



COMMONWEALTH OF PENNSYLVANIA

November 13, 2015

**E-FILED**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Petition of Philadelphia Gas Works for Waiver of Provisions of  
Act 11 to Increase the Distribution System Improvement Charge  
CAP and to Permit Levelization of DSIC Charges  
Docket No. P-2015-2501500**

Dear Secretary Chiavetta:

I am delivering for filing today the **Main Brief on Behalf of the Office of Small Business Advocate**, in the above-captioned proceeding.

Two copies have been served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon E. Webb".

Sharon E. Webb  
Assistant Small Business Advocate  
Attorney ID No. 73995

Enclosures

cc: The Honorable Christopher P. Pell  
The Honorable Marta Guhl  
Parties of Record  
Robert D. Knecht

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of Philadelphia Gas Works :  
for Waiver of Provisions of Act 11 :  
to Increase the Distribution System :     Docket No. P-2015-2501500  
Improvement Charge CAP and to :  
Permit Levelization of DSIC Charges :**

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**MAIN BRIEF  
ON BEHALF OF THE  
OFFICE OF SMALL BUSINESS ADVOCATE**

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**Dated: November 13, 2015**

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## **I. INTRODUCTION AND STATEMENT OF THE CASE**

On or about September 1, 2015, Philadelphia Gas Works (“PGW” or the “Company”) filed a Petition for Waiver of Provisions of Act 11 to increase the Distribution System Improvement Charge CAP and to Permit Levelization of DSIC Charges (“Petition”) with the Commission. The OSBA filed an Answer and Notice of Intervention in this matter on September 21, 2015. PGW filed the Petition in accordance with 66 Pa. C.S. §§ 1358(a), 2212(c), and 52 Pa. Code 5.41. Under its Long Term Infrastructure and Improvement Plan (“LTIP”) PGW will replace its cast iron distribution mains over the next 86 years, and its unprotected steel mains over an undefined period of time.<sup>1</sup> In response to a Pennsylvania Public Utility Commission (“PUC” or the “Commission”) Staff Report dated April 21, 2015 (“Staff Report”) the Company proposes to accelerate the replacement of mains, such that cast iron mains would be replaced over the next 48 years and unprotected steel mains over the next 66 years.<sup>2</sup>

To finance this acceleration, the Company has requested that the Commission approve various modifications to the currently approved Distribution System Improvement Charge (“DSIC”) mechanism. Specifically, PGW proposed: 1) The cap on the DSIC be increased from 5.0% of distribution revenues to 10.0% of distribution revenues, double the current cap; 2) That interest on overcollections not be credited to ratepayers;<sup>3</sup> and 3) That the cost basis for the DSIC percentage be an annual forecast of DSIC-eligible costs rather than the current method which relies on quarterly actual DSIC-eligible expenditures.

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<sup>1</sup> OSBA Statement No. 1, Direct Testimony of Robert D. Knecht (“OSBA Statement No. 1), p. 1.

<sup>2</sup> *Id.*

<sup>3</sup> PGW withdrew its proposal to waive the requirement to pay interest on overcollections of DSIC charges. *See* PGW/I&E Hearing Exhibit 1, Para. 1(A).

While PGW indicates that its proposed changes to the DSIC mechanism represent the primary recommendations contained in the Staff Report, the OSBA notes that the three changes noted above herein, represent a material departure from established precedent for DSIC mechanisms for natural gas distribution companies (“NGDCs”) in the Commonwealth. Additionally, the proposal is being vetted in the context of an accelerated proceeding making a more thorough financial evaluation of the proposal problematic.

## II. PROCEDURAL HISTORY

PGW filed the above referenced Petition on or about September 1, 2015. The Commission's Bureau of Investigation and Enforcement ("I&E") filed an Answer on September 18, 2015. The Office of the Consumer Advocate ("OCA") filed an Answer, Notice of Intervention, Formal Complaint and Public Statement on September 21, 2015. The OSBA filed an Answer and Notice of Intervention in this matter on September 21, 2015. The Philadelphia Industrial and Commercial Gas Users Group ("PICGUG") filed an Answer on September 23, 2015.

A Prehearing notice and Prehearing conference Order were issued on September 30, 2015, and October 2, 2015 respectively. In accordance with the October 2, 2015 Prehearing Order, the OSBA, the OCA, I&E and PICGUG filed prehearing memoranda.

In accordance with the procedural schedule established at the prehearing conference, the OSBA filed the Direct Testimony of OSBA witness Robert D. Knecht on October 19, 2015. The OCA and I&E also filed the Direct Testimony for their respective witnesses on October 19, 2015. Also on October 19, 2015 the Environmental Defense Fund filed a Petition to Intervene.

On October 30, 2015, PGW filed Rebuttal Testimony of the Company witnesses.

Subsequently, on November 3, 2015, the OSBA, and the OCA filed surrebuttal testimony.

On November 5, 2015 the various parties convened for an in person hearing in Philadelphia before Administrative Law Judges Guhl and Pell. At that hearing rejoinder testimony was presented and cross examination was conducted of various witnesses. At the conclusion of the cross examination, the testimony of various parties, including that of the OSBA, was moved into the record.

The OSBA submits this Main Brief in accordance with the litigation schedule established at the prehearing conference and also the Briefing Order issued on November 6, 2014.

### III. BURDEN OF PROOF

Section 332(a) of the Code, 66 Pa. C.S. § 332(a), specifies that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. The Commonwealth Court held that a “litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

The burden of proof is comprised of two separate and distinct burdens. The first burden is the burden of production. The burden of production informs the adjudicator which party must come forward with evidence to support a particular proposition. *See In re Loudenslager’s Estate*, 430 Pa. 33, 240 A.2d 477, 482 (1968).

The second burden is the burden of persuasion. The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established. The burden of persuasion never leaves the party upon whom it is originally placed. *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa.Cmwlth.1993).

A party that offers a proposal not included in the original filing bears the burden of proof for that proposal. *See Brockway Glass Co. v. Pennsylvania Public Utility Commission*, 437 A.2d 1067 (Pa.Cmwlth. 1981). *See also Pennsylvania Public Utility Commission v. Duquesne Light Company*, Docket Nos. R-2013-2372129, *et al.* (Opinion and Order entered April 23, 2014).

## **ARGUMENT**

### **IV. Waiver of 5% Limitation and Authorization for Higher Maximum Allowable DSIC**

#### **A. PGW has not met the burden required for a waiver of the current 5% cap.**

Section 1358 of the Public Utility Code establishes consumer protections associated with utility DSIC mechanisms. PGW appears to have little concern about consumer protections in this proceeding, as that expression does not appear in its petition. Section 1358(a)(1) establishes the 5% cap, and specifies that the Commission may grant a waiver of the cap “. . . in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service.” The OSBA respectfully submits that, in order to meet its burden on this issue, PGW must demonstrate that there are no reasonable alternatives for providing efficient, safe, reliable and reasonable service beyond the requested waiver. If the General Assembly had intended that utilities could evade the legislated cap by simply making vague claims that they would possibly be negatively impacted by the cap, there would have been little reason to establish this consumer protection in the first place.

The Company’s current LTIP proposal to replace its cast iron gas mains over the next 86 years is not an acceptable schedule. Given the age and condition of PGW’s infrastructure, replacement of the cast iron mains over the proposed 86 year period is unreasonable, unsafe and absurd. The OSBA fully supports PGW’s acceleration of the obsolete main replacement.

Furthermore, to the extent that the Company is either unwilling or unable to accelerate its mains replacement program without the proposed changes to the DSIC mechanism, the OSBA

submits that public safety considerations trump the ratepayer impact.<sup>4</sup> Thus, if the Commission concludes that the *only way* PGW can, or is willing to, accelerate its mains replacement is through modifying its DSIC, the DSIC should be modified. Alternatively stated, if the Commission concedes that it has no power to require that PGW accelerate its mains replacement program without granting the requested waivers, the OSBA reluctantly supports granting the waivers. In the OSBA's view, if PGW simply refuses to accelerate the replacement without the waivers, the OSBA concludes that public safety considerations trump the negative impact on PGW's ratepayers. Nevertheless, the OSBA submits that PGW has at least one very reasonable alternative approach for accelerating its mains replacement program, namely a near-term increase in borrowing.<sup>5</sup>

As set forth in the testimony of OSBA witness Robert D. Knecht, a review of the Company's own financial projections provided in discovery illustrates that PGW should be able to readily finance the necessary increase in expenditures using internally generated funds and temporary financing mechanisms without incurring any deterioration in its financial ratios. This is the case at least until the PGW's anticipated base rate increase goes into effect in fiscal year 2018.<sup>6</sup> The financial outlook for PGW 2015 is not the same bleak financial outlook as it was in 2009.<sup>7</sup> In fact, based on PGW's own financial projections, and using the current 5% DSIC, the Company proposes to increase its ratepayer-financed equity from \$454 million in 2015 to \$836 million by fiscal year end 2021.

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<sup>4</sup> OSBA Statement No. 1, p. 4.

<sup>5</sup> Section 1357 (c) of the Public Utility Code explicitly contemplates the use of debt financing for DSIC-eligible property at a city natural gas distribution operation. To date, PGW has not made use of that potential source of funding, choosing to use an approach that serves to supplement city equity at ratepayer expense. *See* OSBA Statement No. 1, pp. 4-6 and 10.

<sup>6</sup> OSBA Statement No 1, p. 4.

<sup>7</sup> *See* Table IEC-2, and OSBA Statement No. 1, p. 6.

Mr. Knecht testified how PGW could finance accelerated changes to its aging infrastructure (without the Company's proposed changes to the DSIC) until the Company's rates are reset in the planned base rates proceeding. Specifically, Mr. Knecht explained an illustration of how the acceleration of mains replacement could be accomplished through short-term debt increases without having a negative impact on the Company's financial statements as follows:

The Company could implement such a change with no negative financial impact relative to either its current position or even with respect to its improved position under its current plan, at least until rates are carefully reset in the planned base rates proceeding. To provide a rough approximation of the impact, I developed a variation on the financial forecasts provided by the Company in OSBA-I-2, which is attached as Exhibit IEc-2. In preparing that analysis, I took the Company's financial forecast based on the proposed DSIC changes (what the Company calls Scenario 2) and I substituted the lower revenues based on the existing DSIC (from Scenario 1). Because the Company anticipates a rate increase in FY 2018, I deemed that it was unnecessary to develop a full forecast beyond FY 2017.<sup>8</sup> I then determined the changes necessary to short term financing that would maintain the cash balances in the Company's forecast. As shown in Exhibit IEc-2, the only necessary changes were an increase in temporary financing of about \$8 million in FY 2016 and \$10 million in FY 2017, which would be repaid in FY 2018. A summary of the financial implications of this alternative is shown in Table IEc-3 below.

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<sup>8</sup> Even if the FY 2018 rate increase remains at the PGW forecast levels, my rough calculations over the entire 2016 to 2021 forecast period suggest that PGW could simply finance the additional capital spending through debt, while continuing to improve its current financial condition, albeit a little less aggressively than under its current plan.

<b>Table IEC-3</b>			
<b>Financial Implications of Accelerated Mains Replacement with No DSIC Changes</b>			
	<b>FY 2015</b>		<b>FY 2017</b>
	<b>Estimated</b>		<b>Current LTIP      Accelerated Investment</b>
City Equity	\$454		\$547      \$549
YE Cash Balance	\$106		\$98      \$98
Net Income	\$64.4		\$64.0      \$65.0
Debt to Capital Ratio	68.4%		67.4%      67.3%
Interest Coverage Ratio	2.2		2.1      2.1
Debt Service Coverage	1.73		1.85      1.87

Note: Debt service coverage and net income are before \$18 mm city fee.  
Source: OSBA-I-2, Exhibit IEC-2

As shown, if PGW were to simply finance the accelerated mains investment over the next two years using short-term debt, it would experience no material negative impact in its financial position relative to its current forecast. Moreover, the Company's financial position would be stronger at the end of 2017 than it is today.<sup>9</sup>

<sup>9</sup> OSBA Statement No. 1 at 7-8

<sup>10</sup> OSBA Statement No. 1 at 8.

Section 1358(a)(1) of the Public Utility Code, 66 Pa. C.S. § 1358(a)(1) sets for the basis upon which the Commission may grant a waiver of the 5% DSIC cap. Section 1358(a)(1) provides:

Except as provided under paragraph (2), the distribution system improvement charge may not exceed 5% of the amount billed to customers under the applicable rates of the wastewater utility or distribution rates of the electric distribution company, natural gas distribution company or city natural gas distribution operation. The commission may upon petition grant a waiver of the 5% limit under this paragraph for a utility in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service.

66 Pa. C.S. § 1358(a)(1).

In contrast to OSBA's evidence, PGW offered no evidence or financial analysis that an increase in the 5% DSIC cap was necessary in order to maintain "adequate, efficient, safe, reliable and reasonable service." Consequently, PGW has not met its burden in this respect, and the requested waiver should not be granted.

#### **V. Waivers to Permit Levelization and Annualization of DSIC Eligible Costs**

##### **A. PGW has not met the burden required for a waiver of the statutory provision to permit Annualization and Levelization of DSIC eligible costs.**

The Public Utility Code provides that a DSIC mechanism that is designed to compensate utilities for actual costs incurred. Sections 1357(a) and (c) of the Public Utility Code, 66 Pa. C.S. § 1357(a) and (c) set forth the eligibility requirements for DSIC programs in general and for the DSIC mechanism of a city natural gas distribution operation in particular.

Section 1357(a)(1) provides that the initial DSIC shall be calculated to recover the fixed cost of eligible property that has: "(i) [n]ot been previously reflected in the utility's rates or rate

base [or] (ii) [b]een placed in service during the three-month period ending one month prior to the effective date of the distribution improvement system charge.”

Section 1357(a)(2) sets the requirements for eligible plant not reflected in the initial DSIC, specifying that the DSIC “must be updated on a quarterly basis to reflect eligible property placed in service during the three-month period ending one month prior to the effective date of each distribution system improvement charge update.” This section clearly limits DSIC modifications to those based on actual incurred costs. Forecast costs are not contemplated and not permitted.

Section 1357(c) specifically addresses DSIC eligible property for a city natural gas operation, explicitly limiting recoverable costs to “. . . amounts reasonably expended or incurred to purchase and install eligible property and associated financing costs, if any, including debt service, debt service coverage and issuance costs.” The explicit use of the past tense in this provision clearly indicates that the DSIC must be limited to costs related to actual expenditures and not forecast expenditures.

This issue has, in fact, already been litigated. In ruling on PGW’s initial petition to establish the DSIC in 2013, (Docket No. P-2012-2337737) the Commission specifically noted and rejected the Company’s proposal to recover an annualized amount of DSIC-eligible costs as both inconsistent with the Final Implementation Order, the Model Tariff, and non-conforming to the filing requirements as provided by Act 11.<sup>11</sup> PGW’s proposal to annualize and levelize based on forecasts is similar to the flawed proposal that was rejected by the Commission in 2013.

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<sup>11</sup> Opinion and Order, Pennsylvania Public Utility Commission, Docket No. P-2012-2337737, entered April 4, 2013, page 29.

**VI. CONCLUSION**

**WHEREFORE**, the OSBA respectfully requests that the Commission reject PGW's Petition in its entirety.

Respectfully submitted,



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Dated: November 13, 2015

## Appendix A

### Proposed Findings of Fact

- 1) PGW, operating since 1836, is owned by the City of Philadelphia and is the largest municipally owned gas utility in the nation. Staff Report, p. 3.
2. PGW has been regulated by the Commission since 2000. Staff Report, at 3
3. Approximately 66% of PGW's system is comprised of cast iron and unprotected steel, both of which are high-risk pipe. Staff Report, at 3.
4. Approximately 1,500 miles of PGW's 3,024 miles of main in service are cast iron which is more than double the miles of cast iron of any other natural gas distribution company ("NGDC") in the state. Staff Report, at 3.
5. PGW has approximately 493 miles of unprotected steel mains still in service. Unprotected steel mains, like cast iron, also pose a corrosion risk because of lack of cathodic protection. Staff report at 3.

## Appendix B

### Proposed Conclusions of Law

- 1) PGW is obligated to provide adequate, safe and reasonable utility service. 66 Pa. §1501.
- 2) On or about September 1, 2015, PGW filed a *Petition for Waiver of Provisions of Act 11 to Increase the Distribution System Improvement Charge CAP and to Permit Annualization/Levelization of DSIC Charges*.
- 3) On April 4, 2013, the Commission entered an order at Docket No. P-2012-2337737 which rejected PGW's proposal to recover an annualized amount of DSIC-eligible costs. Opinion and Order, at 29.
- 4) 66 Pa. Code 1353(a) allows a utility to establish a DSIC to recover the costs to repair improve or replace eligible property in order to maintain adequate, efficient, safe, reliable and reasonable service.
- 5) The statutory requirements for DSIC eligible property for a city natural gas are set forth in Section 1357(c) of the Public Utility Code, 66 Pa. C.S. § 1357(c), and explicitly limits recoverable costs to "...amounts reasonably expended or incurred to purchase and install eligible property and associated financing costs, if any, including debt service coverage and issuance costs."
- 6) The explicit use of the past tense in Section 1357(c) is a clear indication that the DSIC must be related to actual expenditures and not forecast expenditures.
- 7) PGW's has failed to meet its burden of proof and provide sufficient evidence to support a waiver under the provisions of Act 11 to annualize and levelize the DSIC.
- 8) PGW's has failed to meet its burden of proof and provide evidence to support a waiver under the provisions of Act 11 to and increase its DSCI beyond the current 5% cap.

**Appendix C**

**Proposed Ordering Paragraphs**

IT IS RECOMMENDED:

- 1) That PGW's has failed to meet its burden of proof in the Petition for Waiver of provisions of Act 11.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Philadelphia Gas :  
Works for Waiver of Provisions :  
Of Act 11 to Increase the : Docket No. P-2015-2501500  
Distribution System Improvement :  
Charge Cap and to Permit :  
Levilization of DSIC Charges :

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing have been served via email and/or first-class mail (unless other noted below) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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