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August 21, 2017

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

**VIA ELECTRONIC FILING**

**RE: Pennsylvania Public Utility Commission v. Philadelphia Gas Works;  
Docket No. R-2017-2586783**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the Motion of the Philadelphia Industrial and Commercial Gas Users Group ("PICGUG") to Strike Portions of the Office of the Small Business Advocate's ("OSBA") Reply Brief in the above-referenced proceeding.

As shown on the attached Certificate of Service, all parties to this proceeding are being duly served. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By

A handwritten signature in black ink, appearing to read 'Adeolu A. Bakare', written over a horizontal line.

Adeolu A. Bakare

Counsel to the Philadelphia Industrial  
and Commercial Gas Users Group

Enclosures

- c: Deputy Chief Administrative Law Judge Christopher P. Pell (via e-mail and First-Class Mail)
- Administrative Law Judge Marta Guhl (via e-mail and First-Class Mail)
- Pamela McNeal (via e-mail)
- Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

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Commercial Gas Users Group

Dated this 21<sup>st</sup> day of August, 2017, at Harrisburg, Pennsylvania

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>PENNSYLVANIA PUBLIC UTILITY</b>	<b>:</b>	
<b>COMMISSION,</b>	<b>:</b>	<b>Docket Nos. R-2017-2586783</b>
<b>OFFICE OF CONSUMER ADVOCATE,</b>	<b>:</b>	<b>C-2017-2592092</b>
<b>OFFICE OF SMALL BUSINESS</b>	<b>:</b>	<b>C-2017-2593497</b>
<b>ADVOCATE,</b>	<b>:</b>	
<b>PHILADELPHIA INDUSTRIAL &amp;</b>	<b>:</b>	<b>C-2017-2595147</b>
<b>COMMERCIAL GAS USERS GROUP,</b>	<b>:</b>	
<b>WILLIAM DINGFELDER</b>	<b>:</b>	<b>C-2017-2593903</b>
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>PHILADELPHIA GAS WORKS</b>	<b>:</b>	

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**MOTION TO STRIKE**

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**TO THE HONORABLE, THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:**

Pursuant to 52 Pa. Code § 5.103, the Philadelphia Industrial and Commercial Gas Users Group ("PICGUG") hereby files this Motion to Strike ("Motion") portions of the Office of Small Business Advocate's ("OSBA") Reply Brief filed with the Pennsylvania Public Utility Commission ("PUC" or "Commission") on August 4, 2017, in the above-captioned proceeding.

**I. INTRODUCTION**

1. On February 27, 2017, Philadelphia Gas Works ("PGW" or the "Company") filed Supplement No. 100 with the PUC requesting a general rate increase calculated to produce \$70 million in additional annual revenues (an 11.6% overall increase) to become effective on April 28, 2017. In addition, PGW proposed several tariff modifications, including the elimination of three rate schedules, revisions to the rate formula for interruptible transportation customers, and a proposal to establish a new tariff provision to cover "back-up" service.

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**I. INTRODUCTION**

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2. Upon receiving notice of PGW's base rate filing, several parties, including PICGUG and the OSBA, filed complaints in the above-captioned proceeding. Subsequently, the Administrative Law Judge held a Prehearing Conference during which she approved the litigation schedule for this proceeding and implemented rules for discovery, testimony, and briefs.

3. Several parties submitted Direct, Rebuttal, and Surrebuttal Testimony in this proceeding. Of particular relevance to this Motion is OSBA's Direct, Rebuttal, and Surrebuttal Testimony. In its Direct Testimony, OSBA proposed that all of PGW's universal service costs should be allocated to the residential class. OSBA Statement No. 1, Direct Testimony of Robert D. Knecht, pp. 32-36. In its Rebuttal Testimony, OSBA advocated that, if its proposal to shift cost responsibility to the residential class is rejected, then all customers, including Rate IT customers, should be allocated a portion of universal service costs. OSBA Statement No. 1-R, Rebuttal Testimony of Robert D. Knecht, p. 13. In response to OSBA's Rebuttal Testimony, PICGUG served Surrebuttal Testimony strongly opposing any allocation of universal service costs to Rate IT customers. PICGUG Statement No. 1-SR, Surrebuttal Testimony of Richard A. Baudino, p. 14. OSBA also served Surrebuttal Testimony, which continued to argue that only residential customers should pay universal service charge costs; however, in the alternative, all customers should pay to support universal service programs. OSBA Statement No. 1-SR; Surrebuttal Testimony of Robert D. Knecht, p. 14.

4. On July 21, 2017, PGW and the other active parties to this proceeding filed a Joint Petition for Partial Settlement ("Settlement") reflecting resolution of all but two issues presented in PGW's base rate proceeding. These two unresolved issues (hereinafter, collectively referred to as the "Litigated Issues") are:

(i) Cost Responsibility for USC: Whether the cost responsibility for Universal Service Charge ("USC") charges should be shifted 100% to Residential Customers;

(ii) Method of Payment Postings: Whether PGW's present method of posting partial payments to arrearages is consistent with Commission regulations and is otherwise reasonable.

Joint Petition for Settlement, ¶ 43.

5. Also on July 21, 2017, several parties, including the OSBA, filed Main Briefs addressing the Litigated Issues. OSBA's Main Brief requested that the Commission rule that PGW's USC costs should solely be recovered from the residential class. OSBA Main Brief (hereinafter, "M.B."), p. 17. Importantly, OSBA's Main Brief did not discuss its alternative USC cost recovery proposal: that if the PUC does not allocate all PGW's USC costs to residential customers, then the USC cost responsibility should be shared amongst all customers classes (hereinafter referred to as the "Alternative Proposal"). *See id.* PICGUG did not file a Main Brief because the Settlement, to which OSBA remains a signatory party, indicated that the only USC cost responsibility issue reserved for litigation was "[w]hether the cost responsibility for [USC] charges should be shifted 100% to *residential customers*." Joint Petition for Settlement, ¶ 43(a) (emphasis added). In light of the Litigated Issues, no parties' Main Brief supported OSBA's alternative proposal to recover USC costs from all customers, although PGW's Main Brief set forth reasons why the alternative should not be approved. *See* PGW M.B., pp. 46-47.

6. On August 4, 2017, the OSBA, PGW, and other parties filed Reply Briefs addressing issues raised in Main Briefs. As no party filed a Main Brief proposing approval of OSBA's Alternative Proposal, PICGUG also declined to file a Reply Brief. Incredulously, OSBA flaunted Commission regulations and case precedent on the procedural scope of Reply Briefs by

supporting its Alternative Proposal for the first time in its Reply Brief. OSBA Reply Brief (hereinafter, "R.B."), pp. 11-12.

7. Importantly, PGW's Reply Brief recognized (prior to seeing OSBA's Reply Brief) that OSBA should be estopped from litigating its Alternative Proposal because OSBA never raised this issue in its Main Brief. PGW R.B., p. 34 n. 139 (Aug. 4, 2017) (citing *Jackson v. Kassab*, 812 A.2d 1233 (Pa. Super. 2002), *appeal denied*, 825 A.2d 1261 (Pa. 2003); *Browne v. Pa. Dep't. of Transp.*, 843 A.2d 429 (Pa. Commw. Ct. 2004), *appeal denied*, 863 A.2d 1149 (Pa. 2004)). PICGUG concurs with PGW's observation. As discussed more fully herein, OSBA's decision to exclude its Alternative Proposal from its Main Brief constitutes a waiver of that issue. OSBA's attempt to include this issue in its Reply Brief is procedurally improper and violates both the Commission's regulations and traditional due process principles. *See* Section II, *infra*. Accordingly, PICGUG hereby submits this Motion to Strike the following language from OSBA's Reply Brief:

- a. The language on page 11 beginning with "However, the Commission has subsequently determined that Rates for Rate IT" through the language on page 12 that ends "all commercial customers-including Rate IT.";
- b. Footnote number 9 on page 11;
- c. The word "or" from the language in subcategory (1) of OSBA's Conclusion on page 12; and
- d. The language in subcategory (2) of OSBA's Conclusion on page 12, beginning with "If the Commission determines" and ending with "including Rate IT."



## II. ARGUMENT

8. The OSBA's inclusion of the Alternative Proposal in its Reply Brief is inappropriate because such inclusion violates the Commission's regulations and principles of due process. Therefore, all references to the Alternative Proposal should be stricken from OSBA's Reply Brief.

9. As OSBA is aware, Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that a party seeking a rule or order from the Commission has the burden of proof in that proceeding. OSBA M.B., p. 6; *see also* 66 Pa. C.S. § 332(a); *PUC v. PPL Gas Utils. Corp.*, 2007 Pa. PUC LEXIS 779, \*11 (Order entered Feb. 8, 2007) ("[T]he burden of proof must be on a party to a general rate increase case who proposes a rate increase beyond that sought by the utility"). In this instance, the OSBA has the burden of proving that PGW's longstanding PUC-approved USC cost recovery methodology is not appropriate and should be modified. OSBA's burden extends to both of its arguments: (i) allocating all USC costs to residential customers; or (ii) allocating USC costs to all customers. Despite bearing the burden of proving these requested, alternative modifications, OSBA opted not to address its Alternative Proposal for USC cost recovery in its Main Brief. Rather, the entirety of OSBA's Main Brief focuses upon the proposal to allocate all USC costs to residential customers with not a single mention or reference to OSBA's Alternative Proposal.

10. Section 5.501(a)(3) of the Commission's regulations, provides that briefs must contain "[a]n argument preceded by a summary. The party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing." 52 Pa. Code § 5.501(a)(3). When parties "have been directed to file briefs and fail to include an issue in their briefs, the unbriefed issues may properly be viewed as having been waived." *Pa. Pub. Util. Comm'n. v. Columbia Gas of Pa.*, 2005 Pa. PUC LEXIS 14 at \*165-66 (Order entered Nov. 4, 2005) (citing *Jackson v. Kassab*, 812 A.2d 1233 (Pa.



Super. Ct. 2002)); *see also Browne v. Pa. Dep't. of Transp.*, 843 A.2d 429 (Pa. Commw. Ct. 2004) (holding, among other things, that issues in a post-trial motion are waived if they are not effectively argued and briefed in the memorandum of law); *Borough of Glendon v. Dep't. of Env'tl. Res.*, 603 A.2d 226 (Pa. Commw. Ct. 1992) (holding that "a party's reply brief is limited to those issues which were raised by another party's brief and were not addressed by the party in its principal brief"); *Park v. Chronister*, 617 A.2d 863 (Pa. Commw. Ct. 1992) ("A reply brief may not be used by a party as an opportunity to raise new issues which should have been included in the party's main brief").

11. In this instance, the OSBA is in violation of the PUC's regulations. OSBA had ample opportunity and ability to address its Alternative Proposal as part of its Main Brief. Because OSBA did not discuss its Alternative Proposal in its Main Brief, OSBA relinquished the ability to raise this issue in its Reply Brief. Inclusion of this Alternative Proposal in the Reply Brief, without reference thereto in the Main Brief, does not comply with Commission regulations and Commonwealth precedent.

12. Further consideration of OSBA's Alternative Proposal would also violate other parties' due process rights. Per Section 5.501(a)(3) of the Commission's regulations, 52 Pa. Code § 5.501(a)(3), and Commonwealth case precedent, as indicated in Paragraph 10 *supra*, it is procedurally improper for OSBA to raise this issue in its Reply Brief. The Commission's regulations exist to provide due process, and at this stage neither PICGUG nor any other party will have opportunity to adequately respond to OSBA's Alternative Proposal on the record. Accordingly, PICGUG's ability to fully and completely litigate this proceeding was hindered through OSBA's belated effort to support a proposal that was waived in its Main Brief.

13. Accordingly, in this instance, the Joint Petition provided that one of the Litigated Issues was to focus on whether the entirety of USC costs should be allocated to residential customers. In all of the Main Briefs, the parties recognized the parameters of the Litigated Issue. Although the bearer of the burden of proof, by waiting until its Reply Brief to address the Alternative Proposal, the OSBA runs afoul of Commission regulations, Commonwealth Court precedent, and the scope of the issues to be litigated. For these reasons, the Commission should grant PICGUG's Motion to Strike portions of the OSBA's Reply Brief referencing the Alternative Proposal.


### III. CONCLUSION

**WHEREFORE**, the Philadelphia Industrial and Commercial Gas Users Group respectfully requests that Administrative Law Judges Marta Guhl and Christopher P. Pell grant this Motion to Strike the following text in the Office of Small Business Advocate's Reply Brief:

- a. The language on page 11 beginning with "However, the Commission has subsequently determined that Rates for Rate IT" through the language on page 12 that ends "all commercial customers-including Rate IT.";
- b. Footnote number 9 on page 11;
- c. The word "or" from the language in sub-item (1) of OSBA's Conclusion on page 12; and
- d. The language in sub-item (2) of OSBA's Conclusion on page 12, beginning with "If the Commission determines" and ending with "including Rate IT."

Respectfully submitted,

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Dated: August 21, 2017

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	:	
v.	:	
	:	
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## 9