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February 4, 2013

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. Philadelphia Gas Works;
Docket No. C-2011-2278312

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Exceptions with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Very truly yours,

A handwritten signature in cursive script that reads "Daniel Clearfield".

Daniel Clearfield

DC/lww
Enclosure

cc: Hon. Angela Jones w/enc. (via email and overnight delivery)
Office of Special Assistants w/enc. (via email only ra-OSA@pa.gov)
Cert. of Service w/enc.


CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of PGW's Exceptions upon the participant listed below in accordance with the requirements of § 1.54 (relating to service by a participant).

VIA EMAIL AND HAND DELIVERY

Michael L. Swindler
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Date: February 4, 2013


Daniel Clearfield, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	Docket No. C-2011-2278312
<i>Complainant,</i>	:	
	:	
v.	:	
	:	
Philadelphia Gas Works,	:	
<i>Respondent.</i>	:	

**EXCEPTIONS OF
PHILADELPHIA GAS WORKS**

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I. INTRODUCTION

Philadelphia Gas Works (“PGW” or “Company”) continues to support the Joint Petition for Settlement (“Settlement”) entered into between PGW and the Commission’s Bureau of Investigation and Enforcement (“I&E”) in the above-captioned proceeding. The Settlement: (a) resolves all of the issues raised by the I&E Complaint; (b) is in the public interest; and, (c) represents a fair, just, reasonable and equitable resolution of this proceeding. Accordingly, subject to the exception discussed below, and one minor technical modification,¹ the Initial Decision issued by Administrative Law Judge (“ALJ”) Angela T. Jones approving the Settlement should be approved by the Commission.

Importantly, as permitted by the Settlement itself,² PGW argues below that the allocation of the agreed upon \$500,000 payment should be modified and, while the total payment should remain at \$500,000, fewer funds should be allocated to the General Fund as a “fine” and more funds should be allocated to natural gas or fire safety programs for the benefit of PGW ratepayers and the citizens of Philadelphia. The Initial Decision approves the “default” allocation of the financial payment of \$500,000: \$400,000 as a civil settlement amount and \$100,000 as a contribution to an existing Philadelphia Fire Department (“PFD”) program to assist homeowners’ installation of smoke detectors (unless the Commission orders a different allocation).³

¹ PGW submits that the Initial Decision approving the Settlement contained a technical error. The Complaint commenced by I&E was settled and satisfied by the Settlement. Ordering Paragraph 1 of the Initial Decision states that the I & E complaint “is sustained.” While the use of this term does not appear to have any legal significance, since both I & E and PGW have agreed *not* to litigate the factual or legal issues that were raised in this proceeding, it would be more accurate to state that the I & E Complaint is “settled and satisfied.”

² Settlement at ¶¶ 34, 35.

³ Settlement at ¶ 22, 30.

As detailed in PGW's Statement in Support, PGW requests that either: (a) \$350,000 of total civil settlement payment be made to specific deserving programs and the remaining \$150,000 be made as a civil settlement amount; **or** (b) the entire \$500,000 be directed to fund helpful programs for the benefit of PGW customers and Philadelphia citizens (who in most respects, are one and the same).

Allocating funds to worthy programs is justified by the unique status of PGW as a municipal utility with no shareholders, and the fact that any payment will eventually inure to the detriment of ratepayers and Philadelphia citizens. Especially in view of the traumatic nature of this incident, PGW submits that it would only be appropriate and reasonable to permit the ratepayers of Philadelphia to derive some advantage from this unfortunate event. PGW's proposal to fund programs such as furnace repair/replacement, or public education on gas safety for grade school children, would help mitigate the harm to ratepayers and produce a positive good for the City. A revised allocation would, in turn, bring the penalty here far closer to the Commission's established position vis-a-vis PGW than does the present allocation.

II. EXCEPTIONS

A. **Exception No. 1: The ALJ Erred In Rejecting PGW's Alternative Allocation (Initial Decision at 35-39, and Ordering Paragraph 9).**

The ALJ recommended approval of the agreed upon "default" allocation of the financial payment of \$500,000.⁴ This default position would allocate \$400,000 as a civil settlement amount, payable to the General Fund of the Commonwealth, and \$100,000 as a contribution to

⁴ Initial Decision at 35-39, Ordering Paragraph 9.

an existing PFD program to assist homeowners' installation of smoke detectors.⁵ As permitted by the Settlement, PGW respectfully requests that the Commission reallocate all or a majority of the agreed upon \$500,000 payment so that most of the monies are used to fund projects and programs that will benefit City of Philadelphia citizens, rather than simply being paid as a "fine." PGW has proposed specific programs to which to allocate all but \$150,000 of the payment – but would not object if the Commission decided to allocate the entire agreed upon \$500,000 payment to the deserving programs already identified by PGW, nor would it object if the Commission decided to allocate the entire agreed upon payment of \$500,000 to worthy programs of the Commission's own selection.

1. PGW's Suggested Allocation Is Reasonable And In The Public Interest

As noted in the Settlement, the default allocation of the agreed upon \$500,000 payment was made with the express understanding that PGW could argue for a different allocation,⁶ which it now does. PGW's main proposal would allocate \$350,000 of the total civil settlement payment to deserving programs and the remaining \$150,000 to the payment of a civil settlement amount. This proposal would allocate the \$350,000 as follows:

- \$100,000 contribution to the PFD's smoke detector program (as presently contemplated in the "default" allocation);
- \$107,000 to assist with furnace repair or replacement of damaged or malfunctioning heaters for low income citizens of Philadelphia;
- \$36,000 for mailing special safety information bill-stuffers to residential customers describing safe natural gas safety practices at home; and
- \$107,000 in funds for programs designed to improve public education on gas safety. This program would be an adjunct to a current program offered by the PFD and

⁵ Settlement at ¶¶ 22, 30.

⁶ Settlement at ¶¶ 34, 35.

aimed at educating fourth and fifth graders in elementary and middle schools in Philadelphia.

More details about each of these additional proposed programs are set forth in Appendix 2 of PGW's Statement in Support of the Settlement. Allocating the majority (or all) of the agreed upon \$500,000 payment to fund worthy programs to benefit the City of Philadelphia is justified for PGW because of PGW's unique status as a municipally owned natural gas distribution utility and the unique facts of this incident.

(a) PGW Is Unique

Unlike investor owned utilities, PGW is municipally owned and has no shareholders in the typical sense. More precisely, its "shareholders" are the citizens of the City of Philadelphia, which own the Gas Works. PGW has agreed that it will not request recovery of any portion of the \$500,000 payment in a future rate case. However, because PGW is a cash-flow regulated company, the payment will affect its current cash flow and, therefore, at some point, will necessarily affect its "shareholders," the citizens of Philadelphia.⁷

The Commission has previously recognized this reality and has modified its normal rules on imposing penalties. In *Malisa Alexander v. PGW*, Docket No. C-20077389 (Nov. 6, 2008), the Commission refrained from imposing a penalty upon PGW in a gas leak complaint case, noting that, as a municipally-owned entity, any fine imposed would eventually affect PGW's customers. The Commission reaffirmed this position in 2010 and 2012. In *Thea Jones v. PGW*, Docket No. F-2009-2138367 (Dec. 16, 2010), the Commission upheld ALJ Ky Van Nguyen's

⁷ PGW is obligated to make an annual, \$18 million payment to the City of Philadelphia, *see* 66 Pa. C.S. § 2212(f). Even if it were legally possible to reduce that payment to account for the financial payment agreed to here (which it is not), the payment would nonetheless affect the citizens of Philadelphia by reducing the amount of support provided to the City by the Gas Works' operations.

legal conclusion that PGW violated Section 1501 of the Code but modified ALJ Nguyen's decision by removing the civil penalty. The Commission recognized that ALJ Nguyen had "properly evaluated the evidence and concluded that PGW should be assessed a civil penalty" but explained that "given PGW's status as a municipally owned gas utility, we cannot justify the additional burden on the ratepayers." *Id.* In 2012, in *Nia Peterson v. PGW*, Docket No. F-2010-2215379 (Jan. 27, 2012), the Commission adopted the Initial Decision of ALJ Eranda Vero⁸ which had sustained part of the customer's complaint but refused to impose a civil penalty for the reasons stated in *Alexander, supra*, and *Jones, supra*.

The Initial Decision suggests that the holdings in these prior decisions are distinguishable because they were instances in which the Commission considered imposing a fine payable to the General Fund in a litigated case, rather than in a settlement.⁹ But this distinction is of no moment because the Settlement here specifically leaves open the issue of how to allocate the agreed upon payment of \$500,000.

Thus, the imposition of the substantial fine here would be inconsistent with the Commission's general approach as to PGW. In other circumstances, PGW would have argued against any fine and argued that the important revisions to PGW's emergency procedures were a sufficient and appropriate resolution to the case. It does not do so here for the many reasons discussed above. But PGW believes if there is to be a financial payment, let alone one of this magnitude, it would be appropriate and far more consistent with the Commission's prior actions as to PGW to reallocate the payments in ways that provide benefits to PGW customers, who are

⁸ See also *Mary Kingcade v. PGW*, Docket No. C-2009-2134662, Opinion and Order of November 8, 2012, denying Kingcade's exceptions to the Initial Decision of May 8, 2012 (wherein the Commission agreed with the ALJ Vero that no fine should be imposed upon PGW under the circumstances presented).

⁹ Initial Decision at 35.

also its “shareholders.” PGW’s proposal to do so, which it reserved in the Settlement the right to raise, is to allocate less payment funds to the General Fund as a civil settlement amount and more (or, all) to natural gas or fire safety programs. The beneficiaries of these natural gas or fire safety programs would in substantial part be PGW ratepayers and all would be PGW “shareholders.” Allocating funds to those programs would thus mitigate potential future harm to ratepayers and bring the penalty here far closer to the Commission’s established position vis-a-vis PGW than does the present allocation. If the Commission agrees with the general principle, but is not completely comfortable with the specific programs proposed by PGW for this allocation, then the Commission can certainly establish a process (via a workshop or process through its Director of Operations, for example) to identify different worthy projects and supervise the funding of those programs by PGW from the \$500,000 payment.

(b) Funding Programs Rather Than Fining PGW Will Create Positive Benefits From This Tragedy

As noted, the incident was traumatic for the Company, its employees, their families, neighborhood residents, and the entire City of Philadelphia. The loss of the life of a young PGW employee, as well as the injuries to several other PGW personnel, was particularly hard for the Company and its employees. Structuring PGW’s payment so that it enhances public safety would be a far more fitting and appropriate memorial to those who were so dramatically and adversely affected. A civil penalty provides no such positive benefit. The Commission thus has the opportunity to have good come out of this tragedy and to have a close fit between that good and the issues at hand.

(c) A Payment To The General Fund Would Not Create Any Additional Incentives To PGW To Maintain Its Distribution System At The Highest Possible Level Of Safety

As noted, PGW is a municipal utility with no conventional shareholders. Thus, a penalty or fine will not create a disincentive for future incidents by reducing shareholder return or the company's share price. The tragic events of January 18, 2011 were penalty enough for PGW and its ratepayers. Since that day, PGW has done everything within its power to try to ensure no repeat of this type of incident. Forcing the Company to remit a large sum of money – with no attendant benefit to ratepayers – will not provide any further incentive.

2. Contrary To The ALJ's Determination, The Specific Programs That PGW Proposes To Fund Are Worthy Of Support From This Payment

The ALJ (wrongly, in PGW's view) opined that contributions to the programs (other than to the contribution to the PFD's smoke detector program) were not reasonable.¹⁰ Specifically, the ALJ rejected the proposed contributions to the "additional" programs based on the belief that these programs were too narrow, and that they should yield benefits to a wider section(s) of the public. Under this logic, any program not "open" to all PGW customers (without any distinctions for income or rate classification) would be rejected. Such logic contradicts the ALJ's approval of the contribution to the PFD smoke detector program which plainly will only benefit a segment of the Philadelphia population (those presently without smoke detectors); but this distinction would seem irrelevant. Any program funded by a utility will benefit some portion of the public more than another, but such distinctions are acceptable, so long as there is a reasonable justification for the distinction.

¹⁰ Initial Decision at 37-38.

The ALJ correctly recognized that the PFD smoke detector program “has the potential of saving lives” and benefits “the employees of the utility, the customers of the utility, the PFD and other emergency responders outside of the utility and the citizens of Philadelphia.”¹¹ That same finding can be fairly applied to the other programs suggested by PGW. Like the PFD smoke detector program, each of the selected programs serves the public, enhances public safety and has the potential to save lives.

For example, it should be obvious that a damaged or malfunctioning heater could blow up or emit dangerous levels of poisonous carbon monoxide gas. Repairing or replacing such heaters may help save lives and may prevent gas emergencies. Such efforts benefit the employees of the utility, the customers of the utility, the PFD and other emergency responders outside of the utility and the citizens of Philadelphia. Similarly, educating residential customers and fourth and fifth graders may help them know how to stay safe in a natural gas emergency (such as when outdoor lines are damaged) and/or may arm them with safety tips to help prevent gas emergencies in their homes. Such education efforts benefit the employees of the utility, the customers of the utility, the PFD and other emergency responders outside of the utility and the citizens of Philadelphia.

The ALJ also (wrongly, in PGW’s view) opined that safety information (as bill stuffers) should not be distributed to residential customers because, in PGW’s next rate case, PGW may not be able to distinguish these “unique” bill stuffers from “regular” bill stuffers.¹² That concern is purely speculative, and not supported by the details of PGW’s proposal and the Settlement terms. It was agreed that the costs of these “unique” bill stuffers would not be recovered in

¹¹ Initial Decision at 26.

¹² Initial Decision at 38.

rates,¹³ and any effort to do so would be objectionable if recovery is actually sought by PGW. Given that such issue would be resolved in that future rate proceeding, that stated concern is insufficient to justify preclusion of a program to distribute safety information to residential customers.

3. PGW’s Alternative Allocation Is Reasonable And In The Public Interest

PGW’s alternative proposal would allocate the entire \$500,000 to helpful programs for the benefit of PGW customers and Philadelphia citizens (who in most respects, are one and the same), with the Commission using its discretion to allocate the remaining amounts. The ALJ did not recommend that the Commission act on its own discretion in this endeavor because such Commission action could delay implementation of the Settlement.¹⁴

That concern is not supported by the record. Paragraph 23 of the Settlement acknowledges that “PGW has already implemented virtually all of the changes to its operating procedures as sought by I&E, and these changes address all the non-monetary action items in the formal complaint’s prayer for relief.”¹⁵ There would, of course, be a delay in making the payment. But, that delay would only be as long as it required for the Commission to determine the best allocation of the \$500,000. It would not, as the ALJ suggested, supplant the efforts of the parties or reduce the benefits set forth in the Settlement. To the contrary, such action would increase the benefit to PGW customers and Philadelphia citizens (who in most respects, are one and the same).

¹³ Settlement at ¶ 30.

¹⁴ Initial Decision at 38.

¹⁵ Settlement at ¶ 23(a). The specific details of the Operational Modifications made or to be made are set forth in detail in Appendix A to the Settlement.

III. CONCLUSION

For the reasons set forth above, PGW respectfully requests that the Commission grant these exceptions and issue a consistent decision which finds that the Joint Petition for Settlement is in the public interest, is consistent with the Public Utility Code and Commission regulations and take any other action deemed to be in the public interest, such as redirecting all or part of that agreed-upon civil penalty to programs that would provide new funding to assist Philadelphia citizens with natural gas or fire safety.

Respectfully submitted,



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