

1033-C-11

**Office of the People's Counsel
District of Columbia**



1133 15th Street, NW • Suite 500 • Washington, DC 20005-2710
202.727.3071 • FAX 202.727.1014 • TTY/TDD 202.727.2876

Elizabeth A. Noël
People's Counsel

June 1, 2005

Dr. Christine D. Brooks
Commission Secretary
Public Service Commission
of the District of Columbia
1333 H Street, N.W.
Second Floor West
Washington, D.C. 20005

05 JUN - 1 AM 11:05
PUBLIC CLERK
PUBLIC COMMISSION

Re: **Formal Case No. 1033, In The Matter of The Petition of the Office of the People's Counsel Requesting A Declaratory Ruling on the Application of the Washington Gas Light Company's Budget Payment Plan**

Dear Dr. Brooks:

Enclosed for filing in the above-referenced proceeding is an original and fifteen (15) copies of the "Reply Brief of the Office of the People's Counsel Regarding the Washington Gas Light Company's Budget Payment Plan."

If there are any questions regarding this matter, please contact me at (202) 727-3071.

Sincerely,

Jennifer L. Emma
Assistant People's Counsel

Enclosure

COMMISSION RECEIVED

05 JUN -1 AM 11:06

FILED CLERK

BEFORE
THE DISTRICT OF COLUMBIA
PUBLIC SERVICE COMMISSION

In the Matter of §
§
The Petition of the Office of the People's §
Counsel Requesting A §
Declaratory Ruling § Formal Case No. 1033
Regarding the Application of §
The Washington Gas Light §
Company's Budget Payment Plan §

REPLY BRIEF
OF THE OFFICE OF THE PEOPLE'S COUNSEL REGARDING THE WASHINGTON
GAS LIGHT COMPANY'S BUDGET PAYMENT PLAN

Pursuant to the Public Service Commission's ("Commission" or "PSC") Order No. 13562¹ in the above-titled docket, the Office of the People's Counsel for the District of Columbia ("OPC" or "Office") respectfully files its Reply Brief regarding the application of General Service Tariff Section 4, Payments, subpart (f) governing Washington Gas Light Company's ("WG" or "Company") Budget Payment Plan in light of §§ 305.10 and 305.11 of the Consumer Rights and Responsibilities, also known as the Utility Consumer Bill of Rights.² Succinctly stated, OPC requests the Commission reject the Company's May 12, 2005 Brief because it is not responsive to Commission Order No. 13562. OPC further urges the Commission to give full force and effect to its existing regulations and practices, requiring WG comply with existing regulations and not alter its tariffs without notice to and authority from the Commission.

Commission Order No. 13652 directed the Company to provide, "further briefing on the [se]

¹Formal Case No. 1033, *In the Matter of the Petition of the Office of the People's Counsel Requesting a Declaratory Ruling on the Application of the Washington Gas Light Company's Budget Payment Plan*, Order No. 13562 dated April 22, 2005.

²15 DCMR §§ 305.10 and 305.11 (2002).

issues...cite any relevant case law or statutory authority to support the Company's position."³ The Company's May 12, 2005 Brief fails to respond to the directives of Commission Order No. 13652. Rather than provide any case law or relevant statutory authority to support its contention that its tariff can directly oppose existing regulation and the Company is empowered to alter its tariffs without Commission directive or approval, the Company merely makes unsupported, unfounded bald assertions. Only OPC has provided case law and relevant statutory authority to support the premise that the Company engaged in the unauthorized usurpation of Commission regulation and Commission practice.

The Company's claims are not supported by the law and would not withstand judicial scrutiny. Thus, the Commission should reject the bald assertions of the Company and require the Company to file new tariff provisions governing the Budget Payment Plan that adhere to Commission regulations and orders. The Company cannot be allowed to usurp Commission regulation and practice in such a nefarious and devious manner as to alter the language of its tariff with no notice to the Commission.

I. INTRODUCTION

On November 8, 2004, the Commission issued a Press Release warning D.C. consumers that natural gas prices could rise by 25% this winter heating season. PSC's Press Release further explained that the increase was a direct result of higher wholesale prices in the natural gas markets, in addition to a colder than normal winter prediction. The Press Release makes clear that the increase in the wholesale natural gas markets is not regulated by the Commission, thus outside of

³Order No. 13562 at p. 2.

the control of the Commission.

In an attempt to address the impact of a 25% increase in natural gas bills the Press Release and a subsequent “Frequently Asked Questions” document suggest that D.C. consumers can enroll in WG’s Budget Payment Plan,

*[enabling them to pay a **fixed amount each month** by spreading costs over a 12-month period, thereby reducing gas bills during high-usage winter months. Thus, a household can pay less than the actual monthly cost during the winter months and make up the difference during the remainder of the year. [Emphasis added.]*⁴

The Commission issued “Frequently Asked Questions” document stated, “The Company will assess your usage and payment information towards the end of the 12 month billing period to determine if an adjustment to your monthly payment is required.”⁵[Emphasis added].

On November 12, 2004, OPC filed its Petition requesting a Declaratory Ruling by the Commission to reconcile the Company’s application of the tariff governing the Budget Payment Plan with the Commission’s and OPC’s understanding of the program and its purpose.⁶ On November 22, 2004, Washington Gas filed its Answer, opposing OPC’s request.⁷

On January 14, 2005, the Commission issued Order No. 13487, requiring by February 15,

⁴Public Service Commission of the District of Columbia, “D.C. Regulators Cite Possibility of Higher Winter Heating Bills,” Press Release dated November 8, 2004, p. 2
www.dcpsc.org/pdf_files/hottopics/RisingGasPrices_PressRelease.pdf

⁵Public Service Commission of the District of Columbia, “Rising Commodity Gas Charges (Possible Questions and Answers), dated November 8, 2004, p. 3.
www.dcpsc.org/pdf_files/hottopics/RisingGasPrices_FAQ.pdf

⁶Formal Case No. 1033, *In the Matter of the Petition of the Office of the People’s Counsel Requesting a Declaratory Ruling on the Application of the Washington Gas Light Company’s Budget Payment Plan*, OPC Petition Requesting a Declaratory Ruling, filed November 12, 2004.

⁷Formal Case No. 1033, *In the Matter of the Petition of the Office of the People’s Counsel Requesting a Declaratory Ruling on the Application of the Washington Gas Light Company’s Budget Payment Plan*, WG Answer to OPC Petition Requesting a Declaratory Ruling, filed November 22, 2004 (“WG Answer”).

2005, Washington Gas to address inconsistencies with the Company's tariff to the Commission's Rules and Regulations adopted in 1979, and inviting reply comments from interested parties by March 2, 2005.

On April 22, 2005, the Commission issued Order No. 13562, requiring Washington Gas to file a brief within 20 days to address the issues and cite case law and relevant statutory authority to support its claims.⁸

II. WG Improperly Altered the Tariff Provision Governing the Budget Payment Plan in Contravention of Commission Rules and Regulations.

WG admits in its February 15, 2005 Reply that it altered the tariff for the Budget Payment Plan in 1999.⁹ The Company incorrectly asserts that the 1999 alteration was in direct response to Commission Order No. 11344, in GT 97-1. In GT 97-1, the Company requested permission to amend its tariffs for three reasons:

1. Restructure Rate Schedule No. 1, "Residential Service," by replacing the existing "commodity charge" with separate "distribution" and "purchased gas" charges;
2. Modify the Purchased Gas Adjustment/Purchased Gas Charge to permit use of forecasted or market-based prices to estimate natural gas costs;
3. State, as a separate line item on customer bills, the gross

⁸Formal Case No. 1033, *In the Matter of the Petition of the Office of the People's Counsel Requesting a Declaratory Ruling on the Application of the Washington Gas Light Company's Budget Payment Plan*, Order No. 13562 dated April 22, 2005.

⁹WG Answer at 3.

receipts tax applicable to tariffed charges for miscellaneous services performed by the Company.¹⁰

The Company did not request permission to amend its tariff with regard to the application of the Budget Payment Plan. Rather, in the course of examining the use of market-based prices, the Commission concluded greater public awareness of the already existing Budget Payment Plan was needed,

Moreover, there is already a mechanism in place that allows customers to spread the effect of higher winter bills over the warmer months: WG offers a “budget plan” that estimates a customer’s total annual gas bill, then bills the customer’s average monthly payment each month. The budget plan is available to any customer who requests level payment billing. To increase public awareness of the level billing option, WG is directed to include the budget plan in the Company’s tariff.[Emphasis added.]¹¹

The Commission’s Order did not examine or discuss amending the already existing Budget Payment Plan, but only emphasized the need for greater public awareness. In response to the Commission’s directive, WG abrogated existing Commission regulations and altered the tenor of the Budget Payment Plan when it filed its Compliance Filing per Order No. 11344 in GT 97-1. Under the guise of a Compliance Filing in GT 97-1, WG actually amended its budget plan tariff without ever seeking permission to do so.

In 1979, the Commission noticed and adopted 15 D.C.M.R. Sections 305.10 and 305.11, which established the rules and regulations governing level payment billing programs;

¹⁰GT 97-1, *In the Matter of the Application of Washington Gas Light Company, District of Columbia Division, for Authority to Amend its Tariff*, Order. No. 11344 dated April 2, 1999, pp. 1-2.

¹¹Id. at 9.

- 305.10 A gas or electric utility may, at the election of a customer, bill a customer in accordance with a level payment billing program. The utility shall inform the customer of this option and explain how the monthly payments are calculated. Prior to implementation of the Plan, the utility shall provide the customer with the following information in writing:
- (a) An acknowledgment that the customer shall be on the Plan effective the next billing period; and
 - (b) The customer's projected use on an annual basis and an explanation of how the equal monthly payment has been calculated.

305.11 The utility shall perform a periodic analysis of the customer's plan and notify the customer if actual usage varies significantly from that upon which the plan was based and give the customer an opportunity for revision of the plan.

The Rules and Regulations specifically require notice and an opportunity for customer revision of the Plan. There is no provision that allows the Company to revise the Plan during the 12-months without customer approval. Despite these well-established regulations,¹² WG purposefully submitted altered tariff provisions deleting customer opportunity for revisions to the Plan, thus unilaterally changing the Plan to the detriment of consumers. Notably, the Company did not advise the PSC that its "amendment," which it presented as a Compliance Filing, was in direct contradiction with the PSC's existing regulations.

III. Commission Regulations Supercede Company Tariff Provisions.

To justify its deceptive alteration of the tariff and attempt to respond to Commission Order

¹²Sections 300.1 and 300.2 specifically state the regulations apply to residential service provided by the electric, gas, and telephone utilities subject to regulation by the Commission, for the purpose of uniform standards for among other services, billing.

No. 13487 requesting WG, “submit a written explanation explaining why its tariff language deviates from the applicable provision in our rules, including a citation to the Commission order that approved the new language,” WG baldly claims that Company tariffs trump Commission regulations.¹³ The Company further makes such a claim without any legal citation or evidence to support its argument in response to Commission Order No. 13562.¹⁴ The Company continues with its bald assertions despite the Commission’s request for “case law and relevant statutory authority” because the law supports the exact opposite of WG’s claim that regulation trumps tariff provisions.

Black’s Law Dictionary, Sixth Edition defines **regulations** as,

Such are issued by various governmental departments to carry out the intent of the law. Agencies issue regulations **to guide the activity of those regulated by the agency** and of their own employees and to ensure uniform application of the law.[Emphasis added.]

While **tariff** is defined as,

A public document setting forth services of common carrier being offered, rates and charges **with respect to services and governing rules, regulations and practices** relating to those services.[Emphasis added.]

OPC submits regulations guide the activity of those regulated by the agency and tariffs respect the governing rules and regulations of an agency. This is not the proposition of administrative law touted by the Company.

¹³Formal Case No. 1033, *In the Matter of the Petition of the Office of the People’s Counsel Requesting a Declaratory Ruling on the Application of the Washington Gas Light Company’s Budget Payment Plan*, WG Reply to Order No. 13487, filed February 15, 2005 (“WG Reply”) p. 5.

¹⁴Formal Case No. 1033, *In the Matter of the Petition of the Office of the People’s Counsel Requesting a Declaratory Ruling on the Application of the Washington Gas Light Company’s Budget Payment Plan*, WG Brief to Order No. 13562, filed May 12, 2005 (“WG Brief”) p. 7.

In 1939, the Supreme Court of Washington discussed the nature of tariffs in relation to regulations when discussing an agency that was a corporation that filed tariffs on behalf of common carriers that used state highways in *Pacific Inland Tariff Bureau v. Schaaf*, 1 Wn.2d 210 (Wash., 1939). The Washington Court stated, “[S]uch tariffs may be issued and distributed under rules and regulations to be adopted by the department.” The Kansas Court of Appeals reiterates the authority of governmental agency regulations, such as the PSC’s rules and regulations, in *Sunflower Pipeline Co. v. Kansas Corp. Com.*, 3 Kan. App. 2d 683 (Kan. Ct. App., 1979). The Court stated,

The KCC has the authority to prescribe reasonable rules and regulations regarding the printing and filing of all schedules, tariffs and classifications of all rates, tolls, fares, charges and all rules and regulations of such public utilities.

The Supreme Court of Iowa again emphasized a utility commission’s authority over utility tariffs and regulations in *Teleconnect Co. v. U.S. West Communications*, 508 N.W.2d 644 (Iowa, 1993). It is this authority that the PSC clearly exercises over WG and its tariff provisions. Despite the authority of the Commission and its governing rules and regulations, the Company thwarted that authority with its 1999 Budget Payment Plan alteration.

The misapplication of Commission rules and regulations cannot be superceded by the filing of a tariff not approved by the Commission. It is only with the direct authority and permission of the Commission that the Company can amend its tariff provisions. WG knows this, that is why it sought permission to amend its tariff in GT 97-1. The Company did not, however, seek permission to amend the Budget Payment Plan, but did so anyway.

Subsequently, consumers have suffered from WG’s misapplication of Commission

regulations sections 305.10 and 305.11. Under Commission Order No. 13487, since WG did not have permission from the Commission to alter the budget plan tariff, WG must “correct its tariff pages.”¹⁵

IV. The Company Cannot Alter its Tariff Under the Guise of a Compliance Filing Pursuant to Section 296 of Title 15 of the D.C.M.R.

Section 296 of Title 15 of the D.C.M.R. requires public utilities to submit compliance filings affecting existing rates. Commission Order No. 13562 held that in order for Section 296 to be applicable, “WGL must first show that its budget payment plan constitutes a rate.”¹⁶ The Company fails to demonstrate or even attempt to demonstrate that the Budget Payment Plan is a rate. Rather, the WG Brief provides a strained interpretation of Section 296 applying to “changing rates.”¹⁷ The Budget Payment Plan is not an existing rate or a changing rate. Consumers on the Budget Payment Plan do not receive natural gas at alternate rates, but rather the same residential rates with an alternative payment option.

However, the Company does not even address this issue in its Brief. The Company merely jumps to the conclusion that the Budget Payment Plan is a “changing rate.” Even this leap does not salvage the Company’s contention that Section 296 allowed it to alter an existing tariff without Commission approval. Despite the Company’s claims that one could interpret existing rates to mean “changing rates,” WG does not cite any case law or relevant statutory authority to support such a

¹⁵Order No. 13487, p. 3.

¹⁶Order No. 13562, p. 2.

¹⁷WG Brief, p. 8.

reading. Prevalent case law on statutory interpretation does not support WG's strained reading of Section 296. In *Tibbs v. United States*, the court held,

the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917) (citations omitted); accord, e.g., *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d J 751, 753 (D.C. 1983) (en banc); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 46.01, 46.04 (4th ed. rev. 1984).

OPC submits that WG's erroneous interpretation blatantly ignores the plain language of the rule and invents a "Company convenience" standard whereby the WG attempts to justify altering the Budget Payment Plan tariff without Commission approval. As such, WG's inventive interpretation should be rejected. The Office submits that based upon the plain meaning or language of Section 296 of Title 15 of the D.C.M.R. compliance filings apply only to existing rates.

Further, the Commission's own holding in Order No. 11902 in Formal Case No. 945, Phase II supports the proper use of compliance filings for previously approved existing rates. The Commission held that the Potomac Electric Power Company's ("PEPCO") filing of Schedule 1 fees under its supplier tariff did not qualify as a compliance filing since the fees were not approved by the Commission in any of its earlier Orders.¹⁸ The Commission's holding in Order No. 11902, a 2001 docket, undermines the Company's bald assertion that the Commission never specifically approved compliance filings prior to this Formal Case because clearly it ruled upon PEPCO's Electricity

¹⁸Formal Case No. 945, Phase II, *In the Matter of the Investigation Into Electric Services, Market Competition and Regulatory Practice*, Order No. 11902 dated February 1, 2001, p. 6.

Supplier Tariff .

Although the Budget Payment Plan is not a rate, the requirement of Commission approval prior to altering existing tariffs is supported by the Commission's holding in Order No. 11902. Just as the Schedule 1 fees were not approved prior to the compliance filing, WG's altered language regarding the Budget Payment Plan was not approved prior to its filing. WG must adhere to Commission regulations, practices and orders. Moreover, the Commission has paramount authority to oversee utility services and conditions of payment for such services, such as the Budget Payment Plan payment option.¹⁹ The Company should not be allowed to act as a rogue public utility, thumbing its nose at the Commission's authority.

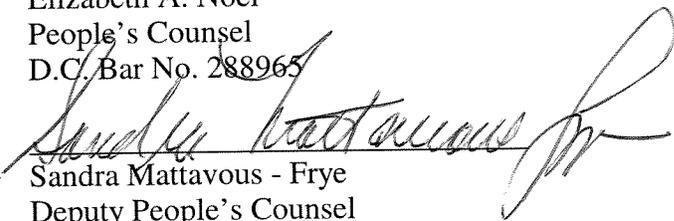
¹⁹D.C. Official Code § 34-908.

V. CONCLUSION

For the reasons set forth above, OPC requests that the Commission declare the proper operational application of the WG Budget Payment Plan, as consistent with Commission rules and regulations. The proper operational application of the Budget Payment Plan limits WG to one consistent monthly payment amount for the entire Budget Payment Plan year, with no increases during the Budget Payment Plan year, without the consent of consumers.

Respectfully submitted,

Elizabeth A. Noël
People's Counsel
D.C. Bar No. 288965



Sandra Mattavous - Frye
Deputy People's Counsel
D.C. Bar No. 375833

Barbara L. Burton
Assistant People's Counsel
D.C. Bar No. 430524

Jennifer L. Emma
Assistant People's Counsel
D.C. Bar No. 481853

Brian O. Edmonds
Assistant People's Counsel
D.C. Bar No. 475869

OFFICE OF THE PEOPLE'S COUNSEL
OF THE DISTRICT OF COLUMBIA
1133 Fifteenth Street, N.W., Suite 500
Washington, D.C. 20005-2710
(202) 727-3071

Dated: June 1, 2005

CERTIFICATE OF SERVICE

Formal Case No. 1033, In The Matter of The Petition of the Office of the People's Counsel Requesting A Declaratory Ruling Regarding the Application of the Washington Gas Light Company's Budget Payment Plan

I hereby certify that on this 1st day of June, 2005, a copy of the "Reply Brief of the Office of the People's Counsel Regarding the Washington Gas Light Company's Budget Payment Plan" was served on the following parties of record by hand delivery or first class mail, postage prepaid:

General Counsel
Public Service Commission of the
District of Columbia
1333 H Street, N.W.
7th Floor East Tower
Washington, D.C. 20005

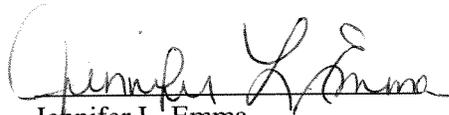
Bernice K. McIntyre, Esq.
Senior Counsel
Washington Gas Light Company
1100 H Street, N.W., 12th Floor
Washington, D.C. 20080

Linda Jordan, Director
Office of Consumer Services
Public Service Commission of the
District of Columbia
1333 H Street, N.W., 9th Floor West
Washington, D.C. 20005

Frann G. Francis, Esq.
Apartment and Office Building Association of
Metropolitan Washington
1050 17th Street, NW, Suite 300
Washington, D.C. 20036

Chuck Clinton, Director
D.C. Energy Office
2000 14th Street, NW, 3rd Floor
Washington, D.C. 20009

Telemac N. Chryssikos, Esq.
Attorney
Washington Gas Energy Services
1100 H Street, N.W., 12th Floor
Washington, D.C. 20080


Jennifer L. Emma
Assistant People's Counsel