



Philadelphia Gas Works

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September 3, 2009

James McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17105-3265

Re: Digital 833 Chestnut, LLC v. PGW Docket No. C – 2008 – 2076235

Dear Secretary McNulty:

Pursuant to 52 Pa. Code §5.535(d), the Philadelphia Gas Works ("PGW") hereby files the original and nine (9) copies of its Reply to Complainant's Exceptions in the above captioned matter.

If additional information is required, please do not hesitate to contact the undersigned. Thank you for your assistance in the matter.

Sincerely,

A handwritten signature in blue ink that reads "Kristine Trock". The signature is written in a cursive, flowing style.

Kristine Trock

Enclosure

cc: Charis Mincavage, Esquire (E-Mail and Regular Mail)
Barry A. Naum, Esquire (E-Mail and Regular Mail)
Frank Markle, Esquire (E-Mail and Regular Mail)
Ward L. Smith, Esquire (E-Mail and Regular Mail)
Anne Marie Cromley (PGW Mail)
Linda Pereira (PGW Mail)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Digital 833 Chestnut, LLC,	:	
Complainant	:	
v.	:	Docket No. C – 2008 – 2076610
	:	Docket No. C – 2008 – 2076235
PECO Energy Company,	:	Docket No. C – 2008 – 2076623
Philadelphia Gas Works,	:	
UGI Energy Service, Inc.,	:	
Respondents	:	

**PHILADELPHIA GAS WORKS’
REPLY TO COMPLAINANT’S EXCEPTIONS**

Pursuant to 52 Pa. Code §5.535, the Philadelphia Gas Works, (“PGW”) hereby files an original and nine (9) copies of its reply to the exceptions filed on August 24, 2009, to the Initial Decision, in the above captioned matter, granting PGW’s Motion for Judgment on the Pleadings and dismissing with prejudice the Complaint with as to PGW, issued on August 3, 2009 (Initial Decision).

I. INTRODUCTION

In this matter, the Complainant seeks relief from the Commission in the form of reimbursement of funds paid to PGW for gas service. The Complainant filed a formal complaint on November 19, 2008 with the Commission averring that the Respondents had each known that the Celeren Corporation (Celeren), the Complainant’s agent, was responsible for remitting payment for utility service and that the Respondents did not inform the Complainant that the Complainant’s utility accounts were delinquent.

As to the averments pertaining to PGW, the Complaint avers that pursuant to 52 Pa. Code §56.41, setting forth utility notification procedures in order to request a deposit when an account is delinquent, PGW had a duty to inform the Complainant that its agent, Celeren, had failed to remit payment for gas service and that PGW breached that duty.¹ The Complainant further avers that to keep the account for gas service current, the Complainant paid the delinquent amounts to PGW, stating that the Complainant has

¹ Complaint, Paragraphs 20 and 39

paid for gas service twice, once to the Complainant's own agent, Celeren, and once to PGW.²

The Complaint seeks relief in the nature of reimbursement (through refund or credit) from PGW in compensation for PGW's breach of its alleged duty to notify the Complainant that Celeren was not remitting payments for gas service.³ The Complainant asserts that 66 Pa. C. §1312(a) (awarding refunds where the rates charged by a public utility were determined unreasonable, charged in violation of a Commission order, in excess of the applicable rate) provides the Commission authority to award the Complainant the relief it seeks.⁴

On December 16, 2008, PGW filed a timely answer to the Complaint admitting that PGW had entered into a contract with Celeren, the Complainant's agent, executed on June 19, 2006 for service under PGW's Interruptible Transportation Rate (Rate IT Contract). The Rate IT Contract sets forth the terms of service under that Commission approved rate. Under the Rate IT Contract, Section 20-Notice, Section 20.1, the parties agreed that written notices, requests, statements, and bills under this Agreement shall be given to the parties as designated in that section, unless changed by either party upon written notice, with confirmation, to the other.⁵

As to the communication with the Customer, the Rate IT Contract designates Celeren (at Celeren's address) as the entity to receive all bills, letters, and notices including delinquent payment and termination notices. The parties made no changes pursuant Section 20.1 of the Rate IT Contract, amending the designation for Notice. Each month PGW billed the appropriate party and expected payment for gas service rendered. When payment was not received, PGW mailed the appropriate notice and demand for payment to the entity designated in the Rate IT Contract, Celeren.⁶

On June 12, 2009, PGW filed its Motion for Judgment on the Pleadings, maintaining that the Complaint fails to state a claim that PGW has violated any statutory or contractual obligation over which the Commission has jurisdiction and that the

² Complaint, Paragraphs 15, 17 and 18

³ Complaint, Paragraphs 41 - 43

⁴ Id.

⁵ Complaint, Exhibit "B" and Answer to Complaint, Exhibit "A"

⁶ Motion to Dismiss, Paragraph 8

Complaint seeks relief in the nature of monetary damages for which the Commission has no authority to grant.

On August 3, 2009, the Commission issued the Initial Decision, granting PGW's Motion for Judgment on the Pleadings and dismissing with prejudice the Complaint as against PGW (Initial Decision). The Initial Decision concluded, *inter alia*, that the Commission has no authority to entertain an action for breach of contract or award damages resulting from a breach of contract, that there are not genuine issues of material fact, and that PGW is entitled to judgment as a matter of law in this case.⁷

On August 24, 2009, the Complainant filed two (2) exceptions to the Initial Decision. This reply follows.

II. REPLY TO EXCEPTIONS

A. Reply to Exception No. 1: The Initial Decision Does Not Err In Holding That The Commission Lacks Jurisdiction To Resolve The Complaint As To The Awarding Of Damages.

Although the Complainant's Exception No. 1 states that it takes exception to the holding of the Initial Decision, Conclusion of Law Paragraph 4, the Initial Decision does not state that the Commission does not have jurisdiction to resolve the Digital 833's complaint against PGW.⁸ We assume that the exception is to Conclusion of Law Paragraph 3, concerning the Commission's lack of authority to award damages. The Complainant argues that its action is not based upon a breach of contact claim but rather PGW's alleged violation of some statutory obligation.

Despite that exception's convoluted characterization of the issue of breach of contract versus statutory violation, the Initial Decision addresses the issue of whether the Complainant is entitled to the requested relief, a reimbursement from PGW in the form of a refund of, or credit for the amount that the Complainant paid to PGW under 66 Pa. C. §1312(a). The Initial Decision, pages 6 through 8 aptly sorts out the nature of

⁷ Initial Decision, Conclusions of Law, p. 8

⁸ The Initial Decision, Conclusion of Law, Paragraph 4, concludes that there are not genuine issues of material fact and PGW is entitled to judgment as a matter of law in this case.

the requested relief as a “thinly veiled request for monetary damages.”⁹ The Initial Decision states,

The Complaint alleges that respondent, PGW, violated Section 56.41 of the Commission regulations when it breached a duty owed to complainant to notify it of the account delinquency. As relief, complainant is seeking reimbursement (refund and/or credit) for all amounts received by PGW for natural gas charges that complainant already paid to Celeren pursuant to Section 1312 of the Public Utility Code (citing Complaint Paragraphs 38 through 43 and 53 and 54)

... The complaint in essence is requesting that the Commission find that the complainant paid Celeren pursuant to the contract and that those payments relieve it of any obligation to pay PGW. In other words, complainant is requesting that the Commission find that the complainant did not breach its contract with Celeren but that Celeren breached its contracts with complainant and PGW. As a remedy, the complainant requests that the Commission issue an order requiring PGW to refund monies paid to PGW by complainant and instead, require PGW to seek payment from Celeren for the monies due.¹⁰

In further support of its holding that the Complainant is not entitled to the requested relief as a matter of law, the Initial Decision continues to state that there is no dispute that PGW at all times relevant provided gas service to the Complainant's property as contracted. There is no dispute that the bill for services that Celeren did not pay, was ultimately paid by the Complainant. There is no allegation that PGW was paid twice for the same services or that the rate charged was unjust, unreasonable or in excess of any tariff.¹¹

As stated in the Initial Decision the use of 66 Pa. C. §1312(a) is inapplicable in this case. First, the 66 Pa. C. §1312 is applicable to proceedings where the rates charged by a public utility were determined unreasonable, charged in violation of a Commission order, in excess of the applicable rate. In the instant matter, the Complaint appears to rely upon its alleged “excess” payment for gas service when the Complainant paid PGW after its agent Celeren failed to do so. As such, 66 Pa. C. §1312(a) does not authorize the Commission to grant the relief sought. As PGW was paid only once for the gas service rendered, there was no “excess” payment to PGW to

⁹ Initial Decision, p. 8

¹⁰ Initial Decision, p.6

refund to the Complainant. The Complainant's request for a refund or credit, (because its agent, Celeren had failed to pay for gas service) is a request for monetary damages for Celeren's breach of contract for which the Commission has no authority to grant. As such, the Complainant's Exception No. 1 should be denied.

B. Reply To Exception No. 2: The Initial Decision Does Not Err In Considering The Other Facts Alleged By The Complaint, The Complainant Fails To Demonstrate PGW's Violation For Which Relief Against PGW Is Sought.

At the center of the Complainant's theory is an alleged violation of the Pennsylvania the Public Utility Code, 52 Pa. Code §56.41. Under this section, a public utility must notify a residential (or small commercial) customer when an account has become delinquent. The Complainant maintains that as PGW is a natural gas distribution company providing gas service to the Complainant, PGW owed a duty to notify the Complainant when Celeren, its agent, was delinquent in the payment on the account for gas service.

As stated in the Motion for Judgment on the Pleadings, 52 Pa. Code §56.41 sets forth the utility notification procedures to request a deposit on a delinquent account, the Complaint fails to establish that 52 Pa. Code §56.41 or Commission precedent created PGW's additional obligation to notify the Complainant when its agent, Celeren, failed to make payments. Under the Rate IT Contract, Section 20.1, PGW was obligated to notify only Celeren of the status of the account for gas services. The Complaint does not aver that PGW failed to notify Celeren of the status of the account. The Complaint avers that PGW has a special duty to notify the Complainant of its agent's behavior. As previously argued, the Complaint fails to provide even a colorable connection between 52 Pa. Code §56.41 and this special duty to notify. As such, the Complaint fails to identify any statutory source of this special duty.

Paragraph 40 of the Complaint incorporates the Rate IT Contract. As stated above, the Rate IT Contract designated Celeren as the entity to receive all bills, letters and notices including delinquent payment and termination notices. In the normal course of its utility business, PGW gave notice to the party designated to receive notices. Even

¹¹ Id., p. 7

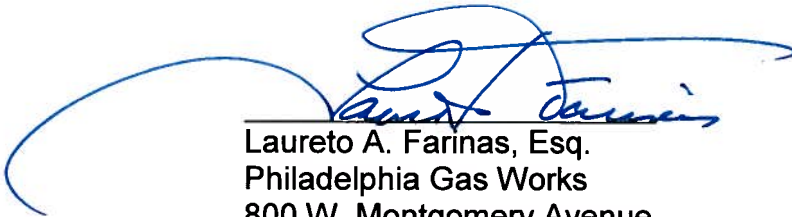
if PGW requested a deposit for the Complainant's delinquent account pursuant to 52 Pa. Code §56.41, PGW would have provided such notice of delinquency to Celeren as designated in the Rate IT Contract. Under the facts as averred, the Complaint fails to identify any statutory source of this special duty to notify the Complainant when its agent, Celeren fails to remit payment. The finding of the Initial Decision that there are no genuine issues of material fact and that PGW is entitled to judgment as a matter of law in this case is sound. The Complainant's Exception No. 2 should be denied.

CONCLUSION

For the reasons stated above, the Commission should deny the Complainant's Exceptions and adopt Initial Decision without modification.

Respectfully submitted,

September 3, 2009



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Philadelphia Gas Works
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Philadelphia, PA 19122

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DAY SERVED A TRUE COPY OF THE FOREGOING DOCUMENT UPON THE PARTICIPANTS LISTED BELOW, IN ACCORDANCE WITH THE REQUIREMENTS OF 52 PA CODE §1.54 (RELATING TO SERVICE BY A PARTICIPANT).

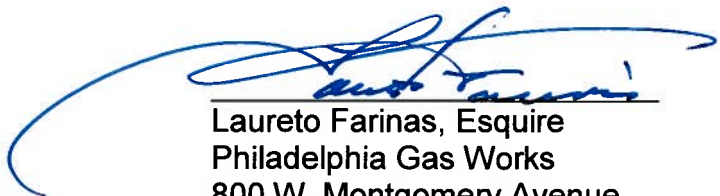
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