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January 15, 2009

VIA ELECTRONIC FILING

James McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
2nd Fl., 400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission v. Philadelphia Gas Works
Docket No. R-2008-2073938

Dear Secretary McNulty:

Enclosed for filing is the original Answer of Philadelphia Gas Works to Petition for Reconsideration of the Office of Small Business Advocate. Also enclosed is a copy of the PUC's electronic filing confirmation page. As evidenced by the attached Certificate of Service, the parties of record have been served in the manner indicated.

Sincerely,



Daniel Clearfield
For WolfBlock LLP

DC/jls
Enclosure
cc: Cert. of Service w/enc.

HAR:84544.1/PHI211-255739

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of PGW's Answer to OSBA's Petition for Reconsideration upon the participants listed below in accordance with the requirements of § 1.54 (relating to service by a participant).

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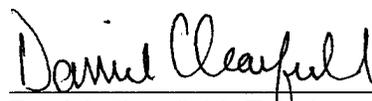
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Daniel Clearfield, Esquire

Dated: January 15, 2009

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	
	:	
v.	:	Docket No. R-2008-2073938
	:	
PHILADELPHIA GAS WORKS	:	

**ANSWER OF PHILADELPHIA GAS WORKS
TO PETITION FOR RECONSIDERATION
OF THE OFFICE OF SMALL BUSINESS ADVOCATE**

Philadelphia Gas Works (“PGW”) files this answer to the Office of Small Business Advocate’s (“OSBA”) petition for reconsideration in the above-captioned matter. OSBA's Petition challenges not the amount of the rate increase granted by the Commission’s December 19, 2008 order but the Commission’s decision to allocate the \$60 million rate relief on an "across-the-board" basis pending the results of a new general rate case that must be completed no later than 21 months from now. The premise of OSBA’s petition is that PGW’s November 14, 2008 rate increase filing triggered a mandatory 7-month suspension period ending August 13, 2009, and that the \$60 million rate increase is required as a matter of law¹ to be allocated based upon an updated cost of service study (“COSS”) in the context of this continued proceeding. OSBA further asserts that, to the extent that the PUC waived these legal requirements using its authority contained in Section 2212(c) of the Public Utility Code, such waiver is invalid because the use of the PUC waiver authority in this instance is unconstitutional.

PGW submits that OSBA is wrong on all points.

¹ *Lloyd v. Pa. P.U.C.*, 904 A.2d 1010 (Pa.Cmwlt. 2006), *appeals denied*, 916 A.2d 1104 (Pa. 2007).

However, while all of the issues raised in OSBA's petition have been addressed in the December 19th order,² PGW urges the Commission to take this opportunity to clarify that it granted PGW's rate relief request on a separate, independent basis that did not involve waiving any portion of the Public Utility Code, rendering moot OSBA's challenge to the constitutionality of the Commission's waiver authority under Section 2212(c). The PUC should then deny OSBA's claims on the merits because the PUC decision fully complied with the Public Utility Code and constitutes a valid final decision pursuant to Section 1308(d). Further, the Commission should reject OSBA's claims that an across-the-board allocation of the authorized rate increase is somehow illegal or not supported by substantial evidence. On the contrary, given the emergency nature of the rate request, the PUC's decision to dispense with a cost of service study and maintain the status quo revenue/cost relationships from the prior base rate case was an appropriate and reasonable exercise of the Commission's discretion and fully supported by the record. Accordingly, OSBA's requests for a continuation of this base rate proceeding to reexamine the allocation of the rate increase and to rescind of the Commission's statutory waivers under Section 2212(c) should be denied.³

Introduction

1. The Commission's December 19, 2008 order granted PGW \$60 million of extraordinary/emergency rate relief pursuant to Sections 1308(d) and (e) of the Code. The

² *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559, 1982 Pa. PUC LEXIS 4, *11-*13 (December 17, 1982).

³ The OSBA's petition should also be granted so the Commission can clarify that the waivers of the Commission's general rate case filing regulations were authorized under 52 Pa. Code §§ 1.2(c), 1.91, 5.41, 5.43 and 56.222, as requested by PGW, and were not issued under Section 2212(c). *See, Petition of ALLTEL Pennsylvania, Inc. for Declaratory Order*, Docket No. P-00950955, *et al.*, 1996 PUC Lexis 67 (June 10, 1996), at notes 9, 10 (Commission's authority to waive its regulations is set forth in 52 Pa. Code § 5.43).

Commission's order allocated the \$60 million rate increase according to the OSBA's proposed methodology – an across-the-board, or constant percentage, increase in total base rates (customer charges and delivery charges) for each customer class.⁴ The Commission concluded that “[a]doption of OSBA’s revenue allocation proposal maintains the existing revenue allocations, which are based on PGW’s last base rate case and the cost of service studies introduced in that proceeding.”⁵

2. Nonetheless, OSBA argues that the Commission misunderstood that its across-the-board revenue allocation proposal was conditioned upon the Commission’s subjecting the allocation to additional immediate review in this docket pursuant to Section 1308(d) of the Code, based upon an updated COSS.⁶ OSBA admits that the essence of its objection “is the timing of the Section 1308(d) proceeding.”⁷

3. OSBA asserts that the result of the Commission directive that PGW file a base rate case on or before December 31, 2009 is to grant PGW a “permanent” \$60 million annual rate increase “without basing allocation of that increase on cost of service.”⁸

4. Neither assertion is correct. As PGW’s base rates will change no later than October 2010,⁹ PGW has not been granted a “permanent” \$60 million base rate increase

⁴ *December 19th Order* at 47. The increase was not allocated to interruptible customers who do not take service at cost-based rates, and the Commission excepted customers with zero delivery charges and only customer charges from this rate design methodology. *Id.*

⁵ *Id.*

⁶ OSBA Petition at ¶ 16.

⁷ *Id.* at ¶ 19.

⁸ *Id.* at ¶ 18.

⁹ This time period assumes that: 1) PGW files the base rate increase on December 31, 2009, to become effective in 60 days; 2) the filing is suspended at the end of the 60-day

although, to be sure, any change in PGW's base rates will only occur on a going forward basis.¹⁰ As the across-the-board allocation of the \$60 million rate increase is based upon PGW's last base rate case and the cost of service studies submitted in that case (R-00061931), the Commission has thus granted the \$60 million increase in consideration of cost of service, albeit not based on an updated COSS as requested by OSBA. However, and as explained in more detail below, in view of the longstanding ratemaking principles reaffirmed by *Lloyd*, the absence of an updated COSS to allocate the rate increase was a proper exercise of the Commission's discretion in establishing rate structure, is fully supported by the record, and is not legal error.

Sections 1308(d) and (e)

5. OSBA is correct that the Commission deemed PGW's rate increase request to be a filing under Sections 1308(d) and (e) of the Public Utility Code.¹¹

6. However, that determination does not entitle OSBA to the relief it requests – just the opposite. In fact, the Commission's December 19th order was a final adjudication under Section 1308(d) that was fully compliant with the Public Utility Code and did not require the PUC to waive any portion of that section to reach its decision.

notice period; and 3) the new rates become effective at the end of the 7-month suspension period.

¹⁰ The characterization of the rate increase granted as not permanent in this context is shared by other parties: "Several parties argued that any extraordinary rate relief awarded in these proceedings should not be permanent. Instead, they argue that the Commission should require PGW to file a base rate case in the near future, during which the rates set in this proceeding would be subject to review and adjustment." *December 19th Order* at 33.

¹¹ "PGW's Petition clearly seeks an increase in base rates subject to Chapter 13 of the Code." *December 19th Order* at 16. Although PGW argued that its filing was not made under Section 1308(d) of the Code (PGW Petition at ¶ 23), the Commission did not agree.

7. The explicit language of Section 1308(d) requires: 1) the filing of a tariff;¹² 2) a general rate increase request;¹³ 3) prompt investigation and analysis, and a hearing;¹⁴ 4) a vote of a majority of the members of the Commission concerning the rate increase.¹⁵ PGW and the Commission complied with all of these statutory requirements for a Section 1308(d) rate filing.

8. The Commission's December 19th order permitted the requested rate increase to go into effect on less than 60 days notice, but such action is clearly within the scope (and intent) of Section 1308(d) and does not require a waiver of the section. For example, Commonwealth Court has stated:

Even though CS Water filed a general rate increase before the Commission, Section 1308(d) does not require the Commission to utilize the full sixty-day review period provided therein. Nothing in this Section prohibits the Commission from immediately entering into a hearing upon the filing of a Water Act-related rate request.

Similarly, under a non-general rate increase, filed pursuant to Section 1308(b), 66 Pa.C.S. § 1308(b), the Commission is also permitted to enter immediately into a hearing on the requested rate relief. Therefore, it is quite clear that these provisions of the Code already enable expedited rate relief at the discretion of the Commission.¹⁶

¹² A tariff that complied with 66 Pa. C.S. § 1308(d) was filed with PGW's Petition.

¹³ The Commission agreed with OTS and OSBA that the rate increase request constituted a general rate increase pursuant to Section 1308(d) of the Code. *December 19th Order* at 16.

¹⁴ An evidentiary hearing was held on December 4, 2008, at which time the testimony of PGW and numerous witnesses representing several parties, including OSBA, was admitted into the record and subjected to cross-examination.

¹⁵ The Commission voted at its Public Meeting on December 18, 2008.

¹⁶ *Masthope Rapids Property Owners Council v. Pa. P.U.C.*, 581 A.2d 994, 1001-02 (Pa.Cmwlth. 1990) (emphasis added; footnote also citing Section 1308(e) omitted).

9. Thus, the premise of OSBA’s petition – that a 7-month suspension of a Section 1308(d) rate increase request is mandatory – is plainly wrong.¹⁷ As the Commission deemed PGW’s filing to be a Section 1308(d) filing and permitted it to become effective on less than 60 days notice but after hearing, the 7-month suspension period was not invoked: “[T]he commission may, at any time by vote of a majority of the members of the Commission serving in accordance with law, permit such tariff to become effective, except that absent such order such tariff shall be suspended for a period not to exceed seven months from the time such rate would otherwise become effective [i.e., 60 days after filing, as mandated by Section 1308(a)].”¹⁸

10. Indeed, the Commission’s Section 1308(d) suspension orders generally state explicitly – as did the suspension order in PGW’s 2002 base rate case, cited by OSBA¹⁹ – that the filing will be suspended by operation of law “unless permitted by Commission Order to become effective at an earlier date.”

11. As the extraordinary rate increase requested (and granted) in this case was equal to the total general rate increase requested, there is no statutory requirement for immediate additional proceedings in this docket, and the Commission’s December 19th order properly provided for the end of this proceeding.²⁰

¹⁷ “Section 1308(a) provides, *inter alia*, that a tariff proposing a general rate increase be suspended within 60 days after its filing. Section 1308(d) requires that the tariff proposing a general rate increase be suspended for a period not longer than seven months.” OSBA Petition at 6, n. 10 (emphasis added). OSBA has clearly mischaracterized both provisions.

¹⁸ 66 Pa. C.S. § 1308(d) (emphasis added). The phrase “the time the tariff would otherwise become effective” refers to the expiration of the 60-day notice period of Section 1308(a).

¹⁹ OSBA Main Brief at 11, n. 20.

²⁰ Ordering Paragraph No. 11. By Secretarial Letter dated December 31, 2008, the Commission accepted PGW’s compliance filing and directed the Secretary’s Bureau to mark this docket closed.

12. As all the Section 1308(d) statutory requirements were met, the OSBA's claim that the December 19th order violated this section is plainly incorrect. Accordingly, as statutory waivers under Section 2212(c) of the Code are not necessary to provide the requested rate increase, the Commission should affirm its order but clarify that it was based upon on two separate and independent grounds. First, affirm that PGW's submission constituted a Section 1308(d) rate request which the Commission finally adjudicated in its December 19, 2008 order while waiving any filing requirements imposed by PUC regulations as necessary to grant the relief. The OSBA does not challenge the PUC's authority to waive in its discretion any such regulatory requirements. Second, and independently, if there are any provisions of Section 1308(d) with which PGW's filing and the PUC's Order are not compliant, the Commission exercised its authority pursuant to Section 2212(c) of the Code to waive those provisions.²¹ It will be shown below that using Section 2212(c) in this manner is not unconstitutional, contrary to OSBA's assertions. Therefore, there is no basis for OSBA's claim that the Commission was legally required to immediately order a 1308(d) proceeding (or continue the above-captioned proceeding) for any purpose, including to determine the allocation of the authorized rate increase pursuant to an updated cost of service study (COSS).

Cost of Service Study Not Mandatory

13. The question raised by OSBA's petition thus boils down to whether the Commission was required, as a matter of law, to base the allocation of the rate increase exclusively on an updated COSS. In other words, did the Commission commit legal error in allocating the increase to maintain the class cost and revenue relationships established in PGW's

²¹ PGW requested waivers under Section 2212(c) "to the extent necessary" to grant the relief requested. PGW Petition at p. 3, ¶¶ 23, 25, and p. 20.

last base rate case pending reallocation in PGW's next base rate filing to be made on or before December 31, 2009?

14. The answer is no for several reasons. First, as indicated above, the requirement to include a COSS in a Section 1308(d) filing is regulatory, not statutory.²² That requirement (and any other requirement of the Commission's regulations) may be waived by the Commission when the Commission believes that it is in the public interest to do so.²³

15. Second, to the extent applicable to setting rates for gas distribution service, *Lloyd* merely reaffirmed longstanding public utility ratemaking principles that cost to serve, while important, does not exclude other relevant factors when establishing reasonable rates.²⁴ Scores of appellate court decisions have held that the establishment of rate structure is an administrative

²² 52 Pa. Code § 53.53. Requests for rate increases on less than statutory notice need not always be accompanied by the data required by the provisions of 52 Pa. Code §§ 53.51 to 53.53 (relating to information furnished with the filing of rate changes). See 52 Pa. Code § 53.103.

²³ *Id.*; see also 52 Pa. Code §§ 1.2, 5.41, 5.43, 56.222, 1.91. If the Commission has the authority to make, rescind, or modify its regulations, the lesser act of waiving its regulations in individual circumstances may be contained within those powers. See 66 Pa. C.S. § 501(a); *Petition of ALLTEL Pennsylvania, Inc. for Declaratory Order [etc.]*, P-00950955, *et seq.*, 1996 PUC Lexis 67 (June 10, 1996), notes 9, 10. PGW requested regulatory waivers pursuant to this authority and not pursuant to Section 2212(c), (PGW Petition at ¶ 23) as stated in Ordering Paragraph No. 10 of the December 19th order.

²⁴ *Lloyd*, 904 A.2d at 1015-16; *City of Pittsburgh v. Pa. P.U.C.*, 126 A.2d 777, 785 (Pa.Super. 1956) (court rejected contention "that the problem of unreasonable [interclass] discrimination cannot be resolved unless estimates of service are produced for each class of consumers and the cost of service to each class," finding evidence of many factors other than cost of service, including quantity of gas used, sufficient justification for the approved rate structure) (emphasis added); *Peoples Natural Gas Co. v. Pa. P.U.C.*, 409 A.2d 446, 457-58 (Pa.Cmwlth. 1979) (court rejected argument that COSS controls "to the exclusion of other equally appropriate factors," describing PUC's rate structure determinations as "multifaceted approach"); *Philadelphia Electric Co. v. Pa. P.U.C.*, 470 A.2d 654, 657-58 (Pa.Cmwlth. 1984) (court rejected argument that differences in rates based on customer use can be justified only on cost basis as "without merit") (emphasis added).

function peculiarly within the expertise of the Commission, and a matter over which the court's scope of review is limited.²⁵

16. *Lloyd* stated that cost of service is the “polestar” – i.e., “a directing principle”²⁶ – for setting rates and rate structure. OSBA is trying to turn what *Lloyd* called a (not “the”) directing principle into an exclusive legal requirement.

17. Here, based upon record evidence, the Commission recognized that the emergency nature of the rate increase request made the filing of a full COSS impossible.²⁷ Further, the results of the prior COSS were outdated and, if used as a basis for rate allocation, could easily lead to unreasonable results.²⁸ Instead, the Commission exercised its discretion to examine these factors and determined to allocate the increase in a manner that preserved the relative revenue and cost relationships of each class that were mandated in PGW's last base rate proceeding.²⁹ Thus, contrary to the OSBA's assertion, the allocation was based upon cost of service. The across-the-board increase maintained the movement of class rates closer to a cost of service basis as the Commission had ordered in PGW's prior base rate case.³⁰ That prior decision

²⁵ See, e.g., *Pittsburgh v. Pa. P.U.C.*, 78 A.2d 35 (Pa.Super. 1951); *Natona Mills, Inc. v. Pa. P.U.C.*, 116 A.2d 876 (Pa.Cmwlth. 1955).

²⁶ Webster's Ninth New Collegiate Dictionary, p. 910.

²⁷ PGW St. 4 (Dybalski) at 2.

²⁸ Tr. at 148-149; PGW Main Brief at 57.

²⁹ *December 19th Order* at 47.

³⁰ *PGW 2007 Rate Order* at 84. Nonetheless, the Commission agreed with OCA “that the *Lloyd* decision does not demand slavish adherence to COSS in revenue allocation.” *Id.* As shown herein, this is consistent with *Lloyd* and the authorities relied upon in *Lloyd*; see also, *Zucker v. Pa. P.U.C.*, 401 A.2d 1377, 1381 (Pa.Cmwlth. 1979) (“[T]here are factors which may warrant departure from strict adherence to the objective cost-of-service standard.”). Also, PGW notes that basic principles of public utility law contain “no requirement that rates for different classes of service be either uniform or equal, or

was based in the results of the cost of service study submitted by PGW in that case.³¹ Finally, the Commission recognized that any continued rate proceeding while PGW was attempting to remarket its variable rate bonds and complete several other key financial transactions could create unneeded uncertainty.³² Therefore, the Commission ordered PGW to file another general rate case no later than the end of 2009 so that rate allocation, as well as all other rate case issues, may be examined, after the current financial crisis has subsided. This provides absolute assurance that OSBA will have an adequate opportunity to argue for reallocation of revenue responsibility among customer classes without creating additional financial risk for the Company.³³ The OSBA's claim that, notwithstanding these facts and the preservation of the status quo in this manner, the revenue allocation is nonetheless illegal is simply not sustainable.³⁴

18. This allocation approach was affirmed for use in at least one prior base rate proceeding. In *Welch v. Pa. P.U.C.*, the Commonwealth Court approved the same type of

even equally profitable to the utility.” *Alpha Portland Cement Co. v. Pa. P.U.C.*, 84 Pa.Super. 255, 1925 WL 4826, *9 (Pa.Super. 1925) (emphasis added).

³¹ *December 19th Order* at 47; *PGW 2007 Rate Order* at 75-76.

³² Even if a proceeding was limited to the allocation of the rate increase without challenging the overall rate award, the investment community or the bond rating agencies might see this uncertainty as reason to avoid purchasing PGW's remarketed bonds or otherwise becoming involved with the Company. The Commission properly did not want to take that risk.

³³ *See, December 19th Order* at 32.

³⁴ *See, e.g., U.S. Steel Corp. v. Pa. P.U.C.*, 390 A.2d 865, 871 (Pa.Cmwlt. 1978) (Rate structure may be rearranged in response to changed economic conditions “whether general changes or changes especially affecting particular classes of customers. . . . We see no reason why in times of stringency the utility might not propose, and the Commission might not approve, rates for residential users less than the rates which a strict application of cost of service studies would suggest.” (Emphasis added).

across-the-board allocation of a rate increase as the Commission approved in this case, concluding that:

In light of the characteristics of an across-the-board increase discussed above we are at a complete loss to understand how the Commission's order here subject to review, which appears to be an archetype of nondiscriminatory treatment of utility customers with respect to the allocation of an approved increase, could possibly be the subject of a successful challenge on the basis of discrimination.³⁵

19. In *Welch*, a uniform rate increase was allocated across-the-board to the classes and imposed on an existing rate structure, and the result was an essentially identical rate structure as before the increase, just as occurred here.

20. Accordingly, it is clear that OSBA misstates the holding and legal effect of the *Lloyd* case. *Lloyd* does not require a COSS as a matter of law in every base rate case.³⁶ Although *Lloyd* described cost of service as the “polestar” for setting rates and rate structure, *Lloyd* also reaffirmed longstanding public utility ratemaking jurisprudence that cost of service considerations do not exclude other relevant factors: “While cost to serve is important, other relevant factors may also be considered.”³⁷ The unbundling addressed in *Lloyd* and required by

³⁵ *Welch v. Pennsylvania Public Utility Commission*, 464 A.2d 568, 574-75 (Pa.Cmwlt. 1983).

³⁶ This is consistent with PUC practice and case law predating *Lloyd*. In *Zucker*, the court described the following language from a Commission order as “a sound legal position”: “(T)his Commission will not take the position of condemning any proposed rate structure not fully substantiated by a cost of service study.” *Zucker*, 401 A.2d at 1381 (quoting *Pa.PUC v. Bell Telephone Co.*, R.I.D. 196 (June 30, 1976)).

³⁷ *Lloyd*, 904 A.2d at 1015-16 (quoted with approval from Commission opinion in *Pa.PUC, City of Reading et al. v. Metropolitan Edison Company*, 44 Pa.P.U.C. 709, 750-51 (1970), as properly descriptive of principles applicable to fixing reasonable rate schedules).

the Electric Competition Act does not translate into a legal requirement that an updated COSS must be used to allocate PGW's rate increase in this proceeding.

Unconstitutional Delegation of Legislative Power

21. Although the Commission's resolution of PGW's rate increase request as a Section 1308(d) and (e) filing renders moot the OSBA's "as applied" constitutional challenge, PGW nonetheless responds to OSBA's argument to provide separate and independent grounds showing the lawfulness of the PUC's Order.³⁸

22. OSBA concedes that Section 2212(c) is not unconstitutional on its face.³⁹ PGW certainly agrees with this position, but not with OSBA's rationale – that "the General Assembly itself rendered the fourth prong of the Section 1308(e) test inoperative with regard to PGW" – or with OSBA's characterization of the basis for the Commission's waiver of the fourth prong – "because the fourth prong is inconsistent with the legislature's explicit direction under Section 2212(c)."⁴⁰ First, contrary to OSBA's assertion, the return on equity limitation of Section 1308(e) is not inherently impossible to apply to PGW – a just and reasonable return on equity calculation could be developed. However, the Commission properly recognized that it would be illogical to apply a rate of return standard to a cash flow regulated company.⁴¹ Second, the

³⁸ PGW's Main Brief in this proceeding adequately addressed OSBA's misplaced reliance upon *PPL Energyplus, LLC v. Com.*, 814 A.2d 861 (Pa.Cmwlth. 2003), *reversed on other grounds*, *Delmarva Power & Light Co. v. Com.*, 870 A.2d 901 (Pa. 2005) on this issue.

³⁹ OSBA Petition at ¶ 31.

⁴⁰ *Id.* at ¶¶ 27, 32.

⁴¹ In the 2002 extraordinary rate relief proceeding, OSBA and CEPA argued that the City's \$18 million payment to PGW could be viewed as a return on equity, but the Commission rejected that position because it would have precluded the level of relief necessary to address PGW's immediate liquidity problems and would have effectively rendered application of Section 1308(e) a nullity in that case. *PGW 2002 Extraordinary Rate*

Commission waived the fourth prong in the 2002 extraordinary rate relief case (“*PGW 2002*”) – and here – guided and restrained by its obligations under the Public Utility Code generally, and its obligation to assure that rates are just and reasonable in particular.⁴² The Commission recognized in *PGW 2002* that “[i]t is well settled that the Commission must always be guided by the just and reasonable standards, which permeate its ratemaking authority.”⁴³ None of the parties in *PGW 2002*, including OSBA, suggested then that the fourth prong was inconsistent with Section 2212(e). In this case, the Commission stated that the waivers granted “are consistent with our actions in *PGW 2002*.”⁴⁴ In addition, in response to the OSBA’s argument that the Section 2212(c) waivers in this case are granted with no standards or guidelines, the Commission clarified that “the waivers at issue here are necessary for the purpose of acting on PGW’s extraordinary rate relief due to the nature of regulation over PGW as a cash flow utility and the Code’s requirements regarding the 1998 Ordinance Bond coverages.”⁴⁵

23. Accordingly, OSBA concedes that Section 2212(c) may be used to waive provisions of Section 1308(e), but denies that Section 2212(c) may be used to waive any provisions of Section 1308(d). The OSBA cannot have it both ways,⁴⁶ as the Commission used

Order at 19. In this case, PGW’s Exh. JRB-1 (Part B) showed the net effect of the \$60 million rate increase on City Equity, which OSBA relied upon. OSBA Main Brief at 25.

⁴² *PGW 2002 Extraordinary Rate Order* at 18-19; *December 19th Order* at 32, 44.

⁴³ *PGW 2002 Extraordinary Rate Order* at 18-19.

⁴⁴ *December 19th Order* at 44.

⁴⁵ *Id.* (emphasis added); *see*, PGW Petition at ¶ 21 and p. 20, and PGW Main Brief at 51-54.

⁴⁶ Apparently recognizing this, OSBA came up with a new standard for Section 2212(c) waivers allegedly based on the Commission’s action in *PGW 2002* – inconsistency with Section 2212 – but that is not the standard the Commission used in *PGW 2002*, or in this case.

the same standard to waive both provisions. Moreover, as explained below, the court has already recognized that the provisions of the Public Utility Code and the fundamental principles of Pennsylvania public-utility jurisprudence guide and restrain the Commission's exercise of its waiver authority. This makes the Commission's actions plainly constitutional.

24. Based on a gaming industry case, OSBA argues that the "public interest" is not a constitutionally sufficient standard for the Commission's exercise of its waiver authority under Section 2212(c) of the Code.⁴⁷ OSBA's reliance on a gaming industry case is misplaced.⁴⁸ That case involved complicated issues of preemption and zoning not present in the regulation of Pennsylvania public utilities. While the "public interest" may be difficult to determine in the context of the fledgling gaming industry in Pennsylvania, that is not the case with respect to Pennsylvania's decades of utility regulation and the clear directive that the Commission must act to assure just and reasonable rates.

25. The more apt analysis on this issue is set forth in cases involving the Public Utility Code. *Barasch v. Pa.P.U.C.*⁴⁹ involved a provision of another statute stating that the Commission "shall approve such . . . rate increase requests as are necessary and appropriate [for the limited and special purpose of ensuring repayment of principal and interest on loans made under the statute]."⁵⁰ The Commission concluded that this provision, along with the findings of

⁴⁷ OSBA Petition at ¶ 37. Of course, that is not the only standard PGW and the Commission have identified.

⁴⁸ *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Com.*, 877 A.2d 383, 418 (Pa. 2005).

⁴⁹ 562 A.2d 414 (Pa.Cmwlth. 1989), *rehearing denied*, 1989 Pa. Commw. LEXIS 727 (Pa.Cmwlth. Sept. 27, 1989), *appeal denied*, 586 A.2d 923 (Pa. 1991).

⁵⁰ 32 Pa. C.S. § 7518.

the General Assembly set forth in that statute,⁵¹ gave the Commission discretion to approve a rate increase to accomplish loan repayment whether or not the facilities constructed with the loan proceeds were then “used and useful.” The court rejected the Commission’s position:

That the General Assembly failed to indicate what factors should guide the Commission in determining whether a rate increase is necessary and appropriate does not commit to the Commission the unfettered discretion to make that determination. Rather, the Commission's determination is governed by the provisions of the Public Utility Code, 66 Pa.C.S. §§ 101-3315, and the fundamental principles of our public-utility jurisprudence.⁵²

This is consistent with the manner in which the Commission has in fact exercised its waiver authority under Section 2212(c) of the Code, in view of the unique ratemaking methodology required by the Code for PGW.⁵³

26. The court followed *Barasch* in a subsequent case where it held that these same loan act provisions did not authorize the Commission to approve a rate increase request through a surcharge mechanism rather than a base rate case proceeding.⁵⁴

27. Thus, contrary to OSBA’s argument, the PUC’s application of its waiver authority under Section 2212(c) guided by the Public Utility Code, including the special ratemaking provisions applicable to PGW, was constitutionally sufficient.

⁵¹ 32 Pa. C.S. § 7503.

⁵² *Barasch*, 562 A.2d at 418 (emphasis added).

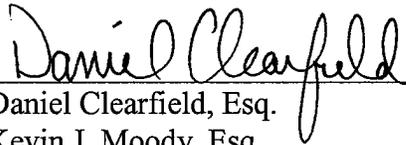
⁵³ See note 44 *supra*.

⁵⁴ *Masthope Rapids*, 581 A.2d at 998-1001 (“Accordingly, we conclude that the Commission's review procedures regarding a Water Act-related rate increase must comply with the mandate of the Code, and that such a determination can only result from a review of the filing to be certain that any rate approved is just and reasonable.”).

Conclusion

For the reasons set forth herein, PGW respectfully requests that the Commission consider OSBA's petition for the purpose of clarifying that the Commission's December 19th order approving and allocating PGW's rate increase in accordance with Sections 1308(d) and (e) of the Public Utility Code was lawful without regard to the constitutionality of the Commission's waiver authority under Section 2212(c) of the Code and without the use of an updated cost of service study.

Respectfully submitted,



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