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January 28, 2010

**Via Fed Ex Overnight**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**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-2009-2136508**

Dear Secretary McNulty:

On behalf of Tenant Union Representative Network (TURN) and Action Alliance of Senior Citizens of Greater Philadelphia (collectively "TURN et al."), enclosed please find for filing the original and three (3) copies of the following documents in the above-captioned matter:

- Comments of TURN et al. to Proposed Policy Statement
- Notice of Appearance of TURN et al.

Copies of these documents are being served on the parties as indicated on the attached Certificate of Service.

Very truly yours,

Philip A. Bertocci, Esquire  
Thu B. Tran, Esquire

Attorneys for TURN et al.

Enclosures

cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of Philadelphia Gas Works** :  
**for a Statement of Policy on the** : **Docket No. P-2009-2136508**  
**Application of Philadelphia Gas Works'** :  
**Cash Flow Ratemaking Method** :

**COMMENTS OF TURN et al. TO PROPOSED POLICY STATEMENT**

**I. Introduction.**

The Tenant Union Representative Network (TURN) and Action Alliance of Senior Citizens of Greater Philadelphia (collectively "TURN et al.") are two Philadelphia based membership and advocacy organizations who work to defend and advance the interests of low and lower income persons in consumer matters, including issues concerning access to reliable, efficient and affordable utility service. Through their attorneys, Community Legal Services, Inc., TURN et al. submits the following Comments to the Commission's Proposed Policy Statement in accordance with the Commission's Order entered December 30, 2009 in this matter.

On October 16, 2009, PGW filed a Petition for a Proposed Policy Statement on the Application of PGW's Cash Flow Ratemaking Method. PGW's proposed Policy Statement, attached to its Petition as Appendix A, represented the most recent of a succession of PGW efforts over a ten year period to persuade the PUC that its historical ratemaking method, which the Gas Choice and Competition Act required the PUC to adopt, mandated the utilization of a set financial formula which, if followed, produced rates which were presumptively just and

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reasonable. The Commission's Proposed Policy Statement has recognized the self-serving and one-sided character of PGW's Policy Statement and has, in contrast, added "consideration factors" that would require evidence concerning whether, in the broadest terms, PGW is providing "adequate, efficient, safe, and reasonable service and facilities" including the fulfillment of its universal service obligation to assist all consumers to obtain and maintain access to its natural gas services. The Commission accordingly added Sections 69.2703(a)(4) concerning the reasonableness of "operating and other expenses," 69.2703(a)(6) concerning "management quality, efficiency and effectiveness," 69.2703(a)(8) concerning "service quality and reliability," and 69.2703(a)(9) concerning the effect of the proposed rates on "universal service."

TURN et al. support these amendments which go in the direction of providing more specific guidance on considerations which are necessary in order to implement the Cash Flow Method. However, TURN et al. submit that the Commission's Proposed Policy Statement, if it is to be more than a partial statement of PGW's ratemaking method, must also incorporate specific reference to the fact that its foundation, any rate determined for PGW must satisfy the constitutionally based "just and reasonable" standard which requires a balancing of the interests of customers and of the utility.

**II. The Commission Should Add a Subsection (c) to Section 69.2702 of the Proposed Policy Statement: In determining PGW's "just and reasonable" rates, the Commission will apply the paramount federal standard arising from the 5<sup>th</sup> and 14<sup>th</sup> amendments to the U.S. Constitution mandating the balancing of consumer and utility interests.**

Consistent with the Commission's determination that PGW and the parties to PGW's rate

cases may benefit from guidelines clarifying applicable ratemaking standards, TURN et al. submit that the Guidelines should reference not just the Public Utility Code and PGW's Management Agreement Ordinance, but also the federal constitutional "just and reasonable" standard. No intended clarification of the ratemaking standards applicable to PGW can fulfill its purpose without giving due recognition to the federal constitutional standard.<sup>1</sup>

The Commission and Pennsylvania Courts have long recognized that this standard is the paramount standard governing ratemaking for public utilities. Indeed, the Pennsylvania Supreme Court, in a decision holding that PGW, as a municipally owned utility, was not less subject to this standard than any other Pennsylvania public utility, has stated:

When examining the ... rates for PGW, this Court is mindful that no applicable constitutional requirement is more exacting than the requirement of "just and reasonable" rates. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 607, 64 S.Ct. 281, 290, 88 L.Ed. 333 (1944).

Public Advocate v. Philadelphia Gas Commission, 544 Pa. 129, 139-140, 674 A.2d 1056, 1061 (1996).

As this Comment demonstrates, since the transfer of regulatory jurisdiction over PGW from the Philadelphia Gas Commission on July 1, 2000, the Commission has repeatedly explicitly acknowledged in its decisions regarding PGW rates that the "just and reasonable" standard is constitutionally based, and by implication, not subject to alteration by statute,

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<sup>1</sup> TURN et al. infer from the Commission's discussion preceding the Order and Proposed Policy Statement that the Commission implicitly has recognized that the Policy Statement in no way may supersede or attenuate the PUC's obligation to balance the interests of customers and utilities arising from the constitutionally based standard underlying all its ratemaking actions. These additions reflect the PUC belief that "certain consideration factors should be added to better reflect the appropriate balance of consumer and utility interests to be considered in determining 'just and reasonable' rates under the Public Utility Code." Order and Proposed Policy Statement, at 13. This statement is consistent with the Commission's long standing position that Public Utility Code Section 1301 incorporates as a matter of state law the constitutionally based "just and reasonable" standard. Popowsky v. Pa. P.U.C., 542 Pa. 99, 107-8, 665 A.2d 808, 812 (1995).

ordinance or regulation.

In its first decision addressing PGW rates (deciding a request for interim rate relief filed in August 2000), the PUC recognized that the constitutionally based “just and reasonable” standard was always applicable to PGW, even where interim relief was requested and there was no requirement to adhere to the “cash flow method.”

Given the unique nature of this interim rate proceeding, the only legally required standard to which the Commission is bound is that the resulting rates must be ‘just and reasonable’ *See, Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 288 (1944); 66 Pa. C.S. § 1301.... As explained by CEPA, the standard set forth in the Management Agreement and followed by the Philadelphia Gas Commission in prior base rate proceedings is consistent with the ‘just and reasonable’ analysis .... Additionally, in reviewing Philadelphia Gas Commission decisions, the Pennsylvania appellate courts have recognized that PGW rates are subject to the constitutional requirement that rates be just and reasonable. *See, e.g., Public Advocate v. Philadelphia Gas Commission*, 674 A. 1056 (Pa. Cmwlth. [sic]1996); *Action Alliance v. Philadelphia Gas Commission*, 406 A.2d 115 (Pa. Cmwlth. 1979).

Pa. P.U.C. v Philadelphia Gas Works, 94 Pa.P.U.C. 479, 2000 WL 33143808 (Pa.P.U.C.), at 7.<sup>2</sup>

In PGW’s 2001 base rate increase case, the Commission, again quoting the Supreme Court’s Public Advocate “no ... more exacting” language with approval, held that the “just and reasonable” standard in Public Utility Code Section 1301 is “coextensive with the federal constitutional standard for determining utility rates.” Pa. P.U.C. v. Philadelphia Gas Works, 213 P.U.R. 4<sup>th</sup>, 280, 2001 WL 1704791 (Pa.P.U.C.), at 15. In reaching this conclusion, the Commission underscored that the PGW ratemaking requirements set forth in the Management Agreement Ordinance were subordinate to the constitutionally based imperatives of Public Utility Code Section 1301: “We conclude that there is no presumption that, if PGW’s rates were

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<sup>2</sup> Citations to Commission decisions reported on Westlaw are to the Westlaw page number for the particular case.

set pursuant to the Management Agreement/Cash Flow Method, the rates would be just and reasonable as prescribed in Section 1301 of the Code.” Pa. P.U.C. v. Philadelphia Gas Works, 213 P.U.R. 4<sup>th</sup>, 280, 2001 WL 1704791 (Pa.P.U.C.), at 15.

In its 2004 decision denying PGW’s Petition for the establishment of a Cash Receipts Reconciliation Clause, the Commission reiterated that PGW rates were subject to a “just and reasonable” standard ultimately grounded in the U.S. Constitution requiring the balancing of the interests of a utility and its customers:

The Code states that “[e]very rate made, demanded, or received by any public utility ... shall be just and reasonable, and in conformity with regulations or orders of the commission.” 66 Pa. C.S. § 1301. The Supreme Court of the United States has held that just and reasonable rates have a constitutional basis. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601, 64 S.Ct. 281 (1944). When determining whether rates are just and reasonable, the decision maker must examine the impact and effect of the proposed rates on the balance between the interests of the utility and those of its customers.

Pa. P.U.C. v. Philadelphia Gas Works, 2004 WL 1592809 (Pa.P.U.C.) at 8-9.

In the PGW’s 2007 base rate case, the Commission once again referenced Public Advocate in its acknowledgment that the “just and reasonable” standard was constitutionally based:

It is well settled that the rates must be just and reasonable. 66 Pa. C.S. § 1301; *Pa. PUC v. Philadelphia Gas Works*, Docket No. R-00006042, 2001 Pa. PUC LEXIS 109 (October 4, 2001); *Public Advocate v. Philadelphia Gas Commission*, 544 Pa. 129, 674 A.2d 1056 (1996). It is clear that the just and reasonable standard was applied to PGW when it was regulated by the PGC. In *Public Advocate*, the Supreme court held that the rates of PGW must be just and reasonable. Additionally, in *Public Advocate*, the Court stated that “[w]hen examining the 91-92 rates for PGW, this Court is mindful that no applicable constitutional requirement is more exacting than the requirement of ‘just and reasonable’ rates.” *Public Advocate, supra* at 1061. The Pennsylvania Supreme Court went on to hold as follows, “(w)e hold today that the United States Supreme Court guidelines for determining the constitutionality of a rate are also applicable to examining rate disputes involving municipal utilities.” *Public Advocate, supra* at 1062.

Pa. P.U.C. v. Philadelphia Gas Works, Docket No. R-00061931 (Order entered September 28, 2007), at 13.

In PGW's late 2008 emergency rate relief case, the Commission yet again invoked the "well settled" "just and reasonable" standard, making direct reference once more to the Pennsylvania Supreme Court's holding in Public Advocate that "no constitutional requirement is more exacting than the requirement of 'just and reasonable' rates." Pa.P.U.C. v. Philadelphia Gas Works, 103 Pa. P.U.C. 791, 2008 WL 5582639 (Pa.P.U.C.), at 10.

In sum, in reaching its decisions concerning PGW rates, the Commission has historically recognized, like its predecessor Philadelphia Gas Commission, that the application of the mathematical formulas contained in the Management Agreement is but one part of PGW's cash flow ratemaking methodology, subject always to the balancing of customer and utility interests required by the overarching federal constitutional "just and reasonable" standard.

### **III. Conclusion.**

For the foregoing reasons, TURN et al. respectfully request that the Commission amend its Proposed Policy Statement by adding the language set forth above explicitly incorporating reference to paramount federal constitutional considerations. Due to this constitutional dimension to utility rate setting, PGW's ratemakers have never been bound to an absolute or mathematical formula, but rather have been empowered to apply policy concerning the appropriate balance between the interests of utility customers and the interests of the utility. The

Commission's Policy Statement should recognize this standard, not just implicitly, but explicitly.

Respectfully submitted,



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Date: January 28, 2010

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of TURN et al.'s Comments to Proposed Policy Statement (P-2009-2136508) 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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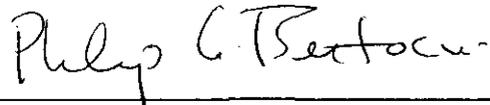
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Dated: January 28, 2010



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