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October 7, 2015

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17105-3265


RE: SBG Management Services, Inc./Colonial Garden Realty Co., L.P.; Docket No. C-2012-2304183 and SBG Management Services, Inc./Simon Garden Realty Co., L.P.; Docket No. C-2012-2304324

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' Exceptions in the above-referenced matter. Copies are being served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please contact me at your convenience.

Sincerely,



Carl R. Shultz

CRS/jls  
Enclosure

cc: Certificate of Service (w/enc)  
Hon. Eranda Vero, ALJ (w/enc)  
Office of Special Assistants (w/enc via email only)

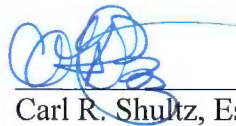
**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of PGW's Exceptions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

**Via Email and/or First Class Mail**

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Date: October 7, 2015



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Carl R. Shultz, Esquire

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc. / :  
Colonial Garden Realty Co., L.P. : Docket No. C-2012-2304183  
 :  
v. :  
 :  
Philadelphia Gas Works :

SBG Management Services, Inc. / :  
Simon Garden Realty Co., L.P. : Docket No. C-2012-2304324  
 :  
v. :  
 :  
Philadelphia Gas Works :

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**EXCEPTIONS OF  
PHILADELPHIA GAS WORKS**

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## I. INTRODUCTION

Philadelphia Gas Works (“PGW” or “Company”) hereby submits these Exceptions to the Initial Decision<sup>1</sup> of Administrative Law Judge Eranda Vero (“ALJ”) in the above captioned matter because the Initial Decision exceeds the Pennsylvania Public Utility Commission’s (“PUC” or “Commission”) jurisdiction. It adjudicates areas of law, that are not only beyond the Commission’s jurisdiction but, even if the Commission does review the legal issues presented, are wrong as a matter of law.

Before explaining in detail why portions of the Initial Decision should be rejected on these grounds, it is important to understand that an affirmance of this erroneous decision stands to threaten PGW’s ability to appropriately deal with customers such as the Complainant who systematically refuse to pay for the gas they receive.

As the Commission is well aware, all customers, regardless of financial means, have an obligation to pay for natural gas service provided by the Company. Otherwise, customers’ unpaid bills are included in the PGW’s uncollectible expense and ultimately paid by PGW’s remaining ratepayers.<sup>2</sup> Large uncollectible amounts not only have a negative effect on PGW’s financial performance, but result in higher rates for remaining, good paying customers. Accordingly, PGW not only is entitled to receive payment for the service it provides when the bill becomes due – it has an obligation to those customers who do not shirk their responsibilities to collect what it is owed under PGW’s tariff. Late payment charges are a rate – one fully authorized and approved by the Commission – for the service of carrying delinquent accounts.

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<sup>1</sup> In these Exceptions, (1) the Initial Decision is referred to as the “ID” or the “Initial Decision”; (2) Findings of Fact are referenced as “FF at ¶ \_\_\_”; (3) Conclusions of Law are referenced as “COL at ¶ \_\_\_”; and (4) Ordering Paragraphs are referenced as “Ordering ¶ \_\_\_” or “Ordering Paragraph.”

<sup>2</sup> See, e.g., *Bolt v. Duquesne Light Co.*, 66 Pa. PUC 463 (1988).

The goal of these charges is to increase timely collections, while ensuring that service is available to all customers based on equitable terms and conditions.

The Complainants<sup>3</sup> motive is clear. They wish to avoid timely paying for natural gas service and to also avoid tariffed late payment charges for as long as possible. For more than a decade, there has been a thematic pattern to their conduct: the Complainants refuse to consistently pay for gas consumption at any property where SBG is the customer of record. They do not pay for natural gas service for long periods of time, allege confusion and then dispute any and all efforts to collect any amounts on their delinquent accounts (which tend to have accumulated large arrearages). Essentially, what the Complainants are doing is borrowing money from the paying customers while they refuse for years to pay significant portions of the bill. The Commission should not permit this unfair form of cash flow management practiced by Complainants to be subsidized by other ratepayers.

The Initial Decision erroneously found that PGW's charging of late payment fees on the Complainants' arrearages is essentially barred once PGW, a municipal utility with municipal lien authority, files a lien on the Complainants' property. But, such claims are not within the jurisdiction of the Commission to adjudicate. Providing gas service to properties in Philadelphia constitutes the supply of a lienable service under the Municipal Claim And Tax Lien Law<sup>4</sup> ("MCTLL"). The MCTLL, authorizes the imposition of municipal liens by the City of Philadelphia ("City" or "Philadelphia")<sup>5</sup> to secure payment for unpaid natural gas services

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<sup>3</sup> The Complainants are (1) SBG Management Services, Inc. on behalf of Colonial Garden Realty Co., L.P. ("Colonial" or "Colonial Garden") and (2) SBG Management Services, Inc. on behalf of Simon Garden Realty Co., L.P. ("Simon" or "Simon Garden") (collectively, the "Complainants").

<sup>4</sup> 53 P.S. §§ 7101, *et. seq.*,

<sup>5</sup> Only the City, since it is a municipality, can file a municipal lien. Respondent is a municipal utility that is wholly owned by the City. Respondent consists only of the real and personal assets that are used to manufacture and deliver natural gas to entities within the City's borders. *Public Advocate v. PUC*, 674

rendered by PGW at a specific property. The sole and exclusive legal procedure to challenge municipal liens is set forth in the MCTLL. Accordingly, this Commission has found in numerous prior proceedings, that it lacks jurisdiction to litigate or resolve issues related to municipal liens.

Even if the Commission sets aside the lack of jurisdiction to interpret the MCTLL and resolve issues related to municipal liens, the Initial Decision has improperly applied municipal lien law and has misunderstood the difference between a lien and a “judgment” and the legal effect of each. The Initial Decision fails to appropriately recognize the differences between (a) municipal claims and judgments, (b) municipal liens and judgment liens and (c) late payment charges and interest on a civil judgment. It further fails to comprehend (w) the Commission’s jurisdiction over municipal liens; (x) the statutory process for the adjudication and enforcement of municipal liens; (y) the electable imposition of interest on liens; and (z) the correct application of *Equitable Gas v. Wade*, 812 A.2d 715 (Pa. Super. 2002) (“Wade”).

These errors were compounded by the direction to PGW in the Initial Decision to refund all of the late payment charges to a sophisticated customer who has chronically and consistently refused to pay for gas service on time and in full. The failure to include some level of late payment charges is a manifest error because even if the Commission does have jurisdiction to hear the claim, even under the (incorrect) logic of the Initial Decision some amount of a late payment charge is correct.

The Initial Decision further creates a new order (or allocation) of a partial payment between late payment charges and other arrearages. The Initial Decision mandates changing

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A.2d 1056 (Pa. 1996). Because PGW does not meet the legal definition of an entity authorized to file a lien to enforce a municipal claim, it is the City that has the municipal claim which it can enforce by way of a lien on the property that was provided natural gas service. *See* 53 P.S. § 7101.

PGW's long-standing (and generally industry-consistent) billing practice and would require that late payment charges be paid only after other arrearages are paid. The allocation mandated by the Initial Decision (a) is not supported by the plain language of the existing regulation, which does not distinguish between the 9 types of charges (described below) that constitute charges for basic service; (b) would permit the holders of delinquent accounts to systematically avoid paying late payment charges to PGW; and (c) is not consistent with the intent behind Chapter 14 of the Public Utility Code<sup>6</sup> and Chapter 56 of the Commission's Regulations, both of which seek to eliminate the opportunities for residential customers – and, in particular, PGW customers – capable of paying to avoid remitting their utility bills, and to provide utilities with the means to reduce their uncollectible accounts by modifying the procedures for delinquent account collections – in this instance, given that this is a commercial customer, the election to not pay the bill is even more troubling.<sup>7</sup>

Lastly, PGW further excepts to the recommended civil penalty. As explained in greater detail herein, PGW submits that it cannot be held to a standard newly (and incorrectly) created in the Initial Decision that was adopted well after the occurrence of the conduct the new standard is alleged to control. The improper *ex post facto* effect of such a retroactive penalty is compounded by the fact that no prior Regulation, Order or directive of the Commission suggested that PGW's

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<sup>6</sup> 66 Pa. C.S. §§ 101, *et seq.*

<sup>7</sup> *See, e.g.*, 66 Pa. C.S. §§ 1402(1) (“Increasing amounts of unpaid bills now threaten paying customers with higher rates due to other customers' delinquencies.”), 1402(3) (“Through this chapter, the General Assembly seeks to provide public utilities with an equitable means to reduce their uncollectible accounts by modifying the procedures for delinquent account collections and by increasing timely collections. At the same time, the General Assembly seeks to ensure that service remains available to all customers on reasonable terms and conditions.”) and 1403(4) (“The General Assembly believes that it is appropriate to provide additional collection tools to city natural gas distribution operations to recognize the financial circumstances of the operations and protect their ability to provide natural gas for the benefit of the residents of the city.”) (emphasis added). *See also* footnote 104, *infra*.



conduct was improper, since indeed the Commission lacks jurisdiction with respect to exercise of lien rights under the MCTLL

As noted, the determinations made in the Initial Decision, if adopted by this Commission, will have significant negative impacts on the efforts to reduce PGW's uncollectible accounts. The MCTLL was created, in part, to give municipal utilities an additional safeguard for the collection of debt on municipal claims - by permitting the creation of a security interest on the property served. This security interest takes priority over other creditors' sums secured by the property, and is disfavored in bankruptcy, thus giving compliant ratepayers the benefit of a greater chance that delinquent bills will ultimately be paid. The Public Utility Code specifically recognizes the ability of municipal utilities to file such municipal liens, thus also avoiding the cost (to other ratepayers, since there are no shareholders) of obtaining a personal judgment through a civil action.<sup>8</sup>

Adoption of the Initial Decision would disincentivize PGW to use this valuable and legislatively authorized tool, because it could no longer collect interest on late payments at the Tariffed rate. If a civil action is used against the customer of record, the account will need to be closed for a final bill. Litigation on the final bill may require extensive time and effort. This delay creates a significant risk that the debt will not be paid, and ratepayers will be responsible for the resulting bad debt expense. The effect of the Initial Decision is to require PGW to elect remedies and safeguards when neither the Public Utility Code nor the General Assembly have required such election.

Simply put, rather than attempting to restrict the efforts of a municipal utility to collect for unpaid service, the Commission should be encouraging municipal utilities to maximize and

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<sup>8</sup> See footnote 9, *infra*.

utilize all of the available collection tools that the General Assembly has provided to them because full use of those tools reduces uncollectibles and the resulting burden on the majority of good paying customers who must pay for those who refuse to pay for the service they have received.

## II. EXCEPTIONS

### A. **Exception No. 1: The Initial Decision Exceeds The Commission's Jurisdiction By Interpreting The Municipal Claims And Tax Lien Law (MCTLL), 53 P.S. §§ 7101, et. seq., and 42 Pa. C.S. § 8101 (ID at 54-64; COL at ¶ 1, 14-16; Ordering ¶ 5-6)**

At its core, this entire proceeding is related to the effectuation of, and defense to, the statutory lien of the City for unpaid natural gas services rendered by PGW at a specific property.<sup>9</sup> As the ALJ herself recognized,<sup>10</sup> those issues are within the jurisdiction of the Court of Common Pleas of Philadelphia County,<sup>11</sup> not the Commission.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code.<sup>12</sup> The

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<sup>9</sup> The Public Utility Code specifically states that nothing contained in the Public Utility Code shall abrogate the right of the City to collect delinquent receivables through the imposition of liens MCTLL. 66 Pa. C.S. § 2212(n). *See also* 66 Pa. C.S. 1414(a), which reiterates the General Assembly's determination that the previously existing right of the City to enforce payment for natural gas service rendered by PGW through the municipal claim and lien procedure of the MCTLL remains unabated. *Hynn Yoo and Yu Shin Yoo v. Philadelphia Gas Works, infra*; *Rose Daversa v. Philadelphia Gas Works*, PUC Docket No. C-2012-2310986, Final Order (Act 294) entered November 6, 2012 adopting the Initial Decision dated July 26, 2012.

<sup>10</sup> *See, e.g.*, ID at 60 (“I agree with PGW’s position that the Commission does not have jurisdiction to decide whether the correct rate of interest on a municipal lien should be set at 6% or 10%. “), 62 (“... as PGW argued, this Commission has no jurisdiction to determine whether 42 Pa. C.S. § 8101 or 53 P.S. § 7143 should apply to post-judgment interest on the municipal liens.”); COL at ¶ 14-15.

<sup>11</sup> Or the Municipal Court of Philadelphia if the amount is within its jurisdiction. 53 P.S. §§ 7101, *et seq.*

<sup>12</sup> *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

Commission must act within, and cannot exceed, its jurisdiction.<sup>13</sup> Jurisdiction may not be conferred by the parties where none exists.<sup>14</sup> Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.<sup>15</sup>

The Initial Decision exceeds the jurisdiction of the Commission, and the ALJ acknowledged that she should not be interpreting statutes that fall outside of the Commission's area of purview.<sup>16</sup> Nevertheless, the Initial Decision delved into interpretation of the MCTLL, and misinterpreted the statutory municipal lien perfected under the provisions of the MCTLL as being the same as "a judgment for a specific sum of money" under 42 Pa. C.S. § 8101. The Initial Decision then (wrongly) concluded that the provisions of 42 Pa. C.S. § 8101 (which provides post-judgment interest on other types of *in personam* monetary judgments, but not liens under the MCTLL) preempts both the Commission's regulation on late payment charges, 52 Pa. Code § 56.22, and PGW's tariff provisions on late payment charges.

**The ALJ does not have the legal authority, and thus, should not have attempted to interpret municipal claims and liens under the MCTLL.** Municipal claims and liens are statutory. They exist and are governed by the MCTLL.<sup>17</sup> This statutory procedure is intended to afford the City the option of protecting its interest pending resolution of the dispute over the

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<sup>13</sup> *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa. Super. 1945).

<sup>14</sup> *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

<sup>15</sup> *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *appeal denied*, 637 A.2d 293 (Pa. 1993).

<sup>16</sup> *Id.*, at 60-61.

<sup>17</sup> "The [MCTLL] provides for a specific, detailed and exclusive procedure that must be followed to challenge or collect on a municipal lien ...." *City of Phila. v. Manu*, 76 A.3d 601, 604 (Pa. Cmwlth. 2013). Section 3(a)(1) of the MCTLL authorizes municipalities to file liens on properties that will have priority over all other encumbrances, except taxes, tax liens or tax claims. 53 P.S. §7106(a)(1); *see Shapiro v. Center Twp., Butler Cnty.*, 632 A.2d 994 (Pa. Cmwlth. 1993). Once a lien is recorded, a property owner may challenge the municipal lien through the statutory mechanism. *See* footnote 58, *infra*,

amounts owed.<sup>18</sup> Once a municipal claim is recorded, it creates a municipal lien.<sup>19</sup> The property owner may challenge the municipal lien. The MCTLL establishes the exclusive means by which a property owner may challenge the form, substantive validity, or calculation of a lien.<sup>20</sup> The Commonwealth Court has disapproved of owner challenges to municipal liens outside of the statutory process set forth therein.<sup>21</sup> The Complainants are free to make the arguments about the effect of post judgment interest provisions of the MCTLL to a court of competent jurisdiction and obtain all of the relief it has requested here.

**The Commission lacks jurisdiction to interpret municipal claims and municipal liens under the MCTLL.** Nothing in the Public Utility Code confers jurisdiction upon the Commission to determine controversies related to the MCTLL. The Commission is given jurisdiction over public utilities by the Public Utility Code not over municipalities acting in their municipal capacity.<sup>22</sup> To wit, the Commission has consistently recognized its lack of subject matter jurisdiction in cases involving a dispute over a municipal lien placed upon a property.<sup>23</sup>

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<sup>18</sup> *Chartiers Valley School District v. Virginia Mansions Apartments, Inc.*, 489 A.2d 1381 (Pa. Super. 1985) (“Chartiers Valley School District”).

<sup>19</sup> 53 P.S. § 7143 refers to a municipal claim, once filed, as a lien.

<sup>20</sup> *Radhames v. Tax Review Bd.*, 994 A.2d 1170 (Pa. Cmwlth 2010).

<sup>21</sup> *Id.* See, e.g., *Maxatawny Twp. v. Karaisz*, 2015 Pa. Commw. Unpub. LEXIS 710 (Pa. Cmwlth, September 25, 2015).

<sup>22</sup> *Hynn Yoo and Yu Shin Yoo v. Philadelphia Gas Works*, supra. The Commission has jurisdiction over municipalities providing public utility service outside of their municipal boundaries, but only as to the public utility service being rendered. *Petition of Borough of Boyertown*, 466 A.2d 239 (Pa. Cmwlth. 1983). The instant case does not involve municipal extra-territorial service, nor is the lien proceeding public utility service.

<sup>23</sup> There are numerous cases on this issue, which are listed on pages 14 and 15 of PGW’s Main Brief. Additional cases include (but are not limited to): *Malisa Tate v. Philadelphia Gas Works*, PUC Docket No. C-2014-2428639, Final Order (Act 294) entered February 13, 2015 adopting the Initial Decision dated December 24, 2014 (“... the Court of Common Pleas of Philadelphia County has jurisdiction over proceedings relating to the municipal lien. Since the City, not the Respondent, places liens on property, no public utility is involved. In attaching a municipal lien on the premises, the City is acting in its capacity as a municipality only. The Commission has jurisdiction over public utilities pursuant to the Public Utility Code, 66 Pa. C.S. § 101 et seq., not over municipalities acting in their municipal capacity”); *Hynn Yoo and Yu Shin Yoo v. Philadelphia*

**The ALJ did not have the authority to and, thus, should not have attempted to harmonize the interest authorizing provisions of the MCTLL and 42 Pa. C.S. § 8101, which is a provision in the Judicial Code.**<sup>24</sup> 42 Pa. C.S. § 8101 is generally applicable to judgments for monetary damages in civil actions, not *in rem* liens based on municipal claims. It states that:

Except as otherwise provided by another statute, a judgment for specific sum of money shall bear interest at the lawful rate from the date of the verdict or award or from the date of the judgment, if the judgment is not entered upon a verdict or award.<sup>25</sup>

That Section is a procedural rule of post-judgment interest. It does not create a substantive right, rather it builds upon substantive rights already created by the jury's verdict.<sup>26</sup>

**Issues involving civil actions are not within the subject matter jurisdiction of the Commission.** Nothing in the Public Utility Code confers jurisdiction upon the Commission to award monetary damages. It is well settled that the Commission possesses no jurisdiction to consider requests for monetary damages.<sup>27</sup> It follows that the Commission does not have jurisdiction to interpret a statutory provision related to interest upon monetary damages.

**The ALJ did not have the legal authority to refuse to apply the Commission's own regulations and PGW's tariff authorizing late payment charges.** The Commission regulations contain no provisions authorizing the waiver of late payment charges in this

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*Gas Works, supra* (“... it is the City that has a municipal claim which it can enforce by way of a lien on the property that was provided natural gas service.”).

<sup>24</sup> 42 Pa. C.S. § 8101. That Section exists under Chapter 81 (which relates to judgments and other liens), and Part VII (which relates to civil actions and proceedings) of Title 42 of Purdon's Pennsylvania Consolidated Statutes (which relates to the judiciary and judicial procedure).

<sup>25</sup> 42 Pa. C.S. § 8101 (emphasis added).

<sup>26</sup> *Lockley v. CSX Transp., Inc.*, 66 A.3d 322 (Pa. Super. 2013).

<sup>27</sup> See, *DeFrancesco v. Western Pennsylvania Water Company*, 499 Pa. 374, 453 A.2d 595 (1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell Tel. Co. of Pa.*, *supra*.

instance.<sup>28</sup> There was no finding that PGW violated Commission rules or its tariff in applying this provision. The ALJ has no equitable powers to simply “right” what she considered to be a wrong, based upon her (incorrect) interpretation of statutes outside the Commission’s jurisdiction.

To be entirely clear, the existence of a municipal lien does not create a jurisdictional issue with regard to PGW’s service and/or billing practices. The Commission does not have jurisdiction over real property or the debts owed by real property. The customer of record (such as the Complainants) are responsible for gas debt and late payment charges thereon (pursuant to 52 Pa. Code § 56.22 and PGW’s Tariff). If that debt is not paid by the customer of record, the MCTLL provides that the property where the service was rendered may also be responsible for the unpaid debt.<sup>29</sup> Simply put, upon the creation and perfection of a municipal lien,<sup>30</sup> the property itself may be called upon to act as a guarantor for the customer of record’s debt for utility service.<sup>31</sup> The municipal lien puts the property (and the property owner on behalf of the property) on notice that recovery of the underlying debt (e.g., gas debt and late payment charges) may come from the property itself.<sup>32</sup>

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<sup>28</sup> See also 66 Pa. C.S. § 1409 (specifies instances for residential customers where a utility or the Commission may order a waiver of late payment charges.)

<sup>29</sup> The property owes the debt, not the owner of the property. See *Walnutport v Dennis*, 13 A.3d 541 (Pa. Cmwlth, 2010). A lien is filed on the property benefited by the municipal benefit. See, e.g., *Newberry Township v Ray Stambough*, 848 A.2d 173 (Pa. Cmwlth, 2004), *appeal denied*, 860 A.2d 491 (Pa. 2004); *East Taylor Municipal Authority v Finnegan*, 195 A.2d 821 (Pa. Super. 1963). The municipal lien is an in rem proceeding and does not include any personal liability. *Skupien et al v Borough of Gallitzin*, 578 A.2d 577, 579 (Pa. Cmwlth, 1990); *Philadelphia v Northwood Textile Mill*, 149 A.2d 60, 62 (Pa. 1969).

<sup>30</sup> Municipal liens are created and perfected under the MCTLL.

<sup>31</sup> The property can challenge the municipal lien and its liability for the debt. See footnote 17, *supra*. The sole and exclusive legal procedure to challenge the municipal lien is the scire facias procedure set forth in the MCTLL. There is absolutely no other legal process to challenge a municipal lien in Pennsylvania.

<sup>32</sup> It also gives the lien priority over certain debts related to the property. 53 P.S. § 7102; 72 P.S. § 5860.301. See footnote 48, *infra*.

Contrary to the Initial Decision,<sup>33</sup> the municipal lien is not a remedy in and of itself. There is a legal difference between the underlying debt and the municipal lien.<sup>34</sup> As noted, the municipal lien provides notice. But, that lien in and of itself does not create any preclusive effect,<sup>35</sup> and it does not affect the use of the property. A separate process is used to challenge and/or enforce the lien.<sup>36</sup> Once that process is completed, the final amount of the municipal lien is determined.

Until that debt is paid in full, efforts can be made to collect such sums from either the customer of record or the property itself. The Initial Decision, if adopted by the Commission, would necessarily force the City/PGW to pursue the debt against only one of them. But, no support can be found in the Public Utility Code for requiring that efforts to collect debt against the customer of record must end upon the filing of a municipal lien. Nor does the Public Utility Code support only pursuing the customer of record when a guarantor is available for the debt of the customer of record.<sup>37</sup> As set forth in the Introduction, the requirement of making an election between who to pursue for the debt will have negative consequences and results from a misunderstanding of the laws regarding lien and judgments.

Simply put, the Commission lacks the jurisdiction to address issues related to municipal liens. Such issues are for the Court of Common Pleas to determine. This means that the

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<sup>33</sup> See ID at 61, 62.

<sup>34</sup> See, e.g., *Pentlong Corp v GLS Capital Inc.*, 780 A.2d 734 (Pa. Cmwlth. 2011), reversed in part on other grounds, 820 A.2d 1240 (Pa 2012), for the principle that a tax debt and a tax lien are not the same legal concept.

<sup>35</sup> See, e.g., *Philadelphia v Northwood Textile Mill*, *supra* (A municipal lien may not be the exclusive way to collect a utility debt. The fact that a claim against the customer may be filed does not exclude the municipality from choosing to file a lien on the property.)

<sup>36</sup> See footnote 31, *supra*. 53 P.S. § 7106 includes a second procedure to collect a lien. That Section permits the municipality to file a Petition with Rule to Show Cause for permission to expose a lien to public sale.

<sup>37</sup> See footnote 9, *supra*.

Commission lacks jurisdiction to interpret the MCTLL and its relationship to 42 Pa. C.S. § 8101. Without the requisite jurisdiction, the ALJ should not have proceeded to (a) interpret said laws nor (b) to also proclaim that the said laws preempt both the Commission's regulation on late payment charges. As noted, the Complainant is free to make the arguments about the effect of post judgment interest provisions of the MCTLL to a court of competent jurisdiction and obtain all of the relief it has requested here. The ALJ's Initial Decision must be rejected.

**B. Exception No. 2: The Initial Decision Errs In Interpreting Both the MCTLL and 42 Pa. C.S. § 8101 (ID at 54-64; COL at ¶ 17-22; Ordering ¶ 5-8)**

Even if the Commission determines that it has jurisdiction to interpret the MCTLL and/or 42 Pa. C.S. § 8101, it cannot accept the interpretations reached in the Initial Decision. For the reasons set forth in greater detail below, the interpretations reached in the Initial Decision are wrong.

**First, the ALJ failed to understand the inherent, fundamental differences between a municipal claim and a monetary judgment.** These differences are highlighted in the following paragraphs:

A "municipal claim" is a legal claim for unpaid sums. The term is broadly defined in the MCTLL and includes a whole host of matters dealing with work done and service supplied. The statutory definition reads, in the relevant part, as follows:

... the claim arising out of, or resulting from, ... service supplied, work done, or improvement authorized and undertaken, by a municipality, ... and a lien therefor be not filed, but becomes filable within the period and in the manner herein provided, ... .  
A municipal claim shall be together with and shall include all penalties, interest, costs, fines, charges, expenses and fees,



including reasonable attorney fees, as allowed by this act [the MCTLL] and all other applicable laws.<sup>38</sup>

Municipal claims represent a debt owed to the City. They do not involve the resolution of any issue. In fact, the MCTLL itself does not require notice or an opportunity to be heard prior to the creation or filing of a municipal claim. For the purposes of the MCTLL, the municipal claim is not conclusive. As noted herein, a property owner is able to challenge the form, substantive validity, or calculation of a lien using the statutory procedures under the MCTLL.<sup>39</sup>

A judgment stands in stark contrast to a municipal claim. A “judgment” is any definitive order by a court. It is a “decision or sentence of the law given by a court or other tribunal as the result of proceedings instituted therein.” Stated differently, a ‘judgment’ is the official entry of a verdict or decision of the trial judge upon the docket. When adverse litigants are present in court (or each party has notice and opportunity to appear in court) and there is a real controversy between them, a final decision rendered in any form of proceeding of which the court has jurisdiction is a ‘judgment’ in the proper sense of that term, and the giving of it is a judicial function, whether or not execution may follow thereon. A ‘judgment’ may include a decree or order.”<sup>40</sup> Once a judgment becomes final, it is conclusive as to all parties and all issues.<sup>41</sup>

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<sup>38</sup> 53 P.S. § 7101 (definition of “municipal claim”).

<sup>39</sup> See footnotes 17 through 21, *supra*, and the accompanying text.

<sup>40</sup> 28 P.L.E. JUDGMENT § 2 (footnotes omitted).

<sup>41</sup> Under the doctrine of *res judicata*, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive of the rights of the parties and their privies and constitutes a bar to a subsequent action involving that same claim, demand, or cause of action and issues determined therein. See, e.g., *Keystone Bldg. Corp. v. Lincoln Sav. & Loan Assn.*, 360 A.2d 191 (Pa. 1976).

**Second, the ALJ inappropriately confused and comingled the concepts of a municipal lien and a judgment lien.**

The filing and indexing of a municipal claim creates a municipal lien.<sup>42</sup> Municipal liens are limited to a specific property where unpaid service was rendered, and not all of the patron's property within the county. Municipal liens are *in rem* proceedings. Strictly speaking, an action *in rem* is one taken directly against property and has for its object disposition of the property without reference to the titles of individual claimants. The reason for imposing the municipal lien on the property as opposed to the person allegedly responsible for the delinquency is that the property received the benefits of municipal services, not the person.<sup>43</sup> A municipal lien is either valid or invalid as to the property in question, rather than as to the respective property owner involved.<sup>44</sup>

A municipal lien arises by operation of law whenever a municipal claim is lawfully assessed or imposed upon the property.<sup>45</sup> The lien is perfected in Philadelphia by indexing with the Philadelphia County Prothonotary.<sup>46</sup> Perfection of the lien is accomplished merely by filing the municipal claim: No judgment need be obtained and there is no need to wait for decision in its favor in the Courts before filing a municipal claim (to create the municipal lien).<sup>47</sup> The

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<sup>42</sup> See footnote 19, *supra*, and the accompanying text,

<sup>43</sup> See *City of Phila. v. Northwood Textile Mills, Inc.*, *supra*.

<sup>44</sup> See *Borough of Towanda v. Brannaka*, 434 A.2d 889 (Pa. Cmwlth. 1981).

<sup>45</sup> 53 P.S. § 7106; *North Coventry Township v. Tripodi*, 64 A.3d 1128, 1132 (Pa. Cmwlth. 2013); *Twp. of Summit v. Prop. Located at Vacant Land in Summit Twp.*, 92 A.3d 121, 127 (Pa. Cmwlth. 2014).

<sup>46</sup> 53 P.S. §§ 7106(a), (b).

<sup>47</sup> See, e.g., *Chartiers Valley School District*, *supra*; *In re Wilson*, 25 B.R. 61 (Bankr. W.D.Pa. 1982).

placing of a municipal lien on property is not limited by a statute of limitations. This means that the City may file a lien to secure municipal debts for utilities at any time.<sup>48</sup>

In contrast, the filing and indexing of a *judgment* in the Office of the Prothonotary creates a lien upon all of the debtor's real property in that county.<sup>49</sup> Judgment liens are *in personam*. The entire object of an action *in personam* is to determine personal rights and obligations of the parties. The lien created by a judgment binds all real property of the debtor whether legal or equitably held.<sup>50</sup>

In Chapter 14 of the Public Utility Code, the General Assembly made it clear that municipal liens and civil judgments are distinct.<sup>51</sup> Importantly, in Section 1414(c), PGW is authorized to refuse service if there is a municipal lien or a civil judgment.<sup>52</sup> If the municipal lien was the same as a judgment, there would have been no need for the General Assembly to include both liens and judgments within that Section. It follows that the Initial Decision's

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<sup>48</sup> When filed and indexed, municipal liens obtain priority over other liens, claims, judgments, or interest. 53 P.S. 7102. The MCTLL does not contain a statute of limitations, allowing a municipality to file a lien to secure municipal debts for utilities at any time. 53 P.S. § 7432; *City of Philadelphia v. Perfetti*, 119 A.3d 396 (Pa. Cmwlth. 2015).

<sup>49</sup> 42 Pa. C.S. § 4303(a).

<sup>50</sup> *Clairton Corp. v. Chicago Title Ins. Co.*, 652 A.2d 916, 919 (Pa. Super. 1995), *appeal denied*, 665 A.2d 466 (Pa. 1995).

<sup>51</sup> See footnote 9, *supra*, which notes that in Section 1414(a) of the Public Utility Code, the General Assembly reiterates its determination that the City continues to have the right to enforce payment for natural gas service rendered by PGW through the procedures under the MCTLL.

<sup>52</sup> 66 Pa. C.S. § 1414(c). This Section does not confer jurisdiction on the Commission to adjudicate the validity of the City's lien, empower the Commission to remove the City's lien or direct PGW to remove the City's lien. See, e.g., *Barbara Streff and Francis Streff Sr vs Philadelphia Gas Works*, PUC Docket No. C-2012-2306034, Final Order (Act 294) entered November 2, 2012 adopting the Initial Decision dated September 14, 2012.

fundamental conclusion that a municipal lien is the same as a judgment violates the principles of Statutory Construction.<sup>53</sup>

The differences between municipal liens and judgment liens are further apparent under the Pennsylvania Rules. The Appellate Rule 311(a)(1) relates to appeals from orders refusing to open, vacate or strike off a judgment.<sup>54</sup> That Rule does not apply to Court orders refusing to strike municipal liens, because the lien (by itself) does not constitute a judgment that is subject to execution.<sup>55</sup> By its terms, the Rule only applies to orders refusing to strike judgments and judgment liens arising in civil actions.

**Third, the Initial Decision did not accurately reflect or recognize the statutory process for the adjudication and enforcement of municipal liens as compared to monetary judgments.** The Initial Decision treats the municipal lien as a final determination that a specific amount is owned by the customer for service rendered to the property. That is not true. There is a separate statutory process under the MCTLL by which municipal liens are enforced, challenged and/or adjudicated.

To be clear, a municipal lien, by itself, is not conclusive between parties as to the amount owed. The municipal lien is akin to (a) a Uniform Commercial Code (“UCC”) security interest that secures an undetermined amount of debt and/or (b) a mortgage lien which secures an undetermined amount of debt (which is equal to or less than the full amount borrowed by the debtor). The municipal lien is intended to afford the City protection of its interest pending

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<sup>53</sup> See, e.g., 1 Pa. C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”) 1921(b) (“(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

<sup>54</sup> Pa. R.A.P. 311(a)(1).

<sup>55</sup> *Borough of Ambler v. Regenbogen*, 713 A.2d 145 (Pa. Cmwlth. 1998).

resolution of the dispute over the amounts owed.<sup>56</sup> The final and specific amount owed is determined under a separate statutory procedure, which is discussed in greater detail below.

The procedure for enforcing municipal claims, is set forth in the MCTLL.<sup>57</sup> The MCTLL provides for a specific, detailed and exclusive procedure that must be followed to challenge or enforce a municipal lien.<sup>58</sup> Simply put, the MCTLL enables the City and/or an owner to obtain an adjudication of a municipal claim. Issues related to the municipal lien, including (but not limited to) the validity and the final and specific amount owned, are determined as part of a separate, but related statutory process, a writ of *scire facias*. The object of the writ of *scire facias* is ordinarily to ascertain the sum due on a lien of record and to give the property owner an opportunity to show cause why the plaintiff should not have execution.<sup>59</sup> The writ of *scire facias* serves the dual purposes of a summons and a complaint, and a writ of *scire facias* is personal process.<sup>60</sup> Of note, the Complainants have over 70 writs of *scire facias* pending at the present time.<sup>61</sup> Upon conclusion of the writ process, recovery of the amount of the municipal claims which resulted in the municipal lien may be effectuated by a Court ordered sheriff's sale.<sup>62</sup>

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<sup>56</sup> See *Chartiers Valley School District, supra*; *Keller v. Scranton City Treasurer*, 29 A.3d 436 (Pa. Cmwlth. 2011).

<sup>57</sup> *City of Philadelphia v. Manu*, 76 A.3d 601, 604 (Pa. Cmwlth. 2013).

<sup>58</sup> *Id.* “After a municipal claim is filed, three procedural alternatives are available to the parties: (1) the owner may contest the municipal claim or the amount of assessment by filing and serving a notice on the claimant municipality to issue a writ of *scire facias*, thereby forcing a hearing on the municipal claim; (2) the municipality may pursue a writ of *scire facias* without the owner's action; or (3) the owner and the municipality may choose not to do anything, thereby letting the municipal lien remain recorded indefinitely subject to revival of the lien in every twenty years upon the issuance of a suggestion of nonpayment and an averment of default.” See, e.g., *Penn Township v. Hanover Foods Corp.*, 847 A.2d 219, 223 (Pa. Cmwlth. 2014, citing, 53 P.S. §§ 7182 to 7184).

<sup>59</sup> *Perfetti, supra*. See also *Pentlong Corp.*, 780 A.2d at 734 (“A writ *scire facias* is the procedure by which a lienholder prosecutes a lien to judgment....”).

<sup>60</sup> *Perfetti, supra*.

<sup>61</sup> The Commission may take judicial notice of the contents of a Court's docket. See, e.g., Pa. R.E. 201(b)(2) (permitting courts to take judicial notice of facts that may be “determined from sources whose accuracy cannot reasonably be questioned”; *Germantown Cab Co. v. Philadelphia Parking Authority*, 27 A.3d 280,

But, before the writ process, the municipal lien does not bind the customer to any personal liability, or determine the City's interest in the real property. As noted, the filing and indexing of the municipal claim (which creates the municipal lien) does not finally all of the issues related to the debt. The writ process adjudicates all of the issues related to the municipal lien. This process is Constitutional. In June 2015, Commonwealth Court refused to extinguish municipal liens encumbering an investment property located in the city based upon the due process arguments made by the property owner.<sup>63</sup>

**Fourth, the ALJ erred in her reliance on *Wade*<sup>64</sup> and the Doctrine of Merger.** The existence of both *in rem* and *in personam* claims is expressly permitted under the MCTLL. As noted, the statutory municipal lien procedure exists to afford the City protection of its secured interest in a property pending resolution of the dispute over the amounts owed.<sup>65</sup>

Notwithstanding this, the Initial Decision incorrectly determined that the City could not have both an *in rem* claim against the property (as the property receiving service from PGW) and an *in personam* claim against the owner (as the customer of record for the account).

*Wade* is properly distinguishable from the subject circumstances. In *Wade*, Equitable Gas Company ("Equitable") commenced an civil action in the Court of Common Pleas against a former customer. That action resulted in a valid and final personal judgment against Wade. The judgment was conclusive between Equitable and Wade as to the amount owed by Wade to Equitable, and was binding as to Wade with respect to his personal liability for service rendered

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283 n.8 (Pa. Cmwlth. 2011) (taking judicial notice of a Supreme Court docket in a case involving a similar point of law); *In re F.B.*, 726 A.2d 361, 366 n.8 (Pa. 1999).

<sup>62</sup> 53 P.S. § 7283.

<sup>63</sup> *Perfetti, supra*.

<sup>64</sup> *Wade, supra*.

<sup>65</sup> *See Chartiers Valley School District, supra*.

by Equitable. Here, in clear contrast to circumstances presented in *Wade*, neither PGW nor the Complainants commenced the statutory process for adjudication of the municipal lien. There has been no valid and final determination by the Court of Common Pleas as to the valid or amount of the debt owned on the municipal lien. Only after the conclusion of such litigation would there be a valid and final judgment with respect to the municipal lien. As noted herein the municipal lien, by itself, is not conclusive between the City and the Complainants as to the amounts owned by the Complainants to PGW, and is not binding as to the Complainants with respect to their personal liability for services rendered by PGW.

The ALJ inappropriately relied on the doctrine of merger. The doctrine is set forth in Section 18 of the Restatement (Second) of Judgments.<sup>66</sup> That Section provides that when there is a valid and final personal judgment, the original claim and defenses are extinguished upon the judgment and are substituted for the judgment.<sup>67</sup> That doctrine formed the basis of the Commonwealth Court's decision in *Wade*.<sup>68</sup> In *Wade*, the Commonwealth Court held that Equitable was entitled to charge 18% per year pursuant to the tariff until and unless it obtained a final judgment in the Court of Common Pleas. At that point, the Commonwealth Court held that the doctrine of merger applied. Here, as explained herein, there has not been a valid and final adjudication. So, neither the original claim nor any of the defenses to that claim have been extinguished. The municipal lien has not been reduced to a valid and final judgment. Thus, none of the circumstances necessary to effectuate merger actually exist in the circumstances presented in this case thus destroying the linchpin of the ALJ's legal conclusions about the illegality of PGW assessing late payment charges on accounts where a municipal lien has been

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<sup>66</sup> RESTATEMENT (SECOND) OF JUDGMENTS, § 18. (Judgment for Plaintiff -- The General Rule of Merger).

<sup>67</sup> *Id.* See also RESTATEMENT (SECOND) OF JUDGMENTS § 18 comment a.

<sup>68</sup> *Wade*, 2002 PA Super 338 at ¶¶ 14-15.

filed. Moreover, even if that were the case, the ALJ does not have the authority to effect what is essentially an election of remedies. That would be the proper purview of the Court of Common Pleas.

**Fifth, the Initial Decision misinterpreted and misapplied 42 Pa. C.S. § 8101.** Without any discussion of the principles of statutory construction,<sup>69</sup> the Initial Decision implicitly concluded that the interest provision in 42 Pa. C.S. § 8101 should be applied to the subject non-adjudicated municipal liens.

As explained in Section II.A. above, the ALJ should not be interpret statutes that fall outside its area of purview. In fact, the ALJ stated agreement with PGW's position that the Commission does not have jurisdiction to decide whether the correct rate of interest on a municipal lien should be set under 42 Pa. C.S. § 8101, under 53 P.S. § 7143 or under the Public Utility Code.<sup>70</sup>

Nevertheless, the Initial Decision proceeded to implicitly conclude that 42 Pa. C.S. § 8101 (as opposed to 53 P.S. § 7143 and the Public Utility Code) is applicable to non-adjudicated municipal liens. This was done despite (a) clear language in Section 8101 that Section is not applicable if there is a specific provision in another statute.<sup>71</sup> Such language is consistent with the Statutory Construction Act, which provides that the specific statutory provisions should prevail over general statutory provisions,<sup>72</sup> and (b) the fact that the subject municipal liens were not adjudicated in any way by the parties.

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<sup>69</sup> 1 Pa. C.S. §§ 1901, *et seq.*

<sup>70</sup> ID at 60-61.

<sup>71</sup> 42 Pa. C.S. § 8101 (“Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.”) (emphasis added).

<sup>72</sup> 1 Pa. C.S. § 1933 (Particular controls general).



Having done what she said should not do,<sup>73</sup> the ALJ then proceeded to (wrongly) conclude that 42 Pa. C.S. § 8101 preempts 53 P.S. § 7143, the Commission’s regulation on late payment charges (52 Pa. Code § 56.22), and PGW’s Commission approved tariff on late payment charges. In doing so, the ALJ ignored the fundamental difference between a late payment charge and interest on a final judgment in a civil action. The Commission regulates the charge or penalty for delayed payment,<sup>74</sup> consistent with 66 Pa. C.S. § 1509 (billing procedures). Late payment charges are calculated based on the rate of interest specified in 52 Pa. Code § 56.22 and PGW’s Tariff. Late payment charges are not “interest.” Late payment charges are a rate for the service of carrying delinquent accounts.<sup>75</sup> That charge allocates the costs associated with unpaid balances directly to those customers who do not pay their bills timely. The goal of these charges is to increase timely collections while ensuring that service is available to all customers based on equitable terms and conditions.<sup>76</sup> No other charges or fixed fee related to a

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<sup>73</sup> The Initial Decision errs in concluding that PGW did not address the issue of when a municipal lien becomes a judgment). *See* ID at 60 at fn 26, 63. PGW’s argued that it is beyond the Commission’s jurisdiction to decide that issue, and attached cases which clearly provide that the writ *scire facis* procedure is the way a lienholder, such as the City, prosecutes a municipal lien to a “judgment.” *See Pentlong Corp., 780 A.2d at 734.*

<sup>74</sup> 52 Pa. Code § 56.22 (relating to accrual of late payment charges).

<sup>75</sup> *Id.*; *Allen Anderson v Peoples Natural Gas Company*, PUC Docket No. Z-09439330, PUC Opinion and Order entered June 19, 1980 (“Late payment charges are a rate for the service of carrying delinquent accounts.”). *See also* 52 Pa. Code §§ 56.2 (Delinquent account means “Charges for public utility service which have not been paid in full by the due date stated on the bill or otherwise agreed upon ...), 56.15(8) (“The amount of late payment charges, designated as such, which have accrued to the account of the customer for failure to pay bills by the due date of the bill and which are authorized under § 56.22 (relating to accrual of late payment charges”). *See also* 66 Pa. C.S. § 102 (“Rate.” means: “Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.”).

<sup>76</sup> 66 Pa. C.S. § 1402. *See, e.g., Lewis Marcus v UGI Penn Natural Gas Company*, PUC Docket No. C-2013-2390623, Final Order (Act 294) entered May 21, 2014 adopting the Initial Decision dated April 3, 2014; *Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 56 to Comply with the Provisions of 66 Pa.*

delinquent account may be charged by a utility.<sup>77</sup> Simply put, under the Public Utility Code, late payment charges are not “interest” as that term is used for civil actions.<sup>78</sup> In civil actions, “interest” on a valid and final judgment is an element of damages. The interest rate is the usual measure of damages for a delay in payment.

Here, the issue is the amount of late payment charges, not the interest on a judgment. The amount of late payment charges are not the subject of either the MCTLL or 42 Pa. C.S. § 8101. The MCTLL’s interest provision sets the maximum interest rate collectible on all municipal claims from the date of the completion of the work after it is filed as a lien.<sup>79</sup> The interest provision in 42 Pa. C.S. § 8101 provides that “a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award.”<sup>80</sup> These statutory provisions in no way inform the customer as to the appropriate amount of late payment charge that can be imposed by a utility for the service of carrying delinquent accounts. In fact, the MCTLL under 53 P.S. § 7143 permits a municipal claim to include both penalties and charges upon delinquent accounts and interest.<sup>81</sup> This permission was echoed in Chapter 14, which permits the City to “file as liens of record claims for unpaid natural gas distribution service and other related costs, including natural gas supply ...”<sup>82</sup> If the General Assembly had intended to

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*C.S., Chapter 14; General Review of Regulations*, PUC Docket No. L-00060182, Final Rulemaking Order entered March 22, 2011.

<sup>77</sup> 52 Pa. Code § 56.22(b)

<sup>78</sup> See footnote 27, *supra*.

<sup>79</sup> 53 P.S. § 7143.

<sup>80</sup> 42 Pa. C.S. § 8101.

<sup>81</sup> See footnote 38, *supra* and the accompanying text which sets forth the definition of a municipal claim. It should be noted that the MCTLL provide for the recovery from the delinquent payers of reasonable attorney fees expended in the collection of all municipal claims and municipal liens. 53 P.S. § 7106. Moreover, the General Assembly has specified that the amendment shall be retroactive to January 1, 1996.

<sup>82</sup> 66 Pa. C.S. § 1414(a). See also 66 Pa. C.S. §2212(b) (“Nothing contained in this title shall abrogate the power of a city natural gas distribution operation to collect delinquent receivables through the imposition of

limit municipal liens to only charges for natural gas supply (i.e., the so-called “principal” charges) it would not have expressly included the phrase “other related costs.”

For all these reasons the Initial Decision's suggested legal conclusions concerning PGW's charging of late payment charges on accounts with an associated municipal lien should be rejected, as not supported by the law nor subject matter jurisdiction of the Commission.

**C. Exception No. 3: The Initial Decision Errs By Directing Credits Or Refunds Of The Late Payment Charges (of \$94,626.23 and \$471,351.38), In Their Entirety. (ID at 53-64, 68; COL at ¶ 14-22; Ordering ¶ 5, 6)**

Due to obfuscation and other tactics by the Complainants, PGW carried delinquent accounts for the Complainants for long periods of time. In the Initial Decision, the ALJ determined that Simon Garden made no payments for 41 months (3 years, 5 months), i.e., from December 2007 to May 2011.<sup>83</sup> Colonial Gardens made a single payment (in November 2011) for 43 months of service, i.e., from May 2009 to December 2012.<sup>84</sup>

The ALJ concluded that the late payment charges for said delinquent accounts should be refunded in their entirety. The ALJ determined that (1) PGW assessed \$94,626.23 in late payment charges on the outstanding balance or debt represented by 15 liens (filed between July 9, 2009, and November 22, 2010)<sup>85</sup> and (2) PGW assessed \$471,351.38 in late payment charges at a rate of 18% annual on the outstanding balance or debt represented by 24 liens (filed between

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liens pursuant to section 3 of the act of May 16, 1923 (P.L. 207, No. 153), referred to as the Municipal Claim and Tax Lien Law, or otherwise.”)

<sup>83</sup> FF at ¶ 34, 47.

<sup>84</sup> FF at ¶ 7, 52, 56.

<sup>85</sup> FF at ¶ 65, 66.

January 9, 2010, and July 10, 2012).<sup>86</sup> The ALJ directed refunds of \$94,626.23 and \$471,351.38.<sup>87</sup>

**Notwithstanding PGW's other exceptions, the logic used in the Initial Decision does not support a determination that late payment charges could not be charged by PGW on delinquent accounts.** Instead, the Initial Decision (incorrectly) reaches the conclusion that the late payment charges were calculated incorrectly by PGW – despite the fact that PGW calculated late payment charges consistent with 52 Pa. Code § 56.22 and its Tariff. However, rather than directing a refund of the *excess* paid in late payment charges,<sup>88</sup> the Initial Decision improperly directed the refund of the entire amount of late payment charges.

**The failure to include some level of late payment charges is a manifest error because – even under the Initial Decision’s (incorrect) logic – some amount of a late payment charge is correct.** To be clear, under the ALJ’s (incorrect) logic, PGW is entitled to a late payment charge at the “lawful rate” under 42 Pa. C.S. § 8101 on the overdue balance of the bill. Section 8101 does not contain the lawful rate. It is presumed that that ALJ believed that the lawful rate (of 6%) under 41 P.S. § 202<sup>89</sup> should be applicable.<sup>90</sup> However, the ALJ could have

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<sup>86</sup> FF at ¶ 67, 68.

<sup>87</sup> See, e.g., Ordering ¶ 5, 6. The ALJ correctly limited the scope of the Complainants’ claims. The Initial Decision correctly notes that there is nothing on the face of these two Amended Complainants that raised concerns with regard to the statute of limitations applicable to claims brought before the Commission. ID at 22, fn 8. Subsequently, when Complainants attempted to expand the scope of their claims to include claims older than May 2009. PGW responded by explaining that tolling was not applicable and that said “older” claims could not be properly raised for the first time after the applicable statute of limitations had expired. See PGW Main Brief, at § IV.A; and PGW Reply Brief, at III.A. For the reasons discussed in *In Hynn Yoo and Yu Shin Yoo, supra*, the statute of limitations at 66 Pa.C.S. § 3314 divests the Commission of jurisdiction. Simply put, Section 3314 is a non-waivable statute of limitations that may be raised at any time.

<sup>88</sup> Under the Public Utility Code refunds may be directed for the amount of **any excess** paid by any patron. 66 Pa. C.S. § 1312(a).

<sup>89</sup> “Reference in any law or document enacted or executed heretofore or hereafter to “legal rate of interest” and reference in any document to an obligation to pay a sum of money “with interest” without specification

intended that the lawful rate (of 10%) under the MCTLL be applicable. In any event, the (inherently flawed) reasoning within the Initial Decision does not support a determination that no late payment charges should be applicable to the subject delinquent accounts. And, to be clear, it should be noted that PGW has not charged lien interest on any liens in this case.

**D. Exception No. 4: The Initial Decision Errs In The Application Of Partial Payments (ID at 36-54; Ordering ¶ 3, 4)**

Section 56.24 of the Commission’s regulations governs the application of partial payments between among several bills for public utility service. It reads in its entirety:

In the absence of written instructions, a disputed bill or a payment agreement, payments received by a public utility which are insufficient to pay a balance due both for prior service and for service billed during the current billing period shall first be applied to the balance due for prior service.<sup>91</sup>

The term “prior service” includes both basic service and non-basic service. Both basic service and non-basic service constitute the services previously rendered by PGW.

- **Basic Service:** Charges for basic service include (1) security deposits,<sup>92</sup> (2) late payment charges,<sup>93</sup> (3) commodity charges, (4) distribution charges, (5) customer service charges, (6) reconnection fees, (7) gas cost adjustment charges, (8) interstate transition cost surcharges and (9) taxes.<sup>94</sup> The Initial Decision correctly stated that together these items “constitute the balance due for basic service each

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of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum.” 41 P.S. § 202.

<sup>90</sup> COL at ¶ 22.

<sup>91</sup> 52 Pa. Code § 56.24 (Emphasis added).

<sup>92</sup> A utility may require an existing ratepayer to post a deposit to reestablish credit under the following circumstances: “(1) Delinquent accounts. Whenever a ratepayer has been delinquent in the payment of two consecutive bills or three or more bills within the preceding 12 months.” 52 Pa. Code § 56.41(1).

<sup>93</sup> 52 Pa. Code § 56.22 (c) states, that “Late payment charges may not be imposed on disputed estimated bills, unless the estimated bill was required because public utility personnel were willfully denied access to the affected premises to obtain an actual meter reading.”

<sup>94</sup> 52 Pa. Code § 56.2. *See also* ID at 44, 46; 52 Pa Code § 62.74(b)(3).

month and should be all addressed simultaneously when partial payment is applied to the balance due for prior service.”<sup>95</sup>

- **Non-Basic Service:** Charges for non-basic service include (a) PGW parts and labor plan; (b) meter change and meter repair charges, (c) warranties and (d) miscellaneous charges.<sup>96</sup>

The Initial Decision noted that the Commission statutes and regulations do not contain any provisions with regard to the order of application of partial payments amongst the various basic charges assessed during the same billing period.<sup>97</sup>

Here, no written instructions were given by the Complainants. Consistent with Section 56.24, PGW applied the partial payments received first to charges for basic service. The basic service charges included both late payment charges and so-called “principal” charges. PGW applied the partial payments first towards security deposits assessed on the account, then late payment charges, and then arrearages.<sup>98</sup> Of the “arrearages,” PGW would pay the oldest first and then the newer ones.<sup>99</sup> When a payment is made to an account that has multiple SAs, PGW distributes the payment amongst the different SAs based on a weighted average principle.<sup>100</sup>

The current allocation procedure used by PGW is fair, reasonable and in the public interest. As noted, PGW applies partial payments first towards security deposits assessed on the account, then late payment charges, and then arrearages for the so-called “principal” charges. PGW has used this partial-payment methodology since, at least, 2000. By paying off the late payment charges before the so-called “principal” charges, PGW is reducing the costs of the

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<sup>95</sup> ID at 46.

<sup>96</sup> ID at 41.

<sup>97</sup> ID at 50, *citing*, 52 Pa. Code §§ 56.23, 56.24.

<sup>98</sup> FF at ¶ 49.

<sup>99</sup> FF at ¶ 49.

<sup>100</sup> FF at ¶ 49.

carrying delinquent accounts that are borne by other ratepayers. That is fair and reasonable to the other ratepayers and helps ensure that the delinquent account actually pays the late payment charges.

If, for example, an account had a unpaid principal balance of \$98,511.64 and unpaid late payment charges of \$46,948.66,<sup>101</sup> and the customer of record pays \$98,511.64, that partial payment would pay off the late payment charges of \$46,948.66 and would reduce the unpaid “principal” balance (by \$51,562.98) to \$46,948.66.

Although this result is supported by the Commission’s regulation, the Initial Decision unilaterally creates an allocation rule that payments for prior basic service must be first allocated to arrearages for principal” charges<sup>102</sup> for prior basic service and then to “non-principal” charges<sup>103</sup> for prior basic service. Using this newly-created allocation rule, that same customer could pay \$98,511.64 to reduce its “principal” balance to zero. This would leave all of the late payment charges (of \$46,948.66) as unpaid.

There are serious deficiencies in the newly created allocation rule: **First, the newly-created allocation rule is not supported by the plain language of the existing regulation, which does not distinguish between the 9 types of charges (described above) that constitute charges for basic service.** No support for the said rule was found in rulemaking for that regulation or Commission precedent. Moreover, no support for the said rule can be found in how

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<sup>101</sup> This example is based on the outstanding balance as of November 2, 2011 for Colonial Garden’s Account # 6128000245, SA#1375369694, as reflected on the table in FF at ¶ 55. The payment of \$98,511.64 is a hypothetical, and is not reflective of the actual payment made to said account on November 4, 2011.

<sup>102</sup> According to the Initial Decision, “principle” charges include: (3) commodity charges, (4) distribution charges, (5) customer service charges, (6) reconnection fees, (7) gas cost adjustment charges, (8) interstate transition cost surcharges and (9) taxes.

<sup>103</sup> According to the Initial Decision, “non-principle” charges include: (1) security deposits, (2) late payment charges,

this newly-created allocation methodology was applied to the Complainants. The ALJ simply does not have the authority to reverse the Commission's regulations and PGW's longstanding policy.

**Second, the allocation rule for applying partial payments is unreasonable, unworkable and not in the public interest because it would permit the holders of delinquent accounts to systematically avoid paying late payment charges to PGW.** As noted in the above example, the customer's payment would leave all of the late payment charges (of \$46,948.66) as unpaid. That customer could then begin to accrue a new unpaid balance of so-called "principal" charges, which it could subsequently pay, again without ever paying the original unpaid late payment charges of \$46,948.66. So, the newly-created allocation rule could help delinquent customers to avoid paying their late payment charges. This would shift the cost of the service of carrying delinquent accounts from the delinquent customers to PGW's other customers.

**Third, the allocation rule is not consistent with the intent behind Chapter 14 of the Public Utility Code and Chapter 56 of the Commission's Regulations.** Both Chapter 14 and Chapter 56 seek to eliminate the opportunities for customers capable of paying to avoid paying their utility bills, and to provide utilities with the means to reduce their uncollectible accounts by modifying the procedures for delinquent account collections, especially for PGW.<sup>104</sup> As shown by the above example, the newly-created allocation rule does the exact opposite of the stated said intent. It follows that the said newly-created rule violates the principles of Statutory Construction,<sup>105</sup> and cannot be adopted by this Commission.

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<sup>104</sup> See footnotes 7 and 76, *supra*.

<sup>105</sup> See 1 Pa. C.S. §§ 1921 (Legislative intent controls), 1922 (Presumptions in Ascertaining Legislative Intent).



**E. Exception No. 5: The Initial Decision Errs In Assessing A Civil Penalty For Violation(s) Of The Public Utility Code And The Commissions' Regulations (ID at 64-68; COL at ¶ 23, 24; Ordering ¶ 7, 8)**

It is a fundamental rule of due process that the rules are not changed after the game has been played. This is why both the United States Constitution<sup>106</sup> and the Pennsylvania Constitution<sup>107</sup> forbid *ex post facto* laws.

PGW submits that it cannot be held to a standard newly (and incorrectly) created in the Initial Decision that was adopted well after the occurrence of the conduct the new standard is alleged to control. The improper *ex post facto* effect of such a retroactive penalty is compounded by the fact that no prior Regulation, Order or directive of the Commission suggested that PGW's conduct was improper. At least as far back in time as it came under the Commission's jurisdiction, PGW has used municipal liens to secure outstanding, unpaid gas charges. It has also used the same partial-payment allocation methodology since, at least, 2000, and has been regulated by the Commission since 2000.<sup>108</sup> In all that time, no issues or concerns were raised by PGW's conduct regarding municipal liens and allocation of partial payments. So, the assessment of a civil penalty in this proceeding appears to be arbitrary and potentially vindictive.

Here, the Initial Decision errs in assessing for a civil penalty for repeated violations of the Public Utility Code and the Commissions' regulations. As a matter of first impression,<sup>109</sup> the

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<sup>106</sup> Article I, Section 10 of the U.S. Constitution provides that: "No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts."

<sup>107</sup> Article I, Section 17 of the Pennsylvania Constitution provides that: "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

<sup>108</sup> PGW came under Commission regulation on July 1, 2000, pursuant to the Natural Gas Choice and Competition Act, 66 Pa. C.S. §§ 2201, *et seq.*

<sup>109</sup> ID at 68.

Initial Decision made new (and incorrect) interpretations of various laws and regulations. In doing so, the Initial Decision did not (and could not) point to a specific provision that explicitly supported her interpretations. The Initial Decision then (improperly) assessed a civil penalty based on the retroactive application of the standards created by said new interpretations.

No civil penalty is warranted by these circumstances. The City acted in within its statutory authorization to perfect municipal liens as security interests, and PGW acted within the Commission's regulations and its tariff in calculating and charge late payment charges on unpaid balances.<sup>110</sup> PGW's circumstances do not (1) constitute a willful choice and/or an intentional decision to violate the Public Utility Code, a regulation or order of the Commission; or (2) permit an opportunity to modify internal practices and procedures to address the new interpretations so as to prevent future violations. Moreover, it should be noted that since PGW is a municipally-owned gas utility and not an investor-owned utility, any fine imposed would be paid by PGW's ratepayers. PGW does not have shareholders, and is not an investor-owned public utility.

That being said, the basis for the calculations for the (alleged) violations are not clearly articulated. With respect to the allocation of partial-payments, the Initial Decision concluded that a civil penalty in the amount of \$2,000 is appropriate for PGW's (alleged) violation of 66 Pa. C.S. § 1501 and 52 Pa. Code § 56.24 (Application of partial payments among several bills for public utility service.).<sup>111</sup> The Initial Decision does not explain how that this part of the civil

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<sup>110</sup> Neither the Public Utility Code nor the Commission's regulations require public utilities to provide constantly flawless service. The Public Utility Code at 66 Pa. C.S. § 1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. *Analytical Laboratory Services, Inc. v. Metropolitan Edison Co.*, Docket No. C-2006608 (Order entered December 21, 2007); *Emerald Art Glass v. Duquesne Light Co.*, Docket No. C-00015494 (Order entered June 14, 2002); *Re: Metropolitan Edison Co.*, 80 Pa. PUC 662 (1993).

<sup>111</sup> ID. at 67-68. Please note that the ID appears to incorrectly refer to and 52 Pa. Code § 56.24 when discussing the application of partial payments among several bills for public utility service.

penalty relates to the maximum civil penalty per violation.<sup>112</sup> However, one can infer that the ALJ believed that a \$1000 fine was appropriate for each of the two accounts discussed in pages 44 to 49 of the Initial Decision. With respect to the late payment charges, the ALJ concluded that a civil penalty in the amount of \$25,000 is appropriate for PGW's (alleged) violations of 66 Pa. C.S. § 1501 and 52 Pa. Code § 56.22 (accrual of late payment charges).<sup>113</sup> The ALJ intends for this amount to deter PGW from applying its tariff and rates to liened indebted amounts. However, the relationship between this part of the civil penalty and the maximum civil penalty per violation<sup>114</sup> is unclear and is unexplained.

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<sup>112</sup> Under Public Utility Code Sections 3301(a) and (b), "the Commission may levy a fine of up to \$1,000 per day for continuing violations of the Public Utility Code." 66 Pa. C.S. § 3301.

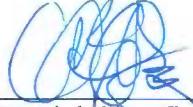
<sup>113</sup> ID at 67-68.

<sup>114</sup> See footnote 112, *supra*.

**III. CONCLUSION**

For the reasons set forth above, PGW respectfully requests that the Commission grant these exceptions, and reverse the Initial Decision consistent with the foregoing discussion.

Respectfully submitted,



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