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December 14, 2015

VIA ELECTRONIC FILING

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

RE: SBG Management Services, Inc./Elrea Garden Realty Co., L.P. v. Philadelphia Gas Works, Docket No. C-2012-2304167; SBG Management Services, Inc./Fairmount Manor Realty Co., L.P. v. Philadelphia Gas Works, Docket No. C-2012-2304215; and SBG Management Services, Inc./Marshall Square Realty Co., L.P. v. Philadelphia Gas Works, Docket No. C-2012-2304303

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 the foregoing **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: December 14, 2015

Carl R. Shultz, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc. / Elrea Garden Realty Co., L.P.	:	Docket No. C-2012-2304167
	:	
v.	:	
	:	
Philadelphia Gas Works	:	
	:	
SBG Management Services, Inc. / Fairmount Manor Realty Co., L.P.	:	Docket No. C-2012-2304215
	:	
v.	:	
	:	
Philadelphia Gas Works	:	
	:	
SBG Management Services, Inc. / Marshall Square Realty Co, L.P.	:	Docket No. C-2012-2304303
	:	
v.	:	
	:	
Philadelphia Gas Works	:	

**EXCEPTIONS OF
PHILADELPHIA GAS WORKS**

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I. INTRODUCTION

Philadelphia Gas Works (“PGW” or “Company”) hereby submits these Exceptions to the Initial Decision¹ 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.

Like the earlier companion case,² this Initial Decision 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 Complainants 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.³ 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

¹ 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 ¶ ____”; (2) Conclusions of Law are referenced as “COL at ¶ ____”; and (4) Ordering Paragraphs are referenced as “Ordering ¶ __” or “Ordering Paragraph.”

² This decision has legal issues and logic in common with the following pending matter: *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. PGW and SBG Management Services, Inc./Simon Garden Realty Co., L.P. v. PGW*, Docket Nos. C-2012-2304183 and C-2012-2304324, Initial Decision dated August 21, 2015 wherein Exceptions are pending before the Commission as of December 14, 2015.

³ See, e.g., *Bolt v. Duquesne Light Co.*, 66 Pa. PUC 463 (1988).

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. 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'⁴ 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 Management Services, Inc. ("SBG") is the customer of record.⁵ 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 Law⁶

⁴ The Complainants are (1) SBG Management Services, Inc. on behalf of Elrea Garden Realty Co., L.P. ("Elrea" or "Elrea Garden"); (2) SBG Management Services, Inc. on behalf of Fairmount Manor Realty Co., L.P. ("Fairmount" or "Fairmount Manor"); and (3) SBG Management Services, Inc. on behalf of Marshall Square Realty Co., L.P. ("Marshall" or "Marshall Square") (collectively, the "Complainants").

⁵ SBG is the managing agent for real estate properties owned by the Complainants. FF at 5.

⁶ 53 P.S. §§ 7101, *et. seq.*

("MCTLL"). The MCTLL, authorizes the imposition of municipal liens by the City of Philadelphia ("City" or "Philadelphia")⁷ to secure payment for unpaid natural gas services 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

⁷ 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 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.

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 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 Code⁸ 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.⁹

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

⁸ 66 Pa. C.S. §§ 101, *et seq.*

⁹ *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 119, *infra*.

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, 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.¹⁰

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

¹⁰ See footnote 11, *infra*.

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 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 84-94; COL at ¶ 1, 13-15; Ordering ¶ 18-20)

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.¹¹ As the ALJ herself recognized,¹² those issues are within the jurisdiction of the Court of Common Pleas of Philadelphia County,¹³ not the Commission.

¹¹ 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.

¹² *See, e.g.*, ID at 90 ("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%."), 92 ("... 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 ¶ 13-14.

¹³ Or the Municipal Court of Philadelphia if the amount is within its jurisdiction. 53 P.S. §§ 7101, *et seq.*

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.¹⁴ The Commission must act within, and cannot exceed, its jurisdiction.¹⁵ Jurisdiction may not be conferred by the parties where none exists.¹⁶ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹⁷

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.¹⁸ 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.¹⁹ This statutory procedure is intended to

¹⁴ *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).

¹⁵ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa. Super. 1945).

¹⁶ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹⁷ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *appeal denied*, 637 A.2d 293 (Pa. 1993).

¹⁸ ID at 90.

¹⁹ "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

afford the City the option of protecting its interest pending resolution of the dispute over the amounts owed.²⁰ Once a municipal claim is recorded, it creates a municipal lien.²¹ 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.²² The Commonwealth Court has disapproved of owner challenges to municipal liens outside of the statutory process set forth therein.²³ 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.²⁴

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

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 68, *infra*.

²⁰ *Chartiers Valley School District v. Virginia Mansions Apartments, Inc.*, 489 A.2d 1381 (Pa. Super. 1985) (“Chartiers Valley School District”).

²¹ 53 P.S. § 7143 refers to a municipal claim, once filed, as a lien.

²² *Radhames v. Tax Review Bd.*, 994 A.2d 1170 (Pa. Cmwlth 2010).

²³ *Id.* *See, e.g., Maxatawny Twp. v. Karaisz*, 2015 Pa. Commw. Unpub. LEXIS 710 (Pa. Cmwlth, September 25, 2015).

²⁴ The existence of a procedure for contesting bills does not alter the statewide statutory scheme for municipal claims and writs of *scire facias*. *See Western Clinton County Municipal Authority v. Estate of Rosamilia*, 862 A.2d 52 (Pa. Cmwlth. 2003).

municipal capacity.²⁵ 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.²⁶

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.²⁷ 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.²⁸

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.²⁹

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

²⁵ *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.

²⁶ 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 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.").

²⁷ 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).

²⁸ 42 Pa. C.S. § 8101 (emphasis added).

²⁹ *Lockley v. CSX Transp., Inc.*, 66 A.3d 322 (Pa. Super. 2013).

consider requests for monetary damages.³⁰ 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 instance.³¹ There was no finding that PGW violated Commission rules or its tariff in applying this provision. The Initial Decision does not dispute PGW's ability/right to assess late payment charges on accounts before a municipal lien is filed in accordance with 52 Pa Code § 56.22 and PGW's Tariff. However, once a municipal lien is filed, the Initial Decision holds that PGW's does not have the ability/right to continue to assess late payment charges in accordance with 52 Pa Code § 56.22 and PGW's Tariff. Nothing in the Public Utility Code, the Commission's Regulations or PGW's Tariff mandate that a different method of assessment of late payment charges applies once a municipal lien is filed. But, the ALJ considered it "wrong" for PGW to continue to assess late payment charges in the same manner - once a municipal lien is filed - because of her (incorrect) interpretation of the MCTLL and 42 Pa. C.S. § 8101. 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

³⁰ *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*.

³¹ *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.)

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.³² Simply put, upon the creation and perfection of a municipal lien,³³ the property itself may be called upon to act as a guarantor for the customer of record's debt for utility service.³⁴ 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.³⁵

Contrary to the Initial Decision,³⁶ the municipal lien is not a remedy in and of itself. There is a legal difference between the underlying debt and the municipal lien.³⁷ As noted, the municipal lien provides notice. But, that lien in and of itself does not create any preclusive effect,³⁸ and it does not affect the use of the property. A separate process is used to challenge

³² 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).

³³ Municipal liens are created and perfected under the MCTLL.

³⁴ The property can challenge the municipal lien and its liability for the debt. *See* footnote 19, *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.

³⁵ It also gives the lien priority over certain debts related to the property. 53 P.S. § 7102; 72 P.S. § 5860.301. *See* footnote 51, *infra*.

³⁶ *See* ID at 90-92.

³⁷ *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.

³⁸ *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.).

and/or enforce the lien.³⁹ 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.⁴⁰ 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 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 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 ALJ's Initial Decision must be rejected.

³⁹ See footnote 34, *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.

⁴⁰ See footnote 11, *supra*.

B. Exception No. 2: The Initial Decision Errs In Interpreting Both the MCTLL and 42 Pa. C.S. § 8101 (ID at 84-94; COL at ¶ 16-21; Ordering ¶ 18-22)

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.⁴¹

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

⁴¹ 53 P.S. § 7101 (definition of “municipal claim”).

form, substantive validity, or calculation of a lien using the statutory procedures under the MCTLL.⁴²

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.”⁴³ Once a judgment becomes final, it is conclusive as to all parties and all issues.⁴⁴

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.⁴⁵ 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

⁴² See footnotes 19 through 23, *supra*, and the accompanying text.

⁴³ 28 P.L.E. JUDGMENT § 2 (footnotes omitted).

⁴⁴ 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 Asso.*, 360 A.2d 191 (Pa. 1976).

⁴⁵ See footnote 21, *supra*, and the accompanying text.

property received the benefits of municipal services, not the person.⁴⁶ A municipal lien is either valid or invalid as to the property in question, rather than as to the respective property owner involved.⁴⁷

A municipal lien arises by operation of law whenever a municipal claim is lawfully assessed or imposed upon the property.⁴⁸ The lien is perfected in Philadelphia by indexing with the Philadelphia County Prothonotary.⁴⁹ 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).⁵⁰ The 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.⁵¹

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.⁵² 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.⁵³

⁴⁶ See *City of Phila. v. Northwood Textile Mills, Inc.*, *supra*.

⁴⁷ See *Borough of Towanda v. Brannaka*, 434 A.2d 889 (Pa. Cmwlth. 1981).

⁴⁸ 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).

⁴⁹ 53 P.S. §§ 7106(a), (b).

⁵⁰ See, e.g., *Chartiers Valley School District*, *supra*; *In re Wilson*, 25 B.R. 61 (Bankr. W.D.Pa. 1982).

⁵¹ 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).

⁵² 42 Pa. C.S. § 4303(a).

⁵³ *Clairton Corp. v. Chicago Title Ins. Co.*, 652 A.2d 916, 919 (Pa. Super. 1995), *appeal denied*, 665 A.2d 466 (Pa. 1995).

In Chapter 14 of the Public Utility Code, the General Assembly made it clear that municipal liens and civil judgments are distinct.⁵⁴ Importantly, in Section 1414(c), PGW is authorized to refuse service if there is a municipal lien or a civil judgment.⁵⁵ 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. This distinction also exists in Section 8142(e) of the Judicial Code.⁵⁶ That Section separately lists verdicts, judgments, orders, instruments and writs creating a lien against real property. Again, there would no need for repetition if the writ was the same as a judgment. It follows that the Initial Decision's fundamental conclusion that a municipal lien is the same as a judgment violates the principles of Statutory Construction.⁵⁷

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.⁵⁸ 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

⁵⁴ See footnote 11, *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.

⁵⁵ 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.

⁵⁶ 42 Pa. C.S. § 8142(e).

⁵⁷ 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.").

⁵⁸ Pa. R.A.P. 311(a)(1).

execution.⁵⁹ By its terms, the Rule only applies to orders refusing to strike judgments and judgment liens arising in civil actions.

Moreover, any reliance on Rule 3001, 3021, 3022, 3023 of the Pennsylvania Rules of Civil Procedure is misplaced. The Complainants have suggested that Rules 3001 to 3023 are relevant.⁶⁰ But, by their terms, these Rules are only applicable to the transfer of judgments to other counties.⁶¹ Those rules have no application to enforcement of municipal liens. As explained in greater detail herein, after a municipal claim is filed, the validity and appropriate amount of the claim is determined by the Court of Common Pleas in the *scire facias* proceeding.⁶² The judgment on the municipal claim is then enforced by a writ of execution in accordance with Pa. R.C.P. No. 3190⁶³ (and, by reference, Pa. R.C.P. No. 3180 to 3183⁶⁴). Until a judgment is entered by the Court of Common Pleas on the municipal claim, the claimant cannot execute and collect on the municipal lien.⁶⁵ This makes the *scire facias* proceeding mandatory for enforcement of the lien and the collection of post-judgment interest. The enforcement process under Pa. R.C.P. No. 3190 is different than the enforcement process applicable to judgments for the payment of money under Pa. R.C.P. Nos. 3101 to 3159.

⁵⁹ *Borough of Ambler v. Regenbogen*, 713 A.2d 145 (Pa. Cmwlth. 1998).

⁶⁰ ID at 87.

⁶¹ Pa. R.C.P. Nos. 3001 to 3023.

⁶² *North Coventry Township*, 64 A.3d at 1134 (citation omitted).

⁶³ *North Coventry Township*, 64 A.3d at 1134 (citation omitted). “A judgment in rem in an action or proceeding upon a ... municipal claim ... or a charge on land shall be enforced against the real property subject to the lien, claim or charge in accordance with Rules 3180 to 3183 governing the enforcement of judgments in mortgage foreclosure.” Pa. R.C.P. No. 3190.

⁶⁴ Rules 3180 to 3183 relate to actions on mortgage foreclosure. *See* Pa. R.C.P. Nos. 3180 to 3183.

⁶⁵ *North Coventry Township*, 64 A.3d at 1134 (citation omitted).

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 resolution of the dispute over the amounts owed.⁶⁶ 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.⁶⁷ The MCTLL provides for a specific, detailed and exclusive procedure that must be followed to challenge or enforce a municipal lien.⁶⁸ 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

⁶⁶ See *Chartiers Valley School District, supra*; *Keller v. Scranton City Treasurer*, 29 A.3d 436 (Pa. Cmwlth. 2011).

⁶⁷ *City of Philadelphia v. Manu*, 76 A.3d 601, 604 (Pa. Cmwlth. 2013).

⁶⁸ *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).

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.⁶⁹ The writ of *scire facias* serves the dual purposes of a summons and a complaint, and a writ of *scire facias* is personal process.⁷⁰ 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.⁷¹

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.⁷²

Fourth, the ALJ erred in her reliance on *Wade*⁷³ 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.⁷⁴

⁶⁹ *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....”).

⁷⁰ *Perfetti, supra*.

⁷¹ 53 P.S. § 7283.

⁷² *Perfetti, supra*.

⁷³ *Wade, supra*.

⁷⁴ See *Chartiers Valley School District, supra*.

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 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.⁷⁵ 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.⁷⁶ That doctrine formed the basis of the

⁷⁵ RESTATEMENT (SECOND) OF JUDGMENTS, § 18. (Judgment for Plaintiff -- The General Rule of Merger).

⁷⁶ *Id.* See also RESTATEMENT (SECOND) OF JUDGMENTS § 18 comment a.

Commonwealth Court's decision in *Wade*.⁷⁷ 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 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,⁷⁸ 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.

In doing so, the Initial Decision seeks to frame the key issue around the appropriate post-judgment interest rate.⁷⁹ Such efforts must fail. It is simply not appropriate to argue that the late payment charges are post-judgment interest. As explained herein, there cannot be any post-judgment interest on the municipal claim until after the *scire facias* proceeding.⁸⁰ So, without

⁷⁷ *Wade*, 2002 PA Super 338 at ¶¶ 14-15.

⁷⁸ 1 Pa. C.S. §§ 1901, *et seq.*

⁷⁹ ID at 92, 93; COL at ¶ 17.

⁸⁰ *See, e.g.*, footnotes 62 through 65, *supra*, and the accompanying text.

that adjudicatory step, there is no enforceable judgment on the municipal claim. Without an enforceable judgment, there cannot be “post-judgment” interest. This argument also fails upon the facts because, as noted in Section II.C (below), PGW has not charged lien interest on any liens in this case.⁸¹

Moreover, 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.⁸²

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.⁸³ Such language is consistent with the Statutory Construction Act, which provides that the specific statutory provisions should prevail over general statutory provisions;⁸⁴ and (b) the fact that the subject municipal liens were not adjudicated in any way by the parties.

Having done what she said should not do,⁸⁵ the ALJ then proceeded to (wrongly) conclude that 42 Pa. C.S. § 8101 preempts 53 P.S. § 7143, the Commission’s regulation on late

⁸¹ See footnote 105, *infra*.

⁸² ID at 90.

⁸³ 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).

⁸⁴ 1 Pa. C.S. § 1933 (Particular controls general).

⁸⁵ The Initial Decision errs in concluding that PGW did not address the issue of when a municipal lien becomes a judgment. See ID at 90, n 66, 92. PGW’s argued that it is beyond the Commission’s

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,⁸⁶ 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.⁸⁷ 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.⁸⁸ No other charges or fixed fee related to a delinquent account may be charged by a utility.⁸⁹ Simply put, under the Public Utility Code, late

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.

⁸⁶ 52 Pa. Code § 56.22 (relating to accrual of late payment charges).

⁸⁷ *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.").

⁸⁸ 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. C.S., Chapter 14; General Review of Regulations*, PUC Docket No. L-00060182, Final Rulemaking Order entered March 22, 2011.

⁸⁹ 52 Pa. Code § 56.22(b).

payment charges are not “interest” as that term is used for civil actions.⁹⁰ 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.⁹¹ 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.”⁹² 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.⁹³ 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 ...”⁹⁴ If the General Assembly had intended to 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.”

⁹⁰ See footnote 30, *supra*.

⁹¹ 53 P.S. § 7143.

⁹² 42 Pa. C.S. § 8101.

⁹³ See footnote 41, *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.

⁹⁴ 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 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.”)

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 \$58,655.68, \$157,238.79 and \$94,557.67), In Their Entirety. (ID at 84-94; COL at ¶ 1, 13-21; Ordering ¶ 1, 18-20)

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 between May 2009 and December 2012, Elrea,⁹⁵ Fairmount,⁹⁶ and Marshall⁹⁷ only made payments towards their respective accounts on one day, April 9, 2012. This means that Elrea, Fairmount and Marshall made no payments for about 2 years and 11 months, i.e., from May 2009 to April 9, 2012. And, that after making payments on the same day, began to accrue arrearages again.

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 Elrea a total of \$58,655.68 in late payment charges on the outstanding balance or debt represented by 94 liens (filed between January 1, 2010, and October 23, 2012);⁹⁸ (2) PGW assessed Fairmount a total of \$157,238.79 in late payment charges on the outstanding balance or debt represented by 130 liens

⁹⁵ FF at ¶ 38, 39, 42, 43, 46, 48.

⁹⁶ FF at ¶ 51, 52, 55, 56, 59, 60, 63, 64, 67, 69, 72, 73, 76, 77, 80, 81, 84, 85, 92, 93.

⁹⁷ FF at ¶ 96, 97, 100, 101.

⁹⁸ FF at ¶ 110, 111.

(filed between January 12, 2010, and October 22, 2012);⁹⁹ and (3) PGW assessed Marshall a total of \$94,557.67 in late payment charges on the outstanding balance or debt represented by 9 liens (filed between February 12, 2010, and October 22, 2012).¹⁰⁰ The ALJ directed refunds of \$58,655.68 to Elrea, \$157,238.79 to Fairmount, and \$94,557.67 to Marshall.¹⁰¹

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,¹⁰² 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

⁹⁹ FF at ¶ 112, 113.

¹⁰⁰ FF at ¶ 114, 115.

¹⁰¹ *See, e.g.,* Ordering ¶ 18-20. 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 37, n 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.

¹⁰² 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).

lawful rate (of 6%) under 41 P.S. § 202¹⁰³ should be applicable.¹⁰⁴ However, the ALJ could have 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. Ralph Savage, the Director of PGW's Commercial Resource Center, testified that, "there are no interest charges on liens. ... The interest charge is on the outstanding debt," explaining that the lien as it stands before or with the Court of Common Pleas of the City of Philadelphia does not accrue any interest charges.¹⁰⁵ There is no evidence to the contrary. So, it is both factually and legally incorrect to say that PGW is charging both late payment charges and "interest" on the municipal lien based upon the filing of the municipal lien itself.

D. Exception No. 4: The Initial Decision Errs In The Application Of Partial Payments (ID at 46-84, 98; Ordering ¶ 1-17)

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.¹⁰⁶

¹⁰³ "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 of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum." 41 P.S. § 202.

¹⁰⁴ COL at ¶ 21.

¹⁰⁵ Tr. 440.

¹⁰⁶ 52 Pa. Code § 56.24 (Emphasis added).

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,¹⁰⁷ (2) late payment charges,¹⁰⁸ (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.¹⁰⁹ The Initial Decision correctly stated that together these items “constitute the balance due for basic service each month and should be all addressed simultaneously when partial payment is applied to the balance due for prior service.”¹¹⁰
- **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.¹¹¹

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.¹¹²

Here, no written instructions were given by the Complainants when they made their payments in April 2012. 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

¹⁰⁷ 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).

¹⁰⁸ 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.”

¹⁰⁹ 52 Pa. Code § 56.2. *See also* ID at 53; COL at ¶ 12; 52 Pa Code § 62.74(b)(3).

¹¹⁰ ID at 55.

¹¹¹ *See* 52 Pa. Code § 56.2 (“Payments received by a public utility without written instructions that they be applied to merchandise, appliances, special services, meter testing fees or other nonbasic charges.”).

¹¹² *See* ID at 55, n 15, *citing*, 52 Pa. Code §§ 56.23, 56.24.

security deposits assessed on the account, then late payment charges, and then arrearages.¹¹³ Of the “arrears,” PGW would pay the oldest first and then the newer ones.¹¹⁴

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 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 \$124,240.37 and unpaid late payment charges of \$56,066.30,¹¹⁵ and the customer of record pays \$124,240.37, that partial payment would pay off the late payment charges of \$56,066.30 and would reduce the unpaid “principal” balance (by \$68,174.07) to \$56,066.30.¹¹⁶

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” charges¹¹⁷ for prior basic service and then to “non-principal”

¹¹³ FF at ¶ 37.

¹¹⁴ FF at ¶ 37.

¹¹⁵ This example is based on the outstanding balance as of April 4, 2012 for Marshall’s Account # ending in 7503, SA# ending in 6324, as reflected on the table in FF at ¶ 99. The payment of \$124,240.37 is a hypothetical, and is not reflective of the actual payment made to said account on April 9, 2012.

¹¹⁶ If \$56,066.30 is applied towards the late payment charges, then \$68,174.07 would be available to be applied to the principal balance. If \$68,174.07 is applied to the principal balance, the remaining principal balance is \$56,066.30.

¹¹⁷ 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.

charges¹¹⁸ for prior basic service. Using this newly-created allocation rule, that same customer could pay \$124,240.37 to reduce its “principal” balance to zero. This would leave all of the late payment charges (of \$56,066.30) 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 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 \$56,066.30) 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 \$56,066.30. 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.

¹¹⁸ According to the Initial Decision, “non-principle” charges include: (1) security deposits and (2) late payment charges.

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.¹¹⁹ 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,¹²⁰ and cannot be adopted by this Commission.

PGW's order of applying payments does not violate any written rule in the Public Utility Code, the Commission's regulations or PGW's tariff. Despite this fact, the Complainants are likely to argue that the order in which payments are applied constitutes the illegal "pyramiding" of late fees. They are mistaken. Fee pyramiding is an illegal practice in which consumers are charged late fees when they do not owe them.¹²¹ Fee pyramiding happens when a consumer (1) makes a late payment; (2) is charged a late fee; (3) makes all monthly payments on time after that one month of being late, but does not pay the late fee; and (4) the business charges a late fee on all the payments that were made on time.¹²² Such circumstances bear no relationship to the actual facts presented. The Complainants have a clear and demonstrated practice of not making any payments for extended periods of time, making a payment that does not cover all of the prior

¹¹⁹ See footnotes 9 and 88, *supra*.

¹²⁰ See 1 Pa. C.S. §§ 1921 (Legislative intent controls), 1922 (Presumptions in Ascertaining Legislative Intent).

¹²¹ See, e.g., 12 C.F.R 227.15 (rule applicable to banks); *Waterman Convalescent Hospital v. Jurupa Community Services District*, 1996 Cal. App. LEXIS 1228 (November 26, 1996) (Waterman paid all monthly charges currently, except for the one late payment that led to a late penalty. All the subsequent penalties were attributable to this one late payment and violated a provision of a California statute).

¹²² *Id.*

outstanding amounts, and then resuming their practice of not making payments.¹²³ Therefore, it cannot be said that PGW is assessing a late payment charge on payments that were made on time.

PGW further excepts to Ordering Paragraph 7, which is duplicative of Ordering Paragraph 5. This appears to be a typographical error. To the extent that a credit is upheld by the Commission, this error should be corrected by the Commission to make it clear said account and SA is only entitled to a single credit of \$123.20, and not two credits of \$123.20 (for a total credit of \$246.40).

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 94-99; COL at ¶ 22-23; Ordering ¶ 1, 21-22)

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 Constitution¹²⁴ and the Pennsylvania Constitution¹²⁵ 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

¹²³ See footnotes 95, 96, 97, *supra*.

¹²⁴ 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."

¹²⁵ 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."

used the same partial-payment allocation methodology since, at least, 2000, and has been regulated by the Commission since 2000.¹²⁶ 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,¹²⁷ the 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.¹²⁸ 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

¹²⁶ 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.*

¹²⁷ ID at 98.

¹²⁸ 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).

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.).¹²⁹ The Initial Decision does not explain how that this part of the civil penalty relates to the maximum civil penalty per violation.¹³⁰ However, one can infer that the ALJ believed that a \$125 fine was appropriate for each of the 16 accounts discussed in pages 53 to 80 of the Initial Decision.¹³¹

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).¹³² 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 violation¹³³ is unclear and is unexplained.

¹²⁹ ID at 97-99.

¹³⁰ 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.

¹³¹ Please note that one of Fairmount's accounts was closed in June 2012. ID at 68, n 55. The outstanding balance on the closed account was transferred to one of Fairmount's active accounts. *Id.*

¹³² ID at 98.

¹³³ See footnote 130, *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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