



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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March 29, 2010

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission v.
Philadelphia Gas Works

Docket Nos. R-2009-2139884 &
P-2009-2097639

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Dear Secretary McNulty:

Enclosed please find an original and three (3) copies of the Office of Trial Staff's (OTS) **Answer to the Joint Motion for Partial Summary Judgement of Philadelphia Gas Works and the Clean Air Counsel** in the above-captioned proceeding.

Copies are being served on all active parties of record.

Sincerely,

Carrie B. Wright
Prosecutor
Office of Trial Staff
PA Attorney I.D. #208185

Enclosure
CBW/nhd
cc: Parties of record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Pennsylvania Public Utility Commission :
: **Docket Nos. R-2009-2139884**
v. :
Philadelphia Gas Works : **P-2009-2097639**

**THE OFFICE OF TRIAL STAFF'S
ANSWER TO THE JOINT MOTION FOR PARTIAL SUMMARY JUDGEMENT
OF PHILADELPHIA GAS WORKS AND THE CLEAN AIR COUNCIL**

I. INTRODUCTION

Philadelphia Gas Works ("PGW") filed its Petition for Approval of a Five-Year Gas Demand Side Management Plan on March 26, 2009. On April 3, 2009, PGW Petitioned to withdraw its DSM Plan filing temporarily in order to engage in discussions with other interested parties about suggested changes and modifications to the Plan. A revised DSM Plan was submitted by PGW on April 20, 2009, at which point answers to the filing were submitted by the Office of Trial Staff ("OTS"), the Office of Consumer Advocate ("OCA") and the Office of Small Business Advocate ("OSBA"). Subsequent Petitions to Intervene were filed by Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (collectively, "TURN *et al.*"), the Philadelphia Industrial and Commercial Gas Users Group ("PICGUG") the Clean Air Council ("CAC" or "Council") and the Retail Energy Supply Association ("RESA"). Collaborative sessions were held in which the Plan was discussed and informal discovery

sessions with all interested parties commenced. On December 18, 2009, PGW filed a *Motion of Philadelphia Gas Works to Consolidate Proceedings* in which they requested the Commission consolidate their DSM Plan filing along with their base rate case filing, which was also filed on December 18, 2009. PGW stated “[c]onsolidating these proceedings will formally recognize PGW’s inclusion of the proposed DSM Plan in PGW’s base rate filing, will promoted the efficient use of the time and resources of the Commission and the parties, and will enable timely disposition of all rate and other issues raised by PGW’s base rate filing.”¹ By Commission Order entered February 11, 2010, the consolidation was approved.

A Prehearing Conference was held March 2, 2010, at which time a procedural schedule was set for the development of a record in this proceeding. The procedural schedule provides for the submission of Intervenor Direct Testimony on March 26, 2010. In addition to dates for responsive testimony and Public Input Hearings, the adopted schedule established that Evidentiary Hearings would be May 10-14, 2010, and Main Briefs would be submitted on June 3, 2010, with Reply Briefs due June 11, 2010.

On March 9, 2010, two (2) of the eight (8) active parties in this proceeding, namely PGW and the Clean Air Council (collectively the “Joint Petitioners”), filed a *Joint Motion For Partial Summary Judgment To Approve Settlement For Expedited Implementation Of Residential DSM Programs* (“Joint Motion”). The Joint Motion indicated that an agreement was reached between the Joint Petitioners regarding the Enhanced Low-Income Retrofit Program and the Comprehensive Residential Heating

¹ PGW Petition to Consolidate, p.1.

Retrofit Program. The Joint Petitioners have couched this agreement as a settlement. The Joint Petitioners also filed a *Petition for Interlocutory Review* on March 9, 2010. OTS submitted its Brief in opposition of the request for Interlocutory Review on March 19, 2010.

Pursuant to 52 Pa. Code § 5.102(b), OTS files this timely Answer to the Joint Petition. In this Answer, OTS respectfully requests that the Commission deny the Motion for Partial Summary Judgment. OTS submits that PGW has failed to provide adequate support in justification of the requested relief and its claim that there are no disputed facts is clearly inconsistent with the evidence served in this proceeding. The requested Interlocutory Review and the Joint Motion for Partial Summary Judgment must not circumvent the thorough development of an evidentiary record. As provided for in the attached Verification, OTS has submitted testimony in opposition of the issues identified in the Joint Motion.

II. DISCUSSION

A. The Joint Motion for Partial Summary Judgment Must Be Denied Because Genuine Issues of Material Fact Exist in this Proceeding.

The Commission's standard for granting a motion for partial summary judgment can be found at 52 Pa. Code § 5.102(d) and it states:

[t]he presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law on one or more but not all outstanding issues.

In this proceeding, summary judgment would be inappropriate because genuine issues of material fact do exist. The burden to prove that no genuine issues of material fact exist is placed on the party requesting summary judgment.² A fact is said to be material when it affects the outcome of a case.³ All evidence must be viewed in the light most favorable to the non-moving party.⁴ If there is any doubt, summary judgment must not be entered.⁵

PGW has not met the burden placed on it to show that no genuine issue of material fact exists in this matter. OTS submits that numerous issues surrounding PGW's DSM Plan exist and these issues will affect the outcome of this case. OTS has numerous outstanding discovery requests regarding issues concerning PGW's DSM Plan. Further, OTS filed Direct Testimony on March 26, 2010, that included an analysis of PGW's DSM Plan.⁶ Included in the OTS testimony is a review of the programs presented in the Joint Motion.

One of the most important outstanding issues regarding PGW's DSM Plan is the appropriate spending level. As will be argued below, since any expenses associated with the implementation of the DSM Plan must be recovered from PGW ratepayers, it is of the utmost importance that all issues related to the Plan be fully explored before PGW is able to move forward with implementation.

² *Campbell v. Eitak, Inc.*, 893 A.2d 749, 751 (Pa. Super. 2006).

³ *Beach v. Burns Intern. Sec. Services*, 593 A.2d 1285, 1286 (Pa. Super. 1991).

⁴ *Wright v. North American Life Assur. Co.*, 539 A.2d 434, 436 (Pa. Super. 1988).

⁵ *Id.*

⁶ Attached is the Verification of Amanda Gordon.

Furthermore, other disputed issues exist in the Joint Motion such as the prudence of PGW's intent to provide its customers with Compact Fluorescent Light Bulbs (CFLs). This is already a part of PECO's Energy Efficiency and Conservation Program Plan which PECO was required by the Commission to implement. To date, PGW has not provided any information demonstrating that its program does not directly conflict with PECO's program; an important detail because both PGW and PECO reside in the same service territory.

In addition, although PGW maintains that it is entitled to judgment as a matter of law because section 1319 of the Public Utility Code enables the Commission to grant summary judgment so long as the programs are "...prudent, cost-effective and will save customers money,"⁷ OTS maintains that this interpretation is incorrect and unsupported. What is indicated by that section of the Code is that if the Commission chooses to approve a program such as PGW's, the Commission will allow recovery of "...all prudent and reasonable costs associated with the development, management, financing and operation of the program, provided that such prudent and reasonable costs shall be recovered only in accordance with appropriate accounting principles."⁸ As the issue of whether the costs are prudent and reasonable is in dispute in this proceeding, the Joint Motion cannot be granted.

For the reasons stated above, it would be improper at this juncture to grant PGW's Motion for Partial Summary Judgment. PGW has failed to carry its burden in proving

⁷ Motion for Partial Summary Judgment, p. 9.

⁸ 66 Pa.C.S. § 1319.

that no genuine issues of material fact exist and that PGW is entitled to judgment as a matter of law.

B. The Joint Motion for Partial Summary Judgment Must be Denied Due to Financial Consequences That May Arise As A Result of PGW's Status As a Cash Flow Company.

The Commission must deny PGW's motion for partial summary judgment based on the potentially detrimental financial consequences to PGW's ratepayers that may result. There is clearly insufficient evidence with which to properly analyze these concerns.

If this program is approved, PGW will undeniably have to spend money to implement it. As stated above, any expense born by PGW in implementing this program must be recovered from ratepayers. Therefore, should the Commission approve the settlement, and later, based upon a full and complete record, reach the conclusion that it was in error, there will be no recourse. The money PGW spent will have to be recovered from its ratepayers because it is a cash flow company with no investors. There is simply no other funding source. It makes no difference that the parties retain their rights to challenge the cost allocation and cost recovery issues in the rate case. Absent the City of Philadelphia, as the parent of the utility, or CAC as the Joint Petitioner, absorbing the cost of the implementation of the program, there simply is no party other than PGW's ratepayers to bear the financial burden.

Because the issue of the potentially detrimental financial consequences that may flow from approving this alleged settlement has not been fully developed, OTS believes it would be improper for the Commission to grant summary judgment at this time.

III. ANSWER TO PETITION

In support of its recommendation to deny the petition, OTS answers the Petition in the following enumerated fashion:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted. By way of further comment, this unique position does not bar the application of sound regulatory principles when reviewing submissions by PGW.
5. Denied in part. OTS is without sufficient knowledge or information to form a belief as to whether the proposed programs will be cost effective.
6. Denied. Although the participants will not be charged for the proposed audits, PGW's ratepayers will pay the costs of the audits.
7. Admitted in part, denied in part. It is admitted that PGW initiated discussions about the early implementation of the Residential DSM programs. However, there is insufficient information as to the advantageous impacts PGW alleges will flow from implementation of this program.
8. Denied. At this stage it would be impossible to determine whether the new programs will be cost effective simply because they are based on PGW's current CWP program.

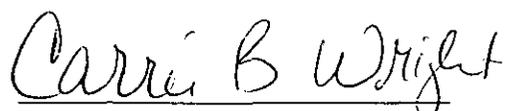
9. Denied. The submitted evidence does not support this averment. At this stage it cannot be determined whether the programs proposed by PGW are in the public interest. Furthermore, it is also too early to determine whether the comparisons made by PGW regarding the Residential DSM Program it wishes to implement and its current CWP program are accurate.
10. Denied. It is denied that the settlement is reasonable and in the public interest. Had OTS believe it to be so, OTS would have joined in the Settlement.
11. Admitted in part, denied in part. It is admitted that the Commission should allow customers to benefit from DSM programs when the programs are cost effective and will save customers money. OTS denies that it reasonably appears that will be true in the instant matter.
12. Denied. The record has not been adequately developed on this issue. The parties are still reviewing the details offered in support of these calculations.
13. Denied.
14. Denied. Approval of this Settlement will prejudice the rights of other parties.
15. Denied. A non-unanimous settlement creates the opposite effect.
16. Denied. OTS disagrees that the Settlement is in the public interest. Had OTS believe it to be so, OTS would have joined in the Settlement.
17. Admitted.
18. Denied. As presented above, OTS maintains that there are genuine issues of material fact in this matter. OTS has submitted testimony in accordance with the procedural schedule addressing, *inter alia*, the issues presented in the Joint Motion.

19. Denied. As there are still genuine issues of material fact in this matter, OTS opines that the Joint Petitioners are not entitled to judgment as a matter of law.
20. Admitted in Part, Denied in Part. The petition presented in PECO's EE&C Plan proceeding is factually distinguishable and offers no support in this proceeding. PECO's petition was a unanimous agreement to implement part of its detailed plan to mitigate electric usage pursuant to Act 129 through the introduction of CFLs. The record is void of any evidence as to why a Natural Gas Distribution Company must engage in the same activity, in the same service territory.
21. Denied. OTS does not believe that the PECO Settlement supports PGW's Motion for Summary Judgment.
22. Denied. The settlement does more than "...merely permits PGW to begin expansion of existing CWP cost-effective efficiency measures..."⁹ It would also present a situation that would burden PGW's ratepayers with the responsibility of the costs related to the implementation of the program. As the evidence is insufficient to support this premise, the petition must be denied.
23. Admitted in part. The document speaks for itself; however, OTS is without further information to comment on the length and content of the hearings.

⁹ Joint Petition, ¶22.

WHEREFORE, for the reasons state herein, the Office of Trial Staff respectfully requests that the Pennsylvania Public Utility Commission deny Philadelphia Gas Works and Clean Air Council's *Joint Motion For Partial Summary Judgment to Approve Settlement For Expedited Implementation Of Residential DSM Programs*.

Respectfully submitted,



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Dated: March 29, 2010

VERIFICATION

RE: Pennsylvania Public Utility Commission v. Philadelphia Gas Works

Docket No. P-2009-2097639

Docket No. R-2009-2139884

I, Amanda Gordon, on behalf of the Office of Trial Staff, hereby verify that I prepared Direct Testimony in the consolidated proceedings identified above that has been preliminarily identified as OTS Statement No. 3. I have also prepared OTS Exhibit No. 3 in support of the testimony. The facts contained therein are true and correct to the best of my knowledge, information and belief. Furthermore, the facts contained in OTS Statement No. 3 address the very issues raised in the Joint Motion for Partial Summary Judgment. This Verification is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.



Amanda Gordon
Fixed Utility Financial Analyst
Pennsylvania Public Utility Commission
Office of Trial Staff

Dated: March 29, 2009

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission :
v. : Docket Nos. R-2009-2139884
Philadelphia Gas Works : P-2009-2097639

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Answer**, dated March 29, 2010, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

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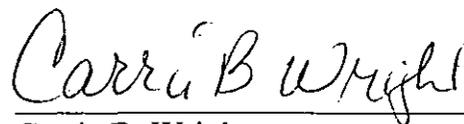
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