

January 12, 2021

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

In re: Docket No. R-2020-3020256, *et al.*
Pa. P.U.C., *et al.* v. The City of Bethlehem – Water Department

Dear Secretary Chiavetta:

We are counsel to the City of Bethlehem – Water Department and are submitting, via electronic filing with this letter, the City's Reply to Opposition of the Office of Consumer Advocate to Settlement. Copies of the Reply are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By 

Thomas T. Niesen

cc: Certificate of Service (w/encl.)
The Honorable Steven K. Haas, Administrative Law Judge (via email, w/encl.)
Edward J. Boscola, P.E. (via email, w/encl.)

**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Administrative Law Judge
Steven K. Haas, Presiding**

Pennsylvania Public Utility Commission	:	R-2020-3020256
Office of Small Business Advocate	:	C-2020-3021576
Office of Consumer Advocate	:	C-2020-3021583
	:	
v.	:	
	:	
City of Bethlehem – Water Department	:	

**REPLY OF THE CITY OF BETHLEHEM TO OPPOSITION OF THE
OFFICE OF CONSUMER ADVOCATE TO SETTLEMENT**

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DATED: January 12, 2021

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. REPLY TO OCA OPPOSITION	1
1. Legal Standards	1
2. The Partial Settlement Should Be Approved	4
3. Revenue Requirement and Scaleback	5
4. Other Provisions	9
III. CONCLUSION	10

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>ARIPPA v. Pa. PUC</i> , 792 A.2d 636 (Pa. Cmwlth. 2002)	2
<i>Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp.</i> , Docket Nos. A-2010-2176520 and A-2010-2176732 (Opinion and order entered March 8, 2011)	2, 3
<i>Pa. P.U.C. v. Columbia Gas of Pa., Inc.</i> , Docket No. R-2020-3018835	4
<i>Pa. P.U.C. v. Pennsylvania-American Water Company</i> , Docket Nos. R-2020-3019369 and R-2020-3019371	5
<i>Pa. P.U.C. v. Philadelphia Gas Works</i> , Docket No. R-2020-3017206, Opinion and Order entered November 19, 2020	<i>passim</i>
<i>Pa. P.U.C. v. UGI Utilities, Inc. - Gas Division</i> , Docket No. R-2019-3015162	6
<i>Popowsky v. Pa. PUC</i> , 805 A.2d 637 (Pa. Cmwlth. 2002)	2

Statutes, Regulations, Texts & Codes

52 Pa. Code § 53.52	3
52 Pa. Code § 5.231	1
51 Pa. Code § 69.401	1

I. INTRODUCTION

On December 28, 2020, the City of Bethlehem (“City) and the Bureau of Investigation and Enforcement (“I&E”) filed a Joint Petition for Approval of Partial Settlement of Rate Investigation (“Joint Petition”) providing for an increase in annual revenue for Outside City Service of \$689,932, in lieu of the originally proposed increase of \$908,421, along with other terms and conditions.

The Office of Consumer Advocate (“OCA”) provided a statement in opposition to the Joint Petition as part of its Reply Brief.¹ OCA asks the Commission to deny the City’s requested rate increase “due to current societal and economic conditions” as a result of the COVID pandemic.²

The City submits this reply to the OCA’s statement in opposition.³ The reply is presented using the same subheadings used by the OCA in its statement.

II. REPLY TO OCA OPPOSITION

1. Legal Standards

In its recent decision approving a partial settlement in the PGW rate proceeding,⁴ the Commission explained, citing 52 Pa. Code Sections 5.231 and 69.401, that its policy is to encourage settlement; that settlement rates are often preferable to those achieved at the conclusion of a fully litigated proceeding; that a full settlement of all the issues in a proceeding eliminates the time, effort and expense that otherwise would have been used in litigating the

¹ OCA Reply Brief, Section III.B – OCA Opposition to Settlement.

² OCA’s opposition to the settlement as a result of the COVID pandemic is essentially the same as its opposition to the rate increase generally.

³ The Office of Small Business Advocate did not comment on the Joint Petition in its Reply Brief.

proceeding, while a partial settlement may significantly reduce the time, effort and expense of litigating a case; and that a settlement, whether whole or partial, benefits not only the named parties directly, but, indirectly, all of the customers of the case.⁵

The Commission explained further, in *PGW*, that it does not simply rubber stamp settlements without further inquiry and that, in order to accept a settlement, the Commission must determine that the proposed terms and conditions are in the public interest and that the focus of the inquiry for determining whether a proposed settlement should be approved by the Commission is whether the proposed terms and conditions foster, promote and serve the public interest.⁶

OCA acknowledges that the Commission's policy, at 52 Pa. Code Section 5.231, encourages settlements.⁷ Citing *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp.*, Docket Nos. A-2010-2176520 and A-2010-2176732 (Opinion and Order entered March 8, 2011) ("*West Penn*"), OCA contends that the legal standard for review of a non-unanimous settlement is the same as those for a fully contested proceeding.

In *West Penn*, the Commission stated, citing *Popowsky v. Pa. PUC*, 805 A.2d 637 (Pa. Cmwlth. 2002) and *ARIPPA v. Pa. PUC*, 792 A.2d 636 (Pa. Cmwlth. 2002),⁸ that "the Commission's standards for reviewing a non-unanimous settlement, as proposed here, are the

⁴ *Pa. P.U.C., et al. v. Philadelphia Gas Works*, Docket No. R-2020-3017206, Opinion and Order entered November 19, 2020 ("*PGW*").

⁵ *PGW*, mimeo at 13-14.

⁶ *PGW*, mimeo at 15.

⁷ OCA Main Brief at 10-11.

⁸ The OCA also cites *Popowsky v. Pa. PUC* and *ARIPPA v. Pa. PUC* stating, at page 11 of its Reply Brief, that these cases provide that a "non-unanimous settlement must also be supported by substantial evidence."

same as those for deciding a fully contested case. ... Accordingly, substantial evidence consistent with statutory requirements must support the proposed settlement.”⁹

The proposed settlement presented by the City and I&E is supported by substantial evidence. The City addressed the evidence of record in its Statement in Support of the settlement explaining that the financial data submitted by the City in support of Supplement No. 15 fully supports the originally proposed increase of \$908,421 and, consequently, fully supports the substantially reduced annual increase of \$689,932 provided for in the Joint Petition.

The financial data, which included the information required by Commission regulation at 52 Pa. Code Section 53.52, was submitted in the form of a traditional rate base/rate of return analysis.¹⁰ The financial data was supported and sponsored by the testimony of Constance E. Heppenstall,¹¹ Harold Walker, III¹² and John J. Spanos¹³ of Gannett Fleming Valuation and Rate Consultants, LLC. Edward J. Boscola, P.E., the City’s Director of Water and Sewer Resources, addressed and explained the City’s water system operations.¹⁴

In *PGW*, the Commission stated that its charge is to evaluate a partial settlement through the lens of a public interest review.¹⁵ The evidence of record presented by the City demonstrates that the settlement increase is at a level reduced from the City’s original filing, which is clearly in the public interest. The evidence of record presented by the City and I&E further demonstrates that the settlement reflects a compromise of the positions of the City and I&E, which, consistent

⁹ OCA did not include the second sentence in its paraphrasing of *West Penn* at page 10 of its Reply Brief.

¹⁰ See City of Bethlehem St. No. 1, Attachment A, Rate Study and Data in Support of Supplement No. 15, and Exhibit CEH-1R, Rebuttal Rate Study and Data in Support of Supplement No. 15.

¹¹ City of Bethlehem Statements Nos. 1, 1R and 1RJ.

¹² City of Bethlehem Statements Nos. 2, 2R and 2RJ.

¹³ City of Bethlehem Statements Nos. 3, 3R and 3RJ.

¹⁴ City of Bethlehem Statements Nos. 4 and 4R.

with Commission policy, fosters and promotes the public interest.¹⁶ Accordingly, the applicable legal standard has been satisfied.

2. **The Partial Settlement Should Be Approved**

Citing pages 9 through 24 of its Main Brief, OCA contends that the partial settlement submitted and supported by the City and I&E should be rejected because of the “impact of the ongoing COVID-19 pandemic on Bethlehem’s ratepayers.”¹⁷ The City addressed the OCA’s proposed rejection of the City’s rate increase on grounds of COVID-19 impact in its Main and Reply Briefs.¹⁸ As presented there, the City submits that the OCA’s position should be given no weight and denied. The Commission has no authority to deny the City rate relief because of the COVID pandemic. The City has taken reasonable and appropriate steps to assist customers with payment for water service during the pandemic. The evidence of record, moreover, does not demonstrate the appropriateness of, or otherwise support, the OCA’s position.

In support of its opposition to the settlement, the OCA cites Administrative Law Judge Dunderdale’s Recommended Decision in the pending rate proceeding of Columbia Gas of Pa., Inc.¹⁹ The Columbia proceeding did not involve a settlement. More pertinent to this proceeding, where the City and I&E have submitted a partial settlement for Commission consideration, is the Commission’s decision approving a partial settlement in *PGW* and the Recommended Decision

¹⁵ *PGW*, mimeo at 66.

¹⁶ As one would expect in settlement, the settlement increase of \$689,932 strikes a balance between the litigation positions of the City, a proposed increase of \$908,421, and of I&E, a proposed increase of \$474,161.

¹⁷ OCA Reply Brief at 11.

¹⁸ See City of Bethlehem Main Brief, Section III.B and City of Bethlehem Reply Brief, Section III.B and C.

¹⁹ *Pa. P.U.C. v. Columbia Gas of Pa., Inc.*, Docket No. R-2020-3018835.

of Administrative Law Judge Johnson approving a “non-unanimous” settlement in the pending rate proceeding of Pennsylvania American Water Company.²⁰

In *PAWC*, Judge Johnson explained that he was bound by Commission policy encouraging settlement and whether the settlement is in the public interest.²¹ He then weighed the evidence, considered the competing arguments of the settling and non-settling parties and concluded that the *PAWC* settlement is in the public interest. A similar analysis supports the partial settlement presented by the City and I&E to resolve the issues in this proceeding. Indeed, the impact of doing other than what Judge Johnson has recommended in *PAWC* would be to discourage settlements contrary to long established Commission policy and Commission regulation and to unreasonably allow non-settling parties to hamper reasonable settlement efforts by asserting a litigation position in opposition to a settlement.

The City submits, once again, that the evidence of record presented by the City demonstrates that the settlement increase is at a level reduced from the City’s original filing, which is clearly in the public interest. The evidence of record presented by the City and I&E further demonstrates that the settlement reflects a compromise of the positions of the City and I&E, which, consistent with Commission policy, fosters and promotes the public interest. Accordingly, the applicable legal standard has been satisfied and the Joint Petition should be approved.

3. Revenue Requirement and Scaleback

In further opposition to the settlement, OCA submits that the City’s overall return at

²⁰ *Pa. P.U.C. v. Pennsylvania-American Water Company*, Docket Nos. R-2020-3019369 and R-2020-3019371, (“*PAWC*”), Recommended Decision of Administrative Law Judge Conrad A. Johnson dated December 22, 2020.

²¹ *PAWC*, Recommended Decision, mimeo at 126.

present rates of 5.65% is adequate in this time of pandemic.²² It refers to the full discussion of this issue in Section III.A of its Reply Brief and at pages 9 through 24 of its Main Brief. A return of 5.65% is, however, *less than* the City's embedded cost of long-term debt of 5.77%. A return of 5.65%, which is less than the embedded cost of debt of 5.77%, is not "adequate" or "fair" in any respect but is, rather, inadequate and unfair in all respects demonstrating that the Joint Petition and settlement increase in rates should be approved.²³

Notably, the Commission, in October 2020, during the COVID pandemic, approved a settlement and \$20,000,000 rate increase for UGI, although UGI had an overall return at existing rates of 5.95%.²⁴ The Commission also approved a partial settlement and \$35,000,000 rate increase for PGW, during the COVID pandemic, although OCA, in that proceeding, had referenced a Moody's credit report that PGW's current rates are sufficient to not only adequately cover annual debt but also to provide excess cash flow.²⁵ The City submits that the Commission, consistent with its approval of settlements for UGI and PGW, should, likewise, approve the

²² OCA Reply Brief at 12.

²³ *Also see* the City's Statement in Support of the Settlement included as Appendix C to the Joint Petition. As explained there, at the originally proposed revenue increase of \$908,421, the City's overall opportunity rate of return would have been 8.24%. City of Bethlehem St. No. 1 at 10. At the substantially reduced settlement increase of \$689,932, the overall opportunity rate of return is 6.72% (i.e., operating revenue at present rates of \$8,334,533 (Exhibit CEH-1R, Schedule 1-R at 3) plus settlement increase of \$690,000 ($\$8,334,533 + \$690,000 = \$9,024,533$) minus total revenue deductions of \$5,711,127 (Exhibit CEH-1R, Schedule 1-R at 3) or \$3,313,406 ($\$9,024,533 - \$5,711,127 = \$3,313,406$) divided by rate base of \$49,286,080 (Exhibit CEH-1R, Schedule 1-R at 3) or 6.72% ($\$3,313,406 / \$49,286,080 = 6.72\%$)), which is below the return claim originally presented by the City and less than that supported by the testimony of Mr. Walker, which reflects a compromise of the positions of the City and I&E, which, consistent with Commission policy, fosters and promotes the public interest.

²⁴ *See Pa. P.U.C. v. UGI Utilities, Inc. – Gas Division*, Docket No. R-2019-3015162 ("*UGP*"), Recommended Decision of Deputy Chief Administrative Law Judge Christopher P. Pell dated August 29, 2020, mimeo at 42.

²⁵ *PGW*, Recommended Decision of Administrative Law Judges Darlene Davis Heep and Marta Guhl, dated September 30, 2020, mimeo at 75.

partial settlement here. The Commission, clearly, is granting rate relief to utilities during the COVID pandemic.²⁶

At page 7 of its Reply Brief, which OCA refers to in support of its statement in opposition,²⁷ OCA claims that Commission decisions approving rate increases during the pandemic are not meaningful because each situation is unique. If the approval of rate relief is, in fact, to be considered on a case-by-case basis then there is no justification for rejecting the City/I&E settlement as a result of COVID concerns. The City is not a publicly held natural gas or electric distribution company. It is not a publicly held water company. It is, rather, a medium size municipal provider of water service to 13,496 Outside City Service customers.

More significantly, as emphasized in the City's Main and Reply Briefs, the City's monthly rates, even at the originally proposed rate level of \$28.52, are *less than half* the existing rates of PAWC at \$64.37.²⁸ At this substantially lower rate level for water service, the COVID pandemic is simply not impacting City ratepayers in the same way as it is impacting PAWC ratepayers. OCA offered no evidence of how many City customers are actually impacted by the COVID pandemic. Notably, in this regard, no customer complaints were filed in opposition to the City's proposed rate increase. The City is not terminating service to customers. It also is continuing to offer payment arrangements and waiving all new late payment charges.²⁹

The still further suggestion that it would be acceptable for the Commission to deny the City rate relief since the City can file again for a rate increase when the COVID -19 pandemic

²⁶ The Commission, also, has before it, for review, the Recommended Decision of Administrative Law Judge Johnson approving a "non-unanimous" settlement in *PAWC* and proposed "phased in" rate increase of \$70,500,000 with a net increase of \$40,000,000 taking effect on January 28, 2021.

²⁷ See OCA Reply Brief at 12.

²⁸ See City Main Brief at 13.

²⁹ See City of Bethlehem Main Brief at 11-12, Reply Brief at 6-7, and Statement in Support of Joint Petition at 9-

has passed³⁰ is a violation of the Code and the Commission's conclusion in *PGW* where it recognized that it does not have the authority to alter a utility's substantive right of a rate increase going into effect at the end of the seven-month deadline.³¹ There are ways of dealing with the needs of customers experiencing payment difficulties as a result of the pandemic short of rejecting the City's filing. The City, for example, has implemented its own COVID customer protections without the need for Commission intervention. Significantly, as set forth above, the City is not terminating service to customers and is continuing to offer payment arrangements to customers and waiving all new late payment charges.³²

The COVID pandemic has certainly had an impact on Pennsylvania consumers and business but it is *not* reasonable to assume, as the OCA contends,³³ that Bethlehem water customers align with the job and wage loss discussed in the testimony of OCA witness Rubin and then reject the City's rate filing. The facts and circumstances in Lehigh and Northampton Counties are not unprecedented as presented by City witness Heppenstall and discussed in Section III.B.2 of the City's Main Brief. Ms. Heppenstall noted that the recovery trend shows a sharp V, which may be heightened further with the development and implementation of a COVID vaccine.

Ultimately, of course, the question is whether the proposed settlement terms are in the

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³⁰ OCA Reply Brief at 14.

³¹ The City states again, as it did in its Main Brief, page 11, footnote 12, and Reply Brief, page 4, footnote 10, that, while the City disagrees with it as it is far below the increase in rates supported by the evidence of record, the OCA presents a "business as usual," traditional rate base / rate of return analysis that shows that the City would be entitled to an increase in rates of \$443,666 for Outside City Service at the end of the seven-month statutory deadline.

³² The City submits that, if the Commission has no authority to postpone the implementation of a rate increase to after the seven-month statutory deadline, then it has no authority to reject an otherwise meritorious rate filing with the assumption that the utility can refile the case after the seven-month deadline.

³³ See OCA Main Brief at 12-13.

public interest.³⁴ The City submits, once again, that the evidence of record presented by the City demonstrates that the settlement increase is at a level reduced from the City's original filing, which is clearly in the public interest, and that the evidence of record presented by the City and I&E further demonstrates that the settlement reflects a compromise of the positions of the City and I&E, which, consistent with Commission policy, fosters and promotes the public interest. Accordingly, the applicable legal standard has been satisfied and the Joint Petition should be approved.

4. **Other Provisions**

OCA opposes other of the settlement terms "due to the rate increase contained in the Partial Settlement."³⁵ The City submits that the Joint Petition is supported by substantial evidence and in the public interest. The Joint Petition, including the other provisions, should be approved in its entirety without modification.

³⁴ See *PGW*, mimeo at 15.


³⁵ OCA Main Brief at 14-15.

III. CONCLUSION

The City submits that the Commission should approve the Joint Petition for Approval of Partial Settlement of Rate Investigation, without modification, and accept the rates proposed in the Joint Petition as just and reasonable and consistent with the Code. The proposed terms and conditions, which provide for an increase in annual revenue for Outside City Service of \$689,932 in lieu of the originally proposed increase of \$908,421, are supported by substantial evidence and in the public interest. Commission policy encourages settlements.

Respectfully submitted,

By



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v.

City of Bethlehem – Water Department

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of January 2021, served a true and correct copy of the foregoing Reply to Opposition of the Office of Consumer Advocate to Settlement, upon the persons and in the manner indicated below:

VIA ELECTRONIC MAIL

The Honorable Steven K. Haas
Administrative Law Judge
Commonwealth of Pennsylvania
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