

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

1305 WALNUT STREET CORP.	:	
d/b/a HOLIDAY INN EXPRESS	:	
Complainant	:	
	:	
v.	:	C-2012-2337290
	:	
PHILADELPHIA GAS WORKS	:	
Respondent	:	

BRIEF OF COMPLAINANT

1305 WALNUT ST. CORP. d/b/a HOLIDAY INN EXPRESS

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Complainant 1305 Walnut Street Corp. d/b/a Holiday Inn Express (the “Hotel”) respectfully submits this Brief in the above-referenced matter.

STATEMENT OF THE CASE

1. FORM OF ACTION.

Complainant 1305 Walnut Street Corp. d/b/a Holiday Inn Express-Midtown (the “Hotel”) filed a Complaint with the Public Utility Commission (the “Commission”) on or about November 26, 2012. The Complaint challenged a \$203,209.74 bill issued by Respondent Philadelphia Gas Works (“PGW”) dated November 6, 2012 for unauthorized use of gas service.

2. PROCEDURAL HISTORY.

(1) April 24, 2008: PGW workers visited the Hotel’s boiler room while working on pipes outside the Hotel on Sansom Street. PGW allegedly discovered that a contractor piped into PGW’s company-installed by-pass which is supplying unmetered gas to two (2) Aero water boilers (PGW Exh. 1)).

(2) April 30, 2008: PGW issued a Monthly Statement to the Hotel, seeking \$203,209.74 as an “Estimated Gas Adjustment” (PGW Exh. 5, pp. 3-4).

(3) September 4, 2010: PGW issued a Monthly Statement to the Hotel, in which the \$203,209.74 charge was removed from the Hotel’s account.

(4) November 6, 2012: PGW issued a Monthly Statement to the Hotel, reimposing the \$203,209.74 charge (Exhibit to Complaint – included as an exhibit to this Brief).

(5) November 26, 2012: The Hotel filed its Complaint with the PUC challenging the \$203,209.74 charge for alleged unauthorized use of gas service.

3. CONDENSED CHRONOLOGICAL STATEMENT.

A. Background Facts.

The Hotel is a Holiday Inn-Express hotel located at 1305-11 Walnut Street in Philadelphia. The Hotel has been in existence for many years, and has purchased gas from PGW for many years as well.

In the summer of 1999, the Hotel contracted with Herman Goldner Co., a well-known mechanical contracting firm, to install two (2) Aero hot water boilers (Tr. 15:18-16:19; Exh. C-1). These boilers would be used to supply hot water for the Hotel’s laundry service and other purposes (Tr. 13:23-14:2).

Herman Goldner Co. installed the new boilers in the fall of 1999 (Tr. 16:20-16:23). On November 1, 1999, a PGW technician inspected the boilers and the fuel lines in the Hotel’s boiler/pump room (Tr. 22:11-22:15). The inspection was conducted according to PGW’s regulations, including a “Meter and Piping Inspection Section” checklist (PGW Exh. 10; Tr. 229:9-231:11). This checklist included the requirement that the PGW inspector “Inspect

ENTIRE fuel line whether or not the piping test is made”. (PGW Exh. 10) (emphasis in document).

The PGW inspector completed his inspection and issued two “Fuel Line Inspection” documents indicating that the piping system had “passed” PGW’s tests. (Exh. C-2). These Inspection documents were affixed to two (2) of the fuel lines leading to the boilers. (Tr. 17:18-19:21).

The Hotel began using the new boilers after the November 1999 inspection. The Hotel’s gas bills from PGW rose significantly after they went into operation (Tr. 21:1-21:11; PGW Exh. 2), giving the Hotel no reason to believe that all gas usage was not properly metered.

PGW’s records indicate that technicians visited the Hotel’s boiler room to work on the pipes at least three (3) times after the boilers were installed, and subsequent to PGW’s November 1, 1999 inspection:

- (i) On or about November 12, 1999, a PGW technician removed a gas meter from the pipes in the boiler room adjacent to the boilers. (PGW Exhibit 3, p.10).
- (ii) On or about May 12, 2000, a PGW technician visited the boiler room for a “field visit” to test the fuel line and for other purposes (PGW Exhibit 3, p. 10; Tr. 193:6-193:21).
- (iii) On or about July 24, 2007, a PGW technician performed an “oil change” on the gas meter (PGW Exhibit 3, p. 11; Tr. 194:5-195:24).

Each of these visits involved work on the gas pipes in the boiler room near the hot water boilers, and in the case of the November 12, 1999 visit, modification of the pipes by removing a gas meter. PGW’s records do not indicate that the technicians observed anything unusual, including theft of gas or any other wrongful practice by the Hotel that might result in unmetered

gas usage. This despite the fact that theft of gas has been a fairly frequent and significant problem for PGW (Tr. 194:5-195:24).

On April 24, 2008, a PGW technician visited the Hotel's boiler room while performing work on pipes outside the Hotel property. While there, he claimed that he found a PGW-installed bypass in the "open" position (PGW Exh. 1; PGW Exh. 3, p.9). This open bypass was allegedly supplying unmetered gas to the Hotel's two (2) hot water boilers (PGW Exh. 1; PGW Exh. 3, p.9). That same day a PGW technician told Jo Ann Bongart, the Hotel's General Manager, that the charge for the unmetered gas would be \$203,327.78 (PGW Exh. 3, p.8; Tr. 40:7-40:12).

The Hotel challenged PGW's gas charges on two (2) grounds: (i) there was no unauthorized use of gas, so there should be no charge for unmetered gas; and (ii) even if there was unmetered gas, PGW's calculation of the amount due was flawed because it incorrectly used a "degree day" methodology to calculate the amount due. The Hotel further argued that the bill was excessive because it assumed that any unmetered gas usage began after the piping inspection in November 1999, while there was no way to determine whether the unmetered gas usage actually began in 2000, 2007, or even 2008.

B. The PUC Hearing.

A PUC hearing was held on May 22, 2013. The Hotel presented four (4) witnesses:

(1) **Richard Sheibley**: Mr. Sheibley was General Manager of the Hotel between 1976 & 2000, and a hospitality consultant for the Hotel since 2000 (Tr. 12:3-13:19). He testified that the Hotel selected Herman Goldner Company to install new boilers because they knew the type of boiler and had an excellent reputation (Tr. 14:21-14:24).

Sheibley further testified that, after the boilers were installed in the fall of 1999, PGW visited the boilers in the “pump room” to certify the installation and authorize the Hotel to begin using them. (Tr. 17:9-17:15). The boilers were hooked up to the gas lines at the time of the inspection (Tr. 19:18-19:21). During the visit, the PGW inspector affixed a Fuel Line Inspection form to each of two (2) vertical pipes that fed the boilers, certifying that the gas system was approved to operate (Tr.18:12-19:8; Exh C-2). Sheibley stated that there was a significant increase in the Hotel’s gas bills after the boilers were installed (Tr. 20:23-21:11).

(2) **Jo Ann Bongart:** Ms. Bongart has been General Manager of the Hotel since October 1, 2000, and has worked at the Hotel since November 1, 1998 (Tr. 26:2-26:21). She testified that only Hotel security and maintenance personnel have access to the pump room where the pipes are located, which is always locked (Tr. 28:20-29:2). Ms. Bongart also stated that the Hotel has paid all gas bills received from PGW except for the bill that is the subject of the current dispute (Tr. 31:9-31:15). Bongart was not aware of anyone doing anything to cause any gas to go unmetered by PGW (Tr. 31:16-31:21).

Bongart first learned of PGW’s allegations that someone tampered with the Hotel’s gas pipes on April 24, 2008, when a PGW worker accused Hotel personnel of doing it. She denied the allegation, saying that no one touched the pipes (Tr. 32:6-32:14).

PGW that day (4/24/2008) told Bongart that they would be sending the Hotel a bill for \$203,000.00 (Tr. 33:23-33:25). The PGW technician said this amount was calculated by taking the Hotel’s average use of gas for the night they allegedly discovered the unmetered gas, and averaging it out back to the date they did the inspection on the fuel line. (Tr. 35:7-35:13). The actual bill was not received until August 2009 (Tr.38:11-25).

(3) **Gary Derr:** The next witness was Gary Derr, owner of Diversified Refrigeration. Derr has 38 years' experience with heating and refrigeration (Tr. 43:15-43:20). His company has serviced the gas-fired boilers at the Hotel since 2004 or 2005 (Tr. 44:13-44:16). Derr was not aware of any changes to the boiler pipes from the first time he saw them until April 2008 (Tr. 45:22-45:24).

Derr examined a photo taken by PGW of the gas pipes prior to April 2008, marked Exhibit C-3 (Exh. C-3 is identical to PGW Exh. 4, p.1). He identified four valves in the setup (#1 to #4 starting from the left side), and a lock on valve #4 (to the right in PGW Exh. 4, p.1) (Tr. 50:1-51:12). Derr testified that PGW installed the gas pipes to the boilers between valves #3 and #4, but by placing the lock on #4 instead of #3, PGW failed to place the lock on the correct pipes, thereby allowing gas to flow even if #4 was locked. (Tr. 50:22-53:25). Only if valve #3 were closed and #4 were opened, it would all be metered gas (Tr. 52:16-52:20). Derr further testified that only PGW could have placed the bypass lock on the gas pipes, and the Hotel or a contractor could not have removed the lock (Tr. 54:21-55:9).

In reviewing the photo in Exhibit C-3, Derr was certain that the lock on valve #4 was closed. (Tr. 65:14-66:3). The boilers were getting gas through valve #3. (Tr. 66:10-66:19).

Derr examined the Fuel Line Inspection forms placed by PGW on the two (2) boiler pipes in November 1999 (Exh. C-2). He testified that an open gas bypass would have been noticeable to the PGW inspector completing the Inspection forms when he inspected the pipes (Tr. 56:11-56:15). Derr did not believe that someone reconfigured the pipes after PGW's November 1, 1999 inspection (Tr. 57:13-57:15). Further, Derr contended that the pipe configuration was not intended as a bypass; rather, it was an alternate means of tying in the boilers without shutting down gas to the rest of the Hotel (Tr. 56:25-57:7).

Finally, Derr testified that he did not know when the configuration shown in Exhibit C-3 came about; he only knows that it was there when he first saw the boilers in 2004 (Tr. 71:8-71:18).

(4) **William McNamara:** The next witness was William McNamara, President of the Hotel's ownership entity. McNamara has been actively involved with the Hotel since 1986, and he oversees its operations (Tr. 74:22-75:7). When the boilers were installed, McNamara understood that Herman Goldner Company would pipe within 3 feet of the metered area, and that PGW would complete the installation (Tr. 76:20-77:2).

McNamara was not aware of anyone doing any work on the gas pipes from the boiler installation in 1999 until 2008. Further, he has no knowledge that the Hotel used any gas without paying for it during that time. (Tr. 78:18-79:7).

McNamara testified that the Hotel saw a "dramatic increase" in gas usage once the boilers were installed. Further, the bills started to increase dramatically again in the latter years between 2000 and 2008, due to new laundry standards imposed by the Intercontinental Hotel Group. Beginning in 2007, these standards required that the Hotel significantly increase its linen counts in guest rooms, and replace nylon bed spreads with duvets and duvet covers. This caused significantly more activity in the Hotel laundry, including hot water consumption from the boilers and the gas-fed dryers, and significantly more gas consumption (Tr. 81:3-82:20).

McNamara presented a chart showing the increased linen usage following Holiday Inn chain mandates (Exh. C-5; 87:17-89:5).

Concerning PGW's 2008 charges, McNamara said that PGW's initial bill -- based upon a degree-day calculation -- was incorrect, as the heating at the Hotel is all electric. So PGW then measured the average gas usage in the three (3) years following the re-metering (in 2008) and

weighed it against the average gas usage in the 8 ½ years prior to the re-metering, arriving at the same bill of approximately \$203,000.00 (Tr. 90:10-91:9). This method was also incorrect, as the calculation of alleged gas usage was heavily skewed to 2007 and 2008, when the increased laundry usage doubled the 8-year average consumption of gas (Tr. 91:13-92:5). Further, it is not possible to pinpoint the date when the use of unmetered gas may have begun, or if any gas was unmetered at all – making any calculation “highly theoretical” (Tr. 91:13-94:10).

McNamara offered an alternate analysis for alleged the amount of unmetered gas usage, assuming there was any unmetered gas at all. (Tr. 90:13-93:9; Exhibit C-6). This analysis is more accurate because it takes into account that gas usage doubled in 2007-2008 due to increased laundry, just before the alleged unmetered gas was discovered.

PGW then presented four (4) witnesses:

(1) **Anne Marie Cromley**: Cromley is PGW’s Senior Customer Review Unit Officer (Tr. 112:11-151:3) Cromley testified as to PGW’s records, including an interoffice message from PGW employee Thomas Seklecki to other PGW employees dated April 25, 2008. This message stated in part that “one of the FSD techs had found a company-installed bypass in the on-position ...” and that “[o]ur investigation discovered that a contractor had piped in the PGW’s company-installed bypass which is supplying unmetered gas to two Aerco water boilers ...”, and further that “[t]he boilers are supplying all the hot water to this 20-story 168-room Holiday Inn Hotel. All other gas appliances are being metered through a 5M rotary.” (Tr. 121:6-121:25; PGW Exh. 1).

(2) **Ralph T. Savage**: Savage is PGW’s Director of Commercial Resource Center, responsible for dealing with commercial account issues (Tr. 152:14-152:20). Savage is not an engineer, nor does he design gas piping systems or repair them as part of his work (Tr. 168:5-

169:2). Savage examined PGW Exhibit 5 – the bill calculation sheet used by PGW to generate the bill for the estimated gas usage for the boilers. He testified that Exhibit 5 was the basis for the original \$203,327.78 PGW bill (Tr. 162:10-163:17; PGW Exh. 5).

Savage then reviewed PGW Exhibit 7, a letter from the Hotel's engineer concerning PGW's method of calculating amounts due. Savage testified that PGW agreed that, since the gas was for hot water meters, it would "not be as accurate or consistent or customer relevant" for the gas bill to be "based on a degree methodology," which was the basis for the original bill (Tr. 164:10-164:23). Instead, PGW decided to re-do their estimate of charges based upon actual gas readings through the entire 8-year period of alleged unmetered usage (Tr. 164:25-165:22). PGW averaged the meter readings over the 8-year period, and then took an average of 3 years of actual data from a period after the alleged unmetered usage was discovered in 2008; this data was used to extrapolate the actual consumption for the alleged unmetered period. (Tr. 165:25-166:16). A bill was never sent to the Hotel based upon this analysis, however (Tr. 171:7-171:12; 174:4-174:7).

Under cross examination, Savage testified that he could not determine from the photographs in PGW's Exhibit 4 how long the pipes were set up as they appeared in those photographs; the conditions could have existed only the day before the photos were taken in 2008. Savage did not witness anyone connecting the pipes to the boilers (Tr. 169:6-170:20).

Further, Savage testified that PGW's analysis of the Hotel's gas usage did not take into account the increased laundry demand discussed by Mr. McNamara due to Holiday Inn regulations beginning in 2007 (Tr. 172:5-173:15).

Savage also testified that PGW, not the Hotel, installed the gas bypass in 1999 (Tr. 174:14-175:2). He further stated, concerning the November 1, 1999 piping inspection by PGW's

inspector, that the installation work must be completed before the inspection (Tr. 184:8-184:19).

Savage stated that the inspector inspects the pipes and the equipment setup at the site of the piece of equipment (Tr. 186:14-186:25).

Savage examined PGW Exhibit 3 (the list of PGW's contacts with the Hotel) and noted that it indicated that PGW conducted a field visit on May 20, 2000. During a field visit a technician will test the firing at the piece of equipment, test the connections, and test the fuel line. The inspector "may or may not have" noticed if a bypass or the pipes were done incorrectly. (Tr. 193:6-193:21).

Savage also noted another PGW visit for an "oil change" on July 24, 2007. Again he stated that the PGW technician "may or may not have" noticed an incorrect configuration. Savage testified that theft of gas is a "fairly frequent" problem for PGW. He did not know when the alleged theft of gas started at the Hotel; PGW had no evidence that it did not start the day before it was discovered in April 2008. (Tr. 194:5-195:24).

Under questioning from the Court, Savage reviewed PGW Exhibit 4 and stated that the original configuration of the pipes was a "parallel meter set", with both gas meters there at the same time. If something changes in the customer's facility, PGW's meter shop will determine if only one meter is needed "based on load," and pull one of the meters. (Tr. 198:12-199:1). With pipes 3 and 4 closed, in order to feed the boilers pipes would have to be hooked into the yellow fuel lines somewhere after the first meter. (Tr. 201:11-201:23). Savage speculated that valve three might have been locked or damaged, or there might have been a flange set on the bottom of that valve to stop the gas; he didn't know (Tr. 204:6-204:23).

However, he testified that it was not his contention that the Hotel created the piping arrangement to get unmetered gas. (Tr. 204:24-205:3). Further he did not believe that the Hotel opened valve 3 (Tr. 205:13-205:17).

(3) **Emil Oetinger:** PGW next called Emil Oetinger, PGW's Manager of the field services department. Oetinger is responsible for the field service technicians, including the meter reading department, revenue protection, dispatching operation, and the meter shop, and he works on instances where there is unauthorized usage of gas (Tr. 218:6-218:21).

Oetinger testified that PGW Exhibit 3 indicates that a meter was removed on November 11, 1999 (Exh. 3, p. 11; Tr. 221:4-221:9). He also stated that, in order for the gas for the boilers to be metered, the fuel lines for the boilers would have to be connected to the vertical portion of the line marked "Customer fuel line" in PGW Exhibit 4, p.1 (Tr. 226:24-227:12).

Oetinger also testified about PGW Exhibit 10, entitled "Meter and Piping Section", including a checklist from the operations manual for PGW's field services department. He stated that, when a PGW technician is dispatched to a new installation, he will inspect the customer's fuel line. The inspector will walk the entire line to see how it's connected and what it's connected to. (Tr. 229:4-230:6). Concerning theft detection, PGW is "always counseling" its service technicians to "be on the lookout for that type of situation" (Trans 233:3-233:13).

Oetinger also testified that the appliance must be connected to the fuel line at the time of the inspection. However, PGW does not typically tie the meter set into the fuel lines at the time of the fuel line inspection; rather, PGW would customarily tie the fuel lines to the meter afterwards, on another visit. (Tr. 234:17-237:17).

On cross examination, Oetinger admitted that PGW's technician's notes from April 24, 2008 state that the boilers were found tied into a PGW installed/locked bypass, *not* a customer-

installed bypass; further, he had no personal knowledge that it wasn't a PGW-installed bypass (PGW Exh. 11, p.2; PGW Exh. 3, p.4; Tr. 237:18-238-19). Further, he admitted that Exhibit 10 – PGW's meter and piping inspection checklist -- indicated that the inspector should have inspected the entire fuel line during the November 1, 1999 inspection. So if an unauthorized tapping into PGW's bypass existed at that point, the inspector should have noticed it; and the fact that he didn't makes it possible it wasn't there (Tr. 238:20-240:2).

Oetinger also stated that valves three and four must have been closed to remove the former parallel meter on November 12, 1999. But then gas would have stopped flowing to the boilers (Tr. 241:1-242:1).

Further, Oetinger testified that PGW's technicians were wrong when they wrote that during the April 24, 2008 inspection they found the boilers tied into and running off a "PGW installed/locked bypass". He stated that the technician applied the wrong terminology (Tr. 237:18-238:14; Tr. 253:14-253:22).

Oetinger also stated that PGW's Interrogatory response #2 was wrong when PGW stated that "The active configuring the pipes into the "PGW bypass" allowed the newly-installed water heater to operate with unmetered gas ..." and made other references to a PGW bypass, as Oetinger testified that there isn't a bypass in the piping system at all (Tr. 242:11-243:17; PGW Response to Interrogatories #2). PGW Exhibit 1, which states (in part) that "our investigation discovered that a contractor had piped into PGW's company-installed bypass" was also wrong (Tr. 253:23-254:3). Oetinger further stated that he didn't know who installed the piping to the boilers (244:5-244:9).

In addition, Oetinger testified that it's possible that the piping between valves 3 and 4 (which allegedly allowed unauthorized use of gas) wasn't there on July 24, 2007, the date

PGW's Exhibit 3 indicates that a PGW technician was on the premises for an oil change (Exh. 3, p. 5; Tr. 248:15-249:1). Further, it's possible that any unmetered gas may have started merely days before the April 24, 2008 discovery (Tr. 249:4-249:15). Finally, Oetinger stated that he didn't know of anything that suggests that PGW's own technicians didn't cause any alleged unmetered gas to flow to the boilers. (Tr. 249:16-249:20).

(4) **Bryan Dallas:** Dallas is a PGW technical support engineer. Dallas discussed an alternative calculation of gas usage by the Hotel, developed after learning that that the gas used was for domestic hot water usage rather than heat. His analysis was summarized in PGW Exhibit 8. He testified that PGW's original bill was "not the best analysis" because it was primarily based on heating degree days. (Tr. 256:23-260:2).

Discussing PGW's formula in PGW Exhibit 8, Dallas testified that the total amount for unauthorized gas usage by the Hotel should be \$314,035.51 (Exh. 8; Tran. 262:16-262:21). This calculation did not consider the increase in hot water usage caused by the change in the Holiday Inn linen policy discussed by Mr. McNamara, however (Tr. 263:25-264:3).

On cross-examination, Mr. Dallas was questioned as to what happened internally at PGW with respect to his \$314,035 analysis, since PGW's bill for unmetered gas remained as originally assessed at \$203,000. Dallas replied that he didn't know whether PGW had accepted the alternative calculation. (Tr. 266:2-269:22).

SUMMARY OF ARGUMENT

The \$203,209.74 bill for gas usage imposed on the Hotel by PGW was wrongly assessed, and must be struck down. PGW itself admitted that this bill was incorrectly calculated based upon a "degree day" analysis, which PGW rejected after further consideration of the facts.

Because the amount claimed by PGW has no basis in fact, it should be voided and the debt of the Hotel to PGW cancelled.

Further, the evidence indicates that the piping system was installed properly, and it remained unchanged and in proper order until PGW allegedly discovered unauthorized use of gas in April 2008. The Hotel demonstrated that it installed the boilers using an experienced contractor, and that this installation was approved by PGW in November 1999. The Hotel authorized no one to make any changes to the piping system after this approval, and is not aware of any changes being made by anyone. In addition, at least three PGW technicians visited the Hotel premises subsequent to the installation between 1999 and 2007, and observed no defects in the piping system or other improprieties that could cause gas to be unmetered.

Even if it could be shown that the Hotel used unmetered gas, there is no way to measure the amount of gas used. PGW presented no evidence to show when the alleged unauthorized use of gas began. Thus, any effort by PGW or the Court to revise the amount due would be based wholly on speculation. Under the circumstances that would be inappropriate.

ARGUMENT

1. PGW'S BILL OF \$203,209.74 FOR UNAUTHORIZED GAS USAGE IS NOT VALID, AS PGW ITSELF ADMITTED THAT THE CALCULATION IS WRONG.

Notwithstanding the extensive discussion at the hearing about piping and bypasses, the real issue in this matter is the accuracy of a \$203,209.74 bill charged to the Hotel by PGW. If that bill is not based in fact, the bill should be struck down and the charges should be removed in their entirety. The other facets of this dispute are really secondary.

In this case, the Hotel presented evidence that, except for the invoice that is the subject of this dispute, it paid all charges levied by PGW over the course of many years in a timely manner. (Tr. 31:9-31:15). PGW's documentary evidence indicates the same. (See, e.g., PGW Exh. 2).

On the other hand, PGW's own officials provided ample and conclusive evidence that their \$203,209.74 bill is grossly in error.

PGW Director of Commercial Resource Center Ralph Savage testified that PGW Exhibit 5 (entitled "PGW Bill Calculation") was used by PGW in 2008 to generate the original bill for the unauthorized gas usage in the amount of \$203,327.78 (Tr. 162:10-163:17; PGW Exh. 5). Savage stated that the amount due in this bill was calculated using a "degree methodology", but this was wrong because it was not "accurate or consistent or customer relevant" for the bill to be calculated this way (Tr. 164:10-164:23).

According to Savage, PGW recognized this inaccuracy and later recalculated their estimate of charges based upon the Hotel's actual gas readings through the entire 8-year period of alleged unmetered usage. (Tr. 165:25-166:16). Savage admitted that a bill was never sent to the Hotel based upon this analysis, however (Tr. 171:7-171:12; 174:4-174:7).

Bryan Dallas, PGW's technical support engineer, further discussed this alternate analysis – which is also summarized in PGW Exhibit 8. Dallas admitted that PGW's original 2008 bill was "not the best analysis" because it was primarily based upon heating degree days. (Tr. 256:23-260:2). He testified that his department at PGW recalculated the total amount for unauthorized gas usage, and arrived at the sum of \$314,035.51 (PGW Exh. 8; Tr. 262:16-262:21). This calculation (on PGW Exhibit 8) was more accurate because it considered that the gas to the boilers was used for hot water rather than heat. Exhibit 8 did not consider the increase in laundry caused by changes in Holiday Inn's linen policy starting in 2007, however. (Tr. 263:25-264:3). So it was flawed as well.

This revised calculation is also flawed because PGW itself never adopted it. Dallas admitted that he did not know whether PGW accepted this alternative calculation (Tr. 266:2-

269:22). In reality it is clear that PGW did not, because PGW never billed the Hotel for \$314,035.51. Rather, the Hotel was only invoiced by PGW for \$203,209.74 – the amount stated in the Hotel’s Complaint. PGW’s analysis espoused by Savage and Dallas, and set forth on PGW Exhibit 8, is therefore merely a “red herring” that is not relevant to these proceedings.

PGW had a responsibility to present the Hotel with an invoice for the value of gas used. In this instance – even if one accepts, *arguendo*, that the Hotel used unmetered gas -- PGW clearly failed to perform that duty. PGW presented the Hotel with an invoice for \$203,209.74, an amount that even PGW admits was wrongly calculated and grossly inaccurate. PGW even offered alternative means that it considered to determine the amount due -- discussed by Savage and Dallas and set forth on Exhibit 8. This evidence proves not only that PGW’s degree-day calculation used to prepare the invoice was flawed. More importantly, it demonstrates that PGW itself knew the invoice presented to the Hotel and the amount due therein is accurate.

If PGW rejected its own methodology for calculating the Hotel’s bill, the inaccuracy of PGW’s \$203,209.74 invoice is conclusively established. The Hotel respectfully suggests that this Court should cancel its indebtedness to PGW in full.

2. EXAMINING THE UNDERLYING FACTS, PGW’S ASSESSMNT OF \$203,209.74 FOR UNAUTHORIZED GAS USAGE CANNOT STAND BECAUSE PGW HAS NOT PRESENTED EVIDENCE THAT UNAUTHORIZED GAS USAGE ACTUALLY OCCURRED.

PGW’s claim for \$203,209.74 for unauthorized gas usage must also fail because there is no evidence that any unauthorized or unmetered gas was ever used. The evidence actually demonstrates that all gas used by the Hotel was paid for.

The Hotel presented consistent and persuasive evidence that it paid for all gas used. Mssrs. McNamara and Sheibley testified that they were involved in engaging Herman Goldner

Company, a respected contractor, to install the two (2) gas boilers. The boilers were inspected by a PGW technician on November 1, 1999 according to the PGW Inspection checklist which required, *inter alia*, an inspection of the entire fuel line (PGW Exh. 10). The boilers and the fuel line passed that inspection. It is certainly reasonable to assume that PGW's fuel line inspector would have found any unauthorized gas usage during his inspection.

The gas piping system was subsequently inspected by PGW on several occasions prior to the alleged discovery of unmetered gas in 2008:

- A meter was removed from the piping on November 12, 1999 (PGW Exh. 3, p.11);
- A field visit was conducted on May 12, 2000, during which the gas connections, gas flow, and fuel line may have been tested (Tr. 193:14-193:21);
- The remaining gas meter underwent an oil change on July 24, 2007 (PGW Exh. 3, p.5).

To conclude that the Hotel used unauthorized gas, one must first determine that a situation existed where gas was going to the Hotel's boilers improperly. The testimony of PGW's own personnel demonstrates that this was unlikely, however. Ralph Savage, PGW's Director of Commercial Resource Center, testified that PGW itself installed the gas bypass in 1999 (Tr. 174:13-175:2). He also testified that PGW tested the pipe connections and the fuel line during the May 12, 2000 field visit. (Tr. 193:6-193:21).

In addition, Savage testified that theft of gas is a fairly frequent problem for PGW. (Tr. 194:5-195:24). PGW Manager Oetinger also stated that PGW is "always counseling" its technicians to be on the lookout for unauthorized use of gas. (Tr. 233:3-233:13).

Given all of these facts, it is very unlikely that the Hotel could have used unauthorized gas without PGW discovering it. To do so would mean that this theft was undiscovered notwithstanding that PGW itself installed the bypass that allegedly allowed the theft. Further, it would mean that the unmetered usage went undiscovered notwithstanding the November 1, 1999 inspection and three (3) subsequent visits to the Hotel's boiler room by PGW technicians prior to 2008 to work on the pipes and the meter, with those technicians under orders to look out for unauthorized use of gas. Under these circumstances, it is just not credible to conclude that unauthorized usage occurred.

It should also be noted that PGW produced no credible evidence of the amount of gas allegedly used without authorization. All of the estimates of unmetered gas – be they in the original bill presented to the Hotel or the revised calculation discussed by Savage and Dallas (PGW Exhibit 8) were based on theoretical concepts without basis in fact. Given that the Hotel's actual gas usage increased materially following the Holiday Inn's mandated linen regulations implemented in 2007 (Tr. 91:13-92:5; PGW Exh. 8, p.5), it is more likely that the Hotel's metered gas usage increased as a result of this increased laundry factor, rather than any fixes to run all the gas through the meter.

Once PGW "discovered" the alleged unmetered gas in April 2008, PGW could have performed tests to measure the amount of gas allegedly bypassing the meter before it "fixed" the pipes in the boiler room. If those tests were done, there would be no doubt about the Hotel's use of unmetered gas, or the amount of that unauthorized use. But PGW chose not to do any tests.

In sum, the Hotel presented evidence that it took all appropriate steps to properly install the gas heaters. Conversely, PGW presented no proof that unauthorized gas usage occurred, or

concerning the amount of such unmetered usage. Thus PGW's invoice should be rendered invalid.

3. PGW CANNOT PROVE THAT THE HOTEL WAS THE CAUSE OF ANY UNAUTHORIZED GAS USAGE; IN FACT, PGW'S OFFICIALS CANNOT AGREE ON THE UNDERLYING CAUSE OF ANY UNAUTHORIZED GAS USAGE.

Even if PGW could prove that some quantity of unauthorized gas usage in fact occurred, PGW cannot agree on the cause of such unauthorized gas usage. Given PGW's internal disagreements, it is wrong to hold the Hotel responsible for this problem.

Consider these conflicting statements of PGW officials:

A. PGW's Interrogatory Responses:

- *PGW's Interrogatory Response #2:* "The active [sic.] configuring the pipes into the PGW bypass allowed the newly-installed water heater to operate with unmetered gas" (Tr. 242:11-243:17).
- *PGW Manager Oetinger:* "... there isn't a bypass there." (Tr. 243:5).

B. PGW's Technical Notes (PGW Exhibit 11, p.2):

- *PGW Technicians:* "...found out AWH boilers were found tied into and running off PGW installed/locked bypass."
- *PGW Manager Oetinger:* "I think it's actually an application of a wrong terminology by our technician." (Tr. 238:12-238:13). "Again, looking at this meter set as it's presented here, there is no PGW-installed bypass." (Tr. 253:4-253:7).

C. PGW's Internal Memorandum (PGW Exhibit 1):

- *PGW Internal Memorandum:* "our investigation discovered that a contractor had piped into PGW's company-installed bypass." (PGW Exhibit 1; Tr. 253:23-253:25).

- *PGW Manager Oetinger*: “I think they used the wrong terminology.” (Tr. 254:2).

D. Testimony of Ralph Savage, PGW’s Director of Commercial Resource Center:

- *Savage*: “They [PGW] removed the one [the meter] on the left between valves three and four, and then they [PGW] installed the bypass there” (Tr. 174:23-174:25).
- *Savage* (replying to the question: “*Do you have a belief as to who installed the bypass?*”): “I think the contractor did.” (Tr. 181:11-181:16).

These contradictory statements by PGW officials demonstrate confusion and disagreement internally at PGW on key matters pertaining to the allegations of unauthorized gas usage. Clearly PGW’s officials disagree on who installed the gas bypass. Moreover, they cannot agree on whether a bypass existed at all. They also cannot agree on when the bypass was installed – if it existed at all.

PGW’s disagreements go to the heart of their allegations about the Hotel’s use of unauthorized gas. PGW charged that the Hotel piped into the bypass, thereby allowing unmetered gas to flow to the boilers. (Tr. 242:11-243:17). Without PGW’s officials agreeing that a bypass even existed, or who installed it, however, PGW cannot prove the cause of any unauthorized gas usage. Moreover, PGW’s allegations that unauthorized gas usage occurred are similarly not credible. PGW’s entire claim cannot stand given these serious uncertainties.

4. ANY DETERMINATION OF ANY AMOUNT DUE FROM THE HOTEL WOULD BE SPECULATIVE AND NOT BASED FIRMLY IN FACT; BUT THE HOTEL’S FORMULA IS THE MOST ACCURATE.

The Hotel believes that it has presented a strong case to strike PGW’s charges. However, the Hotel recognizes that the Court may consider the evidence and determine that some quantity

of unmetered gas was used, and then assess the Hotel for an amount due based upon that determination.

In order to assess charges, the Court would have to determine when the unmetered gas usage began. This would be difficult, as PGW offered no testimony or evidence of when it believes the alleged unauthorized use of gas began. In fact, both Savage and Oetinger testified that it might have started only the day before the discovery of the unmetered gas on April 24, 2008 (Tr. 169:6-170:20; 249:4-249:15).

It is also important to note once again that none of PGW's inspectors or technicians noticed any theft of gas or anything else remiss on three (3) visits to the property prior to April 2008. Because PGW considers theft of gas to be a "fairly frequent" problem (Tr. 194:5-195:24) and it is "always counseling" its service technicians to "be on the lookout" (Tr. 233:3-233:13), it is reasonable to conclude that PGW would have discovered any unmetered gas if the problem existed prior to its technician's last known visit on July 24, 2007. Even using this 2007 date is problematic, however, because there is no evidence to suggest that unauthorized gas usage began then or at any time thereafter. The only date there is any allegation that unauthorized gas usage was witnessed is April 24, 2008, the date the alleged problem was "discovered" by PGW.

If the Court were to conclude that unauthorized gas usage occurred and determined a date when that usage began, the Court would then need to select a means for determining the amount of gas used. The Hotel suggests that the formula described by Mr. McNamara and set forth on Exhibit C-6 is the most accurate. As discussed earlier, PGW admitted that its formula upon which the bill was based is flawed. Further, the alternate formula described by Mr. Dallas and set forth on PGW's Exhibit 8 failed to consider the increased laundry usage demanded by changes in Holiday Inn's linen policy in 2007 (Tr. 263:25-264:3).

The Hotel's formula (Exh. C-6) estimates that the unmetered gas consumption was 134,609 CCF if it is determined that unmetered gas was used the entire period from November 1, 1999 through April 28, 2008 – a period of approximately 3,100 days. If 134,609 is divided by 3,100, a daily consumption of 43.42 CCF is the result. Thus, if the Court were to assess an amount to be paid by the Hotel, it could follow the Hotel's formula and arrive at a result by multiplying 43.42 by the number of days unauthorized gas was used, and then charging according to the yearly rates set forth on PGW's Exhibit 8, page 1.

Finally, the Hotel suggests that the Court consider the Pennsylvania Code's limits on a public utility's recovery in the case of meter error. Because PGW agrees that even if unmetered gas occurred, the Hotel did not create the piping arrangement intending to get unmetered gas (Tr. 204:24-205:3), if the Court finds that unmetered gas occurred and determines to charge the Hotel for it, by analogy the Code's limits on billing charges for meter error should be applied in this matter.

52 Pa. Code § 59.22(b), entitled "Slow meters", provides as follows:

If, upon a test of a gas meter it is found to have an average error of more than 2.0% slow, the public utility may render a bill for the gas consumed but not covered by previous bills rendered, for a period equal to *½ of the time elapsed since the last previous test, but not to exceed 3 months*. If the period of registration error may be definitely fixed, the charge may be computed for the period.

52 Pa. Code § 59.22(b) (emphasis added). This formula is fair to apply in this situation, as an unintentional situation that resulted in unmetered gas is akin to a "slow meter". Applying this method, the Court would need to determine the amount of unauthorized gas used, and then charge the Hotel for the use of that gas for up to 3 months. Such a result would be consistent with the spirit of the Code's regulations.

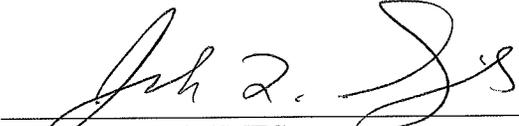
Again, the Hotel emphasizes that it does not agree with any approach assessing charges, believing that the record includes no persuasive evidence for concluding that unauthorized gas was used, and/or a date that this use began. Further, given that this inquiry is primarily about the accuracy of the \$203,209.74 bill, the Hotel suggests that the Court need not fashion its own remedy. However, if the Court chooses in its judgment to make an award in PGW's favor, the Hotel suggests that this is the best way to calculate the amount due.

CONCLUSION

The Hotel has proven that the \$203,209.74 invoice is not supported by the facts or evidence in this matter. The Hotel has met that burden through its own testimony, as well as the evidence and testimony of PGW. Moreover, even PGW's witnesses admitted that that \$203,209.74 invoice is materially wrong. Given these facts, Hotel suggests that the invoice should be rejected and the Hotel's debt cancelled.

Respectfully Submitted,

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