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January 15, 2009

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Pennsylvania Public Utility Commission
v.
Philadelphia Gas Works – Petition for
Emergency Rate Relief
Docket No. R-2008-2073938

Dear Secretary McNulty:

Enclosed for filing are an original and one (1) copies of the Answer of the Office of Consumer Advocate to the Petition for Reconsideration, on behalf of the Office of Small Business Advocate, in the above referenced proceeding. A copy of this document has been filed using eFiling; the eFiling confirmation sheet is enclosed.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Darryl Lawrence'.

Darryl Lawrence
Assistant Consumer Advocate
PA Attorney I.D. # 93682

Enclosures

cc: Honorable Marlane Chestnut
Office of Special Assistants
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2008-2073938
	:	
Philadelphia Gas Works – Petition for Emergency Rate Relief	:	

OFFICE OF CONSUMER ADVOCATE’S ANSWER TO
THE OFFICE OF SMALL BUSINESS ADVOCATE’S
PETITION FOR RECONSIDERATION OF ORDER

I. INTRODUCTION

On November 14, 2008, PGW filed its Petition seeking Extraordinary or Emergency Rate Relief amounting to a distribution base rate increase of \$60 million. PGW requested that the Commission waive any applicable provision of the Public Utility Code, inconsistent with granting its Petition. This case was assigned to Administrative Law Judge Marlane R. Chestnut (ALJ Chestnut).

Numerous parties filed Petitions to Intervene, including the Office of Small Business Advocate (OSBA) and the Office of Consumer Advocate (OCA). After expedited testimony, hearings and briefing, the Commission granted PGW’s request for an immediate \$60 million distribution rate increase. Order at 29-30. The Commission found that PGW had satisfied the test for extraordinary rate relief under Section 1308(e). Order at 24. The Commission also waived, to the extent necessary to give full effect to the rate relief, the

operation of Sections 1308 and 1307(f) of the Public Utility Code and Chapter 53 of the Commission's regulations. Order at 51, ¶ 10. The Commission also ordered PGW to file a general base rate case under Section 1308(d) on or before December 31, 2009. Order at 16.

On January 5, 2009, the OSBA filed its Petition for Reconsideration of Order (Petition). The OSBA, among other things, argues that the Commission overlooked its arguments that, if the Commission approved a permanent rate increase without a full rate investigation, that the Commission rely on the results of the cost of service study submitted by PGW in the compliance phase of its last base rate proceeding for allocating any rate relief awarded. Petition at 6, ¶17. The OSBA also argues that the Commission overlooked the requirements of Lloyd v. Pennsylvania Public Utility Commission, 904 A.2d 1010, 1020 (Pa. Commw. 2006), *appeals denied*, 916 A.2d 1104 (Pa. 2007)(Lloyd) and implicitly waived the requirements of Section 1304 in adopting an across the board allocation of the rate increase. Petition at 6-7, ¶18. The OSBA seeks an immediate general base rate case but limited to only two issues – class cost of service and the revenue allocation of the \$60 million base rate increase. The OSBA argues that this limited general base rate case must be completed by August 13, 2009, which would have been the end of the seven month suspension period had the Commission suspended the rate request pursuant to Section 1308(d).

The OCA files this Answer in opposition to the OSBA's request for an immediate base rate case limited to a consideration of the class cost of service study and revenue allocation. While the OCA did not support granting of the full \$60 million increase requested by PGW, the OCA agrees with the Commission's decision that the appropriate way to allocate any such increase in this case was on an across-the-board basis. The OCA submits that the Commission's decision did not overlook the OSBA arguments, the Public Utility Code or the Lloyd case when

determining the revenue allocation of the \$60 million rate increase. Moreover, the OCA submits that the Public Utility Code, particularly Section 1308(d) relied upon by OSBA, does not support OSBA's request for a limited base rate proceeding that looks only at class cost of service and revenue allocation.

II. ANSWER

A. The OSBA's Petition Fails To Meet The Duick Standard.

The OSBA cites the Duick case in its Petition for the proposition that the Commission may amend or rescind its Order if an issue or argument "appears to have been overlooked or not addressed by the Commission." Petition at 4. The OSBA then alleges that the Commission overlooked its argument that the Commission should rely on the cost of service study that was submitted by PGW in the compliance phase of its last base rate case (Compliance COSS) to allocate the \$60 million emergency rate increase if there was no continuation of the general base rate case. Petition at 6, ¶ 17. The OSBA also alleges that the Commission overlooked the requirements of Lloyd and must order an immediate Section 1308(d) proceeding limited to class cost of service and revenue allocation. The Commission, however, did not overlook these arguments — it specifically considered and rejected these arguments.

Initially, the OCA would note that the Commission Order considered the argument of OSBA that any rate relief awarded in this proceeding had to be immediately followed by litigation of a base rate proceeding within the seven month suspension period (*i.e.*, concluded by August 13, 2009). In its Order, the Commission described the OSBA's argument as follows:

As discussed above, OSBA contends that the Commission only has authority to grant the Petition for Extraordinary Rate Relief if the November 14, 2008 Petition is also deemed a request for a general rate increase under Section 1308(d). Therefore, OSBA contends

that the entire \$60 million increase requested by PGW may be adjudicated immediately, but that PGW must pursue a base rate case deemed to be initiated by the Petition with a seven-month suspension period.

Order at 33. Upon consideration of this issue, the Commission rejected the argument of the OSBA, on this issue. Instead, the Commission directed PGW to file a Section 1308(d) base rate case on or before December 31, 2009. The Commission also addressed this issue early in its Order and explicitly adopted the position of the OTS regarding the need for a base rate filing following a Section 1308(e) proceeding. The Commission stated:

OTS has suggested that we temporarily suspend Section 1308(e)'s requirement that extraordinary relief be requested in the context of a base rate filing, but that we require such filing on or before December 1, 2010. We find that the OTS proposal is appropriate, however, we will require the base rate filing to be made on or before December 31, 2009.

Order at 16.

As to the Commission's decision regarding revenue allocation, it is important to note that the Commission explicitly adopted the OSBA's own alternative methodology for the across-the-board base rate increase. The Commission stated:

Adoption of the 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.

Order at 47.

The OSBA Petition, however, avers that the Commission overlooked the OSBA's other alternative proposal -- if the Commission did not direct the completion of a general base rate case by August 13, 2009 that the across the board revenue allocation should be rejected and the Compliance cost of service study from the last rate case (Compliance COSS or 2006 COSS) should be used for revenue allocation purposes. The Commission's Order in this matter,

however, clearly shows that the OSBA's "Alternative Revenue Allocation Proposal" was considered by the Commission, and not overlooked as the OSBA alleges in its Petition. On this allocation issue, the Order provides:

PGW does object to using the 2006 COSS as the basis for the increase because, as PGW states, it is now outdated.

Order at 46. Moreover, the Order also provides that:

OCA does not agree with OSBA's proposal that the revenue allocation should be based on the 2006 COSS.

Order at 47. As the OCA discussed in its Main Brief, PGW's witness had testified that the Compliance COSS was outdated and it was unknown as to whether it was accurate or not. OCA M.B. at 31. The Compliance COSS was presented in the compliance phase of the last base rate case, not during the litigation of the last base rate case. The Compliance COSS was not tested through the litigation process, reviewed for the reasonableness of its assumptions, or analyzed to determine if it was free from error. It is evident from the discussion in the Order that the Commission specifically considered the OSBA's alternative revenue allocation proposal, and made the decision not to accept it based on the arguments of PGW and the OCA.

Additionally, the OCA submits that the OSBA's argument that the Commission's decision does not meet the principles set forth in Lloyd overstates the holding in that case. OSBA argues that the Commission can only allocate the revenue increase in a base rate case in a just and reasonable manner based on a cost of service study. As the Commission correctly held in PGW's 2007 base rate case, "the Lloyd decision does not demand a slavish adherence to COSS in revenue allocation." Pa. PUC v. PGW, Docket No. R-00061931, slip op. at 84 (Order entered September 28, 2007)(PGW 2007 Order).

The Lloyd case recognizes that there are many factors to be considered by the Commission in revenue allocation, but one factor cannot trump all other factors. The relevant quotes from Lloyd are as follows:

However, while permitted, gradualism is but one of many factors to be considered and weighed by the Commission in determining rate designs, and the principles of gradualism cannot be allowed to trump all other valid ratemaking concerns and do not justify allowing one class of customers to subsidize the cost of service for another class of customers over an extended period of time.

[I]n effect, the Commission has determined that the principle of gradualism trumps all other ratemaking concerns – especially the polestar – cost of providing service.

Lloyd, 904 A.2d at 1020 (citations omitted).

The OSBA also refers to the Commonwealth Court decision in Allegheny Ludlum Corporation v. Pennsylvania Public Utility Commission, 149 Pa. Commw. 106, 111, 612 A.2d 604, 606 (1992)(Allegheny Ludlum) to support its argument that the Commission must base its revenue allocation solely on a cost of service study. The OSBA provides a partial quote from Allegheny Ludlum for the proposition that “the primary consideration in establishing rate structure is the cost of service.” Petition at 8, ¶22. The full quote from the Allegheny Ludlum case is as follows:

The primary consideration in establishing a rate structure is cost of service, although this court has recognized that other concerns are properly considered as well.

Id., 612 A.2d at 606 (emphasis added).

The OSBA argument that Lloyd now requires that the Commission must be solely guided by a cost of service study in allocating a revenue requirement proves too much. A cost of service study is but one tool that the Commission can use to consider the allocation of the

revenue requirement among classes.¹ Lloyd and Allegheny Ludlum require the Commission to give consideration to all ratemaking concerns including what Lloyd calls the “polestar” – the cost of providing service.² Lloyd, 904 A.2d at 1020. Specifically in this case, the Commission gave full consideration to the cost of service by determining to maintain the relative relationship between classes that resulted from its last base rate award.³ The relationship was established based on the cost of service studies provided in the last base rate proceeding. Moreover, the Commission’s requirement for a base rate case to be filed no later than December 31, 2009 will provide an opportunity to review further the cost of service and revenue allocation on a going forward basis when PGW’s financial situation has stabilized. Order at 47.

The OCA submits that, based on the foregoing, the Commission should deny OSBA’s Petition and its request for a base rate case limited to the consideration of cost of service studies and revenue allocation. The Commission did not overlook these issues as the OSBA argues. Rather, the Commission decided these issues as set forth in its Order in an appropriate manner.⁴

¹ The Commission regulations do not even require the filing of a cost of service study in rate cases filed by small utilities where the rate requests are under \$1 million. 52 Pa. Code §53.52. The Commission, however, does perform an allocation of the rate increase in each of those rate cases.

² “Polestar” is a literary reference meaning “guiding light.” The American Heritage Dictionary, Houghton Mifflin Co. (1985).

³ The Commonwealth Court has explicitly affirmed the use of an across the board increase imposed on an existing rate structure such as was done here. Welch v. Pennsylvania Public Utility Commission, 464 A.2d 568, 574 (Pa. Commw. 1983). The Court found the across the board increase imposed on the existing rate structure to be “the archetype of nondiscriminatory treatment of utility customers with respect to the allocation of an approved increase.”

⁴ The OSBA also argues that pursuant to the Commission regulations at Section 53.53, PGW was required to file a cost of service study in conjunction with its request for rate relief. Petition at 7, ¶19. The Commission, however, specifically waived the applicable regulation at Chapter 53 as it concerned PGW’s request for extraordinary rate relief given the exigent circumstances. Order at 51, Ordering ¶10. The OSBA has made no legal argument that the Commission is without authority to waive its own regulatory requirements on a temporary basis in the context of a Section 1308(e) extraordinary rate relief proceeding.

B. The OSBA's Requested Relief Of a Base Rate Proceeding Limited To Two Issues Is Not Supported By The Public Utility Code.

In its Petition, the OSBA requests that the Commission direct an “immediate Section 1308(d) proceeding” limited to two issues that the OSBA has selected –class cost of service and revenue allocation of the \$60 million increase. OSBA provides no legal basis or argument as to how a Section 1308(d) proceeding could be limited as OSBA suggests.

The OSBA's legal argument is based on the premise that, pursuant to Section 1308(e), PGW must file an immediate general base rate case under Section 1308(d), with a suspension period ending August 13, 2009, since relief under Section 1308(e) can only be awarded during the pendency of a Section 1308(d) rate case. Petition at 5, ¶14. The OSBA has argued that the Commission cannot waive this statutory requirement. In its Petition, however, the OSBA requests specific relief, in that, the 1308(d) proceeding should be limited in scope – the only issues to be addressed would be the class cost of service and the appropriate revenue allocation of the \$60 million rate increase. Petition at 7, ¶ 19. The OCA submits that if the OSBA is correct that an additional seven month consideration of a Section 1308(d) case is required pursuant to Section 1308(e), there is absolutely no basis in the law to limit such a proceeding to class cost of service and revenue allocation.

Section 1308(d) requires that “The commission shall promptly enter into an investigation and analysis ... concerning the lawfulness of such rate.” 66 Pa.C.S. §1308(d). If a general base rate case is to be completed as the OSBA argues, it cannot be limited to only those issues identified by the OSBA. All issues, including the \$60 million rate increase awarded, must

be investigated and litigated pursuant to Section 1308(d). OSBA cannot sustain an argument that the rate increase amount is final, but the revenue allocation is not.⁵

Moreover, the OCA submits that the OSBA's Petition seeks a result that is arguably at odds with its own legal arguments. In its Petition, the OSBA argues that the Commission is without authority to waive Section 1308 as it pertains to PGW. But, as discussed above, the OSBA seeks to limit the Commission's consideration under Section 1308(d) to only two issues and avoid any further consideration of the \$60 million revenue increase. Such a modified format would require the Commission to *wave* certain provisions of Section 1308(d) that call for an investigation and analysis of the general rate increase, an act which the OSBA argues the Commission is without authority to perform.

The OCA submits that the OSBA's Petition for Reconsideration and for the establishment of a rate case limited to two issues – class cost of service and revenue allocation – cannot be legally sustained under the Public Utility Code or the OSBA's own legal arguments. As such, the OSBA's requested relief should be denied.

⁵ The OCA would also note that changing the allocation before the next fully litigated base rate case that has been ordered by the Commission could change the Commission's understanding of the impact of its decision on the individual classes from the combination of the base rate increase and the gas cost rate decrease. See, Joint Motion of Chairman Cawley and Commissioner Gardner, p. 5.

III. CONCLUSION

For the reasons set forth herein, the Office of Consumer Advocate respectfully requests the Commission to deny the Office of Small Business Advocate's Petition for Reconsideration.

Respectfully Submitted,



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Dated: January 15, 2009
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CERTIFICATE OF SERVICE

Pennsylvania Public Utility Commission :
 :
 v. : Docket No. R-2008-2073938
 :
 Philadelphia Gas Works – Petition for :
 Emergency Rate Relief :

I hereby certify that I have this day served a true copy of the foregoing document, Answer of the Office of Consumer Advocate to the Petition for Reconsideration, on behalf of the Office of Small Business Advocate, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 15th day of January 2009.

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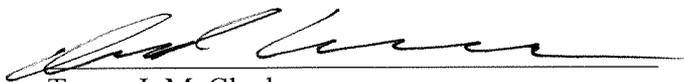
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