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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 the Office of Consumer Advocate 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)  
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## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Motion in Limine (OCA) 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: Office of Consumer Advocate

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  
THE OFFICE OF CONSUMER ADVOCATE  
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 Office of Consumer Advocate (“OCA”). Specifically, PGW moves to have removed from this proceeding the following portions of OCA Statement No. 5 (the “Contested Portions”):

- Page 3, line 26 through and including page 3, line 27;
- Page 4, line 9 through and including page 4, line 22;
- Page 4, line 31 through and including page 5, line 18;
- Page 60, line 6 through and including page 60, line 21; and
- Page 65, line 16 through and including page 73, line 20.

In the Contested Portions, OCA witness Roger D. Colton provided testimony proposing specific changes to PGW’s universal service programs and related policies, including its

Customer Responsibility Program (“CRP”). Mr. Colton 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 OCA Statement No. 5 should not be admitted into the record or otherwise considered in this proceeding because:

- (1) The testimony is not relevant to this base rate case, but, as the Commission has clearly directed, 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; the OCA participated in that proceeding and as a result is precluded from raising this issue here;
- (4) A recent Order approving PGW’s amended USECP is under appeal and the 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 it were inclined to do so here. Directing now that testimony demanding changes in PGW’s USECP should not be considered in this

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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).

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 OCA Statement No. 5 should be barred from admission to this proceeding and disregarded in the disposition of this proceeding.

## **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.

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, OCA served OCA Statement No. 5 which is the direct testimony of Roger D. Colton. In the Contested Portions of the OCA testimony, Mr. Colton testifies regarding PGW's CRP, including existing enrollment and outreach practices, as well as changes related to access for LEP households in light of the 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 OCA Statement No. 5 should not be permitted to be addressed in this proceeding.

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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).



**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 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, OCA submitted an Answer, Notice of Intervention and Public Statement. 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, OCA and Office of Small Business Advocate (“OSBA”) each filed a Petition for Reconsideration of the March 26, 2020 Order. These Petitions for

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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/pcdocs/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).

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

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 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 motion 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

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

<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).

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. OCA's Proposed Changes to PGW's Existing USECP**

14. The Contested Portions of Mr. Colton's direct testimony proposing changes to PGW's universal service program and related policies and procedures are not relevant to this base rate proceeding. The Contested Portions relate to PGW's CRP, including its outreach and enrollment processes. The testimony related to PGW's CRP is not relevant to this proceeding. PGW has not proposed any changes to its CRP as part of this base rate case. Additionally, the Commission specifically ordered that outreach plans be reviewed as part of the USECP proceeding,<sup>10</sup> and a recently approved Consumer Education and Outreach Plan is already included as Appendix G to PGW's USECP.<sup>11</sup> Notably, PGW is not objecting to portions of Mr. Colton'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. Colton's specific recommendations to change PGW's existing USECP and/or related policies and procedures, which are not relevant to this base rate case as discussed herein.

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<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.").

<sup>10</sup> See *Final Policy Statement and Order*, Docket No. M-2019-3012599 at 77 (order and annex entered on November 5, 2019) (subsequently clarified on February 6, 2020, pursuant to a Petition for Reconsideration/Clarification), stating that "[u]tilities should develop enhanced Consumer Education and Outreach Plans with input from stakeholders and submit them as part of their addendums initially and their proposed USECP filings going forward."

<sup>11</sup> PGW's Second Amended Universal Service and Energy Conservation Plan 2017-2022, Appendix G (April 10, 2020), available at <http://www.puc.state.pa.us//pcdocs/1660096.pdf>.

15. Mr. Colton justifies including this testimony on the basis that it considers the “effect on universal service” under the Commission’s policy statement in Section 69.2703(a)(8) of the Commission’s regulations. 52 Pa. Code § 69.2703(a)(8). However, Section 69.2703(a)(8) specifically relates to considerations of determining just and reasonable rate levels as those rate levels will affect universal service programs. Mr. Colton is not examining the effect of rate levels, but rather is proposing program design changes to PGW’s CRP regarding outreach and enrollment practices. These aspects of PGW’s universal service program design have been approved in separate proceedings, specifically the proceeding approving PGW’s USECP. Through Mr. Colton’s testimony, the OCA is inappropriately attempting to re-litigate PGW’s approved USECP. The appropriate place for OCA to raise any concerns with the USECP and CRP is in PGW’s next USECP proceeding.

16. 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. In fact, the Amended USECP approved in the March 26, 2020 Order specifically included a Consumer Education and Outreach Plan as Appendix G to the plan, as required and approved by the Commission.<sup>12</sup>

17. Well-established rules of law do not permit the re-litigation of issues before the Commission. Besides the doctrines of res judicata<sup>13</sup> and collateral estoppel,<sup>14</sup> re-litigation may

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<sup>12</sup> PGW’s Second Amended Universal Service and Energy Conservation Plan 2017-2022, Appendix G (April 10, 2020), *available at* <http://www.puc.state.pa.us/pcdocs/1660096.pdf>.

<sup>13</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).

be barred by Section 316 of the Public Utility Code.<sup>15</sup> That Section of the Public Utility Code precludes a collateral attack upon a Commission Order that has not been reversed on appeal,<sup>16</sup> and is applicable here. Additionally, in this proceeding, the doctrines of res judicata and collateral estoppel prevent re-litigation of issues recently decided in PGW's Amended USECP. The same issues raised by OCA 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 OCA participated in that proceeding. OCA actively participated in the proceeding and filed an Answer to PGW's petition.<sup>17</sup> Thus, the requirements of the preclusion doctrines have been met here and OCA is estopped from re-litigating issues covered by PGW's USECP as part of this base rate proceeding.

18. Further, the above-referenced PUC Order has been appealed to Commonwealth Court by both the OCA 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

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<sup>14</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.Cmwlth. 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>15</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>16</sup> *See Jordan v. The United Telephone Company of Pennsylvania*, Initial Decision dated December 22, 1995, 1995 Pa. PUC LEXIS 158, 1995 WL 945172.

<sup>17</sup> Although a hearing was not held relating to PGW's Amended USECP, OCA's filing 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.

USECP. In accordance with the Rules of Appellate Procedure,<sup>18</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. OCA's Testimony on Language Access Issues**

19. Mr. Colton'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>19</sup> due to recent changes in the Philadelphia Home Rule 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.

20. 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>20</sup> The Commission must act within, and cannot exceed, its jurisdiction.<sup>21</sup> Jurisdiction may not be conferred by the parties where none exists.<sup>22</sup> Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.<sup>23</sup>

21. The Commission does not have jurisdiction to enforce the Civil Rights Act of 1964 or Philadelphia's Home Rule Charter. Certainly, the Commission does not have

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<sup>18</sup> Pa. R.A.P. 1701.

<sup>19</sup> 46 U.S.C. § 2000d.

<sup>20</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>21</sup> *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

<sup>22</sup> *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

<sup>23</sup> *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

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. Colton's testimony would require. Further, Title VI and other requirements included in the amendment to the Philadelphia Home Rule Charter do not apply to PGW since it is not a City agency. Since the Commission lacks jurisdiction over these issues, the Contested Portions regarding 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 OCA Statement No. 5 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 OCA 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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Dated: June 25, 2020