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October 19, 2000

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Commonwealth & North Streets
Harrisburg, Pa 17105

Sent by Federal Express

DOCUMENT
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Re: Pennsylvania Public Utility Commission v. Philadelphia Gas Works
Docket No. R-00005654

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine (9) copies of the Reply Brief of CEPA et al. in the above referenced proceeding. Also enclosed please find a diskette containing CEPA et al.'s Main Brief in Word format.

This filing is made pursuant to 52 Pa.Code §1.11(a)(2).

Very truly yours,

Philip A. Bertocci
PHILIP A. BERTOCCI

Counsel for CEPA et al.

Enclosures

cc:Administrative Law Judge Marlane Chestnut
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

PENNSYLVANIA PUBLIC UTILITY :
COMMISSION :

Docket No. R-0000 5654
R-0000 5654 C0001- C0004

v.

PHILADELPHIA GAS WORKS :

DOCKETED
OCT 23 2000

REPLY BRIEF of CEPA, Action Alliance of
Senior Citizens, ACORN and Tenants' Action Group

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Date: October 19, 2000

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I. Introduction.

This Reply Brief is filed on behalf of the Consumers Education and Protective Association (CEPA), the Association of Community Organizations for Reform Now (ACORN), Action Alliance of Senior Citizens of Greater Philadelphia, and the Tenants' Action Group (TAG) (hereinafter "CEPA et al."), membership advocacy organizations seeking to serve the needs and protect the interests of low and moderate income consumers in the Philadelphia region. As the Commission recognized in its August 17, 2000 Order Establishing Interim Rate Procedures, CEPA et al. oppose granting PGW any rate relief until the fall of 2001, and maintain that PGW management, in collaboration with the PGW's owner the City of Philadelphia "should assemble a combination of resources, involving a City grant, one or more short term advances from the City, and the City's waiver of the \$18 million payment from PGW to address the short term cash problems." August 17, 2000 Order, Docket No. P-00001831, at 4-5.

CEPA et al. believe on the basis of existing law and the expert testimony offered in this proceeding that the Commission would be fully justified in granting no interim increase. These consumer organizations take issue with PGW's suggestion that expert testimony in this case establishes a \$25 million minimal "bottom end" award that the Commission should consider. PGW Main Brief at 3. CEPA et al.'s position stems from the view that utility experts sometimes identify determining a "revenue requirement" too closely with setting a rate to be paid by customers. In this case, an interim case, there are solid grounds for the position that PGW's owner, the City of Philadelphia, should itself provide a substantial portion of the short term revenue requirement, and that the City is not legally justified in looking to PGW's ratepayers to shoulder virtually the full burden of extracting this municipally owned utility from a crisis of its own making.

This Reply Brief, like CEPA et al.'s Main Brief, while relying on much of the testimony provided by OCA's expert, responds particularly to those PGW claims which suggest that what the City has proposed to do constitutes its "fair share," and that it accordingly would be "just and reasonable" to require ratepayers not only to continue to suffer inadequate service with no guarantee of improvement, but also to pay more for that inadequate service.

II No Interim Rate Increase is Justified Due to PGW's Inadequate Service.

CEPA et al.'s first claim is that the Commission should deny PGW's requested interim base rate in its entirety as not just and reasonable in light of the clear inadequacy of PGW's customer service.

In its Main Brief, PGW contends that the record does not show that PGW's customer service fails to comply with any legal or regulatory standard. In addition, the company argues that even if PGW's customer service is adequate, this inadequacy does not provide legal grounds for the Commission either denying the requested interim base rate increase, or for reducing the amount of any base rate increase to be granted. All these contentions are without merit.

A. The Record Shows that PGW Service Is Inadequate.

PGW suggests that the evidence contained in the record concerning PGW's service inadequacies is merely "anecdotal." PGW Main Brief at 53. As the Commission has recognized, sufficient evidence of individual instances of inadequate service, may provide a basis for concluding that those experiences are not just isolated instances, but rather typical of the general experience of a utility's customer base. In the case of PGW,

the evidence presented at the Public Input Hearings carries significant weight to support the conclusion that PGW's customer service is inadequate.

Moreover, that evidence is further supported by three consultants' reports referred to by OCA witness LeLash. Vanguard Communications, which did a study of PGW's Call Center, reported that in terms of percentage of calls answered within 30 seconds and in terms of calls abandoned, PGW's performance was not just a little below, but far below industry standards. Moreover, the consultants reported the need for a thorough going reform of PGW's customer service function. The need for such reform is supported by the fact admitted by virtually everyone that the BCCS system was not properly implemented, with the result that PGW personnel have not been properly trained to work with the new equipment. OCA St. 1 at 48-53. PGW vainly attempts to discredit such evidence on the grounds that the consultants' reports were "draft" reports. PGW Main Brief, at 55.¹ However, PGW elsewhere attempts to credit these consultants as "nationally recognized" experts, when it wishes to convince the Commission that it is "committed" to its so-called Transitioning to Excellence Plan. Interim Rate Procedures

¹ In his Direct Testimony, OCA witness LeLash provides a concise overview of the main conclusions of these studies, including hard statistics concerning the Call Center's rate of response and Vanguard Communications's observation that the Call Center requires a "totally different mindset." OCA St.1 at 53. PGW offered no Rebuttal Testimony suggesting that the draft studies said anything other than what the OCA witness has represented, while conceding that the reports did indeed focus on ways that PGW could "improve its service in various categories." PGW-IR St. 1.1 at 23. As the evidence suggests, this is a very tall order. PGW also disparagingly notes that the consultant studies are not in the record. PGW Main Brief at 54n.166. If they are not part of the record, the reason is that PGW refused to produce them in discovery, and CEPA et al.'s Motion to compel production of these documents for admission into the record was denied by the presiding Administrative Law Judge.

Petition, ¶¶ 17, 18.² The Commission is asked to believe that these “nationally recognized” experts, who are now supposedly helping PGW improve its service, did not begin with an accurate diagnosis of PGW’s customer service problems.

PGW further suggests that there is no evidence in the record that PGW’s customer service fails to meet specific regulatory or legal standards. Although Mr. LeLash, admittedly not an attorney, did not cite such specific standards upon cross examination, the fact remains that CEPA et al. have extensively cited substantial record evidence concerning PGW’s ongoing failure to bill customers in an accurate and timely way and to provide adequate budget billing. OCA St.1 at 7; see CEPA et al.’s Main Brief, at 9-14.³ Under legal and regulatory standards of service contained in the Public Utility Code, Chapter 56 and PGW’s Tariff, PGW is required to comply with such standards and currently does not. See CEPA et al.’s Main Brief, at 9-14.⁴

B. PGW’s Inadequate Customer Service Is Cause for Denial of the Requested Interim Rate Increase in Its Entirety.

Next, PGW argues that even if PGW’s customer service is inadequate, this

² As in CEPA et al.’s Main Brief, the term “Interim Rate Procedures Petition” designates the Petition of Philadelphia Gas Works for Establishment of Interim Rate Procedures and a Declaratory order, Docket No. P-00001831.

³ PGW also claims that with regard to its Budget Billing Program, the company is “on its way.” PGW Main Brief at 1. The problem may have been identified, but nevertheless, substantial evidence suggests that PGW’s Budget Billing program will not function as required by either its own Tariff or by Chapter 56 in the foreseeable future. Tr. 165, 166, 167.

⁴ CEPA et al.’s Main Brief invoked legal and regulatory standards contained in PGW’s Gas Service Tariff, and in Chapter 56. In addition, it would have been appropriate to cite Section 1509 of the Public Utility Code, which requires monthly billing to residential customers. 66 Pa.C.S.§1509.

inadequacy does not provide legal grounds for a Commission decision denying the requested interim base rate increase in its entirety or denying the requested increase to the extent that it includes the \$18 million City Payment. PGW Main Brief at 51-55. The Commission should also reject these arguments.

1. The Management Agreement.

First, PGW contends that under existing law governing ratemaking for PGW, the proposed interim base rate increase may not be denied on the basis of inadequacy of customer service. PGW Main Brief, at 58. PGW bases this claim on the fact that Section VII of the Management Agreement, the Section specifically devoted to ratemaking, does not list adequacy of service as a criteria in the setting and fixing of rates and charges. However, as will be discussed at greater length in Section III(B), *infra*, the Philadelphia Gas Commission has always followed, as it must, United States Supreme Court and the Pennsylvania Supreme Court precedent concerning rate making. This precedent clearly establishes that the primary and ultimate standard in ratemaking for public utilities is whether the impact of a rate is "just and reasonable." The state Supreme Court has specifically so held in addressing ratemaking by the Philadelphia Gas Commission. Public Advocate v. Philadelphia Gas Commission, 544 Pa.129, 674 A.2d 1056 (1996). Determination of whether a proposed rate is just and reasonable can not be divorced from whether service is adequate. D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, 466 F.2d 394, 422 (D.C. Cir. 1972), cert. denied, 409 U.S. 1086.

PGW's excessively narrow interpretation of the Management Agreement also ignores those provisions contained in other parts of the Management Agreement, an ordinance which was drafted in the form of a contract, which clearly place upon the owner, the City of Philadelphia, and its agent, the Philadelphia Facilities Management

Corporation, the duty to “apply the highest standards of management practice and diligence to the operation of the Gas Works,” with the goal of providing “quality gas services to its citizens at reasonable rates.” Management Agreement, §I(5); WHEREAS clause, p. 1.

2. Sections 523 and 526 of the Public Utility Code.

Second, PGW contends that even assuming inadequate customer service, the Commission may not under Sections 526 and 523 of the Public Utility Code, 66 Pa.C.S. §§526,523, either deny PGW’s interim rate request in its entirety, or reduce any rate increase to be granted by the amount of PGW \$18 million City Payment. PGW Main Brief at 51-53. This argument has two parts, each unjustifiable.

The first part is the contention that denial of an otherwise justifiable public utility rate increase request on the grounds of inadequate service is barred by the federal constitutional guarantee that a utility is entitled to recover just and reasonable rates and protected against regulatory “confiscation.” However, under D.C. Transit System, and under a recent Commonwealth Court case applying D.C. Transit System, the law is exactly the reverse. As the D.C. Transit System court held, the “utility’s fulfillment of its service commitments is a *sine qua non* of constitutional protection under confiscation principles.” D.C. Transit System, at 419, quoted with approval *two times* by National Utilities, Inc. v. Pa. P.U.C., 709 A.2d 972, 978, 979 (Pa.Cmwlth. 1998). Indeed, in National Utilities, the Commonwealth Court upheld the Commission’s denial of any increase in rates to a water utility whose service was deficient not merely in water quality, but also, *inter alia*, failing to report water test results to customers despite repeated requests, delaying several days or months before investigating or repairing water main leaks reported by customers, frequent water outages without warning or

explanation. The Court “held” that the U.S. Constitution is not violated when a public utility is denied a rate increase due to inadequate service. Id., at 979.

The second part is the contention that the \$18 million City Payment is not a “return” on investment, but, presumably, more akin to a legitimate known and measurable operating expense. From this fantastic reasoning, PGW suggests that under National Utilities, this payment could not be reduced or disallowed due to inadequate service. PGW Main Brief, at 54.⁵ The problem with this line of argument is that as an operating expense, the \$18 million payment is totally arbitrary, imposing a burden on customers in favor of the City which has no relationship to service rendered. Under existing law, an important justification for the legality of the \$18 million payment is that it is reasonable, when regarded as similar to a return on equity, even though there is no evidence that the City, as opposed to ratepayers, ever invested any capital in the company. Public Advocate v. Philadelphia Gas Commission, 544 Pa.129, 674 A.2d 1056 (1996). If the \$18 million payment may not be placed in the revenue requirement on basis of an analogy with the traditional “return on equity,” then it is likely that would be struck down as an unconstitutional tax. Cf. Public Advocate v. Philadelphia Gas Commission, 637 A.2d 676 (Pa.Cmwlt. 1994), rev’d, 544 Pa. 129, 674 A.2d 1056

⁵ Contrary to PGW’s contentions, National Utilities does not limit the scope of the alleged utility requirements that could be disallowed on the basis of inadequate service to return on investment. PGW does not correctly state the holding in this case. The case was decided on the narrow issue of whether inadequate service was grounds for denial of a rate increase, based on the axiom that adequate service by a utility requesting a rate increase is a sine qua non of constitutional protection under confiscation principles. In addition to that holding, in dicta, the Court discusses how a utility’s rate of return may be “reduced” by such a denial of a rate increase. In National Utilities, there are no “findings” concerning whether Section 526 may constitutionally be used to “deny sufficient funds required for necessary operating expenses or to repay loans”; rather, there is a footnote reporting without comment ALJ recommendations to the PUC. National Utilities, at 979 and 979n.13.

(1996).

3. The Natural Gas Choice and Competition Act.

PGW also contends that Section 2212(f) of the Natural Gas Choice and Competition Act, 66 Pa.C.S. §2212(f), constitutes a “guarantee” which prevents the Commission from denying expressly or implicitly rates which include the \$18 million City Payment in the overall revenue requirement, even when such denial would be justified on the basis of Sections 523 or Sections 526 of the Public Utility Code, or for that matter, or on any other constitutional or statutory ground. PGW Main Brief at 53. To be brief, CEPA et al.’s response is:

(a) Section 2212(f) does not “guarantee” anything explicitly or implicitly. As a constitutional matter, this provision is subordinate to the requirement that the rates of a public utility be “just and reasonable”;

(b) Section 2212(f) is not applicable at the present time, since PGW is still under the ratemaking methodology and requirements which existed under the Philadelphia Gas Commission, and Section 2212(f) merely establishes one criteria among others that will guide ratemaking after the effective date of PGW’s restructuring plan and;

(c) Section 2212(f) is not applicable in an interim proceeding, because provision of a “return on equity” or satisfaction of a “requirement” unrelated to the operating needs of the company through the winter heating season is not “necessary” to meet PGW’s minimal needs through the coming heating season, as set forth in the Commission’s August 17, 2000 Interim Rate Procedures Order. Docket No. P-00001831 at 9-10.

III. The Proposed Interim Rate Increase Is Not Just and Reasonable under All the Circumstances, because PGW's Owner, the City of Philadelphia, Has Not Fulfilled its Ownership Obligations and Has Failed to Commit Available Resources to Mitigate the Impact of the Proposed Rate Increase on Ratepayers.

CEPA et al. also claim that an interim base rate increase is not just and reasonable because the City through its mismanagement has caused the current crisis yet is unwilling to commit its annual \$18 million "Dividend" to PGW and has not fully committed other resources within its means to alleviate PGW's cash flow problems. Placing the financial burden associated with such mismanagement on ratepayers is particularly unjust and unreasonable at this time, because ratepayers are already facing increased rates due to the run up of natural gas costs which will increase their monthly bills by 30% to 40%.

In its Main Brief, PGW contends that it is absolutely entitled under Section VII of the Management Agreement to recover from ratepayers all funds necessary to meet bond debt service coverages, satisfy other "rate covenants" to bondholders, and pay operating expenses. PGW Main Brief at 8-15. The City and PGW maintain that waiver or "grant back" of the \$18 million City Payment and provision of any interest free City loans should constitute only "back up" to ratepayer funds -- a supplement to, but not a replacement for ratepayer funds. PGW Main Brief at 36. They insist that denial by the PUC of any of the elements contained in Section VII of the Management Agreement, particularly the \$18 million City payment is unreasonable, illegal, unconstitutional and confiscatory. PGW Main Brief at 42, 43. The Commission should reject each of these contentions.

A. The Management Agreement Does Not Require That PGW's Full Revenue Requirement Be Recovered Through Rates.

The premise of the City's case is that legal requirements binding upon the City

and the Company mandate that the Commission provide sufficient funds from an interim base rate case to address all PGW's Management Agreement Section VII requirements for the current fiscal year, and to place the company in a situation where it will begin FY 2002 in September 2001 with between \$35 and \$40 million in cash for natural gas acquisition. PGW-IR St.1 at 9; Tr. 135. Several different justifications are offered for this thesis. The City argues that the Management Agreement requires that PGW's total revenue requirement, including the \$18 million City payment, be provided through rates. It argues that the Commission's ratemaking must strictly adhere to Section VII and only Section VII. It further argues that both the Management Agreement and the Bond Ordinances by their terms establish the basis for a revenue requirement which includes maintenance "cash flow needs."

The Management Agreement does not require that PGW's full revenue requirement must be satisfied exclusively through rates. For instance, Section VII of the Management Agreement, the core of the City's case, explicitly states that the revenues needed to meet the Section VII provisions may come from rates and from "other revenues of the Gas Works qualifying as "project revenues" as such term is defined in ...The First Class City Revenue Bond Act. Management Agreement, §VII(1). As CEPA et al. set forth in their Main Brief, the term "project revenues" in that state Revenue Bond Act includes "all subsidies or payments payable by Federal, State or local governments or governmental agencies on account of the cost of operation of, or the payment of the principal of or interest on moneys borrowed to finance the cost of the project..." 53 P.S. §15903. Thus, the Management Agreement itself provides for the eventuality that in a given year, under certain circumstances, PGW would not look to rates alone to satisfy all its operating and other needs.

B. Philadelphia Gas Commission Ratemaking Methodology Gives Absolute Primacy to the Just and Reasonable Requirement, Not Management Agreement Section VII.

Nothing in Philadelphia Gas Commission (PGC) “ratemaking methodology and requirements” mandates that the PUC provide through rates each and every element contained in Management Agreement Section VII where the resulting rate would not be just and reasonable under the circumstances of this case. PGW’s Main Brief itself confirms with previously uncited PGC legal authority *CEPA et al.*’s contentions concerning traditional PGC ratemaking methodology. In that methodology, the primary requirement is that any rate fixed by the Commission must be “just and reasonable,” with Section VII requirements in a secondary and subordinate role.

In support of its claim that ratemaking for PGW must be narrowly focused on Section VII of the Management Agreement, the City and PGW emphatically cite a passage from the PGC’s Supplemental Opinion and Order dated November 18, 1981 stating that “the cash flow method, comprised of all items contained in Section VII of ... [the Management Agreement], is just and reasonable for ratemaking purposes in this case.” PGW Main Brief at 11.⁶ However, to put this quotation in perspective, the Commission should note that just a few pages earlier in that document, the PGC, states that “the standard to be applied by this Commission is whether the rates to be charged the customers of PGW are just and reasonable.”⁷ Moreover, even in the passage quoted by PGW, there is no unqualified endorsement of Section VII as the exclusive or even paramount criteria to be applied in ratemaking for PGW. The resulting rate must be “just

⁶ The quotation is from In the Matter of a Proposed Rate Increase for the Philadelphia Gas Works, filed June 19, 1981, Supplemental Opinion and Order dated November 18, 1981, at 7, attached to PGW Main Brief, Appendix “C,” Tab 2.

⁷ Ibid. Supplemental Opinion and Order dated November 18, 1981, at 5.

and reasonable” and that determination can only be made under all the circumstances of a particular case (“for ratemaking purposes in *this* case”)(emphases added).

Each time that PGW cites a PGC opinion in support of its narrow interpretation of the Management Agreement, closer examination of the same document reveals that the PGC was applying the broader “just and reasonable” standard. For instance, the PGC Adjudication and Order dated September 3, 1982 cited by PGW (Main Brief at 11.n54) for its supposed endorsement of ratemaking based on Article VII, states: “This Commission in determining what rates to approve, both in the past and in the present case, has applied and continues to apply the standard that the rates to be charged the customers of PGW must be just and reasonable.”⁸

Similarly, the PGC Memorandum and Order adopted December 19, 1991, while determining a rate pursuant to Management Agreement Section VII, was careful to specify that PGW rates must ultimately be “just and reasonable”(“The Commission satisfied this “just and reasonable” requirement through the careful and deliberate exercise of its discretion, the review of all evidence properly presented and the utilization of its expertise in applying the standards for rate setting as set forth in Section VII of the ...[Management] Agreement”).⁹

⁸ In the Matter of a Proposed Rate Increase for the Philadelphia Gas Works, filed May 4, 1982, Adjudication and Order dated September 3, 1982, at 8, contained in PGW Main Brief, Appendix “C,” Tab 3.

⁹ In the Matter of a Proposed Base Rate Increase by the Philadelphia Gas Works for Fiscal Year 1991-1992, Memorandum Opinion and Order adopted December 19, 1991, at 4-5, PGW Main Brief, Appendix “C,” Tab 4.

In sum, the most that PGW can correctly state is that no Pennsylvania Court has held that ratemaking on the basis of Management Agreement Section VII is illegal per se. However, the fact remains that under PGC ratemaking methodology and requirements, the PUC must reject the harsh result which ratemaking in sole reliance on Section VII would likely produce for PGW's ratepayers in this case.

C. Neither the Management Agreement nor the Bond Ordinances Require That Monthly Cash Flow Be Recovered Solely From Rates.

The Management Agreement does not require that rates be set at such levels that monthly cash flow may be maintained from rates alone. One of the elements comprising the revenue requirement described in Management Agreement Section VII is “[t]o provide cash, or equivalent, for working capital in such reasonable amounts as may be determined by Company to be necessary....” Management Agreement, §VII(b)(iii). This language covers the cost of providing working capital, not working capital itself. As Mr. LeLash testified, this interpretation is consistent with standard regulatory practice. Indeed, Management Agreement Section IV makes provision for PGW to obtain loans, City advances, and in addition, to borrow up to \$100 million to meet its cash flow needs. Management Agreement, §IV(3). With no justification, PGW has transformed the more limited cost of “working capital” into a “cash flow needs” requirement which is contained nowhere in the Management Agreement. PGW Main Brief at 21, 45-48.¹⁰

¹⁰ PGW cites the November 18, 1981 Supplemental Opinion and Order in In the Matter of a Proposed Rate Increase for the Philadelphia Gas Works, filed June 19, 1981 in support of its contention that the “cash flow” method requires ratepayers to provide not merely the cost of “working capital” but PGW actual “cash flow needs.” PGW Main Brief at 46 and Exhibit “C,” Tab 2. In that case, the Commission reduced PGW’s claim for closing cash from \$7.5 million to \$2 million, without discussion of the degree to which PGW’s cash needs were covered by its Tax Exempt Commercial Paper Program and other mechanisms. Exhibit “C,” Tab 2, at 17.

PGW's expansive "cash flow needs" may not be appropriately or legally considered a part of PGW's revenue requirement in this proceeding. OCA St. 1 at 14, 23.

In the same vein, the Bond Ordinances do not require that PGW must fund all its operating expenses, including the supposed "cash flow needs" through rates. In its Main Brief, PGW discusses the necessity to avoid technical defaults on bond covenants, without distinction between debt service coverage covenants, and rate covenants. There can be no dispute that debt service coverage covenants may be satisfied through a combination of revenues from rates and a "grant back" or outright grant from the City or another governmental entity. Rate covenants to meet operating expenses can be satisfied by a combination of revenues from rates and of money borrowed from various sources, including but not limited to the proposed City of Philadelphia short term \$45 million loan. In its Main Brief, PGW suggests that OCA witness LeLash testified that rate relief was necessary to avoid a technical default on PGW's bonds, when in fact his testimony was focused more narrowly on the necessity of assuring that there were sufficient rates to permit PGW to satisfy its debt service coverage covenants. PGW Main Brief at 20; Tr. 258, 259. Thus, despite the insistence that a technical default on either coverage or rate covenants is a "critical necessity" (PGW Main Brief at 20) and "would bring swift and catastrophic consequences" (PGW Main Brief at 18), the fact remains that nothing precludes the City of Philadelphia as owner of the utility from accepting its ownership obligations and providing sufficient funds through a "grant back" of the City Payment, outright grant and advances to avert such defaults.¹¹

¹¹ PGW also suggests in its Main Brief at 20-21, that PGC tradition requires concern for maintenance of PGW's bond ratings to be added to the Section VII list of ratemaking requirements. Whatever concern past Commissions may have exhibited in permanent rate proceedings for maintenance of PGW's bond ratings, such concerns should not be translated into a discrete revenue requirement in the present interim rate proceeding.

D. The City's Refusal to Commit to Waiver or "Grant Back" of the \$18 Million City Payment is Not Reasonable.

The City and PGW maintain that waiver or "grant back" of the \$18 million City Payment and provision of any interest free City loans should constitute only "back up" to ratepayer funds -- a supplement to, but not a replacement for ratepayer funds. PGW Main Brief at 36. PGW insists that denial by the PUC of any of the elements contained in Section VII of the Management Agreement, particularly the \$18 million City payment is unreasonable, a violation of the Management Agreement and the Natural Gas Choice and Competition Act¹², unconstitutional and confiscatory. PGW Main Brief at 42, 43. The Commission should reject each of these contentions.

Throughout this case, the City and PGW have struggled with a credibility problem arising from an inconsistency implicit in its position -- that even though PGW claims to need expedited "interim" rate relief (not to say emergency relief to avoid "disastrous" and "catastrophic" consequences) in order to address severe cash flow difficulties, \$18 million of the requested \$52 million requested is to be paid right back to the owner before June 30, 2001 as what is variously termed a "prudent expense" or "obligation," a "proven revenue requirement," and a "return on investor capital." PGW Main Brief at 43. The City has unsuccessfully tried to address this credibility problem in two ways, together with repeated assertions that the City is committed to "doing its part." PGW Main Brief at 6.

The first way is to claim that the \$18 million is playing an invaluable role as a

¹² This argument, based on 66 Pa.C.S. §2212(f) has been addressed in Section II(B)(3) supra.

“back up” in case problems arise particularly with debt service coverage. As a “back up,” it is unlikely that ratepayers will ever benefit from waiver or “grant back” of the \$18 million because neither of these events will occur.

The second way, which has appeared in PGW’s Rebuttal Testimony and in the Main Brief, is to assert that the \$52 million requested is actually too low, that PGW’s real interim needs are in the area of \$72 million so that the \$18 million is likely to be in play even if the Commission grants the full \$52 million interim rate request. PGW Main Brief at 28-35. This argument is also meritless. PGW has filed for an interim base rate increase of \$52 million. It could have filed for more or amended its original filing. It did neither. The Commission should hold the City and PGW to their filing. PGW should not be permitted to pile up hypothetical upon hypothetical, when only its \$52 million base rate filing is before the Commission.

The City’s rhetorical attempts to appear to bring the \$18 million City payment to the assistance of ratepayers, without actually giving it up, can not overcome the fact that the more the Commission provides in interim rate relief, the less likely it is that the City will “grant back” or waive the \$18 million payment.

The fact that City Council is the process of considering PGW’s request for “additional support” in the form of a \$45 million interest free advance, repayable in two years should not be given undue weight in considering whether the City as PGW’s owner has taken reasonable steps to mitigate to impact of its proposed base rate increase on ratepayers. PGW Main Brief at 5. The costs to the City of such an advance would be minimal.

Significantly, despite its vast array of hypotheticals piled upon hypotheticals,

PGW offers no charts which spell out the effect which full use of the \$45 million advance would have on its circumstances, assuming the full grant of its interim rate request or some lesser amount.

Moreover, PGW alludes in its Main Brief to conditions that will be attached to this advance. PGW Main Brief at 5. Those conditions are not part of the record in this case – and it remains to be seen whether the conditions will undermine the usefulness of the advance as a means of obviating that portion of the requested base rate relief which is necessary in order to address cash flow problems.

The Commission should not give credence to the conditions which the City as owner imposes on itself in determining available resources that are to be made available to PGW and its ratepayers.¹³ It should reach its rate determination on the assumption that the \$45 million advance will be fully available to PGW, for the same uses as funds under its now exhausted Tax Exempt Commercial Paper Program.¹⁴

In considering the availability of the \$18 million City Payment, the \$45 million

¹³ Final passage of the ordinances relating to the \$45 million advance will not occur before November 2, 2000. Philadelphia Daily News, 10/18/00.

¹⁴ The City and PGW also dismiss the possibility of partially alleviating PGW's cash flow problems through the use of "overfunded pension liabilities" on the grounds that such an effort would require City Council approval and "could generate opposition." PGW Main Brief at 59. As PGW's owner, the City, like the Board of any investor owned utility must often take actions which have some negative consequences somewhere in order to address the utility's critical problems. If the City is to claim its right to \$18 million as a return on equity, it must accept the necessity of such hard choices. The Commission should be no more concerned about such dilemmas facing the City than it would about internal disputes and "opposition" among the members of the Board of Directors of an investor owned utility.

advance, and other resources that the City might reasonably be expected to place at the disposal of PGW and its ratepayers, the Commission should not be deterred by the City's inflated claims of absolute entitlement to these resources. The City and PGW apparently feel obligated to serve warning that they consider the \$18 million, however characterized, as the "property" of the City. PGW Main Brief at 42-43. Failure to provide for the \$18 million in interim rates would, the City and PGW threaten, render that rate unjust and unreasonable, and constitute a confiscation of property in violation of constitutional substantive due process. Such a position totally ignores the facts of this case, which include PGW's past history of poor management and current customer service well below acceptable and legal standards, an \$18 million payment "requirement" without relationship to an actual City investment, the City's failure to accept a significant measure of ownership responsibility for the current crisis, and finally the impact on customers of a skyrocketing GCR driving residential utility bills 30% to 40% above previous levels. Under these circumstances, it would be neither unjust nor unreasonable for the Commission to reduce any interim rate it might otherwise grant by \$18 million. Barasch v. Pa. P.U.C., 516 Pa. 142, 532 A.2d 325 (1987).

IV. In Deciding This Case, the PUC Needs Only to Determine the Amount of a Base Rate Increase, if Any, Which Is Just and Reasonable, because No Other Applicable Philadelphia Gas Commission Rules, Practices or Policies Address These Interim Circumstances.

CEPA et al.'s final claim is that there are no Philadelphia Gas Commission Rules, Practices or Policies other than the "just and reasonable" requirement for the Commission to apply in deciding this Interim Base Rate Case.

In obtaining authorization to institute this "interim" base rate case, PGW contended that the Commission had broad discretion under the Natural Gas Choice and

Competition Act to implement that path breaking statute with respect to the company. Interim Rate Procedures Petition, ¶¶ 27-29. PGW now argues here that very same Act binds the Commission to adhere in interim ratemaking to the company's Management Agreement -- a Management Agreement which PGW construes in an unacceptably narrow manner. PGW Main Brief at 13-15. PGW claims that in the August 17, 2000 Order Granting Interim Rate Procedures, the Commission endorsed this narrow approach. However, the Order itself, in its recognition that the interpretation of the Act's term "ratemaking methodology and requirements" was open to interpretation in the context of this case, suggests no prior commitment by the Commission to PGW's constraining views. Rather, the Order suggests proper recognition that this case presents a unique situation inviting and justifying wide Commission discretion, subject nonetheless to the "just and reasonable" requirement.

This view is confirmed by the presence in this case of the need for the Commission to be sensitive to the needs of comity between itself and the Philadelphia Gas Commission. Although PGW has maintained that the PUC should strictly apply Philadelphia Gas Commission "ratemaking methodology and requirements," it appears to ignore that the Natural Gas Choice and Competition Act has separated the budget making function from the rate making function with regard to PGW. The Act has thereby created an unprecedented situation. Under prior PGW ratemaking practice, rates were determined on the basis of approved Capital and Operating Budgets for the test year.¹⁵ The Management Agreement requires that all PGW expenditures are to be made pursuant

¹⁵ For instance, see Opinion and Order dated November 9, 1981 in In the Matter of Proposed Rate Increase for the Philadelphia Gas Works, at 3-5 (when rate case filed while consideration of Operating Budget for coming fiscal year was still pending before Gas Commission, Operating Budget proceeding and rate case were consolidated because the rate request "involved many common questions of law and fact" with operating budget proceeding), PGW Main Brief, Appendix "C," Tab 1.

to budgets, approved or recommended for approval by the PGC. Management Agreement, §IV(2)(c). As PGW itself has recognized, the Act explicitly states that nothing in the Act shall abrogate or limit the City's executive or legislative powers to "determine the ...functions, *budgets*, activities and mission..." of PGW (emphases added). Pa.C.S. §2212(s). PGW's FY 2001 Capital and Operating Budget proceeding is still pending. In such a circumstance, the PUC is must determine what amount in interim rates, if anything, is appropriate to be recovered from ratepayers to address PGW's minimal financial health in the short run. More far reaching determinations are properly reserved for the permanent rate case, which may proceed with reference to Philadelphia Gas Commission approved FY 2001 budgets.

V. Conclusion.

For all the foregoing reasons, CEPA et al. respectfully request that the Commission deny PGW's request for an interim rate increase in its entirety.

Respectfully submitted,



PHILIP A. BERTOCCI, ESQUIRE
EDWARD A. MCCOOL, ESQUIRE

Attorneys for CEPA et al.

COMMUNITY LEGAL SERVICES, INC.
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CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission

v.

Philadelphia Gas Works
Docket No. R-00005654

I hereby certify that I have this day served a true copy of the foregoing document, Reply Brief of CEPA, Action Alliance of Senior Citizens, ACORN and Tenants' Action Group, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 19th day of October, 2000.

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OCT 19 2000

October 19, 2000

PA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17120

Via Federal Express

DOCUMENT
FOLDER

Re: Pennsylvania Public Utility Commission v. Philadelphia Gas Works
Docket No. R-00005654

DOCKETED
OCT 27 2000

Dear Secretary McNulty:

On October 18, 2000, the Philadelphia Gas Works filed a Motion to Take Official Notice or, in the Alternative, to Reopen the Record in the above-captioned proceeding, in order to introduce additional evidence of a recent announcement by Moody's Investors Service regarding PGW's revenue bonds.

On October 19, 2000, the Office of Consumer Advocate (OCA) and the Office of Trial Staff (OTS) submitted a Joint Answer to this Motion.

CEPA et al. join in and support the Joint Answer filed by OCA and OTS.

Very truly yours,



PHILIP A. BERTOCCI

Counsel for CEPA

cc: Certificate of Service
Honorable Marlane R. Chestnut, Administrative Law Judge

ORIGINAL

Certificate of Service

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

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OCT 19 2000

PA PUBLIC UTILITY COMMISSION
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Philip A. Bertocci

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Date: October 19, 2000

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October 19, 2000

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17120

DOCKETED VIA HAND DELIVERY
OCT 27 2000

**Re: Pennsylvania Public Utility Commission v. Philadelphia Gas Works;
Docket No. R-00005654**

Dear Secretary McNulty:

On October 18, 2000, the Philadelphia Gas Works ("PGW") filed a Motion to Take Official Notice or, in the Alternative, to Reopen the Record ("Motion") in the above-captioned proceeding. PGW's Motion requests that the Pennsylvania Public Utility Commission ("PUC" or "Commission") take official notice or reopen the record in this proceeding to introduce additional evidence of a recent announcement by Moody's Investors Service regarding PGW's revenue bonds. In response, on October 19, 2000, the Office of Consumer Advocate ("OCA") and Office of Trial Staff ("OTS") submitted a Joint Answer to PGW's Motion. In this Answer, the OCA/OTS indicate that they do not oppose PGW's Motion so long as the record is also updated to reflect the current status of the City of Philadelphia's ("City") proposed \$45 million loan to PGW and parties are allowed to respond to any arguments PGW raises in its Reply Brief pertaining to Moody's announcement.

The Philadelphia Industrial and Commercial Gas Users Group ("PICGUG"), a party to this proceeding, supports the OCA/OTS Joint Answer. Similarly, PICGUG does not oppose PGW's Motion provided that the conditions requested by the OCA/OTS are granted. PICGUG agrees that any reopening of the record should include the current status of the proposed \$45 million loan from the City. Additionally, due to the expedited time for the filing of Reply Briefs in this proceeding, parties must be given the opportunity to respond to this information, should PGW choose to reference this information in its Reply Brief.

James J. McNulty, Secretary
October 19, 2000
Page 2

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served a copy of this letter. Please date stamp the extra copy of this transmittal letter and kindly return it for our filing purposes.

Very truly yours,

MCNEES, WALLACE & NURICK

By *Charis M. Burak*
Charis M. Burak

Counsel to the Philadelphia Industrial and
Commercial Gas Users Group

Enclosure
CMB/lhe

c: Administrative Law Judge Marlane Chestnut
Certificate of Service

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I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below.

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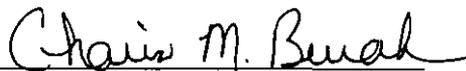
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Charis M. Burak

Dated this 19th day of October, 2000, in Harrisburg, Pennsylvania.



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Consumer Advocate

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E-Mail: paoca@ptd.net

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October 19, 2000

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DOCUMENT
FOLDER

Re: Pa. Public Utility Commission
v.
Philadelphia Gas Works
Docket No. R-00005654

Dear Secretary McNulty:

Enclosed for filing please find an original and 3 (three) copies of the Joint Answer to Philadelphia Gas Work's Motion to Take Official Notice or, in the Alternative to Reopen the Record, of the Office of Consumer Advocate and the Office of Trial Staff, in the above-referenced proceeding.

Copies of this document have been served upon all parties as evidenced by the attached Certificate of Service.

Sincerely yours,

Stephen J. Keene
Assistant Consumer Advocate

Enclosure

cc: All parties of record
Hon. Marlane Chestnut, Administrative Law Judge

43

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY
COMMISSION

v.

Docket No. R-00005654

PHILADELPHIA GAS WORKS

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JOINT ANSWER OF THE OFFICE OF CONSUMER ADVOCATE
AND OFFICE OF TRIAL STAFF TO PHILADELPHIA GAS WORKS
MOTION TO TAKE OFFICIAL NOTICE OR, IN THE ALTERNATIVE,
TO REOPEN THE RECORD

DOCUMENT
FOLDER

The Office of Consumer Advocate ("OCA") and Pennsylvania Public
Utility Commission's Office of Trial Staff ("OTS") are in receipt of the Philadelphia Gas
Works' ("PGW") Motion to Take Official Notice or, in the Alternative, to Reopen the
Record ("PGW Motion"), dated October 18, 2000, and filed with the Pennsylvania Public
Utility Commission ("Commission"). The OCA and OTS respectfully submit the
following Joint Answer to the PGW Motion.

DOCKETED
OCT 27 2000

1. While the OCA and OTS have received a copy of the PGW Motion via electronic-mail, at the time this Answer was prepared, the OCA and OTS are not yet in possession of a hard copy of the PGW Motion and the exhibit attached thereto.

2. The evidentiary record in this proceeding was closed and the record certified to the Commission for its consideration on October 3, 2000. Main Briefs were filed by the parties on October 13, 2000 and Reply Briefs are due October 20, 2000.

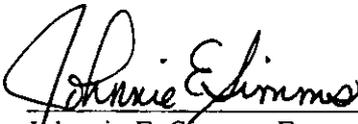
3. The OCA and OTS submit that if PGW seeks to reopen the record in this proceeding to introduce additional evidence of the Moody's announcement, or to allow the Commission take official notice of the Moody's announcement, then the record should also be reopened to introduce the current status of the proposed \$45 million loan from the City of Philadelphia to PGW. This includes any legislation pertaining to the City of Philadelphia's \$45 million loan to PGW which has been voted on by Philadelphia City Council, as well as any legislation pertaining to that loan which is currently pending before the Philadelphia City Council.

4. Given the short time for filing of Reply Briefs, the OCA and OTS submit that the Commission should reserve the right of all parties to respond to this information.

5. Therefore, the OCA and OTS do not oppose the PGW Motion as long as the record is also updated to reflect the current status of the City of Philadelphia's \$45 million loan to PGW and parties are allowed to respond to any arguments PGW raises in its Reply Brief pertaining to the Moody's announcement.

WHEREFORE, the Office of Consumer Advocate and Office of Trial Staff respectfully request that if the Commission grants PGW's Motion to Take Official Notice or, in the Alternative, to Reopen the Record ("PGW Motion"), dated October 18, 2000, that the record in this proceeding should also be updated to reflect, or the Commission should take official notice of, the current status of the \$45 million loan from the City of Philadelphia to PGW.

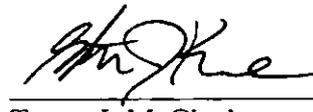
Respectfully submitted,


Johnnie E. Simms, Esq.
Senior Prosecutor

Office of Trial Staff
Pennsylvania Public Utility Commission
P.O. Box 3265
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Dated: October 19, 2000

*60544


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CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission
v.
Philadelphia Gas Works
Docket No. R-00005654

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COMMISSION
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I hereby certify that I have this day served a true copy of the foregoing document, the Joint Answer to Philadelphia Gas Work's Motion to Take Official Notice of the Office of Consumer Advocate and the Office of Trial Staff, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 19th day of October, 2000.

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Bernard A. Ryan, Jr
Small Business Advocate

DOCUMENT
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October 19, 2000

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Pennsylvania Public Utility Commission
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OCT 27 2000

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Re: **Pennsylvania Public Utility Commission v.
Philadelphia Gas Works (Interim Rate Increase Request)
Docket No. R-00005654**

Dear Mr. McNulty:

The Office Of Small Business Advocate ("OSBA") has received by electronic mail the Motion to Take Official Notice or, in the Alternative, to Reopen the Record filed by the Philadelphia Gas Works ("PGW Motion") with the Pennsylvania Public Utility Commission on October 18, 2000. The OSBA also received by electronic mail the Joint Answer of the Office of Consumer Advocate and Office of Trial Staff to the PGW Motion ("OCA and OTS Answer") on October 19, 2000. The OSBA is filing this Letter in Support of the OCA and OTS Answer.

The OSBA concurs with the OCA and OTS Answer; significantly, paragraphs 3 through 5. Reasonableness and equity would require that all additional yet currently available evidence concerning the financial environment of PGW be considered in this expedited proceeding. Additionally, parties should be permitted the opportunity to respond to the accuracy, quality, and credibility of said evidence once presented.

Wherefore, the Office of Small Business Advocate respectfully requests that the Commission grant the Joint Answer of the Office of Consumer Advocate and Office of Trial Staff to Take Official Notice or, in the Alternative, to reopen the Record dated October 19, 2000.

Respectfully submitted,

Angela T. Jones

Angela T. Jones
Assistant Small Business Advocate

68

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY :
COMMISSION :
 :
v. :
 :
PHILADELPHIA GAS WORKS :

Docket No. R-00005654

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CERTIFICATE OF SERVICE

I certify that I am serving a copy of the foregoing document ~~on~~ behalf of the Office of Small Business Advocate by first class mail (unless otherwise indicated) upon the persons addressed below:

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Angela T. Jones
Assistant Small Business Advocate

Dated: October 19, 2000

DATE: October 19, 2000
SUBJECT: R-00005654
TO: Office of Administrative Law Judge
FROM: James J. McNulty, Secretary

DOCKETED
OCT 25 2000

LAF

Pennsylvania Public Utility Commission
v.
Philadelphia Gas Works

Attached is a copy of a Petition to Take Official Notice or, In the Alternative, to Reopen the Record, filed by Philadelphia Gas Works, in connection with the above docketed proceeding.

This matter is assigned to your Office for appropriate action.

Attachment **DOCUMENT FOLDER**

cc: OTS

laf