**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held May 9, 2019

Commissioners Present:

Gladys Brown Dutrieuille, Chairman

David W. Sweet, Vice Chairman

Norman J. Kennard

Andrew G. Place

John F. Coleman, Jr.

SBG Management Services, Inc./ C-2012-2304183

Colonial Garden Realty Co., L.P.

v.

Philadelphia Gas Works

SBG Management Services, Inc./ C-2012-2304324

Simon Garden Realty Co., L.P.

v.

Philadelphia Gas Works

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition), filed on April 12, 2019, by Philadelphia Gas Works (PGW) seeking reconsideration of the Commission’s Opinion and Order entered on March 28, 2019 (*March 28 Order*), in the above-captioned proceeding. For the reasons that follow, we shall deny the Petition.

1. **History of the Proceeding**

By our *March 28 Order*, we denied PGW’s Petition for Stay of its duty to comply with the prior final orders of the Commission entered on December 8, 2016 (*December 2016 Order*), and the subsequent orders denying reconsideration entered on May 18, 2018 (*May 2018 Order*), and August 23, 2018 (*August 2018 Order*), pending the Commonwealth Court’s consideration of PGW’s Petition for Review filed in response to our *August 2018 Order.*[[1]](#footnote-1)

On April 12, 2019, PGW filed a Petition for Reconsideration of the *March 28 Order*, pursuant to Section 703 of the Public Utility Code (Code), 66 Pa. C.S. § 703, and Section 5.572 of the Commission regulations, 52 Pa. Code § 5.572 (regarding petitions for relief).[[2]](#footnote-2)

By our Opinion and Order entered on April 16, 2019, the Commission granted PGW’s Petition for Reconsideration, thereby retaining jurisdiction pending review and disposition on the merits.[[3]](#footnote-3) SBG did not file an Answer in response to PGW’s Petition for Reconsideration.

1. **Discussion**

**A. Standards for Reconsideration, Rehearing and/or Clarification**

The Code establishes a party’s right to seek relief following the issuance of the Commission’s final decision. *See* [66 Pa. C.S. §§ 703(f)](http://www.lexis.com/research/buttonTFLink?_m=d97d976809c17dbc8b706cf0d3fb11c9&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20365%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=3&_butInline=1&_butinfo=66%20PACS%20703&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLzVzk-zSkAb&_md5=0bac42b84c189738312c8b8972dc206e) and [703(g)](http://www.lexis.com/research/buttonTFLink?_m=d97d976809c17dbc8b706cf0d3fb11c9&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20365%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=4&_butInline=1&_butinfo=66%20PACS%20703&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLzVzk-zSkAb&_md5=66e961e991ab6ffa2ab6e45126fdbc6a), relating to rehearing, rescission, clarification and amendment of orders, and other relief.

Requests for relief in the nature of reconsideration, rehearing and/or rescission or amendment, must be consistent with Section 5.572 of our Regulations, [52 Pa. Code § 5.572](http://www.lexis.com/research/buttonTFLink?_m=d97d976809c17dbc8b706cf0d3fb11c9&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20365%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=5&_butInline=1&_butinfo=52%20PA%20CODE%205.572&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLzVzk-zSkAb&_md5=e5937121213b252361c14a5e6af79c68), addressing petitions for relief following the issuance of a final decision. 52 Pa. Code § 5.572.

Section 5.572(c) provides that petitions for relief “shall be filed within 15 days after the Commission order involved is entered or otherwise becomes final.”[[4]](#footnote-4)

PGW acknowledges that the standards for our review and consideration of petitions seeking reconsideration, rehearing and clarification are well settled and are governed by the factors discussed by the Commission in the case of *Duick v. Pa. Gas and Water Company*, 56 Pa. P.U.C. 553 (1982) (*Duick*); *see, also* [*AT&T Comm. of Pa. v****.*** *Pa. PUC*, 568 A.2d 1362 (Pa. Cmwlth. 1990)](http://www.lexis.com/research/buttonTFLink?_m=15f29cdbfe8e3891c8a5b6d0440c9110&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2005%20Pa.%20PUC%20LEXIS%20126%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b568%20A.2d%201362%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=6&_startdoc=1&wchp=dGLbVzt-zSkAW&_md5=86ed0f14980fc9dddc55d9b85f7932dc).

In *Duick*,the Commission reasoned that, while a petition under Section 703(g) of the Code may raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior order, at the same time “[p]arties . . ., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.” *Duick* at 559 (quoting [*Pa. Railroad Co. v. Pa. PSC*, 179 A. 850, 854 (Pa. Super. Ct. 1935)).](http://www.lexis.com/research/buttonTFLink?_m=d97d976809c17dbc8b706cf0d3fb11c9&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20365%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=7&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b179%20A.%20850%2cat%20854%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLzVzk-zSkAb&_md5=fd5ab9b5c849f65bb2aa5901ac9f15ba) Under the standards of *Duick*,such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

The considerations of *Duick*, on application, essentially, require a two-step analysis. *See, e.g., Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket No. A-2012-2329717; A-6415209 (Order entered September 11, 2014). The first step is that we determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. *Id*. The second step of the *Duick* analysis is to evaluate the new or novel argument, or overlooked consideration that is alleged, in order to determine whether to modify our previous decision. *Id*. We will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous order. *Id*.

Further, by the terms Section 703(g) of the Code, the Commission has the power to amend or rescind its own orders at any time subject only to the requirements of due process. *See Department of Highways v. Pa. P.U.C*., 185 Pa. Super. 418, 138 A.2d 143 (1958). Because such relief may result in disturbance of final orders, a petition to amend or rescind a final order must be granted judiciously and only under appropriate circumstances. *See City of Pittsburgh v. Pennsylvania Department of Transportation,* 490 Pa. 264, 416 A.2d 461 (1980).

Finally, it is well settled that any issue, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Accordingly, we shall consider PGW’s Petition under the standards of *Duick*.

**B. PGW Petition**

PGW asserts that reconsideration of our *March 28 Order* denying PGW’s request for stay of its’ duty to comply with the prior final orders of the Commission pending review by Commonwealth Court is warranted because the Commission fails to “recognize [the] facts [as asserted by PGW] or that a stay would be the most reasonable course.” Petition at 3. Specifically, PGW claims to satisfy the standard for stay established under *PUC v. Process Gas Consumers Group*, 467 A.2d 805(1983). PGW asserts that it demonstrates a strong likelihood of success on the merits because: (1) this is a case of first impression; and (2) our *March 28 Order* deprives PGW of the municipal lien collection tool specifically approved by the legislature under 14149(a). PGW further asserts PGW will suffer irreparable harm without a stay. Petition at 6-8.

1. **Disposition**

By our Opinion and Order entered on April 16, 2019, at this docket, we granted reconsideration, within the meaning of Pa. R.A.P. Rule 1701(b)(3), pending review of, and consideration on, the merits of the Petition Pursuant to Rule 1701 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. Rule 1701. Upon review and consideration of the merits of PGW’s Petition for Reconsideration, we shall deny the Petition.

On application of the standards set forth in *Duick*, we do not find that any of PGW’s contentions support reconsideration, clarification, and/or rehearing of our *March 28 Order*. We conclude that PGW’s Petition fails on the merits to raise any new or novel arguments or that the Commission has overlooked any considerations which persuade us that reconsideration is warranted on our *March 28 Order.* We shall address PGW’s arguments in support of its Petition below.

By our *March 28 Order* we fully considered and rejected the arguments which PGW raised for seeking a stay of our prior final order. *March 28 Order* at 14-22. PGW now reiterates those claims as a basis for seeking reconsideration of our denial of a stay.

Since we previously concluded that PGW did not satisfy the established criteria for granting a stay under *Process Gas*, and we will not revisit our analysis of each criteria. *March 28 Order* at 22. However, we specifically reject PGW’ s repeated claims that PGW demonstrates a strong likelihood of success on the merits because: (1) this is a case of first impression; and (2) our *March 28 Order* deprives PGW of the municipal lien collection tool specifically approved by the legislature under 14149(a). Finally, we reject PGW’s assertion that PGW will suffer irreparable harm without a stay. Petition at 6-8.

As we have already noted, the material facts which formed the basis of our prior determination that PGW’s billing and collection practices did not comply with applicable provisions of the Code and Commission regulations did not involve a “case of first impression” which would establish PGW’s likelihood of success on the merits. *March 28 Order* at 14-16. We acknowledged the fact that PGW is uniquely situated as a municipal gas utility, and authorized by the Code, to impose municipal liens under Section 1414(a) of the Code. While acknowledging this fact, we noted that we had never been required to examine the interplay between municipal lien law and a utility’s tariff*. Id.* However, our ultimate determination that PGW’s practices were unlawful fell squarely within our discretion to interpret the billing and collection provisions of the Code, Commission regulations and PGW’s tariff. *Id*. at 15-16.

Our prior order clearly recognized that PGW is authorized to impose a municipal lien if PGW so chooses. *Id*. at 17. However, in an exercise of our discretion to implement the provisions of the Code, we concluded that PGW could either impose a municipal lien or utilize the other billing and collection practices under the Code and regulations, but not both. Our conclusion, as jurisdictional matter, was itself, a matter within our authority and discretion to implement the terms of the Code, including Section 1414 (a). *Id.* at 14-17

We agree with PGW that the plain language of Section 1414(a) establishes PGW’s ability to impose a municipal lien as an “additional collection tool” available to PGW as a municipal gas utility. However, PGW has not, and cannot, point to any language in Section 1414(a), which suggests that the legislature intended a municipal lien as an additional collection tool, which would be reasonably applied to operate *simultaneously* and *overlapping with* other available billing and collections tools provided for in the Code and Commission regulations.

Further, our review of the plain language of the applicable provision of the Municipal Claim and Tax Lien Law (MCTLL), 53 P.S. § 7106(b), discovered no language suggesting a legislative intent that municipal lien law would supersede, control or otherwise “overlay” to operate simultaneously with existing billing and collection provisions of the Code. Accordingly, nothing in the plain language of Section 1414(a) of the Code or the MCTLL at 53 P.S. § 7106(b) supports, or even suggests, PGW’s specialized, and notably self-serving, interpretation of Section 1414(a) of the Code.

To the extent PGW asserts that PGW establishes a strong likelihood of success on the merits because the Commission’s order “defies the legislative directives” of Section 1414(a) by depriving PGW of the ability to impose municipal liens as an additional collection tool granted under 66 Pa. C.S. § 1414(a), we disagree. As discussed above, to the contrary, PGW is free to choose to impose a municipal lien. PGW itself acknowledges this fact. Petition at 11.

PGW has not asserted, and cannot assert, that our Order deprives PGW of the ability to impose municipal liens. However, as PGW noted, our Order does require that “PGW choose between recording liens and imposing late-payment charges.” *Id*. By so requiring, as a matter of discretion, we exercised our authority to apply our reasonable interpretation of the language of Section 1414(a), the Code, and our Regulations to determine what constitutes reasonable provision of service, including billing and collection practices under the Code and our regulations.

Finally, PGW fails to assert irreparable harm. PGW once again asserts that the potential loss it may suffer if forced to comply with the lawful billing and collection practices imposed by the Code and our Order. Petition at 8-10.[[5]](#footnote-5) As we have already noted, the concept of the preservation of “*status quo*” pending review, includes the last peaceful, “and may we add, lawful” posture between the parties*. May 28 Order* citing *PUC v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947).[[6]](#footnote-6)

PGW asserts that the “*status quo*” of PGW’s non-compliance with the Commission’s Final Orders is proper because, due to filing Petitions for Reconsideration, PGW never had a duty to comply with the Commission’s Final Orders. Petition at 14. However, we reject PGW’s conclusion that PGW’s repeated Petitions for Reconsideration served to stay PGW’s obligation to comply with our final orders. *Id*. A petition for reconsideration and a petition for stay are distinct. A petition seeking reconsideration does not operate as a stay of the order, unless the petition is ultimately granted on the merits. In the present proceeding, PGW’s repeated Petitions for Reconsideration were ultimately denied on the merits, in all material respects. See, *May 2018 Order*, and Au*gust 2018 Order.* Consequently, the Commission Orders from which PGW requested reconsideration remained final and enforceable upon entry.

PGW makes the general assertion that where the Commission grants reconsideration pending disposition on the merits of a petition for reconsideration, the Commission’s underlying order is unappealable, and therefore not enforceable. Petition at 14, citing *Pennsylvania State University v. Pa. P.U.C*., 988 A.2d 771, 776, n.13 (Pa. Cmwlth. 2010). However, *Pennsylvania State University v. Pa. P.U.C* applied the rule that the agency’s grant of reconsideration pending disposition on the merits of the petition, is operative only to retain the agency’s jurisdiction, for purposes of tolling the running of the thirty-day appeal period. See, Pa. R. A. P. 1701(b)(3). That case did not apply a rule that an agency order is “unenforceable” once reconsideration is granted.

Similarly, the Secretarial Letter in *Petition of UGI Utilities, Inc.-Gas Division for Approval of its Long Term Infrastructure Improvement Plan*, Docket No. P- 2013-2398833 (entered January 23, 2018) cited by PGW did not establish that the petition for rescission in that case operated as a “stay” of the Commission’s order. Petition at 14. In that case, the Secretarial Letter was issued in response to the letter of UGI requesting direction on whether UGI must comply with the Commission’s order for certain reporting requirements pending review of the petition for rescission. The Commission’s Secretarial Letter advised that compliance with certain reporting requirements would be stayed, while other reporting requirements contained in the same order remained in effect.

Rather than support PGW’s position, the *UGI Utilities* example instructs that the agency retains authority to enforce its final orders. UGI did not assume its petition for rescission operated as a “stay,” but rather sought affirmative instruction from the Commission on whether compliance was required. As a practical matter, a stay of proceedings may be advisable in the circumstances of a petition for relief from a final order. However, parties should be mindful that whether to grant stay of compliance with a final Commission order is a matter of Commission discretion, as a petition for special relief under 52 Pa. Code § 5.572. The agency retains discretion whether to grant a stay, even after a Petition for Review has been filed. See, Pa. R.A.P. Rule 1701(b)(2) (pertaining to agency’s continued enforcement power, unless superseded by court order).

A petition for reconsideration cannot operate as an automatic stay of a final enforceable order, unless, and to the extent, granted on the merits. A party may request a stay of enforcement of a final order, concurrent with a petition for reconsideration. However, unless a stay is granted in the interim, compliance obligations remain in effect. See, Section 316 of the Code, 66 Pa. C.S. § 316 (providing that orders of the Commission remain conclusive and binding upon the parties unless set aside, annulled or modified). To conclude otherwise would enable parties to evade enforcement of Commission orders by filing a petition for reconsideration, even if ultimately denied on the merits.

Accordingly, PGW’s allegations of irreparable harm are unpersuasive when viewed in the proper context of PGW’s continued failure to comply with our *December 2016 Order*, and the subsequent orders denying reconsideration *May 2018 Order*, and *August 2018 Order.* In the present case, we conclude that preservation of the “*status quo*” requires preservation of the last peaceable and *lawful* status between the parties, thereby requiring PGW’s compliance with the final enforceable orders of the Commission, unless the Commission’s enforcement is superseded by an Order of Commonwealth Court granting a stay of enforcement. Consequently, we again reject PGW’s claim of irreparable harm.

**Conclusion**

Because PGW’s Petition for Reconsideration asserts the same facts and arguments previously considered and rejected in our review and disposition of the underlying Petition for Stay and Complaint proceedings, we find that reconsideration is not warranted in the circumstances. Accordingly, we shall we shall deny the Petition, consistent with the discussion in this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration of our Opinion and Order entered March 28, 2019, in the above-captioned proceedings filed on April 12, 2019, by Philadelphia Gas Works is denied, consistent with this Opinion and Order.

2. That these proceedings be marked closed.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: May 9, 2019

ORDER ENTERED: May 9, 2019

1. *See,* Commonwealth Court 1291 C.D. 2018. In its Petition for Review by Commonwealth Court, PGW requested review of our *December 2016 Order,* *May 2018 Order* and *August 2018 Order* (collectively, the *Commission Orders*). [↑](#footnote-ref-1)
2. The Petition for Reconsideration was subject to the requirements of § 5.41 of Commission regulations, 52 Pa. Code §5.41 (regarding petitions generally). [↑](#footnote-ref-2)
3. The Commission must act to grant a petition for reconsideration within thirty days of the date of entry of the order for which reconsideration is sought, or otherwise lose jurisdiction to do so if a petition for review is timely filed. While granting a petition for reconsideration, in order to review it on the merits, operates to preserve agency jurisdiction and tolls the running of the appeal period, it does not stay the enforcement of the agency order in question, unless a stay is granted. *See*, Rule 1781 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P Rule 1781 (pertaining to stay pending action on petition for review) (a party must ordinarily seek a stay before the agency prior to requesting a stay from the Court), and Pa. R.A.P Rule 1701(b) (pertaining the continued authority of agency to enforce its own orders unless superseded by order of the Court). [↑](#footnote-ref-3)
4. We note that PGW disputes our finding that PGW’s Petition for Stay was untimely pursuant to §5.572(c), since the Petition was filed more than fifteen days after entry of the final order. Petition at 5. However, our regulations clearly establish a fifteen-day period for filing petitions for relief, including a stay.

   PGW asserts that because Pa. R.A.P. Rule 1781 requires a party to first seek a stay from the agency before requesting a stay from the court, that the rule establishes that there is “no explicit ability for seeking a stay pending judicial review before judicial review is actually initiated.” Petition at 6, n.20. However, the rule pertains to the conduct of the party, not the agency. This issue is moot, since we treated the Petition as timely.

   We further reject PGW’s assertion that, because a petition for rescission or amendment may be filed at any time following issuance of a final order under 52 Pa. Code § 5.572(d), that section operates to effectively allow the parties to file a request for stay at any time. Petition at 6. However, a petition for rescission or amendment is *not* the same as a petition for stay of an order’s effect pending further review but seeks a reversal or revision of the order in question, which if denied, does *not* operate to stay enforcement of the order in question. Finally, we note that both, (1) whether to consider or grant an untimely petition for relief from a final order, and (2) whether to consider or grant a petition for rescission or amendment of a final order, are matters entirely within the purview of Commission discretion. [↑](#footnote-ref-4)
5. We note that PGW points out that our *March 28 Order* misstated that the Philadelphia Water Department was “subject to Commission jurisdiction.” We note that it was a misstatement, but contrary to PGW’s assertions, our reference to the Philadelphia Water Department was not material to our disposition of the question of whether PGW satisfied any criteria of *Process Gas*. Rather we noted that the Philadelphia Water Department was a municipal authority which, *albeit* not subject to Commission jurisdiction, like PGW, possesses the authority to impose municipal liens and yet follows billing and collection practices which would appear to comply with Commission regulations. PGW’s assertions of overburdensome adjustments to PGW’s practices appears to be controverted by the fact that the Philadelphia Water Department appears to establish a practical and workable model for PGW to follow. *March 28 Order* at 20. [↑](#footnote-ref-5)
6. We note that PGW’s allegations of “irreparable harm” do not acknowledge that preserving the “*status quo*,” will preserve PGW’s position as the “wrong doer” found to be in violation of Commission billing and collection practices which has forced SBG, on behalf of its managed real estate properties, to prosecute its claim for unlawful billing and collection practices over the course of years of litigation. In addition, SBG has repeatedly prevailed before the Commission; yet, through PGW’s refusal to take any steps toward compliance with Commission orders, SBG has been continuously harmed. [↑](#footnote-ref-6)