



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

IN REPLY PLEASE  
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March 19, 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

Dear Secretary McNulty:

Enclosed please find an original and three (3) copies of the Office of Trial Staff's (OTS) **Brief in Opposition to the Joint Petition for Interlocutory Review** in the above-captioned proceeding.

Copies are being served on all active parties of record.

Sincerely,

Adeolu A. Bakare  
Prosecutor  
Office of Trial Staff  
PA Attorney I.D. #208541

Enclosure  
AAB/edc

cc: Parties of record  
Chairman Cawley  
Vice Chairman Christy  
Commissioner Gardner  
Commissioner Powelson  
Hon. Charles E. Rainey, Jr., OALJ  
Bohdan R. Pankiw, Esq., Law Bureau  
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Pennsylvania Public Utility Commission</b>	:	
	:	
v.	:	<b>Docket No. P-2009-2097639</b>
	:	
<b>Philadelphia Gas Works</b>	:	
	:	
	:	
<b>Pennsylvania Public Utility Commission</b>	:	
	:	
v.	:	<b>Docket No. R-2009-2139884</b>
	:	
<b>Philadelphia Gas Works</b>	:	

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**OFFICE OF TRIAL STAFF  
BRIEF IN OPPOSITION TO THE  
JOINT PETITION FOR INTERLOCUTORY REVIEW**

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Dated: March 19, 2010

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## I. INTRODUCTION

On March 9, 2010, Philadelphia Gas Works (“PGW” or “Company”) and the Clean Air Council (“CAC” or “Council”) filed with the Commission a *Joint Petition for Interlocutory Review Of A Material Question And Approval Of A Partial Settlement*. The Office of Trial Staff (“OTS”) was not a signatory to what PGW refers to as a Settlement and actively opposes its approval. Further, apart from PGW the sole other signatory to the alleged settlement is the Clean Air Council (“Council” or “CAC”). The other intervening parties, which include the Office of Consumer Advocate (“OCA”), Office of Small Business Advocate (“OSBA”), Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (collectively, “TURN *et al.*”), and the Philadelphia Industrial and Commercial Gas Users Group (“PICGUG”) did not join as signatories to the Joint Petition.

The Commission’s standards governing interlocutory review are found in Section 331(e) of the Public Utility Code<sup>1</sup> and in Sections 5.302-5.306 of the Commission’s Regulations.<sup>2</sup> The interlocutory review standard has been interpreted in *In re: Application of Knights Limousine Service, Inc.*, wherein the Commission found that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons.<sup>3</sup> The Commission has determined that such a showing may be

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<sup>1</sup> 66 Pa. C.S. § 331(e).

<sup>2</sup> 52 Pa. Code §§ 5.302-5.306.

<sup>3</sup> *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

accomplished by a petitioner proving that without interlocutory review some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later or that granting interlocutory review would “prevent substantial prejudice or expedite the proceeding.”<sup>4</sup>

PGW’s Petition fails to articulate the type of extraordinary circumstances or compelling reasons contemplated in *Knights Limousine* that allows the Commission to grant interlocutory review. PGW is largely responsible for the delay in obtaining approval of the DSM Plan. Additionally, a case with this level of complexity requires the development of a full record to support any finding. In addition, the contentious nature of these issues calls for an Initial Decision from the presiding officer. OTS maintains that these modifications to the Commission’s procedural rules cannot act as a substitute for ALJ Rainey’s experience and involvement in this case leading to the development of a complete record allowing for a legally supported determination.

PGW asserts that expedited review is necessary because it requested consolidation of the DSM Plan with the base rate case to save resources, but believes that delaying partial implementation of the DSM Plan until the end of 2010 would be unreasonable. This is not a sufficient reason to allow for the circumvention of the regulatory process.

Accordingly, OTS submits this timely Main Brief and, as will be argued fully below, maintains that the instant Petition for Interlocutory Review must be

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<sup>4</sup> Id.

denied. In the alternative, OTS maintains that if the Petition is granted, the material question must be answered in the negative. PGW has failed to satisfy their burden of proof and the Settlement must be denied.

## **II. ARGUMENT**

### **A. PGW's Petition for Interlocutory Review Must Not Be Granted**

#### **1. The Claimed Need to Expedite the Approval of the DSM Plan is PGW's Own Making**

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, the Office of Consumer Advocate, the Office of Small Business Advocate. In addition, Petitions to Intervene were filed by Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia, and the Philadelphia Industrial and Commercial Gas Users Group. Collaborative sessions were held in which the Plan was discussed and informal discovery sessions 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 promote 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."<sup>5</sup> OTS did not oppose the Company's Motion to Consolidate. By Commission Order entered February 11, 2010, the consolidation was approved.

A prehearing conference was held March 2, 2010, and a procedural schedule was set providing for hearings May 10-14, 2010, Main Briefs June 3, 2010, and Reply Briefs June 11, 2010. At no point did PGW, the party who requested consolidation of the two filings, express concern about the time frame under which their DSM Plan could be approved. PGW was not required to consolidate the two proceedings and could have proceeded with the two as separate filings which would operate under two separate time frames. Although PGW had stated in their consolidation petition that they believed consolidation would promote efficient use of time and Commission resources, this statement is contradicted by their Petition for interlocutory review. There PGW states that a delay in approval of the DSM Plan "would be unreasonable and not in the public interest."<sup>6</sup> Prior to this interlocutory review petition, PGW seemed to be of the mind that the most efficient way to get the DSM Plan review was by consolidating it with their base rate case, but now they have seemingly changed their mind and

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<sup>5</sup> PGW Petition to Consolidate, p. 11.

<sup>6</sup> Petition for Interlocutory Review, p. 2.

are asking the Commission to circumvent the normal review process in order to accommodate a delay that PGW itself created.

Further, PGW asserts in its Petition to Consolidate, that one reason for consolidation was to give the parties more time to thoroughly examine and address their issues with the Plan as filed.<sup>7</sup> At this juncture, PGW is attempting to take that opportunity away from all parties. All parties involved should be afforded the opportunity to express their concerns with the Plan and suggest changes to the Plan through the traditional Commission process.

Given that PGW was responsible for the consolidation of the two proceedings, PGW's attempt to remove the record from the ALJ and rush the decision in this proceeding must be rejected.

**2. PGW Has Not Alleged Sufficient Harm to Warrant Interlocutory Review**

The question posed by PGW as being material is:

[s]hould the Commission approve the Settlement to permit PGW to implement the Residential DSM Programs proposed in PGW's Five-Year Demand-Side Management ("DSM") Plan pending further review in the rate case and in the detailed implementation process to enable low-income and other residential customers to begin receiving the benefits of reduced and more efficient energy usage as soon as possible before the next winter heating season and to maximize the reduction of CRP subsidy paid by non-low income firm service customers?

For the Commission to be able to grant interlocutory review regarding this question, PGW would have to show that without interlocutory review some harm

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<sup>7</sup> PGW Petition to Consolidate, p. 3-4.

would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later or that granting interlocutory review would “prevent substantial prejudice or expedite the proceeding.”<sup>8</sup>

In this proceeding, that is simply not the case. Ruling on this issue will not expedite the proceeding because the procedural schedule established during the prehearing conference will still be adhered to for all other issues. Whether or not the Commission grants interlocutory review, testimony will still be filed on the dates set forth, hearings will still be held May 10-14, 2010, Main Briefs will still be due June 3, 2010, and Reply Briefs June 11, 2010. Thus, whether interlocutory review is granted or not, the underlying proceeding will ultimately not be expedited.

Further, PGW will not be irreparably harmed by following the traditional Commission process in having this DSM Plan approved when the rate plan, with which they consolidated, is approved. Obviously this was PGW’s original intent when they requested that the two proceedings be consolidated; otherwise, there would have been no reason to seek consolidation. Further, no harm will arise because at some point before the end of the year, a decision will be made on their DSM Plan. At this point, the winter heating season is virtually over, so approving the DSM Plan now would be of little benefit. No matter which avenue is chosen, by the end of the year, a decision will have been made on their DSM Plan.

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<sup>8</sup> *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

Because PGW has failed to allege irreparable harm, or state a reason why interlocutory review would prevent prejudice or expedite the proceeding, it would not be appropriate to grant interlocutory review in this instance.

**3. The Petition is Merely an Attempt by PGW to Circumvent the Commission's Procedural Rules.**

The Public Utility Code provides that the presiding officer has the authority to receive relevant evidence, regulate the course of evidentiary hearings, dispose of procedural requests and make recommended decisions.<sup>9</sup> As presiding officer, ALJ Rainey will regulate the course of the hearings and observe the demeanor and credibility of witnesses. It is well settled that it is within the purview of the presiding ALJ to determine from the demeanor of the witnesses, the credibility and candor of their testimony and to affix a certain weight to their testimony.<sup>10</sup> Given this duty, ALJ Rainey's assessment of the evidence presented is crucial in determining whether this DSM Plan can be approved or not.

Commission Regulations expressly give ALJs the authority to establish procedural schedules through the initiation of a prehearing conference.<sup>11</sup> ALJ Rainey followed through with this directive and established a schedule that was mutually agreeable to all parties involved. OTS maintains that granting the Petition is improper as the parties should continue this proceeding in accordance with ALJ Rainey's procedural schedule so that a complete and accurate record that has received the scrutiny of an ALJ will be available for Commission review.

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<sup>9</sup> 66 Pa. C.S. § 331(d).

<sup>10</sup> *Danovitz v. Partnoy*, 399 Pa. 599, 161 A.2d 146 (1960).

<sup>11</sup> 52 Pa. Code § 5.222.

PGW is effectively usurping ALJ Rainey the ability to make a recommendation based on a complete record.

OTS has outstanding discovery questions regarding the very issues the question presented by PGW attempts to address. Issues such as whether the DSM Plan will actually allow the customers to receive the benefits of reduced usage or more efficient usage have yet to be fully vetted. Until this information has been disseminated and properly reviewed, it would be inappropriate to approve the Plan. It would be premature to grant interlocutory review in this matter and, thus, not allow the ALJ to develop a complete and accurate record on which he can base a decision for review by the Commission on the merits of this DSM Plan.

**B. If the Petition for Interlocutory Review is Granted, the Commission Should Answer the Material Question in the Negative.**

If the Commission grants PGW's request for Interlocutory Review, OTS recommends rejecting both the Joint Motion for Partial Summary Judgment to Approve Settlement for Expedited Implementation of Residential DSM Programs ("Joint Motion") and the underlying Stipulation and Partial Settlement for Expedited Implementation of Philadelphia Gas Works' DSM Programs for Residential Customers ("Partial Settlement"). As discussed below, approval of the Joint Motion will prejudice any opposing parties including OTS. Additionally, OTS submits that the Settling Parties are not entitled to summary judgment on the implementation of the referenced DSM Programs because OTS disputes material facts offered in support of the Joint Motion.

**1. The Commission Should Not Grant the Joint Motion for Partial Summary Judgment because OTS Actively Opposes the Partial Settlement.**

Although not explicitly stated in the Joint Motion, the Partial Settlement is opposed. Under Commission Regulations<sup>12</sup>, a settlement agreement must specifically identify the parties:

- (1) Supporting the settlement.
- (2) Opposing the settlement.
- (3) Taking no position on the settlement.
- (4) Denied an opportunity to enter into the settlement.

Despite the clear direction of the Regulation, this information was not provided in either PGW's Motion or the Partial Settlement Agreement. However, OTS has communicated its concerns regarding the Low-Income and Residential Retrofit programs during previous discussions with interested parties, including PGW and CAC. OTS now submits its opposition to the settlement and notes that of the six intervening parties actively participating in the previous DSM discussions and the consolidated base rate case, only one joins PGW in the Partial Settlement.<sup>13</sup> This contrasts sharply with the PECO Energy Company ("PECO") settlement referenced by PGW in the Joint Motion.<sup>14</sup>

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<sup>12</sup> 52 Pa. Code § 5.232.

<sup>13</sup> Parties participating in the DSM discussions and PGW's base rate case but not signing onto the Partial Settlement include the OCA, OSBA, TURN, et al., the PICGUG and OTS.

<sup>14</sup> On July 31, 2009, PECO filed upon the Commission, a Joint Petition for Partial Settlement of PECO's Energy Efficiency and Conservation Plan seeking early implementation of PECO's Compact Fluorescent Lamp ("CFL") Program. Joint Petition for Partial Settlement at Docket No. M-2009-2093215 [PECO Joint Petition]. The Commission approved the PECO Settlement in its Order Entered August 18, 2009 at Docket No. M-2009-2093215. PGW Joint Motion, p. 10.

Regarding the PECO Settlement, PGW stated that the “Commission’s rationale for approving expedited implementation of PECO’s CFL distribution program supports approval of the attached Settlement permitting expedited implementation of PGW’s Residential DSM Program.”<sup>15</sup> This constitutes, at best, a curious statement considering that seven of the twelve intervening parties in the PECO proceeding signed the PECO Joint Petition and the remaining five parties did not oppose it.<sup>16</sup> In truth, the two situations could hardly present more divergent situations. PGW is asking the Commission to approve an actively opposed Partial Settlement before any party has had an opportunity to present evidence at hearing or even submit written testimony on the contested issues. Non-unanimous Settlements are imperfect resolutions under the best of conditions. The non-unanimous settlement now before the Commission threatens to prejudice any opposing parties and impede procedural due process.

The Commonwealth Court has recognized the dangers accompanying Commission approval of non-unanimous settlements. In *ARRIPPA v. Pa. PUC*, the Commonwealth Court provided a lengthy discussion on this very issue.<sup>17</sup> In this case, a consolidated proceeding involving a merger of GPU Energy into FirstEnergy Corp. and the implementation of a tracking mechanism to recover provider of last resort service costs, the parties participated in evidentiary hearings

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<sup>15</sup> PGW Joint Motion, p. 10.

<sup>16</sup> PECO, OCA, OTS, The Reinvestment Fund, Citizens for Pennsylvania’s Future, et al., Field Diagnostic Services, Inc., and the City of Philadelphia signed the referenced PECO Settlement Agreement. PECO Joint Petition, p. 1-3. OSBA, PAIEUG, TURN, et al., Direct Energy Business, LLC and the Pennsylvania Department of Environmental Protection did not oppose the settlement. PECO Joint Petition, p. 1-3.

<sup>17</sup> *ARRIPPA v. Pa. P.U.C.*, 792 A.2d 636, 658-660 (Cmwlth. Ct. 2002).

and received a Recommended Decision from the presiding ALJ.<sup>18</sup> However, the Commission neither adopted the Recommended Decision nor reached a final disposition.<sup>19</sup> Instead, the Commission directed the parties to engage in collaborative discussions.<sup>20</sup> During the collaborative discussions, First Energy Corp. and GPU Energy proposed a non-unanimous settlement to the Commission.<sup>21</sup> Although the settlement contained modifications to the Recommended Decision it was subsequently approved by the Commission and predictably appealed to the Commonwealth Court by the opposing parties.<sup>22</sup>

In disposing of *ARRIPA v. Pa. PUC* and rejecting the settlement, the Commonwealth Court made several observations relevant to the instant Joint Motion. The court acknowledged the potential benefit of non-unanimous settlements to the utility ratemaking process noting that “they [the Commission] reason that such a procedure is necessitated by the sheer number of parties involved in rate cases and the ability of a single party to obstruct an otherwise reasonable settlement. Accordingly, these commissions see the oxymoronic notion of a non-unanimous or contested settlement as the only realistic means of implementing the settlement process in these cases.”<sup>23</sup> OTS submits that whatever equitable or practical utility exists in approving a Partial Settlement opposed by a small minority of parties cannot justify approval of a Partial Settlement in which

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<sup>18</sup> *Id.* at 650.  
<sup>19</sup> *Id.*  
<sup>20</sup> *Id.*  
<sup>21</sup> *Id.* at 651.  
<sup>22</sup> *Id.*  
<sup>23</sup> *Id.* at 658.

the majority of parties to the proceeding either do not participate or actively oppose. As further addressed below, OTS actively opposes the PGW Partial Settlement. Therefore, the Commission should reject the Partial Settlement and permit the parties to develop a full evidentiary record without undue prejudice.

**2. The Commission Must Not Grant the Joint Motion for Partial Summary Judgment for Approval of a Stipulation and Partial Settlement because OTS Disputes Material Facts Relied Upon by the Settling Parties.**

The Settling Parties inaccurately represent to the Commission that there can be no reasonable dispute that the Partial Settlement is reasonable and in the public interest and that they are therefore entitled to judgment as a matter of law. Commission Regulations governing summary judgment provide that “[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 a judgment as a matter of law.”<sup>24</sup> This is not the case in the instant proceeding as OTS disputes several facts relied upon by PGW and CAC in the Partial Settlement. Although the Joint Motion is before the Commission, OTS submits that the same firmly established standard governs the Commission’s review of a request for summary judgment.

OTS disputes the assertions that PGW’s proposed Enhanced Low-Income Retrofit Program (“Low-Income Retrofit”) and Comprehensive Residential

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<sup>24</sup> 52 Pa. Code § 5.102.

Heating Retrofit Program (“Residential Retrofit”) have been demonstrated to be cost-effective and that early implementation will benefit ratepayers. PGW and CAC argue that both the Low-Income and Residential Retrofit Programs are inherently cost-effective because they are based on PGW’s existing Commission-approved CWP Program and PGW’s analysts have calculated positive benefit/cost ratios. OTS has expressed doubt regarding the Company’s assertions of the cost-effectiveness of its overall DSM program and continues to review interrogatory responses provided in response to questions directly addressing the Low-Income and Residential Retrofit programs. Shortly after the filing of this Brief with the Commission, OTS will submit testimony in the consolidated proceeding which specifically addresses the Low-Income and Residential Retrofit programs.

The Company inaccurately states that the facts at issue relate solely to details such as cost allocation and recovery. The facts disputed by OTS include data offered in support of the Joint Motion, particularly the cost/benefit ratios actually presented in the Joint Motion. Further, OTS submits that any issues relating to cost cannot be reasonably segregated from the implementation of any part of PGW’s DSM program. Unlike PECO or any other investor-owned utility resolving to implement a conservation program, PGW is a regulated under the Cash Flow Method. Therefore, any expenses incurred in carrying out early implementation of the Low-Income and Residential Retrofit Programs can only be recovered from ratepayers. Similarly, OTS disputes PGW’s assertion that the Low-Income Retrofit Program provides “free” services to PGW’s low income

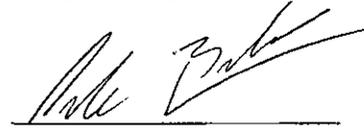
customers. Every penny allocated to the Low-Income Retrofit Program will be recovered from PGW's firm customers, whom OTS has a duty to protect from unjust and unreasonable rates.

OTS acknowledges that the Low-Income and Residential Retrofit Programs may be in the public interest if the preponderance of the evidence demonstrates a reduction in CRP subsidies paid by PGW's firm ratepayers sufficient to warrant the initial expenditures, but cautions that such a determination cannot be made without a fully developed evidentiary record. No such record is available at this point. OTS has various issues to address in testimony and, if necessary, evidentiary hearing and briefing. The contention that approving implementation of the programs will not prejudice litigation concerning the implementation of the programs cannot withstand scrutiny. OTS recognizes the general importance of energy conservation but insists that the end cannot justify the means. Therefore, OTS recommends that the Commission reject PGW's Motion and permit a thorough review of the Low-Income and Residential Retrofit in order to ensure that any implemented programs are properly vetted and in the public interest.

### III. CONCLUSION

Wherefore, for the reasons stated herein, OTS respectfully submits that PGW's Petition for Interlocutory Review must be denied. In the alternative, OTS maintains that if the Petition is granted, the material question must be answered in the negative as PGW has failed to satisfy the legal requirements necessary for approval under the Public Utility Code.

Respectfully submitted,



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Dated: March 19, 2010

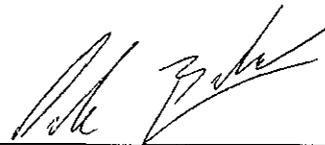


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