



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

April 18, 2016

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

Re: Petition of Philadelphia Gas Works for Approval of Demand-Side
Management Plan for FY 2016-2020, and Philadelphia Gas Works
Universal and Energy Conservation Plan for 2014-2016
52 Pa. Code § 62.4 – Request for Waivers
Docket No. P-2014-2459362

Dear Secretary Chiavetta:

Attached, please find the the Bureau of Investigation and Enforcement's (I&E)
Reply Exceptions in the above-captioned proceeding.

Copies are being served on parties as identified in the attached certificate of
service. If you have any questions, please contact me at (717) 787-6156.

Sincerely,

Carrie B. Wright
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #208185

Gina L. Lauffer
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #313863

CBW/GLL/sea
Enclosure

cc: Certificate of Service
ALJ Christopher P. Pell
ALJ Marta Guhl

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of Philadelphia Gas Works for :
Approval of Demand-Side :
Management Plan for FY 2016-2020, : Docket No. P-2014-2459362
and Philadelphia Gas Works Universal :
and Energy Conservation Plan for :
2014-2016 52 Pa. Code § 62.4 – Request :
for Waivers :**

**REPLY EXCEPTIONS
OF THE
BUREAU OF INVESTIGATION & ENFORCEMENT**

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Dated: April 18, 2016

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I. INTRODUCTION

On December 23, 2014, Philadelphia Gas Works “PGW” filed a Petition for Approval of its Demand-Side Management Plan (“DSM Plan”) for FY 2016-2020 and its Universal Service and Energy Conservation Plan for 2014-2016, 52 Pa.Code § 62.4 – Request for Waivers (“Petition”). The Petition, filed at Docket No. P-2014-2459362, serves, inter alia, as a request to institute Phase II of PGW’s initial five-year DSM Plan, which was originally approved by the Pennsylvania Public Utility Commission (“Commission”) in conjunction with a base rate proceeding settlement on July 29, 2010 at Docket Nos. P-2009-2097639 and R-2009-2139884. Because Phase I of PGW’s DSM Plan expired on August 31, 2015, on April 10, 2015, PGW filed a Petition to extend its DSM I Plan to prevent the Plan’s programs from ending before the completion of the current litigation related to its DSM II Plan. By Order of the Commission, entered on May 7, 2015, PGW’s Petition was granted, and its DSM Phase I Plan was extended until the earlier of either (1) August 31, 2016; or, (2) the effective date of a Phase II compliance plan filed in response to a final Commission Order at Docket Number P-2014-2459362. The Company’s current Petition seeks approval to implement Phase II of the DSM program for five years beginning September 1, 2015 and ending August 21, 2020.

On January 12, 2015, Answers to PGW’s Petition were filed by the Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”) and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”). On January 13, 2015, Petitions to Intervene were filed by the Office of

Small Business Advocate (“OSBA”), Tenant Union Representative Network (“TURN”) and Alliance of Senior Citizens of Greater Philadelphia (“Action Alliance”) (collectively “TURN et al.”), and the Philadelphia Industrial and Commercial Gas Users Group (“PICGUG”). The Clean Air Council (“CAC”) also petitioned for intervention on January 16, 2015.

This proceeding was assigned to the Office of Administrative Law Judge (“OALJ”) and on February 17, 2015, a Prehearing Conference was held and a procedural schedule was adopted. Pursuant to the schedule, a hearing was held in this matter on October 15, 2015, at which testimony and exhibits were entered into the record. After the Hearing, along with I&E, and in accordance with the established procedural schedule, PGW, the OCA, TURN, PICGUG, and CAUSE-PA” filed Main Briefs on November 19, 2015. In accordance with a granted extension request, the OSBA filed its Main Brief on November 20, 2015. With the exception of PICGUG, on December 8, 2015, all of the aforementioned parties filed Reply Briefs.

On March 18, 2016, Administrative Law Judges Christopher P. Pell and Marta Guhl (“ALJs”) issued a Recommended Decision (“RD”) approving PGW’s Petition in part, and with modification. I&E did not submit Exceptions to any of the terms of the RD. However, PGW filed Exceptions to the RD. Pursuant to the Secretarial Letter issued on March 18, 2016, I&E now files these timely Reply Exceptions in response to the Exceptions raised by PGW.

II. REPLY EXCEPTIONS

1. Reply to PGW Exception No. 2: Conservation Adjustment Mechanism (“CAM”)

A. Act 129 Bars PGW’s Proposed CAM

The ALJs correctly concluded that Act 129 bars the implementation of PGW’s proposed CAM. In its Main Brief PGW argued that “Act 129’s express prohibition on large electric distribution companies from recovering lost revenue due to reduced energy consumption other than through a Section 1308 base rate proceeding is instructive here.”¹ I&E agrees with this statement. It seems clear to I&E that the Commission’s intention is to have even those utilities not covered by Act 129 recover lost revenues through a base rate proceeding as well. Chiefly, the fact that the Commission has expressed concern related to the difficulty in measuring lost revenues seems to indicate that all utilities would be required to treat lost revenues in a similar fashion. Simply put a natural gas distribution company’s (“NGDC”) lost revenues are not sufficiently different from an electric distribution company’s (“EDC”) lost revenues to warrant a deviation in treatment. To be clear, PGW is not barred from requesting recovery of lost margins. However, the correct forum in which to make that request would be in the context of a base rate proceeding. As noted by the ALJs RD, “[a]lthough there is not a provision of the Public Utility Code regarding recovery of lost margins specifically applicable to a natural gas distribution company’s EE&C plan...Act 129 is persuasive in this instance.”²

¹ PGW Main Brief, p. 50.

² RD at 59.

Further, the ALJ's RD states that the Commission's reasoning set forth in Act 129 is convincing and there is no reason why it should not be extended to an NGDC.³

While PGW's Exceptions spend much time relating what it believes the Commission's intentions were in not identifying whether lost revenues are a "cost" of the program for Section 1319 purposes⁴, PGW essentially ignores the fact that the Commission has explicitly stated that "[t]he General Assembly's distinction between 'costs' and 'decreased revenues' in Act 129 confirms that the term 'costs' in Section 1319(a) does not include lost revenue."⁵ Contrary to PGW's assertion, the ALJs' conclusion about what a "cost" for Section 1319 purposes is not misplaced.⁶ This Commission has made the determination that costs in Section 1319 do not include lost revenue. Regarding statutory construction, it is well settled that the Courts have to defer to an agency's own interpretation of its rules and regulations unless the interpretation is unreasonable or would frustrate the legislative purpose.⁷ In addition, Courts have held that unless an agencies interpretation is clearly erroneous, that interpretation controls.⁸ Therefore, PGW's argument that recovery of lost revenues is a matter of statutory construction is misguided because the Commission has already spoken on the matter. Furthermore, as noted above, PGW has in no way been barred from seeking recovery in the context of a base rate proceeding. The ALJs' correct recommendation that the CAM

³ RD at 61.

⁴ PGW Exceptions at 25-26.

⁵ *Petition of UGI Utilities, Inc. – Electric Division for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2010-2210316, Opinion and Order entered October 19, 2011 at 23.

⁶ PGW Exceptions at 26.

⁷ *Goslin v. State Board of Medicine*, 937 A.2d 531, 535 (Pa. Cmwlth. 2007).

⁸ *Riverwalk Casino v. Pennsylvania Gaming Control Board*, 926 A.2d 926, 940 (Pa. 2007).

not be approved, simply changes the mechanism through which PGW could seek to recover those lost margins.

In short, nothing that PGW has presented changes the underlying ratemaking issue presented in this case. Namely, that lost revenues are difficult to calculate, and therefore, should not be subject to dollar for dollar recovery. PGW's CAM proposal is simply a way for PGW to circumvent the traditional base rate case process. Accordingly, the ALJs' determination that the CAM should be rejected was correct and PGW's Exception should be denied.

B. Commission Precedent Regarding UGI Bars Adoption of the CAM

The ALJs correctly determined that Commission precedent bars the adoption of PGW's proposed CAM. As noted in the section above, the Commission, in its UGI Order, determined that although UGI was not required to implement an energy efficiency plan under Act 129, deviation from the cost recovery guidance provided in Act 129 was unwarranted.⁹ Furthermore, as noted above, the Commission stated that lost revenues are not a cost of a DSM program under Section 1319 of the Public Utility Code. The proper regulatory avenue to address revenue is a base rate case. The Commission has been quite explicit in this determination of the proper forum in which to recover energy efficiency program related lost revenues. No evidence PGW has presented indicates that PGW should be allowed to circumvent the proper regulatory process.

⁹ *Petition of UGI Utilities, Inc. – Electric Division for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2010-2210316, Opinion and Order entered October 19, 2011 at 23.

In its Exceptions, PGW states that the Commission's decision does not apply to PGW because it was based on two factors: (1) the fact that lost revenue recovery mechanism was governed by the guidance provided by Act 129; and, (2) that UGI's method of calculating lost revenues was imprecise making it inappropriate for dollar for dollar recovery.¹⁰ PGW then goes on to note that the ALJs did not find that PGW's lost revenue recovery calculation mechanism was imprecise.¹¹ While it is true that the ALJs' RD does not explicitly say that PGW's calculation was imprecise, it was simply unnecessary for the ALJs to do so. This Commission has noted that calculation of lost revenues is, in general, imprecise whether the ALJs specifically state that PGW's particular method of calculation is imprecise or not. Furthermore, a finding that PGW's method of calculation is imprecise is not necessary to bar implementation of the CAM as Commission precedent has established that lost revenues are not recoverable under Section 1319. The argument that the Commission's decision does not apply to PGW because it is based on the guidance provided by Act 129 is erroneous because, as shown above, the Commission has clearly shown the link between Act 129 and Section 1319 when it determined that Act 129 confirmed that the term 'costs' in Section 1319 did not include lost revenue.¹²

Accordingly, PGW's Exception must be denied. Commission precedent clearly shows that the CAM proposal is not permissible. Therefore, the ALJs properly determined that the CAM should be denied. Further, PGW's DSM has been successful

¹⁰ PGW Exceptions at 26-27.

¹¹ *Id.*

¹² *Petition of UGI Utilities, Inc. – Electric Division for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2010-2210316, Opinion and Order entered October 19, 2011 at 23.

despite the lack of CAM and PGW has provided no evidence that shows this would change in the future.

2. **Reply to PGW Exception No. 3: The ALJs Properly Determined that a Performance Incentive (“PI”) Cannot Be Awarded Outside of a Base Rate Case (RD at 78-79).**

A. Section 523 of the Public Utility Code Bars Recovery of PIs in the Instant Proceeding

The ALJs’ RD correctly concludes that Section 523 of the Public Utility Code¹³ bars PGW from recovering its claimed PI outside of a base rate case.¹⁴ As set forth in both I&E’s Reply Brief and in the RD,¹⁵ and as previously held by Pennsylvania’s Commonwealth Court, Section 523 permits incentive adjustments for effective conservation programs, but *only* in a base rate case.¹⁶ Furthermore, and as set forth in the RD,¹⁷ the Commonwealth Court recognized that “permitting incentives through a surcharge is beyond the authority of the PUC.”¹⁸

Despite the Commonwealth Court’s clear ruling, PGW excepts on the basis that it is exempt from Section 523 application and is instead seeking authority to implement its PI proposal under Sections 1307 and 1319 of the Public Utility Code.¹⁹ According to PGW these sections permit all prudent and reasonable costs for developing, managing, financing, and operating DSM programs to be recovered through an automatic adjustment

¹³ 66 Pa. C.S. 523.

¹⁴ RD at 79.

¹⁵ I&E Reply Brief at 15; RD at 78-79.

¹⁶ I&E Main Brief at 12-13; I&E Reply Brief at 15-16; RD at 79; *Pennsylvania Indus. Energy Coal. v. Pa. Pub. Util. Comm’n*, 653 A.2d 1336, 1351 (Pa.Cmwth. 1995) *aff’d*, 543 Pa. 307, 670 A.2d 1152 (1996)(emphasis added).

¹⁷ RD at 79.

¹⁸ *Pennsylvania Indus. Energy Coal. v. Pa. Pub. Util. Comm’n*, 653 A.2d 1336, 1351 (Pa.Cmwth. 1995) *aff’d*, 543 Pa. 307, 670 A.2d 1152 (1996).

¹⁹ 66 Pa. C.S. 1307; 66 Pa. C.S. 1319.

clause.²⁰ PGW offers no legal precedent for recovery of its claimed PI under these Sections. Instead, PGW simply alleges that Section 523 cannot apply because PGW is a municipally-owned utility operating on a cash-flow basis, its distribution rates do not include a component for a return on equity, and therefore it cannot yield a return on investment.²¹ However, PGW fails to offer any authority for its self-proclaimed exemption from Section 523, and provides no legal basis for such exemption. On the contrary, existing authority dictates that PGW may be awarded PIs only through a base rate case, as mandated under Section 523, as in that context, the Commission can “exercis[e] its discretion of whether to make adjustments based on specific findings.”²² Accordingly, the ALJs did not err in determining that it would be improper to implement a PI in the context of this proceeding, and PGW’s exception should be denied.

B. PGW is Not Entitled to PIs under Sections 1307 and 1319 of the Public Utility Code

1. On Their Face, PIs Are Not Prudent and Reasonable “Costs”

Even assuming, arguendo, that Sections 1307 and 1319 could provide appropriate grounds for PGW’s requested PIs, which I&E refutes for the reasons explained above, PGW fails to meet the standard for those provisions. More specifically, as PGW articulated, Sections 1307 and 1319 of the Public Utility Code permit all prudent and reasonable costs for developing, managing, financing, and operating DSM programs to be

²⁰ PGW Exceptions at 28-29.

²¹ PGW Exceptions at 29.

²² *Pennsylvania Indus. Energy Coal. v. Pa. Pub. Util. Comm’n*, 653 A.2d 1336, 1351 (Pa.Cmwlt. 1995) *aff’d*, 543 Pa. 307, 670 A.2d 1152 (1996).

recovered through an automatic adjustment clause.²³ At the outset, I&E submits that PIs are not “prudent and reasonable costs” of a DSM program, or even a “cost” in the plain meaning of the word. In its PI proposal, PGW is seeking to earn a reward for meeting self-determined targets, not seeking to recoup a cost of operating the program. Therefore, a PI award is not a prudent and reasonable cost of the DSM II, and PGW’s PI proposal should be denied.

2. PGW’s PIs Would Be an Imprudent and Unreasonable Use of Ratepayer Funds

Beyond the plain meaning of the “prudent and reasonable costs” standard, I&E has previously explained that PGW’s proposed PIs are not prudent or reasonable costs.²⁴ I&E noted that through PGW’s unilateral proposal, ratepayers will be forced to pay PGW a PI, in an amount prescribed by PGW, upon performance of a duty determined by PGW, to benefit PGW. I&E submits that charging captive ratepayers²⁵ to “incentivize” PGW’s “extra efforts” is imprudent, unnecessary, and would subject ratepayers to a forced bribe. PGW’s argument that a PI award is necessary to incent its efforts raises the unsettling question of how much ratepayer money is enough money for PGW to put forth its actual best efforts in the DSM program. Despite PGW’s claim that it requires a PI to align its business interest with the program impacts to customers,²⁶ as noted by the OCA, “as a publicly-owned utility, PGW should not need a direct monetary incentive to do what is in the best interests of its ratepayers since there are no competing

²³ PGW Exceptions at 28-29.

²⁴ I&E Reply Brief at 10-14.

²⁵ “PGW provides natural gas service to approximately 500,000 customers within the city of Philadelphia and is the only utility distributing natural gas within the city of Philadelphia.” PGW Main Brief at 12.

²⁶ PGW Exceptions at 28.

shareholder interests to balance.”²⁷ Accordingly, PGW’s PI proposal would subject ratepayers to paying imprudent and unreasonable costs, and it should be denied.

3. PGW’s PIs Are Imprudent and Unreasonable Because They Dilute the DSM II’s Cost-Effectiveness

The imprudence and unreasonableness of PIs is further magnified by the fact that evidence offered by the OCA in this proceeding revealed that the PI would “slightly reduce the cost effectiveness of PGW’s DSM programs and increase *PGW’s* benefits.”²⁸ OCA witness Crandall offered testimony indicating that implementation of the PI mechanism would actually decrease the DSM’s total resource cost-effectiveness from 1.42 to 1.39.²⁹ I&E submits that PIs, which cost ratepayers more money while simultaneously decreasing the program’s cost-effectiveness, are imprudent, unreasonable costs that must be rejected.³⁰

4. PIs Are Imprudent and Unreasonable Because No Benchmark Exists to Measure Ratepayer Benefits

As I&E previously noted, to the extent that PI proceeds become available, PGW has failed to specify how they would be spent. Although PGW generally alleges that the proceeds will fund its provision of safe and adequate service, that vague description provides an inadequate basis to ensure that ratepayers recoup a measurable benefit. Moreover, PGW presented conflicting information about how much of the funding will be used towards its cost of service. As an example, PGW initially

²⁷ OCA Main Brief at 57.

²⁸ OCA St. I at 22.

²⁹ OCA St. I at 22, ln. 20-p. 23, ln. 1.

³⁰ I&E avers that virtually any performance incentive proposal would fail the “prudent and reasonable cost” standard on this same basis, further supporting the premise that such awards cannot be granted under 66 Pa. C.S. 1307 and 66 Pa. C.S. 1319.

claimed that “every dollar recovered through PGW’s CAM or from performance incentives will go back to fund PGW’s continued provision of safe and adequate service.”³¹ PGW additionally alleged that “100% of any performance incentive would contribute to its cost of service. These dollars therefore are not going to increased profits but straight back to customers.”³² Yet, as outlined in I&E’s Reply Brief,³³ PGW contradicted itself later in the proceeding by admitting that although “some of the benefits would be transferred to PGW through the design of the performance incentive, customers would still retain the vast majority of benefits if the company is successful in meeting or exceeding its goals.”³⁴ Therefore, it is still unclear to I&E what portion of the PI will be going back to customers, and how such apportionment would be determined. While PGW alleges that “performance incentives are no different in concept than the current rule that permits PGW (and all major NGDCs) to retain 25% of any net revenues from natural gas capacity release and off-system sales,”³⁵ a substantial difference does exist. In the off-system sales scenario, ratepayers gain a guaranteed, measurable benefit of 75% of net revenues from off-system sales. In the PI scenario, ratepayers spend money to fund the PIs and any speculative benefits that may flow to customers are undefined.

Accordingly, under PGW’s proposal, there is no benchmark to measure any ratepayer benefits. I&E submits that absent a mechanism to gauge ratepayer benefits,

³¹ PGW Statement 1-R at 6, lines 11-13.

³² PGW Statement 2-R at 24, lines 10-11.

³³ I&E Reply Brief at 13-14.

³⁴ PGW Statement 2-R at 23, lines 19-20.

³⁵ PGW Reply Brief at 38-39; PGW Exceptions at 29-30.

there can be no determination that the PI mechanism would be cost-effective. Therefore, the PI proposal is imprudent, unreasonable, and it should be denied.

3. Reply to PGW Exception No. 8: I&E Concur in PGW's Request for the Commission to Either Modify or Revise the Universal Service and Energy Conservation Plan ("USECP") 2014-2016 Order to Permit the Proposed LIME Cost Recovery Mechanisms to be Implemented and to Modify Findings of Fact Nos. 62 and 64.

I&E did not file an Exception on any of the above bases, and responds to PGW Exception No. 8 only for the sake of providing clarity to the record. In I&E's view, in light in the ALJs' recommendation to approve the LIME program as set forth by PGW and modified by the PGW/I&E Stipulation,³⁶ the RD implied a recommendation for the Commission to modify or revise the *USECP 2014-2016 Order* to authorize implementation of the proposed cost recovery provisions. This implication is derived from the fact that the PGW/I&E Stipulation, which the ALJs recommend be approved, contained the following term:

The Stipulating Parties acknowledge that the LIME cost recovery provisions are not consistent with the Commission's Final Order approving PGW's Universal Service and Energy Conservation Plan for 2014-2016³⁷ and ask the Commission to modify or review its prior directive to the extent necessary to approve this proposed resolution.³⁸

However, PGW's Exception correctly notes that the RD does not specifically recommend that the Commission modify or revise the *USECP 2014-2016 Order* to authorize

³⁶ RD at 156.

³⁷ *Philadelphia Gas Works Universal Service and Energy Conservation Plan for 2014-2016 Submitted in Compliance with 52 Pa. Code § 62.4*, Docket No. M-2013-2366301, Final Order entered August 22, 2014 at 57. The Commission directed the LIME program to be included as part of PGW's LIURP and the costs of PGW's LIURP are recovered through the USC.

³⁸ I&E Reply Brief, Appendix A at 2, PGW/I&E Stipulation, ¶1(d).

implementation of the LIME's proposed cost recovery provisions.³⁹ For this reason, I&E joins in PGW's respectful request that the Commission modify or revise the USECP 2014-2016 in accordance with the PGW/I&E Stipulation in its final order.

Finally, I&E concurs in PGW's request for the Commission to modify Finding of Fact numbers 62 and 64. Finding of Fact 62 states that the LIME program offers no direct benefit of the program for PGW residential low-income customers.⁴⁰ Finding of Fact 64 states that the selection criteria for LIME properties will be based only on income status of the residents not billed for gas service and building usage criteria.⁴¹ I&E concurs in the request to modify these findings of fact for the reasons set forth in PGW's Exceptions,⁴² which explain that application of the PGW/I&E Stipulation negates these findings.

³⁹ PGW Exceptions at 50.

⁴⁰ RD at 14.

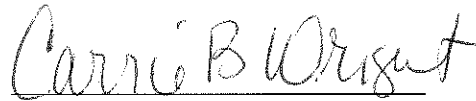
⁴¹ ID.

⁴² PGW Exceptions at 50.

III. CONCLUSION

For the reasons stated herein, the Bureau of Investigation & Enforcement respectfully requests that the Commission Deny PGW's Exceptions Nos. 2 and 3, Grant Exception No. 8, and otherwise adopt the Recommended Decision of the Administrative Law Judges without modification.

Respectfully submitted,



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Philadelphia Gas Works for :
Approval of Demand-Side Management :
Plan for FY 2016-2020, and Philadelphia : Docket No. P-2014-2459362
Gas Works Universal and Energy :
Conservation Plan for 2014-2016 52 Pa. :
Code § 62.4 – Request for Waivers :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Reply Exceptions** dated April 18, 2016, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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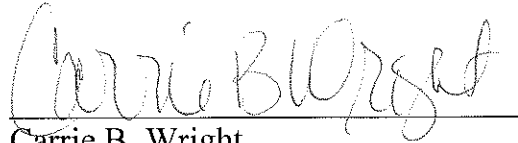
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A handwritten signature in cursive script that reads "Carrie B. Wright". The signature is written in black ink and is positioned above a horizontal line.

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