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November 29, 2022

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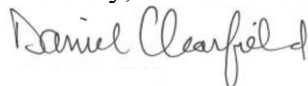
Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: *SBG Management Services, Inc./Simon Garden Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2304324; C-2015-2486642; *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2304183; C-2015-2486677; *SBG Management Services, Inc./Elrea Garden Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2304167; C-2015-2486674; *SBG Management Services, Inc./Fern Rock Gardens Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2308465; C-2015-2486670; *SBG Management Services, Inc./Fairmont Manor Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2304215; C-2015-2486664; *SBG Management Services, Inc./Oak Lane Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2308462; C-2015-2486655; *SBG Management Services, Inc./Marchwood Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2308454; C-2015-2486648; and ; *SBG Management Services, Inc./Marshall Square Realty Co., L.P. v. PGW*; Docket Nos. C-2012-2304303; C-2015-2486618;

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Brief in Support of its Partial Motion to Dismiss with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Daniel Clearfield, Esq.

DC/lww
Enclosure

cc: Hon. Eranda Vero w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this date I served a copy of PGW's Brief in Support of its Partial Motion to Dismiss, upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: November 29, 2022



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

v. :

Philadelphia Gas Works :

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

v. :

Philadelphia Gas Works :

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

v. :

Philadelphia Gas Works :

SBG Management Services, Inc. / :
Fern Rock Realty Co., L.P. : Docket No. C-2012-2308465
: C-2015-2486670

v. :

Philadelphia Gas Works :

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

v. :

Philadelphia Gas Works :

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

v. :

Philadelphia Gas Works :

SBG Management Services, Inc. /	:	
Marchwood Realty Co., L.P.	:	Docket No. C-2012-2308454
	:	C-2015-2486648
v.	:	
	:	
Philadelphia Gas Works	:	
SBG Management Services, Inc. /	:	
Marshall Square Realty Co., L.P.	:	Docket No. C-2012-2304303
	:	C-2015-2486618
v.	:	
	:	
Philadelphia Gas Works	:	

PHILADELPHIA GAS WORKS’

BRIEF IN SUPPORT OF

PHILADELPHIA GAS WORKS’ PARTIAL MOTION TO DISMISS

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I. INTRODUCTION

Philadelphia Gas Works (“PGW” or “Company”) hereby submits this Brief in Support of PGW’s Partial Motion to Dismiss (“Motion”). This Brief will focus on PGW’s supplemental arguments as well as PGW’s replies to Complainants’¹ (“SBG” or “Complainants”) arguments in their Response to the Motion (“SBG Response”) as well as at the prehearing conference of November 8, 2022 consistent with the direction of the presiding Administrative Law Judge (“ALJ”) Eranda Vero.

II. ARGUMENT

A. **The existence of a judgment (created by the docketing of a municipal lien) has a preemptive effect on the Commission’s jurisdiction, and the claims and issues raised in the complaints regarding docketed municipal liens must be dismissed.**

The core question presented by this portion of PGW’s Motion is which body (between the Commission and the Court of Common Pleas) has jurisdiction to determine the amount of damages or overcharges that the Complainants are entitled to given the Pennsylvania Supreme Court’s ruling in *PGW II*.² In that case, the Pennsylvania Supreme Court found that PGW’s act of perfecting or filing a lien transforms the claim or security interest into a final judgment, with the same force and effect as if PGW had obtained a judgment from a court by filing an action in assumpsit. PGW submits that the Court of Common Pleas must do the calculation, as set forth in the Motion and herein, because both applicable precedent and common-sense dictates that an administrative agency such as the PUC does not have the power to modify or revise the amount of a court judgment.

¹ The terms “Complainants” or “SBG” are used to collectively refer to the above-captioned landlords together with their property manager, SBG Management Services PA, Inc.

² *PGW v. PUC*, 249 A.3d 963 (Pa. 2021) (“*PGW I*”), rehearing granted by, in part, and remanded, 256 A.3d 1092 (Table), 2021 Pa. LEXIS 2905, 2021 WL 2697432 (Pa., June 15, 2021), on remand, 2022 Pa. Commw. Unpub. LEXIS 92, 2022 WL 793332 (Pa.Cmwlt., Mar. 16, 2022) (“*PGW III*”).

PGW acknowledges that the Commission has ruled in a contrary manner in the past, i.e., that even though the filing of a lien resulted in PGW no longer being able to apply the Late Payment Charge provisions of its Tariff (or even show those amounts on its regulated bill) the PUC nonetheless retained jurisdiction to determine “billing issues,” including the *amount* of any “overcharge.”³ But PGW submits that *PGW II* changed and impliedly abrogated the PUC’s past pronouncements. That is because the Commission’s past pronouncements were based on the theory that the filing of a lien represented a “choice” to pursue collection through a civil action and not because the filing of a lien transformed the arrearage into a judgment. The Commission’s rationale was that, once that choice was made, PGW could not simultaneously pursue collection in civil court and via its PUC approved Tariff through the application of Late Payment Charges.⁴ The Commission therefore concluded that PGW’s choice to begin a civil action (by filing the lien) prevented it from *also* attempting to collect the same debt using its PUC-approved Tariff and, thus, its jurisdiction to hear other billing questions, including the amount of any “overcharge” reflected on SBG’s (or any customer’s) bill was not affected.

³ See, e.g., *Jerold Kintzel v. Pa. Power and Light Co.*, Docket No. Z-00319269, 1980 Pa. PUC LEXIS 27 (Order entered September 18, 1980) (“*Kintzel*”) (noting that the Commission lacks jurisdiction to award damages, but has jurisdiction over service and billing disputes – without discussing judgments or docketed municipal liens); *Dennis Vicario v. Philadelphia Gas Works*, Docket No. C-2010-2213955, 2011 Pa. PUC LEXIS 417 (Order entered November 16, 2011) (“*Vicario*”) (complainant was allowed a hearing regarding issues pertaining to billing, notice and allocation of LIHEAP funds, even though a lien had been imposed. It is unclear, however, if *Vicario*’s billing issues were related to the amounts subject to the docketed municipal lien or arose under different bills, since the complaint was filed more than 3 years after the subject lien was docketed.); *Cf. Gasparro v. PUC*, 814 A.2d 1282, 1285 (Pa. Cmwlth. 2003) (“*Gasparro*”) (Public Utility Code does not grant the Commission the authority to review the merits of judgment); *Faye Payne v. Philadelphia Gas Works*, C-2011-2247124; 2012 Pa. PUC LEXIS 271, 2012 WL 1066610 (PUC does not authority to order the City to remove or reduce the lien on the Complainant's property).

⁴ For example, in the Joint Motion of Chairman Brown and Commissioner Coleman, resolving PGW’s second petition for reconsideration, they stated their basis for rejecting PGW’s claims: “[T]he imposition of a municipal lien to secure payment of a debt for gas services supplied is a civil action for collection of a ‘municipal claim’ under the MCTLL. As a ‘municipal claim’ the civil action regarding the claim cannot be maintained concurrently with an administrative action or process for the same matter.” *SBG Management Services, Inc. v. PGW*, Docket Nos. C-2012-2304184 and C-2012-2304324, Joint Motion of Chairman Gladys M. Brown and Commissioner John F. Coleman, Jr. dated January 18, 2018, at 2-3, <https://www.puc.pa.gov/pcdocs/1550197.pdf>. There is no mention or intimation that PUC fully lost jurisdiction as it does with a final judgment.

But the Supreme Court’s rationale was quite different even though the Court came to the same conclusion – that PGW was no longer permitted to apply its PUC-approved, tariffed Late Payment Charges once a lien was filed. The Court held – for the first time – that (at least for PGW) docketed municipal liens are “the equivalent of a final resolution of a claim between parties” and are “treated in the same manner as a judgment that has been rendered following an adjudicative process.”⁵ It clearly stated:

By expressly stating that the docketed lien is to be treated like a judgment with regard to the underlying claim, the General Assembly has expressed its intent that docketing the lien have the same effect as a final determination of a dispute between parties without further proceedings that would generally be required to effectuate the result.⁶

It is clear that a “final determination [by a civil court] of a dispute between parties” resulting in a determination setting the amount owed by a party cannot be altered or interfered with by the Commission.⁷ Yet here SBG is clearly asking that the PUC alter or modify the amount of the judgment that the Supreme Court has determined PGW obtained by filing a lien for the total amount PGW was owed – both arrearage and Late Payment Charges. This the Commission plainly does not have the jurisdiction to do.

1. SBG’s arguments claiming that the PUC retains jurisdiction to determine the proper amount owed on arrearages that have been reduced to filed liens do not properly apply *PGW II* or are based on a misstatement of the facts.

SBG raised a number of arguments in an attempt to get around the inevitable conclusion that the Commission no longer has jurisdiction to take action regarding arrearages and Late Payment Charges that have become judgments as a result of PGW perfecting a lien for the

⁵ *PGW II*, 249 A.3d 963, 970 (Pa. 2021).

⁶ *Id.* at 974.

⁷ *Gasparro*, 814 A.2d at 1285.

arrearage and Late Payment Charges. SBG argues that it is simply asking the Commission to determine the proper “rate” – i.e., whether Late Payment Charges or post judgment interest – that should apply to arrearages once PGW filed a lien for that amount.⁸ Rates, they say, are clearly within the Commission’s jurisdiction. While this truism is obviously correct, the problem is that SBG is not asking that the PUC revise a “rate.”

First, and fundamentally, in light of *PGW II*, SBG is no longer questioning whether PGW applied a “rate” appropriately. SBG is improperly characterizing the post-judgment interest, which is the only interest actually at issue, as a “late payment charge” under PGW’s tariff and within the Commission’s jurisdiction. SBG Response at 5, citing 52 Pa. Code 56.22(a) and 66 Pa. C.S. § 1301(a) and 1302. That is not the case. Both *PGW II* and *Equitable Gas v. Wade*⁹ make it clear that the Commission may not set “rates” once there is a judgment. Post-judgment interest is statutory and applies only after a judgment is obtained, either by an assumpsit action or by the docketing of a municipal lien (in cities of the first class). Both of those cases hold that Commission-sanctioned tariffs (as well as the rates contained therein) are no longer applicable once a judgment is entered. There cannot be a “rate” — within the meaning of the Public Utility Code — that exists outside of a Commission-approved tariff. So, the question of what post-judgment interest rate was legally applicable is no more a question for the PUC than if PGW had simply applied the interest rate permitted for non-judgment liens¹⁰ rather than the Supreme Court mandated 6%. Logically,

⁸ SBG argues that this is a “rate dispute” (or “rate issue”) over the “rate amount” that requires a “rate decision” (or “rate determination”) from the Commission. See SBG Response at 5-7, 11.

⁹ *Equitable Gas Co. v. Wade*, 812 A.2d 715 (Pa. Super. 2002) (“*Equitable Gas*”).

¹⁰ For municipal liens that are not subject to Section 7106(b) of the lien law an interest of 10% is permitted. 53 P.S. § 7143. Because, the Supreme Court determined, Section 7106(b) transforms liens filed by cities of the first class from a security interest into a final judgment, the otherwise applicable 10% does not apply.

therefore, post-judgment interest — which is statutory and applies only after there is a judgment — is not within the Commission’s jurisdiction over rates.

It is important to recall that, even using a different legal theory, the Commission’s original order in this case made it clear that the proper rate of interest post judgment was not within the jurisdiction of the Commission.¹¹ Certainly, now that the Supreme Court has completely divested the PUC of any jurisdiction over arrearages set forth in filed liens the Commission cannot have more authority to review the reasonableness of filed lien amounts than it had prior to that determination.

SBG tries to get around this obvious legal infirmity by declaring that a portion of the “judgments” — created by the filing of liens with regard to SBG’s arrearages — are “overcharges”¹² which the Commission can examine. But the PUC has no more jurisdiction to determine whether these judgments contain “overcharges” than it would for any other matter outside its jurisdiction. If the Commission does not have jurisdiction to revise a judgment due to an alleged “overcharge” it is equally without jurisdiction to calculate the amount of an alleged overcharge. Since even SBG admits that the PUC cannot order PGW to pay “refunds,” any “overcharge” determination would amount to an advisory opinion which the PUC does not have authority to issue.¹³

¹¹ See *SBG et al. v. Philadelphia Gas Works*, Docket Nos. C-2012-2304183, C-2012-2304184, Opinion and Order at 70-71, 91 (Order entered December 8, 2016) (*See* Order at 91 (refusing to implicitly decide an applicable rate of interest on the amounts represented by the liens, since that is “a question over which [the PUC] lacks jurisdiction.”); *Id.* at 70 (explaining that a “conclusion regarding the permissible rate of interest on a municipal lien is a determination that is also beyond the scope of jurisdictional authority of this agency.”); and *Id.* at 71 (“The Commission lacks jurisdiction to determine what, if any, is the appropriate rate of interest that PGW may charge for past due amounts that the Company has placed in the municipal lien category according to the [Lien Law].”).

¹² SBG Answer at 4 (“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.”)

¹³ *PUC v. County of Allegheny*, 203 A.2d 544 (Pa. 1964) (Once the PUC lost subject matter jurisdiction, there was no longer a justiciable case or controversy between the parties before the PUC). *See also Mazur v. Washington*

In addition, PGW would note that when the Court of Common Pleas bifurcates a civil action involving public utility service, the court refers the liability portion of the complaint to the Commission. The damage question remains pending before the Court of Common Pleas. There is no valid precedent for having the Commission calculate the amount of damages that the Court of Common Pleas would subsequently “award.”

Critically, the requested calculations *do not* require the Commission’s expertise. Courts are familiar with the calculation of damages and with post-judgment interest. For example, the court in *Equitable Gas* did not seek the Commission’s expertise to determine the amount that the utility had charged Wade for the service provided by that utility.¹⁴ Nor did that court need direction from the Commission regarding post-judgment interest. In addition, a court of common pleas will be familiar with and well-suited to determine the amounts owed for services provided by a municipality as part of their duties under the Lien Law.¹⁵ The need for judicial abstention under the doctrine of primary jurisdiction is not present here. Judicial abstention is not required to protect the integrity of regulatory scheme, since *PGW II* held that post-judgment interest is not a rate under the Commission’s jurisdiction. Moreover, the question to be resolved: the appropriate amount of post-judgment interest that legally could be applied to a judgment, is plainly outside the Commission’s area of expertise.

County Redevelopment Authority, 954 A.2d 50 (Pa. Cmwlth. 2008), appeal denied, 967 A.2d 961 (Pa. 2009) (A declaratory judgment must not be employed for the rendition of an advisory opinion).

¹⁴ See *Equitable Gas*, 812 A.2d at 716 (judgment entered following a non-jury verdict).

¹⁵ To contest amount of a docketed municipal lien, property owner may file and serve notice upon claimant municipality to issue scire facias. 52 P.S. § 7184. See, e.g., *PGW II*, 249 A.3d at 971, noting that a writ of *scire facias* can be used to fix the amount due on a lien of record; In scire facias proceeding under municipal claims statute, property owner may raise all defenses that owner has to municipal claim in “affidavit of defense.” 53 P.S. § 7184; *Shapiro v. Center Tp., Butler County*, 632 A.2d 994 (Pa. Cmwlth. 1993), *appeal denied*, 642 A.2d 488 (Pa 1994).

Nor do the requested calculations raise a “billing dispute” or a “service” issue within the Commission’s jurisdiction as SBG implies. SBG Response at 3, fn1. In the context of this proceeding, PGW views the term “billing dispute” as meaning incorrect charges on a regulated utility bill. Stated otherwise, a billing dispute raises issues and claims involving the amount owed by the customer, such as: (a) the quantity of service actually provided to a customer and (b) the amount correspondingly owned by the customer for the service rendered. Here, the requested calculations relate to amounts due (and paid) on docketed municipal liens (which have become judgments). The requested calculations no longer relate to amounts due on the utility bills, since those amounts are merged into the judgment. SBG readily admits it is not challenging the underlying arrearage (debt) subject to the docketed municipal lien. SBG Response at 4. There are no remaining challenges to billing practices or “service” issues, since the Commission has already directed that amounts subject to docketed municipal liens cannot be shown on a Commission-jurisdictional bill.

2. The fact that SBG is not challenging the amount of the arrearage and is only challenging the appropriate amount of post-judgment interest does not convey jurisdiction on the PUC.

SBG has also argued that the PUC continues to have jurisdiction because they describe their claims as only relating to the interest “PGW charged against arrearages *after those outstanding balances were docketed as liens.*” SBG Response at 4 (emphasis added). Such interest accrued **after** a lien is docketed is often called “post-judgment interest.”¹⁶ Importantly, SBG concedes¹⁷ that they are not challenging the underlying bills or arrearages (the debt) subject to the

¹⁶ See *PGW II* and *Equitable Gas*.

¹⁷ “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.**” SBG Response at 4. (emphasis added).

docketed municipal liens. SBG Response at 4. That concession eliminates any issues or claims regarding the underlying arrearage (amounts owed) by the customers for the service provided by PGW, but it also misstates PGW's lien filing process as well as how PGW applied "interest" (i.e., Late Payment Charges) to arrearages.

Prior to *PGW II*, when SBG failed to pay their gas bill, PGW would apply Late Payment Charges to the arrearage. At some point, PGW would then file a lien to secure the entire amount outstanding, i.e., both the arrearage *and* the Late Payment Charge. Once the lien was filed, PGW would, on the customer bill for gas service, continue to apply Late Payment Charges to the underlying arrearage (which had been liened). Since the arrearage had been transformed into a judgment by the perfection process (according to *PGW II*), all the subsequently applied Late Payment Charges were applied to a judgment and, as such, were post judgment interest. Thus, the fact that SBG is "only" contesting the amount of interest applied to arrearage subject to a judgment and not to the arrearage itself does nothing to confer jurisdiction on the Commission. SBG's claim of right arises under *PGW II* because, essentially, the wrong interest rate was applied to a judgment; a judgment over which the Commission has no jurisdiction. SBG's claims to the contrary must be rejected. Refunds of an incorrect amount of post-judgment interest must be obtained in the Courts.

3. *PGW II* impacts the Commission's jurisdiction, since a docketed lien is a judgment and final resolution between the parties.

Finally, SBG made the argument that if PGW were correct about the consequences of *PGW II*'s holding that a docketed municipal lien is a judgment PGW could remove an arrearage from the PUC's jurisdiction simply by filing a lien for the amount of the arrearage. SBG Response at

6.¹⁸ While SBG overstates the degree to which the PUC loses jurisdiction when a lien is filed and becomes a judgement, those concerns cannot warrant departure from the precedential holdings of *PGW II* and *Gasparro*.

Assuming, *arguendo*, that the holdings of *PGW II* and *Gasparro* are afforded respect and deference, it is true that the Commission will lose jurisdiction over “billing disputes” once a judgment is obtained by docketing a lien. However, the Commission is empowered to review the merits of a utility bill **before** there is a docketed municipal lien (judgment). But the Supreme Court’s decision clearly means that the ability to review and/or to modify the *amount* owed (as reflected in the judgment) ends when there is a docketed municipal lien. That docketed municipal lien is a final resolution and must, according to *PGW II*, be “treated in the same manner as a judgment that has been rendered following an adjudicative process.”

As discussed further below, the existence of a judgment triggers the doctrine of merger. This means that any issues or claims involving the amount owed by the customer, such as (a) the quantity of service actually provided to a customer and (b) the amount correspondingly owed by the customer for the service rendered are merged into the judgment. Once merged, the underlying claims of incorrect charges on a utility bill no longer exist and cannot provide a basis for the Commission’s subject matter jurisdiction. The Commonwealth Court’s *Gasparro* Opinion emphasizes that point. In *Gasparro*, the Commonwealth Court concluded that the Commission correctly refused to review the merits of Gasparro’s utility bills – since Gasparro raised his billing disputes **after** the entry of a judgment. Here, all of the disputed payments were made *after* an

¹⁸ SBG frames this argument as not “rewarding” PGW for its “bad behavior.” This is utterly false. As the presiding officer is aware, PGW at all times applied its Tariff and engaged in the lien process in good faith and in a manner consistent with its view of what the law allowed. That law only changed when the Supreme Court issued its decision in 2021. To suggest that PGW somehow knowingly misapplied its Late Payment Charges is inappropriate and inconsistent with the Commonwealth Court’s decision to give only limited retroactivity to the Supreme Court’s decision.

unpaid gas bill and Late Payment Charges were transformed into a judgment by filing a lien for those amounts. Indeed, many of the payments that SBG did make were made in response to those filed liens. So, the Commission’s review of billing disputes, **after** a judgment has been obtained, would be an impermissible collateral attack upon the judgment under the Lien Law. The Commission should therefore treat judgments created by the docketing of a municipal lien as being conclusive unless the judgments (docketed municipal liens) are vacated or modified consistent with the Lien Law.

This does not mean, however, that the Commission could not review the underlying facts or policies of PGW that gave rise to the arrearage, which was made into a judgment. So, for example, if a customer failed to remit his or her bill and PGW liened that amount, the issue of whether the judgment (lien) amount was correct will now be an issue for the courts. However, the customer could nonetheless bring a complaint, and the Commission could investigate, whether the arrearage was the result of the misapplication of any PUC rules or policies, or the result of inadequate service (such as a faulty meter) and direct changes on a going forward basis.

PGW acknowledges that the Commission’s Formal Complaint form (March 2022)¹⁹ states that the Commission “**can address a complaint about ... incorrect billing even if that amount is subject to a lien.**” That statement will have to be modified to acknowledge that, once a lien is filed, the Commission only has jurisdiction to address “billing issues” from an adequate service standpoint and only on a going forward basis. But the Commission may no longer reduce or change any amount subject to a judgment. This is the clear holding of *PGW II*.

Arguments that the PUC’s past pronouncements remain good law because the Supreme Court did not “overrule” said pronouncements are incorrect. The Supreme Court granted

¹⁹ <https://www.puc.pa.gov/documents/utility-files/261/Formal%20Complaint%20Form-March2022.doc>.

discretionary review (an appeal) on a limited issue.²⁰ That issue, as written and as decided, relates to the interpretation of Section 7106 of the Lien Law.²¹ The Supreme Court acknowledged, in footnote 2, that the Commission continued to assert jurisdiction over billing issues.²² But, the Supreme Court expressly stated, in footnote 4, that the Commission’s assertion of continued jurisdiction was “beyond the scope of the issue upon which this Court granted discretionary review and [was] not encompassed in our resolution of [that] appeal.”²³

This does not mean that the customer is left without a means of challenging the amount of a filed lien because of a “billing issue” or other dispute about the propriety of the amount liened. In *PGW II*, the Pennsylvania Supreme Court explained that there are statutory procedures by which property owners can challenge a judgment after its entry under the Lien Law.²⁴ Specifically, the Supreme Court stated:²⁵

With respect to liens filed under Section 7106(b),²⁶ pursuant to Section 7184,²⁷ a property owner may challenge a recorded municipal lien, including the amount thereof, by serving the municipality with a notice to issue a writ of *scire facias*, thereby forcing a hearing on the lien and allowing the property owner to assert defenses thereto. 53 P.S. § 7184; *N. Coventry Twp. v. Tripodi*, 64 A.3d 1128, 1133 (Pa. Commw. 2013). Alternatively, a property owner may pay the amount of the lien into court and then obtain a hearing on the validity of the amount of the lien. 53 P.S. § 7182.²⁸

²⁰ *PGW II*, 249 A.3d at 967.

²¹ *Id.*; *PGW v. PUC (Petition)*, 236 A.3d 1046, 2020 Pa. LEXIS 3466, 2020 WL 3425299 (Pa. 2020) (Per Curiam Order granting SBG’s Petition for Allowance of Appeal).

²² *PGW II*, 249 A.3d at 966, fn. 2. Footnote 2 cites *Equitable Gas* and *Gasparro*, which support the end of the Commission’s jurisdiction upon entry of a judgment.

²³ *PGW II*, 249 A.3d at 969, fn. 4.

²⁴ *PGW II*, 249 A.3d at 971.

²⁵ *PGW II*, 249 A.3d at 971 (footnotes added).

²⁶ 53 Pa.C.S. § 7106.

²⁷ 53 Pa.C.S. § 7184.

²⁸ 53 Pa.C.S. § 7182.

B. The doctrine of merger mandates that, once a lien is filed and a judgment is created, any claims regarding the unpaid debt merges into the judgment/lien.

In Pennsylvania, the existence of a judgment triggers the doctrine of merger. Under the doctrine of merger, a claim or demand which is the subject of litigation is merged into the judgment, and the judgment then evidences a new obligation.²⁹ “The claim or demand in its original form is at an end and cannot again be the subject of litigation.”³⁰ In its merged form as a judgment it may be enforced by judicial process, and it can be pleaded only in its merged form.³¹

PGW submits that the existence of any judgment on unpaid balances ends the Public Utility Commission’s jurisdiction, in accordance with *PGW II* and *Equitable Gas*. In those cases, issues and claims related to amounts owed by the customer (rates) were merged into judgments (under the doctrine of merger). Once merged, the underlying issues and claims no longer provided a separate, independent basis for the Commission’s subject matter jurisdiction because nothing in the Public Utility Code empowers the Commission to review the merits of a judgment,³² whether obtained under the Lien Law (by docketing a municipal lien) or by using an adjudicative process.

SBG does not dispute that – as a result of the filing of a lien – a judgment exists against SBG in favor of PGW. However, SBG mischaracterizes PGW’s position and claims that the existence of a judgment does not bar SBG’s continued litigation before the Commission over the amounts owed by SBG under the unpaid balances, since PGW “holds the judgment.” SBG Response at 7-8. But SBG’s position ignores the holding of *PGW II*. That case held for the first

²⁹ *Lance v. Mann*, 360 Pa. 26, 60 A.2d 35 (1948).

³⁰ 28 PENNSYLVANIA LEGAL ENCYCLOPEDIA, JUDGMENT § 228, *citing*, *Miller v. Rohrer*, 127 Pa. 384, 18 A. 2 (1889); *Brenner, Trucks & Co. v. Moyer*, 98 Pa. 274 (1881); *Bell v. Allegheny County*, 184 Pa. 296, 39 A. 227 (1898); and *Nelson v. Nelson*, 117 Pa. 278, 11 A. 61 (1887).

³¹ *See, e.g., Wilmington Tr. v. Unknown Heirs*, 219 A.3d 1173 (Pa. Super. 2019); *EMC Mortg., LLC v. Biddle*, 114 A.3d 1057 (Pa. Super. 2015).

³² *Gasparro*, 814 A.2d at 1285.

time that docketed municipal liens are “the equivalent of a final resolution of a claim between parties”³³ and are “treated in the same manner as a judgment that has been rendered following an adjudicative process.”³⁴ This means the docketed municipal lien – which has to be treated as a judgment – prevents both PGW and SBG from continuing to litigate before the Commission over the amounts owed under the unpaid balances (which were incorporated into a lien), since those claims are merged into the judgment.³⁵

PGW would note that SBG’s position, if accepted, would require PGW to defend itself against a claim for which a final judgment has already been entered both before the Commission and in the Courts (under the Lien Law or otherwise). This is simply not correct. As judgments have been entered against SBG under the Lien Law, SBG should pursue relief from the judgments in civil court under the Lien Law³⁶ (or otherwise) – not from the Commission under the Public Utility Code.

³³ *PGW II*, 249 A.3d 963, 970 (Pa. 2021) (“By expressly stating that the docketed lien is to be treated like a judgment with regard to the underlying claim, the General Assembly has expressed its intent that docketing the lien have the same effect as a final determination of a dispute between parties without further proceedings that would generally be required to effectuate the result.”).

³⁴ *PGW II*, 249 A.3d at 974.

³⁵ *See* Restatement (Second) of Judgments § 17 (Effects of Former Adjudication—General Rules), § 18 (Judgment for Plaintiff—The General Rule of Merger) and § 19 (Judgment for Defendant—The General Rule of Bar).

³⁶ The Lien Law provides the statutory procedures for resolving disputes arising thereunder. In *PGW II*, the Pennsylvania Supreme Court explained that there are statutory procedures by which property owners can challenge a judgment after its entry under the Lien Law. *PGW II*, 249 A.3d at 971. Other causes of action (and/or remedies) may be available in actions before the courts.

C. To the extent the Commission finds it has subject matter jurisdiction over judgments and post-judgment relief (which it does not), *PGW III* forecloses certain claims and issues by some of the Complainants for specific time periods.

SBG argues that the 2012 Complaints of Elrea Garden, Fairmount Manor, Marshall Square,³⁷ Marchwood, Oak Lane, and Fern Rock³⁸ were “pending” at the time *PGW II* was decided. That is wrong. For a matter to be pending, there must be action required by the Commission. No other action was required by the Commission for these Complainants for the 2012 Complaints, since the September 2018 Order and October 2018 Order disposed of all claims of all parties.³⁹ The Commonwealth Court’s (unpublished) Orders relating to those Orders became final, since no appeal was filed therefrom within thirty days.⁴⁰ In addition, the 2012 Complaints were not part of *PGW III*, which only remanded the 2012 Complaints of Colonial Garden and Simon Garden to the Commission.

Precedent does not allow a single appeal in a “lead case” to operate as an undisclosed appeal from other cases.⁴¹ The general rule is that when orders are entered on more than one docket, separate notices of appeal must be filed for each case (docket).⁴² SBG filed a single appeal (to the Pennsylvania Supreme Court) from one docket (1291 CD 2018) at the Commonwealth

³⁷ *Elrea Garden/Fairmount Manor/Marshall Square v. PGW*, C-2012-2304167, C-2012-2304215, C-2012-2304303.

³⁸ *Marchwood/Oak Lane/Fern Rock*, C-2012-2308454, C-2012-2308462, C-2012-2308465.

³⁹ See Pa.R.A.P. No. 341.

⁴⁰ 42 Pa.C.S. § 5505. See *Miller Elec. Co. v. DeWeese*, 172, 907 A.2d 1051, 1054 (Pa. 2006) (“A trial court’s jurisdiction generally extends for thirty days after the entry of a final order”); *Upper Moreland Twp. Sch. Dist. v. Crisafi*, 86 A.3d 950, 954 (Pa. Cmwlth. 2014) (quoting *Miller Elec. Co.* and denying the petition to set aside under Lien Law where trial court lost jurisdiction two months earlier).

⁴¹ Pa.R.A.P. No. 341, Note (Where ... one or more orders resolves issues arising on more than one docket or relating to more than one judgment, separate notices of appeal must be filed. *Malanchuk v. Tsimura*, 137 A.3d 1283, 1288 (Pa. 2016) (“[C]omplete consolidation (or merger or fusion of actions) does not occur absent a complete identity of parties and claims; separate actions lacking such overlap retain their separate identities and require distinct judgments’”)); 20 West’s Pa. Prac., Appellate Practice § 341:3.1.02.

⁴² See, e.g., *Com. v. Walker*, 185 A.3d 969, 979 (Pa. 2018).

Court.⁴³ That single appeal did not list the other dockets (1404 and 1405 CD 2018).⁴⁴ Nor could it, since the cases were not consolidated before the Commonwealth Court⁴⁵ or the Commission.

PGW would note that accepting SBG’s argument that the 2012 Complaints were pending (a) could mean that the entirety of the prior multi-year proceedings were in vain; and (b) would be the opposite of the common goal of securing a just, speedy, and inexpensive determination for said 2012 Complaints.

D. This action should be dismissed because it is duplicative of the 2021 Civil Action filed by Complainants in the Philadelphia Court of Common Pleas currently pending disposition.

1. Uncertainty exists over the court’s use of the requested calculations by the Commission.

SBG is raising the same issues regarding the calculation of the compensation (refund) owed to (e.g., the damages incurred by) SBG before both the Commission and the Courts. SBG argues that the Commission’s decision here will impact, inform, and guide the Common Pleas Court. SBG Response at 2, 11. That is only the case because the Court is facing the same issues. Recognizing that the Commission cannot award damages,⁴⁶ SBG is attempting to litigate the extent of its damages before the Commission so that the Commission’s calculations could be the basis for an award of damages by the Court. It is unclear, however, the extent to which the requested calculations — if litigated before the Commission — could serve the evidentiary basis for Court’s award of damages. It cannot be disputed that the Commission has no jurisdiction over claims predicated on breach of contract, whether express (Count I of the 2021 Civil Action) or implied

⁴³ *PGW II*; Supreme Court of Pennsylvania, No. 21 EAL 2020, Order Granting Petition for Allowance of Appeal entered June 23, 2020; 236 A.3d 1046, 2020 Pa. LEXIS 3466, 2020 WL 3425299.

⁴⁴ *See* Pennsylvania Supreme Court, Docket Sheets for Docket No. 21 EAL 2020 and 14 EAP 2020.

⁴⁵ Commonwealth Court Docket No. 1291 CD 2018, Order entered January 2, 2019 (“... the application to consolidate is denied. The cases shall proceed seriatim”).

⁴⁶ SBG Response at 5-7.

(Count II of the 2021 Civil Action).⁴⁷ Therefore, it is clear that the Commission cannot validly calculate the potential damages regarding Counts I (Breach of Contract) and II (Unjust Enrichment) of the Civil Action. It follows that the requested calculations will be rejected by the Court and proceeding further would be a waste of the parties' and the Commission's resources, since (a) question of damages lies with the Court, as noted above (even under the doctrine of primary jurisdiction); (b) the requested calculations were not requested, nor needed, by the Court; and, (c) the Commission exceeded its jurisdiction in making the calculations in the first instance.

2. The Judicial Code's statute of limitations does not change the Commission's statutory jurisdiction.

The timing of any civil action was always within the control of SBG. SBG reads the Commission's December 2016 Order as explaining that only the Court of Common Pleas has direct authority to issue an order with respect to the docketed municipal liens. SBG Response at 5. Based on their own reading, SBG was informed in December 2016 of the need to seek damages in the courts regarding docketed municipal liens. They did not file an action in the Courts until April 29, 2021.

SBG expressed concern over the statute of limitations for the 2021 Civil Action. That concern does not change the limits of the Commission's subject matter jurisdiction. Nor does it change the statute of limitations for the 2021 Civil Action. Counts I (Breach of Contract) and II (Unjust Enrichment) of the 2021 Civil Action are subject to a four-year statute of limitations.⁴⁸ But, those Counts purport to be based on conduct covering "almost two decades." *See* Third

⁴⁷ The Commission does not have the authority to entertain an action for a breach of contract or to award damages or any other form of relief in an action for a breach of contract. *Terminato v. Pa. National Insurance Co.*, 645 A.2d 1287 (Pa. 1994); *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977); *Ostrov v. I.F.T., Inc.*, 586 A.2d 409 (Pa. Super. 1991); *Poorbaugh v. Pennsylvania Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlt. 1995).

⁴⁸ *See* 42 Pa.C.S. § 5525.

Amended Complaint at p. 2, 6; see also Third Amended Complaint at ¶¶ 16, 19, 92, 111, 116. PGW raised the statute of limitations as a defense in its New Matter. At this point, the Court has not decided issues related to the applicable statute of limitations for the 2021 Civil Action. In any event, it would not be appropriate to direct the Complainants to pursue their claims before the Commission in parallel to their civil action because the statute of limitations may be different.

3. The Commission’s three-year statute of limitations would apply to challenges to post-judgment interest on docketed municipal liens, if the Commission had subject matter jurisdiction.

SBG argues that if the Commission determines that it has jurisdiction over post-judgment interest on the docketed municipal liens which have become judgments pursuant to *PGW II*, then the Commission should apply the four-year limitations period under 66 Pa. C.S. § 1312 (“Section 1312”), as opposed to the three-year limitations period under 66 Pa. C.S. § 3314(a). *See* SBG Response at 11-12.

That argument contradicts *PGW II*. Section 1312 is limited to situations where a party seeks a refund for a payment that exceeds the amount a utility is due under a tariff.⁴⁹ Refunds are available pursuant to Section 1312 only if the Commission determines that **rates** received by the utility (a) were unlawful; (b) were unjust or unreasonable; or (c) were in excess of the rates contained in the utility’s applicable tariff filing.⁵⁰ Under *PGW II*, any **post-judgment interest on the judgments (because they are docketed municipal liens)** are not “rates” subject to the PGW’s Tariff and Commission’s jurisdiction. That is of course the entire basis for the ruling – that once a lien is filed PGW cannot charge its tariffed rates.

⁴⁹ *Pettko v. Pa. Am. Water Co.*, 39 A.3d 473, 484-485 (Pa. Cmwlth. 2012) (Pettko and his fellow PAWC customers would be entitled to a refund for any payments they made above the charges the PUC may determine PAWC was entitled to bill under the tariff.).

⁵⁰ *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 464 A.2d 546, 564 (Pa. Cmwlth. 1983).

SBG's argument also contradicts the prior proceedings. In the prior proceedings, the Commission applied the three-year limitations period to the docketed municipal liens. SBG did not challenge the application of three-year limitations period in exceptions, in an appeal, or in a cross-appeal. To the extent that SBG did not challenge the Commission's prior application of the three-year limitations period on appeal of the prior orders, those arguments have been explicitly foreclosed and the Commission's application of the three-year limitations period is the final rule of the case.

III. CONCLUSION

PGW respectfully requests that (a) this Motion be granted so as to dismiss or deny any and all issues and claims in the above-captioned complaints regarding payments on judgments (docketed municipal liens) and post-judgment relief; and (b) any other relief in favor of PGW that is deemed to be reasonable and appropriate also be granted.

Respectfully submitted,



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