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June 25, 2020

**Via Electronic Filing**

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

Re: PA Pennsylvania Public Utility Commission et al., v. Philadelphia Gas Works –  
Docket No. R-2020-3017206;

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' (PGW") Motion in Limine Regarding Certain Portions of Testimony Submitted by TURN, et al., regarding Universal Service Programs in the above referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*Lauren M. Burge*

Lauren M. Burge

LMB/lww

cc: Hon. Marta Guhl w/enc. (via email only)  
Hon. Darlene Heep w/enc. (via email only)  
Cert. of Service w/enc. (via email only)  
Graciela Christlieb w/enc. (via email only)

## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Motion in Limine (TURN) 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: June 25, 2020

*/s/ Lauren M. Burge*

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Lauren M. Burge, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION	:	
	:	Docket No. R-2020-3017206
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	

**NOTICE TO PLEAD**

TO: Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (“TURN et al.”)

You are hereby notified to file a response to the enclosed Motion in Limine in the form and manner as directed by the Administrative Law Judges or a judgment may be entered against you.

Respectfully submitted,

*/s/ Lauren M. Burge*

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*Counsel for Philadelphia Gas Works*

Dated: June 25, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION	:	
	:	Docket No. R-2020-3017206
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	

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**MOTION IN LIMINE OF PHILADELPHIA GAS WORKS REGARDING  
CERTAIN PORTIONS OF TESTIMONY SUBMITTED BY  
TURN ET AL. REGARDING UNIVERSAL SERVICE PROGRAMS**

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**TO ADMINISTRATIVE LAW JUDGES HEEP AND GUHL:**

Pursuant to 52 Pa. Code § 5.103 of the regulations of the Pennsylvania Public Utility Commission (“Commission”), Philadelphia Gas Works (“PGW” or “Company”) files this Motion in Limine to bar from consideration in this proceeding certain portions of the pre-served Direct Testimony submitted on behalf of the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (“TURN et al.”). Specifically, PGW moves to have removed from this proceeding the following portions of TURN et al. Statement No. 1 (the “Contested Portions”):

- Page 8, line 5 through and including page 8, line 9;
- Page 8, line 17 through and including page 9, line 3;
- Page 12, line 1 through and including page 12, line 4;
- Page 19, line 17 through and including page 20, line 5;
- Page 25, line 9 through and including page 25, line 12;
- Page 25, line 13 through and including page 26, line 2;
- Page 26, line 22 through and including page 27, line 9;

- Page 29, line 5 through and including page 29, line 17;
- Page 32, line 3 through and including page 32, line 4;
- Page 35, line 3 through and including page 36, line 7;
- Page 35, line 5 through and including page 39, line 8;
- Page 43, line 12 through and including page 43, line 14;
- Page 44, line 7 through and including page 45, line 18;
- Page 54, line 20 through and including page 61, line 6;
- Page 64, line 11 through and including page 64, line 20;
- Page 66, line 5 through and including page 68, line 19;
- Page 69, line 15 through and including page 70, line 2; and
- Page 72, line 7 through and including page 72, line 23.

In the Contested Portions, TURN et al. witness Harry Geller provided testimony proposing specific changes to PGW’s universal service programs and related policies, including various aspects of its Customer Responsibility Program (“CRP”). Mr. Geller also provides testimony about the requirements established in the Philadelphia Home Rule Charter and Title VI of the Civil Rights Act of 1964 (“Title VI”) and makes recommendations related to access for Limited English Proficient (“LEP”) households for PGW based on those authorities. The Contested Portions of TURN et al. Statement No. 1 should not be admitted to the record or otherwise considered in this proceeding because:

- (1) The testimony proposing changes to PGW’s universal service programs and related policies is not appropriately raised in this base rate case, because the Commission has clearly directed that these issues must be addressed in a Universal Service and Energy Conservation Plan (“USECP”) proceeding;

- (2) These universal service issues were recently decided in a USECP proceeding that occurred as a result of the Commission's amendment to its Policy Statement on Customer Assistance Programs ("CAP Policy Statement"), which directed that these issues be addressed in a utility's USECP;<sup>1</sup>
- (3) PGW recently concluded a proceeding to amend its USECP as directed by the Commission; TURN et al. participated in that proceeding and as a result is precluded from raising the issues here;
- (4) Additionally, a recent Order approving PGW's amended USECP is under appeal and Commission is without legal authority to alter or amend its Order, and thus the Commission cannot make changes in PGW's universal service programs until these appeals are resolved, even if it were inclined to do so here. Directing now that testimony demanding changes in PGW's USECP should not be considered in this proceeding is important to avoid the needless expenditure of time and resources by PGW, the Administrative Law Judges ("ALJs") and the Commission in responding and ruling on these extensive demands for changes in programs that cannot legally be changed here; and
- (5) The Commission does not have jurisdiction over the language access issues raised in the Contested Portions.

For these reasons and as further discussed below, the Contested Portions of TURN et al. Statement No. 1 should be barred from admission to this proceeding and disregarded in the disposition of this proceeding.

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<sup>1</sup> The Commission's Policy Statement on Customer Assistance Programs ("CAP") was amended effective March 21, 2020, pursuant to an order and annex entered November 5, 2019. See *Final Policy Statement and Order*, Docket No. M-2019-3012599 (order and annex entered on November 5, 2019) (subsequently clarified on February 6, 2020, pursuant to a Petition for Reconsideration/Clarification).

## **I. BACKGROUND**

### **A. PGW's 2020 Base Rate Proceeding**

1. On February 28, 2020, PGW filed Supplement No. 128 to PGW's Gas Service Tariff – PA. P.U.C. No. 2 (Supplement No. 128) and Supplement No. 85 to PGW's Supplier Tariff – Pa. P.U.C. No. 1 (Supplement No. 85) to become effective April 28, 2020, seeking a general rate increase calculated to produce \$70 million (10.5%) in additional annual revenues. At that time, PGW also filed a Petition for Waiver seeking waiver of the application of the statutory definition of the fully projected future test year ("FPFTY") so as to permit PGW to use a FPFTY beginning on September 1, 2020 (its fiscal year) in this proceeding.

2. By Order entered April 16, 2020 ("Suspension Order"), the Commission instituted an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase. Pursuant to Section 1308(d) of the Public Utility Code, 66 Pa. C.S. § 1308(d), Supplement No. 128 and Supplement No. 85 were suspended by operation of law until November 28, 2020, unless permitted by Commission Order to become effective at an earlier date.<sup>2</sup> The Suspension Order did not consider the Petition for Waiver. In addition, the Commission ordered that the investigation include consideration of the lawfulness, justness and reasonableness of PGW's existing rates, rules and regulations. The matter was assigned to the Office of Administrative Law Judge for the prompt scheduling of hearings culminating in the issuance of a Recommended Decision.

3. A telephonic prehearing conference was held on May 5, 2020, which resulted in the issuance of a Corrected Prehearing Order dated May 15, 2020.

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<sup>2</sup> PGW later agreed to voluntarily extend the end of the suspension period to December 4, 2020. *See Corrected Prehearing Order* at 2 (May 15, 2020).



4. Pursuant to the May 15, 2020 Corrected Prehearing Order, other parties' direct testimony was required to be served by June 15, 2020. Rebuttal testimony will be due on July 13, 2020 and surrebuttal testimony will be due on July 24, 2020. Hearings are scheduled for July 28-30, 2020.

5. On June 15, 2020, TURN et al. served TURN et al. Statement No. 1 which is the direct testimony of Harry Geller. In the Contested Portions of the TURN et al. testimony, Mr. Geller proposes changes to various PGW "policies" related to its CRP, including enrollment processes, income verification requirements, CRP Average Bill calculations, and access to LIURP services, as well as changes related to access for LEP households in light of requirements established in the Philadelphia Home Rule Charter and Title VI. For the reasons set forth above and more fully explained hereinafter, the Contested Portions of TURN et al. Statement No. 1 should not be permitted to be addressed in this proceeding.

**B. PGW's Recent Amended USECP Proceeding**

6. On October 3, 2019, the Commission issued an Order establishing a new USECP Filing Schedule and extending the duration of existing USECPs.<sup>3</sup> At that time, PGW was directed to provide updated enrollment and budget projections for the extended terms of its existing USECP based on the new filing schedule. The Commission's Policy Statement on Customer Assistance Programs ("CAP Policy Statement") was amended effective March 21, 2020, pursuant to an order and annex entered November 5, 2019.<sup>4</sup> The November 2019 Order

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<sup>3</sup> *Universal Service and Energy Conservation Plan Filing Schedule*, Docket No. M-2019-3012601, October 3, 2019 Order available at <http://www.puc.pa.gov/pdocs/1638860.docx>.

<sup>4</sup> *See Final Policy Statement and Order*, Docket No. M-2019-3012599 (order and annex entered on November 5, 2019) (subsequently clarified on February 6, 2020, pursuant to a Petition for Reconsideration/Clarification).

strongly urged natural gas distribution companies and electric distribution companies to incorporate the CAP policy amendments into their USECPs.

7. In response to the October 2019 USECP Order and the November 2019 amendment to the CAP Policy Statement, PGW filed an addendum to its USECP and later requested expedited review of the filing.<sup>5</sup> On March 2, 2020, TURN et al. (in conjunction with other low-income advocates) submitted a Letter in Lieu of an Answer in support of PGW's Petition. By Order issued March 26, 2020, the Commission approved the changes specified in PGW's 2020 Addendum and directed PGW to implement certain changes to its CRP.

8. On April 10, 2020, the Office of Consumer Advocate ("OCA") and Office of Small Business Advocate ("OSBA") each filed a Petition for Reconsideration of the March 26, 2020 Order. These Petitions for Reconsideration were not granted. Subsequently, on May 4, 2020, OCA and OSBA each filed a Petition for Review with Commonwealth Court.<sup>6</sup> These appeals are currently pending.

## **II. APPLICABLE LEGAL STANDARDS**

9. The Administrative Law Judges are authorized to rule on this Motion pursuant to Section 331(d) of the Public Utility Code and Section 5.103(d) of the Commission's regulations. 66 Pa. C.S. § 331(d) and 52 Pa. Code § 5.103(d).

10. Section 5.403(a)(1) of the Commission's regulations authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence. 52 Pa. Code § 5.403(a)(1). The presiding officer also has authority to confine the evidence to the

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<sup>5</sup> 2020 Addendum to PGW's Existing 2017 USECP and Petition to Expedite Review (Docket Nos. M-2016-2542415 & P-2020-3018867).

<sup>6</sup> *Evans v. Pa. P.U.C.*, 421 C.D. 2020; *McCloskey v. Pa. P.U.C.*, 422 C.D. 2020.

issues in the proceeding and to impose necessary limitations upon the admission of evidence. 52 Pa. Code §§ 5.403 and 5.483.

11. The Commission’s regulations at 52 Pa. Code § 5.401(a) provides that evidence is admissible, subject to objections on other grounds, if it is “relevant and material.”

12. Section 332(b) of the Public Utility Code requires that, as a matter of policy, evidence that is irrelevant or immaterial must be excluded. 66 Pa. C.S. § 332(b).

13. Upon the filing of a motions in limine, ALJs have employed the authority granted by Section 5.403 to exclude evidence that is beyond the proper scope of Commission proceedings and focus the evidence on the matters properly at issue.<sup>7</sup> In *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*,<sup>8</sup> the ALJ struck pre-served written testimony regarding proposals to undertake a cost-benefit analysis and other studies, noting that other Commission proceedings were available for addressing those issues and that challenges could also be effectively pursued in complaint proceedings. The ALJ expressly refused to permit the litigation of issues that are presently pending before the Commission in another proceeding.<sup>9</sup>

### III. ARGUMENT

#### A. TURN et al.’s Proposed Changes to Universal Service Programs and Policies

14. The Contested Portions of Mr. Geller’s direct testimony proposing changes to PGW’s universal service programs and related policies and procedures are not relevant to this base rate proceeding. This testimony relates to various PGW CRP “policies,” including

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<sup>7</sup> Section 5.403(b) of the Commission’s regulations requires presiding officers to “actively employ these powers to direct and focus the proceedings consistent with due process.” 52 Pa. Code § 5.403(b).

<sup>8</sup> Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015).

<sup>9</sup> See also *Pa. Public Utility Commission, et al. v. Pennsylvania American Water Co.*, Docket No. R-00932670 et al, 1994 Pa. PUC LEXIS 120 at \*158 (Final Order entered July 26, 1994) (adopting the ALJ’s conclusion that the issues raised by OCA were outside the scope of the rate case and would be better addressed in a statewide rulemaking proceeding); *Re Gas Cost Rate No. 5*, 57 Pa. P.U.C. 158 (1983) (“The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding.”).

enrollment processes, income verification requirements, CRP Average Bills, and access to LIURP services. The testimony proposing changes to PGW's CRP and related policies is not relevant to this proceeding. PGW has not proposed any changes to its CRP as part of this base rate case.

15. The Contested Portions of Mr. Geller's testimony propose changes to PGW's CRP and policies implementing the CRP that are already addressed in PGW's recently approved USECP. PGW's CRP enrollment processes are specifically addressed on pages 3 and 4 of the USECP.<sup>10</sup> Mr. Geller also recognized that the CRP Average Bill was implemented as part of PGW's previous USECP proceeding.<sup>11</sup> Other changes proposed by Mr. Geller would affect established PGW policies and procedures implementing the USECP, which the Commission and the Bureau of Consumer Services ("BCS") have reviewed and were aware of when approving PGW's Amended USECP in March of this year. Notably, PGW is not objecting to portions of TURN et al.'s testimony raising concerns about its universal service programs (even though the Commission just approved PGW's Amended USECP), but rather the Contested Portions only include Mr. Geller's specific recommendations to change PGW's existing USECP and related policies and procedures, which are not relevant to this base rate case as discussed herein.

16. Mr. Geller attempts to justify the recommendations in the Contested Portions as relevant to this base rate case because they relate to the quality of service and justness and reasonableness of rates charged to low-income customers. Despite these attempts to characterize the testimony, in actuality the Contested Portions relate to changes to CRP policies and basic universal service program design that have been approved in separate proceedings, specifically

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<sup>10</sup> PGW's Second Amended Universal Service and Energy Conservation Plan 2017-2022, (April 10, 2020), available at <http://www.puc.state.pa.us/pcdocs/1660096.pdf>.

<sup>11</sup> TURN Statement No. 1 at 31.

the proceeding approving PGW's USECP. Through Mr. Geller's testimony, TURN et al. is inappropriately attempting to re-litigate PGW's recently approved USECP. The appropriate proceeding for TURN et al. to raise any concerns with the USECP and CRP is in PGW's next USECP proceeding. Mr. Geller's testimony distracts from the other issues appropriately being considered in this rate case by raising irrelevant issues that are most appropriately addressed in a separate proceeding specifically focused on the USECP.

17. Importantly, issues related to PGW's customer assistance programs have recently been fully and comprehensively addressed in a separate USECP proceeding, and in the granting of a separate PGW Petition to implement specific policy changes as articulated by the Commission in its CAP Policy Statement, as discussed above.

18. Well-established rules of law do not permit the re-litigation of issues before the Commission. Besides the doctrines of res judicata<sup>12</sup> and collateral estoppel,<sup>13</sup> re-litigation may be barred by Section 316 of the Public Utility Code.<sup>14</sup> That Section of the Public Utility Code precludes a collateral attack upon a Commission order that has not been reversed upon appeal,<sup>15</sup> and is applicable here. Additionally, in this proceeding, the doctrines of res judicata and

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<sup>12</sup> Res Judicata, also known as claim preclusion, prevents re-litigation in subsequent proceedings. For res judicata to apply, four things must be identical between the old lawsuit and the new one: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the parties suing or sued. *See, e.g., Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa.Super. 225, 464 A.2d 1313, 1316-1317 (1983).

<sup>13</sup> The doctrine of collateral estoppel, also known as issue preclusion, applies to administrative proceedings and prevents litigation on the same claims or issues between the same parties. *See, e.g., Lehigh Valley Power Committee v. Pa. Public Utility Commission*, 563 A.2d 548, 555-556 (Pa.Cmwth. 1989) (*Lehigh Valley*). Collateral estoppel applies when: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom it is asserted has had a full and a fair opportunity to litigate the issue in question in a prior action. *See Safeguard Mutual Insurance Co. v. Williams*, 345 A.2d 664, 668 (Pa. 1975).

<sup>14</sup> 66 Pa. C.S. § 316 states, in part, that: "Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review."

<sup>15</sup> *See Jordan v. The United Telephone Company of Pennsylvania*, Initial Decision dated December 22, 1995, 1995 Pa. PUC LEXIS 158, 1995 WL 945172.

collateral estoppel prevent re-litigation of issues recently decided in PGW's Amended USECP. The same issues raised by TURN et al. in the Contested Portions were approved as part of the USECP proceeding. The Commission issued a final judgment approving PGW's plan, and both PGW and TURN participated in that proceeding. TURN et al. actively participated in the proceeding and filed a letter in lieu of an Answer in support of PGW's petition.<sup>16</sup> Thus, the requirements of the preclusion doctrines have been met here and TURN et al. is estopped from re-litigating issues covered by PGW's USECP as part of this base rate proceeding.

19. Further, the above-referenced PUC Order has been appealed to Commonwealth Court by both the Office of Consumer Advocate and the Office of Small Business Advocate. These appeals question the entirety of PGW's Universal Service and Energy Conservation Plan for 2017-2022, challenging the legality of the Commission's review process and the PUC Order approving PGW's amended USECP. In accordance with the Rules of Appellate Procedure,<sup>17</sup> once appeals have been taken, the Commission is without legal authority to alter or amend its Order, and thus, to make changes in PGW's universal service programs, until these appeals are resolved.

**B. TURN et al.'s Testimony on Language Access Issues**

20. Mr. Geller's testimony raises issues with PGW's service to LEP customers, including an argument that PGW must comply with Title VI of the Civil Rights Act of 1964<sup>18</sup> as an entity that receives federal grants, and due to recent changes in the Philadelphia Home Rule

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<sup>16</sup> Although a hearing was not held relating to PGW's Amended USECP, TURN *et al.*'s filing of a Letter in Lieu of an Answer constitutes a meaningful opportunity to be heard and meets the requirement for a full and fair opportunity to litigate the issue in question, given that the issue raises a question of law, policy or discretion, and not a question of fact. *Lehigh Valley* at 556.

<sup>17</sup> Pa. R.A.P. 1701.

<sup>18</sup> 46 U.S.C. § 2000d.

Charter requiring City agencies to meet these and other requirements. The Contested Portions on language access issues are outside the Commission's jurisdiction and cannot be considered as part of this proceeding.

21. As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code.<sup>19</sup> The Commission must act within, and cannot exceed, its jurisdiction.<sup>20</sup> Jurisdiction may not be conferred by the parties where none exists.<sup>21</sup> Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.<sup>22</sup>

22. The Commission does not have jurisdiction to enforce the Civil Rights Act of 1964 or Philadelphia Home Rule Charter. Certainly, the Commission does not have jurisdiction to evaluate PGW's compliance with the Philadelphia Home Rule Charter or Title VI. The Commission also lacks jurisdiction to order PGW to make a filing with the Philadelphia Office of Immigrant Affairs, ("OIA"), as Mr. Geller's testimony would require. Further, Title VI or other requirements included in the amendment to the Philadelphia Home Rule Charter do not apply to PGW since it is not a City agency, which TURN et al.'s testimony seems to recognize.<sup>23</sup> Since the Commission lacks jurisdiction over these issues, the Contested Portions regarding

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<sup>19</sup> See *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); see also *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008).

<sup>20</sup> *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

<sup>21</sup> *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

<sup>22</sup> *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

<sup>23</sup> TURN et al. Statement No. 1, Direct Testimony of Harry Geller, at 58, footnote 113 ("As an entity owned by the city of Philadelphia, PGW should strive to meet the standards applicable to city agencies.").

language access should be barred from admission to this proceeding and disregarded in the disposition of this proceeding.

#### **IV. CONCLUSION**

For the reasons set forth above, PGW respectfully requests that the ALJs issue an order determining that the Contested Portions of TURN et al. Statement No. 1 should not be admitted into the evidentiary record or considered in this proceeding because: (1) the testimony is not relevant to this base rate case, but rather raises issues that must be addressed in the context of a USECP proceeding; (2) these universal service issues were recently decided in a USECP proceeding that occurred as a result of the Commission's amendment to its CAP Policy Statement which directed that these issues be addressed in a utility's USECP; (3) PGW recently concluded a proceeding to amend its USECP as directed by the Commission and the TURN et al. is precluded from raising this issue here; (4) a recent Order approving PGW's amended USECP is under appeal and Commission is without legal authority to alter or amend its Order, and thus, to make changes in PGW's universal service programs, until these appeals are resolved; and (5) the Commission lacks jurisdiction over the language access issues.



Respectfully submitted,

*/s/ Lauren M. Burge*

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