**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held May 3, 2018

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

Norman J. Kennard, Statement

David W. Sweet

John F. Coleman, Jr.

|  |  |
| --- | --- |
| Pennsylvania Public Utility Commission  Office of Consumer Advocate  Office of Small Business Advocate  Philadelphia Industrial & Commercial Gas Users Group & William Dingfelder  v.  Philadelphia Gas Works | R-2017-2586783  C-2017-2592092  C-2017-2593497  C-2017-2595147  C-2017-2593903 |

**OPINION AND ORDER**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Reconsideration Petition) filed by the Office of Consumer Advocate (OCA) on November 27, 2017, to the Commission’s Opinion and Order entered in this proceeding on November 8, 2017 (*November 8 Order*), and the Answer to the Reconsideration Petition filed by Philadelphia Gas Works (PGW) on December 7, 2017. For the reasons discussed, *infra*, we shall grant the Petition for Reconsideration and modify the Recommended Decision (R.D.) of Administrative Law Judges Christopher P. Pell and Marta Guhl (collectively, the ALJs), that was issued in this proceeding on September 8, 2017.

1. **History of Proceeding**[[1]](#footnote-2)

On February 28, 2017, PGW filed Supplement No. 100 to Tariff Gas – Pa. P.U.C. No. 2 (Supplement No. 100), with the Commission to become effective April 28, 2017, at Docket No. R‑2017-2586783. PGW filed Supplement No. 100 pursuant to Section 1308(d) of the Public Utility Code (Code), 66 Pa. C.S. § 1308(d) (regarding general rate increases), and pursuant to Sections 53.51-53,56 of our Regulations, 52 Pa. Code §§53.51-53,56 (regarding information to be furnished with the filing of rate changes). In Supplement No. 100, PGW proposed a general rate increase applicable to all its jurisdictional customers that would result in an annual increase in base rate revenues in the amount of $70 million, approximately an 11.6 percent increase over present rates. PGW also filed a Petition for Waiver seeking waiver of the application of the statutory definition of the fully projected future test year (FPFTY) to permit the Company to use a FPFTY beginning on September 1, 2017, in this proceeding.

On March 6, 2017, the OCA filed a Public Statement, a Notice of Appearance and a Formal Complaint.

By Order entered March 16, 2017 (*Suspension Order*), we instituted an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase. Pursuant to Section 1308(d) of the Code, 66 Pa. C.S. § 1308(d), we suspended Supplement No. 100 by operation of law, until November 28, 2017, unless permitted by Commission Order to become effective at an earlier date. In addition, we directed in the *Suspension Order* that the investigation include consideration of the lawfulness, justness and reasonableness of PGW’s existing rates, rules, and regulations. The investigation was assigned to the Office of Administrative Law Judge (OALJ) for the prompt scheduling of hearings culminating in the issuance of a Recommended Decision.

Prior to the convening of the evidentiary hearings in this proceeding, the Parties served direct, rebuttal, surrebuttal and rejoinder written testimonies, along with various exhibits. On May 22, 2017, PGW filed a Motion In Limine to Limit the Scope of the Evidentiary Hearing and this Proceeding and to Exclude Certain Portions of Testimony Submitted by the OCA. On May 25, 2017, the OCA filed an Answer to PGW’s Motion In Limine. By Prehearing Order No. 5 issued May 26, 2017, the ALJs denied PGW’s Motion In Limine.

On June 27, 2017, the Parties informed the ALJs 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. During the evidentiary hearing, the written testimonies of PGW, the OCA, and the remaining Parties to this proceeding, were admitted into the record.

On July 21, 2017, a Joint Petition for Partial Settlement (Joint Petition or Partial Settlement) was filed by PGW, the OCA, and the remaining Parties to this proceeding (collectively, the Joint Petitioners) which was represented as having resolved all base rate issues except for two issues reserved for litigation. Among the litigated issues not resolved by the Partial Settlement was a dispute between the OCA and PGW concerning PGW’s partial payment allocation practices.

On July 21, 2017, and August 4, 2017, PGW, the OCA, and the remaining Parties to the proceeding, filed Main Briefs and Reply Briefs, respectively.

On September 8, 2017, the ALJs’ Recommended Decision was issued. In their Recommended Decision, the ALJs found that the Partial Settlement was reasonable and in the public interest and recommended that it be approved without modification. The ALJs further recommended that the OCA’s claims regarding PGW’s partial payment allocation practices be dismissed, without prejudice.

The OCA filed Exceptions to the Recommended Decision on September 25, 2017. On this same date, PGW submitted a Letter in Lieu of Exceptions. Replies to Exceptions were filed on October 2, 2017, by PGW and the OCA.

On November 8, 2017, we entered an Opinion and Order at this docket in which we denied the OCA’s Exceptions, adopted the ALJs’ Recommended Decision, approved the Joint Petition for Partial Settlement, without modification, and dismissed, without prejudice, the OCA’s claims regarding PGW’s partial payment allocation practices.

As noted above, on November 27, 2017, the OCA filed its Reconsideration Petition to the *November 8 Order*, and on December 7, 2017, PGW filed its Answer thereto.

1. **Discussion**
   1. **Legal Standards**

The Code establishes a party’s right to seek relief following the issuance of a final decision by the Commission pursuant to Sections 703(f) and (g) of the Code, 66 Pa. C.S. § 703(f) and § 703(g), relating to requests for rehearing or rescission and amendment of orders. Any request for relief filed by a party pursuant to these Code provisions must be consistent with the Commission’s procedural rules relating to petitions for relief following the issuance of a final decision, found at Section 5.572 of our Regulations, 52 Pa. Code § 5.572.

In relevant part, Section 703(g) of the Code, which governs petitions for reconsideration, provides as follows:

The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

66 Pa. C.S. § 703(g). By the terms of this Code provision, the Commission has the power to amend or rescind its own orders at any time subject only to the requirements of due process. *See Department of Highways v. Pa. P.U.C*., 185 Pa. Super. 418, 138 A.2d 143 (1958). Because such relief may result in disturbance of final orders, a petition to amend or rescind a final order must be granted judiciously and only under appropriate circumstances. *See City of Pittsburgh v. Pennsylvania Department of Transportation,* 490 Pa. 264, 416 A.2d 461 (1980).

While a petition under Section 703(g) may raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior order, at the same time “[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.” *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (Order entered December 17, 1982) (quoting [*Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)](http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=118+Pa.+Super.+380) (*Duick*). Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

Furthermore, adjudications by the Commission must be supported by substantial evidence in the record. 2 Pa. C.S. § 704. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Finally, any issue that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

* 1. ***November 8 Order***

In the Recommended Decision, the ALJs recommended to dismiss, without prejudice, the OCA’s claims regarding PGW’s partial payment allocation practices (R.D. at 72-77), for the following three reasons: (1) because the language in PGW’s tariff is consistent with the Commission’s Regulations, the ALJ’s determined that PGW’s existing tariff was not at issue (R.D. at 75-76); (2) because the record lacked any actual billing data reflecting how PGW’s partial payment allocation practices have actually affected its customers, whereas the record in the then-pending consumer complaint case regarding PGW’s partial payment practices did contain such evidence, *SBG Management Services/Colonial Garden Realty Company v. PGW*, Docket Nos. C-2012-2304183 and C-2012-2304324 (Order entered December 8, 2016) (*SBG* *Order*) (R.D. at 76); and (3) because the challenges raised by the OCA in this case effectively could be pursued in a separate complaint proceeding (R.D. at 77). OCA Exc. at 4.

In the *November 8 Order*, we adopted the ALJs’ recommendation to dismiss the OCA’s claims, without prejudice to the OCA’s future right to separately file a formal complaint on this matter, or to petition this Commission to initiate an investigation into PGW’s partial payment allocation practices. *November 8 Order* at 46, 48.

We further stated that the OCA’s claims regarding PGW’s partial payment allocation practices do not appear to challenge the lawfulness, justness or reasonableness of PGW’s proposed or existing rates, rules or regulations, but rather appear to challenge PGW’s historical and current processes and practices. We acknowledged, as the ALJs had pointed out, that the existing tariff language in question – Section 4.2 of PGW’s tariff – mirrors Section 56.22(a) and (c) of the Commission’s Regulations, and we noted that such language in the Regulations had not been challenged by the OCA as being unlawful, unjust or unreasonable. We acknowledged that the OCA proposed that language be added to PGW’s tariff to correct its current practices, which the OCA alleged violates PGW’s existing tariff and our Regulations, but we stated that the issue to be examined is PGW’s alleged wrongful practices. With the focus being on PGW’s alleged wrongful practices, we, therefore, viewed the nature of the OCA’s claims as a challenge to PGW’s quality of service to its customers. *November 8 Order* at 46-47.

We also acknowledged in the *November 8 Order* the relevance of the OCA’s claims to our consideration of PGW’s rate increase request under Sections 523 and 526 of the Code, 66 Pa. C.S. §§ 523, 526. However, we found that the burden of proof on this complainant-initiated claim squarely resided with the OCA under Section 332(a) of the Code, and not with PGW under Section 315(a) of the Code. We stated we were persuaded by PGW’s Replies to Exceptions that because a party simply proposes that certain language be added to a utility’s tariff, whether as new language or as a modification to existing language, does not automatically make the issue(s) addressed by such language the utility’s burden to carry. We stated it would be improper burden shifting in a general rate proceeding to allow a party to bring forth an issue that does not challenge a proposed or existing rate, rule or regulation, and then require the utility to carry the burden of proof with respect to that issue. We noted that 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 for a decision on the merits. *November 8 Order* at 47.

Moreover, in the *November 8 Order* we noted that the Joint Petitioners – the OCA included – had presented a Partial Settlement for our approval in this proceeding that established, within the context of a “black box” settlement, PGW’s overall allowed revenue requirement and the rates that will go into effect for customers following the Commission’s order in this proceeding. To address its claim regarding PGW’s practices that are alleged to violate PGW’s Tariff and our Regulations, we noted that the OCA did not propose or present evidence regarding any specific adjustments to the Company’s cost of service claim for the Commission to adopt under Section 523(a) of the Code; nor had the OCA proposed under Section 526(a) that the Commission reject, in whole or in part, PGW’s revenue requirement as set forth in the Joint Petition. Thus, we agreed with the ALJs that the OCA’s claim could be effectively pursued in a separate complaint or petition proceeding. *November 8 Order* at 48.

* 1. **Reconsideration Petition, Answer and Disposition**
     1. **OCA’s Reconsideration Petition**

In its Reconsideration Petition, the OCA requests that we reconsider our decision that the OCA’s claims regarding PGW’s partial payment allocation practices are not a challenge regarding the lawfulness, justness or reasonableness of a proposed or an existing rate, rule or regulation of PGW. *See* Petition at 1-2. The OCA further submits that it raised the following two issues in the proceeding 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). Petition at 4-5.

The OCA submits that if the Commission considers the partial payment allocation issue to be a quality of service issue, reconsideration is warranted under *Duick* because the Commission’s Order raises a new and novel interpretation of the law by concluding that a quality of service issue may only be addressed in a base rate proceeding if there is a rate adjustment or financial impact in the overall revenue requirement. Petition at 2, 5.

The OCA avers that a rate adjustment is not necessary or appropriate to resolve a quality of service issue in all cases. Petition at 6. The OCA asserts that the partial payment allocation claims can be resolved by changing the Company’s practices to adhere to the Commission’s Regulations. Petition at 6. Although pursuant to Sections 523 and 526 of the 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. Petition at 7.

The OCA argues that reconsideration is warranted because the Commission 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. Petition at 6. Thus, the OCA requests that the Commission reconsider its prior decision and address the merits of the OCA’s claim based on the fully developed record in this case. Petition at 8.

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. Petition at 2, 8. 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. Petition at 8.

The OCA states that it had challenged Section 4.2 of PGW’s existing Tariff and its application thereof and had proposed an adjustment to that Tariff provision. The OCA argues that under Section 315 of the Code, the OCA had only the burden of going forward with the evidence when it challenged the Company’s existing or proposed rates and tariff, and the Commission erred in concluding that the OCA had the burden of proof on this issue. *See* Petition at 9-10.

The OCA states that the Commission appears to have overlooked the fact that the Commission’s dismissal of the OCA’s claims regarding PGW’s partial payment allocation practices would result in a judicial waste of resources when all the parties have already had the required due process in this proceeding (notice and opportunity to be heard in this proceeding). *See* Petition at 11-12. Per the OCA, 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. *See* Petition at 12. 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 claims again, would not promote either judicial efficiency or due process. *See* Petition at 13.

In order to provide the OCA a meaningful opportunity to be heard, the OCA argues that the Commission must render a decision on the merits. The OCA asserts that its challenges to PGW’s partial payment allocation practices are relevant and directly related to PGW’s existing tariff and have a direct effect on the existing rates charged to residential customers. Moreover, all 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. *See* Petition at 13.

* + 1. **PGW’s Answer**

In its Answer, PGW submits that the Commission properly dismissed the OCA’s claims without prejudice in determining PGW’s partial payment allocation practices are not a challenge to the lawfulness, justness or reasonableness of a proposed or existing PGW rate, rule or regulation. PGW argues that Rule 4.2 of its tariff mirrors the requirements of Section 56.22 of the Commission’s Regulations governing the computation and assessment of late payment charges and has no language relating to the application of customers’ partial payments.

PGW argues that the Commission previously determined that the OCA never presented any evidence to show that PGW’s partial payment allocation practices actually affect the rates that are charged to customers. See Answer at 5-6. Moreover, PGW asserts that its partial payment allocation practices do not affect the rates that are charged to customers. PGW claims it bills its customers and imposes late payment charges in accordance with its tariff. *See* Answer at 6.

PGW argues the Commission properly found that the OCA’s claims regarding PGW’s partial payment allocation practices do not involve the existing or proposed tariff of PGW. Further, PGW asserts that the Commission correctly determined that the OCA’s claims relate to PGW’s quality of service under Code Sections 523 and 526. *See* Answer at 8. PGW asserts that the Commission correctly noted that the OCA did not propose or present evidence regarding any specific adjustments to the Company’s cost of service claims or proposed that the Commission reject, in whole or in part, PGW’s revenue requirement. In fact, per PGW, the OCA settled all revenue requirement issues without reservation, leaving no basis for the Commission to consider the quality of service issues raised by the OCA. *See* Answer at 8-9. PGW avers that the Commission correctly interpreted Sections 523 and 526 of the Code, and no reconsideration of those determinations is warranted. Because the OCA failed to propose any remedies pursuant to Sections 523(a) and 526, and because the OCA agreed to a settlement that resolved all issues as to the just and reasonable rates of PGW, PGW submits that the Commission had no proposal before it that could be properly addressed. *See* Answer at 9-10.

PGW avers that given the OCA’s failure to prove any violation, and the lack of any proposed adjustments to cost of service claims or revenue requirements, the Commission properly rejected OCA’s claims without prejudice, and no reconsideration is warranted. *See* Answer at 10-11.

PGW asserts that the Commission correctly concluded that the OCA had the burden of proof on its claims. Additionally, PGW states that the OCA appears to be misreading the *November 8 Order*, in which the Commission confirmed the ability of parties to raise quality of service issues in base rate cases, while correctly it concluded that when parties raise such issues, they bear the burden of proof to show that the utility violated its existing tariff or the Commission’s Regulations. PGW asserts that the Commission clearly did not conflate the burden of proof and relevancy determinations; rather, the Commission made two separate conclusions, one that recognized the parties’ ability to raise service issues and another that placed the burden of proof on the complainant raising such issues. *See* Answer at 11-12.

Further, per PGW, the fact that quality of service issues were voluntarily addressed by the Partial Settlement is of no relevance to the Commission’s burden of proof determination concerning quality of service issues that were raised by OCA and litigated by the parties. *See* Answer at 12.

Importantly, PGW notes that the ALJs stated that the record in this proceeding “contains OCA’s hypothetical scenarios as to how PGW’s partial payment allocation practices may result in the assessment of late payment charges in excess of 18% per year.” *See* Answer at 12-13, citing R.D. at 76. Consistent with that shortcoming in the record, and the ALJs’ determination that this issue went beyond the scope of PGW’s tariff and the base rate proceeding, the ALJs recommended dismissal of OCA’s claim without prejudice – a recommendation that the Commission subsequently adopted in the *November 8 Order*. Therefore, it is inaccurate to say that the OCA has been deprived of receiving a disposition on the merits. To the contrary, PGW asserts that the Commission found that the OCA failed to carry its burden of proof but has permitted the OCA to try again through other avenues. *See* Answer at 13.

PGW states that the OCA has cited no authority in support of the proposition that a party seeking relief from the Commission is entitled to a decision on the merits, particularly when the Commission has reviewed the issue and determined that it was raised through an improper proceeding and the record in support of the OCA’s claims are nothing but hypothetical scenarios. Therefore, PGW asserts that reconsideration is not warranted on the grounds of due process. *See* Answer at 14.

As for the OCA’s due process concerns, PGW argues that due to the manner and timing of OCA’s raising the issue in the base rate proceeding, it is PGW’s due process rights that have been jeopardized. PGW asserts that, at a very minimum, if the Commission desires to address PGW’s partial payment allocation practices in this proceeding then it should remand the record to the Office of the ALJ for further proceedings. PGW claims it has had no opportunity, as it would in a complaint proceeding, to present a direct case in support of the partial payment allocation practices that it follows. *See* Answer at 14-15.

As to the OCA’s claims about promoting judicial efficiency, PGW argues that judicial efficiency was not advanced by requiring PGW in the base rate case to spend valuable time and resources addressing an issue that is beyond the scope of such a proceeding.  *See* Answer at 15.

**3. Disposition**

Upon review, we grant the OCA’s request for reconsideration regarding our determinations surrounding quality of service. We maintain our determination in the *November 8 Order* that our review of PGW’s current practices of applying partial payments for consistent with Section 56.24 of our Regulations is an issue involving PGW’s quality of service to its customers pursuant to 66 Pa. C.S. § 1501. Indeed, we note here that in ALJ Vero’s Initial Decision, issued September 17, 2015, in the *SBG Order*, the ALJ stated that “PGW’s application of partial payments out of order so that the most recent late payment charges are paid before the gas charges due for prior service constitutes a failure to provide adequate and reasonable service in accordance with 66 Pa.C.S.A. § 1501.”

We recognize that quality of service issues are frequently raised in a base rate proceeding. The OCA argued that the November 8 Order raises a new and novel interpretation of the law by concluding that a quality of service issue may only be addressed in a base rate proceeding if there is a rate adjustment or financial impact in the overall revenue requirement. We recognize that our duties and powers under the Code to appropriately remedy a quality of service issue or an existing rate issue are not limited or diminished simply because such issues are raised in the context of a Section 1308(d) general base rate increase proceeding.[[2]](#footnote-3) The remedy necessary in this proceeding, as advocated by the OCA, is not one that would involve the revenue requirement or cost of service and would, instead, be a revision to the partial payment allocation methodology. Therefore, the OCA’s request for reconsideration regarding our determinations surrounding quality of service is granted.

In the *Suspension Order*, we directed an investigation into PGW’s existing rates, rules and regulations. Essentially, the OCA argued in this proceeding that PGW is charging its late-paying customers excessive late fees and annual interest due to effects of its partial payment allocation practices, in violation of 52 Pa. Code § 56.22(a) and 66 Pa. C.S. §§ 1301 and 1303. Because the late fees that PGW charges its customers are existing rates, we find that the OCA’s claims also directly relate to the Commission’s investigation into PGW’s existing rates, rules and regulations, in accordance with the *Suspension Order*. Specifically, whether late-paying residential customers are being charged late fees in amounts that are more than the amounts permitted under Section 56.22(a) of our Regulations is clearly relevant to our ‘just and reasonable’ review of PGW’s existing rates under Section 1301 of the Code and our review under Section 1303 of the Code as to whether the existing rates being charged to customers adhere to PGW’s existing tariff, Rule 4.2.[[3]](#footnote-4)

In granting reconsideration, we find that the factual evidence of the record and the Parties’ legal positions have been developed to a significant extent in this proceeding. Indeed, PGW and the OCA have submitted prepared written testimonies on the OCA’s claims regarding PGW’s partial payment allocation practices, and such testimony has been admitted into the record, subject to no cross examination because the Parties’ waived their right to cross examine witnesses. Additionally, the legal positions of the Parties’ on the OCA’s claims have been addressed extensively in the Parties’ Main Briefs and Reply Briefs, Exceptions and Replies to Exceptions. We agree with the OCA that it would not promote judicial efficiency to require the OCA to file another complaint raising the same claims against PGW related to PGW’s partial payment allocation practices, and to require the Parties to present their evidence again and start anew on arguing the merits of the OCA’s claims. Accordingly, we find that a separate on-the-record proceeding is not required to address the OCA’s claims.

Based on the foregoing, we deem the OCA’s claims regarding PGW’s partial payment allocation practices, including the relevant portions of the existing record, the ALJ’s Initial Decision, the Parties’ filed Briefs, Reply Briefs, Exceptions and Replies Exceptions related thereto, as having been bifurcated from our final determination in the *November 8 Order* and held in abeyance for a final decision on the merits, as contained in this comprehensive Opinion and Order.[[4]](#footnote-5)

As for the OCA’s and PGW’s due process concerns, our decision herein to deem the OCA’s claims as bifurcated and held in abeyance reflects an exercise of the Commission’s discretion to take additional time with the record developed thus far to enable to reach a thorough and well-reasoned decision.[[5]](#footnote-6) As noted above, we find that the record is developed sufficiently to support the Commission’s findings and conclusions on the question of whether PGW’s partial payment allocation practices are in violation of or inconsistent with 52 Pa. Code § 56.24 and 52 Pa. Code § 56.22, as alleged by the OCA. Those findings and conclusions are contained within this comprehensive Opinion and Order, as discussed further below in Section D. Based on the foregoing, there is no indication that the Commission will adjudicate the OCA’s claims on anything less than a sufficiently developed record.

* 1. **Disposition of the OCA’s Claims Regarding PGW’s Partial Payment Allocation Practices**

In the *November 8 Order*,we provided an extensive summary of the various positions of the Parties on this issue, as expressed in the Briefs and Reply Briefs, and we incorporate by reference that discussion as if fully re-stated herein. *See* *November 8 Order* at 30 – 32.In addition, we provided an extensive discussion of the ALJs’ recommendation on this issue, as set forth at pages 75 through 77 of the Recommended Decision, and we incorporate by reference that discussion in the Recommended Decision as if fully re-stated herein. *See* *November 8 Order* at 32 – 34. Finally, the OCA filed three Exceptions to the ALJs’ Recommended Decision on this issue, and PGW filed Replies thereto. In the *November 8 Order*,we provided an extensive summary of the OCA’s Exceptions and PGW’s Replies to Exceptions on this issue, and we incorporate by reference that discussion as if fully re-stated herein. *See* *November 8 Order* at 34 – 46.

* + 1. **52 Pa. Code § 56.24**

At the outset, we note that it is undisputed in this proceeding that PGW’s partial payment allocation practices involve applying a customer’s partial payment in the following hierarchy: (1) first, to a security deposit, if required; (2) next, to any outstanding late payment charges; and (3) finally, to the oldest balances due for prior basic service. It is also undisputed that PGW applies partial payments against new, non-interest bearing late charges before applying the payments against older, interest-bearing amounts due for prior basic service. PGW M.B. at 16-19, 21; PGW St. 10-R at 7; OCA Exc. at 16. We accept the foregoing undisputed descriptions of PGW’s partial payment practices as facts for purposes of our analysis as to whether such practices violate Section 56.24 of our Regulations.

### The OCA argued that PGW’s practice of posting a customer’s partial payment out-of-sequence – first, against more recent non-interest bearing late payment charges, and, then, against older interest-bearing principal – is in a manner that is contrary to the posting sequencing requirements of Section 56.24 of the Commission’s Regulations. The OCA argued that the Company should not be permitted to continue a practice that violates the Commission’s Regulations and the Code. As such, the OCA recommended that PGW be required to change its payment posting methodology consistent with the OCA’s recommendations and provide customers with effective notice of the corrected payment posting methodology in the Company’s Tariff. OCA M.B. at 11-22.

Based on the record, we find PGW’s practice of applying partial payments against all late charges due before applying the payments against older amounts due for prior basic service constitute violations of 52 Pa. Code § 56.24 and 66 Pa. C.S. § 1501.

Our finding is consistent with the finding in the *SBG Order*. In the *SBG Order*, we determined that a partial payment shall be applied equally to all basic charges due for prior service, with no prioritization to be given to late payment charges over other types of charges for basic service. *See* *SBG Order* at 98. In that case, we examined PGW’s partial payment allocation practices, which are the same practices being challenged by the OCA in this proceeding, as such practices pertained to PGW’s collection of late payment charges from the complainants in that case. In the *SBG Order*, we determined that the clear and unambiguous interpretation of our Regulation at 52 Pa. C.S. § 56.24 means that all basic charges together constitute the balance due for prior basic service each month. *See SBG Order* at 98. Consequently, we stated, “in the case of a partial payment on a past due bill, the entirety of the ‘balance due’ for prior service for which the utility has issued a bill and of which the ratepayer has received noticed, should be addressed simultaneously.” *See SBG Order* at 98. We determined that PGW’s partial payment allocation practices violate the Commission Regulation at 52 Pa. Code § 56.24, by applying partial payments against all outstanding late payment charges before applying the payments toward the oldest amounts due for the other basic charges. *See SBG Order* at 97. We stated it is a violation to the extent a partial payment does not reduce interest bearing basic charges billed and accumulated under a past due bill, *i.e.* August 2011 bill, before paying off late payment charges for a more current bill, *i.e*. November 2011 bill. *See SBG Order* at 97.

In this proceeding, PGW argued that Section 56.24 is silent on the hierarchy or prioritization that must be followed when a utility applies a partial payment to the various components of charges for prior basic service. PGW M.B. at 21-22. PGW also argued that it is noteworthy that the OCA took no position on whether PGW’s practice of first applying partial payments to unpaid security deposits is acceptable, and, therefore, construed this silence to mean that the OCA accepts that some prioritization is permissible. PGW contended that any recommended modifications to its practices that pertain to security deposits would run afoul of Chapter 14, specifically Sections 1404 and 1406(a)(3) of the Code, 66 Pa. Code §§ 1404and 1406(a)(3). PGW M.B. at 17, n. 36.

Moreover, PGW argued that its payment posting practices are consistent with the intent of Chapter 14 of encouraging customers to timely pay their bills in full and avoiding situations where timely-paying customers are shouldering greater financial burdens due to the paying performance of late-paying and partial-paying customers. PGW M.B. 17-18. Indeed, PGW argued that nothing in the Code or the Commission’s regulations prohibit prioritization of other components of prior service, including late payment charges. PGW M.B. at 17, n. 36. Accordingly, PGW argued that the rulemaking process must be used by the Commission to consider and direct modifications to PGW’s partial payment allocation practices. PGW M.B. at 35-38.

To address PGW’s arguments, first we recognize that the OCA’s challenges to PGW’s partial payment allocation practices pertain only to late payment fees, not security deposits. In other words, the OCA did not challenge PGW’s practice of applying a customer’s partial payment first to pay off any required security deposit.

Next, as to PGW’s arguments related to Chapter 14, such involve statutory interpretation, which is a question of law. The Statutory Construction Act provides that the object of interpretation is to ascertain and effectuate the intent of the General Assembly. 1 Pa. C.S. § 1921(a). The statute's plain language generally provides the best indication of legislative intent. *See* 1 Pa. C.S. § 1921(b); *see also A.S. v. Pennsylvania State Police*, 636 Pa. 403, 415, 143 A. 3d 896, 903 (2016), citing *McGrory v. Dep't of Transp.,* 591 Pa. 56, 915 A.2d 1155, 1158 (2007); *Commonwealth v. Gilmour Mfg. Co.,* 573 Pa. 143, 822 A.2d 676, 679 (2003).

The Rules of Statutory Construction, 1 Pa. C.S. § 1921(a)-(b), provide as follows:

(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Chapter 14, 66 Pa. C.S. § 1401 *et seq*., in general, confers certain rights and responsibilities to utilities with respect to a customer’s delinquent account and failure to comply with the material terms of a payment arrangement. The operative provisions of Chapter 14 to review include Sections 1404(a) and 1406(a)(3). Section 1404 of the Code, 66 Pa. C.S. § 1404(a), establishes a public utility’s right to require a cash deposit from residential customers, payable over a ninety-day period in accordance with the Commission’s Regulations. Meanwhile, Section 1406(a)(3) of the Code, 66 Pa. C.S. § 1406(a)(3), authorizes a public utility to terminate service to a customer, after the required notice is given, for the customer’s failure to complete payment of a security deposit.

The plain language of these Chapter 14 provisions clearly establishes a utility’s right to collect a security deposit from its customers and to terminate service to a customer for such customer’s failure to timely complete payment of the security deposit. These words are clear and free from ambiguity.

However, while Chapter 14 confers certain rights to a public utility with respect to the collection of a security deposit, the statute does not afford a utility the same or similar rights for the collection of late payment fees. For that matter, the statute does not distinguish any other type of utility charge, other than security deposits. Had the General Assembly intended to provide the same rights for the utility’s collection of late payment charges as for security deposits, presumably it would have added similar language in the statute as it did for security deposits. Under the Rules of Statutory Construction, 1 Pa. C.S. § 1921(b), we are prohibited from disregarding the letter of Chapter 14 under the pretext of pursuing its spirit. Thus, we must reject PGW’s argument that its prioritization of late payment charges over other types of basic charges when posting a customer’s partial payment practices is consistent with the policy objectives and intent of Chapter 14 to encourage customers to timely pay their bills in full and to avoid shifting financial burdens to timely-paying customers.

Accordingly, we see no reason why PGW should be able to continue its practice of posting a residential customer’s partial payment to all late fees before posting it to an older balance for prior basic service. Consequently, we direct PGW to cease and desist this practice and to modify its partial payment allocation practices in a manner consistent with the discussion below.

Specifically, we direct PGW to modify its practices to stop the practice of applying a customer’s partial payment to all late payment charges due before applying the payment to the balance due for prior basic service. Thus, PGW shall apply a customer’s partial payment to basic services first. To be clear, no priority shall be given to late payment charges.

As for timing, PGW shall have ninety (90) days from the entry date of this Opinion and Order to comply with the requirements of 52 Pa. Code § 56.24, consistent with the discussion above.

Finally, we reject PGW’s arguments that our adjudication regarding whether PGW’s partial payment allocation practices is not permitted because our interpretation as set forth above is not consistent with Section 56.24 of our Regulations and any interpretation that changes the Regulation must be finalized through the regulatory review process.  *See* PGW M.B. at 20, 35-38. As stated above, our interpretation of Section 56.24 of our Regulations is clear and unambiguous. “An agency may establish binding policy through…adjudications which constitute binding precedents.” *See D.E.R. v. Rushton Mining Co*., 591 A. 2d 1168, 1173 (Pa. Cmwlth. 1991) (citing *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 349-50, 374 A. 2d 671, 679 (1977) (quoting *Pacific Gas and Electric Company v. Federal Power Commission*, 506 F. 2d 33, 38 (D.C. Cir. 1974). “Certainly, much deference is to be accorded an agency’s interpretation of its own regulations and orders.” *See UGI Utilities, Inc. – Gas Division v. Pa. PUC*, 677 A. 2d 882, 885 (Pa. Cmwlth. 1996) (quoting *Peoples Natural Gas Company v. Pa. PUC*, 523 Pa. 370, 374, 567 A. 2d 642, 643-44 (1989).

* + 1. **52 Pa. Code § 56.22(a)**

### The Company’s initial case in this proceeding included its proposed and existing Tariff, which included, specifically, Rule 4.2. Rule 4.2 mirrors the requirements of the Commission’s Regulations at 52 Pa. Code § 56.22(a).

Rule 4.2 of PGW’s Tariff provides, in pertinent part, as follows:

PGW will assess a late penalty for any overdue bill, in an amount which does not exceed 1.5% interest per month on the full unpaid and overdue balance of the bill. These charges are to be calculated on the overdue portions of PGW Charges only. The interest rate, when annualized, may not exceed 18% simple interest per annum.

Supplement No. 84, Gas Service Tariff – Pa. P.U.C. No. 2, Second Revised Page No. 26 Section 4.2.

### Section 56.22(a) of our Regulations, 52 Pa. Code § 56.22(a), provides as follows:

(a)  Every public utility subject to this chapter is prohibited from levying or assessing a late charge or penalty on any overdue public utility bill, as defined in § 56.21 (relating to payment), in an amount which exceeds 1.5% interest per month on the overdue balance of the bill. These charges are to be calculated on the overdue portions of the bill only. The interest rate, when annualized, may not exceed 18% simple interest per annum.

### The OCA argued that PGW’s practice of posting a customer’s partial payment out-of-sequence – first, against more recent non-interest bearing late payment charges, and, then, against older interest-bearing principal – results in PGW effectively charging interest of 19.562 percent per year. The OCA argued that the effect of the practice violates the 18 percent per annum limit on interest set forth in Section 56.22(a) of the Commission’s Regulations. The OCA asserted that the Company should not be permitted to continue a practice that violates the Commission’s Regulations and the Code. As such, the OCA recommended that PGW be required to change its payment posting methodology consistent with the OCA’s recommendations and provide customers with effective notice of the corrected payment posting methodology in the Company’s Tariff. OCA M.B. at 11-22.

### The OCA presented the following evidence in this proceeding to support its claim that PGW’s partial payment practices are inconsistent with Section 56.22(a) of our Regulations: (1) a general calculation to show the maximum amount a customer could be charged if the permitted monthly interest rate is charged on a compounded basis; and (2) a hypothetical calculation showing how PGW’s practices may potentially result in the charging of an annualized interest rate in excess of 18 percent limit.

### As to the general calculation, the OCA’s witness, Mr. Roger D. Colton, explained that if the 1.5 percent monthly late payment permitted under Section 56.22(a) is charged on a non-compounded basis, it results in an annual percentage rate interest of 18 percent, in accordance with the limit set forth in Section 56.22(a). However, if the 1.5 percent monthly late payment fee is charged on a compounded basis, it results in an annual percentage rate interest of 19.562 percent. *See* OCA St. No. 4 at 38. In Schedule RDC-1(SR), Mr. Colton also presented a hypothetical example, showing that PGW’s sequencing of customer payments results in more recent late payment charges being paid before older unpaid principal balances are paid, which leaves interest-bearing charges outstanding while retiring new non-interest-bearing charges. *See* OCA St. No. 4 at 37-38. Mr. Colton stated that the continuing growth in the outstanding interest-bearing principal generates the same effect as compounded interest and maximizes customer late payment charges, in exceedance of the 18 percent limit. *See* OCA St. No. 4 at 38, 43.

PGW argued that the fact that it sequences its payments to apply partial payments against newer, non-interest-bearing late charges before applying the payments against older, interest-bearing principal amounts is not evidence of PGW charging or effectively charging customers more than 18 percent interest per annum. PGW noted that the record developed by the OCA in this proceeding did not contain any actual billing data reflecting how PGW’s partial payment allocation practices have affected PGW’s customers. PGW explained that the OCA’s only support for its claim that “PGW’s posting practices result in an interest rate of 19.562 percent” is the calculation of its witness which is nothing more than the mathematical outcome of charging 18 percent annual interest on a compounded basis. PGW maintained that this calculation has no basis in reality, in terms of the interest rate that PGW customers are actually assessed or that they ultimately pay. PGW asserted that each of the OCA’s contentions of alleged violations rests on the flawed premise that PGW is “effectively” charging customers more than 18 percent on an annual basis. PGW claimed that the fact that “PGW sequences its payments to apply partial payments against newer, non-interest-bearing late charges before applying the payments against older, interest-bearing principal amounts” is not evidence of charging or effectively charging customers more than 18 percent interest. Thus, PGW argued there is no evidence to show that it is in violation of Section 56.22 of the Commission’s Regulations. PGW M.B. at 16-30; PGW R. Exc. at 8-12.

We find OCA’s arguments persuasive. PGW’s methodology of applying a partial payment against more recent, non-interest-bearing late payment charges followed by older, interest-bearing principal effectively charges interest in excess of the 18% annual limit, as defined in Section 56.22(a) of our Regulations. Any interest rate charged by PGW that exceeds the 18% simple annual interest level established in our Regulations is a *de facto* unjust and unreasonable rate, in violation of 66 Pa. C.S. § 1301. And, finally, any interest rate charged by PGW that exceeds the 18% simple annual interest level established in Rule 4.2 of PGW’s Tariff is a violation of 66 Pa. C.S. § 1303, which prohibits utilities from charging or receiving any rate greater than that established in its Commission-approved tariff. As the remedy for the foregoing violations, we direct PGW to modify its partial payment allocation practices, consistent with the discussion above, within ninety (90) days from the entry date of this Opinion and Order.

1. **Conclusion**

Based upon our review of the record in this proceeding, the Reconsideration Petition, the Answer thereto, the Recommended Decision, the Exceptions and Replies to Exceptions, we shall: (1) grant the Reconsideration Petition of the OCA; (2) grant the Exceptions of the OCA; and (3) modify the ALJs’ Recommended Decision, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration filed by the Office of Consumer Advocate on November 27, 2017, to the Opinion and Order entered in this proceeding on November 8, 2017, is granted, consistent with this Opinion and Order.

2. That the Exceptions filed by the Office of Consumer Advocate on September 25, 2017, to the Recommended Decision of Administrative Law Judges Christopher P. Pell and Marta Guhl, are granted, consistent with this Opinion and Order.

3. That the Recommended Decision of Administrative Law Judges Christopher P. Pell and Marta Guhl, issued on September 8, 2017, is modified consistent with this Opinion and Order.

4. That the Formal Complaint of the Office of Consumer Advocate, filed at Docket No. C-2017-2592092, regarding the issue of the partial payment allocation practices of the Philadelphia Gas Works, is sustained, consistent with this Opinion and Order.

5. That Philadelphia Gas Works’ practice of applying partial payments out of sequence so that the most recent late payment charges are paid before the gas charges due for prior service constitutes a violation of the Commission’s Regulations at 52 Pa. Code § 56.24.

6. That Philadelphia Gas Works’ practice of applying partial payments out of sequence so that the most recent late payment charges are paid before the gas charges due for prior service constitutes a failure to provide adequate and reasonable service in violation of 66 Pa. C.S. § 1501.

7. That Philadelphia Gas Works’ practice of applying partial payments out of sequence so that the most recent late payment charges are paid before the gas charges due for prior service constitutes a violation of 52 Pa. Code § 56.22(a), which prohibits the charging, collecting or receiving of late payment charges or fees in amounts that exceed the annualized 18 percent simple interest limit.

8. That Philadelphia Gas Works’ charging of residential customers late payment fees in excess of the 18% annual interest limit set forth in 52 Pa. Code § 56.22(a), constitutes a violation of PGW’s obligation to charge “just and reasonable” rates pursuant to 66 Pa. C.S. § 1301.

9. That Philadelphia Gas Works’ charging of residential customers late payment fees in excess of the 18% annual interest limit set forth in Rule 4.2 of the Company’s Tariff, constitutes a violation of 66 Pa. C.S. § 1303.

10. That Philadelphia Gas Works shall have ninety (90) days from the entry date of this Opinion and Order to comply with the requirements of this Order pertaining to the modification of its partial payment allocation practices, consistent with this Opinion and Order.

11. That Philadelphia Gas Works shall comply with all directives, conclusions and recommendations contained in this Opinion and Order that are not the subject of individual ordering paragraphs as fully as if they were the subject of specific ordering paragraphs.

12. That Philadelphia Gas Works shall file a verification statement pursuant to 52 Pa. Code § 1.36 with the Secretary’s Bureau at this docket indicating compliance with the requirement of Ordering Paragraph Nos. 10 and 11 within ten (10) days of said completion.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: May 3, 2018

ORDER ENTERED: May 18, 2018

1. We provide a description of the history of this proceeding as it relates to the subject of the Reconsideration Petition. For a more extensive description of the procedural history of this proceeding, please see the *November 8 Order*. [↑](#footnote-ref-2)
2. The discussion in the *November 8 Order* regarding Sections 523 and 526 of the Code was not intended to imply or conclude that an appropriate remedy for a quality of service claim may not be considered by the Commission in a Section 1308(d) base rate proceeding, if a rate adjustment under Section 523 or Section 526 of the Code, 66 Pa. C.S. §§ 523, 526, has not been proposed by a party. Nor did we intend to imply that a rate adjustment under Section 523 or 526 is the *only* appropriate remedy to address a quality of service issue that is raised during a Section 1308(d) rate proceeding. [↑](#footnote-ref-3)
3. Because PGW’s Tariff Rule 4.2 mirrors the requirements of our Regulations, at 52 Pa. Code § 56.22(a) on its face, Rule 4.2 is reasonable and consistent with the Commission’s Regulations. Thus, the relevant question, per 66 Pa. C.S.§ 1303, is whether PGW’s partial payment allocation practices leads to the charging of interest by PGW in amounts that exceed the 18% annual limit set forth in Rule 4.2 of its Tariff. [↑](#footnote-ref-4)
4. We note here our disagreement with the assertion in PGW’s Answer (*see* Answer at 5‑6) that by adopting the ALJ’s decision to dismiss the OCA’s claims in the *November 8 Order*, the Commission determined that the OCA failed to present sufficient evidence showing that PGW’s partial payment allocation practices affect the rates that are charged to customers. Rather, we will decide the merits of the OCA’s claims within this comprehensive Opinion and Order, in Section D below. [↑](#footnote-ref-5)
5. As noted in the *November 8 Order*, the Commission’s obligation under Section 1308(d) to render a final determination within the statutorily-prescribed time frame pertains only to the general rate increase *requested by the utility*. [↑](#footnote-ref-6)