

**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	:	

**REPLY BRIEF OF COMPLAINANT
1305 WALNUT ST. CORP. d/b/a HOLIDAY INN EXPRESS**

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

ARGUMENT

A. THE HOTEL PROVED THAT PGW ACTED UNREASONABLY.

PGW alleges that the Hotel failed to show that PGW acted unreasonably or provided unreasonable service in violation of the Public Utility Code in the discovery of gas theft or the billing for it. (PGW Brief pp. 4-7). This is untrue. The testimony at the hearing and other evidence made it abundantly clear that PGW failed to perform at acceptable levels. PGW is simply ignoring the facts.

Before considering the Hotel’s detailed reply, the Hotel suggests that the Court review the basic facts of this situation. All of these facts (with references to the record) were presented in the Hotel’s main Brief:

- (i) PGW inspected and passed the Hotel’s gas boiler piping upon installation;

(ii) PGW failed to notice any improprieties despite several visits to the Hotel by technicians to work on the pipes in the subsequent 9 years;

(iii) Upon discovering the alleged unmetered gas, PGW failed to perform tests to determine the exact amount of gas passing through to the boilers before it re-configured the pipes and eliminated the “evidence”; and

(iv) PGW issued an invoice for over \$203,000 in allegedly unmetered gas immediately upon discovering the issue in April 2008, and then stuck to this amount in subsequent bills despite acknowledging that this amount is erroneous.

The remainder of this Reply Brief addresses the specific allegations raised by PGW in its main Brief. However, the Hotel respectfully suggests that the merits of this matter may be determined based upon the simple and uncontroverted facts listed above.

1. The Evidence Failed to Show that the Configuration of the Piping Serving the Water Heaters Bypassed PGW’s Meters and Supplied Unmetered Gas.

As an initial matter, the basic ideas at the heart of PGW’s allegations are very much in doubt. PGW cites the Public Utility Code at 66 Pa.C.S.A. §1501 *et seq.* for the directive that “Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, ...”. (PGW Brief p. 5). PGW contends that it determined that the piping configuration caused unmetered gas, and it then took steps to investigate the “theft of service” and calculate a bill based upon information it had at the time.

The Hotel’s disputes that there was any “theft of service”, and the record supports the Hotel’s contention. Each of the Hotel’s witnesses – Sheibley, Bongart, Derr, and McNamara -- testified that they had no knowledge that the Hotel stole gas, used gas that was not properly metered, or performed any work on the pipes other than routine maintenance. (Tr. 21:12-17; 32:22-25; 29:23-30:4; 69:2-7; 78:18-79:7; 94:18-95:8). Sheibley, Bongart, and McNamara were

in charge of the Hotel from 1999 through the present, so they would certainly have knowledge of any work on the pipes.

Just as important, PGW's *own* witnesses support the Hotel's contention that it did not commit "theft of service." PGW Director Ralph Savage testified:

Q. Is it your testimony then that the customer, the hotel, created all of this so it would get unmeasured gas?

A. No, it's not my contention that did this to get unmeasured gas.

(Tr. 204:24-205:3). Savage also testified, concerning the allegation that the Hotel unlocked the bypass:

Q. Is it your belief that the customer opened valve three?

A. No. It's not my belief –

Q. The unlocked valve?

A. – that they did that, no.

(Tr. 205:13-17). PGW Manager Oetinger testified in a similar manner, stating that PGW itself may have caused the problem leading to theft of gas:

Q. ... Do you know of anything that suggests that PGW did not cause this – any alleged unmeasured gas flowing through to the boilers, PGW's own technicians didn't cause it?

A. I don't know.

(Tr. 249:16-20).

Because PGW's testimony clearly demonstrates that PGW itself didn't believe that the Hotel committed acts to steal gas, the record fails to prove that theft of gas by the Hotel occurred.

It should be noted that PGW presented no witnesses with first-hand knowledge of the gas pipes at the Hotel between 1999 and 2008, or the alleged discovery of unmeasured gas in 2008.

(See, *e.g.*, Tr. 183:19-184:5). All of PGW's evidence to prove theft was found in documents

containing alleged statements of technicians who were not asked to testify at the hearing. This seems hardly adequate to refute the Hotel's first-hand accounts of its proper conduct, and testimony that no work was done on the pipes on the Hotel's behalf that would result in unmetered gas.

PGW's reference to the Public Utility Code's requirement that a utility furnish and maintain adequate facilities highlights another of PGW's failures: its failure to discover the alleged improper piping leading to unmetered gas despite at least four (4) visits to the Hotel by PGW technicians. If the problem existed, it is reasonable to expect that PGW would have caught it on each of those visits. PGW failed to offer any evidence as to what made the alleged improper piping so "discoverable" in April 2008 so that it could be found by the technician on the premises for other purposes at that time.

PGW in its Brief denies that its technicians exacerbated any unmetered gas problem by failing to discover the alleged theft of service during their visits. (PGW Brief pp. 6-7). However, once again PGW's witnesses testified otherwise, and prove that PGW failed to meet the PUC's standards.

As discussed extensively in the Hotel's main Brief, PGW recognized theft of gas as a significant and frequent problem, and its technicians were on alert for any impropriety. (Hotel Brief p. 21). Oetinger testified that PGW's meter and piping inspection on November 1, 1999 should have included an inspection of the entire fuel line, so the inspector should have noticed any unauthorized tapping into PGW's gas line. (Tr. 238:20-240:2). He further stated that PGW is "always counseling" its service technicians to "be on the lookout" for theft. (Tr. 233:3-233:13).

Given this testimony and the fact that the alleged unmetered gas wasn't discovered until April 24, 2008, there are only two (2) possible conclusions: (i) That unmetered gas didn't exist for all or part of the relevant time period; or (ii) That PGW's technicians were negligent in not discovering it during their four (4) visits before April 2008. Assuming, *arguendo*, that theft of gas did happen, PGW's testimony is proof positive that PGW failed to provide reasonable service by not discovering the problem earlier than it did.

The second part of PGW's attempt to prove it adhered to the adequate and reasonable service standard relates to its calculation of the Hotel's bill. PGW's claims fail in this regard as well, as there is compelling and clear evidence that PGW's \$203,209.74 bill is inaccurate. Further, PGW admitted that its "recalculation" of the Hotel's bill is similarly inaccurate.

PGW's initial calculation of the amount allegedly due is undoubtedly wrong. PGW's own employees testified to that fact. Savage testified that the bill, calculated using "degree methodology", was not "accurate or consistent or customer relevant". (Tr. 164:10-164:23). This is why PGW abandoned this bill and recalculated their estimate of charges due based upon actual gas readings (Tr. 171:7-171:12; 174:4-174:7). Since PGW didn't stand behind its own bill, how can it expect the PUC to find the charges to be reasonable?

PGW attempts to demonstrate that it provided reasonable service by stating that it recalculated the Hotel's charges using a better methodology. As set forth in the Hotel's main Brief, this methodology was similarly defective because it didn't account for an increase in the Hotel's hot water usage for laundry. Also, this recalculation assumes that the unmetered gas usage started at the time of boiler installation in November 1999, an assumption for which PGW offered absolutely no proof. In fact, PGW offered no evidence that the alleged theft began at any particular point in time – not in 1999, or in 2000, 2007, or even 2008.

Moreover, PGW's recalculation cannot be used to demonstrate that PGW acted reasonably, because PGW didn't issue a bill using that methodology. To PGW, the recalculation was just an idea that it failed to act upon by re-issuing an invoice based upon that new analysis.

Given all of these facts, it is clear that PGW failed to act reasonably in accordance with the Public Utility Code. The charges should be struck down.

2. The Evidence Does Not Prove That the Piping Bypassed PGW's Metering Apparatus & Supplied Unmetered Gas to Operate the Hot Water Heaters.

The issues of the alleged bypass of PGW's meter and use of unmetered gas were discussed extensively in the Hotel's main Brief. (Hotel Brief pp. 16-20). The Hotel will not repeat those facts here, except to reiterate that PGW's expert Oetinger repeatedly testified that there was no bypass installed in the pipes. (Tr. 243:5; 253:16-253:22). If PGW's own manager doesn't believe that a bypass existed – the basis for its allegation of theft of gas – how can it ask the PUC to find that the Hotel used unmetered gas?

In its main Brief, the Hotel proved that it paid for gas over the course of the period at issue; that the boilers were installed professionally and thoroughly inspected by PGW; and that PGW technicians performed work on the pipes at least three (3) times subsequently without noticing anything remiss. Further, the Hotel noted that PGW failed to perform any tests on the pipes after their "discovery" in April 2008 to prove that unmetered gas was actually used, or to measure the amount of gas allegedly stolen. Instead, PGW just reconfigured the pipes and eliminated any chance to prove with certainty that a measurable amount of unmetered gas was used. Thus, there was no proof of a wrongful bypass, and no proof of a theft of gas, and the charges should be stricken.

3. PGW Itself May Have Caused – and Certainly Exacerbated – Any Non-Metering of Gas That May Have Occurred.

As stated above and in the main Brief, PGW's failure to detect any improper piping for up to eight (8) years despite several inspections proves that either the impropriety didn't exist, or that PGW's technicians failed to detect a discoverable problem.

It is worth noting that in its Brief, PGW "forgot" to mention a technician's visit on November 12, 1999 to remove a parallel gas meter on the pipes. This visit was noted on PGW Exhibit 3 and prominently discussed by PGW Director Savage and Manager Oetinger because the technician failed to note any unauthorized piping even though he worked in the immediate area of the boiler connections. (Tr. 175-176; 180; 247:7-248:14).

Savage and Oetinger also testified about a PGW field visit on May 12, 2000 – also not mentioned in PGW's Brief -- when the technician may have tested the fuel line and gas flow. (Tr. 193:6-193:240:9-240:17). So it appears that PGW visited the property on two (2) different occasions not mentioned by PGW – five (5) visits in all -- before the alleged unmetered gas was discovered in 2008.

The record demonstrates that all on-site work by PGW's technicians during their many visits was performed on the very same group of pipes that PGW alleges were allowing gas to flow unmetered. The record further demonstrates that PGW's technicians were told to be on alert for suspicious piping that could allow theft of gas. In the face of these facts, to argue that PGW acted reasonably even though it failed to catch over \$203,000 worth of unmetered gas for nine (9) years is plainly a meritless claim.

Finally, one has to wonder how the technician "discovered" the alleged bypass in April 2008. This technician visited the Hotel during a project on pipes under nearby Sansom Street –

he was not on the Hotel premises for the purpose of investigating unmetered gas. Because the tech was able to notice the alleged problems with the Hotel's pipes under the circumstances, the set-up allegedly allowing unmetered gas must have been plain to see and readily discoverable. Since the defect was not discovered earlier by PGW's trained technicians, it must not have existed at all, or it was placed in the pipes between the 2007 and 2008 visits.

4. "Theft of Service" Was Not Proven.

PGW alleges that theft of service occurred. This allegation is based upon a single report made by PGW personnel on April 24, 2008 – the day that PGW claims its technicians discovered that the hot water heater pipes “were configured by someone other than PGW for the purpose of bypassing the measurement of such gas”. (PGW Brief p. 7). But is this really true? The evidence actually indicates it is not.

As stated earlier in this Reply Brief, PGW Director Savage testified that he did not believe the Hotel configured the pipes in order to get unmetered gas. Savage also stated that he did not believe the Hotel unlocked the alleged bypass on valve 3 (p. 2, *supra*; Tr. 204:24-205:17). Manager Oetinger also testified that he didn't know anything to suggest that PGW technicians themselves didn't cause the problem (p.2, *supra*). Further, Oetinger found several errors in the technicians' report of the conditions they found in the pipes on April 24, 2008, including the statement that a bypass even existed (Hotel Brief p. 19). The presence of a bypass is the key to PGW's allegations.

Given these material conflicts in PGW's testimony and the internal disputes at PGW as to what happened, it is apparent that there was no proof of theft of service or any other use of unmetered gas.

B. THE HOTEL IS NOT OBLIGATED FOR THE PAYMENT OF THE UNMETERED GAS CONSUMED BY THE HOTEL'S TWO HOT WATER HEATERS.

1. PGW Provided Two (2) Different Calculations of Amounts Allegedly Due for Use of Unauthorized Gas, But They Were Both Erroneous; Further, The Second Calculation is Irrelevant Because PGW Never Issued a Bill Based Upon It.

PGW's argument about its calculation of the Hotel's bill (PGW Brief pp. 8-9) includes misleading and incorrect statements about discussions between PGW and the Hotel over a period of more than four (4) years intended to arrive at a settlement. The Hotel disputes PGW's summary, including the allegation that the Hotel did not respond to PGW's "new analysis" until the Hearing date.

In any event, PGW's allegations are largely irrelevant to the matter now before the PUC. PGW never issued a bill except using its first calculation method -- the "degree day" calculation that even PGW admitted was erroneous. PGW also admitted that its second calculation method was wrong, since it failed to consider the Hotel's increase in laundry usage after 2007.

Finally, PGW's calculations assume that any unmetered gas usage began on November 1, 1999, the date that PGW's inspector approved the new boiler piping after a full inspection thereof. If the PUC is willing to accept that unmetered gas started that date and continued for nearly 9 years unabated despite 4 or 5 subsequent visits by PGW technicians, then this assumption may be correct. But since the evidence and the testimony of PGW's witnesses indicate that any unmetered gas began after that date, PGW's bill must be wrong.

2. The Hotel Demonstrated that Increased Hot Water Usage Due to Laundry Began in 2007.

PGW defends its erroneous bill calculation by complaining that the Hotel did not provide evidence of a 2007 increase in hot water usage due to Holiday Inn brand regulations until the day

of the PUC hearing. That is false. It is also false that the Hotel provided no substantiation of the timing and magnitude of changes. In fact PGW provided this information itself at the Hearing.

Look at PGW's Exhibit 8, page 5. This exhibit, provided to PGW by the Hotel to demonstrate the increased laundry usage, is part of PGW's exhibit package that was brought to the Hearing. That being the case, how could it possibly have been produced only on the day of the Hearing? The fact is that the Hotel furnished this chart and other evidence of its increased hot water usage to PGW months before. Savage's testimony backed this up: he told the Court that McNamara and Bongart discussed the increases in the laundry usage with him in 2012. (Tr. 173:16-173:22). PGW's allegations in its Brief to the contrary are false, and should be disregarded.

In terms of the Hotel substantiating the timing and magnitude of changes, PGW Exhibit 8, page 5 speaks for itself as to the amount of increase in the Hotel's laundry. Also, Mr. McNamara testified that the linen counts in the guest rooms began to significantly increase in the first quarter of 2007. (Tr. 82; 88:13-19).

Further as to the timing and magnitude of changes, PGW's own records corroborate the Hotel's evidence. PGW Exhibit 8, pages 2-3 is a chart of the Hotel's monthly gas usage. It shows that monthly billed usage went from under 1,000 CCF/year in nearly all months from 2000 to 2007, to over 1,400 CCF/year for six (6) consecutive months beginning with the bill issued March 27, 2007. Exhibit 8 also shows consistently increased usage by the Hotel after that time. In sum, PGW's own evidence is substantial and compelling evidence of the timing and magnitude of the increased gas usage due to the Holiday Inn brand's changing linen requirements. PGW's allegations to the contrary are therefore baseless.

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; moreover, PGW's own evidence and testimony support the Hotel's position. It is also clear that PGW failed to act reasonably in billing the Hotel for an amount even PGW admits is materially wrong. Given these facts, Hotel suggests that the invoice should be rejected and the Hotel's debt cancelled.

Respectfully Submitted,

Dated: July 22, 2013



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