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December 23, 2016

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Petition for Reconsideration, Clarification and/or Rehearing of the Commission's December 8, 2016 Final Order, 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 **Petition for Reconsideration** 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 23, 2016



Carl R. Shultz, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

v. :

Philadelphia Gas Works :

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

v. :

Philadelphia Gas Works :

**PETITION OF PHILADELPHIA GAS WORKS
FOR RECONSIDERATION, CLARIFICATION AND/OR REHEARING
OF THE COMMISSION'S DECEMBER 8, 2016 FINAL ORDER**

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- 1 Verified Statement of Bernard Cummings
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**PETITION FOR RECONSIDERATION, CLARIFICATION AND/OR REHEARING
OF THE COMMISSION'S DECEMBER 8, 2016 FINAL ORDER**

Pursuant to Sections 703(f) and 703(g) of the Public Utility Code,¹ and Section 5.572 of the Pennsylvania Public Utility Commission's ("Commission" or "PUC") regulations,² Philadelphia Gas Works ("PGW") submits this Petition for Reconsideration, Clarification and/or Rehearing ("Petition") of the Commission's Final Order entered December 8, 2016 ("Final Order") in the above-captioned consolidated complaints.

If this Final Order is not revised, in the context of a complaint challenging, *inter alia*, the application of tariff-approved late payment charges to unpaid account balances, the Commission will have created, applied and enforced two new rules that could well have a very negative effect on PGW and the vast majority of its customers. Because of these serious negative consequences, as well as the fact that these new rules would be implemented without a proper foundation in law or fact, it is imperative that the Commission grant reconsideration and reverse, or at the very least, further examine the complex underlying legal principles and the adverse impact on PGW's operations and customers.

First, the Commission incorrectly held that it lacks jurisdiction to hear any dispute related to amounts owed for utility service when the amount becomes the subject of a municipal lien. Upon reaching this conclusion, the Final Order likewise determined that PGW has no authority – upon the creation of a municipal lien – to impose tariff-approved

¹ See footnote 22, *infra*.

² 52 Pa. Code § 5.572.

late payment charges on the bills of delinquent customers. But because an “inchoate” lien is created whenever a customer bill is past due, the Commission’s ruling could divest the PUC of jurisdiction – and bar PGW from using the collection rules in its tariff – virtually immediately after a customer bill is in arrears. If, on the other hand, the Commission clarifies its ruling to say that its jurisdiction is divested by the “voluntary act” of docketing the lien, then PGW could be faced with the choice of continuing to utilize this effective collection tool – municipals liens – that minimizes the uncollectible amounts that must be paid by other (paying) customers. Either choice is fraught with concerns and potentially adverse consequences for the Company and most of its customers.

The Commission should reconsider its ruling because the Final Order’s jurisdictional rule lacks a solid legal foundation, does not take out account of the special “lien provisions” of the Public Utility Code and is inconsistent with the Commission’s own precedent. As explained below, the mere existence of a lien does not have any bearing on the Commission’s jurisdiction. To the contrary, the Commission continues to have jurisdiction over PGW’s rates and services until such time as a court enters a judgment following the commencement of judicial proceedings on the lien. Additionally, the Final Order makes no distinction between inchoate liens, i.e., not filed or docketed, and which arise by operation of The Municipal Claims and Tax Lien Law, when the billed amount has not been paid by the 31st day, and choate liens (which result from the perfection of inchoate liens by docketing them with the prothonotary). Therefore, if

taken on its face, the Final Order would divest the Commission of jurisdiction to hear billing disputes each time a customer's bill goes unpaid on the 31st day after billing.

The key error in the Final Order is the incorrect equating of the legal effect of the existence of a municipal lien with that of the entry of a final judgment by a Court. As explained in greater detail below, neither inchoate nor choate municipal liens are the same as final court judgments because since liens are not a final determination on the merits of any issue they are not given preclusive effect. Only final court judgments on the lien should be given preclusive effect. But, contrary to precedent, the Commission's Final Order gives preclusive effect for any lien, even those that have merely been docketed and have not yet been adjudicated. Consistent with the rule applicable to final money judgments, prior to a lien being reduced to a final judgment, the Commission continues to have jurisdiction to examine the justness and reasonableness of the billed amounts, or whether they were billed consistent with PGW's tariff, for example, but, of course, cannot question the legitimacy of the filing of the lien or the legality of the lien process itself.

Moreover, in violation of the principles of statutory construction, the Final Order fails to give effect to Sections 2212(n) and 1414 of the Public Utility Code. These Sections clearly and unequivocally establish that the City's/PGW's lien authority was to be maintained and not abrogated "[notwithstanding anything] contained in [Title 66]." Thus, the General Assembly clearly mandated that the ability to lien was to continue *concomitant with* PUC regulation of PGW's operations – a fact that the Commission has repeatedly and consistently recognized. In fact, continued Commission jurisdiction –

unless and until a final judgment for money is entered by the Court – is consistent with Statements in which Chairman Brown has joined supporting the concept that, even if a municipal lien is filed, the Commission, while not having jurisdiction to question the lien or lien process, could decide complaints that would affect the underlying amount in dispute, and over which the Commission has jurisdiction, for example, allegations of incorrect billing³ and poor customer service on PGW’s part. Without specifically acknowledging those statements, the Final Order, if left in place, would contradict and overrule, Chairman Brown’s reasoned conclusions.

Accordingly, the Commission must reconsider and revise its final decision to recognize that it loses jurisdiction over arrearages that are the subject of municipal liens only when the lien has been reduced to a final judgment by action of either party. In turn, all of PGW’s rights (and obligations) continue to attach to the amount in dispute, including the provisions of its tariff that permit it to assess a late payment charge on past-due amounts. Since, as explained above, an inchoate municipal lien exists by operation of law and is created the moment a gas bill becomes past due, failure to revise its interpretation would mean that the Commission would divest itself of virtually all authority over PGW’s collection practices, a result that the PUC likely did not intend.

Alternatively, barring a revised legal determination, the Commission should order rehearing and investigation of the issues presented. Prior to issuing its ruling – which relied upon a new legal theory of jurisdiction as applied to municipal liens – the

³ *Habanna Holding Corp. v. PGW*, Docket No. C-2014-2413775, Joint Dissenting Statement of Commissioners Brown and Cawley dated July 24, 2014 (allegations of incorrect billing and customer service are within Commission jurisdiction and should have proceeded to evidentiary hearing).

Commission did not have the opportunity to fully explore the legal, policy and operational issues of implementing such a far-reaching jurisdictional rule. The potential impacts are significant. PGW and the City rely upon the municipal liens for PGW's fiscal stability.⁴ Approximately 25,000 liens are filed per year.⁵ Without liens, the negative financial impact upon PGW could be as high as \$30 Million.⁶

Given the nature of this proceeding, the Final Order does not give full weight to the impacts and implementation problems related to finding that the Commission lacks jurisdiction over unpaid bills once a lien exists. The Commission did not receive facts and information relevant to implementation of the jurisdictional rule, which – as explained herein and in the attached verified statements – will have a major negative effect on PGW in a host of ways. It appears that the approach announced by the Final Order could profoundly change the City's/PGW's ability to use municipal lien authority to help in the collection of arrearages. In addition, prior to adopting the Final Order, the Commission did not receive any evidence on alternatives, the detrimental effects of this unprecedented approach, or consider any criticism and advice regarding its rule – because the first that PGW knew of the Commission's new preemption analysis was in a Final Order here subject to this Petition. Accepting such inputs would be reasonable because the effect of the Final Order is that any residential or business customers wishing to raise a late payment dispute apparently will now need to proceed to the Courts, not to the

⁴ Verified Statement of Bernard Cummings at ¶ 6.

⁵ *Id.*

⁶ *Id.*

Commission, thereby depriving customers of the protections of PUC jurisdiction. Such a rule will also impose additional costs and burdens on PGW as it struggles to reconcile its obligations under the Public Utility Code and its obligations and rights as a municipal utility.

Second, the Final Order established a totally new rule regarding the application of partial payments to prior service without initiating a rulemaking proceeding or giving advance notice to PGW of the standard that it was required to follow. Although PGW followed the existing regulatory standards mandating that partial payments first be applied to prior basic service balances, which, under the applicable definitions, includes late payment charges, the Commission erroneously concluded nonetheless that PGW violated the Commission's regulations because it applied a partial payment to particular portions of the basic service arrearage, pursuant to a long-established hierarchy. In doing so, the Commission effectively added new language to existing regulation by ruling that when the regulation states that partial payments are to be applied first to prior charges for basic service as a homogenous whole, rather than by applying the partial payments to the subset of charges that make up the past due basic service amount in an established (and longstanding) order of application. But no such prohibition or counter directive exists in the regulations.

In addition, the Commission failed to consider the operational impacts of its new partial payment allocation rule on PGW when directing PGW to comply with its payment rule in 45 days, a task that will require PGW to totally reprogram its bill payment program for hundreds of thousands of customers. As explained herein and in the attached

Verified Statement of Denise Adamucci, the “45 day” period of time arbitrarily mandated in the Order is not nearly sufficient for PGW to achieve compliance with that newly-created rule. The time allotted for full compliance is not even enough time for PGW to develop the code to reprogram the complex changes being mandated by the Commission, which PGW estimates to be 33 weeks, with the full task estimated to take over eight months.

Accordingly, PGW respectfully urges the Commission to reconsider its ruling on both issues reopen the record and accept the attached verified statements into the record and revise its legal rulings on both issues discussed above; alternatively it should grant rehearing and begin an investigation during which consideration of the legal policy and operational consequences of its ruling can occur.

In further support of this Petition, PGW states as follows:

I. BACKGROUND

1. PGW is a city natural gas distribution operation as defined in the Public Utility Code, 66 Pa.C.S. § 102, that provides natural gas distribution utility service pursuant to Section 2212 of the Code, 66 Pa.C.S. § 2212. It is a municipal utility that is wholly owned by the City of Philadelphia (“City”), and consists only of the real and personal assets that are used to manufacture and deliver natural gas to entities within the City’s borders. Notably, PGW is the *only* operation that qualifies as a “city natural gas distribution operation” and is subject to Section 2212.

2. Pursuant to The Municipal Claims And Tax Lien Law⁷ (“MCTLL”), the City, as owner of PGW, has the right to collect on municipal claims for amounts owed to PGW for gas service provided to a service address.⁸

3. An inchoate⁹ municipal lien arises automatically by operation of law whenever there are unpaid natural gas services rendered by PGW at a specific property.¹⁰ Perfection of the lien is accomplished by docketing the lien/claim with the Philadelphia County Prothonotary.¹¹ However, the perfected lien (i.e., a choate lien) does not create any preclusive effect,¹² and it does not affect the use of the property.¹³ A separate legal process (pursuant to the MCTLL) resulting in a court judgment must be used to challenge and/or enforce the perfected lien.¹⁴ Once that process is completed, the final amount of the

⁷ 53 P.S. §§ 7101, *et. seq.*

⁸ The “right” to file a municipal lien may be referred to as right of the City or PGW (or both). Both Section 1414 and Section 2212(n) of the Public Utility Code authorize “a city natural gas distribution operation” to file liens for unpaid gas bills. PGW is that “operation.” It is not a separate legal entity, but rather an instrumentality of the City . The City is the actual entity that is authorized to file a lien under the MCTLL. That is why the City liened properties for unpaid gas bills before the Commission obtained jurisdiction over PGW in 2000, and why, even now, gas liens are filed in the name of the City. These are ordinary municipal liens.

⁹ The difference between an inchoate and choate lien is explained in greater detail in Paragraph 22 of this Petition.

¹⁰ 53 P.S. § 7106; *Twp. of Summit v. Prop. Located at Vacant Land in Summit Twp.*, 92 A.3d 121, 127 (Pa.Cmwlth. 2014), appeal denied, 2014 Pa. LEXIS 3477 (Pa. 2014); *North Coventry Township v. Tripodi*, 64 A.3d 1128, 1132 (Pa.Cmwlth. 2013); *Borough of Ambler v. Regenbogen*, 713 A.2d 145, 148 (Pa.Cmwlth. 1998).

¹¹ 53 P.S. §§ 7106(a), (b), 7143. Claims may be filed in the Municipal Court of Philadelphia if the amount is within its jurisdiction. 53 P.S. § 7143. *See also In re Aikens*, 87 B.R. 350 (Bankr. E.D. Pa. 1988); *Ransom v. Marrazzo*, 848 F.2d 398, 405-406 (3d Cir. 1988).

¹² *See, e.g., Philadelphia v Northwood Textile Mill*, 149 A.2d 60 (Pa. 1959)(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.).

¹³ *Borough of Ambler, supra.*

¹⁴ *See, e.g., City of Philadelphia v. Perfetti*, 119 A.3d 396, 399-400 (Pa.Cmwlth, 2015), appeal denied, 131 A.3d 493 (Pa. 2016) (“Under Section 16 of the MCTLL, a property owner may dispute a lien by requesting a lienholder to issue a writ of *scire facias*. A municipality may also pursue a writ without the owner filing notice. Alternatively, both parties may choose to do nothing and let the municipal lien remain recorded

municipal lien is conclusively determined by the court. On occasion, courts have used the doctrine of “primary jurisdiction” in this context to stay their resolution of the matter pending PUC determination of the proper amounts owing. When, and only when, that determination is reduced to judgment by the court for money, is the court judgment enforceable in the same manner and to the same extent as any other judgment for money.¹⁵ Ultimate recovery of the amount of said court judgment may be effectuated by a court ordered sheriff’s sale.¹⁶

4. The PGW customers in these proceedings are Colonial Garden Realty Co., L.P., owner of Colonial Garden Apartments (“Colonial Garden”), and Simon Garden Realty Co., L.P., owner of Simon Garden Apartments (“Simon Garden”). Both Colonial Garden and Simon Garden are managed by a real estate management company, SBG Management Services, Inc. (“SBG”). For ease of reference, unless the context indicates otherwise, Colonial Garden, Simon Garden and SBG are collectively referred to as “SBG.”¹⁷

indefinitely subject to revival of the lien in every twenty years. After the lienholder issues the writ, the owner may file an affidavit raising defenses to the lien, such as actual payment of taxes, a defective claim or lien, fraud, or lack of process or notice.”) (citations and internal quotes omitted).

¹⁵ 53 P.S. § 7106(a)(2).

¹⁶ 53 P.S. § 7283. Enforcement of the lien is a judicial procedure controlled by the Court of Common Pleas, with due process safeguards provided to protect the rights of interested parties. *See, Newberry Twp. v. Stambaugh*, 848 A.2d 173 (Pa.Cmwlt. 2004), *appeal denied*, 860 A.2d 491 (Pa. 2004); 53 P.S. §§ 7106(c), 7283.

¹⁷ SBG explained that, pursuant to an Exclusive Management Agreement, SBG was given full agent authority to represent the various, listed, property owners in legal proceedings against PGW. Final Order at 18.

5. Multiple municipal liens for unpaid gas service were docketed against the properties owned by Colonial Garden and Simon Garden and managed by SBG.¹⁸

6. Before the Administrative Law Judge (“ALJ”) Eranda Vero, the dispute focused upon the application of late payment charges (as authorized by PGW’s tariff) to unpaid utility debt (calculated pursuant to PGW’s tariff) once such debt became the subject of a docketed municipal lien. The dispute also included challenges to the posting practices of PGW regarding partial payments.

7. The Initial Decision was issued September 17, 2015. Exceptions to the Initial Decision were filed by PGW and Replies to the Exceptions were filed by SBG.

8. The Final Order was issued by the Commission on December 8, 2016. The Final Order, *inter alia*, granted and denied the Exceptions of PGW. In doing so, and as discussed in greater detail herein, the Final Order completely changed the reasoning of the Initial Decision (but not the result)¹⁹ and, as explained below, incorrectly concluded that the existence of a municipal lien has a preemptive effect on the Commission’s ability to exercise any jurisdiction over the amounts billed by PGW for gas service.²⁰

¹⁸ Final Order at 89, *citing*, Finding of Fact Nos. 65, 67.

¹⁹ Final Order at 62.

²⁰ *See, e.g.*, Final Order at 65 (“Upon the filing of a municipal lien for the debt represented by an unpaid utility bill, there is a preemptive legal effect resulting from this act that affects PGW’s rights to include the said liened amount in the determination of charges under a Commission-approved tariff.”), 68-69 (“On consideration of the weight of authority, this Commission concludes that at such time as PGW’s municipal claim becomes a municipal lien, this is a voluntary election by the City of Philadelphia, as a creditor, that acts to remove the procedural and substantive entitlement to recovery on the debt from the administration of this Commission and relegates that legal entitlement into the province of the Courts.”), 73 (“Transformation of the indebtedness resulting from the unpaid utility bill into a municipal lien, whether by operation of law, or by the volitional act of the City of Philadelphia as creditor of the utility patron, is an act that results in the preemption of this agency’s ability to exercise any degree of authority or jurisdiction over its collection.”).

9. The Final Order also established a totally new rule regarding the application of partial payments to prior service.²¹ The Commission’s regulation on partial payments is found at 52 Pa. Code § 56.24. As discussed in greater detail below, the Final Order effectively modified the plain language of Section 56.24 – without initiating a rulemaking proceeding or giving advance notice to PGW. The Commission applied this modified language to PGW, and concluded that PGW violated that regulation by applying a partial payment to basic service arrearages in accordance with a hierarchy, rather than treating “basic service” as an homogenous whole.

II. THIS PETITION MEETS THE LEGAL STANDARD FOR RECONSIDERATION

10. The Public Utility Code establishes a party’s right to seek relief following the issuance of a final decision.²² Such requests for relief must be consistent with Section 5.572 of the Commission’s Regulations.²³

11. It is well settled that petitions made pursuant to Section 703(g) may properly raise any matters designed to convince the Commission that it should exercise its discretion under the Public Utility Code to rescind or amend a prior order in whole or in part.²⁴ Parties cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them. What the Commission expects in

²¹ Final Order at 93-96.

²² 66 Pa.C.S. § 703(f) relating to rehearings and § 703(g), relating to the rescission, clarification and amendment of orders.

²³ 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

²⁴ *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 et al., Order entered December 17, 1982; 56 Pa. P.U.C. 553 (1982).

petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission. Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.²⁵

12. In addition, the Commission is required to render consistent opinions that must follow, distinguish or overrule its own precedent.²⁶ An agency abuses its discretion if it fails to interpret statutes, regulations or orders consistent with their clear and plain meaning or when an agency fails to follow its own regulations and procedures.²⁷

III. PREEMPTION OF COMMISSION JURISDICTION: REQUEST FOR RECONSIDERATION, REHEARING AND/OR CLARIFICATION

13. The Final Order is based on errors of law, and is inconsistent with precedent.

14. Reconsideration, rehearing and/or consideration of the Final Order is warranted because the Commission erred as a matter of law in interpreting the Public Utility Code, the MCTLL and applicable precedent as providing that the existence of a municipal lien has a preemptive effect of the Commission's jurisdiction. This interpretation was not previously articulated by the Commission²⁸ or the Courts, and this Petition is PGW's first opportunity to respond to said interpretation.

²⁵ *Id.*

²⁶ *Standard Fire Insurance v. Insurance Department*, 611 A.2d 356, 359 (Pa.Cmwth. 1992).

²⁷ *See Peoples Natural Gas Company v. Pennsylvania Public Utility Commission*, 542 A.2d 606, 608 (Pa.Cmwth. 1988), *affirmed*, 567 A.2d 642 (Pa. 1989).

²⁸ The Commission's prior decisions correctly hold that the Commission does not have jurisdiction over the liens themselves (i.e., issues related to the validity, enforcement or removal of a municipal lien). *See* Final Order at 67-68 (citing a plethora of PUC decisions). Such decisions do not hold that either a inchoate lien

15. Reconsideration, rehearing and/or clarification of the Final Order is further warranted because the Commission overlooked and/or failed to give the proper weight to the unforeseen consequence and practical impacts of its (flawed) interpretations on jurisdiction.

16. Rehearing should include: (1) reopening the record; (2) acceptance of the attached verified statements into the record; and (3) revision of the Commission's legal conclusions regarding the two issues discussed below; alternatively, the Commission should open an investigation into the legal, policy and operational consequences of the Commission's jurisdictional decision (as well as its decision about application of partial payments).

A. The Commission Has Incorrectly Equated the Legal Effect of the Existence of a Municipal Lien With That of the Entry of a Final Judgment by a Court

17. The Commission has misinterpreted its statutory jurisdiction over customer arrearages that are both subject to PUC jurisdiction and the subject of a municipal lien. The Final Order holds that the legal effect of a municipal lien is to remove the indebtedness for the unpaid utility bill from the Commission's jurisdiction.²⁹ But that holding is based on the

or a perfected choate lien deprive the Commission of jurisdiction over the debts that form the basis of the liens - prior to the entry of a final court judgment on the lien. *Id.*

²⁹ Final Order at 65. The Commission further concluded that if it lacked jurisdiction, the tariff-authorized late payment charge could not be used. Final Order at 86-96. That conclusion is wrong for the reasons set forth herein and in PGW's Exceptions 1 to 3, which are incorporated herein by reference. Simply put, PGW properly applied its tariff-authorized late payment charge on past due balances accrued for service.

Order's improperly equating the existence of a municipal lien with the effect of the *entry* of a judgment for money by a court of competent jurisdiction.³⁰ Under the Final Order, the Commission concluded that the use of civil process acts to exclude the underlying debt from the Commission's jurisdiction, just as it does when a final court judgment resolving a dispute about the payment of money is entered.³¹

18. But a final money judgment by a court indisputably is not the same as the creation of a lien. A court's final money judgment precludes the Commission from taking further action with respect to the underlying amount in controversy because the final court judgment represents a final determination by a court of competent jurisdiction concerning the controversy, and thus the doctrines of issue preclusion, *res judicata*³² and collateral estoppel,³³ bar the Commission from interfering with the final result.

³⁰ Final Order at 69.

³¹ See Final Order at 66-67 ("Recovery to satisfy the debt that has resulted in the claim, or challenges to the validity, amount, or civil process involving the claim must be pursued through the Courts, however."), 69 (any "... civil collection process that invokes the jurisdiction of the Courts ..." works to "the exclusion of this Commission").

³² Application of the doctrine of *res judicata* requires the concurrence of four elements: identity of the thing sued for; identify of the cause of action; identity of persons and parties to the action; and identify of the quality or capacity in the persons for or against whom the claim is made. *In re Stevenson*, 40 A.3d 1212, 1228 (Pa. 2012). Moreover, under *res judicata*, when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to that case are thereafter bound "not only as to every matter which was offered and received, but also as to any other admissible matter which might have been offered." *Commission v. Sunnen*, 333 U.S. 591 (1948); *Jones v. Costlow*, 47 A.2d 259 (Pa. 1946).

³³ Similar to the doctrine of *res judicata* is the doctrine of collateral estoppel; however, it is a broader concept. Collateral estoppel operates to prevent a question of law or an issue of fact that has been once litigated and adjudicated finally in a court of competent jurisdiction from being re-litigated in a subsequent suit. See *Baker v. Pa. Human Relations Comm.*, 462 A.2d 881 (Pa.Cmwlth. 1983). Collateral estoppel applies if (1) the issue decided in the prior case is identical to the one presented in the latter case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privity to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and, (5) the determination in the prior proceeding was essential to the judgment. *City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh, Zullo and Dale*, 559 A.2d 896, 901 (Pa. 1989).

19. Indeed, the Commission has repeatedly held that the commencement of a civil action does not preempt the Commission's statutory jurisdiction. In the past, the Commission has ruled that, even if a utility has pursued or is pursuing civil remedies to collect a final bill, the Commission still has jurisdiction (under Sections 1301, 1501 and 1503 of the Public Utility Code) to consider certain issues related to the validity of the final bill.³⁴

20. For example, in *Stallworth v. Philadelphia Electric Co.*,³⁵ it was held that, even after the filing of a civil action for collection of an amount claimed to be owed by the complainant, the Commission continued to have jurisdiction to review and resolve the billing dispute between the complainant and PECO to the extent that the dispute involved: (1) the quantity of electric service actually rendered to the complainant and the amount correspondingly owed by the complainant to PECO for the service rendered; and (2) PECO's compliance or noncompliance with the Commission's billing regulations. Many other cases hold to the same effect.³⁶

21. It is the preclusion doctrines that preempts Commission action once a final judgment has been entered by the Courts. A court's judgment for money in a civil action bars further action by the Commission on the underlying debt because, under the doctrines

³⁴ *Ford v. Duquesne Light Company*, Docket No. Z-00245911, Opinion and Order entered May 3, 1995, citing, *Sentner v. Bell Telephone Co. of Pennsylvania*, F-00161106 (order adopted August 5, 1993, entered October 25, 1993); *Ashman v. National Fuel Gas Distribution Corp.*, Docket No. F-09031384 (order adopted October 17, 1991, entered January 21, 1993); *Thompson v. Columbia Gas of Pennsylvania, Inc.*, Docket No. F-009136337 (order entered August 27, 1991).

³⁵ *Stallworth v. Philadelphia Electric Co.*, Docket No. F-09231349, Order entered May 6, 1993 adopting, Initial Decision dated February 24, 1993.

³⁶ See, cases cited in footnote 34, *supra*.

of *res judicata* and collateral estoppel, the Commission should not re-litigate a matter decided by a Court of competent jurisdiction so as to waste the resources of the agency and the utility regarding issues that already have been adjudicated.

22. A lien is not a final court judgment for money. The MCTLL creates a separate statutory procedure for municipalities to collect unpaid debts.³⁷ Under the MCTLL, an “inchoate” lien³⁸ is created anytime a person or business owes money to a municipality and the time for payment has passed.³⁹ This means that the inchoate lien exists when a bill issued by PGW is not paid within 30 days. The municipality⁴⁰ can then perfect the inchoate lien, making it “choate,” by docketing (i.e., filing and recording) it⁴¹ with the prothonotary.⁴²

³⁷ See Paragraph 3 of this Petition.

³⁸ See 8 Summ. Pa. Jur. 2d Property § 19:3 (“Choate liens are those that are certain as to the amount, the identity of the lienholder, and the identity of the property, and a lien becomes choate when nothing more needs to be done to perfect it and make it enforceable. An “inchoate lien” is one that attaches to property by operation of a statute or the entry of a judgment but cannot be enforced until it becomes a consummate lien by the appropriate statutory or judicial process.”) (footnotes omitted).

³⁹ See footnote 10, *supra*.

⁴⁰ To be clear, only the City, being a municipality, can file and record a municipal lien. The MCTLL, as explained in footnote **Error! Bookmark not defined.**, *infra*, compels the City to take action to protect itself. As the Court of Appeals for the Third Circuit recognized in *Ransom, supra*, the reason that the City must docket its claims of municipal lien is merely to protect its interest vis-à-vis bona-fide purchasers and lienors — a protection that the providers of gas service *everywhere else in the Commonwealth obtain automatically* (i.e., without docketing a lien claim). In this critical sense, the City’s action in docketing a claim of lien is not “volitional” at all; the City is, literally, *compelled* to do it to obtain the statutory protection (vis-à-vis bona-fide purchasers and lienors) that providers of gas service everywhere else in the Commonwealth obtain automatically.

⁴¹ The MCTLL does not warrant the Commission’s ruling that the City’s action of filing and recording (i.e. perfecting) a municipal lien is sufficiently “volitional” to constitute an intentional invocation of and submission to the jurisdiction of the court system that strips the Commission of its jurisdiction over the rates and/or late charges assessed by PGW. See *Aikens, supra* (docketed municipal claims were “statutory liens” that could not be avoided in Bankruptcy); *Ransom, supra* (concluding that, in Philadelphia, the filing and recording of a lien is simply a means of the City’s protecting the priority of its lien as to subsequent purchasers and lienors). See also *Gaffen v. City of Philadelphia*, 94 F.2d 91 (3d. Cir. 1992).

⁴² See footnote 11, *supra*.

23. The docketing of a municipal lien does not create a final court “judgment.” A court “judgment” is the decision given by a Court or other tribunal as the result of proceedings instituted therein.⁴³ Even after it is perfected, the lien is merely a claim on the property associated with the past due amount.⁴⁴ Before a municipality can use the power of the court to compel any payment of the amount owed, the municipality must take action in Court to obtain a court “judgment” for money on the amount claimed to be due.⁴⁵ Once such a court judgment is entered, then, and only then can the municipality execute on the court judgment by conducting a sheriff’s sale of the property liened to obtain payment of

⁴³ *Dombrowski v. Cherkassky*, 691 A.2d 976 (Pa.Super. 1997) (a judgment is the official entry of a verdict or decision of the trial judge upon the docket.). *See also Gaffen, supra*, wherein the Third Circuit Court of Appeals offered the following commentary on the difference between a municipal lien filed by the City and a court judgment:

“The Bankruptcy Code recognizes three types of liens: judicial, statutory, and consensual. H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 312 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6269; *In re McLean*, 97 B.R. at 792 n. 5. As it is clear that the City’s lien was not created consensually, it is either judicial or statutory. A judicial lien is “obtained by judgment, levy, sequestration or other legal or equitable process or proceeding.” 11 U.S.C. § 101(36). *But there was no legal process or proceeding in this case. Those terms inherently relate to court procedures or perhaps similar administrative proceedings. While we do not doubt that in some circumstances a judicial proceeding may be ex parte, here the Water Department administratively determined the amount of the lien. The prothonotary simply docketed the lien the Water Department delivered.*

By contrast a statutory lien arises “solely by force of statute on specified circumstances or conditions.” 11 U.S.C. § 101(53). We are satisfied that the lien here arose “solely by force of statute” as “Pennsylvania state law authorizes the City of Philadelphia to impose liens against property benefited by unpaid water and sewer service.” *Ransom v. Marrazzo*, 848 F.2d 398, 404 (3d Cir. 1988). While the record does not reveal how the City calculates the amount of its water charges, even if we assume that the property owner must receive service for the property to be subject to the lien, this service simply would be a specified circumstance or condition to the lien arising. Accordingly such a requirement would be consistent with the definition of a statutory lien.”

Gaffen, 94 F.2d at 96 (italics in first paragraph supplied here).

⁴⁴ A “lien” is a charge upon property placed to secure payment of a debt or other obligation. *Borough of Ambler*, 713 A.2d at 148-149.

⁴⁵ *See* footnote 14, *supra*.

that judgment.⁴⁶ It follows that only the judgment by the court disposes of issues (and defenses) related to the amount owned on their merits.

24. The Commission appears to have misread and/or misinterpreted the MCTLL. Under the MCTLL, other than acting as an encumbrance, inchoate or choate municipal liens are simply not the same as court judgment for money. The first sentence in 53 Pa.C.S. § 7106(b) recognizes that filing a claim of municipal lien has **the effect of a judgment**.⁴⁷ But the mere existence of either an inchoate lien or a perfected choate lien does not constitute a final court “judgment” that conclusively determines the underlying debt so as to divest the Commission of its jurisdictional authority. That effect of the first sentence is explained and limited by the second sentence in Section 7106(b), which expressly provides that: “The docketing of the lien shall be given the effect of a judgment against the said property only with respect to which the claim is filed as a lien.”⁴⁸ That is, the lien is a judgment as to the underlying property. The language in 7106(b), when read together and with other provisions in the MCTLL that require further proceedings to obtain a final court judgment,⁴⁹

⁴⁶ See footnote 15, *supra*.

⁴⁷ 53 P.S. § 7106(b). The first sentence of 7106(b) provides generally that “any . . . tax claim or tax lien, including interest, penalty and costs, imposed by [the City], shall be a judgment only against the said property when the lien has been docketed by the prothonotary.”

⁴⁸ *Id.* See footnote 49, *infra*.

⁴⁹ The purpose of the docketing, the Court explained, as merely to protect the City vis-à-vis such bona-fide purchasers and lienors. See the discussion and cases in footnote **Error! Bookmark not defined.**, *supra*.

Municipal liens are given **the effect of a judgment** only after docketing with the prothonotary See 53 P.S. 7106(b). In order to make the lien as effective as a court judgment for money, the lien must be reduced to a judgment by the court. 53 Pa.C.S. §§ 7106(a)(2)-(3). To give effect to the plain language in Sections 7106(a)(2) and (3), the language in Section 7106(b) cannot be read as equating either an inchoate or choate lien as a court judgment for money. See 1 Pa.C.S. § 1921(a), 1921(b), 1922, 1928(c), 1932.

can only be understood as encumbering⁵⁰ the property to secure payment of a debt, and the docketing of the lien provides notice to the world of that encumbrance.

25. **It should be crystal clear that the doctrines of collateral estoppel and *res judicata* do not apply to the creation or perfection (docketing) of a lien – until the lien is reduced to a judgment by a court.**⁵¹ The docketing of the lien itself does not decide any issue related to the underlying debt or to the validity or enforceability of the lien.⁵² Nor does it result in a final court judgment on the merits.

26. Thus, unlike the entry of a final judgment by a court, neither the fact that an inchoate lien is created automatically nor the perfection of the lien by docketing it with the prothonotary (as contemplated by the MCTLL) preempts the Commission’s jurisdiction under the Public Utility Code.

27. Continued Commission jurisdiction – **unless and until a final judgment is entered by the Court** – is consistent with Statements that Chairman Brown has joined in *Habanna Holding Corp.* and *EVC Holdings* supporting the concept that, even if a municipal lien is filed, the Commission could decide complaints alleging any problem over which the

⁵⁰ Black’s Law Dictionary defines an “encumbrance” as a “claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest. BLACK’S LAW DICTIONARY (10th, 2014).

⁵¹ Generally speaking, this done at the end of an adversarial proceeding such as the *scire facias* procedure under 53 P.S. § 7184 or a final determination in a civil action.

⁵² The Final Order misperceives the very nature of liens under the MCTLL. Municipal liens are a collection tool that have no effect on the underlying claim. They enable the City, among certain other political subdivisions, to collect an underlying debt against the benefited property, in addition to other collection methods. The MCTLL also gives the City/PGW the right to impose costs of collection on the property, including reasonable attorney and collection agency charges – but it in no way diminishes the interest, penalty, or other charges due on the tax or other charge that forms the basis of the lien. All of such charges – both those created by the political subdivision and those added by the MCTLL – continue to accrue until the lien is paid off.

Commission has jurisdiction, for example, allegations of incorrect billing⁵³ and poor customer service on PGW's part.⁵⁴ Such Statements are consistent with the doctrine of primary jurisdiction, which is discussed in footnote 63, *infra*, and with the Commission's 2005 policy statement,⁵⁵ which stated that "It is clear that the General Assembly sought to give PGW an additional collection tool to assist the Company in improving its overall collection rates. Even more significant, it appears, that the General Assembly placing this authority under the Public Utility Code puts ... the accessibility of the Commission's formal complaint procedures to PGW customers who have a dispute with the lien process." (citations omitted).

28. Importantly, the two cases on which the Final Order stated it relies – *Gasparro*,⁵⁶ and *Equitable Gas*⁵⁷ – are **both** cases involving final judgments by courts of common pleas resolving money claims. Both make clear that before a court issues such a final judgment – and the preclusion doctrines stop the Commission from further adjudicating the facts associated with that judgment – the Commission is actually free to continue to exercise its jurisdiction over the underlying dispute.

⁵³ *Habanna Holding Corp. v. PGW*, Docket No. C-2014-2413775, Joint Dissenting Statement of Commissioners Brown and Cawley dated July 24, 2014 (allegations of incorrect billing and customer service are within Commission jurisdiction and should have proceeded to evidentiary hearing).

⁵⁴ *EWC Holdings, Inc. v. PGW*, Docket No. C-2013-2379030, Statement of Commissioners Cawley and Brown dated February 6, 2014 (allegations of poor customer service are within Commission jurisdiction).

⁵⁵ Chapter 14 Implementation, Docket No. M-00041802F0002, Second Implementation Order entered September 12, 2005.

⁵⁶ *Gasparro v. Pa. PUC*, 814 A.2d 1282 (Pa.Cmwlth. 2003).

⁵⁷ *Equitable Gas v. Wade*, 812 A.2d 715 (Pa.Super. 2002).

29. In *Gasparro*,⁵⁸ the Commonwealth Court held that, prior to a judgment, the Commission has the authority “to [review] the underlying facts to determine whether over-billing occurred.”⁵⁹ In that case, the customer waited to challenge the merits of his past due bills before the Commission until after judgment was entered by the Court and the utility was moving to collect on its court judgment. It was only at that point, the Court held, that the Commission no longer had jurisdiction to review the merits of the customer’s past due bills,⁶⁰ and deferred to the judgment court’s pre-existing determination of the amount owed.

30. Similarly, in *Equitable Gas*,⁶¹ the Superior Court held that a utility “was certainly entitled to charge [the late payment charge of] 18% per year pursuant to the tariff until and unless it obtained a final judgment in the Court of Common Pleas.”⁶² Following the court judgment, the utility is entitled to recover the statutory rate of post-judgment interest (as opposed to the late payment charge authorized by its tariff).⁶³

⁵⁸ *Gasparro, supra.*

⁵⁹ *Id.* at 1285.

⁶⁰ *Id.*

⁶¹ *Equitable Gas, supra.*

⁶² *Id.* at 718.

⁶³ *Id.* at 718-719. The Commission also cited the doctrine of “primary jurisdiction” in support of its conclusion that the filing of a lien divested the Commission of jurisdiction over the underlying amount in dispute. **But this is a misreading of that doctrine.** The purpose of the doctrine, among other things, is to make use of the agency’s special experience and expertise in complex areas and promote consistency and uniformity in the area of administrative policy. Simply put, the doctrine guides a court in determining whether it should bifurcate proceedings and refrain from exercising their jurisdiction, until after an administrative agency has determined certain questions, or even aspects of certain questions, at issue in the case before the court. Once the court properly refers a matter or a specific issue to the agency, that agency’s determination is binding upon the court and the parties (subject, of course, to appellate review through normal channels), and is not subject to collateral attack in the pending court proceeding. Accordingly, the doctrine does not, as the Final Order suggests, hold that either the filing (or perfection) of a municipal lien or the commencement of a civil action preempts (or divests) an agency, such as the Commission, of its statutory jurisdiction. To be clear, if the Final Order is correct that the *commencement* of a civil collection process (that invokes the jurisdiction of the Courts concerning the debt) preempts the Commission’s jurisdiction, the Courts will no longer be able to use the doctrine of primary jurisdiction to refer issues concerning tariff-related debt, rates, and/or late charges to the Commission.

31. Accordingly, the two seminal cases cited by the Commission to support its finding actually support the conclusion that the Commission is not divested of jurisdiction by the filing of a judicial action, like a lien or an action at law seeking the payment of a claim, unless and until those judicial actions are reduced to court judgments for money and the underlying claims are resolved by the court.

B. The Commission's Order Fails to Give Effect to Sections 2212(n) and 1414 of the Public Utility Code

32. In ruling that, once a municipal lien is docketed by the City, the Commission no longer has jurisdiction over the underlying debt and neither Chapter 56 nor PGW's tariff further applies, the Commission appears to have overlooked the clear import of two sections of the Public Utility Code that plainly establish that the City's/PGW's lien authority is to continue *concomitant with* PUC regulation of PGW's operations.

33. The Public Utility Code, at 66 Pa.C.S. § 2212(n),⁶⁴ evidences 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. It states:

Nothing contained in this title [Title 66] 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.

⁶⁴ Section 2212(n) was enacted in 1999, Act 21 of 1999 (H.B. 1331), P.L. 122, § 3, approved June 22, 1999, eff. June 30, 2000, and provides that: "Nothing contained in this title [Title 66] 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."

34. Chapter 14 of the Public Utility Code was enacted in 2004.⁶⁵ The goal of Chapter 14 is to increase timely collections while ensuring that service is available to all customers based on equitable terms and conditions.⁶⁶

35. In Chapter 14, the General Assembly declared 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.”⁶⁷

36. In addition, Chapter 14, at 66 Pa.C.S. § 1414(a),⁶⁸ explicitly authorizes the PGW, as an instrumentality of the City that is not a separate legal entity, to file liens for unpaid natural gas service:

A city natural gas distribution operation furnishing gas service to a property is entitled to impose or assess a municipal claim against the property and file as liens of record claims for unpaid natural gas distribution service and other related costs, including natural gas supply, in the court of common pleas of the county in which the property is situated or [in] the Municipal Court of Philadelphia . . . , pursuant to sections 3 and 9 of the act of May 16, 1923 (P.L.207, No.153), referred to as the Municipal Claim and Tax Lien Law, and Chapter 22 (relating to natural gas competition).

⁶⁵ Act 201 of 2004 (S.B. 677), P.L. 1578, § 3, approved Nov. 30, 2004, eff. in 14 days. See 66 Pa.C.S. § 1419, which provides that Chapter 14 shall expire on December 31, 2024. Act 155 of 2014 (H.B. 939), § 8, approved Oct. 22, 2014, eff. in 60 days.

⁶⁶ 66 Pa.C.S. §§ 1402(1)-(3).

⁶⁷ 66 Pa.C.S. § 1402(4).

⁶⁸ Section 1414(a) provides that: “A city natural gas distribution operation furnishing gas service to a property is entitled to impose or assess a municipal claim against the property and file as liens of record claims for unpaid natural gas distribution service and other related costs, including natural gas supply, in the court of common pleas of the county in which the property is situated or, if the claim for the unpaid natural gas distribution service does not exceed the maximum amount over which the Municipal Court of Philadelphia has jurisdiction, in the Municipal Court of Philadelphia, pursuant to sections 3 3 [53 P.S. § 7106] and 9 [53 P.S. § 7143] of the act of May 16, 1923 (P.L.207, No.153), referred to as the Municipal Claim and Tax Lien Law, and Chapter 22 (relating to natural gas competition).” (emphasis added). The reference to “chapter 22” in the statute refers to the provision at 66 Pa.C.S. § 2212(n).

37. That the Legislature did not intend to have the City's/PGW's use of liens divest the Commission of jurisdiction, or bar the City/PGW from continuing to pursue collection rights pursuant to PGW's tariff, can be seen in Section 1414(c) of the Code. That Section states that the Commission:

shall permit [PGW] to refuse to provide service to an applicant if the applicant has a pending lien or civil judgment by the city natural gas distribution operation outstanding against the applicant or against property owned in whole or in part by the applicant unless the applicant enters into a payment arrangement for the payment of the amount associated with the lien or judgment that remains outstanding at the time of the application.⁶⁹

This subsection clearly directs the Public Utility Commission to permit the City/PGW to take collection action against an applicant subject to a lien and clearly shows that the Legislature intended that the rights pursuant to the MCTLL and rights pursuant to its tariff (and the Public Utility Code) were intended to function in tandem. The Commission has no jurisdiction over the liens themselves, but would have concurrent jurisdiction over the debts that form the basis of the liens, at least until a money judgment is entered by a court.

38. Contrary to the Final Order, the plain language in 1402, 1414(a) and 2212(n) clearly were intended to give PGW an additional collection tool to assist the Company in improving its overall collection rates, in addition to, and not in place of the tools established by the rest of Chapter 14, not to force the City/PGW to choose between rights pursuant to its PUC approved tariff and rights pursuant to municipal lien law.

⁶⁹ 66 Pa.C.S. § 1414(c).

39. It is worth noting that both Section 2212(n) and 1414(a) established that lien authority for debts to PGW was to continue by amending the Public Utility Code, not the MCTLL. Since the MCTLL was not repealed or affected by the passage of either these Acts, the logical conclusion is that the General Assembly was clearly attempting to guarantee that liens for debts to PGW could continue as before, *in addition to* its new authority as a PUC-regulated operation.

40. As noted in the introduction, and of great concern to PGW, the Commission's decision here makes it entirely unclear how PGW's obligations under the Public Utility Code are to be reconciled with the Commission's interpretation of the effect of either an inchoate or perfected choate lien. These sections plainly stand for the Legislative intent that PGW be permitted to continue to apply liens as prior to the Commission's jurisdiction while at the same time PGW is otherwise subject to the Public Utility Code and the Commission's regulations. In fact, to the extent that the Commission's decision is based, in whole or in part, on its interpretation of other Sections of the Public Utility Code (i.e., Section 1303⁷⁰), its finding is clearly at odds with Section 2212(n) which states that the lien authority shall not be abrogated "notwithstanding any other provision" of the Public Utility Code.⁷¹

⁷⁰ 66 Pa.C.S. § 1303 (Adherence to tariffs.)

⁷¹ The Commission's conclusion that the General Assembly did not intend "to provide a municipally-owned natural gas distribution operation superior authority, rights, or privileges in the collection and management of delinquent accounts, than possessed by non-municipal utilities," and that the intent of Chapter 14 "was to subject municipal utilities to the Commission's jurisdiction and authority as other, private, investor-owned concerns, regarding Chapter 14's statutory scheme" is demonstrably incorrect. It is clear that the General Assembly saw municipal liens as among the "additional collection tools [available] to city natural gas distribution operations" to improve overall collection rates, "recognize[ing] the financial circumstances of the operations and protect[ing] their ability to provide natural gas for the benefit of the residents of the city." 66 Pa.C.S. § 1402(4). Moreover, the Order appears to have overlooked Section 221(n) in which, at the same time that the General Assembly extended PUC jurisdiction over PGW it also mandated that the municipal lien authority "shall [not be] abrogate[d]." 66 Pa.C.S. § 2212(n).

41. Accordingly, the Commission must reconsider and revise its final decision and recognize that it loses jurisdiction over arrearages that are the subject of municipal liens only when the lien has been reduced to a final judgment by action of either party. In turn, all of PGW's rights (and obligations) continue to attach to the amount in dispute, including the provisions of its tariff that permit it to assess a late payment charge on past-due amounts. Since, as explained above, an inchoate municipal lien exists by operation of law the moment a gas bill becomes past due, failure to revise its interpretation would mean that the Commission would divest itself of virtually all authority over PGW's collection practices, a result that the PUC likely did not intend.

C. The Commission Should Grant Rehearing and Initiate An Investigation to Fully Explore the Legal, Policy and Operational Issues of Its Order

42. If it becomes final, the Commission's Order here will have a major negative effect on PGW in a host of ways. It appears that it will profoundly change its ability to use its municipal lien authority to help in the collection of arrearages. As the attached Verified Statement of Bernard Cummings explains, the City/PGW relies upon municipal liens for PGW's fiscal stability and about \$30 million in collections could be negatively impacted.⁷²

The Public Utility Code, at 66 Pa.C.S. § 2212(n), evidences 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.

⁷² Verified Statement of Bernard Cummings at ¶ 6.

43. If PGW is unable to continue to use this additional tool in the way that it does today it would likely increase its uncollectibles and impose additional administrative costs, all of which will have to be absorbed by its ratepayers. As the Commission is well aware, due to the large number of low income customers in its service territory, PGW's uncollectible levels are already high compared to other utilities. Impairing PGW's lien ability certainly would not improve PGW's ability to collect from non-paying customers. If the ability to lien is not an option for PGW, PGW's collection rate could be adversely impacted by as much as three percent.⁷³

44. If PGW is able to continue to use this additional tool, it is entirely unclear how PGW would proceed under the Final Order, as written.⁷⁴ Under the Final Order, once a municipal lien exists, and, as noted above, an inchoate lien is created the moment a customer gas bill becomes past due, the Commission relinquishes its jurisdiction to hear billing disputes and to rule upon agreements between the utility and customer to decrease the amount of arrearages. This means that, under the Final Order, the Commission's formal complaint procedures may no longer be available to PGW's customers once a municipal lien exists. The vast majority of customers could well be forced to initially deal with the PUC (before the bill is past due) and then to litigate issues in the Court of Common Pleas or the Municipal Court without the protections of the PUC's Chapter 56 or the Commission's expert review of such determinations. In addition, if it is determined that an arrearage is beyond the Commission's jurisdiction, it will require PGW to revise its entire collections

⁷³ Verified Statement of Bernard Cummings at ¶ 6-7.

⁷⁴ *See, e.g.*, Final Order at 91 ("...when a sum due for unpaid utility service is placed in the civil collection process with the Courts, it is, concomitantly, removed from Commission adjudication.").

process for the non-PUC jurisdictional amounts.⁷⁵ It further means that an arrearage would no longer be the subject of a Commission payment arrangement.⁷⁶

This system for non-PUC jurisdictional amounts will create substantial additional costs for PGW (and its ratepayers) and coordination issues with its “PUC regulated” operations. Moreover, those non-PUC-jurisdictional amounts could be subject to rules to address them, including the imposition of late payment charges or other remedies established by the Philadelphia Gas Commission.⁷⁷

45. None of these issues was discussed or explored in the individual complaint case below. Before the Commission issues a decision with such far-reaching and jurisdictional depriving ramifications, it would be reasonable to conduct a fuller investigation in which the policy and operational issues can be considered. Moreover, since the legal theory on which the Commission’s decision was based was only first articulated in its final order, an investigation and rehearing would permit a full exploration of the legal issues that have been discussed above.

IV. ORDER OF PARTIAL PAYMENTS: REQUEST FOR REARGUMENT, REHEARING AND/OR CLARIFICATION

46. Reconsideration, rehearing and/or clarification of the Final Order is further warranted because the Commission is mandating complex changes to PGW’s long-standing

⁷⁵ Verified Statement of Bernard Cummings at ¶ 7.

⁷⁶ *Id.*

⁷⁷ Before the Gas Choice Act became effective on July 1, 2000, the Philadelphia Gas Commission exercised regulatory control over PGW. Among other things, the Philadelphia Gas Commission fixed and regulated gas rates consistent with the City ordinances and adjudicated billing disputes.

billing practice dealing with partial payments in the context of an adjudication involving a few customers. Rehearing should include both the acceptance of the attached verified statements into the record and the opening of an investigation into the legal policy and operational consequences of the mandated modification to PGW's billing practices.

47. In concluding that PGW violated Section 56.24⁷⁸ of the Commission's regulations with respect to its application of partial payments to prior service, the Commission effectively modified the plain language of Section 56.24 and failed to consider the operational impacts of its conclusion on PGW.⁷⁹

48. For the reasons noted below, the Commission should determine that PGW did not violate Section 56.24 when it applied Complainants' partial payments to their balances due for prior services. If the Commission continues to believe that PGW's long-standing approach that is consistent with the regulations should be modified, it is obligated to initiate a rulemaking proceeding to propose changes to Section 56.24. At the very minimum, the Commission should remand this matter to the ALJ for further hearings during which PGW should have an opportunity to present evidence regarding operational impacts of the new partial payment allocation rule announced in this proceeding.

49. Section 56.24 clearly provides that, "...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.*"

⁷⁸ 52 Pa. Code § 56.24.

⁷⁹ PGW incorporates herein by reference Exception No. 4 at pp. 25-28 of its Exceptions.

52 Pa. Code § 56.24 (emphasis added).⁸⁰ It is not in dispute that PGW first applied partial payments received from Complainants to the balances due for prior basic service.⁸¹ It is also not in dispute that security deposits and late payment charges are components of basic service.⁸² Therefore, in first applying Complainants' partial payments to the balance due for prior security deposits and late payment charges, PGW did precisely what Section 56.24 mandates; accordingly, PGW did not violate Section 56.24 of the Commission's regulations.

50. The Commission's conclusion to the contrary is apparently based on an amendment to its existing rule, announced for the first time in this proceeding that has not been vetted through the rulemaking process and is not supported by the express language of Section 56.24, and is contrary to myriad calculation determinations by the Commission regarding billed amounts in prior cases. Specifically, the Commission found that PGW should have first applied partial payments to the entire balance due for prior basic service (simultaneously to all components of basic service) rather than first applying them first to the balance due for prior security deposits and late payment charge portion of the basic

⁸⁰ Although PGW's practices comply with Chapter 56, the Commission's rationale for applying these requirements in this proceeding is not persuasive. Noting that the Complainants are served under a commercial tariff, the Commission nonetheless finds that Chapter 56 is applicable due to the definition of residential service, which includes services provided to a commercial establishment if concurrent service is provided to a residential dwelling attached thereto. Final Order at 97. Here, there is no evidence showing that a residential dwelling is attached to a commercial establishment. To the contrary, the Complainants are commercial customers of PGW who essentially resell natural gas to residential customers. PGW has no direct relationship to the residential customers and the partial payments in dispute here were made by the Complainants, who are commercial customers. Therefore, it is inappropriate to apply Chapter 56 to PGW in this proceeding.

⁸¹ Final Order at 97.

⁸² Final Order at 97; *See* 52 Pa. Code §§ 56.2 and 62.74.

service arrearage.⁸³ However, in requiring public utilities to first apply partial payments to the entire balance due for prior service, nothing in Section 56.24 or in any other provision of the Commission's regulations dictates the manner in which the partial payments should be applied to the components of the prior balance.⁸⁴

51. Further, nothing in the Commission's regulations prohibits a public utility from exercising discretion in how to apply partial payments among the several components of basic service. Since the Commission has not previously announced its intent to interpret Section 56.24 as requiring public utilities to apply partial payments in a specific way to a customer's prior balance, PGW was not provided adequate notice that the Commission viewed its approach as violating the regulation.

52. Indeed, if the Commission continues to apply the regulation in the manner described in the Final Order, it will render the regulation unconstitutionally vague because it did not provide notice that PGW was required to follow a specific method in applying partial payments to the customer's prior balance or is prohibited from using its method for such allocation. The United States Supreme Court has explained that in order to satisfy the Fifth Amendment's Due Process Clause – made applicable to the states through the Fourteenth Amendment – laws must not fail to “give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited.”⁸⁵ While PGW interprets Section 56.24 as merely requiring the application of partial payments first to the balance for prior service,

⁸³ Final Order at 97-99.

⁸⁴ 52 Pa. Code § 56.24.

⁸⁵ *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). See also *Commonwealth v. Parker White Metal Col.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct be unambiguously identified).

which occurred here, the regulation is rendered unconstitutionally vague if it is interpreted as prohibiting a public utility from first applying partial payments to specific components of the basic service charge according to a long and consistently followed hierarchy.

53. Moreover, it is well-settled that the Commission may not establish industry standards through adjudications.⁸⁶ Rather than finding that PGW violated Section 56.24, it was incumbent upon the Commission to initiate a rulemaking proceeding proposing that a specific method be employed by public utilities in applying partial payments to prior basic service balances. Through such a proceeding, the Commission would have determined the various public utilities' practices, as well as the rationales for and the results of their approaches. In addition, the Commission would have been aware of any operational or policy impacts that may be experienced by public utilities as a result of a regulatory requirement for a particular method of applying partial payments to balances for prior service.

54. Since the Commission has not proposed a specific approach through the regulations, it has not received comment or feedback from the industry or other stakeholders as to the practical implications of any particular method. The Commission has also not weighed the pros and cons of different ways of applying partial payments to the balance for prior service. For instance, PGW's method makes customers responsible for paying their own late payment charges, thereby reducing uncollectible expenses that are borne by other customers – which is consistent with the intent and procedures set forth in Chapter 14 of the

⁸⁶ See *Pa. Human Relations Commission v. Norristown Area School Dist.*, 374 A.2d 671 (Pa. 1977); Regulatory Review Act, 71 P.S. §§ 745.1-745.15.

Public Utility Code⁸⁷ and Chapter 56 of the Commission’s regulations.⁸⁸ As explained in PGW’s Exceptions, but not acknowledged by the Commission’s Order, the newly-created allocation rule for partial payments would permit a customer to indefinitely and forever avoid paying late payment charges.⁸⁹

55. Despite the consistency between PGW’s approach and the objectives of Chapter 14 and Chapter 56, the Commission has unfairly criticized PGW’s method “to the extent a partial payment does not reduce interest bearing charges billed and accumulated under a past due bill.”⁹⁰ The flaw in this criticism is that all previously billed and unpaid charges are interest-bearing and all balances are reduced when partial payments are made by the customer. In fact, the record in this proceeding shows that the application of the Commission’s newly-announced preferred method or the long-standing practice of PGW results in very little difference on the consumers’ bills.⁹¹ In any case, the late payment charges do not simply disappear; if they are not paid by the delinquent customers, the cash flow effect of the late payment will be borne by all other customers. Importantly, either the Commission’s preferred approach or PGW’s long-standing practice writes down the interest-bearing balance for prior service before partial payments are applied to current charges, which is consistent with the requirement set forth in Section 56.24.

⁸⁷ 66 Pa.C.S. Ch. 14.
⁸⁸ 52 Pa. Code Ch. 56.
⁸⁹ PGW’s Exceptions at 27-28.
⁹⁰ Final Order at 97.
⁹¹ Initial Decision at 44-51.

56. Even if the Commission continues to find that it is lawful to impose new rules on PGW (and, apparently, the entire utility industry) as part of adjudicated proceeding, it should at least direct the scheduling of a further hearing so that PGW may offer evidence of the operational impacts of this modification to its partial payment allocation practices. As PGW was not aware during the hearings that the Commission would announce a new rule governing the application of partial payments to balances for prior service as part of this proceeding, such evidence was not offered.

57. The current practices of PGW have been in place for many years and are embedded in PGW's billing system.⁹² The timeframe and the costs involved – which will be passed along to customers – in making changes to this billing system to revise the partial payment allocation practices are significant and should be considered by the Commission before new rules are imposed. For example, the Commission directed PGW to comply with its payment rule in 45 days. But this is a task that will require PGW to totally reprogram its bill payment program for hundreds of thousands of customers. As explained in the attached verified statement, a 45 day period of time is totally insufficient for PGW to achieve compliance with that newly-created rule.⁹³ The time allotted for full compliance is not even enough time for PGW to develop a plan to reprogram the complex changes being mandated by the Commission.⁹⁴ If directed to reprogram its entire billing system, it will need about

⁹² Verified Statement of Denise Adamucci at ¶ 5-6; Verified Statement of Bernard Cummings at ¶ 6.

⁹³ Verified Statement of Denise Adamucci at ¶ 5-6.

⁹⁴ Verified Statement of Denise Adamucci at ¶ 5-6..

33 weeks just to develop the code to reprogram the complex changes being mandated.⁹⁵ In addition, it will take another 24 weeks for quality assurance and user acceptance testing.⁹⁶

58. Given the minimal financial impact on customers by the differing methods for allocating partial payments, the Commission may very well determine that extensive system changes are unnecessary and would in fact be inappropriate. Particularly in view of the fact that this issue arose in the context of commercial customers that were not timely paying their very large utility bills, to the harm of PGW's remaining customer base, PGW submits that an upheaval of its current approach – one that complies with the existing regulations – is unwarranted.

V. CONCLUSION

59. PGW respectfully requests that the Commission grant reconsideration, within the meaning of Pa.R.A.P. Rule 1701(b)(3),⁹⁷ pending review of and consideration of the merits of the Petition on or before Friday, January 6, 2017.

60. PGW also respectfully requests that, following review of and consideration of the merits of the Petition, that the Commission issue an order consistent with the recommendations set forth herein.

⁹⁵ *Id.* at ¶ 6.

⁹⁶ *Id.*

⁹⁷ Pursuant to Rule 1701 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. Rule 1701, the Commission must act to grant a petition for reconsideration within thirty days of the entry date of the order for which reconsideration is sought, or otherwise lose jurisdiction to do so if a petition for review is timely filed. The thirtieth day after the Final Order is Saturday, January 7, 2017. Therefore, that day and the next, Sunday, January 8, 2017, are not included in the computation of the thirty-day time period. 1 Pa.C.S. § 1908. Accordingly, **the thirty day period within which PGW may file an appeal and/or the Commission must act upon this Petition in order to preserve jurisdiction ends on Monday, January 9, 2017.**

WHEREFORE, PGW respectfully requests that the Commission: (1) reopening the record; (2) accept the attached verified statements into the record; and (3) revise the Commission's legal conclusions regarding the two issues discussed above in this Petition or, alternatively, open an investigation into the legal, policy and operational consequences of the Commission's jurisdictional decision on liens and its decision about application of partial payments; and (4) grant any other relief in favor of PGW as may be just and proper under the circumstances.

Respectfully submitted,



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Date: December 23, 2016

Attorneys for Philadelphia Gas Works

PGW
Attachment 1

Verified Statement of Bernard Cummings

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

VERIFIED STATEMENT OF BERNARD CUMMINGS

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

I, Bernard Cummings, declare as follows:

1. My name is Bernard Cummings, and my business address is 800 West Montgomery Avenue, Philadelphia, PA 19122.
2. I am Vice President of Customer Service and Collections (“Vice President”) for the Philadelphia Gas Works (“PGW”).
3. As Vice President for PGW, I am responsible for the following at PGW: Customer Service Center, District Offices, Residential and Commercial and Industrial Collections, Remittance Processing and Billing, and back office Account Management.
4. In this capacity, I am authorized to provide information concerning the impact on PGW’s operations of the Commission’s Final Order entered on December 8, 2016 in the above-captioned proceeding.

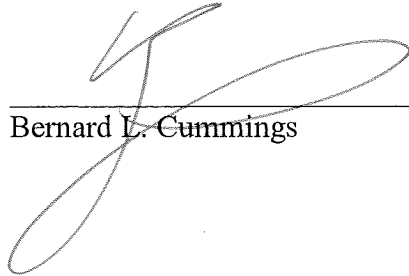
5. In the Commission's Opinion and Order, entered on December 8, 2016 in the above-captioned proceeding, Conclusion, p 109, the Commission has determined that once PGW has converted unpaid debt for gas service into a municipal lien, it lost subject matter jurisdiction over "any aspect of the customers' underlying debt."

6. PGW and the City of Philadelphia relies upon the municipal lien authority for its fiscal stability. At the current time, PGW places approximately 25,000 liens per year. If the ability to lien is not an option for PGW, the negative financial impact to PGW could be as high as \$30,000,000. The ability not to collect \$30,000,000 could adversely impact PGW's collection rate by as much as three percent.

7. I am advised that the effect of the Commission's Opinion and Order in this matter could force PGW to make an election of whether to have unpaid debt subject to a municipal lien or to allow it to stay within the Commission's jurisdiction. If it is determined that an arrearage is beyond the Commission's jurisdiction, it will require PGW to revise its entire collection process. For example, an arrearage would no longer be the subject of a Commission payment arrangement. Further, PGW would have to somehow revise its termination and collection process to take account of the end of Commission jurisdiction.

I Bernard Cummings, hereby state that am the Customer Service and Collections for the Philadelphia Gas Works, and am authorized to make this verification on its behalf, and that the facts set forth in the foregoing Verified Statement are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: December 23, 2016



Bernard L. Cummings

PGW
Attachment 2

Verified Statement of Denise Adamucci

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

VERIFIED STATEMENT OF DENISE ADAMUCCI

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

I, Denise Adamucci, declare as follows:


1. My name is Denise Adamucci, and my business address is 800 West Montgomery Avenue, Philadelphia, PA 19122.
2. I am Vice President of Regulatory Compliance and Customer Programs (“Vice President”) for the Philadelphia Gas Works (“PGW”).
3. As Vice President for PGW, I am responsible for the Special Projects group for Customer Affairs which, among other things, reviews procedures and works with PGW’s information services group to adjust to changes in PUC customer service and billing regulations.
4. In this capacity, I am authorized to provide information concerning the impact on PGW’s operations of the Commission’s Order and Opinion entered on December 8, 2016 in the above-captioned proceeding.

5. The system modifications required to make the “billing practices” changes mandated in ordering paragraph #10 of the Order and Opinion are extensive. They include system wide modifications of PGW’s current payment application and billing process. These will include new code development, and wide-ranging quality assurance and user acceptance testing. These are to ensure that implementation of these new billing practices does not result in massive, customer-wide billing errors. Such extensive modifications cannot be accomplished in 45 days.

6. PGW has a preliminary, rough estimate for the amount of time it would take to make the payment application modifications. It is expected that the payment application modifications could require approximately: (i) 33 weeks for code development; and (ii) 24 weeks for quality assurance and user acceptance testing (total 57 weeks). Requiring such modifications in an abbreviated amount of time would present enormous risks for PGW and its customers’ bills.

I, Denise Adamucci, hereby state that I am the Vice President of Regulatory Compliance and Customer Programs for the Philadelphia Gas Works, and am authorized to make this verification on its behalf, and that the facts set forth in the foregoing Verified Statement are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: December 23, 2016



Denise Adamucci