



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

February 11, 2013

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. 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 filing is the original copy of the Reply to Exceptions on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced case. Pursuant to 52 Pa. Code § 5.535, a party has the right to file a reply to an exception in proceedings before the Commission.

Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please feel free to contact me.

Sincerely,

Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Enclosure

cc: As per Certificate of Service
Cheryl Walker Davis, OSA

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BEFORE THE
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Pennsylvania Public Utility Commission, :
Bureau of Investigation and Enforcement, :
Complainant :

v. :

Docket No. C-2011-2278312

Philadelphia Gas Works, :
Respondent :

**BUREAU OF INVESTIGATION AND ENFORCEMENT
REPLY TO EXCEPTIONS**

Pursuant to 52 Pa. Code § 5.535, the Pennsylvania Public Utility Commission's Bureau of Investigation & Enforcement ("I&E") submits this Reply to Exceptions at the above docket.

On November 14, 2012, I&E and Philadelphia Gas Works ("PGW") filed with the Commission a Joint Petition for Settlement ("Settlement Agreement"), accompanied by its Appendix A and Statements in Support of I&E and PGW, which set forth the following terms, summarized as follows:

- a. PGW agrees to pay a total settlement amount of \$500,000, in accordance with the following allocation:
 - i. PGW will pay a civil settlement amount of \$400,000, and shall not make any claim whatsoever for recovery of any portion of this \$400,000 in any future proceeding; and

- ii. PGW will contribute \$100,000 to the existing smoke alarm program operated by the Fire Prevention Division of the Philadelphia Fire Department.

See, Settlement Agreement at 20-21.

In addition to the monetary relief, as allocated above, PGW agreed to additional “non-monetary relief” in the form of modifications to its operating procedures as sought by I&E in the “Requested Relief” portion of its formal complaint. *Id.* at 21-25. The Settlement Agreement also included the following:

34. While not stating or implying that I&E joins in the request and notwithstanding the above, it is agreed that, at the time that the Settlement Agreement is considered by the Commission, PGW may propose to the Commission that, in its approval of the Settlement Agreement, it assign a greater portion of the \$500,000 total settlement amount to programs that would provide new funding to assist Philadelphia citizens with natural gas or fire safety.

Id. at 29.

The Settlement Agreement requested that the assigned presiding officer, Administrative Law Judge Angela T. Jones (“ALJ Jones”), recommend approval of the Settlement Agreement reached between the parties, intended to fully and completely resolve the issues related to the I&E Complaint filed in the above docket.

By Commission Secretarial letter dated January 28, 2013, the Initial Decision of ALJ Jones was served on the parties to this proceeding. The Initial Decision approved the Settlement Agreement without modification.

On February 4, 2013, PGW filed Exceptions to the Initial Decision of ALJ Jones. In its Exceptions, PGW asserts, *inter alia*, that due to its “unique” capacity as a municipal

utility¹ owned by the City of Philadelphia (rather than being a more traditional investor-owned utility) the Commission has “modified its normal rules” on the imposition of civil penalties such that “the imposition of the substantial fine here would be inconsistent with the Commission’s general approach as to PGW.” PGW Exceptions at 4, 5.² The crux of PGW’s contention is that the allocation of the \$500,000 payment that I&E and PGW expressly agreed to in their Settlement Agreement would be better served if a majority, if not all, of the \$500,000 settlement amount were instead re-allocated to support specific programs rather than the bulk being assessed as a civil penalty.

According to PGW’s Exceptions, the Commission’s treatment of PGW in the past bolsters the Company’s position in this case that the imposition of any civil penalty, or favoring the majority of the settlement payment as a civil penalty as allocated in the settlement agreement, is not appropriate. PGW cites *Alexander v. PGW*³, *Jones v. PGW*⁴ and *Peterson v. PGW*⁵ for the proposition that the Commission has fashioned a “general approach” to PGW and “modified its normal rules on imposing penalties.” PGW Exceptions at 4. I&E disagrees.

One might perceive from PGW’s Exceptions and the cases cited therein that the Commission has consistently treated PGW differently from a traditional utility when it comes to assessing civil penalties – referred to in PGW’s Exceptions as “the

¹ As set forth in the Joint Petition for Settlement at page 3, PGW is a jurisdictional “city natural gas distribution operation” as defined by 66 Pa.C.S.A. § 102 and is engaged in, *inter alia*, the provision of public utility service for compensation as a natural gas distribution company within Philadelphia.

² The argument set forth in PGW’s Exceptions is identical or nearly identical to its position as stated in Philadelphia Gas Works’ Statement in Support of Joint Petition for Settlement, filed concurrently with the Joint Petition for Settlement, dated November 14, 2012.

³ *Malisa Alexander v. PGW*, Docket No. C-20077389 (November 6, 2008).

⁴ *Thea Jones v. PGW*, Docket No. F-2009-2138367 (December 16, 2010).

⁵ *Nia Peterson v. PGW*, Docket No. F-2010-2215379 (January 27, 2012).

Commission's *established position vis-à-vis PGW.*" PGW Exceptions at 2 (emphasis added). This perception is incorrect, as the Commission has no such established position of avoiding the imposition of a fine against PGW. As shown in other PGW matters before the Commission not cited by the Company, the Commission has, in fact, imposed civil penalties against PGW. In *Doe v. PGW*, Docket No. F-01559449 (Dec. 13, 2005), 2005 WL 6504402 (Pa.P.U.C.), the Complainant instituted a formal complaint against PGW in which she claimed that PGW sent her an incorrect bill. ALJ Ky Van Nguyen found that PGW was in violation of 52 Pa. Code § 56.12 for its failure to read the meter of Complainant and recommended that a civil penalty of \$200 be imposed upon PGW. *Id.* The Commission agreed that PGW violated 52 Pa. Code § 56.12, but modified the ALJ's decision and directed PGW to pay a civil penalty of \$250 for each of the four years that the Complainant was liable for a back-billing, for a total fine of \$1,000. *Id.*

In *Perez v. PGW*, Docket No. F-01761817 (Sept. 19, 2006), 2006 WL 6611455 (Pa.P.U.C.), the Complainant filed a formal complaint against PGW alleging that he was not liable for payment of a bill for previously unbilled service. ALJ Mark A. Hoyer found that PGW was in violation of both 66 Pa.C.S. § 1501 and 52 Pa. Code § 56.11 for its failure to provide the Complainant with reasonable service and recommended that PGW be assessed a civil penalty of \$500. *Id.* The Commission agreed that PGW violated 66 Pa.C.S. § 1501 and 52 Pa. Code § 56.11, but modified the ALJ's decision and directed PGW to pay a civil penalty of \$250 per month for thirteen months, for a total fine of \$3,250. *Id.* The Commission reasoned that a \$500 civil penalty, as recommended

by the presiding ALJ, was not sufficient to incentivize PGW to be more responsible in its operations.

There are additional Commission decisions wherein civil penalties have been imposed upon PGW. Moreover, if one were to accept PGW's claim that the Commission had established a general approach to *not* impose a fine against PGW (which it has not), then PGW would be exonerated in all future actions *ad infinitum*, regardless of the nature or severity of the alleged violations. Certainly, the Commission would not send a message to PGW that no matter how tragic or egregious the violation (or alleged violation), PGW is exempt from the imposition of a civil penalty – and it has not. Rather, the Commission recently made clear in *Mullins v. PGW*, Docket No. C-2011-2266040 (October 2, 2012), 2012 WL 6087517 (Pa.P.U.C.) that “PGW’s status as a municipally-owned utility does not negate the Commission’s authority to impose a penalty on PGW when appropriate.”⁶ *Mullins* Opinion and Order at 4.

The *Alexander* and *Jones* matters, cited by PGW as exemplifying the Commission’s desire to avoid penalties that would result in an “additional burden on the ratepayers” are not representative of the instant case wherein, as ALJ Jones noted in her Initial Decision, PGW has already agreed that it would not seek recovery of the civil penalty amount from ratepayers. Consequently, there is no concern of an additional burden to ratepayers here which distinguishes this case from *Alexander* and *Jones*.

⁶ Again, I&E agreed in the Settlement Agreement that, despite PGW’s acceptance of the allocation of the total settlement amount of \$400,000 civil penalty and \$100,000 program contribution as expressed in the Settlement Agreement, PGW could propose to the Commission that, in its approval of the Settlement Agreement, it assign a greater portion of the \$500,000 total settlement amount to programs. I&E has upheld that agreement. I&E’s Reply to Exceptions herein relates only to what I&E characterizes as a misleading proposition in PGW’s Exceptions that this Commission has consistently ruled that civil penalties will not be imposed upon PGW.

On the issue of funding the civil penalty as allocated in the Settlement Agreement, without being prompted, PGW raised in its Exceptions, Page 4, Footnote 7, that it makes an annual \$18 million payment to the City of Philadelphia. PGW states:

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.

PGW Exceptions at 4.

I&E counters that there is no factual basis for PGW's contention that this source of funds could not be utilized to absorb the civil penalty agreed to in the Settlement Agreement. In fact, in a June 22, 2011 PGW news release, the Company noted that in past years, the City had granted all or part of this \$18 million payment back to PGW. The news release continues that "today's payment marks the first time since 2004 that the City will retain the full \$18 million." Consequently, it would seem that there exists more leeway in the execution of this payment than PGW admits and PGW's claim that there is no legal possibility of reducing the City payment to account for the financial payment agreed to here is suspect.

Lastly, PGW proposes in its Exceptions that as part of the Commission's review of the total payment application, the Commission is free to "establish a process (via a workshop or process through its Director of Operations, for example)" to identify and fund worthy projects. However, a suggestion to establish a Commission workshop is not only inappropriately raised for the first time in PGW's Exceptions, but to establish such a workshop would obviously delay the implementation of the monetary allocation. This

flies in the face of PGW's Exception to the recommendation of ALJ Jones that the Commission not act on its own discretion to re-allocate the monetary settlement amount. PGW excepts on the grounds that the ALJ's concern of a delay "is not supported by the record." Then, PGW suggests the establishment of a workshop under the auspices of the Commission's Director of Operations, delaying the implementation of the monetary allocation.

WHEREFORE, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that the Exceptions of PGW [to the extent that they suggest that the Commission has established a "general approach" of not imposing civil penalties on PGW] be denied and that the recommendation of ALJ Jones to approve the Joint Petition for Settlement, including all terms and conditions contained therein, be adopted by this Commission without modification, as being in the public interest.

Respectfully submitted,



Michael L. Swindler, Prosecutor
Carrie B. Wright, Prosecutor
Wayne T. Scott, First Deputy Chief Prosecutor
Bureau of Investigation and Enforcement

Dated: February 11, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

By First Class Mail:

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