



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

October 15, 2020

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission v.
Philadelphia Gas Works
Docket No. R-2020-3017206
I&E Exceptions

Dear Secretary Chiavetta:

Enclosed for filing, please find the Bureau of Investigation and Enforcement's (I&E) **Exceptions** for the above-captioned proceeding.

Copies of this letter are being served on parties of record as evidenced in the attached Certificate of Service. *Due to the temporary closing of the PUC's offices, I&E is only providing electronic Service.* Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Carrie B. Wright". The signature is written in a cursive, slightly slanted style.

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CBW/jfm
Enclosures

cc: Hon. Marta Guhl, Office of Administrative Law Judge (*via email only*)
Hon. Darlene Heep, Office of Administrative Law Judge (*via email only*)
Office of Special Assistants (*via email only* - RA-OSA@pa.gov)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2020-3017206
	:	
Philadelphia Gas Works	:	

**EXCEPTIONS
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

Carrie B. Wright
Prosecutor
PA Attorney ID No. 208185

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Dated: October 15, 2020

TABLE OF CONTENTS

I. INTRODUCTION 1

 A. Procedural Background 1

 B. Summary of I&E Exceptions 3

II. EXCEPTIONS 4

I&E EXCEPTION NO. 1

 The ALJs’ Erred by Materially Altering the Settlement as it
 no Longer Reflects the Compromises Reached by the
 Joint Petitioners, Violates the Public Utility Code and is
 Inconsistent With Commission Precedent..... 4

 A. Revenue Requirement (Recommended Decision, pp. 76-79) 4

 B. Pipeline Replacement Costs (R.D., p. 78)..... 12

III. CONCLUSION 13

TABLE OF CITATIONS

CASES

<i>Bell Telephone Co. v. Pa. P.U.C.</i> , 452 A.2d 86 (Pa. Cmwlth. 1982).....	9
<i>Joseph Horne Co. v. Pa. P.U.C.</i> , 485 A.2d 1105, 1111 (Pa. 1984)	9
<i>Pa. P.U.C. v. C S Water and Sewer Associates</i> , 74 PA PUC 767, 771 (1991)	5, 12
<i>Pa. P.U.C. v. Columbia Gas of Pa. Inc.</i> , Docket No. R-2020-3018835 (Order on Petition for Reconsideration of Staff Action Entered August 20, 2020)	10
<i>Pa. P.U.C. v. Pennsylvania American Water Company</i> , Docket Nos. R-2020-3019369 and R-2020-3019371 (Order on Petition for Reconsideration of Staff Action Entered August 20, 2020)	10
<i>Pa. P.U.C. v. UGI</i> , Docket No. R-2019-3015162 (Order Entered October 8, 2020) Statement of Chairman Gladys Brown Dutrieuille..	11

STATUTES

66 Pa.C.S. § 1308(d).....	1, 9
---------------------------	------

REGULATIONS

52 Pa. Code § 5.231	7
52 Pa. Code § 69.2702(b)	6
52 Pa. Code § 69.401	7

I. INTRODUCTION

The Bureau of Investigation and Enforcement (I&E) respectfully submits these instant Exceptions to the Recommended Decision of Administrative Law Judges Darlene D. Heep and Marta Guhl (the ALJs) in this base rate proceeding. I&E respectfully requests that its Exceptions be granted and that the referenced portions of the Recommended Decision be reversed or modified consistent with these Exceptions.

A. Procedural Background

On February 28, 2020, Philadelphia Gas Works (PGW or Company) filed Supplement No. 128 to PGW's Gas Service Tariff – Pa. P.U.C. No. 2 (Supplement No. 128) in which, PGW sought an increase in annual distribution revenues of \$70 million, to become effective April 28, 2020. PGW used the Fully Projected Future Test Year (FPFTY) as the basis for its rate increase request.

On April 16, 2020, pursuant to 66 Pa. C.S. § 1308(d), the Commission ordered suspension of the proposed tariff changes until November 28, 2020 unless permitted by Commission Order to become effective at an earlier date. PGW agreed to a voluntary extension of the suspension period until December 4, 2020. The Commission directed that the case be assigned to the Office of Administrative Law Judge (OALJ) for the scheduling of hearings as may be necessary for the Administrative Law Judge to render a Recommended Decision (RD). A Prehearing Conference was held on May 5, 2020, before the ALJs. Pursuant to the procedural schedule agreed to at the Prehearing Conference, the parties exchanged direct, rebuttal, and surrebuttal testimony, as well as

oral rejoinder outlines. I&E served the following testimony and exhibits:

- I&E Statement No. 1, I&E Exhibit No. 1, and I&E Statement No. 1-SR the prepared direct and surrebuttal testimony and exhibits of I&E witness Anthony Spadaccio;
- I&E Statement No. 2, I&E Statement No. 2-R, I&E Exhibit No. 2-R, and I&E Statement No. 2-SR, the prepared direct, rebuttal, and surrebuttal testimony and exhibit of I&E witness Ethan Cline;
- I&E Statement No. 3, I&E Exhibit No. 3, and I&E Statement No. 3-SR, the prepared direct and surrebuttal testimony and exhibit of I&E witness Scott Orr.

The testimony and exhibits identified above were entered into the record during the telephonic evidentiary hearing held on July 29, 2020.

On August 19, 2020, the ALJs were informed that a resolution of almost all issues in this proceeding had been reached by [list of signatory parties] (Joint Petitioners). The issues remaining for litigation were those raised by the Environmental Stakeholders which was composed of the Sierra Club and the Clean Air Council. On August 26, 2020, the Joint Petition for Partial Settlement of this rate proceeding was filed.

The remaining issues raised by the Environmental Stakeholders were reserved for briefing. Main Briefs were filed by PGW and the Environmental Stakeholders on August 26, 2020. PGW, I&E, and the Environmental Stakeholders filed a Reply Briefs on September 2, 2020 related to the issues reserved for litigation.

The ALJs issued an RD dated September 30, 2020. In that RD, the ALJs recommend certain changes to the settlement negotiated by the Joint Petitioners which materially alter the Joint Petitioners agreement. In support of the Settlement to which it was a signatory, I&E now files the following Exceptions. I&E asks that the Commission

granted the following Exceptions and reject the recommendations made by the ALJs which materially alter the Partial Settlement.

B. Summary of I&E Exceptions

I&E thoroughly scrutinized PGW's rate filing and made certain recommendations related to this analysis. However, after much discussion and negotiation, a settlement of most issues was reached in this proceeding. As one of the Joint Petitioners, I&E maintains that the settlement represents a fair, just and reasonable resolution of the instant proceeding. The settlement results in rates that are just and reasonable and the stepped in approach to this rate increase contemplated by the settlement will be beneficial to customers who have been impacted by the COVID-19 pandemic. The settlement contains provisions that serve to protect both PGW and its ratepayers. The settlement was conditioned on the Commission's approval thereof, without modification.¹ I&E acknowledges the commitment made in the settlement that "[a]ll Joint Petitioners shall support the Settlement, and (except with respect to provisions in which they do not join) will make reasonable and good faith efforts to obtain approval of the Settlement by the ALJs and the Commission without modification."² Further, the settlement allows for any Party thereto to withdraw if the Commission issues an order modifying the settlement, and reserves the withdrawing Party's right to fully litigate this base rate case.³ I&E, as one of the signatories to the settlement, continues to support the agreements contained therein as being in the public interest. Therefore, I&E excepts to the ALJs' RD as it

¹ Joint Petition, para. 52.

² Joint Petition, para. 53.

³ Joint Petition, para. 52.

materially alters certain settlement provisions, including but not limited to the timeframe within which rates go into effect. For the reasons explained fully below, I&E respectfully requests the Commission approve the following Exceptions and approve the Joint Petition for Partial Settlement as filed without modification.

II. EXCEPTIONS

I&E EXCEPTION NO. 1

The ALJs' Erred by Materially Altering the Settlement as it no Longer Reflects the Compromises Reached by the Joint Petitioners, Violates the Public Utility Code and is Inconsistent With Commission Precedent.

A. Revenue Requirement (Recommended Decision, pp. 76-79)

The Signatories to the Settlement agreed that PGW would, in lieu of its requested \$70 million base rate increase, be permitted to increase rates by \$35 million in a three (3) step process. Pursuant to the settlement, PGW would implement a \$10 million increase on January 1, 2021, another \$10 million on July 1, 2021, and the final \$15 million on January 1, 2022. Importantly, PGW, by using this process, has foregone the increments between these stepped-in increases, thus forgoing a certain amount of revenue through this settlement process that it would be otherwise entitled to had the \$35 million increase be implemented in one step. I&E concluded that this was a just and reasonable resolution to this proceeding which is evidenced by its signature on this settlement and accompanying I&E Statement in Support of Settlement.

The RD substantially alters the revenue requirement contained in the Settlement as it pushes the three steps contained in the settlement out an additional six months. Specifically, the ALJs recommend the Commission issue an order in which PGW would

recover \$35 million; however, the first step would not be implemented until July 2021, rather than January 2021 as agreed by the Joint Petitioners in the settlement.⁴ The ALJs further recommend that the other two steps of the rate increase be deferred for six months and be implemented on January 1, 2022 and July 1, 2022 respectively.⁵ I&E is concerned with this recommendation for various reasons. If the ALJs' recommendation is accepted, I&E is concerned that this will have a chilling effect on settlements going forward. This Commission has recognized that a settlement reflects a compromise of the positions held by the parties as a result, settlements arguably promote the public interest.⁶ If the parties cannot trust that their agreement will not be materially altered, it may make little sense to enter into a settlement agreement. Further, I&E is concerned because the recommendation made by the ALJs violates the Public Utility Code and is inconsistent with Commission precedent.

The settlement modifications proposed in the RD must be rejected. The Company's suspension period ends December 2, 2020; however, under the RD, PGW will not be permitted to increase rates in the initial step until July 2021 and it will not fully be permitted to recover the \$35 million increase until July 2022. Pushing PGW's rate recovery out this far is especially harmful as PGW's rates are determined on a cash flow basis and PGW does not have shareholders. In its Policy Statement related to the

⁴ RD, p. 77.

⁵ RD, pp. 77, 100.

⁶ *Pa. P.U.C. v. C S Water and Sewer Associates*, 74 PA PUC 767, 771 (1991).

setting of rates for PGW, the Commission noted the following:

(b) The Commission is obligated under law to use the cash flow methodology to determine PGW's just and reasonable rates. Included in that requirement is the subsidiary obligation to provide revenue allowances from rates adequate to cover its reasonable and prudent operating expenses, depreciation allowances and debt service, as well as sufficient margins to meet bond coverage requirements and other internally generated funds over and above its bond coverage requirements, as the Commission deems appropriate and in the public interest for purposes such as capital improvements, retirement of debt and working capital.⁷

I&E does not believe that the phase-in contemplated in the RD satisfies these important requirements. Moreover, I&E would point out that the Recommended Decision itself is internally inconsistent regarding the setting of PGW's rates. The ALJs note that there is evidence that PGW's cash and debt management will be affected if there is not a rate increase in the next few years and that an influx of cash would allow PGW to begin to implement I&E's suggestion that PGW remove risky cast iron pipeline as quickly as possible.⁸ In addition, the ALJs found that "[w]ithout sufficient rate relief, PGW will be on the edge of not being able to meet its debt service coverage requirements in the FPFTY and will violate debt service coverage in FY 2022."⁹ All of which seems to be in line with the Commission's Policy Statement. However, while apparently acknowledging the need for an increase, the ALJs curiously state about the settlement that "[t]he COVID-19 relief plan included in the Partial Settlement seeks to address concerns that arise in raising rates at this time. That intention notwithstanding, the plan

⁷ 52 Pa. Code § 69.2702(b).

⁸ RD pp. 76, 96.

⁹ RD, p. 17.

has limitations that do not support a finding that the increase, even given the relief plan, is reasonable or in the public interest.”¹⁰ Therefore, the ALJs seem to acknowledge that PGW is in need of rate relief for various reasons, but then go on to note that the increase in the settlement is not in the public interest and further recommend the settlement be approved with modification. This internal inconsistency regarding whether a rate increase is in the public interest or not is, perhaps, what led to a result that is, in I&E’s view neither consistent with the Public Utility Code and Commission precedent, nor sound ratemaking principles. Therefore, I&E excepts to this recommendation. PGW has, in fact, shown that some level of rate relief is necessary and in the public interest. The Joint Petitioners have shown, through the Joint Petition for Partial Settlement, and their respective Statements in Support, that the settlement achieved in this proceeding is in the public interest and is a reasonable resolution of this proceeding for PGW and its customers.

Additionally, the modifications contained in the RD are inconsistent with the Commission’s policy of encouraging settlements.¹¹ The following policy statement articulates general settlement guidelines and procedures for major rate cases:

In the Commission’s judgement, the results achieved from a negotiated settlement or stipulations, or both, in which the interested parties have had an opportunity to participate are often preferable to those achieved at the conclusion of a fully litigated proceeding.¹²

¹⁰ RD, p. 76.

¹¹ 52 Pa. Code § 5.231.

¹² 52 Pa. Code § 69.401.

This policy statement highlights the importance of settlement in Commission proceedings. Substantially modifying settlement terms may chill the willingness to enter into settlement.

Further, it is important to note that the ALJs have ignored an important aspect of the settlement agreement, specifically paragraph 52 that provides Joint Petitioners the ability to withdraw from the settlement if the terms are modified. Therein, it states:

This Settlement is conditioned upon the Commission's approval of the terms and conditions contained herein without modification. If the Commission should disapprove the Settlement or modify any terms and conditions herein, this Settlement may be withdrawn upon written notice to the Commission and all parties within five (5) business days following entry of the Commission's Order by any of the Joint Petitioners and, in such event, shall be of no force and effect. In the event that the Commission disapproves the Settlement or the Company or any other Joint Petitioner elects to withdraw from the Settlement as provided above, each of the Joint Petitioners reserves their respective rights to fully litigate this case, including, but not limited to, presentation of witnesses, cross-examination and legal argument through submission of Briefs, Exceptions and Replies to Exceptions.¹³

The modification recommended by the ALJs is significant. Essentially, by adopting the ALJs' recommendation, the Commission would provide the parties an opportunity to withdraw from the settlement and fully litigate this case. One of the benefits of settlement, as noted in the I&E Statement in Support, is that it saves the time and expense of fully litigating a case to its final resolution.¹⁴ If the Commission issues a final Order

¹³ Settlement, para. 52.

¹⁴ I&E Statement in Support, p. 5.

approving the ALJs' RD, this benefit may be lost as the parties are free to withdraw from the settlement and fully litigate PGW's rate request.

Further, the ALJs' recommendation is inconsistent with the Public Utility Code, as well as past and recent Commission precedent. Section 1308(d) of the Public Utility Code states that by operation of law, if the Commission has not entered an Order by the end of the suspension period of a base rate case, the proposed rates will go into effect at the end of the suspension period, subject to potential refund.¹⁵ This is consistent with the Commonwealth Court's holding in *Bell Telephone Co. v. Pa. P.U.C.* wherein the Court held that the appropriate time for rates to go into effect was at the end of the statutorily proscribed suspension period and not the date of a compliance filing, and going beyond the statutory seven month deadline violated Section 1308(d) of the Code.¹⁶ In *Joseph Horne Co. v. Pa. P.U.C.*, the Pennsylvania Supreme Court affirmed of *Bell Telephone*, stating that "We affirmed the Commonwealth Court's holding that under Section 1308(d) the PUC may not suspend the effective date of filing of the revised tariffs when the effective date would thereby be more than nine months after the initial general rate increase filing."¹⁷ These cases show that the Commission does not unilaterally possess the ability to implement a rate increase later than the statutorily proscribed seven month period except upon agreement of the parties. In this instance the Joint Petitioners have agreed that the first phase of the rate increase will be implemented on January 1, 2021.

¹⁵ 66 Pa.C.S. § 1308(d).

¹⁶ *Bell Telephone Co. v. Pa. P.U.C.*, 452 A.2d 86 (Pa. Cmwlth. 1982).

¹⁷ *Joseph Horne Co. v. Pa. P.U.C.*, 485 A.2d 1105, 1111 (Pa. 1984).

The referenced cases stand for the proposition that the Commission is not allowed to unilaterally change this date to something later than that which was agreed upon.

More recently, the Commission has recognized that it does not have this power. In agreeing that an extension of the procedural schedule in the recent Columbia base rate case filed this year, the Commission noted:

Because we are only authorizing the extension or suspension of *deadlines* and not of substantive rights, failure to meet the seven-month deadline would result in the proposed rates going into effect by operation of law. Therefore, we find that Columbia is entitled to the appropriate rate relief in accordance with Section 1308(d) of the Code immediately following the end of the original statutory rate suspension period, which, in this case, is January 23, 2021.¹⁸

A similar result was reached in the recent Pennsylvania American Water Company base rate case.¹⁹ The Commission has clearly acknowledged that while it may have the ability to alter deadlines as a result of the Governor's Proclamation of Disaster Emergency and the Commission's Emergency Order, it does not have the authority to alter a utilities substantive right of a rate increase going into effect at the end of the seven-month deadline.

In this instance, the only departure from the *Columbia* and *PAWC* cases is that PGW and the other Joint Petitioners have agreed that rates will be implemented on January 1, 2021 in the amount of \$10 million; on July 1, 2021, in the amount of \$10 million; and on January 1, 2022, in the amount of \$5 million. Therefore, under the

¹⁸ *Pa. P.U.C. v. Columbia Gas of Pa. Inc.*, Docket No. R-2020-3018835 (Order on Petition for Reconsideration of Staff Action Entered August 20, 2020) pp. 20-21.

¹⁹ *Pa. P.U.C. v. Pennsylvania American Water Company*, Docket Nos. R-2020-3019369 and R-2020-3019371 (Order on Petition for Reconsideration of Staff Action Entered August 20, 2020).

Commission's recent precedent, PGW is entitled to have the rate increase agreed to as part of this settlement go into effect as of these dates. The ALJs' cited no legal authority that would give the Commission authority to alter PGW's substantive right to have rates become effective on the agreed upon dates.

In addition, on October 8, 2020, the Commission approved, a settlement in the recent UGI base rate case, which included a stepped-in rate increase similar to the one agreed to in the instant settlement. In that proceeding Chairman Dutrieuille noted, "I would like to commend UGI, the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Bureau of Investigation and Enforcement, and all other parties in the proceeding (Parties) for reaching a Joint Settlement which I believe is in the public interest."²⁰ Frankly, the settlement achieved in the instant proceeding is more protective of ratepayers than the settlement reached in the *UGI* case. Per the UGI settlement, the first step of the phased-in rate increase, designed to produce \$10 million of increased revenue on an annual basis, will go into effect on January 1, 2021 and be effective through June 30, 2021.²¹ On July 1, 2021, the second \$10 million step of the phased-in rate increase, will go into effect.²² However, as explained in the RD, "in order for UGI Gas to receive the full benefit of the revenue during the FPFTY itself (i.e., for the period that rates would have been in effect as a result of this proceeding), the parties have agreed that UGI Gas can recover, in the third step of the phase-in, the deferred

²⁰ *Pa. P.U.C. v. UGI*, Docket No. R-2019-3015162 (Order Entered October 8, 2020) Statement of Chairman Gladys Brown Dutrieuille.

²¹ UGI RD, p. 34.

²² *Id.*

revenue that would have been recovered from customers if the Company had fully implemented the \$20 million increase in a single step on January 1, 2021.”²³ In the instant proceeding PGW has agreed to forgo this deferred revenue. The similarities between the two cases cannot be denied. As PGW has demonstrated that rate relief is necessary, and the Commission recently approved a very similar settlement, it is appropriate that the Commission approve the instant settlement without modification.

B. Pipeline Replacement Costs (R.D., p. 78)

In addition to altering the agreed-to dates for the revenue phase-in, the ALJs make other alterations to the settlement agreement. Specifically, the ALJs’ recommend that “no later than 90 days following entry of the Final Order in this matter, and biannually through 2022, PGW must meet with the Commission’s Pipeline Safety Division to review PGW’s increasing costs of pipeline replacement and to develop a plan to reduce pipeline replacement costs and leaks.”²⁴ This was a position taken by I&E in testimony, but was not included in settlement. Settlement is a give and take process on behalf of all parties, including I&E. As a result, not all of the issues raised in I&E’s testimony were included in the settlement. I&E’s Statement in Support of the settlement noted that this Commission has recognized that a settlement “reflects a compromise of the positions held by the parties of interest, which, arguably fosters and promotes the public interest.”²⁵ The settlement agreement in the instant proceeding protects the public interest in that a comparison of the original filing submitted by the Company and the negotiated

²³ *Id.*

²⁴ RD p. 79.

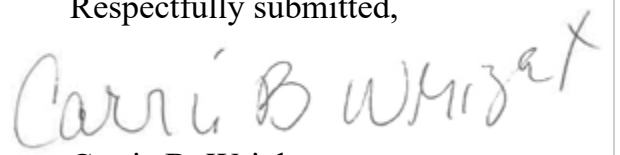
²⁵ *Pa. P.U.C. v. C S Water and Sewer Associates*, 74 PA PUC 767, 771 (1991).

agreement demonstrates that compromises are evident throughout the Joint Petition. As a signatory to the settlement I&E maintains that what was contained therein is in the public interest and requests that it be approved without modification.

III. CONCLUSION

For the reasons set forth herein, the Bureau of Investigation and Enforcement respectfully requests that the Pennsylvania Public Utility Commission grant these Exceptions to the Recommended Decision and incorporate the results in its final Order which approves the settlement in the instant proceeding without modification.

Respectfully submitted,

A handwritten signature in cursive script that reads "Carrie B. Wright". The signature is written in black ink and is contained within a thin black rectangular border.

Carrie B. Wright

Prosecutor

PA Attorney ID No. 208185

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Dated: October 15, 2020

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :
:
v. : Docket No. R-2020-3017206
:
Philadelphia Gas Works :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Exceptions** dated October 15, 2020, in the manner and upon the persons listed below:

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