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March 4, 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: PUC v. Philadelphia Gas Works, Docket No. R-2008-2073938

Dear Secretary McNulty:

Enclosed for filing are the original and three copies of Philadelphia Gas Works' ("PGW") Motion to Strike and Response to the "Answer" of the Office of Small Business Advocate, in the above matter. As evidenced by the attached Certificate of Service, the parties of record have been served in the manner indicated.

Please contact me if you have any questions or if you need additional information.

Very truly yours,



Kevin J. Moody
For WolfBlock LLP

KJM/jls
Enclosure

cc: Hon. Marlane Chestnut (w/enc)
Certificate of Service (w/enc)

HAR:87879.1/PHI211-255739

CERTIFICATE OF SERVICE

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

VIA EMAIL & FIRST CLASS MAIL

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Kevin J. Moody, Esquire

Dated: March 4, 2009

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY
COMMISSION

v.

PHILADELPHIA GAS WORKS

:
:
:
:
:
:

Docket No. R-2008-2073938

NOTICE TO PLEAD

To: Office of Small Business Advocate

You are hereby notified to file a written response to the enclosed motion to strike within twenty (20) days from service hereof or a judgment may be entered against you.

Respectfully submitted,



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Dated: March 4, 2009

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**PHILADELPHIA GAS WORKS' MOTION TO STRIKE AND RESPONSE TO
THE "ANSWER" OF THE OFFICE OF SMALL BUSINESS ADVOCATE
TO PGW'S ANSWER TO OSBA'S PETITION FOR RECONSIDERATION**

Pursuant to 52 Pa. Code § 5.103, Philadelphia Gas Works ("PGW") submits this Motion to Strike and response to the "Answer" of the Office of Small Business Advocate ("OSBA") to PGW's Answer to OSBA's Petition for Reconsideration of the Commission's December 19, 2008 Order.

Summary

The Commission has approved \$60 million extraordinary/emergency rate relief for PGW pursuant to Sections 1308(d) and (e) of the Public Utility Code. OSBA filed a petition for reconsideration, alleging that 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 to be filed by the end of this year violated Section 1308(d) and was not supported by substantial evidence. OSBA also alleged that the Commission's grant of waivers under Section 2212(c) of the Code "to the extent necessary" was unlawful.

PGW filed an answer to OSBA's reconsideration petition. Because the OSBA had filed a petition, not a complaint, PGW did not respond paragraph by paragraph to the OSBA petition. Instead, PGW argued in response to the petition that: (1) the Commission's order fully complied with the Code; (2) the order constituted a valid final adjudication pursuant to Section 1308(d)

independent of the Section 2212(c) waivers granted by the Commission; (3) the across-the-board revenue allocation of the authorized rate increase maintained the status quo revenue/cost relationships from PGW's prior base rate case; and (4) the Commission's action was an appropriate and reasonable exercise of the Commission's discretion and fully supported by the record. PGW's answer also argued that because there was an independent basis for the Commission's order rendered moot the OSBA's challenge to the constitutionality of the Section 2212(c) waivers.

OSBA then filed an "answer" to PGW's answer. That additional "answer to an answer" is not authorized by the applicable rules of procedure. Apparently recognizing this obstacle, OSBA mischaracterizes PGW's answer as "new matter," thus arguably justifying application of the "complaint pleading" rules which do permit a "reply" (although not an "answer" as OSBA asserts) to New Matter.

OSBA's answer is procedurally defective and should be stricken because: (1) OSBA relies on rules of pleading that are inapposite to a reconsideration petition; (2) PGW's answer does not raise new matter or seek affirmative relief; and (3) PGW's answer contains only legal argument and conclusions of law applied to undisputed facts of record.

Apart from being procedurally defective, OSBA's "answer to an answer" is wrong on the law and fails to show that the Commission's order is unlawful. Accordingly, if OSBA's answer is not stricken, its arguments should be rejected.

Motion to Strike

In support of the relief requested herein, PGW states the following:

1. PGW’s answer to OSBA’s petition for reconsideration of the Commission’s order is expressly authorized by the Commission’s rules of procedure.¹ As required,² PGW’s answer responded to the arguments set forth in OSBA’s petition. Because the OSBA had filed a petition, not a complaint, PGW did not respond paragraph by paragraph to the OSBA Petition.³

2. On the other hand, no Commission rule or regulation authorizes OSBA to file an “answer” to PGW’s answer to OSBA’s petition. Apparently recognizing this, OSBA asserts that PGW’s answer raised “new matter” and requested “affirmative relief,” thus permitting it to file a response under 52 Pa. Code § 5.63(a).⁴ OSBA identifies the so-called affirmative relief allegedly requested by PGW’s answer,⁵ but does not identify the new matter to which it is responding.

3. OSBA’s characterization of PGW’s answer is clearly a mischaracterization. Even if the complaint pleading process applied, PGW’s answer neither raised new matter nor requested affirmative relief.

¹ 52 Pa. Code § 5.572(e).

² As relevant to this matter, an answer to a petition must “[a]dvice the parties and the Commission of the parties’ position on the issues raised in the petition [and] [s]tate concisely the facts and matters of law relied upon.” 52 Pa. Code § 5.61(e)(1),(3).

³ *Compare*, 52 Pa. Code § 5.61(b)(1) -(5) and 5.61(e)(1) - (4). (Contrary to OSBA's repeated assertions, numbered paragraphs are only required in an answer to a *complaint*. In any event, failure to number paragraphs is neither material nor prejudicial and thus could never be the basis for dismissal or the striking of the pleading.)

⁴ This regulation authorizes a “reply” to “new matter,” not an “answer” as filed by OSBA.

⁵ OSBA asserts (erroneously) that PGW’s answer requests the PUC “to rewrite” its order “based on a new rationale.” OSBA Answer at 3. That is incorrect. As explained below, the rationale contained in PGW’s answer is clear in the record.

4. New matter comprises new facts and/or affirmative defenses.⁶ A pleading that contains no affirmative defenses and only conclusions of law and denials of the averments of the preceding pleading does not contain new matter.⁷

5. OSBA's answer confirms that PGW's answer raised no new facts. OSBA's answer either admits the averments of record facts contained in PGW's answer or states, correctly, that the averments in PGW's answer are "arguments and conclusions of law to which no response is required."

6. Affirmative defenses to be set forth in New Matter are listed in the Rules of Civil Procedure.⁸ PGW's answer did not raise any of these affirmative defenses.

7. More generally, affirmative relief is relief sought against another party.⁹ PGW's answer did not request relief against (or from) any party, including OSBA. PGW's answer merely requested that the Commission recognize the alternative basis for its order and made

⁶ "Answers raising new matter. An affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of 'New Matter.' A party may set forth as new matter another material fact which is not merely a denial of the averments of the preceding pleading." 52 Pa. Code § 5.62(b).

⁷ *Goodrich-Amram* (2nd ed.), Civil Action § 1017(a):5.

⁸ Accord and satisfaction, arbitration and award, consent, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth, waiver, assumption of the risk, comparative negligence and contributory negligence. Pa.R.C.P. No. 1030 (New Matter).

⁹ "Answers seeking affirmative relief. In its answer, a respondent may seek relief against other parties in a proceeding if common questions of law or fact are present." 52 Pa. Code § 5.62(a) (emphasis added).

defensive arguments to support preserving the relief already granted to PGW. Doing that does not constitute raising new matter.¹⁰

8. OSBA's mischaracterization of PGW's answer as "new matter" to justify its "answer" to PGW's answer should be rejected, and OSBA's answer should be stricken.

Response – OSBA's Answer is Substantively Defective

9. If OSBA's answer is not stricken, its arguments are contrary to applicable law and should be rejected.

10. OSBA expressly agrees with statements of the law in PGW's answer concerning the requirements of Section 1308(d) and the PUC's authority under it.¹¹

11. However, OSBA argues that the Commission's order is unlawful because it does not specifically articulate the rationale contained in PGW's answer.¹² This is a legal "straw man." It is well settled that an appellate court may affirm an agency order on a different basis than stated in the order, provided the basis exists in the record.¹³

¹⁰ 6 Standard Pennsylvania Practice 2d § 26.50 n. 12; § 26.51; *see also, Kaiser v. Monitrend Investment Management, Inc.*, 672 A.2d 359, 362-63 (Pa.Cmwlth. 1996) (distinguishing between affirmative relief [setoff and counterclaim] and matters intrinsically defensive in nature [recoupment]).

¹¹ OSBA Answer at 8 (referring to PGW Answer at ¶¶ 7-8; Section 1308(d): 1) requires the filing of a tariff; 2) requires a general rate increase request; 3) requires prompt investigation and analysis, and a hearing; 4) requires a vote of a majority of the Commission on the request; and 5) permits the Commission to make a final decision in less than 60 days.).

¹² *See, e.g.*, OSBA Answer at 4. OSBA also asserts that the rationale contained in PGW's answer is inadequate to avoid an appeal of the Commission's grant of Section 2212(c) waivers unless the Commission withdraws the parts of the Opinion and Order that concern the waivers. *Id.*

¹³ *Chrzan v. Workers' Comp. Appeal Bd. (Allied Corp.)*, 805 A.2d 42, 47 n. 10 (Pa.Cmwlth. 2002), *reconsideration/reargument denied, appeal denied*, 821 A.2d 588 (Pa. 2003); *Continuous Metal Tech, Inc. v. Unemployment Comp. Bd. of Review*, 740 A.2d 1219,

12. OSBA's "new rationale" argument fails to acknowledge expressly what OSBA's answer admits – that PGW's answer contains only averments of record facts (which OSBA's "answer" admits) and arguments and conclusions of law (which OSBA disputes).¹⁴ Thus, the rationale contained in PGW's answer: (1) exists clearly on the record; (2) is a separate, independent and lawful basis for the Commission's order; and (3) renders moot the OSBA's constitutional challenge to the Commission's waivers under § 2212(c).¹⁵

13. OSBA also argues that the December 19th order is unlawful because the Commission allegedly failed to "address" revenue allocation of the \$60 million rate relief on a cost-of-service basis in a manner sufficient to constitute an adjudication.¹⁶ OSBA is wrong.

14. As explained in PGW's answer, the Commission examined the record and exercised its discretion to allocate the increase in a manner that preserved the relative revenue and cost relationships of each class that the PUC had mandated in PGW's last base rate proceeding. Thus, contrary to the OSBA's assertion, the PUC did address revenue allocation, basing the allocation on cost of service in a manner that maintained the movement of class rates closer to a cost of service basis, just as the Commission had ordered in the prior base rate case.¹⁷ The PUC's action was lawful, as more fully explained in PGW's answer.

1224 n. 5 (Pa.Cmwlth. 1999); *Civil Service Com'n v. Paieski*, 559 A.2d 121, 124 n. 6 (Pa.Cmwlth. 1999).

¹⁴ See, ¶ 5 above.

¹⁵ A court should avoid unconstitutional issues when the matter may be decided on other grounds. *Delmarva Power & Light Co. v. Com. and Pa. P.U.C.*, 870 A.2d 901, 912 n. 26 (Pa. 2005).

¹⁶ See, e.g., OSBA Answer at 6, 8.

¹⁷ PGW Answer at ¶ 17.

Conclusion

For the reasons set forth herein, PGW respectfully requests that the Commission strike the OSBA's "answer" to PGW's answer to OSBA's petition for reconsideration. Alternatively, the PUC should reject the arguments set forth in the OSBA's answer.

Respectfully submitted,



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Date: March 4, 2009