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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF WASHINGTON GAS LIGHT COMPANY'S APPLICATION FOR AUTHORITY TO WITHDRAW WATERGATE TARIFF	**GT-95-3**

PETITION FOR LEAVE TO INTERVENE BY WATERGATE EAST, INC.; WATERGATE HOLDINGS I AND II, LLC; WATERGATE SOUTH, INC.; WATERGATE OFFICE FEE OWNER, LLC AND WATERGATE HOTEL LLC

Pursuant to 15 DCMR § 106.1, Watergate East, Inc. ("Watergate East"); Watergate Holdings I and II, LLC ("Watergate Holdings"); Watergate South, Inc. ("Watergate South"); Watergate Office Fee Owner, LLC ("Watergate Office"); and Watergate Hotel LLC ("Watergate Hotel") (collectively, "Intervenors"), by their undersigned counsel, seek leave to intervene in support of Washington Gas Light Company's ("Washington Gas" or "WGL") "Application for Authority to Withdraw P.S.C. of D.C. No. 3, pages 28-31, Steam and Chilled Water Rates for Service to the Watergate Project" (the "Application"). In support thereof, Intervenors state as follows:

1. The Application relates to the historic Watergate Complex, which was built between 1963 and 1971. Originally contemplated as five buildings, the Complex as constructed consists of six buildings: three residential buildings (Watergate East, Watergate West, and Watergate South), two office buildings (located at 600 New Hampshire Avenue and 2600 Virginia Avenue NW), and the hotel.

2. Intervenors own five of the six buildings. Watergate East owns the residential property at 2500 Virginia Avenue NW. Watergate Holdings owns the office property at 600 New Hampshire Avenue NW. Watergate South owns the residential property at 700 New Hampshire

Avenue NW. Watergate Office owns the office property at 2600 Virginia Avenue NW. Watergate Hotel owns the hotel at 2650 Virginia Avenue NW.

3. The other building is owned by Watergate West, Inc. ("Watergate West") (residential building at 2700 Virginia Avenue NW)[1] (together with the Intervenors, the "Watergate Entities").

4. By its Application, Washington Gas seeks to terminate a 1964 Agreement of Services (described below), by which it was to provide a unique gas-powered heating-and-cooling system for the Watergate Complex by way of a central plant. The Watergate Entities are parties to that Agreement, and Intervenors therefore have a "substantial interest" in these proceedings. 15 DCMR § 106.1.

5. Intervenors support Washington Gas's application because, as explained below, the Agreement's provisions are outdated and either impossible to perform or commercially impracticable.

BACKGROUND

A. Agreement for Services.

6. In 1964, in connection with the design and construction of the Complex, a "master agreement" was entered into between Washington Gas and Watergate Improvements, Inc., the developer of the project. At that time, the project was to consist of five buildings, a parking garage, and a commercial area.

7. Under the Agreement for Services dated as of July 29, 1964 (the "Agreement"), Washington Gas agreed to supply steam and chilled water from which the properties in the Complex would obtain space and domestic hot water heating and cooling for their buildings.

[1] Watergate West moved to intervene in these proceedings on February 1, 2017. (Dkt. No. 18.)

Washington Gas agreed to construct, own (or lease), and operate the central plant on property leased from the Complex. From that central plant, "delivery and return facilities" for steam and for chilled water would be built to circulate the utilities throughout the Complex, with each building having its own separate delivery point through which the steam or chilled water would pass, circulate through the respective building, and be returned at the delivery point as condensate (in the case of steam) and warm water (in the case of the chilled water) to Washington Gas's return facilities. (A copy of the Agreement and amendments are appended to the Application as Attachment B pgs. 22-58.)

8. In return for these services, the buildings agreed to pay two amounts to Washington Gas: a "demand charge" and a "commodity charge" for steam and chilled water delivered to each building. The demand charge for each building was based on the contract demands set forth in the Agreement which were, in turn, based on (a) the planned (or developer-estimated) size of each building, and (b) the anticipated usage for each building (the "Contract Demands"). The Contract Demands set the minimum bill for steam and chilled water. The commodity charge was the charge per each million Btu of steam or chilled water metered at each building.

9. The rates for these charges were estimated in Exhibit C of the Agreement, but subsequently determined by tariffs approved by the District of Columbia Public Service Commission, subject to periodic adjustment to reflect Washington Gas's costs to operate the plant at the Complex as well as for taxes.

10. The initial term of the Agreement runs until February 1, 2020. Regarding termination, the Agreement states that the term

> thereafter shall be automatically renewed for further terms of twenty-five (25) years each, subject to termination however by either party at the end of the initial

> term or of any of the subsequent 25-year terms, by giving three (3) years' prior written notice directed to the end of the initial term or of any of the 25-year terms . . . . Notwithstanding the above, the Purchaser's right to terminate hereunder shall be exercisable only if all the then-owners of the Buildings comprising the Watergate project, join in such termination.

(Dkt. No. 17, WGL Pet. Attach. B, Ex. 1 § 3, at p. 24) (the "Termination Clause").

11. Accordingly, provided that the notice provisions are satisfied, Washington Gas can opt to terminate the Agreement *unilaterally* after the initial term "with the approval of any regulatory authority having jurisdiction." (*Id.*) The buildings,[2] by contrast, must agree unanimously to terminate the Agreement. This effectively means that, absent action by Washington Gas, any one building can force all of the other buildings to continue with the Agreement in perpetuity simply by refusing to join in on any desired termination.

B. <u>The Complex as Built</u>.

12. The Complex was built and the various buildings were opened during the late 1960s and early 1970s. However, between the time of the Agreement (1964) and the opening of the buildings, several significant changes occurred. The most significant change was that the design was modified from five buildings to six buildings. Building 1, a residential building, was divided into two buildings: the office building at 600 New Hampshire and the residential building at Watergate South.

13. These design changes were <u>not</u> tracked fully in the agreements with Washington Gas. For example, where the Agreement set forth a square footage number for what was then the proposed residential building later known as Watergate West, the as-built Watergate West may be as much as 40% larger in square feet than the Agreement for Services shows. As result of this, Watergate West has enjoyed a windfall under the Agreement for more than 40 years.

[2] The Agreement uses the term "Buildings," to refer to the then-five buildings in the Complex. *Id.* § 1, at p. 23. A sixth building was later created by dividing one building into two. *See* ¶ 12 *infra*. The term "buildings" as used herein refers to all six buildings.

C. Changes in Operations.

14. The current operations of the central plant at the Watergate Complex would be unrecognizable to the people who entered into the original Agreement. Today:

a. The plant uses electricity, not gas, for chilled-water production and most of its utility needs;

b. The plant does not use steam to propel pumps and compressors (as had been originally designed);

c. The central plant equipment is no longer owned by Washington Gas;

d. The buildings themselves, acting through the Watergate Complex Council, pay suppliers directly for natural gas, oil, water, sewer, electricity, the plant operator, rent, capital improvements, operation and maintenance, and repair services;

e. The buildings voluntarily have entered into separate allocation contracts to allocate the costs of equipment and other costs;

f. Washington Gas has outsourced operation of the plant itself to a third-party central-plant operator; and

g. The 600 New Hampshire building installed a glycol-based chilled-water facility in 1993 that reduced and subsequently eliminated a need to be connected to the chilled-water-delivery-and-return facilities and to rely on the chillers in the Central Plant.

15. As a result of these and other changes, the Contract Demand provisions in the Agreement do not correlate to the actual performance of the plant or the usage and needs of the buildings. For example, where the contract includes a demand charge—essentially guaranteeing a revenue stream to Washington Gas to recover its fixed costs (debt, returns, personnel, plant staffing, and their related costs, depreciation, etc.) regardless of the actual consumption by the

buildings—now virtually all of the costs of the plant are shared by the buildings and are not routed through Washington Gas.[3] The demand charge therefore now operates as a "tax" on buildings regardless of their consumption and results in differentiated costs per Btu for each building.

16. Watergate South and the 600 New Hampshire building have also been affected adversely by the contracts. Recalling that these two properties were originally planned as one—and were considered one building under the Agreement for Services originally—they have been treated differently under the contracts. When they were constructed and opened in 1971, they were assigned higher Contract Demands than the existing buildings in the Complex. That unfair disparity has persisted in the 40-plus years since.

17. Moreover, the disconnect between the operations of the plant and the contractual formulas reduces incentives to improve each individual building's operating efficiencies. The disconnect also impedes the ability to reach agreement between the buildings on improvements to the complex and its operations. The buildings cannot take advantage of new technologies and the steep reduction in the relative cost of different energy sources because they have been locked into a contractual arrangement that depends upon a fixed demand charge and uneven allocation of relative costs.

[3] Washington Gas currently invoices the buildings for natural gas delivery on the WGL distribution system and related ROW fees, its in-house personnel that oversee the Central Plant and their benefits, and the guaranteed profit of $4000/month, through a nominal demand and commodity charge. This adds up less than $500,000 per year compared to the $3 to $4 million that the buildings have paid annually in shared operating, fuel, utilities, and capital costs. The Contract Demands are key components in allocating costs between the buildings. Terminating the Agreement will eliminate the disparity in Contract Demands based on estimated building sizes and usage that do not represent the "as built" Complex.

CURRENT PROCEEDINGS

18. Given the commercial impracticability of the Agreement, coupled with its inherent inequities, in December 2016, Watergate South filed a complaint for declaratory and injunctive relief in the Superior Court for the District of Columbia (Case No. 2016 CA 009321 B), seeking to eliminate the unanimity provision in the Termination Clause and end the Agreement (the "Superior Court litigation"). (A copy of that complaint is appended to the Application as Attachment B, pp. 1-21.) Subsequently, on January 19, 2017, Watergate South, together with Watergate Holdings, filed for a temporary restraining order in the Superior Court litigation, seeking to toll the February 1, 2017 deadline by which the Watergate Entities would have had to unanimously invoke the Termination Clause. Watergate West opposed the TRO.

19. Shortly thereafter, on January 23, 2017, Washington Gas timely invoked the Termination Clause, notifying the owners of the Watergate Complex that the Agreement of Services "shall terminate on February 1, 2020, without renewal, subject to the requisite regulatory authority approval" (the "WGL Termination Notice"). (Dkt. No. 17, WGL Appl. Attach. A.)

20. In light of the WGL Termination Notice, Judge William Jackson denied the TRO on January 26, 2017, effectively staying the Superior Court litigation pending the outcome of any proceedings before the Public Service Commission.

21. On January 30, 2017, Washington Gas filed the Application in the above-captioned proceeding, seeking to terminate the Watergate Tariff as no longer in the public interest. (Dkt. No. 17.)

22. On February 1, 2017, Watergate West petitioned to intervene, arguing that it has been "severely prejudiced by [Washington Gas's] last-minute move" to terminate the Agreement

three years from now on February 1, 2020. (Dkt. No. 18, Pet. to Intervene at 3.) Watergate West, which enjoys an unjust windfall under the Agreement, argues loosely that it has "an interest in continuing to have supplied energy services from Washington Gas" such that the Agreement ought to be continued for another 25 years. (*Id.*) But Watergate West has not claimed that it would be unable to find an alternative energy source or would otherwise be irreparably harmed if the Agreement were terminated.

For all the foregoing reasons, Watergate East, Watergate Holdings, Watergate South, Watergate Office and Watergate Hotel seek leave to intervene in the above-captioned proceedings in support of the Application filed by Washington Gas.

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Dated: March 27, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of March, 2017, I served a true and correct copy of the foregoing via email on the following counsel of record:

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I further certify that a courtesy paper copy of the foregoing filing was sent to the Commission within 24 hours of the submission of the electronic filing.

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