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July 2, 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

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Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Motion to Dismiss the Objections of the Sierra Club and Clean Air Counsel and Compel Responses to PGW's Interrogatories Set I, Nos. 6, 8-10, and 17-18 in the above referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*Kristine E. Marsilio*

Kristine E. Marsilio

KEM/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 to Dismiss the Objections of the Sierra Club and Clean Air Counsel and Compel Responses to PGW's Interrogatories Set I, Nos. 6, 8-10, and 17-18 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: July 2, 2020

*/s/ Kristine E. Marsilio*

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Kristine E. Marsilio, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**PHILADELPHIA GAS WORKS’  
MOTION TO DISMISS THE OBJECTIONS  
OF THE SIERRA CLUB AND CLEAN AIR COUNCIL AND COMPEL RESPONSES  
TO PHILADELPHIA GAS WORKS’ INTERROGATORIES,  
SET I, NOS. 6, 8-10, AND 17-18**

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

Pursuant to 52 Pa. Code § 5.342(g) and the Corrected Prehearing Order dated May 15, 2020 in the above-captioned proceeding, Philadelphia Gas Works (“PGW” or “the Company”) hereby files this Motion to Dismiss the Objections of the Sierra Club and Clean Air Council (collectively, “the Environmental Stakeholders”) and Compel Responses to PGW’s Interrogatories, Set I, Nos. 6, 8-10, and 17-18 (“Motion”). In Set I, Nos. 6, 8-10 and 17-18, PGW seeks to have the Environmental Stakeholders identify the legal basis for claims and recommendations they make in their pre-served Direct Testimony in this proceeding. This information is neither privileged nor prohibited from disclosure by the Commission’s regulations. The information is directly relevant to the issues that the Environmental Stakeholders are attempting to raise through their testimony. Finally, the information PGW seeks is not unduly burdensome, as the Environmental Stakeholders have already made the underlying claims and

recommendations in their pre-served testimony and should, therefore, be able to easily provide the basis of those claims. In further support of this Motion, PGW avers as follows.

## **I. BACKGROUND**

1. On June 19, 2020, PGW served Set I Interrogatories upon the Environmental Stakeholders.

2. On June 22, 2020, the Environmental Stakeholders informed counsel for PGW of their objections to certain interrogatories in PGW Set I. Counsel for PGW and the Environmental Stakeholders were able to resolve a number of the Environmental Stakeholders' Objections to Set I, but were unable to resolve the Objections to Nos. 6, 8-10, and 17-18.

3. PGW's Set I Interrogatories, Nos. 6, 8-10, and 17-18 seek for the Environmental Stakeholders to identify the basis of claims made by the Environmental Stakeholders in their pre-served Direct Testimony in this proceeding.<sup>1</sup>

4. On June 26, 2020, the Environmental Stakeholders served written Objections to Set I, Nos. 6, 8-10, and 17-18, on the grounds that said discovery requests seek privileged information, are not relevant, and are unduly burdensome. A copy of the Environmental Stakeholders Objections is attached hereto as Exhibit A.

5. The Environmental Stakeholders' Objections should be denied because the underlying discovery requests seek information that is not privileged or otherwise prohibited by the Commission's regulations, is directly relevant to the issues the Environmental Stakeholders have raised in their pre-served Direct Testimony, and is not unduly burdensome.

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<sup>1</sup> PGW filed a Motion in Limine seeking to exclude from this proceeding certain portions of the pre-served Direct Testimony of the Environmental Stakeholders that are the subject of these discovery requests. This Motion in Limine, however, is still outstanding. If PGW's Motion in Limine is granted, PGW will voluntarily withdraw this Motion.

## II. LEGAL STANDARD

6. Under Section 5.321 of the Commission's regulations, "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 52 Pa. Code § 5.321(c).

7. Under Section 5.323 of the Commission's regulations, a party may obtain discovery of matters within the scope of Section 5.321(c) "even though prepared in anticipation of litigation or hearing by or for another party or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent." 52 Pa. Code § 5.323(a).

8. Further, Section 5.323(a) of the Commission's regulations codifies the attorney work product privilege, which prohibits only the "disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories." 52 Pa. Code § 5.323(a).

9. The Commission's regulations also do not permit discovery which is sought in bad faith; would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party; relates to a matter which is privileged; and would require the making of an unreasonable investigation by the deponent, a party or witness. 52 Pa. Code § 5.361(a).

### III. ARGUMENT

PGW's Set I, Nos. 6, 8-10 and 17-18 to the Environmental Stakeholders provide:

6. Provide the statutory authority under which the PA PUC can require a natural gas utility to produce a Climate Business Plan (CBP) and authorize rates based on the CBP.
8. Provide statutory authority under which the PA PUC can order PGW to investigate the potential for non-pipeline alternatives.
9. Provide statutory authority under which the PA PUC can direct PGW to reduce fossil fuels.
10. Provide statutory authority under which the PA PUC has jurisdiction over issues pertaining to greenhouse gas emissions.
17. Provide the statutory authority under which the PUC may direct PGW to switch its customers to electric service.
18. Provide the statutory authority under which PGW ratepayers can be required to subsidize a customer's switch from natural gas to electric service.

**1. The information sought in PGW Set I, Nos. 6, 8-10, and 17-18 is not privileged information and is not prohibited by the Commission's regulations.**

10. In their Objections, the Environmental Stakeholders first argue that the information sought in Set I, Nos. 6, 8-10 and 17-18 is privileged attorney work product and is prohibited by Section 5.323(a) of the Commission's regulations.

11. Through this argument, the Environmental Stakeholders have completely mischaracterized the information sought by PGW. In Set I, Nos. 6, 8-10 and 17-18, PGW is not seeking attorney work product or legal conclusions, opinions, or theories. For example, PGW is not seeking for a legal analysis, or the identity of every source that supports a legal theory or position. Rather, PGW is seeking the party in this Proceeding, the Environmental Stakeholders, to identify the statutory basis for the claims and recommendations made by the Environmental

Stakeholders in their pre-served Direct Testimony. This distinction is important, and the Pennsylvania Rules of Civil Procedure make clear that these requests are distinguishable.

12. As the Commission’s regulations do, the Pennsylvania Rules of Civil Procedure also codify the attorney work product privilege and prohibit the “disclosure of the mental impressions of a party’s attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories.” Pa. R.C.P. 4003.3. The Rules of Civil Procedure further provide, “Except as otherwise provided by these rules, it is not ground for objection that the information sought involves an opinion or contention that relates to a fact or the application of law to fact.” Pa. R.C.P. 4003.1(c). Importantly, the Note related to this provision explains:<sup>2</sup>

*Note:* Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made in pleadings or other documents should be used sparingly and, if used, should be designed to target claims, defenses or contentions that the propounding attorney reasonably suspects may be the proper subjects of early dismissal or resolution or, alternatively, to identify and to narrow the scope of claims, defenses and contentions made where the scope is unclear.

13. Thus, it is clear that the attorney work product privilege does not prohibit discovery solely because it seeks the legal basis of a claim or defense. The Commission’s regulations, similarly, contain no such prohibition.

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<sup>2</sup> The referenced note was written by the Pennsylvania Civil Procedural Rules Committee. <http://www.pacourts.us/courts/supreme-court/committees/rules-committees/civil-procedural-rules-committee>. Notes contain directional or referential statements or citations to authority and are often located within the rule text itself. See 86 Pa. B.A. Q. 47. While notes and explanatory comments are not part of the Rules, they may be used in construing the Rules. In *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 151 (Pa. 1981), the Supreme Court of Pennsylvania explained that explanatory notes “indicate the spirit and motivation behind the drafting of the rule, and they serve as guidelines for understanding the purpose for which the rule was drafted.” See also *Sherrill v. Port Auth. of Allegheny Cty.*, 556 A.2d 450 (Pa. Super. 1989); *Commonwealth v. 2338 N. Beechwood St. Phila.*, 134 A.3d 507 (Pa. Cmwlt. 2016).



14. PGW seeks the information for the exact purpose authorized in the explanatory note to Pa. R.C.P. 4003.1(c). Specifically, through Set I, Nos. 6, 8-10 and 17-18, PGW seeks the legal basis for claims and recommendations raised by the Environmental Stakeholders in their pre-served Direct Testimony. PGW has filed a Motion in Limine seeking to exclude from this proceeding the portions of the Environmental Stakeholders' pre-served testimony that serves as the basis for these discovery requests. In its Motion in Limine, PGW argues, among other things, that the Commission lacks jurisdiction over the claims and recommendations raised by the Environmental Stakeholders. Thus, these interrogatories target contentions that PGW "reasonably suspects may be the proper subjects of early dismissal" of the issues raised by the Environmental Stakeholders. Further, to the extent, PGW's Motion in Limine is not granted, the discovery requests will help to "narrow the scope of the claims [...] and contentions" raised by the Environmental Stakeholders and to clarify which legal standards the Environmental Stakeholders are challenging through their pre-served testimony. Moreover, the discovery requests will permit PGW a reasonable opportunity to develop a factual record to respond to any mixed questions of law and fact or policy.

15. For the reasons explained above, PGW Set I, Nos. 6, 8-10 and 17-18 do not seek privileged information or information that is, otherwise, prohibited by the Commission's regulations.

**2. The information sought in PGW Set I, Nos. 6, 8-10, and 17-18 is relevant to the issues that the Environmental Stakeholders seek to raise in this proceeding.**

16. The Environmental Stakeholders next object to PGW Set I, Nos. 6, 8-10, and 17-18 on the grounds that the information sought is not relevant. This objection is entirely unfounded and contradicts the position maintained and relied upon by the Environmental Stakeholders

throughout this entire proceeding. The discovery requests are directly related to the issues the Environmental Stakeholders are attempting to raise in their pre-served Direct Testimony.

17. Specifically, while PGW has consistently sought to exclude from this proceeding issues pertaining to Climate Business Plans, non-pipeline alternatives, the reduction of fossil fuels, greenhouse gas emissions, and electrification (because the Commission does not have jurisdiction to order these proposed solutions), the Environmental Stakeholders have consistently maintained that such information is relevant and appropriate in this proceeding.<sup>3</sup> In this regard, the Environmental Stakeholders served their Direct Testimony (“SC St. No. 1”), in which they argue that the Company has not adequately considered energy efficiency and electrification as alternatives to its proposed infrastructure work with the purpose of reducing or eliminating PGW’s sale and distribution of natural gas, because it is a claimed source of carbon emissions. SC St. No. 1 at 3-4. The Environmental Stakeholders recommend that the Commission direct PGW to produce a Climate Business Plan, consistent with the goals set forth by Governor Wolf in Executive Order Number 2019-01 and the Philadelphia City Council in City Council Resolution No. 190728. SC St. No. 1 at 4, 11-18. These goals include aggressively reducing, and ultimately eliminating, greenhouse gas emissions in the Commonwealth of Pennsylvania and the City of Philadelphia and transitioning to renewable energy and away from the sale of natural gas to PGW’s customers. SC St. No. 1 at 4, 6. The testimony further provides that PGW should cease replacing its antiquated pipeline facilities, presumably including the some 3,000 miles of cast iron main, and

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<sup>3</sup> See e.g. *Motion to Dismiss Objections and Direct Answers to Interrogatories of the Environmental Stakeholders and PGW’s Answer to Motion to Dismiss Objections and Direct Answers to Interrogatories of the Environmental Stakeholders* in the above-captioned proceeding.

be required to investigate “non-pipeline alternatives,” to serving its customers even if distribution system maintenance is necessary for safety-related reasons. SC St. No. 1 at 4, 6, 10-11.

18. Thus, for the Environmental Stakeholders to now challenge the relevancy of information pertaining to Climate Business Plans, non-pipeline alternatives, the reduction of fossil fuels, greenhouse gas emissions, and electrification is preposterous, as this information is clearly relevant to the Environmental Stakeholders’ pre-served testimony.

19. Further, the Environmental Stakeholders’ assertion that these interrogatories are not relevant because they do not seek factual information is not a basis for objection. As discussed above, discovery is not prohibited merely because it requests the legal basis for a claim or contention.

**3. The information sought in PGW Set I, Nos. 6, 8-10, and 17-18 is not unduly burdensome.**

20. Finally, the Environmental Stakeholders argue that Set I, Nos. 6, 8-10 and 17-18 are unduly burdensome because they require legal research.

21. First, the Commission’s regulations do not prohibit discovery merely because it would require some investigation. Rather, the standard is “*unreasonable*” burden. That said, Set I, Nos. 6, 8-10, and 17-18 should not require any legal research. As noted above, PGW is not requesting a legal analysis or for the Environmental Stakeholders to produce every source that supports a legal position. Rather, PGW is seeking the Environmental Stakeholders’ view of the jurisdictional-basis of the issues that the Environmental Stakeholders have already raised (and, presumably, had already determined). The Environmental Stakeholders should already know this information. It would be imprudent for the Environmental Stakeholders to serve testimony without

knowing the legal basis for their claims and recommendations and their assertion that the PUC has jurisdiction for its claims.

22. As such, the information sought in PGW Set I, Nos. 6, 8-10 and 17-18 is not unduly burdensome.

### III. CONCLUSION

WHEREFORE, PGW respectfully requests that Administrative Law Judges Heep and Guhl grant this Motion, dismiss the Objections of the Environmental Stakeholders, and direct the Environmental Stakeholders to produce the information requested in PGW's Set I, Nos. 6, 8-10, and 17-18.

Respectfully submitted,

*/s/ Kristine E. Marsilio*

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Dated: July 2, 2020

# Exhibit A

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	R-2020- 3017206
	:	
	:	
Office of Consumer Advocate	:	C-2020-3019161
Office of Small Business Advocate	:	C-2020-3019100
Philadelphia Industrial and Commercial Gas User Group	:	C-2020-3019430
	:	
v.	:	
	:	
Philadelphia Gas Works	:	

**ENVIRONMENTAL STAKEHOLDERS’ OBJECTIONS TO  
PHILADELPHIA GAS WORKS’ DISCOVERY REQUESTS  
DIRECTED TO THE CLEAN AIR COUNCIL AND SIERRA  
CLUB/PA CHAPTER, SET I**

Clean Air Council and Sierra Club/PA Chapter (“Environmental Stakeholders”) hereby object to Philadelphia Gas Works’ (“PGW”) Discovery Requests, Set I, Nos. 6, 8–10, and 17–18. Via teleconference on Monday, June 22, 2020, the Environmental Stakeholders discussed PGW’s Discovery Requests, Set I with PGW and were able to resolve a number of potential objections, but were not able to resolve the objections enumerated herein. The Discovery Requests that Environmental Stakeholders object to are set out in Attachment A.

Environmental Stakeholders object to PGW’s Discovery Requests, Set I, Nos. 6, 8–10, and 17–18 for the following reasons:

**I. PGW’s Discovery Requests Set I, Nos. 6, 8–10, 17–18 pertain to privileged information, are not relevant, and are unduly burdensome. 52 Pa. Code §§ 5.321(c), 5.323(a), and 5.361(a).**

PGW’s Discovery Requests Set I, Nos. 6, 8–10, and 17–18 (the “Statutory Authority Requests”) request Environmental Stakeholders to produce statutory authority in support of

various legal propositions. Namely, they ask Environmental Stakeholders to provide statutory authority under which the Commission can require PGW to produce a Climate Business Plan and authorize rates based on the plan; can order PGW to investigate the potential for non-pipelines alternatives; can direct PGW to reduce fossil fuel use; has jurisdiction over issues relating to greenhouse gases; and can require PGW to switch its customers to electric service or to subsidize customer transitions to electric service.<sup>1</sup> Environmental Stakeholders object on multiple grounds.

To begin, Environmental Stakeholders object to the Statutory Authority Requests because the requests impermissibly seek information protected by privilege. As a rule, discovery is not permitted that “relates to matter which is privileged.”<sup>2</sup> The Commission’s rules go on to expressly provide that “discovery may not include disclosure of the mental impressions of a party’s attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories.”<sup>3</sup> PGW’s requests, however, would impermissibly require counsel for Environmental Stakeholders to disclose privileged and confidential legal research and legal theories that are protected from discovery by the rules of this Commission.<sup>4</sup>

In addition, Environmental Stakeholders object that the Statutory Authority Requests are not relevant because they are not “reasonably calculated to lead to the discovery of admissible evidence,” or any evidence at all.<sup>5</sup> To the contrary, PGW’s requests for the statutory bases of various recommendations concern pure questions of law which belong not to the discovery period, but to briefing. The guiding standard for discovery is that it must be “reasonably calculated to lead to the discovery of admissible evidence.”<sup>6</sup> As inquiries concerning the mental

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<sup>1</sup> See Attach. A.

<sup>2</sup> 52 Pa. Code § 5.361(a)(3); *see also* 52 Pa. Code § 5.321(c) (parties “may obtain discovery regarding “any matter, *not privileged*, which is relevant to the subject matter involved in the pending action”) (emphasis added).

<sup>3</sup> 52 Pa. Code § 5.323(a).

<sup>4</sup> 52 Pa. Code § 5.361(a)(3).

<sup>5</sup> 52 Pa. Code § 5.321(c).

<sup>6</sup> *Id.*

impressions and legal theories of the Environmental Stakeholders' counsel, these interrogatories will not and cannot contribute to establishing a single fact of relevance for the development of the evidentiary record regarding PGW's proposed rates.

Finally, Environmental Stakeholders object that the Statutory Authority Requests are unduly burdensome<sup>7</sup> because they require Environmental Stakeholders to produce legal research and legal theories relating to their case, for no valid evidentiary purpose, well in advance of the briefing deadlines set out in the Corrected Prehearing Order.<sup>8</sup>

For the reasons explained above, Environmental Stakeholders object to PGW's Statutory Authority Requests as they impermissibly seek privileged information, are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and are unduly burdensome.

June 26, 2020

Respectfully submitted,

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<sup>7</sup> 52 Pa. Code § 5.361(a)(2).

<sup>8</sup> Docket No. R-2020-3017206, *Corrected Prehearing Order* at 7 (May 15, 2020).



**Attachment A**

Philadelphia Gas Works' Discovery Requests Directed to the  
Clean Air Council and Sierra Club/PA Chapter, Set I.

6. Provide the statutory authority under which the PA PUC can require a natural gas utility to produce a Climate Business Plan (CBP) and authorize rates based on the CBP.
8. Provide statutory authority under which the PA PUC can order PGW to investigate the potential for non-pipeline alternatives.
9. Provide statutory authority under which the PA PUC can direct PGW to reduce fossil fuels.
10. Provide statutory authority under which the PA PUC has jurisdiction over issues pertaining to greenhouse gas emissions.
17. Provide the statutory authority under which the PUC may direct PGW to switch its customers to electric service.
18. Provide the statutory authority under which PGW ratepayers can be required to subsidize a customer's switch from natural gas to electric service.