

COMMONWEALTH OF PENNSYLVANIA



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December 13, 2011

HAND DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

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SECRETARY'S BUREAU

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

Dear Secretary Chiavetta:

I am delivering for filing today the original plus three copies of the Answer to the Joint Petition for Settlement, on behalf of the Office of Small Business Advocate in the above-captioned proceeding.

Two copies have been served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Webb".

Sharon E. Webb
Assistant Small Business Advocate
Attorney ID No. 73995

Enclosures

cc: Parties of Record
Robert D. Knecht
Hon. Charles E. Rainey, Jr.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	
	:	
v.	:	Docket No. R-2008-2073938
	:	
PHILADELPHIA GAS WORKS, PETITION FOR EXTRAORDINARY OR EMERGENCY RATE RELIEF	:	

**ANSWER OF THE OFFICE OF SMALL BUSINESS ADVOCATE
TO JOINT PETITION FOR SETTLEMENT**

Background

On December 19, 2008, the Pennsylvania Public Utility Commission (“Commission”) entered an Order in the Extraordinary Rate Relief proceeding of Philadelphia Gas Works (“PGW” or the “Company”), which, *inter alia*, directed PGW to convene a collaborative within 60 days of the entry of the Order. The stated purpose of the collaborative was to explore options for transitioning some or all of PGW’s customers to an alternative default supplier.¹ Specifically, the Commission stated that PGW should “explore any and all means of reducing the financial risks and costs of its utility business.”²

Company witness Thomas Knudsen testified in support of PGW’s Extraordinary Rate Relief filing. In response to Mr. Knudsen’s testimony, Anthony Cusati, III (on behalf of Interstate Gas Supply, Inc. (“IGS”) and Dominion Retail, Inc. (“Dominion”))

¹ *Pennsylvania Public Utility Commission v Philadelphia Gas Works*, Docket No. R-2008-2073938 (Order entered December 19, 2008) at 40.

² *Id.*

testified about the magnitude of the cost (to PGW) of financing the annual purchases of the gas commodity for its customers.³ Specifically, Mr. Cusati testified that PGW's ability to borrow funds is hindered by its need to purchase natural gas supply for its customers at a cost of \$600 to \$700 million annually. Mr. Cusati suggested that a longer term solution for PGW would be to transition most (or all) of its load to competitive suppliers.⁴ Mr. Cusati proposed that the cost burden (to PGW and ultimately to the Company's ratepayers) for financing the commodity purchases may be lessened by transitioning customers to an alternative supplier.

In the ensuing collaborative convened in response to the Commission's directive, IGS and Dominion jointly submitted a two-page draft proposal entitled "Suppliers Recommended Plan." Hess submitted a three-page proposal. Both were circulated to the Parties and considered in the March 5, 2009, collaborative meeting. The Office of Small Business Advocate ("OSBA") subsequently provided a response to each of those proposals.

A revised "Supplier Proposal" was submitted to PGW and circulated for comment to the other participants in the collaborative on July 23, 2009, for comment. Although the July 23rd Supplier Proposal presented considerable detail regarding an auction process, the Supplier Proposal contained many of the same flaws inherent in the original proposals. The Supplier Proposal consisted of three documents:

- A two-page document entitled "Proposal to PGW to 'Exit the Merchant Function' Collaborative," dated July 23, 2009;

³ Rebuttal Testimony of Anthony Cusati, III on behalf of IGS and Dominion Retail ("Cusati Statement No. 1") at 2.

⁴ Cusati Statement No. 1 at 2.

- An eight-page document entitled “PGW-Exiting the Merchant Function Collaborative,” dated July 23, 2009; and
- A one-page undated document entitled “Proposed Revisions to PGW’s Daily Balancing Service (Rate DB).”

On October 21, 2009, the OSBA and the other parties submitted comments to the Commission regarding substantive and legal issues raised by the Supplier Proposal. In response to the comments submitted by other parties, the OSBA and other parties submitted reply comments on November 4, 2009.

On April 13, 2011, the Commission issued a Secretarial Letter referring the Supplier Proposal to the Office of Administrative Law Judge (“OALJ”) for an on the record proceeding in which the suppliers would bear the burden of proof.⁵ The Secretarial Letter stated that if the suppliers wished to pursue the matter before the OALJ, they should be prepared to provide evidence to address specific concerns set forth by the Commission in the Secretarial Letter.⁶

After the issuance of the April 13, 2011 Secretarial Letter, PGW, IGS, Dominion Retail, Hess Corporation, and Direct Energy Services engaged in extensive discussions to try and achieve a settlement.⁷ The OSBA was not a part of those settlement discussions. By letter dated May 13, 2011, IGS and Dominion Retail, Inc., requested that the Commission grant an additional sixty (60) days in which to notify the Commission of the suppliers’ intent to participate in the litigation process. The request was granted. By letter dated July 13, 2011, the suppliers requested an additional sixty (60) days until

⁵ April 13, 2011, Secretarial Letter at 2.

⁶ *Id.*

⁷ Joint Petition for Settlement at Para. 14.

September 12, 2011. By letter dated September 19, 2011, counsel for Dominion Retail, Inc. and IGS requested an additional thirty (30) days to conclude negotiations.

Joint Petition for Settlement

By cover letter dated November 23, 2011, PGW filed a Joint Petition for Settlement Collaborative Process Re: Alternative Default Service Supply. The settling parties are PGW, Dominion Retail and IGS, Hess Corporation and Direct Energy Services, LLC. The cover letter provides that the Settling Parties anticipate submitting Statements in Support by December 2, 2011. To date, the OSBA has not received copies of any Statements in Support of the Joint Petition.

While the OSBA recognizes that the intent of the collaborative process was to identify options for reducing PGW's costs and risks, the OSBA cannot support any proposal that achieves those ends by unreasonably shifting (and potentially increasing) costs and risks to ratepayers.

The Joint Petition for Settlement requires PGW to provide consumer education about natural gas suppliers operating in its service territory.⁸ The settlement further provides that PGW will seek recovery of the funding for the consumer education program via a consumer education surcharge to be included in the distribution charge.⁹ The nature of the recovery mechanism for the consumer education costs, and the corresponding spending level, have been referred to the ongoing Purchase of Receivables Collaborative ("POR") at Docket No. R-2009-2139884.¹⁰

⁸ Joint Petition for Settlement at Para. 16.

⁹ *Id.*

¹⁰ Joint Petition for Settlement at Para. 16.

The language of the Joint Petition implies that that the POR Collaborative will address all of the issues that are referred to it from the Joint Petition. However, all of the details which are not set forth in the Joint Petition must be decided by the Commission, either in a settlement in the POR Collaborative proceeding, or in reviewing a recommended decision in a litigated proceeding.

Based on the OSBA's experience, a collaborative such as this one can succeed only if one party has the primary responsibility for preparing a proposal, compiling the views of the parties, and developing a finished product. Because the concept of an alternative supplier was put forth by IGS/Dominion in the rate proceeding, the OSBA recommended in its October 21, 2009 Comments (filed in response to the Supplier Proposal), that the NGSs bear the cost of developing a feasibility study which would help determine whether a more extensive viability study is warranted. Similarly, under PGW's cash flow ratemaking method, all costs incurred by PGW to take the lead in this process, relative to customer education, will eventually be borne by PGW's ratepayers as has been proposed in the Joint Petition for Settlement. Therefore, until there is at least some data (rather than bald assertions) to indicate that the Supplier Proposal would benefit ratepayers, the OSBA does not believe that it is just and reasonable for ratepayers to bear the cost of either a viability study or consumer education program.

Ironically, a concept promoted to the Commission as a way to save ratepayers money would require higher rates simply to determine if there is enough evidence to proceed with implementing that concept. In the absence of even a rudimentary cost/benefit analysis by the NGSs and in the absence of any offer by the NGSs to share

the study costs, pushing those study costs onto ratepayers would not be prudent or reasonable.

Non-Unanimous Settlements

Despite the Commission's policy of encouraging settlements, a non-unanimous settlement is entitled to no evidentiary presumption. Specifically, Section 5.231(a) of the Commission's Rules of Practice and Procedure, 52 Pa. Code §5.231(a), states that "[i]t is the policy of the Commission to encourage settlements." Significantly, Section 5.231(a) states nothing in support of *non-unanimous* settlements." Furthermore, Section 5.231(a) does not state that non-unanimous settlements are entitled to a presumption in favor of their approval.

The Commonwealth Court commented on the use of non-unanimous settlements when it reviewed the merger of FirstEnergy and GPU Energy. *See ARIPPA v. Pennsylvania Public Utility Commission*, 792 A.2d 636 (Pa. Cmwlth. 2002). The Court observed that "[n]on-unanimous settlements, while not common, are not unique and have been the source of some controversy." *ARIPPA*, 792 A.2d at 658. After making that observation, the Court cited to an article by Professor Stefan H. Krieger regarding the dangers of non-unanimous settlements. Of particular relevance, the Court quoted Professor Krieger as follows:

The danger of such an approach is obvious. Parties with a substantial interest in a utility proceeding can be left out of the decision-making process. Although commissions that permit nonunanimous settlements require review of these settlements to determine their reasonableness, these commissions often defer to the decision of the consenting parties.

* * *

Furthermore, in their zeal to reap the benefits of the nonunanimous settlement process, commissions shift the burden of proof to the

nonconsenting parties by forcing them to prove the unreasonableness of the settlement. While both traditional regulatory hearings and the unanimous settlement process provide protection for all parties, the nonunanimous settlement process places some parties at a severe disadvantage.¹¹

ARIPPA, 792 A.2d at 658-659.

Ultimately, the Court noted as follows:

While challenging the way the non-unanimous Settlement Stipulation was approved and its effect on other orders, *surprisingly*, Intervenors do not challenge the ability of the Commission to approve such a settlement.

* * *

Because that issue was not raised, we will not address the issue of whether the Commission can enter such an order

ARIPPA, 792 A.2d at 660. (emphasis added)

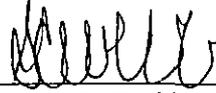
The Court also identified, but did not reach, the question of “whether fact-finding made to support a settlement is the same as independent fact finding, adjudicative fact-finding, when there is no pre-ordained outcome.” *ARIPPA*, 792 A.2d at 660.

There is no evidentiary record to support this non-unanimous settlement. The non-settling parties have been afforded no opportunity to fully evaluate the issues raised and to offer testimony. The Commission has no basis to evaluate whether the settlement is in the public interest.

¹¹ Compounding that disadvantage before the Commission is the privileged nature of settlement discussions. See Section 5.231(d). Because of the privilege, non-settling parties are often deprived of their best chance to prove the unreasonableness of the settlement, *i.e.*, by revealing the changes they proposed in the settlement and the position of one or more other parties on those changes.

WHEREFORE, the OSBA respectfully requests that the Commission reject the *Petition* in its entirety.

Respectfully submitted,



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For:

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Dated: December 13, 2011

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Answer to the Joint Petition for Settlement, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted) upon the persons addressed below:

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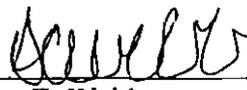
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