

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility
Commission

DOCKETED
APR 19 2001

Docket Number

v.

R-00006042

Philadelphia Gas Works

DOCUMENT
FOLDER

R-00006042C0001 et al

011710

ORDER #3 DENYING PGW'S MOTION IN LIMINE

History of the Proceeding

On January 5, 2001, Philadelphia Gas Works ("PGW" or "Respondent") filed Supplement No. 7 to Tariff Gas – Pa. P.U.C. No. 1 with the Pennsylvania Public Utility Commission ("PUC"). Said Supplement was scheduled to become effective March 6, 2001. In said tariff, PGW proposed changes in rules, regulations and rates calculated to produce \$65,000,000 in additional annual revenues.

RECEIVED
SECRETARY'S BUREAU
APR 18 AM 9:14

In addition, PGW filed a petition for waiver of potentially applicable notification and filing requirements and establishment of expedited hearing schedule for base rate proceeding. Pursuant to 52 Pa. Code §§5.41 and 5.43, 66 Pa. C.S. §§2212(c), (d) and (e), Chapter 13 and Section 2212(c) of the Public Utility Code ("Code"), PGW requested that the Commission, among other things, acknowledge that certain filing requirements in the Commission's regulations applicable to the filing of a base rate are not presently applicable to PGW, or to the extent deemed applicable, to waive them.

Comments to PGW's Petition were filed by the Office of Consumer Advocate ("OCA"), Office of Trial Staff ("OTS"), Philadelphia Industrial and

Commercial Users Group ("PICGUG") and the Consumers Education and Protective Association, the Association of Community Organizations for Reform Now, Action Alliance of Senior Citizens of Greater Philadelphia and Tenants' Action Group (collectively "CEPA et al").

By Order entered February 8, 2001, the Pennsylvania Public Utility Commission ("Commission") instituted an investigation into the lawfulness, justness and reasonableness of the proposed rate increase. Pursuant to section 1308(d) of the Public Utility Code, 66 Pa. C.S. §1308(d), Supplement No. 7 to Tariff Gas – Pa. P.U.C. No. 1 was suspended by operation of law until October 6, 2001 unless otherwise directed by Order of the Commission. In addition, the Commission ordered that the investigation include consideration of the lawfulness, justness and reasonableness of PGW's existing rates. The matter was assigned to the Office of Administrative Law Judge for resolution by hearings and for issuance of a Recommended Decision. The petition for waiver of potentially applicable notification and filing requirements and establishment of expedited hearing schedule for base rate proceedings was granted in part and denied in part. PGW's request for waiver of 52 Pa. Code §53.45(a) which requires that a utility file with the Commission written notice 30 days prior to the filing was granted. PGW's request to provide notice to customers under the alternative method set forth in 52 Pa. Code §53.45(b)(4) was granted. PGW's request for waiver from providing the information required at 52 Pa. Code §§53.52 and 53.53 was denied.

On March 12, 2001, OCA filed a Motion to Dismiss Objections and Compel Answers to Interrogatory 31 of OCA SET II and Interrogatories 15, 23-26, 28-32, 34-37, 39-41, 45-46 and 51 of OCA SET III. PGW filed an Answer to the Motion to Compel on March 16, 2001 and mentioned that it would be filing a Motion in Limine. On March 20, 2001, CEPA et al filed a Letter Memorandum in support of OCA's Motion to Dismiss Objections and Compel Answers.

PGW filed a Motion in Limine on March 21, 2001.

On March 22, 2001, CEPA et al filed a Motion to Dismiss Objections and Compel Answers to Interrogatories CEPA-1 through 21, 23 through 30, 32 through 42 and CEPA-49 of CEPA et al's First Set of Interrogatories. On March 28, 2001, PGW filed an Answer to the Motion.

Public Input Hearings were held on March 28 and 29, 2001.

On April 2, 2001, OCA, OTS, PICGUG and CEPA et al filed Answers to the Motion in Limine.

On April 6, 2001, PGW filed Reply to Answers to the Motion in Limine or, in the Alternative, Request for Leave to Respond and the Response to the Answers of PICGUG, CEPA et al, OTS and OCA.

Discussion

A Motion in Limine may be presented in a pending matter when exclusion is sought in order to ensure the elimination of anticipated prejudicial evidence, to remove extraneous issues from the underlying proceeding, to preclude references to prejudicial matters, or to prevent encumbering the record with immaterial matters. See Commonwealth of Pa. v. Pikur Enterprises, Inc., 596 A. 2d 1253 [Pa. Commonwealth 1991]. (PICGUG's Answer to Motion, p. 4)

PGW argued that certain parties were engaging in discovery to repeat past arguments that the PUC, in setting rates for PGW, should not use the ratemaking methodology and requirements used by PGW prior to PUC regulation and should not necessarily provide working capital allowing PGW to pay its debts as they come due. According to PGW, rate-setting based on such arguments would violate Section 2212 of

the Public Utility Code, the bond covenants of PGW and the City of Philadelphia, and the principles set forth in the PUC's Interim Rate Settlement Order (Motion, p. 1).

Therefore, PGW submitted the Motion in Limine, pursuant to 52 Pa. Code §5.103(a) and (d)(2), requesting an Order from the ALJ acknowledging the specifics of the ratemaking methodology and requirements that are mandated by the Public Utility Code and the Commission's Interim Rate Settlement Order in setting rates for PGW. PGW asserted that the specific directives will also assist in determining in advance the testimony and adjustments that may be submitted by the parties when responding to PGW's base rate request (Id.).

PGW's position is that Section 2212 of the Code establishes very clear ratemaking standards that must be used in setting PGW's base rates which are distinctly different from the methods for non-municipal companies. PGW submits that the law requires the PUC to use the "prior ratemaking methodology and requirements" applicable to PGW prior to PUC jurisdiction. This methodology is the "cash flow method" which sets PGW's revenue requirement at the level needed to fund its operating budget. Moreover, this previous ratemaking approach, as well as PGW's bond ordinances, require that PGW's rates be set so that it will have enough cash each month and at the end of the fiscal year to pay its obligations when they come due during that year. PGW posited that the PUC acknowledged in its Interim Rate Settlement Order that the Public Utility Code obligates the Commission to set PGW's rates in accordance with the prior ratemaking method and so that the Gas Works can satisfy its bond ordinances¹ (Motion, pp. 1, 2).

PGW stated that several parties have challenged the use of the "cash flow method" as the basis for setting PGW's rates in the past and specifically have denied that PGW should be able to claim a revenue requirement that includes cash working capital

¹ PUC Order Approving Joint Petition for Settlement at 7 and ¶ 1; see Joint Petition at ¶¶ 10, 25 and 28. The Order and Joint Petition are attached to the Motion as Attachment A.

necessary to pay obligations when they come due. Moreover, those parties have made extensive discovery requests which seek data about a variety of PGW items that have regularly been part of PGW's budgeted expenses and recovered in its revenues. Thus, PGW believes that it is crucial that the ALJ and the PUC clarify the scope of PUC ratemaking authority, now, to assist all the parties by avoiding the expenditure of time and energy that will be incurred in advancing unnecessary and legally irrelevant issues and adjustments (Motion, pp. 2, 3).

PGW stated that in light of the PUC's Interim Settlement Order, it is vital that the ALJ and PUC resolve any remaining ambiguity that may exist regarding the scope of the PUC's ratemaking authority. PGW reasons that the Interim Settlement Order, when read in context, clearly acknowledges that the PUC's "statutory obligations" under Section 2212(e) include the "authorization of the rate changes and cash reserves." PUC Order Approving Joint Petition for Settlement at 7 [emphasis added] (Motion, p. 3). PGW suggested that the ALJ's decision should be certified to the PUC for review and approval as soon as possible.

OTS, OCA, PICGUG and CEPA disagree with PGW's assertion that the information requested in discovery, references to PGW's budgetary expenditures and information regarding ratemaking methodologies are prejudicial or extraneous (Answers to Motion). The other parties submit that this information is relevant to making a determination in this base rate proceeding.

Proper Ratemaking Methodology-Controlling Section

PGW's position is that section 2212(e) of the Code commands the PUC, notwithstanding any other provision of the Public Utility Code to the contrary, to follow the "same ratemaking methodology and requirements" that were applied by PGW's former ratemaking body, the Philadelphia Gas Commission ("PGC"), when determining

PGW's revenue requirements and overall rates and charges. 66 Pa. C.S. § 2212(e). Section 2212(e) requires the PUC to follow that rate making methodology until all "approved bonds have been retired, redeemed, advance refunded or otherwise defeased" (Motion, p. 4). PGW noted that the approved bonds will not be retired, redeemed, advance refunded or otherwise defeased until 2026 (Motion p. 4, fn.5).

OCA, OTS, PICGUG and CEPA disagree with PGW's interpretation of section 2212(e). These parties assert that sections 1301 and 1308 of the Public Utility Code also apply to this proceeding.

PGW reads this section to dismiss the other sections of the Public Utility Code. However, in its February 8, 2001 Order, the Commission indicated that an investigation would be conducted pursuant to Section 1308 (Order, p. 11). Therefore, the Order indicated that the existing rates as well as the proposed rates would be examined.

Cash Flow Method Of Ratemaking

PGW explained that the ratemaking method previously applied to PGW by the PGC was set forth in an ordinance of the City of Philadelphia, which adopted the Management Agreement between it and its governing board, the Philadelphia Facilities Management Corporation ["PFMC"]² (Motion, p. 4).

PGW asserted that the Management Agreement,³ which was attached to the Motion in Limine as Attachment B, compelled the PGC to utilize the "cash flow"

² The Management Agreement Ordinance was incorporated into and approved by an ordinance of Philadelphia City Council (No. 455 of 1972) ("Management Agreement").

³ Pursuant to the Management Agreement Ordinance, PFMC is responsible for all operations of PGW, subject to the oversight and approval of various City officers and entities including PGC and Philadelphia City Council. Management Agreement Ordinance at § I, ¶1. PFMC is a non-profit corporation whose specific purpose is to operate PGW for the City. The Board of PFMC is appointed by the mayor of Philadelphia.

methodology in setting PGW's rates (Motion, p. 5). The cash flow method, established in Section VII, ¶1, mandated that the PGC:

shall fix and regulate rates and charges for supplying gas to customers . . . which (together with revenues for gas supplied to the City and to the Board of Education and other revenues of the Gas Works qualifying as "project revenues" as such term is defined in section 2 of the 1st Class City Revenue Bond Act) will, in each fiscal year produce revenues, at a minimum:

(a) Sufficient to pay all of the operation and maintenance costs and expenses of conducting the Gas Works enterprise and to pay the interest and amortization becoming due in such fiscal year on debt incurred for the Gas Works, including, but not limited to:

. . .

(b) Sufficient also . . .

(i) To make base payments to the City in the aggregate annual *principal* amount of \$18,000,000 . . . ;

(iii) To provide cash, or equivalent, for working capital in such reasonable amounts as may be determined by Company to be necessary and as shall be approved by the Gas Commission.

PGW states that the Management Agreement Ordinance, Section VII, ¶1, requires PGW's rates to cover an array of costs and expenses, including depreciation, retirement costs, all sinking fund charges payable for principal and interest on the City's gas works revenue bonds, capital additions, working capital, and an annual \$18 million base payment to the City. Further, the cash flow method also obligated PGC to set rates and comply with the covenants of its bonds issued in accordance with the First Class City

Revenue Bond Act. Management Agreement Ordinance at Section VII, ¶1(c). (Motion, pp. 5, 6)

PGW has three bond covenants that it must meet:

- a) A covenant that requires PGW to maintain funds that are 150% of its annual debt service obligation;
- b) A covenant that requires PGW and its owner, the City of Philadelphia, to charge rates that permit PGW to have sufficient cash to pay all of its obligations, including its debt service obligations, during each fiscal year in full when they are due; and
- c) A covenant that requires PGW and the City to continuously maintain and operate the Gas Works.⁴

(Motion, pp. 6, 10)

PGW stated that in orders issued before the PUC had jurisdiction, the PGC acknowledged the cash flow method as the statutory basis for establishing PGW's revenue requirement (Motion, p. 6). PGW quoted from the 1999 Gas Cost Rate Recommended Decision:

The relevant standard for review and approval of the Company's proposed Gas Cost Rate for FY 1999 is set forth in Section VII. 1. of the Management Agreement, which provides in pertinent part:

The Gas Commission shall fix and regulate rates and charges for supplying gas to its customers . . . which . . . will, in each fiscal year produce revenues, at a minimum:

⁴ Joint Petition, ¶ 10; see PUC Order Approving Joint Petition for Settlement at ¶ 1.

(a) Sufficient to pay all of the operation and maintenance costs and expenses of conducting the Gas Works enterprise

This Agreement was adopted by an ordinance passed by the City Council of Philadelphia on December 29, 1972. The ordinance has statutory effect.

In the Matter of Philadelphia Gas Works' Proposed FY 1999 Gas Cost Rate,
Recommended Decision at 4 (November 18, 1998) (citations omitted). The Recommended Decision was attached to the Motion in Limine as Attachment C.

PGW contends that notwithstanding the above evidence that the “cash flow method” is the required means of establishing rates for PGW, questions have been raised by opposing parties about the propriety of using this method of ratemaking. Specifically, while acknowledging the need to permit PGW to produce enough income to realize its 1.5x debt service coverage covenant during the interim proceeding, several parties contended that it would be “improper” to go further and recognize the level of cash that PGW needs to have on hand to pay its various obligations, including its debt service payments (Motion, p. 9). PGW referred to the language in the Joint Petition for Settlement regarding PGW having a \$20 - \$25 million positive cash balance at fiscal year end,⁵ and requesting that the PUC recognize that need by approving the \$18 million interim rate increase, cash conservation measures and the creation of a cash reserve fund in order to produce the necessary cash at year end.⁶ The PUC approved these provisions declaring that,

“[i]n the Commission’s judgement, authorization of the rate changes and cash reserves in the proposed settlement are consistent with our statutory obligations under Section

⁵ Joint Petition for Settlement, ¶ 25.

⁶ Joint Petition, ¶¶ 22-23, 25-27.

2212(e) as well as the just and reasonable standards relied upon in our November 22, 2000 Order.”⁷

(Motion, pp. 9, 10)

PGW argues that the second and third covenants clearly require PGW to have adequate cash from rates to pay its various cash obligations when they become due. The PUC’s Order approving the Settlement with its own Law Bureau, indicated its intention to comply with Section 2212(e) of the Public Utility Code and the PUC specifically acknowledged its obligation to “follow the same ratemaking methodology and requirements that were applicable to [PGW] prior to the assumption of jurisdiction by the Commission and permit PGW to impose, charge or collect rates or charges as necessary to permit . . . PGW to comply with its [bond] covenants 66 Pa. C.S. § 2212(e)”⁸ (Motion, pp. 10, 11).

CEPA et al denies that the Management Agreement Ordinance requires that all of PGW's cash needs must always be provided through rates (CEPA et al Answer, pp. 11-14). CEPA references a recent \$45 million advance by the City to PGW and payment of the \$18 million payment to the City of Philadelphia from borrowed funds (CEPA et al Answer, pp. 13, 14).

PGW submits that establishing rates that permit PGW to have the necessary cash balances is not only at the heart of its "prior ratemaking methodology and requirements" but is also required by its bond covenants, with which both the Public Utility Code and the PUC indicate PGW must comply. Accordingly, PGW requested that

⁷ PUC Order approving Joint Petition for Settlement at 8; see Id. at ¶ 5.

⁸ PUC Order at 7, n. 1 While PGW acknowledges that the parties will offer into evidence differing theories and data on what level of rates will guarantee the satisfaction of those bond covenants, PGW asserts that the ALJ should bar any testimony or evidence which purports to identify or describe the nature of PGW’s bond covenants in a way that is inconsistent with the Commission’s findings in its Order of February 21, 2001.

the ALJ issue an order declaring that PGW's rates will be established using the cash flow method of ratemaking. In addition, PGW requested that the order specifically indicate that the cash flow method requires that rates be set so as to produce sufficient cash on each month of the year to satisfy its projected cash obligation, and importantly, sufficient cash at the end of the fiscal (or test) year to permit PGW to pay its obligations in the months following the fiscal/test year (Motion, p. 11).

The parties differ on the interpretation of relevant cases. PGW contends that Pennsylvania reviewing courts have recognized and upheld the cash flow rate making methodology in Action Alliance v. Philadelphia Gas Commission, 406 A.2d 1155, 1158 (Pa. Commonwealth 1979), as producing just and reasonable rates. PGW stated that the cash flow methodology has also been held by the Supreme Court to produce rates that are constitutionally just and reasonable and non-confiscatory. Public Advocate v. Philadelphia Gas Commission, 674 A.2d 1056, 1061 [Pa. 1996] (Motion, p. 7). The other parties deny that these cases support the proposition that use of the cash flow method produces just and reasonable rates.

PGW states that the other parties incorrectly argue that the constitutional just and reasonableness question is a ratemaking standard or formula that "trumps" all other statutory ratemaking requirements. PGW argues that "the Constitution leaves the states free to decide what ratemaking methodology best balances the interest of the utility and the public," and does not designate "a single theory of ratemaking as a constitutional requirement." Public Advocate, 674 A.2d at 1061.

Instead of answering each paragraph of the Motion, OTS submitted that the issue is whether the Commission should be guided by the "just and reasonable" standard of the Public Utility Code or by the budget approval process of the Philadelphia Gas Commission. OTS submits that if the budgetary process controls the level of the rate increase, the instant rate proceeding should be terminated as pointless and

inconsequential (OTS Answer to Motion, p. 2). OTS stated that if the PGC budget controls, the public input hearings should have been held before the PGC during the deliberations on PGW's budget request (Id).

OCA stated that if the PGC were to set a budget that far exceeded what *could be considered just and reasonable*, PGW asserts that the Commission would still be obligated, under PGW's reading of the Gas Choice Act, to set rates to meet that budget (OCA Answer to Motion, p. 3). OCA argues that this is an untenable result that renders the Gas Choice Act meaningless (Id, p. 3). If the Commission's only function is to "rubber stamp" a budget approved by the Philadelphia Gas Commission, the OCA submits that there was no reason for bringing PGW under the commission's jurisdiction pursuant to 66 Pa. C. S. §2212(b). (Id, pp. 3,4)

OCA contends that a more appropriate reading of the Act is that an approved PGW budget should be reviewed just as any other budget of a utility is reviewed. The Commission should not be precluded from applying appropriate ratemaking principles to arrive at a just and reasonable level of rates (Id, p. 4).

PGW acknowledges that the current budget request before the PUC has not been approved by the PGC (Motion, p. 14, OCA's Answer, p. 4). The OCA submits that it is the duty of the Commission to review all costs, expenses, and revenues to determine just and reasonable rates. (Id, p. 5).

Adjustments To PGW Annual Expenditures

PGW also requests clarification regarding the question of the scope of adjustments to PGW's projected fiscal year expenses, income statement and cash flow statement that can be made by the parties and accepted by the PUC. OTS, OCA, CEPA

and PICGUG have all served interrogatories on PGW seeking information concerning PGW's past and proposed operating budgets and expenditures (Motion, p. 12).

PGW filed timely objections to these operating budget/past expenditure interrogatories, asserting that they were legally irrelevant and could not lead to admissible evidence (Motion, p. 12).

PGW stated that it has attempted to cooperate with the parties by responding to these and other data requests without waiving its view that the information requested in the discovery is legally irrelevant and cannot lead to legally relevant evidence⁹ (Motion, p. 12).

PGW submits, however, that the data requested could only be used to make the types of pro forma operating expense adjustments that the parties, such as the OCA and OTS, regularly make in base rate proceedings. For example, this data is used by the parties to recommend that an amount equal to the level of such an expense should be disallowed (Motion, p. 13). PGW asserts that it is subject to a unique ratemaking scheme and, for at least three reasons, such adjustments are violative of that ratemaking scheme (Motion, p. 13).

First, PGW argues that Section 2212(e) commands that the Commission follow the same ratemaking methodology and requirements previously applicable to PGW. PGW's Fiscal Year 2000-2001 budget, on which its \$65 million revenue requirement is based, is made up virtually entirely of expenditures, programs and operations that were approved by the PGC for inclusion in prior approved budgets, and,

⁹ PGW indicated that OTS agreed to such a stipulation, and that PGW answered OTS' discovery responses. PGW stated that it is willing to enter into a similar stipulation with the OCA and CEPA. Since they declined to enter into such an agreement, PGW has not responded to their data requests.

thus, funded by PGW's rates. Thus, PGW contends that the PUC does not have the authority to refuse to include an allowance for the cafeteria subsidy, for example, regardless of how the PUC would typically treat such an expenditure for a non-municipal gas distribution utility (Motion, p. 13).

Second, PGW's prior ratemaking method obligated its ratemaking authority (the PGC) to set rates sufficient to fund its budget, which included a level of charges that enabled PGW to meet its bond covenants. 66 Pa. C.S. § 2212(e). As indicated above, one of PGW's key bond covenants obligates PGW to have sufficient cash on hand to pay its obligations, including its debt service, when those obligations become due. Whether or not the type of expenditure at issue was previously approved by the PGC, PGW contends that the PUC cannot refuse to allow such expenditures to be included in PGW's rates without making it impossible for PGW to have the necessary cash to meet its expenditures when they come due (Motion, p. 14).

Finally, the specific expenditures, programs and operations reflected in PGW's 2000-2001 budget are part of PGW's proposed budget, presently being considered by the PGC. PGW stated that the PGC is scheduled to issue a decision on the proposed budget in the near future. Under the previously cited regulatory approach, PGW states that the PUC will be obligated to fund that budget, as approved. Consequently, PGW requests that the ALJ exclude testimony and evidence regarding PGW's operating budgets and specific expenditures (Motion, p. 14).

Moreover, PGW submits that adjustments to exclude the cost of certain PGW operations or programs intrudes into the City's budget approval authority. Prior to the passage of the Gas Choice Act, the PGC exercised two separate responsibilities: first it approved PGW's annual budget; and second, it approved a level of rates to fund that budget. Since the PUC assumed jurisdiction of PGW on July 1, 2000, it has the responsibility to set PGW's rates, but the PGC retains authority to approve PGW's

budgets. 66 Pa. C.S. § 2212(b) and (s). The approach followed by the PGC was to rule upon whether specific activities and operations were properly included in the budget. Once that *determination* was made, the PGC was obligated to fund the operation at whatever level it had authorized. PGW argues that if the PUC now were to disallow a particular expense item, the only way that PGW could absorb such a revenue adjustment and avoid a violation of its bond covenants and prior ratemaking approach would be by actually altering its operation to eliminate the expenditure (Motion, pp. 14, 15). PGW objects to questions about whether a particular activity or operation should or should not be undertaken, or whether a particular expenditure should be incurred. PGW contends that PGW's budgeting authority decides those matters (Motion, p. 15).

OTS submits that the Commission is guided by the just and reasonable standard in determining the appropriate level of rate request for PGW, not the budgetary process of PGC (OTS Answer to Motion, p. 3). OTS refers to sections 1301 and 1308(c) and (d) of the Public Utility Code. Pursuant to section 1301, "every rate . . . shall be just and reasonable." Neither section 1301 nor section 1308 contain language which would suggest that the Commission is under an obligation to determine rates for a public utility on the basis of a budgetary process (Id, p. 4). If the expenses are unlawful or unreasonable then there must be an adjustment as to what the ratepayers will or will not pay for in rates, and the public utility is obligated to make the appropriate adjustment as it relates to its ratepayers based upon the Commission's Order (Id, p. 4).

OCA, PICGUG and CEPA et al agree that the "just and reasonable" standard is applicable to this proceeding (PICGUG Answer p. 6, CEPA et al Answer, pp. 5-7).

OTS argues that there is nothing in section 2212(e) of the Public Utility Code, 66 Pa. C. S. § 2212(e), that suggests that the budget process of PGC is a factor in the establishment of rates by the Commission for PGW (OTS Answer, p. 4). If the PGC

approves a budget of \$65 million, and the Commission approves a rate increase less than \$65 million, the management of PGW must make the appropriate budgetary adjustments like any other public utility or business (Id, pp. 5). If the PGW management continues to make debts knowing that the money is not there to pay for the debt, the problem is one of nonfeasance for the management of PGW (Id, p. 5).

A careful review of Action Alliance, *supra*, reveals that although the Commonwealth Court described the process of fixing rates for PGW as the cash flow method, the Court stated that "[t]he parties all agree that the rates for gas services in Philadelphia must be just and reasonable." 406 A.2d at 1156-1158. In addition, the Court stated that "without findings by the Philadelphia Gas Commission we do not know what evidence produced in the five days of hearings it believed reliable and without reasons for its adjudication we do not know why it concluded that the proposed rates were just and reasonable." 406 A.2d at 1158. The Court remanded the matter to the PGW for preparation of an adjudication explaining why the proposed rates were just and reasonable.

In Public Advocate v. Philadelphia Gas Commission, *supra*, the Pennsylvania Supreme Court referred to the constitutional requirement of "just and reasonable" rates set forth in Federal Power Commission v. Hope Natural Gas Co, 320 U.S. 591, 607 (1944). The Court held "that the United Supreme Court guidelines for determining the constitutionality of a rate are also applicable to examining rate disputes involving municipal utilities." 674 A.2d at 1062.

Furthermore, the Commission's February 8, 2000 Order in this proceeding indicates that the lawfulness, justness and reasonableness of the rates will be investigated (Order, p. 11, Ordering ¶s 1, 3).

In Action Alliance, supra, a \$40,500,000 rate increase was requested and PGC approved a \$31,312,000 rate increase. 406 A.2d at 1157. Consequently, the PUC should not rubberstamp the proposed rate increase. It is noted that the rate increase is based on a budget that has been submitted to but not approved by the PGC. Therefore, the record must contain information to allow the PUC to determine whether the rates are just and reasonable.

City Authority

Section 2212(s) of the Code also provides that nothing contained in the Public Utility Code shall be construed to abrogate or limit the City of Philadelphia's ability to control, manage, or govern PGW. 66 Pa. C.S. § 2212(s). The City's autonomy extends to determining the powers, functions, budgets, activities, and mission of PGW. The City has exercised this autonomy pursuant to the Management Agreement Ordinance.

Section IV, ¶ 2 of the Management Agreement Ordinance requires PGW's annual operating budget to be submitted to and approved by the PGC and its capital budget to be recommended by the PGC and the City's Director of Finance and approved by the Philadelphia City Council. Section IV, ¶ 2(c) of the Management Agreement Ordinance provides that "[a]ll expenditures and commitments therefor [of PGW] shall be made pursuant to" the annual operating budget approved by the PGC.

PGW averred that its current year operating and capital budgets were submitted to the PGC on June 11, 2000 for approval. PGW recently updated that budget to reflect the \$65 million base rate PUC filing. PGW asserts that although the PGC has not approved this year's budget, it is expected to do so soon.

PGW interprets Section 2212(s) as a limitation on the PUC's jurisdiction.

Said section reads:

[N]othing contained in this title shall be construed to abrogate or limit the executive or legislative powers of a city that owns a city natural gas distribution operation to legislate or otherwise determine the powers, functions, budgets, activities and mission of the city natural gas distribution operation . . . including but not limited to, the ownership, governance, management or control thereof.

66 Pa. C.S. § 2212(s).

Thus, PGW submits that while PGW's level of rates are now subject to PUC approval, control of PGW's "budget," "management" and "operation" are specifically reserved to the City of Philadelphia.

PGW contends that the PUC's ratemaking investigation must proceed within these parameters. The base rate proceeding would verify that PGW does indeed require the full \$65 million increase in order to fund its operating budget and to pay its obligations when they come due. The specific level of cash and total income needed to accomplish this would continue to be subject to review and approval by the PUC. PGW requested that the ALJ specifically declare that adjustments to PGW's annual operating expenditures may not be made to the extent that they: were contained in PGW's prior, approved operating budget; are contained within its current operating budget once approved; or will result in PGW not having sufficient cash available throughout the year and at year end to pay specific operating costs and obligations, including debt service, when those expenditures come due (Motion, p. 16).

The other parties deny that the scope of the proceeding should be limited.

PGW's request to have the cash flow method listed as the only approved method is denied. In addition, the request to have the testimony limited to cash flow method without adjustments is denied.

PGW has requested that the ALJ issue a ruling and certify the question pursuant to 52 Pa. Code §5.305. This is the Administrative Law Judge's ruling on the matter. PGW or any other party can file a petition for interlocutory Commission review and answer to a material question pursuant to 52 Pa. Code §5.302.

ORDER

THEREFORE,
IT IS ORDERED:

1. That Motion in Limine is denied.
2. That the request to have the ALJ certify this ruling to the Commission is denied.
3. That a party can certify a material question to the Commission pursuant to 52 pa. Code §5.302.

Date:

April 13, 2001

Cynthia Williams Fordham
CYNTHIA WILLIAMS FORDHAM
Administrative Law Judge

Pennsylvania Public Utility Commission v. Philadelphia Gas Works
Docket Number R-00006042

SERVICE LIST

ACTIVE PARTIES

Daniel Clearfield, Esquire
Mark S. Stewart, Esquire
Wolf, Block, Schorr & Solis-Cohen LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101
Fax (717) 237-7161
dclearfield@wolfblock.com

Johnnie E. Simms, Esquire
Charles F. Hoffman, Esquire
PA Public Utility Commission
Office of Trial Staff
P.O. Box 3265
Harrisburg, PA 17105-3265
Fax (717) 772-2677
simmsj@puc.state.pa.us

Tanya J. McCloskey, Esquire
Stephen J. Keene, Esquire
James A. Mullins, Esquire
Christy M. Appleby, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Forum Place
Harrisburg, PA 17101-1923
Fax (717) 783-7152
skeenc@paoca.org; mullins@paoca.org
(C0023)

Steven C. Gray, Esquire
Office of Small Business Advocate
Commerce Building Suite 1102
300 North 2nd Street
Harrisburg, PA 17101
Fax (717) 783-2831
sgrav@state.pa.us
(C0070)

Philip A. Bertocci, Esquire
Edward A. McCool, Esquire
Community Legal Services, Inc.
1424 Chestnut Street, 4th Floor
Philadelphia, PA 19102-2505
Fax (215) 981-0435
pbertocci@clsphila.org

Consumers Education & Protective Association (C0027)
ACORN (C0027)
Action Alliance of Senior Citizens (C0027)
Tenants' Action Group (TAG) (C0027)

David M. Kleppinger, Esquire
Charis M. Burak, Esquire
Karen S. Miller Orner, Esquire
McNees Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Fax (717) 237-5300
dkleppin@mwn.com
cburak@mwn.com

Phila. Industrial Commercial Gas Users GP (C0060)

Wendell F. Holland, Esquire
Steven W. Ching, Esquire
Obermayer Rebmann Maxwell & Hippel LLP
One Penn Center 19th Floor
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103-1895
(215) 665-3282
wfh@obermayer.com

Walter W. Cohen, Esquire
Obermayer Rebmann Maxwell & Hippel LLP
204 State Street
Harrisburg, PA 17101
Fax (717) 234-9734
walter.cohen@paonline.com