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September 29, 2023

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

VIA ELECTRONIC FILING

**RE: Pennsylvania Public Utility Commission v. Philadelphia Gas Works;
Docket No. R-2023-3037933**

Dear Secretary Chiavetta:

Attached for filing with the Pennsylvania Public Utility Commission is the Motion to Strike Portions of the Reply Exceptions of the Office of Small Business Advocate and Philadelphia Gas Works on behalf of the Philadelphia Industrial and Commercial Gas Users Group ("PICGUG"), in the above-referenced proceeding.

As evidenced by the attached Certificate of Service, all parties to this proceeding are being duly served with a copy of this document. Thank you.

Sincerely,

A handwritten signature in cursive script that reads 'Charis Mincavage'.

Charis Mincavage
MCNEES WALLACE & NURICK LLC

c: Administrative Law Judge Eranda Vero (via e-mail)
Administrative Law Judge Arlene Ashton (via e-mail)
Office of Special Assistants (ra-OSA@pa.gov)
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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Dated this 29th day of September, 2023, at Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2023-3037933
	:	
Philadelphia Gas Works	:	

NOTICE TO PLEAD

To: The Office of Small Business Advocate and Philadelphia Gas Works

PER 52 PA. CODE § 5.103(C), YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

Respectfully submitted,



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Dated: September 29, 2023

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2023-3037933
	:	
Philadelphia Gas Works	:	

**MOTION TO STRIKE PORTIONS
OF THE REPLY EXCEPTIONS OF
THE OFFICE OF SMALL BUSINESS ADVOCATE
AND PHILADELPHIA GAS WORKS**

TO THE HONORABLE, THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

The Philadelphia Industrial and Commercial Gas Users Group ("PICGUG") hereby files, pursuant to the Pennsylvania Public Utility Commission's ("Commission") regulations at 52 Pa. Code § 5.103, this motion to: (1) strike certain portions of the Reply Exceptions of the Office of Small Business Advocate ("OSBA"); and (2) strike certain portions of the Reply Exceptions of Philadelphia Gas Works ("PGW"), or in the alternative, to respond to the new argument PGW presents for the first time in its Reply Exceptions.¹ In support thereof, PICGUG states as follows:

I. BACKGROUND

1. On February 27, 2023, PGW filed with the Commission Supplement No. 159 to Gas Service Tariff – Pa. P.U.C. No. 2 ("Supplement No. 159"), requesting approval of an increase in its annual base rate operating revenues of \$85.8 million, or 10.3%, on a total revenue basis. Complaints and Petitions to Intervene were filed by various parties, including PICGUG

¹ The alternative argument for leave to respond applies only to PGW's late legal argument. For reasons discussed below, PICGUG has not had an opportunity for discovery or cross-examination of OSBA's late-filed evidence and could not respond even if granted leave to do so.

and OSBA. The parties of record served several rounds of written testimony. Evidentiary hearings were held on July 11 and 12, 2023. The record in this proceeding closed on July 12, 2023.

2. Following the submission of parties' Main and Reply Briefs, Administrative Law Judges Eranda Vero and Arlene D. Ashton ("ALJs") issued their Recommended Decision ("R.D.") on September 5, 2023. The ALJs recommended approval of a rate increase of approximately \$22.5 million, or approximately 25% of PGW's original request. R.D. at 1. The ALJs also recommended approval of PGW's proposed Cost of Service Study ("COSS") and revenue allocation. R.D. at 67, 69, 74.

3. Various parties, including PICGUG, filed Exceptions to the R.D. on September 15, 2023.

4. Various parties, including OSBA and PGW, filed Reply Exceptions on September 22, 2023.

II. MOTION TO STRIKE

5. Prior to issuance of the R.D., PICGUG contested PGW's proposed COSS and associated revenue allocation as applied to PGW's Rate Interruptible Transportation ("IT"). PICGUG raised several concerns regarding PGW's proposed treatment of Rate IT as firm for purposes of the COSS and interruptible for purposes of PGW's tariff, including the fact that this treatment results in unreasonable discrimination against Rate IT customers in violation of Section 1304 of the Public Utility Code, 66 Pa. C.S. § 1304. PICGUG Main Brief, pp. 15, B-1 (Conclusion of Law No. 5); PICGUG Reply Brief, p. 9. Both PGW and OSBA addressed PICGUG's COSS and revenue allocation arguments in the briefing stage of this proceeding. PGW Main Brief, p. 38; PGW Reply Brief, 30-31, 33-34; OSBA Main Brief, pp. 16-17. Following issuance of the R.D., PICGUG excepted to the ALJs' recommendations that the

Commission approve PGW's proposed COSS and resulting revenue allocation as applied to Rate IT. PICGUG Exceptions, pp. 8-10, 15-16. In its Reply Exceptions, OSBA responds to PICGUG's Exceptions, but further includes a new extra-record rate analysis presented for the first time in Reply Exceptions. OSBA Reply Exceptions, p. 13. Similarly, in its Reply Exceptions, PGW presents a legal argument offered for the first time in Reply Exceptions. PGW Reply Exceptions, p. 6. Because both PGW and the OSBA had ample opportunity to present these arguments in their Main and Reply Briefs, but chose not to do so, these arguments must now be stricken. To allow PGW and OSBA to present new arguments in the Reply Exceptions stage of this proceeding would be inappropriately prejudicial to PICGUG and violate PICGUG's due process rights.

A. OSBA Extra-Record Evidence

6. It is clearly improper to introduce new evidence or testimony at the Exceptions stage of a Commission proceeding. The Commission has held that new evidence is generally not admissible during the Exceptions stage, because it deprives parties of the opportunity to test the reasonableness of the new evidence or to present evidence in response. *Pa. P.U.C. v. Pennsylvania Gas and Water Company Water Division*, 1988 Pa. PUC LEXIS 511, *10 (Pa. PUC 1988). For example, in *PA PUC v. NFGDC*,² the Commission found that that the parties did not have an opportunity to test or respond to updated short-term debt data presented by the utility at the Exceptions stage and thus declined to consider that update. Similarly, the Commission has held that use of post-hearing documents to present new evidence in a contested proceeding is a violation of due process. *Enron Capital & Trade Resources Corporation v. The Peoples Natural Gas Company, et al.*, Docket No. R-00973928C0001, 1998 Pa. PUC LEXIS 199 (August 24, 1998).

² *Pa. P.U.C. v. National Fuel Gas Distribution Company*, 1986 Pa. PUC LEXIS 25 (Pa. PUC 1986), *63.

7. In this case, OSBA presents new evidence in the form of a rate analysis not previously introduced anywhere on the record. OSBA's Reply Exceptions provide a response, inclusive of a table never before seen in this proceeding, to PICGUG's Exceptions addressing the R.D.'s inappropriate discriminatory treatment of Rate IT customers. OSBA Reply Exceptions, pp. 10-13. Specifically, OSBA responds to PICGUG's arguments by purporting to "offer" a comparison of rates paid by an "average" Rate GS firm industrial compared to an "average" Rate IT customer. OSBA Reply Exceptions, pp. 12-13. Although OSBA includes a record cite to its electronic workpaper RDK WP3, the referenced workpaper does not include the new table presented in OSBA's Reply Exceptions or the calculations and assumptions underlying the newly offered rate analysis. *See id*; *see also* OSBA Statement No. 1, Exhibit RDK-2 (listing OSBA's electronic workpapers); *see also* Tr. 410 (admitting OSBA workpapers to the record).

8. Moreover, OSBA's new analysis purports to have developed per-MCF monthly rates for an "average" Rate GS customer compared to per-MCF monthly rates for an "average" Rate IT customer. *See id*. Because OSBA offers this comparison for the first time in Reply Exceptions, PICGUG had no opportunity to issue discovery or even cross-examine OSBA's witness on whether the methods and assumptions applied to develop this analysis are just and reasonable. Specifically, PICGUG had no opportunity to investigate the parameters or methods OSBA applied to determine an "average" customer on either Rate IT or Rate GS. Additionally, the rate analysis shows OSBA calculated the Rate IT customer charge by applying a Rate GS customer charge to whatever OSBA considers to be an "average" Rate IT customer. OSBA

Exceptions, p. 13. PICGUG also had no opportunity investigate the basis for applying the Rate GS customer charge to a Rate IT "average" customer to develop a per-MCF rate.³

9. Consideration of OSBA's new offer of evidence at this stage would constitute a grievous violation of PICGUG's due process rights. Even if PICGUG were granted leave to respond to OSBA's extra-record analysis, PICGUG would be unable to interpret or analyze the calculations without discovery and an opportunity for cross-examination. OSBA had ample opportunity to provide this table and accompanying argument in several rounds of testimony but chose not to. Now, OSBA is attempting to circumvent its failure to previously present this evidence under the guise of proffering evidence for the Commission's "consideration." Needless to say, this attempt to present new evidence at a time that thwarts PICGUG's ability to respond must be rejected. Accordingly, consistent with past precedent, the Commission should grant PICGUG 's Motion to Strike and disregard the extra-record rate analysis offered by OSBA.

B. PGW Late Legal Argument

10. Similar to the preclusion against extra-record evidence, a party cannot raise new legal arguments that it failed to raise in its Main Brief during the Exceptions stage of a proceeding. *Pa. P.U.C. v. Mechanicsburg Water Company*, 1993 Pa. PUC LEXIS 112 (Pa. P.U.C. July 22, 1993), *164 (finding that presentation of this argument at the Exceptions stage of the proceeding, and not the briefing stage, is a violation of 52 Pa. Code § 5.501(a) and declining to consider the argument).

11. In contravention of this most fundamental legal principle, PGW raises a new argument not even in its Exceptions, as had occurred with the parties in *Mechanicsburg Water*

³ OSBA's rate analysis includes a footnote stating "GS-Industrial customer charge applied to Rate IT average customer, on a per-mcf basis." OSBA Reply Exceptions, p. 13. Needless to say, this footnote does not take the place of discovery or cross examination and in fact, if provided earlier in this proceeding, would have prompted discovery or cross-examination to understand why the GS-Industrial customer charge would be applied to a Rate IT customer.

Company, but rather, in its Reply Exceptions. *See id.* As referenced above, PICGUG has continually argued that PGW's COSS unreasonably discriminates against Rate IT customers in violation of Section 1304 of the Public Utility Code. PICGUG Main Brief, pp. 15, B-1; PICGUG Reply Brief, p. 9. In its Main and Reply Briefs, PGW argued in support of its COSS as consistent with cost-of-service principles. PGW Main Brief, p. 38; PGW Reply Brief, pp. 30-31, 33-34. However, in responding to PICGUG's Exceptions, which continued to challenge PGW's COSS as unreasonably discriminatory towards Rate IT customers, PGW, for the first time, raises the specific argument that cost allocation methods cannot be unreasonably discriminatory because Section 1304 applies only to rates. PGW Reply Exceptions, p. 6.

12. Notably, PGW offers no record citations for this new and far-reaching legal argument. Moreover, PGW did not raise this argument in its Main or Reply Briefs. Rather, by presenting this legal argument in its Reply Exceptions, PGW attempts to violate PICGUG's due process rights. If PGW had presented this legal argument in its Main Brief, PICGUG would have had the opportunity to respond in its Reply Brief. By waiting until the Reply Exceptions stage of this proceeding, PGW effectively ensured that PICGUG would have no ability to respond. Accordingly, the Commission should grant PICGUG's Motion to Strike and disregard PGW's late and improper argument.

13. If, however, the Commission denies PICGUG's Motion to Strike PGW's improper legal argument, PICGUG alternatively requests leave to respond. In the event the Commission considers PGW's argument (*i.e.*, that Section 1304 applies only to rates and not cost allocation), this meritless argument should be dismissed for lack of any legal support. While PGW nonsensically seeks to distinguish a "rate" from the underlying cost allocation process used to set the rate, the Public Utility Code defines "rates" inclusively as follows:

"Rate." Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, *and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.*

66 Pa. C.S. § 102. (Emphasis added). Accordingly, there is no question that the statutory provisions of Section 1304 apply to cost allocation methods as well as the rates affected by such cost allocation methods. Thus, PGW's late and unsupported argument lacks any basis in law and should be dismissed.

III. CONCLUSION

WHEREFORE, the Philadelphia Industrial and Commercial Gas Users Group respectfully requests that the Pennsylvania Public Utility Commission: (1) strike the extra-record evidence and related argument on pages 12-13 of the Reply Exceptions of the Office of Small Business Advocate (striking the language beginning with "However regarding" on page 12 through "nearly 20 years" on page 13); and (2) strike the late argument on page 6 of the Reply Exceptions of Philadelphia Gas Works (striking the language "Here, it is not the proposed rate itself that PICGUG is challenging but rather the cost allocation approach" and "Besides the inapplicability of Section 1304 to the cost allocation method,"). If, however, the Commission declines to grant PICGUG's Motion to Strike with respect to PGW's Reply Exceptions, PICGUG alternatively requests that the Commission grant leave to respond to the late argument, consider

the response set forth herein, and reject PGW's proposed interpretation of Section 1304 of the Public Utility Code.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By _____

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