

COMMONWEALTH OF PENNSYLVANIA



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IRWINA. POPOWSKY
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November 10, 2009

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Petition of Philadelphia Gas Works for a
Statement of Policy on the Application of
Philadelphia Gas Works' Cash Flow
Ratemaking Method
Docket No. P-2009-2316508

Dear Secretary McNulty:

Enclosed for filing is the Answer of the Office of Consumer Advocate, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Jennedy S. Johnson".

Jennedy S. Johnson
Assistant Consumer Advocate
PA Attorney I.D. # 203098

Enclosures

cc: Office of Administrative Law Judge
Office of Special Assistants

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Philadelphia Gas Works for a :
Statement of Policy on the Application of : Docket No. P-2009-2316508
Philadelphia Gas Works' Cash Flow :
Ratemaking Method :

ANSWER OF THE
OFFICE OF CONSUMER ADVOCATE

Pursuant to Section 5.61 of the regulations of the Pennsylvania Public Utility Commission (Commission), 52 Pa. Code Section 5.61, and in accordance with the Commission's October 26, 2009 Notice of Publication in this matter, the Pennsylvania Office of Consumer Advocate (OCA) hereby files this Answer to the Petition of Philadelphia Gas Works for a Statement of Policy on the Application of Philadelphia Gas Works' Cash Flow Ratemaking Method (Petition). The OCA files this Answer in opposition to the relief sought in the Petition. In support of its Answer, the OCA submits the following:

I. INTRODUCTION

On October 16, 2009, Philadelphia Gas Works (PGW) filed a Petition requesting that the Pennsylvania Public Utility Commission (Commission) "issue a 'Statement of Policy' explaining how it intends to apply PGW's Cash Flow Ratemaking Method on a going forward basis." Pet. at 1. PGW alleges that "inconsistencies" exist among recent Commission and Commonwealth Court decisions regarding the application of the Cash

Flow Method to PGW. Pet. at 3. PGW argues in its Petition that unless such guidance is provided prior to PGW filing its base rate case before the end of 2009, “PGW will only be able to guess about the nature and types of evidence it must submit in order to justify its requested rate increase.” Pet. at 7.

The OCA submits that PGW’s Petition is substantively in error, completely inadequate to satisfy the legal standards for the relief sought, and procedurally deficient. PGW’s Petition provides a tortured reading of the Commission’s and the Commonwealth Court’s recent applications of the Cash Flow Method to PGW in an attempt to create inconsistency and uncertainty where none exists. Moreover, PGW’s current request for relief is nothing more than the Company seeking one more “bite at the apple” on issues it has already argued and lost on several levels. PGW’s request for a Statement of Policy is also procedurally in error, as the “uncertainty” that the Company allegedly wishes to dispel cannot be addressed through a Statement of Policy. The OCA submits that PGW’s Petition must be denied.

II. ANSWER

A. PGW’s Attempts to Create Doubt or Uncertainty as to the Application of the Cash Flow Method Should Be Disregarded.

The Commission has applied the Cash Flow Method of ratemaking to PGW in a number of base rate and emergency proceedings over the last 10 years. The notion that there is “uncertainty” or “inconsistencies” as to how the Cash Flow Method is applied to PGW is wholly without merit and must be disregarded.

As part of the Natural Gas Choice and Competition Act in 1999, Section 2212 was added to the Public Utility Code. 66 Pa.C.S. § 2212. Pursuant to Section 2212, PGW was brought under the jurisdiction of the Commission on July 1, 2000. At that time, the

regulation of PGW's rates, rules, terms and conditions of service was transferred from the Philadelphia Gas Commission (PGC) to the Pennsylvania Public Utility Commission. The PGC continues to consider PGW's Operating Budget and Capital Budget each year, but rates and rate increases are subject to the jurisdiction of this Commission. Since PGW was brought under Commission jurisdiction in 2000, the Company has filed four (4) general base rate cases and has filed two (2) petitions for extraordinary rate relief.¹ The Commission has substantial experience in applying the Cash Flow Method to PGW. Through its Petition, however, PGW is requesting the Commission to provide a "clear explication" of the Cash Flow Method. Pet. at 3.

In PGW's 2006 base rate case Order, the Commission provided the following as to the Cash Flow Method:

It is well settled that, pursuant to 66 Pa. C.S. § 2212(e), the Commission utilizes the cash flow method of ratemaking to establish PGW's rates. The Commission, in its 2001 PGW Base Rate Order, explained that:

[T]he General Assembly clearly directs the Commission, in Section 2212(e) of the Act, to set rates in a base rate proceeding for PGW in accordance with its previous ratemaking methodology and requirements rather than by other ratemaking methods traditionally employed in reviewing public utility rate filings. In this instance, the previous ratemaking methodology, as contained in PGW's Management Agreement and affirmed by the Pennsylvania courts, is the cash flow method.

Pa. PUC v. Phila. Gas Works, Docket No. R-00061931 at 9, (order entered Sept. 28, 2007)

(PGW 2007) citing Pa. PUC v Phila. Gas Works, Docket No. R-00006042, 2001 Pa. PUC

¹ See docket numbers: R-00005654, filed 8-8-2000; R-00006042, filed 1-05-2001; R-00017034, filed 2-25-2002; R-00061931, filed 12-22-2006; and, R-2008-2073938, filed 11-14-2008. On 2/25/2002, PGW concurrently filed a Petition for Extraordinary Rate Relief that requested that \$44 million of its \$60 million base rate request be approved as extraordinary relief. In an opinion and order entered on 4/12/2002, the PUC granted said Petition, but only for \$36 million. The PUC's order dated 08/08/2002 granted a Joint Petition for Settlement where all parties involved (including the OCA) agreed that PGW's base rate increase may only be equal to the previously granted \$36 million.

LEXIS 109, *15 (October 4, 2001). As the Commission provided, there can be no doubt or argument that the Cash Flow Method of ratemaking applies to PGW. In PGW 2007, the Commission also provided the following:

At the same time, the adoption of this ratemaking methodology to set rates for PGW allows the Commission's other statutory directives, such as minimum debt service coverage and just and reasonable rates, to be fulfilled in accordance with Sections 1301 of the Code and 2212(c) of the Act.

As such, it is clear that the Commission is permitted to use other statutory directives, such as the determination of just and reasonable rates, in accordance with the Code and the Act.

PGW 2007 at 9-10 (internal citations omitted). It is thus equally clear that the Commission must harmonize and balance the Cash Flow Method of ratemaking with its statutory duty to ensure that rates are just and reasonable. PGW appealed the Commission's Decision in PGW 2007 to the Commonwealth Court.²

In affirming the Commission's Decision in its entirety, the Commonwealth Court³ provided the following as to PGW's contention that the Commission erred in applying the Cash Flow Method:

First, PGW contends that PUC committed an error of law when, despite being required to do so by Section 2212(e) of the Gas Choice Act, it refused to apply the mandated Cash Flow Method in setting PGW's rates and instead substituted its own judgment as to the factors by which it considered whether PGW's requested rate level was just and reasonable, thereby significantly understating PGW's justified rate increase. *We disagree.*

² Phila. Gas Works v. Pa. PUC, Docket No. 1914 C.D. 2007, Memorandum Opinion (filed Feb. 4, 2009) (2009 Commonwealth Court Order), Petition for Allocatur pending, Docket No. 259 EAL 2009, (filed May 4, 2009).

³ The 2009 Commonwealth Court Order (Order) is an unpublished opinion. Such an opinion should not ordinarily be cited for its decisional value. In this matter, however, the OCA's use of the Order is permissible as it is this appellate decision that establishes the "law of the case" as to the issues contained in PGW's Petition. See 210 Pa. Code § 67.55. See also supra pg. 7. In addition, PGW freely cites to the Order in its Petition.

2009 Commonwealth Court Order at 5 (emphasis added).⁴ Specifically, the Commonwealth Court provided the following as to the Commission's application of the Cash Flow Method:

In this case, PUC applied a cash flow analysis as identified in the MAO.⁵ PUC recognized that PGW must comply with the following bond covenants:

- (1) a covenant that requires PGW to maintain funds that are 150% of its annual debt service obligations [debt service coverage covenant];
- (2) a covenant that requires PGW and its owner, the City of Philadelphia, to charge rates that permit PGW to have sufficient cash to pay all of its obligations, including its debt service obligation, during each fiscal year in full when they are due [rate covenant]; and
- (3) a covenant that requires PGW and the City to continuously maintain and operate the Gas Works.

PUC also applied the just and reasonable standard to the proposed rate increase. Based upon our review, we conclude that PUC applied the proper ratemaking methodology and requirements as set forth in the MAO, the Gas Choice Act and Public Utility Code.

2009 Commonwealth Court Order at 8 (brackets in original).⁶ PGW filed a Petition for Allowance of Appeal of the Commonwealth Court's Order to the Supreme Court of Pennsylvania. See infra fn 3.

The Commission has consistently applied the Cash Flow Method of ratemaking to PGW over the last 10 years. The Commonwealth Court has recently affirmed

⁴ It is important to recognize that PGW's failed argument to the Commonwealth Court and its argument in this Petition are one and the same – PGW disagrees with how the Commission applies the Cash Flow Method in setting PGW's rates.

⁵ Management Agreement Ordinance.

⁶ In its Petition, PGW attempts to argue that the Commission's Decision in its recent emergency rate case somehow changes the factors that the Commission will consider in applying the Cash Flow Method to PGW. Petition at 14-16. Pa. PUC v. Phila. Gas Works, Docket No. R-2008-2073938 (order entered Dec. 19, 2008) (Emergency Order). These contentions are completely without merit. The Emergency Order at pages 18-20 sets out the exact same standards as the Commission relied on in PGW 2007 and as affirmed by the Commonwealth Court.

that the Commission's application of the Cash Flow Method to PGW strikes the appropriate balance between Section 2212 of the Gas Choice Act and Section 1301 of the Public Utility Code. The OCA submits that PGW's need for clarification as to the application of the Cash Flow Method has already been adequately supplied – PGW simply disagrees with the result. Accordingly, there is no uncertainty here that needs to be removed, and PGW's Petition should be denied.

B. PGW's Request For A Statement Of Policy Is Legally Unsupportable.

PGW's request for this Commission to enter a "Statement of Policy" is nothing more than a request for reconsideration as to issues that PGW has already had the full and fair opportunity to contest – and lost. As such, and for the reasons that follow, PGW's Petition must be denied as a matter of law.

Section 316 of the Public utility Code provides:

Whenever the Commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

66 Pa.C.S. § 316. In a similar case to the matter at bar here, the Commission found that Emporium Water Company (Emporium or Company) could not evade the "law of the case" or the mandates of Section 316 by filing a petition as PGW has done here. Petition for Relief of Emporium Water Company, Dock. No. R-00005050 (order entered Sept. 8, 2003) (Emporium Water).

In Emporium Water the Company had filed a general base rate case. The Commission ruled on the case (March 8th Order) and Emporium appealed to the Commonwealth Court. While the appeal was pending, the Company and the Commission's

Law Bureau settled the appeal and filed the Settlement with the Commission. The Commission approved the Settlement (June 21st Order). The OCA appealed to the Commonwealth Court. The Commonwealth Court set aside the Settlement and reinstated the Commission's original decision on the rate case. Emporium Water at 1-2. Emporium filed a Petition for Allowance of Appeal with the Supreme Court.⁷ While the Petition for Appeal was pending, Emporium filed a Petition with the Commission, essentially seeking to disregard the findings and conclusions of the March 8th Order and the decision of the Commonwealth Court, and instead sought to set and collect rates pursuant to the June 21st Order. Id.

The OCA argued that the Company's Petition to the Commission was an impermissible collateral attack on the March 8th Order that was reviewed and affirmed by the Commonwealth Court. The OCA concluded that Section 316 provided that the March 8th Order was now binding on all parties. Emporium Water at 6. The Commission agreed. Id. at 9-10. The Commission held that the March 8th Order, affirmed by the Commonwealth Court, established the law of the case as to Emporium's rates. Id. at 9-10. In accord with Section 316, unless and until the March 8th Order was "set aside, annulled or modified on judicial review" the Order became "conclusive upon all parties affected thereby." Id. at 10.

PGW's current Petition presents the same scenario. The Commission made determinations in PGW 2007 as to the application of the Cash Flow Method. The Commonwealth Court affirmed those determinations in their entirety. Those determinations now form the law of the case for this matter. Unless or until the Supreme Court takes this issue up on appeal, the matter that PGW currently complains of has already been finally decided. Thus, as a matter of law, PGW's Petition must be denied.

⁷ At the time that the Commission decided Emporium's Petition, its Petition to the Supreme Court was pending. This is exactly the same procedural posture that exists with PGW in this case.

The Commission has already decided this issue in a string of PGW rate cases. Here, PGW is essentially asking the Commission to completely redraw the lines as to how the Cash Flow Method is applied to PGW, within the context of a petition proceeding. The OCA submits that PGW is free to argue the merits of its proposals within the context of its upcoming rate case. As to its current Petition, however, PGW's request for a Statement of Policy must be denied.

C. PGW's Request for a "Statement of Policy" as to the Application of the Cash Flow Method is Legally Deficient.

PGW is asking the Commission to issue a Statement of Policy on how the Commission intends to apply the Cash Flow Method of ratemaking to PGW in its upcoming base rate case. Pet. at 1. According to PGW, "uncertainty" exists as to how the Commission will apply the Cash Flow Method. PGW's request, however, is misdirected as the relief it seeks applies only to PGW, and thus is not a proper platform from which to request a Statement of Policy. Moreover, the OCA submits that the relief PGW seeks cannot be provided through a Declaratory Order as no uncertainty exists as to the application of the Cash Flow Method.

A Statement of Policy is defined in the Commonwealth Documents Law as:

any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any statute enforced or administered by such agency.

45 Pa.C.S. § 501. During the Chapter 14 Implementation proceedings, PGW provided a vehicle for the Commission to discuss the differences between a Statement of Policy and a Declaratory Order when PGW filed a Petition for Declaratory Order therein. Chapter 14

Implementation, Dock. No. M-00041802F0002, 2005 Pa. PUC LEXIS 20 (Nov. 21, 2005)

(Implementation Order). In its Petition for Declaratory Order in that case, PGW argued that the Commission's Implementation Orders as to Chapter 14 constituted statements of policy.

The Commission agreed, as follows:

These orders did not arise from *a specific case or controversy* -- for example, from a customer complaint alleging that a utility violated Chapter 14 in its collection practices. The process leading up to the Implementation Orders was initiated by the Commission itself and involved every utility in the Commonwealth as well as all other interested parties. The purpose was to decide how, going forward, the Commission should interpret Chapter 14 in its entirety. *This broad scope and forward focus is the antithesis of an adjudication.* Accordingly, the Commission was acting in a quasi-legislative, not a quasi-judicial manner.

Implementation Order at *16-*17 (emphasis added).

As the Commission explained, the Chapter 14 Implementation Orders were statements of policy as they did not deal with any specific case or controversy and had a broad scope. The situation here is completely the opposite – there is a specific case related to the application of the Cash Flow Method and the requested relief is not broadly applicable, as the Cash Flow Method applies only to PGW. The Commission also provided “that the Implementation Orders at issue constitute policy statements setting forth how the Commission intends to interpret Chapter 14 in *future adjudications and rulemakings.*” Implementation Order at *20 (emphasis added). Again, contrary to the facts of the Implementation Orders, PGW's Petition comes on the heels of several recent adjudications that directly address the issue that PGW now claims lacks certainty – the application of the Cash Flow Method to PGW. The OCA submits that PGW's Petition must not form the basis for a Statement of

Policy, and as discussed below, also fails to meet the standards for the issuance of a Declaratory Order.

In the Implementation Order case, PGW filed a Petition for Declaratory Order to remove an alleged “uncertainty” in the law, as the Commission explained:

Based on PGW's representations that "uncertainty" exists with respect to our interpretation of § 1407 in the *Second Implementation Order*, we shall grant PGW's Petition and issue a **Declaratory Order** pursuant to § 331(f).

Implementation Order at *2 (emphasis in original). PGW’s position there and here are essentially the same, according to PGW there is some “uncertainty” with respect to the law at issue. The Commission may remove such uncertainty in appropriate cases by issuing a declaratory order.⁸

Here, however, PGW’s Petition would fail as a request for a Declaratory Order as well because there is no uncertainty. After a recent, fully-litigated base rate case, which included an unsuccessful PGW appeal to the Commonwealth Court regarding this very issue, and a recent emergency rate proceeding, there is no basis for PGW to request a Declaratory Order as to the application of the Cash Flow Method by filing a petition. Put simply, there is no “uncertainty” or “controversy” here.

⁸ See 66 Pa. C.S. § 331(f) (The Commission may issue a declaratory order to terminate a controversy or remove uncertainty); Petition of The Penn State University for Declaratory Order, Docket No. P-2007-2001828, 2008 Pa. PUC LEXIS 36, at *11-*12 (Sept. 11, 2008) (A declaratory order should be issued only when there is no outstanding issue of fact. The issuance of a declaratory judgment is within the Commission's discretion and is not a matter of right); citing Petition of Phila. Gas Works for Establishment of Interim Rate Procedures and for a Declaratory Order, Docket No. P-00001831, 2000 Pa. PUC LEXIS 51, at *12 (Aug. 17, 2000).

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the Office of Consumer Advocate respectfully submits that the Petition for Statement of Policy on the Application of Philadelphia Gas Works' Cash Flow Ratemaking Method filed by the Philadelphia Gas Works should be denied.

Respectfully Submitted,



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Dated: November 10, 2009

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CERTIFICATE OF SERVICE

Petition of Philadelphia Gas Works for a :
Statement of Policy on the Application of : Docket No. P-2009-2316508
Philadelphia Gas Works' Cash Flow :
Ratemaking Method :

I hereby certify that I have this day served a true copy of the foregoing document, Notice of Intervention and Public Statement of the Office of Consumer Advocate, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 10th day of November 2009.

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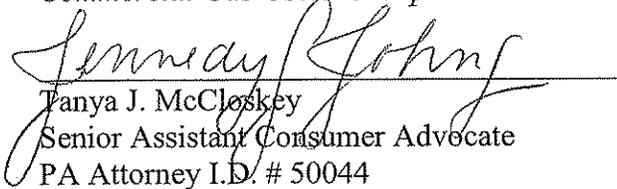
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