC received one or two weeks before this incident occurred, and tries to connect these low tank alarms to the main break in question. (OCA Exceptions at 17) Similarly, Complainants Neil Rahn and David Singerling refer in their Exceptions to uncited testimony by John Rothwell of PAWC that he "had indications of a water leak problem much earlier then [sic] the reporting of the problem by customers." (Rahn and Singerling Exceptions at 2) The testimony of record does not support this statement. There is absolutely no connection that can be made between these low level tank alarms beginning ten days prior to this main break, and the occurrence of this main break. While Rothwell did testify about the sounding of low tank alarms in the days prior to the date of the water main break, there was never any connection made between those alarms and the rupture of this main break. On the contrary, Rothwell testified that the break was of such a magnitude that each of the two 500,000 gallon water supply tanks emptied in about 20 minutes. (N.T. 731) Low tank alarms occurring as early as ten days before this main break cannot be related to this main break. Complainants' arguments in this regard are without a factual foundation and should be disregarded.

Along those same lines, Complainant Wilson School District asserts a lack of adequate service on the part of PAWC because Rothwell was alerted to the existence of this problem by a customer call center and not through its standard operating procedures. (Exceptions at 9) First, this is incorrect -- Rothwell clearly testified that he received an alarm call on his cell phone from the computerized alarm system that PAWC employed, as well as being alerted through the call center. (N.T. 630) However, it must be asked what difference it made as to how he was alerted? The fact is that Rothwell was alerted to the problem and immediately initiated efforts to identify

its source which, due to the fact that there were no complaints of flooding and no surface water appearing that would have pinpointed the source of the break, were completely reasonable under those unusual circumstances.

Despite significant evidence to the contrary, Complainants also argue that PAWC acted deficiently in failing to perform adequate leak detection procedures and in failing to employ its leak detection teams. (OCA Exceptions at 18; Township of Spring Exceptions at 2; Wilson School District Exceptions at 10) Reference is made to PAWC's Main Brief filed in these proceedings, at pages 18 - 20, which are incorporated herein by reference, for a complete recitation of the evidence that establishes the reasonableness of its leak detection program under these circumstances. The substantial evidence in this case does confirm that PAWC acted reasonably, not just with its entire leak detection program employed all along, but with its level of response to this problem.

What also bears repeating, however, is the expert metallurgical testimony of Craig Clauser that there was no leak evident in the water main at the site of its breakage, such that any additional leak detection efforts would have failed to prevent the occurrence of this water main break anyway.

The OCA also argues that PAWC acted deficiently in failing to report the main break and associated damage to the Commission and to the DEP. (OCA Exceptions at 18) The OCA is referring to 52 Pa.Code §65.2 as requiring PAWC to report this water main break to the Commission as a "reportable accident". This term is defined for purposes of these proceedings as "[a]n occurrence of an unusual nature, ... which apparently will result in a prolonged and serious interruption of normal service of more than three days." OCA fashions the argument that this water main break was such a reportable accident, and that it should have been reported to the

Commission, and that the failure of PAWC to so report this incident is a violation of §1501. This argument is flawed for three reasons.

First, what happened in this situation was a water main break. This, in and of itself, is not an unusual occurrence.<sup>14</sup> Water main breaks happen. For a variety of reasons, such an event does from time to time occur, and there is nothing "unusual" about its occurrence to have it constitute an occurrence of an unusual nature. Moreover, it is the water main break in this case that is the event that must be of an unusual nature to raise the potential reporting requirement, not any of its immediate or more eventual consequences.

Second, this entire situation does not rise to the level of a reportable accident. As discussed above, this occurrence did not result in an interruption of normal service that was prolonged, or serious, or that lasted more than three days. Complainant Wilson School District takes liberties with the evidence on the chronology of the water shut off and subsequent restoration, ultimately concluding that a total of "approximately four days of no water service" was experienced. (Exceptions at 8-9) This is a mischaracterization of the evidence. It bears repeating that the residents all acknowledged that their water service was restored within six to eight hours after awakening on Sunday, February 6. The school district was closed on Monday, and was provided bottled water for Tuesday of that next week, with full service being restored by Wednesday. PAWC refers to and incorporates herein by reference pages 13-14 of its Reply Brief for a recitation of the evidence establishing the adequacy, promptness and reasonableness of the response to this leak that transpired. Again, as stated above, the evidence does not

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<sup>14</sup> Complainant Wilson School District describes this incident as "a catastrophic event", "a major failure" and "a major rupture". (Exceptions at 8) Now matter how it is described, it still does not rise to the level of a reportable accident for purposes of this reporting requirement.

establish a prolonged and serious interruption of service for more than three days, but instead establishes an all-day encompassing and timely response to this situation.

Third, even assuming, for purposes of argument only, that this incident rose to the level of a "reportable accident", whether PAWC failed in its obligation to the Commission to report this incident has nothing whatsoever to do with whether it furnished and maintained reasonable and adequate service and facilities to its customers in connection with this incident. There is no cause and effect between the one and the other – falling short in an administrative requirement of filing a report with the Commission does not impact in any way the service being rendered by PAWC to its customers.

The OCA also challenges PAWC's claimed failure to produce certain pieces of evidence. The OCA refers in part to certain SCADA data, electronic records of tank levels and pressures. The OCA, at page 18 of its Exceptions, implies that an adverse inference should have been drawn against PAWC because it only provided SCADA documents from June, 2005 through 2006. What the OCA fails to mention, however, is that SCADA records are only kept for one year (NT 663, 664), and that, in June, 2006, it provided one year's worth of those SCADA records. (OCA Exceptions at 18, footnote 17) PAWC therefore, reasonably and in good faith, provided all such SCADA records that it routinely maintained.

The OCA also takes exception to PAWC's actions in disposing of additional segments of water main piping that were removed in the excavation and repair of the water main after this break. (OCA Exceptions at 18) One must question the significance of the remaining portions of piping - the portions of the water main directly involved in the break were retained after excavation, and it was those portions of the pipe that were subject to a failure analysis by Craig Clauser, the only metallurgical expert to testify in this claim. If the water main break occurred in

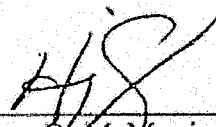
one specific area, what possible relevance would other portions of piping have that were not associated at all with the area of the water main break? The answer is none.

The OCA cites case law to support the proposition that a negative inference can be drawn "where relevant documents are not produced". (OCA Exceptions at 19) The key to this issue is the word "relevant". None of the documents or items identified by OCA in this argument are relevant to the issue of what caused this water main break to occur. This argument should be disregarded.

#### IV. CONCLUSION

For all of the foregoing reasons, therefore, Respondent Pennsylvania American Water Company respectfully requests that the Exceptions filed by all of the Complainants in these proceedings be dismissed, and that the Initial Decision of The Honorable Wayne L. Weismandel be adopted by the Commission.

BINGAMAN, HESS, COBLENTZ & BELL, P.C.

  
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Harry D. McMunigal, Esquire  
Attorney for Respondent,  
Pennsylvania American Water Company

## CERTIFICATE OF SERVICE

I, Harry D. McMunigal, Esquire, hereby certify that three true and correct copies of the foregoing Reply of Respondent Pennsylvania American Water Company to Exceptions of Complainants Office of Consumer Advocate, Township of Spring, Wilson School District, Neil R. Rahn, David Singerling, Robert Creveling, Thomas Schmidt, Roberto Soto and Anna Stubenrauch-Soto were mailed by United States first class mail, postage prepaid and one copy sent via email upon the following party(ies):

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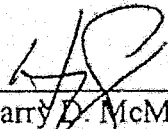
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TO: Cheryl W. Davis, Director  
Office of Special Assistants

FROM: James J. McNulty  
Secretary  
nvl

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Neil R. Rahn, David Singerling et al v. Pennsylvania-American Water Company  
Township of Spring v. Pennsylvania-American Water Company  
Wilson School District v. Pennsylvania-American Water Company

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

**COMPLAINANT  
SOTO & ANNA K STUBENRAUH-SOTO  
NEIL RAHN & DAVID SINGERLING  
OFFICE OF CONSUMER ADVOCATE  
TOWNSHIP OF SPRING**

Reply Exceptions have been received from:

**RESPONDENT**

**BTL**

cc: Susan Hoffner