**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission : R-2017-2586783

Office of Consumer Advocate : C-2017-2592092

Office of Small Business Advocate : C-2017-2593497

Philadelphia Industrial & Commercial :

Gas Users Group : C-2017-2595147

William Dingfelder : C-2017-2593903

:

v. :

:

Philadelphia Gas Works :

**ORDER GRANTING PICGUG’S MOTION TO STRIKE**

**PORTIONS OF THE OSBA’S REPLY BRIEF**

On February 28, 2017, Philadelphia Gas Works (PGW) filed Supplement No. 100 to PGW’s Gas Service Tariff – PA. P.U.C. No. 2 (Supplement No. 100) to become effective April 28, 2017, seeking a general rate increase calculated to produce $70 million (11.6%) in additional annualrevenues. PGW also filed a Petition for Waiver seeking waiver of the application of the statutory definition of the fully projected future test year (FPFTY) so as to permit PGW to use a FPFTY beginning on September 1, 2017 in this proceeding.

On March 6, 2017, Carrie B. Wright, Esq., entered a Notice of Appearance on behalf of the Commission’s Bureau of Investigation and Enforcement (I&E).

On March 6, 2017, the Office of Consumer Advocate (OCA) filed a Public Statement, a Notice of Appearance on behalf of Kristine E. Marsilio, Esq., Harrison W. Breitman, Esq., Darryl A. Lawrence, Esq., and Christy M. Appleby and a formal Complaint. The Complaint was docketed at C-2017-2592092.

On March 13, 2017, the Office of Small Business Advocate (OSBA) filed a Verification, Public Statement, a Notice of Appearance on behalf of Sharon E. Webb, Esq., and a formal Complaint. The Complaint was docketed at C-2017-2593497.

On March 16, 2017, William Dingfelder (“Mr. Dingfelder” or “Complainant”) filed a formal Complaint. The Complaint was docketed at C-2017-2593903.

By Order entered March 16, 2017, the Pennsylvania Public Utility Commission (Commission) instituted an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase. Pursuant to Section 1308(d) of the Public Utility Code, 66 Pa. C.S.A. § 1308(d), Supplement No. 100 to Philadelphia Gas Works’ Gas Service Tariff – PA. P.U.C. No. 2 was suspended by operation of law until November 28, 2017, unless permitted by Commission Order to become effective at an earlier date. In addition, the Commission ordered that the investigation include consideration of the lawfulness, justness and reasonableness of the respondent’s existing rates, rules, and regulations. The matter was assigned to the Office of Administrative Law Judge for the prompt scheduling of hearings culminating in the issuance of a Recommended Decision.

On March 17, 2017, the Retail Energy Supply Association (RESA) filed a Petition to Intervene in this proceeding.

In accordance with the Commission’s March 16, 2017 Order, the matter was assigned to Deputy Chief Administrative Law Judge Christopher P. Pell and Administrative Law Judge Marta Guhl.

On March 22, 2017, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), through its counsel, filed a Petition to Intervene in this proceeding.

On March 23, 2017, the Philadelphia Industrial and Commercial Gas Users Group filed a formal Complaint. The Complaint was docketed at C-2017-2595147.

On March 24, 2017, the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN *et al*.) filed a Petition to Intervene in this proceeding.

In compliance with the Commission’s March 16, 2017 Order, on March 27, 2017, PGW filed Supplement No. 103 to Gas Service Tariff – Pa P.U.C. No. 2, suspending the effectiveness of rates proposed in Supplement No. 100 to Tariff Pa.P.U.C. No. 2 until November 28, 2017.

In accordance with a Prehearing Conference Order dated March 17, 2017, PGW, I&E, OCA, OSBA, RESA, CAUSE-PA, PICGUG and TURN *et al*. submitted prehearing memoranda to the presiding officers.

A call-in telephonic prehearing conference was held on March 29, 2017. The presiding officers were in the Philadelphia Office for the prehearing conference. Counsel for PGW, I&E, OCA, OSBA, RESA, CAUSE-PA, PICGUG and TURN *et al*. participated.

In our Prehearing Order #1 dated March 30, 2017, we granted RESA’s Petition to Intervene and established the procedural schedule and the procedures applicable to this proceeding.

On March 31, 2017, PGW filed a Motion for Protective Order (Motion) pursuant to 52 Pa.Code § 5.423(a). There was no formal opposition to the request and we granted the Protective Order via Prehearing Order #3 dated April 19, 2017.

Also On March 31, 2017, PGW filed its Answers opposing the Petitions to Intervene of both CAUSE-PA and TURN *et al*.

On April 5, 2017, CAUSE-PA and TURN *et al*. each filed a response to PGW’s Answer opposing their respective Petitions to Intervene. Additionally, OCA and I&E each, separately, filed responses to PGW’s Answers. We granted the Petitions to Intervene of CAUSE-PA and TURN et al. via Prehearing Order #2 dated April 7, 2017.

A total of four Public Input hearings were held in this matter on May 9 and May 10, 2017. During the Public Input Hearings, 24 PGW customers gave sworn testimony.

On May 10, 2017, Ms. Pickens from TURN *et al*. contacted us via electronic mail indicating that there was a discovery dispute and requesting a modification of the procedural schedule. We responded via electronic mail to the parties indicating that they had until noon on Friday, May 12, 2017 to provide a solution to the discovery dispute.

On May 11, 2017, a Hearing Notice was issued setting the evidentiary hearings for this matter for Wednesday, June 28, 2017, Thursday, June 29, 2017 and Friday, June 30, 2017 starting at 10:00 a.m. each day.

Later on May 11, 2017, counsel for PGW informed us that PGW and TURN *et al*. had reached a resolution that involved a proposed modification to the procedural schedule. PGW proposed that TURN *et al*. be allowed to submit its Direct Testimony on Friday, May 19, 2017 and that PGW be allowed to submit Rejoinder Testimony to TURN *et al*.’s testimony on Tuesday, June 13, 2017.

On May 16, 2017, the parties served Direct Testimony, with the exception of TURN *et al*.

By Prehearing Order #4 dated May 17, 2017, we granted the proposed modifications to the procedural schedule.

On May 19, 2017, TURN *et al.* submitted its Direct Testimony.

On May 22, 2017, PGW filed its Motion In Limine to Limit the Scope of the Evidentiary Hearing and this Proceeding and to Exclude Certain Portions of Testimony Submitted by the Office of Consumer Advocate.

On May 25, 2017, OCA filed its Response to PGW’s Motion.

By Prehearing Order #5 dated May 26, 2017, we denied PGW’s Motion In Limine.

On May 31, 2017, I&E served the Amended Direct Testimony of Rachel Maurer, I&E St. 1 (Amended). On June 2, 2017, OCA served the Revised Direct Testimony of Roger D. Colton, OCA St. No. 4 (Revised). On June 7, 2017, TURN *et al.* served the Revised Direct Testimony of Harry S. Geller, TURN *et al.* St. No. 1 (Revised).

On June 9, 2017, the parties served Rebuttal Testimony.

On June 22, 2017, the parties served Surrebuttal Testimony.

On June 22, 2017, we e-mailed the parties the cross-examination matrix for the hearings in this proceeding. We directed the parties to complete the cross-examination matrix and return it to us by 3:00 p.m. on June 23, 2017. The parties submitted the completed cross-examination matrix on June 23, 2017.

On June 23, 2017, PGW filed its Motion to Strike Certain Portions of Testimony Submitted by TURN *et al*.

On June 26, 2017, PGW served Rejoinder Testimony.

On the same date, I&E filed a letter to indicate its support for PGW’s Motion and its agreement that portions of the surrebuttal testimony of Harry S. Geller should bestricken.

Also on June 26, 2017, TURN *et al*. filed its Answer of the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia to the Motion to Strike of Philadelphia Gas Works. Also, CAUSE-PA filed a letter indicating its opposition to PGW’s Motion.

By Prehearing Order #6, dated June 27, 2017, we denied PGW’s Motion to Strike Certain Portions of Testimony Submitted by TURN *et al*.

On June 27, 2017, the parties informed us that they had agreed to waive cross-examination of all witnesses and were prepared to stipulate to the admission of testimony and exhibits into the record.

The evidentiary hearing was held as scheduled on June 28, 2017. Although the parties had not achieved an agreement on all of the issues raised in the proceeding, all parties agreed to waive the cross-examination of witnesses. Accordingly, the written testimony of PGW, OCA, I&E, OSBA, PICGUG, RESA, and TURN *et al*. was admitted into the record.

The Joint Petition for Partial Settlement (Settlement) was filed on July 21, 2017. The issues which were not resolved by the Settlement include PGW’s partial payment allocation practices as well as the allocation of universal service cost recovery. PGW, OCA, OSBA, TURN *et al*. and CAUSE-PA[[1]](#footnote-1) filed main briefs on July 21, 2017. PGW, OCA, OSBA, TURN *et al*. and CAUSE-PA[[2]](#footnote-2) filed reply briefs on August 4, 2017.

On August 21, 2017, PICGUG filed a Motion to Strike Portions of the OSBA’s Reply Brief. On August 22, 2017, we directed the parties to provide any responses to the Motion to Strike by the close of business on August 23, 2017. On August 23, 2017, OSBA provided a response to the Motion to Strike.

The Motion is now ready for decision. For the reasons set forth below, we will grant the Motion and strike the portions of OSBA’s Reply Brief identified by PICGUG.

DISCUSSION

PICGUG argues in its Motion to Strike that OSBA's inclusion of the Alternative Proposal in its Reply Brief is inappropriate because such inclusion violates the Commission's regulations and principles of due process. PICGUG requests that all references to the Alternative Proposal should be stricken from OSBA's Reply Brief.

Further, PICGUG asserts that since OSBA has the burden of proving that PGW's longstanding Commission-approved Universal Service Charge (USC) cost recovery methodology is not appropriate and should be modified. PICGUG indicates that despite bearing the burden of proving these modifications, OSBA opted not to address its Alternative Proposal for USC cost recovery in its Main Brief. PICGUG notes that the entirety of OSBA's Main Brief focuses upon the proposal to allocate all USC costs to residential customers with not a single mention or reference to OSBA's Alternative Proposal. As such, PICGUG argues that OSBA relinquished the ability to raise this issue in its Reply Brief.

Lastly, PICGUG argues that it is procedurally improper for OSBA to raise this issue in its Reply Brief because it violates the due process rights of the other parties, and neither PICGUG nor any other party have had an opportunity to adequately respond to OSBA's Alternative Proposal on the record. Accordingly, PICGUG's ability to fully and completely litigate this proceeding was hindered through OSBA's belated effort to support a proposal that was waived in its Main Brief.

In response to PICGUG’s Motion, OSBA argues that the issue was properly raised in its Reply Brief. Specifically, OSBA contends that the issue was raised in PGW and other parties’ Main Briefs and OSBA was properly responding to those arguments in its Reply Brief. OSBA asserts that PICGUG failed to cite to any particular statute or case law that prevented it from raising the issue in its Reply Brief. Further, OSBA also argues that the other parties had an adequate opportunity to address the issue in their Main and Reply Briefs.

Section 5.501(a)(3) of the Commission's regulations, provides that briefs must contain "[a]n argument preceded by a summary. The party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing." 52 Pa.Code § 5.501(a)(3). When parties "have been directed to file briefs and fail to include an issue in their briefs, the unbriefed issues may properly be viewed as having been waived." *Pa. Pub. Util. Comm'n. v. Columbia Gas of Pa.*, 2005 Pa. PUC LEXIS 14 at \*165-66 (Order entered Nov. 4, 2005) (citing *Jackson v. Kassab*, 812 A.2d 1233 (Pa.Super. 2002); *see also Browne v. Pa. Dep't. of Transp.*, 843 A.2d 429 (Pa.Cmwlth. 2004); *Borough of Glendon v. Dep't. of Envtl. Res.*, 603 A.2d 226 (Pa.Cmwlth. 1992); *Park v. Chronister*, 617 A.2d 863 (Pa.Cmwlth. 1992).

We agree with PICGUG in this regard. OSBA clearly did not raise this Alternative Proposal in its Main Brief. PGW even noted in its Reply Brief that OSBA’s Alternative Proposal should be deemed waived because OSBA did not brief this issue in its Main Brief. OSBA’s argument in response to PICGUG’s Motion, that it presented arguments in its Reply Brief that responded to arguments raised in other parties’ Main Briefs, is unpersuasive. Pursuant to 52 Pa.Code § 5.501(a)(3), OSBA should have raised its Alternative Proposal in its Main Brief. By raising the Alternative Proposal in its Reply Brief, OSBA has deprived the other parties of the opportunity to respond fully to its specific arguments on this issue. Therefore, since OSBA did not raise the Alternative Proposal in its Main Brief, it has been waived. Accordingly, PICGUG’s Motion to Strike Portions of OSBA’s Reply Brief is granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion to Strike Portions of the OSBA’s Reply Brief filed by the Philadelphia Industrial and Commercial Gas Users Group at Docket No. R-2017-2586387 is granted; and

2. That the following language of the reply brief of filed by the Office of Small Business Advocate are stricken:

1. The language on page 11 beginning with "However, the Commission has subsequently determined that Rates for Rate IT" through the language on page 12 that ends "all commercial customers-including Rate IT.";
2. Footnote number 9 on page 11;
3. The word "or" from the language in subcategory (1) of OSBA's Conclusion on page 12; and
4. The language in subcategory (2) of OSBA's Conclusion on page 12, beginning with "If the Commission determines" and ending with "including Rate IT."

Date: August 24, 2017 \_\_\_\_\_\_\_\_

Christopher P. Pell

Deputy Chief Administrative Law Judge

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Marta Guhl

Administrative Law Judge

Pennsylvania Public Utility Commission v. Philadelphia Gas Works

Docket Number R-2017-2586783

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(C-2017-2593903)

1. TURN et al. and CAUSE-PA filed a joint Main Brief. [↑](#footnote-ref-1)
2. TURN et al. and CAUSE-PA filed a joint Reply Brief. [↑](#footnote-ref-2)