

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

William R. Lloyd, Jr.
Small Business Advocate

(717) 783-2525
(717) 783-2831 (FAX)

March 19, 2010

HAND DELIVERED

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

**Re: Pennsylvania Public Utility Commission v. Philadelphia Gas Works
Docket No. R-2009-2139884 and P-2009-2137639**

Dear Secretary McNulty:

Enclosed for filing are the original and nine (9) copies of the Brief in Response to the Joint Petition for Interlocutory Review of a Material Question and Approval of Partial Settlement, on behalf of the Office of Small Business Advocate in the above-docketed proceedings.

As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon E. Webb".

Sharon E. Webb
Assistant Small Business Advocate
Attorney ID No. 73995

Enclosures

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :
v. : **Docket No. R-2009-2139884,**
Philadelphia Gas Works : **P-2009-2137639**

**BRIEF IN RESPONSE TO THE JOINT PETITION FOR
INTERLOCUTORY REVIEW OF A MATERIAL QUESTION
AND APPROVAL OF PARTIAL SETTLEMENT
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

Sharon E. Webb
Assistant Small Business Advocate
Attorney ID No. 73995

For: William R. Lloyd, Jr.
Small Business Advocate
Attorney ID No. 16452

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Dated: March 19, 2010

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TABLE OF CONTENTS

I. INTRODUCTION 1

 A. Request by PGW and CAC 1

 B. Background 1

II. SUMMARY OF THE ARGUMENT 4

III. ARGUMENT..... 6

 A. The Motion for Summary Judgment must be denied because there are
 genuine factual disputes raised by the Partial Settlement 6

 B. The Joint Petitioner’s representation that the parties will have the right
 to modify the ELIRP in the future is contrary to the language in the
 settlement document 8

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Pennsylvania Public Utility Commission v. Philadelphia Gas Works,
Docket No. R-2008-2073938 (Order entered December 19, 2008) 1

Statutes

52 Pa. Code §5.102(b) 1

52 Pa. Code §5.102(d)(1) 5, 6

52 Pa. Code §5.302(a) 6

52 Pa. Code § 5.302(b) 1

66 Pa. C.S. §703(g) 9

66 Pa. C.S. §1319..... 4, 9

66 Pa. C.S. §2806.1(a)(11) 11

I. INTRODUCTION

A. Request by PGW and CAC

On March 9, 2010, Philadelphia Gas Works (“PGW” or “Company”) and the Clean Air Council (“CAC”) (together “Joint Petitioners”) filed a Petition for Interlocutory Review of a Material Question and Approval of a Settlement (“Petition for Interlocutory Review”) with the Pennsylvania Public Utility Commission (“Commission”). At the same time, the Joint Petitioners also filed a Joint Motion for Partial Summary Judgment To Approve Settlement for Expedited Implementation of Residential DSM Programs (“Motion for Summary Judgment”).

By filing the Petition and the Motion, PGW and CAC are seeking approval for the expedited implementation of two demand side management (“DSM”) programs, *i.e.*, the Enhanced Low-Income Retrofit Program (“ELIRP”) and the Comprehensive Residential Heating Retrofit Program (“CRHRP”).

The Office of Small Business Advocate (“OSBA”), pursuant to 52 Pa. Code § 5.302(b), submits this brief in opposition to the Petition for Interlocutory Review. At the same time, the OSBA, pursuant to 52 Pa. Code §5.102(b), is submitting an Answer in opposition to the Motion for Summary Judgment.

B. Background

On or about March 26, 2009, PGW filed with the Commission a Petition for Approval of Energy Conservation and Demand-Side Management Plan (“DSM Petition”). PGW filed the DSM Petition pursuant to the Commission’s Order approving PGW’s request for emergency/extraordinary rate relief.¹ Subsequently, on or about April

¹ *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*, Docket No. R-2008-2073938 (Order entered December 19, 2008).

3, 2009, PGW filed a Petition to Withdraw its DSM Petition. On or about April 20, 2009, PGW filed with the Commission the Revised Petition for Approval of Energy Conservation and Demand-Side Management Plan (“Revised DSM Petition”).

On May 11, 2009, the OSBA filed an Answer to the Revised DSM Petition. In the Answer, the OSBA raised several issues of concern, including PGW’s proposal to recover the costs for residential DSM programs from all customers.²

The Commission’s Office of Trial Staff (“OTS”) and the Office of Consumer Advocate (“OCA”) also filed Answers to PGW’s Revised DSM Petition.

The Revised DSM Petition was never assigned to an Administrative Law Judge, in part because PGW requested that “the PUC provide time to permit PGW to conduct a collaborative to discuss the [Revised] Plan and improvements to the [Revised] Plan by interested stakeholders.”³ No consensus was achieved through the collaborative process.

Thereafter, PGW filed a Motion to Consolidate its DSM Plan with PGW’s 2009 base rate case which the Company filed on December 18, 2009.

On January 7, 2010, the OSBA filed an Answer in opposition to the Motion to Consolidate. In its Answer, the OSBA again cited to numerous flaws in the underlying DSM Plan. The OSBA also expressed concern that the consolidation, if ultimately granted, would dilute the attention paid to the Company’s request for a base rate increase.⁴

The Commission granted PGW’s Motion and consolidated the DSM Plan with PGW’s base rate case on February 11, 2010.

² See OSBA Answer to Revised DSM Petition at 3.

³ Revised DSM Petition at Para. 34.

⁴ OSBA’s January 7, 2010, Answer at Para. 10.

On March 9, 2010, the Joint Petitioners filed the instant Petition for Interlocutory Review and the Motion for Summary Judgment, seeking expedited implementation of two residential DSM programs, *i.e.*, the ELIRP and the CRHRP, through the approval of a settlement between those two parties (“Partial Settlement”).

The OSBA submits this brief in opposition to the March 9, 2010, request of the Joint Petitioners.

II. SUMMARY OF THE ARGUMENT

PGW and CAC have filed a Petition for Interlocutory Review in order to put immediately before the Commission a Motion for Summary Judgment approving a Partial Settlement of certain portions of PGW's Demand Side Management Plan ("DSM Plan"). The Commission should deny the Petition for Interlocutory Review because PGW's Motion for Summary Judgment does not meet the standard for approval under the Commission's regulations.

The Partial Settlement represents that PGW's DSM Plan satisfies Section 1319 of the Public Utility Code, 66 Pa. C.S. §1319. Section 1319(a) authorizes the Commission to approve a conservation or load management program proposed by a natural gas distribution company ("NGDC") only "after a determination by the commission that the program is prudent and cost-effective." Section 1319(a) also requires a Commission determination that the costs of the program will "be recovered only in accordance with appropriate accounting principles."

Through their Motion for Summary Judgment, PGW and CAC seek to short-circuit the development of an evidentiary record on whether the Enhanced Low-Income Retrofit Program ("ELIRP") is "prudent" and "cost-effective" and whether ELIRP costs will be recovered "only in accordance with appropriate accounting principles." The linchpin to the argument by PGW and CAC is the representation that the ELIRP raises "no genuine issues of material fact." However, as set forth in the affidavit of OSBA witness Robert D. Knecht (attached to the OSBA's Answer to the Motion for Summary Judgment), there are numerous genuine issues of material fact which go to the heart of whether the ELIRP meets the standard for approval under Section 1319(a).

Under Section 5.102(d)(1) of the Commission's regulations, 52 Pa. Code §5.102(d)(1), the Commission must deny a motion for summary judgment unless "there is no genuine issue as to a material fact." Because there are genuine issues of material fact regarding the ELIRP, the Commission must deny the Motion for Summary Judgment filed by PGW and CAC. Because the Commission must deny the Motion for Summary Judgment, the Commission should also deny the Petition for Interlocutory Review.

PGW and CAC represent that even if the Commission grants the Motion for Summary Judgment (thereby approving the Partial Settlement), there will be an opportunity for interested parties to suggest changes in the ELIRP prior to actual implementation. However, the Partial Settlement specifies no procedure by which the OSBA can obtain an adjudication by the Commission of any such changes to which the OSBA objects or of any such changes proposed by the OSBA but rejected by PGW.

Similarly, PGW and CAC represent that approval of the Partial Settlement will not prevent the OSBA from continuing to argue in the underlying base rate case that non-residential customers should be relieved from having to pay universal service costs. However, there are at least two fundamental flaws in that argument. First, the Partial Settlement allows PGW to begin collecting ELIRP costs from non-residential customers before the purportedly reserved question has been adjudicated. Second, the Partial Settlement does not expressly reserve the OSBA's right to litigate whether, consistent with Act 129 of 2008, the costs of a residential conservation program such as ELIRP should be recovered entirely from the residential class even if the Commission otherwise decides not to relieve non-residential customers from paying universal service costs.

III. ARGUMENT

A. The Motion for Summary Judgment must be denied because there are genuine factual disputes raised by the Partial Settlement.

The Commission's regulation at 52 Pa. Code §5.302(a) sets forth the parameters for a petition for interlocutory review directed to the Commission. Specifically, the regulation requires petitioners to state not only the material question to be answered but also the compelling reasons why interlocutory review should be granted. PGW and CAC allege that expedited review is necessary so that "...the benefits to all firm service customers will be maximized by having these [DSM] programs in place before the beginning of the next winter heating season."⁵ Further, the Joint Petitioners allege that "expedited implementation of these programs prior to final resolution of PGW's base rates case is reasonable...in the public interest...and will not prejudice any party's right to address any other DSM program issue or the details of program implementation."⁶ The Joint Petitioners' representation that no party will be prejudiced is disingenuous.

The procedural vehicle through which the Joint Petitioners are seeking approval of the Partial Settlement is a Motion for Summary Judgment. Under Section 5.102(d)(1) of the Commission's regulations, 52 Pa. Code §5.102(d)(1), the Commission must deny a motion for summary judgment unless "there is no genuine issue as to a material fact." As set forth in detail in the Affidavit of OSBA witness Robert D. Knecht (attached to the OSBA's Answer to the Motion for Summary Judgment), there are many genuine issues of material fact, including the following:

⁵ Petition for Interlocutory Review at 1.

⁶ *Id.*

- Short-circuiting the vetting of the ELIRP could preclude the adoption of a revised ELIRP, or an alternative to it, that either would be more cost-effective or would provide greater benefits to ratepayers.
- The Joint Petitioners represent that the ELIRP should be approved because it is simply an expansion of the purportedly cost-effective Conservation Works Program (“CWP”). However, there is legitimate doubt about whether the existing CWP actually is cost-effective.
- Even if the CWP is cost-effective, that fact does not necessarily constitute credible evidence that expanding the CWP through the ELIRP would be cost-effective.
- There is serious doubt about whether the benefit-cost analysis presented by PGW in this proceeding to justify the ELIRP is based on credible economic assumptions and verifiable calculations.
- It is debatable that the Compact Fluorescent Lamp (“CFL”) replacement program proposed as part of the ELIRP would provide benefits to PGW ratepayers, in that *gas* customers would be paying to achieve *electric* conservation.

If the Commission rejects the Joint Petitioners’ effort to prevent the vetting of these complex factual issues through the development of an evidentiary record, the OSBA will present testimony on these issues and on any other related issues which emerge during the litigation process.

On February 11, 2010, the Commission entered an Order at this docket consolidating PGW’s DSM filing with the Company’s base rate case. In so doing, the Commission said that it “will consolidate the two filings for purposes of *hearings* before an Administrative Law Judge *and a Recommended Decision.*”⁷ Approval of the Joint Petitioners’ request for summary judgment would prevent the development of a full

⁷ February 11, 2010, Order at 2 (emphasis added).

evidentiary record on these ELIRP issues, despite the Commission's stated expectation when it granted consolidation.

Because there are genuine issues of material fact regarding the ELIRP, the Commission must deny the underlying Motion for Summary Judgment and should, therefore, also deny the Petition for Interlocutory Review.

B. The Joint Petitioner's representation that the parties will have the right to modify the ELIRP in the future is contrary to the language in the settlement document.

The Joint Petitioners are likely to argue that the OSBA will not be prejudiced by approval of the *Partial Settlement* because that document has expressly reserved the rights of other parties to address issues regarding the ELIRP prior to implementation of that DSM program or during the balance of the base rate case. Unfortunately, this purported reservation of parties' rights provides for meaningful opportunity for the OSBA or other parties to modify the ELIRP or to challenge how it is funded.

In their Petition for Interlocutory Review, PGW and CAC represent that "early implementation of these programs [ELIRP and CRHRP] will not prejudice any party's right to address any other DSM program issue or the details of program implementation."⁸ Specifically, the Petition represents that parties will be able to address "(i) changes to program measures; (ii) detailed implementation plans; and (iii) cost allocation and recovery issues" and to engage in "discussions during the implementation phase through the Detailed Work Plans ['DWP'] required by the Settlement."⁹

⁸ Petition for Interlocutory Review at 1.

⁹ Petition for Interlocutory Review at 3.

However, in the Motion for Summary Judgment, PGW and CAC represent that they are entitled to the relief requested as a matter of law pursuant to Section 1319 of the Public Utility Code, 66 Pa. C.S. §1319.¹⁰ Section 1319(a)(1) provides for the recovery of “prudent and reasonable costs” through an appropriate recovery mechanism “[i]f...a natural gas...public utility elects to establish a conservation or load management program and that program is approved by the Commission *after a determination by the commission that the program is prudent and cost effective....*” (*emphasis added*) If the Commission approves the early implementation of the ELIRP, it will have made a finding that the ELIRP is “prudent and cost effective” and that the recovery mechanism is “in accordance with appropriate accounting principles.” There is no provision in Section 1319, nor in the Petition, Motion, or Settlement which provides a way to modify a final Commission Order to that effect. Therefore, the OSBA, or any other party desiring to change the design of the ELIRP over the objections of the Joint Petitioners, will have the burden of seeking to rescind or modify the Commission’s Order through a proceeding under Section 703(g) of the Public Utility Code, 66 Pa. C.S. §703(g).

The Joint Petitioners are likely to point out that PGW will file the DWP within 30 days of Commission approval of the Partial Settlement.¹¹ The DWP will describe how PGW plans to implement the ELIRP.¹² The Partial Settlement commits PGW to “meet and discuss” the DWP with interested parties prior to its filing and provides for interested parties to submit comments prior to PGW’s implementation of the DWP.¹³ However, the

¹⁰ Motion for Summary Judgment at Para. 19.

¹¹ Partial Settlement at 11.

¹² *Id.*

¹³ Partial Settlement at 11.

opportunity to “meet and discuss” and “submit comments” to PGW will not provide the OSBA, or other interested parties, a meaningful opportunity to respond to concerns about the ELIRP, in that there is no mechanism for obtaining a Commission adjudication of whether suggested changes should, or should not, be made.

Finally, the Partial Settlement provides that “[t]he Settling Parties [PGW and CAC] agree that the issue of customer class responsibility for USC charges [Universal Service Charges] may continue to be raised in the [base rate] proceeding.”¹⁴ There are at least two problems with this provision of the Partial Settlement. First, the Partial Settlement allows PGW to begin collecting ELIRP costs from non-residential customers through the USC before the question of whether those customers should even be charged has been adjudicated in the base rate case.¹⁵ Second, the Partial Settlement assumes that the issue of customer class responsibility for universal service costs is the relevant cost allocation issue regarding the ELIRP. Therefore, the Partial Settlement does not reserve the right of the OSBA to litigate whether, consistent with Act 129 of 2008, the costs of a residential conservation program such as ELIRP should be recovered entirely from the residential class even if the Commission otherwise decides not to relieve non-residential customers from paying universal service costs.

The Motion for Summary Judgment and the Partial Settlement both draw parallels to the Energy Efficiency and Conservation (“EE&C”) cases filed by most electric distribution companies (“EDCs”) pursuant to Act 129.¹⁶ Unfortunately, PGW and CAC

¹⁴ Partial Settlement at Para. 22.

¹⁵ Partial Settlement at Para. 21.

¹⁶ See Motion for Summary Judgment at 7, 9 and 10. See also Partial Settlement at 14-16

have ignored a key feature of Act 129, *i.e.*, Section 2806.1(a)(11) of the Public Utility Code, 66 Pa. C.S. §2806.1(a)(11), which requires the Commission to establish “[c]ost recovery to ensure that [conservation] measures approved are financed by the same customer class that will receive the direct energy and conservation benefits.” Just as Section 2806.1(a)(11) makes residential customers solely responsible for the costs of electric conservation programs targeted at low-income residential customers, PGW’s residential customers should be solely responsible for funding the ELIRP from its outset.

IV. CONCLUSION

For the reasons stated herein, the OSBA respectfully requests that the Commission deny the Joint Petitioners' Petition for Interlocutory Review. In the alternative, the OSBA respectfully requests that the Commission grant the Petition and answer the question in the negative, thereby denying the Joint Petitioners' Motion for Summary Judgment.

Respectfully submitted,



Sharon E. Webb
Assistant Small Business Advocate
Attorney I.D. No 73995

For:

William R. Lloyd, Jr.
Small Business Advocate
Attorney I.D. No 16452

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525

Dated: March 19, 2010

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :
 :
 v. : **Docket Nos. R-2009-2139884**
 : **P-2009-2097639**
 :
 Philadelphia Gas Works :

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Brief in Response to the Joint Petition for Interlocutory Review of a Material Question and Approval of Partial Settlement, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted) upon the persons addressed below:

Hon. Charles E. Rainey, Jr.
Administrative Law Judge
Pa. Public Utility Commission
801 Market Street - #4063
Philadelphia, PA 19107
(215) 560-2105
(215) 560-3133 (fax)
crainey@state.pa.us

Gregory J. Stunder, Esquire
Philadelphia Gas Works
800 W. Montgomery Avenue
Philadelphia, PA 19122
(215) 684-6878
(215) 684-6798 (fax)
greg.stunder@pgworks.com

Daniel Clearfield, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street - 8th Floor
Harrisburg, PA 17101
(717) 237-6000
(717) 237-6019 (fax)
dclearfield@eckertseamans.com

Todd S. Stewart, Esquire
Hawke McKeon Sniscak, LLP
P. O. Box 1778
Harrisburg, PA 17105
tsstewart@hmslegal.com

Darryl Lawrence, Esquire
Jennedy S. Johnson, Esquire
Tanya J. McCloskey, Esquire
Jessica Horner
Office of Consumer Advocate
555 Walnut Street - 5th Floor
Harrisburg, PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)
OCAPGW2010@paoca.org
(E-mail and Hand Delivery)

Richard A. Kanaskie, Esquire
Office of Trial Staff
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-1976
(717) 772-2677 (fax)
rkanaskie@state.pa.us
(E-mail and Hand Delivery)

Philip Bertocci, Esquire
Thu B. Tran, Esquire
Community Legal Services
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3702
(215) 981-0434 (fax)
pbertocci@clsphila.org
ttran@clsphila.org

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Philip L. Hinerman, Esquire
Jill Guldin, Esquire
Robert Clothier, Esquire
Fox Rothschild, LP
2000 Market Street - 10th Floor
Philadelphia, PA 19103-3291
(215) 299-2000
(215) 299-2150 (fax)
phinerman@foxrothschild.com
jguldin@foxrothschild.com
relothier@foxrothschild.com

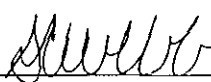
Adam H. Cutler, Esquire
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway - 2nd floor
Philadelphia, PA 19103
(215) 627-7100
(215) 627-3183
(First-class Mail Only)

John F. Povilaitis, Esquire
Matthew A. Totino, Esquire
Ryan Russell Ogden & Seltzer, PC
800 North Third Street - #101
Harrisburg, PA 17102-2025
(717) 236-7714
(717) 236-7816 (fax)
jpovilaitis@ryanrussell.com
mtotino@ryanrussell.com

Date: March 19, 2010

Charis Mincavage, Esquire
Barry Naum, Esquire
Saad A. Syed, Esquire
McNees Wallace Nurick
P. O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(717) 237-5300 (fax)
cmincavage@mwn.com
bnaum@mwn.com
ssyed@mwn.com

Richard Lelash
18 Seventy Acre Road
Redding, CT 06896
(203) 438-4659
lplash@snet.net



Sharon E. Webb
Assistant Small Business Advocate
Attorney ID No. 73995