

COMMONWEALTH OF PENNSYLVANIA



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November 27, 2017

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Bldg.  
400 North Street  
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission  
v.  
Philadelphia Gas Works  
Docket No. R-2017-2586783

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Petition for Reconsideration in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Christy M. Appleby  
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Attachment

cc: Honorable Christopher P. Pell, ALJ  
Honorable Judge Marta Guhl, ALJ  
Office of Special Assistants  
Certificate of Service

\*241863

# CERTIFICATE OF SERVICE

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2017-2586783
	:	
Philadelphia Gas Works	:	

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Petition for Reconsideration, 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 27<sup>th</sup> day of November 2017.

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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
	:	
v.	:	
	:	
Philadelphia Gas Works	:	

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PETITION OF THE  
OFFICE OF CONSUMER ADVOCATE  
FOR RECONSIDERATION

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The Office of Consumer Advocate (OCA) hereby submits this Petition pursuant to Sections 5.41 and 5.572 of the Public Utility Commission's (Commission) regulations. 52 Pa. Code §§ 5.41, 5.572. The OCA requests that the Commission reconsider and/or clarify its Order entered November 8, 2017, in the above-captioned case regarding the partial payment allocation method of Philadelphia Gas Works (PGW or the Company).<sup>1</sup>

**I. INTRODUCTION**

On November 8, 2017, the Commission entered an Opinion and Order (November 8 Order) in the above-captioned proceeding. The November 8 Order dismissed, without prejudice, the partial payment allocation issue raised by the OCA in Direct Testimony in the proceeding. The OCA respectfully requests that the Commission reconsider four aspects of its November 8 Order. First, the OCA requests that the Commission reconsider its decision that the partial payment allocation practices are not a challenge regarding the lawfulness, justness or

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<sup>1</sup> The OCA notes that its Petition for Reconsideration is limited to the Commission's decision to dismiss, without prejudice, the OCA's claims regarding PGW's partial payment allocation.



reasonableness of a proposed or an existing rate, rule or regulation of PGW. Second, if the Commission considers the partial payment allocation issue to be a quality of service issue, the OCA requests that the Commission reconsider its decision not to address the matter in this base rate proceeding. Third, the OCA requests that the Commission reconsider its determination that the burden of proof determination bars the Commission's review of the OCA's claim. Finally, the OCA requests that the Commission reconsider its determination that a second Formal Complaint is required when a Formal Complaint has been filed and all of the necessary factual evidence and legal arguments have been presented to allow the Commission to make a determination based on the merits. The OCA seeks to ensure that the Company's tariff is clarified to ensure that the Company's practices, tariff language, and the Commission's regulations are in alignment.

## **II. STANDARD OF REVIEW**

As set forth in Duick v. Pennsylvania Gas and Water Co., 56 Pa. P.U.C. 553 (1985), the standards for granting a petition for reconsideration are as follows:

A petition for reconsideration, under the provisions of 66 Pa.C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad case, wherein it was stated that "[p]arties...cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...". What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

50 Pa. P.U.C. at 559, (quoting Pennsylvania R.R. Co. v. Pa. Publ. Util. Comm'n, 118 Pa. Super. 380, 179 A. 850 (1935)).

In this Petition, the OCA raises points not previously heard or considered and which the Commission may have overlooked. The OCA seeks Commission reconsideration regarding the Commission's determination regarding whether the partial payment allocation issue is a rate issue or is a quality of service, and that in either case, the OCA requests that the Commission determine that the burden of proof belongs on the Company to demonstrate the justness and reasonableness of all of PGW's rates, rules and regulations. The OCA seeks reconsideration regarding the Commission's determination to dismiss claims appropriately raised in the base rate proceeding. The OCA also requests that the Commission re-examine the impact of its decision on the due process rights of the OCA. For the reasons set forth below, the OCA submits that the OCA has met the standard for reconsideration, and the Commission should grant reconsideration of the issues raised in this Petition.

### **III. RECONSIDERATION AND/OR CLARIFICATION**

#### **A. The Commission Should Reconsider Its Determination That Partial Payment Allocation Does Not Impact Rates, Rules, And Regulations.**

The OCA requests that the Commission reconsider its decision that partial payment allocation is not a rate, rule, or regulation of PGW. The November 8 Order provides:

As for the OCA's Exception No. 1, we find the OCA's claim regarding PGW's partial payment allocation practices is not a challenge regarding the lawfulness, justness or reasonableness of a proposed or an existing rate, rule or regulation of PGW's, but rather it is a challenge related to PGW's historical and current processes and practices. Indeed, as the ALJs pointed out, the existing tariff language in question – Section 4.2 of PGW's tariff – closely mirrors our Regulations at 56.22(a) and (c), and such language has not been challenged by the OCA as being unlawful, unjust or unreasonable. Rather, the claim is that PGW's partial payment allocation practices are inconsistent with and in violation of PGW's existing tariff and the Commission's Regulations. Thus, the OCA's claim regarding PGW's partial payment allocation practices appears to be related to PGW's quality of service to its customers.

November 8 Order at 47. Pursuant to the requirements of Duick, the OCA submits that reconsideration is appropriate because the Commission appears to have failed to consider or overlooked that the practices affecting late payments would fall within the definition of rates under the Public Utility Code. See, Duick at 559; 66 Pa. C.S. § 102. The Suspension Order placed the existing rates, rules, and regulations at issue. Pa. PUC v. PGW, Docket No. R-20172586783, Suspension Order at 3 (March 16, 2017)(Suspension Order).

The Commission's Order in reaching its conclusion overlooks the definition of the term "rate" in the Public Utility Code. Rate is defined much more broadly in the Public Utility Code than the discussion in the Commission's November 8 Order. Section 102 defines rate as:

Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, **practices**, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.

66 Pa. C.S. § 102. (Emphasis added). The Commission has limited its interpretation of the scope of the base rate proceeding to the Company's base rates, but the practices affecting PGW's compensation and late payment charges also fall within the definition of rate.

PGW's calculation of the partial payment allocation directly impacts the amount that customers pay and the practices that PGW uses to calculate the late payment charges will increase the costs to residential ratepayers. The OCA has raised two issues that impact the rates customers will pay under PGW's tariff: (1) PGW's tariff and practices do not comply with the Commission's regulations that provide that late fees (the rate that customers are charged for paying their bill late) must represent annual simple interest, rather than the effect of a

compounded interest and (2) PGW's payment posting practices increase the amount customers will pay to PGW (*i.e.*, the compensation to PGW). See, OCA M.B. at 11-22; OCA R.B. at 6-21. Both directly fall under the statutory definition of "rate." See, 66 Pa. C.S. § 102.

The OCA submits that reconsideration under the Duick standard is appropriate because the Commission appears to have failed to consider or has overlooked that the issue raised by the OCA in this matter involves the Company's existing rates, rules and regulations as defined in Section 102 of the Public Utility Code. See, 66 Pa. C.S. § 102. The Commission should reconsider its decision and fully consider this matter in this rate case.

B. If The Partial Payment Allocation Is a Quality Of Service Issue, The Commission Should Still Reconsider Its Decision.

The Commission's Order categorizes the partial payment allocation issue as a quality of service issue. The Commission notes, "Because the OCA's claim relates to PGW's quality of service, we acknowledge the relevance of the issue to our consideration of this proceeding under Section 523 and 526 of the Code, 66 Pa. C.S. §§ 523, 526." November 8 Order at 47. The Commission then considers partial payment allocation to be a quality of service issue and appears to conclude that quality of service issues can only be addressed if there is a financial impact in the overall revenue requirement or cost of service authorized to the Company. November 8 Order at 47-48.<sup>2</sup> Pursuant to the Duick standard, the OCA submits that reconsideration is warranted because the Commission's Order raises a new and novel interpretation of the law regarding quality of service issues being addressed in a base rate proceeding. The Commission appears to conclude that although the partial payment allocation issue is a relevant quality of service issue, an appropriate remedy may not be considered because a rate adjustment has not been proposed. November 8 Order at 47-48. For the reasons set forth

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<sup>2</sup> The OCA notes that the Settlement regarding the revenue requirement and cost of service is a black box settlement and does not specifically identify adjustments.

below, the Commission should reconsider its decision. The OCA submits that reconsideration is also warranted because the Commission has failed to consider the fact that review of quality of service is a key component to a base rate proceeding and a full and complete record regarding partial payment allocation has been developed in this proceeding. See, Duick at 559; 66 Pa. C.S. §§ 523, 526.

Sections 523 and 526 of the Public Utility Code specifically identify that quality of service should be evaluated as part of a base rate proceeding, and under Section 1501 of the Public Utility Code, the Company has a continuing obligation to provide safe, adequate, and reasonable service. 66 Pa. C.S. §§ 523, 526, 1501. Although the partial payment allocation is a part of the Company's rates, rules and regulations, the Commission has failed to consider that a rate adjustment is not the remedy necessary to resolve the issue nor is a rate adjustment necessary or appropriate in all cases. The partial payment allocation issue can be resolved by changing the Company's practices to adhere to the Commission's regulations.

The Commission's Order acknowledges that the payment posting practice is relevant to the Company's base rate proceeding because quality of service is always appropriately raised pursuant to Section 332(a) of the Public Utility Code. November 8 Order at 47. The Commission states that the "partial payment allocation practices appear to be related to PGW's quality of service to its customers," and that quality of service may be appropriately raised and is relevant to a claim by the Company for rates such as the instant base rate proceeding. November 8 Order at 47, citing 66 Pa. C.S. 332(a). The Commission notes that the OCA has not made any adjustments to revenue requirement or cost of service as a result of the payment prioritization issue pursuant to Sections 523 or 526 of the Public Utility Code, and therefore, the Commission states "we agree with the ALJs that the OCA's claim can be effectively pursued in a separate

complaint or petition proceeding.” November 8 Order at 47; see also, 66 Pa. C.S. §§ 523, 526. Although pursuant to Sections 523 and 526 of the Public Utility Code the Commission may consider an adjustment to rates based on quality of service, the OCA submits that there is no requirement that the only way that a quality of service issue can be considered is with an adjustment to rates when a correction in practices will suffice. Moreover, the Commission may also have overlooked the unique cash flow method of ratemaking used by PGW and the attendant issues with making rate adjustments under such a method.

Under Section 1501 of the Public Utility Code, the Company is always under an obligation to provide safe, adequate, and reasonable service. 66 Pa. C.S. § 1501. Specifically, Section 1501 requires that “Such service and facilities shall be in conformity with the regulations and orders of the Commission.” Id. Quality of service issues have been addressed in prior rate cases without a direct decrease to the revenue requirement and cost of service. See, e.g., Pennsylvania Public Utility Commission v. Philadelphia Gas Works, Opinion and Order, Docket No. R-00061931, *et al.*, Order at 124-126 (September 28, 2007) (As part of a general rate case, the Commission considered whether the record evidence supported a finding that PGW provided inadequate service to low income households.); see also, Pa. PUC v. Deer Haven, Docket No. R-2010-2194577, Order at 45-46 (May 19, 2011) (Commission found Section 1501 violation and exercised its discretion to order improvements to bring the system into compliance with Section 1501 of the Public Utility Code.)

The Commission’s Suspension Order opens for investigation the lawfulness, justness and reasonableness of the Philadelphia Gas Works’ existing rates, rules, and regulations. Suspension Order at 3. In a base rate proceeding, the burden is on PGW to demonstrate that its rate request is just and reasonable, and that the Company’s operations are in compliance with the

Commission's regulations. Here, the OCA has claimed that the Company's application of its partial payment allocation is not in compliance with the Commission's regulations. As such, the Commission should reconsider its decision and address the merits of the OCA's claim based on the fully developed record in this case.

C. The Commission Should Reconsider Its Decision That The Burden Of Proof Issue Precludes The Commission From Addressing The Partial Payment Allocation Issue In This Base Rate Proceeding.

The OCA submits that the Commission should reconsider its decision that the burden of proof issue effectively bars the Commission from addressing the partial payment allocation issue in this base rate proceeding. The Commission's November 8 Order states:

[W]e find that the burden of proof on this *complainant-initiated* claim squarely resides with the OCA under Section 332(a) of the Code, and not with PGW under Section 315(a) of the Code. The OCA has argued otherwise in its Exception No. 2, which we deny, and by extension, we deny OCA's Exception No. 3. [...] Here, the OCA proposed language to be added to PGW's tariff to correct PGW's practices that are alleged to violate PGW's existing tariff and our Regulations, but the issue to be examined is PGW's alleged wrongful practices. Had the burden of proof been properly placed with the OCA on this issue as the proponent of a Commission order finding the alleged violations and ordering the tariff modifications, the OCA's claim regarding PGW's partial payment allocation practices likely would be properly before us now for a decision on the merits. It is not, however.

November 8 Order at 47.

Pursuant to the Duick standard, the OCA submits that reconsideration is appropriate because the Commission appears to have overlooked that quality of service issues are regularly raised in base rate proceedings and do not alter the burden of proof. See, Duick at 559; November 8 Order at 77. In this proceeding, the Commission has approved a Settlement that addresses multiple quality of service issues including approval of: (1) a hazardous hearing remediation pilot; (2) a credit and collection collaborative; (3) a cost/benefit analysis of the impact of changing the LIHEAP crisis acceptance policy; (4) documentation of the Company's

Section 1521 policies; (5) a low-income collaborative; (6) tracking of unauthorized use determinations; and (7) budget billing modifications. Settlement at ¶¶ 26-35. The Commission appears to have overlooked that the determination of the burden of proof and the determination regarding whether an issue is relevant to the proceeding are two separate issues.

As the Commission correctly identifies regarding burden of proof, Section 315(a) of the Public Utility Code requires the public utility to bear the burden of proof to establish the justness and reasonableness of every element of the rate increase request. November 8 Order at 47; 66 Pa. C.S. § 315(a); see also, Pa. PUC v. Aqua Pennsylvania, Inc., Docket No. R-00038805, 236 PUR 4<sup>th</sup> 218, 2004 Pa. PUC LEXIS 39, \*8-11 (August 5, 2004); see also, Sharon Steel Corp. v. Pa. PUC, 78 Pa. Cmwlth. 447, 452 (1986) (Sharon Steel). When the Commission orders an investigation into the propriety of existing and proposed rates, rules, and regulations, the burden of justifying both existing and proposed rates is on the utility. See, Sharon Steel at 451-52.

As in Sharon Steel, the Commission has opened an investigation on its own motion into PGW's base rate filing including the Company's proposed and existing rates, rules and regulations. Suspension Order at 3. The Commission's Suspension Order specifically states:

That this investigation shall include consideration of the lawfulness, justness, and reasonableness of the Philadelphia Gas Works' existing rates, rules and regulations.

Suspension Order at 3 (emphasis added). In this proceeding, the OCA has challenged Section 4.2 of PGW's existing tariff and its application thereof and has proposed an adjustment to that tariff provision.

Under Section 315 of the Public Utility Code, the OCA has the burden of going forward or the burden of persuasion when it challenges the Company's existing or proposed rates and tariff. See, Pa. PUC v. Breezewood Telephone Co., 1991 Pa. PUC LEXIS 45 at \*9-10, Docket



No. R-901666 (Jan. 31, 1991) (Breezewood). Specifically, in Breezewood, the Commission provided:

With respect to rate proceedings before the Commission, Section 315 of the Public Utility Code, 66 Pa. C.S. § 315, provides that the burden of proof shall be upon the utility. Clearly, although the burden of going forward with evidence may shift, the burden of proof does not shift to an intervenor challenging a requested rate increase. However, the Commission has indicated that where a party proposes an adjustment to a ratemaking claim of a utility, the proposing party does bear the burden of presenting some evidence or analysis tending to demonstrate the reasonableness of the adjustment.

Breezewood at \*9-10 (citing Pa. PUC v. PECO, Docket No. R-891364, Slip Opinion at 42, 53-54 (May 16, 1990)). The Commission, however, found that the OCA has the burden of proof on this issue.

While the OCA disagrees with the Commission's analysis, the burden of proof determination is not a reason to dismiss the OCA's claims in this case. Even if the Commission does not agree with the OCA's burden of proof analysis, such a factor does not provide a basis to dismiss the OCA's claims in this case. If the Commission were to place the burden of proof on the OCA, the Commission could still render a decision on the merits in this case. The Commission has acknowledged that the OCA has raised an issue that is relevant to this base rate proceeding. The OCA has presented Direct Testimony and Surrebuttal Testimony, and has filed briefs on the merits of its claim. The OCA has certainly met the burden of persuasion, and even if the burden of proof is on the OCA, the OCA has also met the burden of proof.

Although the OCA continues to argue that the Company has the burden of proof and the OCA has the burden of going forward in this matter, the OCA submits that a determination of the burden of proof cannot serve as a bar to raising the issue in this proceeding or to receiving a disposition on the merits. See, NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC v. Duquesne Light Company, Docket No. C-2013-2390562,

Order at 26 (May 7, 2015) (The Commission addressed the merits of NRG's proposal even though the Commission determined that NRG bore the burden of proof); see also, Pa. PUC v. Pennsylvania Electric Company, Metropolitan Edison Company, Docket Nos. R-00061367, *et al.* Order at 117 (January 11, 2007) (The Commission addressed the merits of PennFuture's proposal to implement an energy efficiency program even though the Commission determined that PennFuture bore the burden of proof.) The only factor that is important to deciding whether the issue may be addressed in this proceeding is whether the issue is relevant and germane to the base rate proceeding. The OCA submits that the issue of partial payment allocation is relevant and germane to PGW's base rate proceeding for two reasons: (1) the accumulation of late fees involves the Company's existing rates, rules, and regulations and (2) the practice addresses the quality of service provided by the Company.

The OCA submits that the Commission should reconsider its determination that the burden of proof bars the OCA's claims in this matter. As the Commission has acknowledged, the issue of partial payment allocation practices are relevant to the Company's base rate proceeding. Moreover, the issue has an impact on the Company's existing and proposed rates and tariff. The assignment of the burden of proof does not limit the Commission's ability to evaluate the full and complete record developed in this proceeding regarding the Company's payment posting practices.

D. Due Process Requires That The Commission Issue A Decision On The Merits.

The Commission's Order suggests that there would be a "potential impact to the due process rights of the parties in this case" if the matter were decided in this base rate proceeding. November 8 Order at 49. The OCA submits that the Commission should reconsider this determination because pursuant to the Duick standard, the Commission appears to have

overlooked the fact that the Commission's dismissal of the OCA's Formal Complaint regarding partial payment allocation would result in a judicial waste of resources when all parties have already had the required due process in this proceeding. Administrative agencies are required to provide due process to parties appearing before them, and due process requires "notice and opportunity to be heard." See, Schneider v. Pa. P.U.C., 479 A.2d 10 (Pa. Cmwlth. 1984). All parties have had notice and opportunity to be heard in this proceeding.

The Commission's Order overlooks the fact that the Company filed a Motion to Strike OCA witness Colton's testimony on this issue, and the ALJs denied the Motion and allowed the OCA to move forward with its case. Pa. PUC v. PGW, Docket No. R-20172586783, Prehearing Order # 5 (May 26, 2017). PGW did not file for any interlocutory review of the decision to deny its Motion to Strike. The OCA filed a Formal Complaint in this proceeding and addressed the issue of partial payment allocation in the Direct and Surrebuttal Testimony of its witness Roger D. Colton. See, OCA St. 1 at 35-44; OCA St. 1S at 17-25, Exh. RDC-1SR (Revised). As such, the Company and the parties to this proceeding have been placed on notice that the OCA intended to address the issue, and the Company through its witness Bernard Cummings responded to the issue in its testimony. Throughout this proceeding, the OCA has challenged the "lawfulness" of PGW's existing tariff, application thereof, and resulting late payment charge, and presented substantial record evidence to support a finding that PGW's tariff and practices are in violation of the Commission's regulations and the Public Utility Code. See, OCA M.B. at 11-22; OCA R.B. at 7-21. The Company has had the full opportunity to respond to the OCA's claims in this matter, including the opportunity for responsive testimony, hearings, and briefs on the matter.

At a minimum, the Commission has acknowledged that the Company's partial payment allocation practice raises a quality of service issue that is relevant to the Company's base rate proceeding. November 8 Order at 47. The Commission, however, has declined to make a decision on the merits when a relevant factual and legal question has been appropriately raised. In order to provide the OCA a meaningful opportunity to be heard, the Commission must render a decision on the merits. To now require the OCA to file another complaint raising the same claims against PGW related to PGW's partial payment allocation, present its evidence again, and argue the merits of its claim again would not promote judicial efficiency or due process.

As discussed above, the OCA's challenges to PGW's partial payment allocation are relevant and directly related to PGW's existing tariff and have a direct effect on the rates charged to residential customers. The Commission appears to have overlooked or has failed to consider that the time and expense of litigation of identical issues would be a judicial waste when the issue has been appropriately raised in this forum. Moreover, all of the facts and legal discussion necessary for a full review of the issue have been presented to the Commission in this forum, and are ripe for review by the Commission.

### III. CONCLUSION

For these reasons, the OCA respectfully requests that the Commission reconsider and/or clarify its decision as set forth above.

Respectfully Submitted,

/s/ Christy M. Appleby

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