

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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IRWINA. POPOWSKY
Consumer Advocate

March 15, 2010

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-2009-2136508

Dear Secretary McNulty:

Enclosed for filing are the Reply Comments 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, appearing to read "Darryl Lawrence".

Darryl Lawrence
Assistant Consumer Advocate
PA Attorney I.D. # 93682

Enclosures

cc: Stanley E. Brown, Law Bureau

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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-2009-2136508
Philadelphia Gas Works' Cash Flow	:	
Ratemaking Method	:	

REPLY COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

On December 17, 2009, the Commission issued a Proposed Policy Statement. In Re PGW Petition, Order and Proposed Policy Statement, Dock. No. P-2009-2136508 (entered December 30, 2009) (Order). The Proposed Policy Statement included revisions and additions to the policy statement that PGW had originally submitted. Accordingly, the Order provided that comments to the Proposed Policy Statement would be due within 30 days of entry of the Order.

On January 29, 2010, in accord with the procedural schedule established in the Order, the OCA filed its Comments (OCA Comments). In its Comments, the OCA argued that no policy statement should be issued in this proceeding. In the OCA's view, there is no real confusion over how the Cash Flow Method of ratemaking applies to PGW, only PGW's continued disagreement with the Commission's application of the methodology is at issue. The OCA argued that the Proposed Policy Statement is contrary to recent decisions by this Commission and the Commonwealth Court and does not follow the Management Agreement

Ordinance (MAO). Accordingly, the OCA submitted in its Comments that the Proposed Policy Statement should not be issued. Alternatively, the OCA supplied a revised policy statement for the Commission's consideration.

On February 16, 2010, PGW filed a Motion for Leave to File Reply Comments (PGW Motion). In its Motion, PGW averred that it wished to address the "substantive issues" that OCA and OTS "have raised for the first time." Motion at 1. It is important to note that, the Order did not provide any schedule or opportunity for the submission of reply comments. Moreover, PGW attached its Reply Comments to its Motion.

On February 24, 2010, the OCA filed its Answer to the PGW Motion. Therein, the OCA argued that PGW's Motion should be denied as the Commission had not provided any opportunity for the submission of reply comments in this docket. In addition, the OCA argued that PGW's assertions that issues were being "raised for the first time" in the comment phase of this proceeding lacked merit.

On March 5, 2010, the Commission issued a Secretarial Letter, which provided that even though the Commission agreed with the OCA that the "internally-generated funds" and "non-borrowed cash" issues were not raised for the first time in the comment phase of this proceeding as PGW alleged, other parties besides PGW should also have the ability to file reply comments. In accord with the established due date of March 15, 2010, the OCA submits these timely Reply Comments.

II. REPLY COMMENTS

The OCA continues to hold the position that no policy statement should be issued on this topic. The OCA further submits that the Proposed Policy Statement does not accurately reflect the holdings of recent decisions by this Commission and by the Commonwealth Court.

Moreover, the Proposed Policy Statement does not follow the MAO. In the event that the Commission decides that a policy statement should be issued, the OCA would then urge the Commission to adopt the revised policy statement attached to the OCA's Comments. These Reply Comments, however, specifically respond to PGW's Comments filed in this docket on January 29, 2010.

PGW discussed four separate areas of concern that it had with the Proposed Policy Statement in its Comments. In summary, PGW addressed: (1) the deletion of PGW's "access to the capital markets" language; (2) the addition of "non-financial" considerations to the Proposed Policy Statement; (3) the concern that the Proposed Policy Statement is creating new filing requirements for PGW, and (4) that any policy statement would also apply to "successor municipal entities" that may be created. The OCA will address each of these issues, as necessary, below.

A. The Commission Was Correct To Delete PGW's "Access To The Capital Markets" Language.

In its Comments, PGW stated that one of its originally-proposed clauses was omitted from the Proposed Policy Statement. PGW Comments at 3-4. Specifically, PGW argued that the language "A level of financial performance to permit access to the capital markets at the lowest reasonable costs to customers over time" is relevant and should be included in the policy statement. Id. The OCA submits that the Commission was correct in deleting this proposed language for several reasons.

First, as the OCA discussed in its Comments, the language that PGW proposed finds no support in the MAO, the Public Utility Code or the Commission's regulations. OCA Comments at 2-5.¹ PGW's prior ratemaking methodologies as set out in the MAO do not support inclusion of the language that PGW wishes to insert in the Proposed Policy Statement. On the contrary, this language would reshape the MAO in a manner that was rightfully rejected by the Commission. The Company is certainly free to include this type of information in its rate case, but suggesting through a policy statement that this type of information must be considered in setting PGW's rates is improper.

Second, as several recent rate cases have shown, PGW continues to have access to the capital markets even during the worst of the economic crisis. PGW's language would lead to the conclusion that at some unspecified level of financial performance, PGW would be able to access the markets at some unspecified level of costs that may be less than what it is presently incurring. The problem is that PGW's assertions to this end are non-quantifiable, and thus not a reasonable basis upon which to set rates. Again, PGW is free to include information of this kind in its base rate proceeding as support for whatever rate request it makes at that time, but this type of pure market speculation as to what level of financial performance would equal lower capital costs is just that – speculation. PGW is unable to quantify what level of financial performance would be required in order for PGW to achieve a bond rating upgrade, and presumably, some unknown level of cost reduction. PGW's arguments on this point lack merit and should be rejected by the Commission.

¹ In PGW's Comments, the Company also discusses Section 69.2703(a) (4) of the Proposed Policy Statement in suggesting that the Commission's language therein be removed and replaced with PGW's "access to the capital markets" language. PGW Comments at 5-7. The OCA discussed this same clause in its Comments at 8-9. A further response to this argument here is unnecessary.

B. PGW's Argument As To The Removal Of "Non-Financial" Considerations From The Policy Statement Should Be Dismissed.

In its Proposed Policy Statement, the Commission added several clauses to recognize the fact that PGW's rates are not set solely based on the MAO, but rather are also subject to other requirements of the Public Utility Code and the Commission's regulations. Specifically, the Proposed Policy Statement provides, in relevant part:

§ 69.2703. Ratemaking procedures and considerations.

(a) In determining just and reasonable rate levels for PGW, the Commission will consider, among other relevant factors:

- ...
- (6) PGW's management quality, efficiency and effectiveness;
 - (7) Service quality and reliability; and
 - (8) Effect on universal service.

Proposed Policy Statement, § 69.2703(a) (6)-(8). In its Comments, PGW argued that because these particular clauses do not explain the Cash Flow Method of ratemaking they do not belong in the policy statement as particular factors. PGW Comments at 7-9. PGW not only places too much emphasis here on the role of any policy statement as to setting rates for PGW, but also is internally inconsistent on what should and should not become a part of the policy statement.

PGW argues that the Commission should remove these non-financial considerations from the policy statement. PGW Comments at 12-13. Then, because these non-financial considerations would no longer be included in the policy statement, PGW suggests that certain language may have to be added to the policy statement to ensure that these non-financial considerations are not somehow "barred" or "precluded" from consideration due to the fact that they are not mentioned in the policy statement. Id. The OCA submits that the statement of policy will not bar or preclude the Commission from considering anything relevant to setting rates for PGW, or any other utility. As the Commission provided in its Order:

At the outset, it is important to understand the effect of a policy statement. Simply stated, a policy statement is not a regulation. It is not enforceable and has no binding effect on the agency, or on anyone else.

Order at 9. In the OCA's view, if a policy statement is issued in this matter, it will provide some general indications of how the Commission may decide to proceed on this issue in a future case. On the contrary, in its Comments PGW discusses the factors in the Proposed Policy Statement as if some rule of law was being created, which of course it is not. PGW Comments at 8.

PGW's Comments are internally inconsistent though, on what should or should not be included in a policy statement. In its Comments, PGW readily admits that these non-financial considerations should be a part of any rate proceeding, but that they should not be enumerated within the policy statement because they do not help to explain the application of the Cash Flow Method. PGW Comments at 7-8. On the other hand, PGW argues for the inclusion of "non-borrowed cash", "internally-generated funds" and "access to the capital markets" language, even though such terms are not found in the MAO, much like the non-financial considerations that PGW cites.

The OCA submits that these non-financial considerations are part and parcel of PGW ratemaking considerations as they relate to the just and reasonable standard. The just and reasonable standard, grounded in the United States Constitution, requires the Commission to balance the interests of the utility and its customers. See Pa. P.U.C. v. Philadelphia Gas Works, Dock. No. R-00061931 at 13 (order entered September 28, 2007); Pa. P.U.C. v. Philadelphia Gas Works, 2004 WL 1592809 at 9-10. If a policy statement is issued, the "non-financial" considerations in Sections 69.2703(a) (6)-(8) of the Proposed Policy Statement provide a reasonable indication of the balance that the Commission must strike in setting rates for PGW, and accordingly, should be recognized.

C. Policy Statements, By Their Nature, Do Not Create Filing Requirements.

In a similar vein to the “non-financial” considerations issue just discussed, PGW significantly overstates the legal effect of a policy statement. In its Comments, PGW discusses at length its concern that a policy statement will create new filing requirements for PGW. PGW Comments at 13-15. The OCA would point out that since no “binding norms” are being created, a statement of policy cannot create “requirements” that are legally binding. Order at 9. The OCA submits that PGW has overemphasized the legal reach that a policy statement may have in this regard.

D. PGW’s Request For An Acknowledgment Of Other Entities Is Premature.

In its Comments, PGW states that Section 2212 provides that the City of Philadelphia may legally decide to create a different business entity to provide natural gas service, and if such an event were to occur, at some time in the future, then it should be indicated that such an entity would also be covered by the policy statement – if indeed any is issued. PGW Comments at 16. The OCA submits that PGW’s request should be denied on this issue. There is no context for this request, and further, the issue of what Section 2212 means or does not mean in such a situation is well beyond the scope of this proceeding.

E. Conclusion.

As discussed above, the OCA maintains its position that no policy statement should be issued in this matter for all the reasons discussed here, and also discussed in OCA’s Answer to PGW’s Petition and OCA’s Comments. Alternatively, a revised policy statement was submitted by the OCA for the Commission’s consideration as part of the OCA’s Comments in this docket.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the Office of Consumer Advocate respectfully requests that the Commission not issue the Proposed Policy Statement as to Philadelphia Gas Works' Cash Flow Ratemaking Method. Alternatively, attached to its Comments, the OCA submitted a revised Policy Statement for the Commission's consideration.

Respectfully Submitted,



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Dated: March 15, 2010

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CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the Reply Comments 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 15th day of March 2010.

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