

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc.,	:	Docket No.	C-2012-2304324
Simon Garden Realty Co., L.P.	:		C-2015-2486642

v.

Philadelphia Gas Works

SBG Management Services, Inc.,	:	Docket No.	C-2012-2304183
Colonial Garden Realty Co., L.P.	:		C-2015-2486677

v.

Philadelphia Gas Works

SBG Management Services, Inc.,	:	Docket No.	C-2012-2304167
Elrea Garden Realty Co., L.P.	:		C-2015-2486674

v.

Philadelphia Gas Works

SBG Management Services, Inc.,	:	Docket No.	C-2012-2304465
Fern Rock Realty Co., L.P.	:		C-2015-2486670

v.

Philadelphia Gas Works

SBG Management Services, Inc.,	:	Docket No.	C-2012-2304215
Fairmount Manor Realty Co., L.P.	:		C-2015-2486664

v.

Philadelphia Gas Works

SBG Management Services, Inc.,	:	Docket No.	C-2012-2308462
Oak Lane Realty Co., L.P.	:		C-2015-2486655

v.

Philadelphia Gas Works

SBG Management Services, Inc., : Docket No. C-2012-2308454
Marchwood Realty Co., L.P. : C-2015-2486648

v. :

Philadelphia Gas Works :

SBG Management Services, Inc., : Docket No. C-2012-2304303
Marshall Square Realty Co., L.P. : C-2015-2486618

v. :

Philadelphia Gas Works :

**RESPONSE OF SBG MANAGEMENT SERVICES, INC., ET AL.
TO PHILADELPHIA GAS WORK’S PARTIAL MOTION TO DISMISS**

SBG Management Services, Inc., et al. (SBG or SBG parties), through the undersigned counsel, responds to the Partial Motion to Dismiss filed by Philadelphia Gas Works (PGW). For the reasons set forth herein, contrary to PGW’s assertions: (1) the Pennsylvania Public Utility Commission (PUC or Commission) does have jurisdiction to adjudicate the issues remanded to it by the Commonwealth Court; (2) the Commonwealth Court did not limit application of the Supreme Court’s decision to the parties to the Supreme Court appeal; and (3) SBG’s Common Pleas Court action is not duplicative of this matter – in fact, the Commission’s decision here will impact, inform and guide the Common Pleas Court.

I. ARGUMENT

A. PUC has Jurisdiction over Questions concerning Rates under its Regulatory Control pursuant to the Public Utility Code, 66 Pa.C.S. § 101 et seq.

PGW argues that the PUC lacks jurisdiction over this matter as a result of the Pennsylvania Supreme Court’s holding that docketed liens in the City of Philadelphia are the equivalent of judgments against the SBG parties. *See PGW v. PUC*, 249 A.3d 963 (Pa. 2021) (PGW II). Specifically, PGW claims that the mere existence of the judgments “ends the

Commission's jurisdiction, as any issues and claims related to the amounts owed by the customer are merged into the judgement (sic)." Motion of PGW at 6. PGW's argument is incorrect for several reasons.

1. The issue presented is within the PUC's jurisdiction.

As a threshold matter, the Commission has *always* had jurisdiction to decide questions concerning the rates under its regulatory control. *See Bell Tel. Co. v. Philadelphia Warwick Co.*, 50 A.2d 684, 688 (Pa. 1947) (recognizing Commission's authority "to determine the reasonable and just amount" of all rates, as a condition precedent to any recovery on outstanding balances); 66 Pa.C.S.A. § 102 (defining the term "rate" under the Public Utility Code).¹ In the instant case, under this precept, the PUC not only has jurisdiction to determine the amounts that PGW overcharged complainants by improperly using the PUC's 18% tariff rate, it is the Commission's responsibility to make this determination. *See* PUC Order, 12/8/2016, at 71 (noting the Commission has regulatory authority to determine the adequacy and reasonableness of all rates charged by public utilities).

PGW argues that *Gasparro v. PUC*, 814 A.2d 1282 (Pa. Cmwlth. 2003), explains why the PUC does not have jurisdiction in this matter. *Gasparro*, however, is inapposite. There the utility was seeking to collect on a default judgment entered against a customer, who challenged the factual foundation underlying the judgment. The customer claimed that the default judgment was based on estimated, not actual, usage. In other words, the underlying amount of the judgment was factually incorrect. The PUC determined, however, that it lacked jurisdiction to review the merits of the default judgment because the customer had failed to raise the estimate

¹ "[The Commission] has subject matter jurisdiction over a service or billing issue raised in a lien-related complaint[.]" which allowed it "[to] find[] that PGW improperly imposed late payment charges on past due amounts subject to a municipal lien[.]" *See* PUC Order, 8/23/2018. Neither the Supreme Court, nor the Commonwealth Court, determined that this restatement of the Commission's authority was incorrect.

vs. actual usage claim with the Commission prior to the entry of default. The Commonwealth Court agreed, holding that the Public Utilities Code “does not grant the PUC the authority to review the merits of judgment entered on a contract claim.” *Id.* at 1285.

PGW suggests that SBG is attempting to use this forum to attack the underlying factual basis of docketed municipal liens, but this is not accurate. In this matter, SBG’s challenge relates to the 18% interest and late fees that PGW charged against arrearages *after those outstanding balances were docketed as liens*. Unlike the customer in *Gasparro*, SBG does not challenge the underlying arrearage amount docketed, only the impermissible interest and late fees charged at 18%. SBG is not disputing the utility usage by its properties, but rather asking the PUC to determine the amount of overcharges based on PGW’s application of the incorrect rate to docketed liens. Moreover, SBG did raise this rate issue before the Commission, and the Commission ruled that PGW could not charge its tariff rate of 18% on amounts docketed as liens. SBG could not raise this issue before the liens had been docketed and PGW improperly charged 18% on those docketed amounts.

The issue before this Commission is a pure question of the proper rate PGW should have charged (the post-judgment interest rate of 6%) and the proper amounts PGW should have charged based on the correct rate, which is squarely within the PUC’s jurisdiction. SBG is not collaterally attacking the any docketed lien, as PGW appears to contend. The question is simply *how much* PGW overcharged SBG Parties using the 18% tariff rate on arrearages.

PGW also cites to *Margaret Collins v. Pennsylvania American Water Company*, 2019 WL 4247025 (PUC August 29, 2019), as standing for the proposition that the PUC “is not empowered to consider a challenge to billing practices reflected in an outstanding balance that is subject to a docketed municipal lien.” Motion of PGW at 7. Like PGW’s argument based on

Gasparro, if one does not actually read the cited sources, one might believe that PGW's argument is sound. However, once one reads *Gasparro* and *Margaret Collins*, it is clear that neither case supports the argument PGW is advancing.

The Commission in *Margaret Collins* was dealing with a complainant's claim that a lien had been docketed against her property for unpaid wastewater charges by a utility that preceded the Pennsylvania American Water Company (PAWC). The complainant requested that the PUC order the removal of the lien. The facts revealed that a balance of \$325.67 was transferred from the original water utility to PAWC when that utility took over her account from her previous provider, and PAWC issued a courtesy credit for the entire \$325.67; therefore, no balance was transferred. In addition, PAWC did not assume any liens docketed by the prior utility and had not docketed any liens against her property. The Commission found that the complainant had failed to meet her burden of proving her claim and noted that the PUC lacks jurisdiction to provide the relief the complainant sought – the removal of the likely non-existent lien.

PGW conflates the PUC's authority to make rate decisions with its lack of jurisdiction to mandate that PGW vacate or withdraw docketed municipal liens. Only the Court of Common Pleas has direct authority to issue an order with respect to the docketed municipal liens. *See* PUC Order, 12/8/2016, at 79-82. SBG has consistently acknowledged this point. Authority over the docket municipal liens, however, is distinct from authority over the rate amounts that PGW has improperly charged SBG.

The Commission, the Commonwealth Court and the Supreme Court have consistently recognized the Commission's authority to make the type of rate decisions at issue here. Although the PUC cannot issue an order with respect to the municipal liens that PGW docketed, the PUC absolutely has authority to determine the amount that PGW overcharged SBG for

interest and late fees using the 18% tariff rate. This is, perhaps, one of the PUC's core functions – to settle rate disputes. The Public Utilities Code places the late payments “collected or enforced” by PGW pursuant to its approved tariff and § 56.22(a) “within the jurisdiction of the [C]ommission.” 66 Pa. C.S.A. § 1302. The Code also charges the Commission with ensuring “[e]very rate made, demanded, or received by any public utility ... shall be just and reasonable, and in conformity with regulations or orders of the commission.” 66 Pa. C.S.A. § 1301(a) (emphasis added).

There is no dispute that SBG cannot obtain *full* relief from the Commission. But PGW should not be rewarded for its bad behavior. If the Commission accepted PGW's jurisdictional argument, a utility could improperly docket a rate amount and strip the Commission of jurisdiction to issue a rate determination and resolve the dispute. This cannot be the case. PGW improperly overcharged late fees on docketed municipal liens. The amount of these overcharges should be determined by the Commission. The Commission is the authority on rate amounts, not the Court of Common Pleas.

Instead of the clear rate dispute that exists between the parties, PGW tries to persuade the Commission that the critical question is the authority to compel action with respect to the municipal liens. This is **not** the question presented here. The question here is simple: what is the amount overcharged by PGW? The PUC should answer this inquiry.

Relatedly, PGW claims that any Commission review of the overcharges would constitute a collateral attack on the judgments arising from PGW's docketed liens because challenging the amounts due on the utility bills is an indirect challenge to the judgments themselves. PGW argues that the docketed liens, as judgments, are “the equivalent of a final resolution of a claim between parties” and to be “treated in the same manner as a judgment that has been rendered

following an adjudicative process.” *PGW II* at 970, 974. PGW concludes that “the Commission is not empowered to review the merits of judgments.” Motion of PGW at 8. This argument would be persuasive, if SBG were, in fact, challenging the merits of the judgments. But that is not the case. SBG is simply seeking a calculation of the amounts PGW liened using the incorrect rate of 18%, which rests squarely in the PUC’s authority.

Recouping the overcharged amount is an effort that will require enforcement in the Court of Common Pleas – the same as when a utility enforces collection of outstanding amounts owed by ratepayers through, *inter alia*, docketing municipal liens with the appropriate Prothonotary. This does not strip the Commission of its authority to determine the underlying rate amounts. Yet, this is precisely PGW’s argument.

2. The doctrine of merger does not prevent the Commission’s consideration of PGW’s overcharged rate amounts.

PGW contends that the Commission is stripped of jurisdiction because SBG’s rate complaints ‘merged’ with the docketed municipal liens, which are treated as judgments. This argument lacks cogency because that is simply not how the doctrine of merger works. The doctrine of merger provides that after a plaintiff recovers a final judgment, “his original claim is extinguished and rights upon the judgment are substituted for it. ‘The plaintiff’s original claim is said to be ‘merged’ in the judgment.’” *Kessler v. Old Guard Mut. Ins. Co.*, 570 A.2d 569, 573 (Pa. Super. 1990) (citing Restatement (Second) of Judgments § 18 comment a). The doctrine clearly requires that the party holding the judgment be the same party whose claim is merged. Here, PGW urges a result where its judgments and SBG’s claims merge. This application of the doctrine of merger is wrong as a matter of law. PGW’s argument that SBG’s rate complaints filed in the PUC merge with PGW’s civil judgments confuses (a) *which party* holds the judgment with (b) *which party* filed the rate complaints.

The Superior Court explained in *Equitable Gas Co. v. Wade*, 812 A.2d 715, 718–19 (Pa. Super. 2002), that the doctrine of merger prevents a utility from (a) docketing and executing upon an outstanding balance while (b) simultaneously charging the 18% tariff rate upon the docketed amount. Once the amount is docketed as a municipal lien and the utility “recovered a final judgment, it may no longer pursue ‘part of the claim’ (i.e., a claim for 18% interest from the date of judgment until the bill is paid).” *Equitable Gas*, 812 A.2d at 718–19. In other words, the doctrine of merger prevents PGW from pursuing separately a “part of the claim” that has already been docketed as a municipal lien.

PGW, however, is entirely wrong that SBG’s rate complaints somehow merge with PGW’s municipal lien judgments. Simply put, SBG does not have a judgment against PGW wherein the rate complaints would merge. PGW’s argument contends that the PUC lacks jurisdiction over SBG’s rate complaints because those complaints merged with its judgment. This is not how the doctrine of merger operates.

B. The SBG Parties’ Claims have not been Foreclosed.

PGW argues that, per the Commonwealth Court’s decision on remand, only SBG, Simon Garden Realty and Colonial Garden Realty can benefit from the Supreme Court’s decision. PGW’s position is inconsistent with the plain language of the Commonwealth Court’s decision, which explains that the holding applies both (i) to the parties involved in the appeal itself *and* (ii) to the parties involved in “other proceedings pending at the time the PGW II decision was issued in April 2021.” *See PGW v. PUC*, 1291 C.D. 2018 at *29. PGW reads the Commonwealth Court’s decision more narrowly than the actual language supports.

The Commonwealth Court, when tasked with determining whether the Supreme Court’s decision applied retroactively, stated: “we conclude that our Supreme Court’s decision in *PGW*

II applies retroactively only as to parties to this litigation **and to other proceedings pending at the time the *PGW II* decision was issued in April 2021.**” *PGW v. PUC*, 1291 C.D. 2018 at *29 (Pa. Cmwlth. March 16, 2022) (emphasis added). Notably, the Commonwealth Court did not limit application to matters on appeal in April of 2021. The clear language states the Supreme Court’s decision applies retroactively to proceedings that were pending in April of 2021. All of the SBG matters listed on the caption before the PUC were pending before the PUC in April of 2021.

In deciding whether the Supreme Court’s interpretation of § 7106(b) applies retroactively, the Commonwealth Court relied upon the reasoning and analysis of *Blackwell v. Com., State Ethics Comm’n*, 589 A.2d 1094 (Pa. 1991). There, the Pennsylvania Supreme Court held that its decision declaring a section of the Sunshine Act unconstitutional “[wa]s to be applied retroactively to the parties before the court **and to all cases pending at the time of that decision in which the issue of the constitutionality of Section 4(4) of the Sunset Act was timely raised and preserved.**” *Id.* at 1099 (emphasis added). The Commonwealth Court made the same decision regarding the retroactive application of the Supreme Court’s interpretation of § 7106(b) in *PGW II*.

The Commonwealth Court’s holding applies the interpretation of § 7106(b) to two distinct groups: (1) the Plaintiffs who intervened in the appellate litigation that ultimately culminated in Supreme Court’s ruling of April 2021; and (2) the Plaintiffs who were parties “to other proceedings pending at the time the *PGW II* decision was issued in April 2021.” *PGW v. PUC*, 1291 C.D. 2018, at *29 (emphasis added). *PGW* contends that this language constrains the retroactive application to direct appeals raising the same issue. This narrow interpretation of the Commonwealth Court’s holding is inconsistent (a) with the plain language in the Court’s

decision; and (b) with the precedent in *Blackwell*, 589 A.2d at 1099, upon which the Court relied. The Complainants who did not intervene in the appeal culminating in *PGW II* were parties to proceedings pending before the PUC – that is, “cases pending at the time of [the Supreme Court’s *PGW II*] decision in which the issue[s] of [§ 7106(b)’s proper construction and the applicability of *PGW*’s tariff rate to docketed municipal liens] w[ere] timely raised and preserved.” *Blackwell*, 589 A.2d at 1099. These PUC proceedings presented identical issues to those raised by the intervening Complainants, and were stayed pending the outcome of the appellate process.

PGW argues that these other Complainants do not fall within the ambit of the Commonwealth Court’s holding in regard to retroactive application. This position belies the language in the Court’s decision, which patently authorizes retroactive application to the parties of “other proceedings pending at the time the *PGW II* decision was issued in April 2021.” *See PGW v. PUC*, 1291 C.D. 2018, at *29. Moreover, *PGW*’s argument would make this language superfluous, as *PGW*’s position would *only* retroactively apply the Supreme Court’s interpretation of § 7106 to the intervening Complainants. This result was clearly not the Commonwealth Court’s intent, especially given that the record indicated *all* litigants to the pending proceedings before the PUC had raised the same issues prior to the imposed stay.

Complainants are parties to separate parallel proceedings before the PUC, which were stayed pending the ultimate outcome of the appeals to the Commonwealth Court and Supreme Court. Accordingly, the Supreme Court’s decision applies to all of the parties to this matter as listed on the caption.

C. This Matter and the Common Pleas Action are not Duplicative.

PGW regards this matter and the 2021 action SBG filed in the Common Pleas Court to be duplicative, asking the Commission to dismiss the SBG parties' complaints. PGW is wrong. This matter and the Common Pleas action are actually complementary. Each tribunal has its own functions, and what the PUC decides in this instance can and will inform and guide the Common Pleas Court in its determinations in the 2021 action.

The PUC is tasked with determining the rate issue and calculating how much PGW overcharged SBG. The PUC cannot order or compel relief for SBG with respect to the municipal lien amounts that reflect PGW's overcharges and that were docketed by PGW. That is the bailiwick of the Court of Common Pleas. To receive a refund or repayment from PGW, SBG must seek redress in the Court of Common Pleas. But this redress does not – and should not – require the Court of Common Pleas to issue a rate determination as to the overcharged amounts. While the Court is capable of determining the overcharged amounts, this body has the authority and jurisdiction to do so. *See Bell Tel. Co.*, 50 A.2d at 688 (explaining the Commission, however, is equipped to redress “complaining of rates or regulations which [are] under [its] control”). This is a rate determination. The Commission should decide how much PGW overcharged SBG and the amount of the refund required. Enforcement of any relief lies within the authority of the Common Pleas Court. Given the discrete functions of the Commission and the Court of Common Pleas, it is plain that this matter is not duplicative.

Additionally, the PUC proceedings filed in 2012 and 2015 tolled the statute of limitations as to those claims. Therefore, if the Commission determines that it has jurisdiction, the PUC would determine the rate issue presented from at least 2012, if not 2008, four years before the initial PUC filings. If, however, the Commission concludes that this rate issue should be decided

by the Common Pleas Court, the action before the court was filed in 2021, which could result in that court reasoning that the statute of limitation has run as to the claims filed in 2012 and 2015. In fact, the Court of Common Pleas might consider only those claims filed from 2017 forward, which is a substantial difference of 9 years of overcharges for which the SBG parties would not be compensated. This result would thwart the clear language and spirit of both the Supreme and Commonwealth Courts' decisions.

II. CONCLUSION

For the foregoing reasons, SBG respectfully requests that the Commission deny PGW's partial motion to dismiss.

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CERTIFICATE OF SERVICE

I, Shawn M. Rodgers, Esquire, do hereby certify that on November 2, 2022, I caused a true and correct copy of Complainants' Response in Opposition to PGW's Partial Motion to Dismiss to be served upon the following by e-filing and/or email:

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