

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Karen O. Moury
717.237.6036
kmoury@eckertseamans.com

June 4, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: PA Public Utility Commission v. Philadelphia Gas Works - R-2017-2586783
Office of Consumer Advocate v. Philadelphia Gas Works - C-2017-2592092
Office of Small Business Advocate v. Philadelphia Gas Works - C-2017-2593497

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Petition for Reconsideration of the Commission's May 18, 2018 Order with regard to the above-referenced matter. Copies of the filing are being served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury
KOM/lww

Enclosure

cc: Hon. Christopher Pell
Hon. Marta Guhl
Certificate of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Petition for Reconsideration of the Commission's May 18, 2018 Order 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

Carrie Wright, Esq.
Erika L. McLain, Esq.
Bureau of Investigation and Enforcement
PA Public Utility Commission
Commonwealth Keystone Building
PO Box 3265
400 North Street, 2nd Floor West
Harrisburg, PA 17105-3265
carwright@pa.gov
ermclain@pa.gov

Sharon Webb, Esq.
Office of Small Business Advocate
Commerce Building
300 North Second Street, Suite 202
Harrisburg, PA 17101
swebb@pa.gov

Patrick M. Cicero, Esq.
Elizabeth R. Marx, Esq.
Joline Price, Esq.
The Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net

Mr. Robert D. Knecht
Industrial Economics Incorporated
2067 Massachusetts Ave.
Cambridge, MA 02140
rdk@indecon.com

Harrison Breitman, Esq.
Darryl Lawrence, Esq.
Christy Appleby, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
hbreitman@paoca.org
dlawrence@paoca.org
cappleby@paoca.org

Todd S. Stewart, Esq.
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
tsstewart@hmslegal.com

Josie B. H. Pickens, Esq.
Robert W. Ballenger, Esq.
Jennifer Collins, Esq.
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
jpickens@clsphila.org
rballenger@clsphila.org
jcollins@clsphila.org

Charis Mincavage, Esq.
Adelou A. Bakare, Esq.
Alessandra L. Hylander, Esq.
McNees Wallace & Nurick, LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
cmincavage@mcneeslaw.com
abakare@mcneeslaw.com
ahylander@mcneeslaw.com



Date: June 4, 2018

Karen O. Moury, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	R-2017-2586783
	:	
Office of Consumer Advocate	:	C-2017-2592092
	:	
Office of Small Business Advocate	:	C-2017-2593497

**PETITION FOR RECONSIDERATION OF PHILADELPHIA GAS WORKS
OF THE COMMISSION'S MAY 18, 2018 ORDER**

Of Counsel:

Brandon J. Pierce, Esq.
Philadelphia Gas Works
800 West Montgomery Ave.
Philadelphia, PA 19122

Daniel Clearfield, Esq., Attorney ID 26183
Karen O. Moury, Esq., Attorney ID 36879
ECKERT SEAMANS CHERIN & MELLOTT, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
717.237.6000
717.237.6019 (fax)
dclearfield@eckertseamans.com
kmoury@eckertseamans.com

Attorneys for Philadelphia Gas Works

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....1

I. BACKGROUND4

II. LEGAL STANDARDS FOR RECONSIDERATION.....8

III. RECONSIDERATION IS WARRANTED9

 A. No Evidence in the Record, Let Alone Substantial Evidence, Supports the Commission’s Directive for Modifications to be Made Within Ninety Days9

 B. The Commission’s May 18 Order Unlawfully Circumvents the Regulatory Review Process and Establishes Binding Norms.....10

 C. No Evidence in the Record, Let Alone Substantial Evidence, Supports the Finding that PGW Charges More than 18% Interest on an Annual Basis14

 D. The May 18 Order Fails to Consider the Costs of the Required Modifications and Impacts on Customers Who Pay their Bills on Time and In Full.....16

IV. CONCLUSION17

I. INTRODUCTION AND SUMMARY

Pursuant to Sections 703(f) and 703(g) of the Public Utility Code,¹ and Section 5.572 of the regulations of the Pennsylvania Public Utility Commission (“Commission”),² Philadelphia Gas Works (“PGW” or “Company”) files this Petition for Reconsideration (“Petition”) of the Commission’s Order entered on May 18, 2018 (“May 18 Order”), which modified the Commission’s Order entered on November 8, 2017 (“November 8 Order”) in PGW’s base rate proceeding. In the November 8 Order, the Commission had properly determined that the challenge by the Office of Consumer Advocate (“OCA”) to PGW’s partial payment allocation practices did not relate to the lawfulness, justness or reasonableness of a proposed or an existing rate, rule or regulation of PGW, and dismissed OCA’s claims without prejudice. By the May 18 Order, the Commission granted OCA’s Petition for Reconsideration of the November 8 Order, wrongfully determined that PGW’s partial payment allocation practices are within the proper scope of a base rate proceeding, unlawfully concluded that PGW’s practices violate the Commission’s regulations and, without any supporting evidence in the record, directed that PGW modify such practices within ninety days.

While PGW continues to view its partial payment allocation practices, which are not set forth in its tariff, as beyond the scope of its base rate proceeding, and firmly adheres to the belief that these practices are fully compliant with the Commission’s regulations, the primary focus of this Petition is on the timeframe established by the May 18 Order for implementing the required changes. In unrefuted testimony admitted into the evidentiary record in this proceeding – and in fact the only evidence in the record regarding a timeframe for the proposed modifications – PGW’s witness, Bernard L. Cummings, explained that it would take over a year for PGW to

¹ 66 Pa. Code § 703(f)-(g).

² 52 Pa. Code § 5.572.

develop the code to reprogram the complex changes and undertake the wide-ranging quality assurance and user acceptance testing that such modifications would entail.³ Through the attached Verified Statement of Frank Weigert, Chief Information Officer, PGW provides additional detail about the timeframe and further explains that it would be impossible to properly implement the changes within ninety days without significant risk to the integrity of PGW's billing process as a whole. If the Commission continues to believe that such modifications are necessary, following a review of this Petition, it is imperative that the Commission afford PGW a minimum of fifty weeks to complete this process in order to avoid the significant risk of massive, Company-wide billing errors.⁴

In addition to PGW's significant concerns regarding the real-world issues with the extensive time needed to code and properly and test a large system-wide modification to PGW's customer information system, these changes also do not come without a cost. In unrefuted testimony offered by Mr. Cummings in this proceeding, the recoding and testing costs would exceed \$400,000, and that estimate does not include all costs, such as the costs of training all customer service representatives.⁵ Other financial impacts would include decreased revenues from late payment charges and an increase in PGW's bad debt expense. While these impacts have not been quantified, the fact that they will occur is demonstrated by evidence in the record that has not been refuted by any party. As a municipally-owned cash flow ratemaking company with no shareholders, PGW will have to call upon its customers to absorb these costs in the form

³ PGW St. No. 10-R at 20.

⁴ Alternatively, to the extent that the Commission determines that additional record support is needed for a timeline for the directed modifications, beyond what is in the existing record and the attached Verified Statement, PGW proposes that the Commission reopen the proceeding and remand the matter for further hearings before the Office of Administrative Law Judge.

⁵ PGW St. No. 10-RJ at 10.

of higher rates.⁶ None of these impacts were considered by the May 18 Order, which contains no discussion of whether it is in the public interest to require customers who pay their bills in full and on time to be burdened with higher rates to subsidize late-paying partial-paying customers.

Before burdening ratepayers with these additional costs, the Commission should reconsider whether the modifications directed by the May 18 Order are truly warranted. As PGW's current practices are fully compliant with the language in the Commission's regulations, it is not necessary for them to be modified. In finding that PGW's partial payment allocation practices do not comply with Section 56.24 of the regulations, the Commission has read language into the regulations that is simply not there and unlawfully created a new regulatory requirement. The express language of Section 56.24 of the Commission's regulations only requires that partial payments be allocated to charges for prior basic service, which includes late payment charges, before they are allocated to charges for current basic service. PGW's practices follow that requirement to the letter. Indeed, no evidence was presented to the contrary.

To the extent that the Commission desires to impose industry-wide standards governing the precise manner in which PGW and other public utilities prioritize the posting of partial payments among various components of prior basic service, it is incumbent upon the Commission to initiate a proposed rulemaking proceeding. The Commonwealth Court decision cited by the Commission in the May 18 Order for the proposition that an agency may establish policy through adjudications also makes it clear that an agency must promulgate regulations to establish binding norms.⁷ In fact, in *Rushton Mining*, the Court invalidated standards that had been developed by an administrative agency through an adjudication.⁸

⁶ PGW St. No. 10-R at 16-17; PGW St. No. 10-RJ at 3, 6-7, 10

⁷ *D.E.R. v. Rushton Mining Co.*, 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991).

⁸ *Id.* at 1176 ("Because the standard conditions in the permits issued by the DER were, in fact, regulations, and were not promulgated pursuant to the Commonwealth Documents Law, and the DER did not have

Also, in finding that PGW's partial payment application practices violate Section 56.22 of the Commission's regulations, the May 18 Order points to no evidence in the record to support its finding that PGW "charges interest in excess of the 18% annual limit."⁹ The only way to charge interest in excess of the 18% limit is to charge compound interest, or assess late fees on late fees, which PGW does not do. The lone finding that the record in this proceeding supports is that customers ultimately pay more for their service than they would pay if they paid their bills on time and in full. But, that is also true under the modifications directed by the May 18 Order. When customers make partial payments that do not cover past due consumption charges, the unpaid portion of the charges is subject to the levying of new late payment fees in subsequent months. Therefore, the higher amount of late payment fees that is assessed is the direct result of customers making partial payments.

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.

statutory authority to insert the standard conditions without first promulgating the conditions as regulations, we find that the EHB did not err in finding that the standard conditions were invalid."

⁹ May 18 Order at 26.

2. On February 28, 2017, PGW filed Supplement No. 100 to Tariff Gas – Pa. P.U.C. No. 2 (“Supplement No. 100”). By Supplement No. 100, PGW proposed a general rate increase applicable to all its jurisdictional customers that would result in an annual increase in base rate revenues in the amount of \$70 million, approximately an 11.6 percent increase over present rates.

3. PGW did not propose any changes to Rule 4.2 of its tariff, which governs the assessment of late payment charges (or to its long-standing partial payment application method). That tariff provision establishes that PGW will assess a late penalty for any overdue bill in an amount that does not exceed 1.5% interest per month on the full unpaid and overdue balance of the bill. It further states that the interest rate, when annualized, may not exceed 18% simple interest per annum. Rule 4.2 of PGW’s tariff mirrors the language of the Commission’s regulations at 52 Pa. Code §56.22. PGW’s tariff does not contain language addressing the priority for posting partial payments.

4. On March 6, 2017, OCA filed a Formal Complaint against Supplement No. 100. The Formal Complaint did not identify any issues concerning PGW’s partial payment allocation practices. Similarly, OCA’s Prehearing Memorandum filed on March 27, 2017 contained no reference to these practices of PGW.

5. OCA raised issues concerning PGW’s partial payment allocation practices for the first time in Direct Testimony served on May 16, 2017.

6. PGW filed a Motion in Limine on May 22, 2017, seeking to exclude issues and proposals presented by OCA regarding PGW’s application of partial payments to balances for prior basic service.

7. Administrative Law Judges Pell and Guhl issued Prehearing Order #5 on May 26, 2017 denying the Motion in Limine on the basis that PGW's procedures for assessing late payment charges appear in the current tariff, which is within the scope of a base rate proceeding.

8. Through the filing of Rebuttal Testimony and Rejoinder Testimony, PGW addressed OCA's proposals regarding its partial payment allocation practices. PGW did not have an opportunity, as it would have in a separate complaint proceeding, to present Direct Testimony on its partial payment allocation practices.

9. On July 21, 2017, the parties filed a Joint Petition for Partial Settlement, which carved out the partial payment application issue, along with an issue concerning the allocation of universal service costs, for litigation.

10. On July 21, 2017 and August 4, 2017, PGW and OCA submitted Main and Reply Briefs, addressing PGW's partial payment application practices.

11. By the Recommended Decision of Deputy Chief Administrative Law Judge Christopher P. Pell and Administrative Law Judge Marta Guhl ("ALJs") issued on September 8, 2017, the ALJs recommended approval of the Joint Petition for Partial Settlement. As to the partial payment application issue, the ALJs correctly determined that the issue has no relationship to PGW's tariff provisions governing the computation and assessment of late payment charges, which nearly mirror the Commission's regulations, and therefore was not properly before the Commission in this proceeding.¹⁰

12. Following the review of Exceptions filed by OCA on September 25, 2017, and Reply Exceptions filed by PGW on October 2, 2017, the Commission entered the November 8 Order approving the Joint Petition for Partial Settlement.

¹⁰ R.D. at 76.

13. On the issue raised by OCA regarding PGW's partial payment allocation practices, the November 8 Order adopted the ALJs' recommendation to dismiss OCA's claims without prejudice. In so ruling, the Commission correctly recognized that "OCA's claim regarding PGW's partial payment allocation practices is not a challenge regarding the lawfulness, justness or reasonableness of a proposed or an existing rate, rule or regulation."¹¹ As a result, the Commission dismissed OCA's claim without prejudice to OCA's right to file a formal complaint or petition the Commission to initiate an investigation into PGW's partial payment allocation practices.

14. On November 27, 2017, OCA filed a Petition for Reconsideration, to which PGW filed an Answer on December 7, 2017. Also on December 7, 2017, the Commission entered an Order granted OCA's Petition for Reconsideration, pending further review of, and consideration on, the merits.

15. By Order entered on May 18, 2018, the Commission granted OCA's Petition for Reconsideration, sustained OCA's base rate Complaint as to the issues concerning PGW's partial payment allocation practices and directed PGW to make system-wide changes within 90 days. In reaching this conclusion, the Commission determined that the evidentiary record and legal arguments were sufficiently developed in this proceeding to decide the issues here without requiring OCA to pursue its claims in a separate on-the-record proceeding.¹²

16. PGW now files this Petition for Reconsideration primarily focusing on the abbreviated timeframe directed by the Commission for implementing these systematically significant changes but also raising various issues that appear to have been overlooked by the

¹¹ November 8 Order at 46-47.

¹² May 18 Order at 16.

Commission in finding that PGW's partial payment application practices violate the Commission's regulations and should be modified.¹³

II. LEGAL STANDARDS FOR RECONSIDERATION

17. The Public Utility Code establishes a party's right to seek relief following the issuance of a final decision.¹⁴ Such requests for relief must be consistent with Section 5.572 of the Commission's regulations.¹⁵

18. 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.¹⁶ Parties are not 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 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.¹⁷

19. In addition, the Commission is required to render consistent opinions that must follow, distinguish or overrule its own precedent.¹⁸ An agency abuses its discretion if it fails to

¹³ Although PGW continues to believe that Code Sections 523 and 526 do not allow the Commission to address a quality of service claim if no rate adjustment has been proposed, as argued in its Answer to OCA's Petition for Reconsideration (pages 8-11), it does not expressly seek reconsideration of the May 18 Order on that basis. However, PGW is preserving the issue for appellate review if the May 18 Order is not modified since it involves a question of the Commission's subject matter jurisdiction to consider quality of service issues in a base rate proceeding for which no rate adjustment has been proposed. 66 Pa. C.S. §§ 523 and 526.

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

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

¹⁶ *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).

¹⁷ *Id.*

¹⁸ *Standard Fire Insurance v. Insurance Department*, 611 A.2d 356, 359 (Pa.Cmwlth. 1992).