



July 9, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*
2020 Base Rate Case Filing / Docket No. P-2020-3017206

Dear Secretary Chiavetta,

Enclosed for filing in the above-referenced proceeding, please find the Environmental Stakeholders' Answer to Philadelphia Gas Works' Motion to Dismiss the Objections of the Environmental Stakeholders and Compel Responses to Philadelphia Gas Works' Interrogatories, Set I, Nos. 6, 8-10, And 17-18.

As evidenced by the attached Certificate of Service, all parties to the proceeding are being served with a copy of this document. Thank you. Should you have any questions, please contact me at dmcdougall@earthjustice.org.

Sincerely,

/s/ Devin McDougall

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	Docket No. R-2020-3017206
v.	:	
	:	
Philadelphia Gas Works	:	
	:	

**ENVIRONMENTAL STAKEHOLDERS’ ANSWER
IN OPPOSITION TO PGW’S MOTION TO DISMISS THE OBJECTIONS OF THE
ENVIRONMENTAL STAKEHOLDERS AND COMPEL RESPONSES TO PGW’S
INTERROGATORIES, SET I, NOS. 6, 8-10, AND 17-18**

Pursuant to 52 Pa. Code § 5.342(g)(1), and the Corrected Prehearing Order dated May 15, 2020 in the above-captioned proceeding, Clean Air Council and Sierra Club/PA Chapter (hereinafter “Environmental Stakeholders”), respectfully submit this Answer in Opposition to Philadelphia Gas Works’ (“PGW”) Motion to Dismiss the Objections of the Environmental Stakeholders and Compel Responses to Interrogatories, Set I, Nos. 6, 8–10, and 17–18 (“Motion to Dismiss”), filed in the above-captioned proceeding on July 2, 2020.¹

For the reasons set out below, PGW’s Motion to Dismiss should be denied, and the Environmental Stakeholders’ objections (the “Objections”) to PGW’s Interrogatories, Set I, Nos. 6, 8–10, and 17–18, should be sustained.

¹ Pursuant to the Corrected Prehearing Order, because PGW served this Motion on Environmental Stakeholders after 12:00 noon on a business day preceding a state holiday, the Motion is deemed to have been served on the following business day (Monday, July 6, 2020) for purposes of tracking responsive due dates. Docket No. R-2020-3017206, *Corrected Prehearing Order*, ¶14.i (“May 15 Order”).

I. INTRODUCTION

On June 19, 2020, PGW served its first set of interrogatories on the Environmental Stakeholders, which was comprised of twenty-nine questions (the “Interrogatories”). On June 22, 2020, the Environmental Stakeholders discussed the Interrogatories with PGW, and were able to resolve several potential objections.

However, during that conversation, the Environmental Stakeholders also provided notice to PGW that they planned to object to six of the Interrogatories (the “Statutory Authority Requests”) that requested information on what statutory provisions would provide the Commission with the authority to act on various recommendations in the expert testimony of the Environmental Stakeholders (the “Expert Testimony”) on the grounds of privilege, relevance, and burden. The Environmental Stakeholders and PGW were unable to resolve those objections.

On June 24, 2020, PGW filed a motion in limine (“Motion in Limine”) seeking the exclusion of large portions of the Expert Testimony on the grounds that the Commission did not have the statutory authority to consider or act on issues raised therein.² On June 26, 2020, the Environmental Stakeholders served PGW with their Objections to the Statutory Authority Requests. On June 29, 2020, the Environmental Stakeholders served PGW with answers to the twenty-three Interrogatories that sought factual information, rather than legal opinions. On June 30, 2020, the Environmental Stakeholders filed their Answer in Opposition to PGW’s Motion in Limine.³ On July 7, 2020, the Commission issued an order granting the Motion in Limine in part

² Docket No. R-2020-3017206, *Motion in Limine of Philadelphia Gas Works Regarding the Testimony Submitted by the Environmental Stakeholders*, PGW (June 24, 2020) (“Motion in Limine”).

³ Docket No. R-2020-3017206, *Environmental Stakeholders’ Answer in Opposition to PGW’s Motion in Limine*, Environmental Stakeholders (June 30, 2020) (“Answer in Opposition”).

and excluding references to electrification in the Expert Testimony but denying the Motion in Limine in part and rejecting the exclusion of the rest of the Contested Portions.⁴

II. LEGAL FRAMEWORK

The Public Utility Code and its implementing regulations provide for reasonable discovery in rate cases in order to develop the factual record necessary to support informed decision-making by the Commission on whether a utility's proposed rates are just and reasonable.⁵ Discovery is subject to numerous limitations, including the rules that it may not inquire into privileged matters,⁶ that it must be limited to building a factual record relevant to the proposed rates,⁷ and that it may not be unduly burdensome.⁸

Notably, confidential attorney-client communications and attorney work product are privileged under Pennsylvania law, and therefore not subject to discovery.⁹ The Commission's discovery regulations further 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."¹⁰

III. ARGUMENT

A. The Environmental Stakeholders' Objections Should Be Sustained Because the Statutory Authority Requests Seek Privileged Information

⁴ Docket No. R-2020-3017206, *Order on PGW's Motion in Limine Regarding the Direct Testimony of Ezra D. Hausman, Ph.D. Submitted by Environmental Stakeholders* (July 8, 2020) ("Order on Motion in Limine").

⁵ 66 Pa. C.S. §§ 1301, 2212.

⁶ 52 Pa. Code § 3.361(a)(3).

⁷ 52 Pa. Code § 5.321(c).

⁸ 52 Pa. Code § 5.361(a).

⁹ *Id.*

¹⁰ 52 Pa. Code § 5.323(a).

As an initial matter, the Environmental Stakeholders' Objections to answering the Statutory Authority Requests should be sustained because they seek to compel the Environmental Stakeholders to disclose privileged legal research, analysis, and advice in violation of numerous Commission regulations.¹¹

To start, Section 5.323(a) of the Commission's regulations prohibits discovery that seeks "disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories."¹² Section 5.321(c) bars discovery into privileged matters, including matters protected by attorney-client privilege and attorney work product privilege. These rules are simple and straightforward, and they make sense as a way of ensuring the tools of discovery are used to develop the factual record, and not misappropriated to try to force disclosure of privileged legal materials.

As Sections 5.323(a) and 5.321(c) rightly recognize, the protective shield of privilege is essential to the just administration of due process. The attorney-client privilege has been described as "the most revered of the common law privileges," which is necessary to enable "full and frank communication" between parties and their counsel.¹³ The attorney work-product privilege is similarly among "the most fundamental tenets of our system[.]"¹⁴ Protecting attorney work-product "provid[es] a privileged area within which [an attorney] can analyze and prepare

¹¹ 52 Pa. Code § 5.321(c); 52 Pa. Code § 5.323(a).

¹² *Id.*

¹³ *Commonwealth v. Chmiel*, 738 A.2d 406, 414 (Pa. 1999) (citing *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333 (Pa. 1986)); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."); *See also Alexander v. Queen*, 97 A. 1063, 1065 (Pa. 1916) ("Without such a privilege the confidence between client and advocate, so essential to the administration of justice would be at an end."); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011) (construing attorney-client privilege "to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.").

¹⁴ *Commonwealth v. Dennis*, 859 A.2d 1270, 1278 (Pa. 2004).

[a] client’s case . . . enabling attorneys to prepare cases without fear that their work product will be used against their clients.”¹⁵

PGW’s requests to the Environmental Stakeholders to “[p]rovide the statutory authority” under which the Commission can act on various recommendations in the Expert Testimony are in flagrant violation of Sections 5.323(a) and 5.321(c), because the Environmental Stakeholders do not have an opinion on the Commission’s statutory powers other than what they may have been advised by counsel in privileged and confidential attorney-client discussions.

Moreover, the Statutory Authority Requests, which ask about the scope of the Commission’s statutory powers to act upon on various policies proposed in the Expert Testimony, seek an advisory opinion from the Environmental Stakeholders as to purely legal questions. PGW has its own lawyers, and should not, in direct violation of Commission regulations, seek to compel the Environmental Stakeholders to assist PGW in understanding the scope of the Commission’s statutory authority.

PGW’s requests are so inappropriate that it is perhaps unsurprising that PGW cannot and does not furnish a single example of any interrogatory similar to the Statutory Authority Requests ever being upheld by this Commission. More broadly, PGW cannot identify any authority in the Public Utility Code or this Commission’s regulations that would support the Statutory Authority Requests, which directly conflict with the plain language of Sections 5.323(a) and 5.321(c).

Instead, PGW needs to reach to the Rules of Civil Procedure, which govern a completely different adjudicative process, in order to find the sole authority it puts forth to support its

¹⁵ *BouSamra v. Excelsa Health*, 210 A.3d 967, 976–77 (Pa. 2019) (quoting *Barrick v. Holy Spirit Hops. Of the Sisters of Christian Charity*, 32 A.3d 800, 812 (Pa. Super. 2011), *aff’d* 91 A.3d 680 (2014)).

requests. Even here, the best (and only) authority PGW can muster to justify its requests is a nonbinding Explanatory Note appended to a Rule of Civil Procedure, Rule 4003.1.¹⁶ The Explanatory Note opines that, in the context of a civil litigation, interrogatories that seek the “basis of particular claims, defenses or contentions made in pleadings or other documents” should be allowed “sparingly” in order to facilitate “early dismissal or resolution” or to “narrow the scope of claims, defenses and contentions made where the scope is unclear.”¹⁷

PGW’s reliance on the Explanatory Note is misplaced for several key reasons. As a starting point, PGW avoids mentioning in its Motion to Dismiss the critical fact that the Commission never adopted anything like the Explanatory Note anywhere in its regulations. While the Commission’s discovery regulations contain some of the same language concerning discovery as contained in the Rules of Civil Procedure, there are also many differences, reflecting the fundamentally different nature and purposes of a Commission proceeding and a civil litigation.

The fact that the Commission could have adopted language similar to the Explanatory Note, but chose not to, is indicative of those differences. Most notably, in a civil litigation: 1) a plaintiff files a pleading detailing its legal claims at the start of the proceeding, and 2) a defendant is entitled to file a motion to dismiss or motion for summary judgment to resolve some or all of the claims prior to the close of discovery.¹⁸

However, in a Commission proceeding like the current rate case, parties engage in discovery first, to develop a complete factual record, and then parties submit their legal

¹⁶ Docket No. R-2020-3017206, *Motion to Dismiss Objections and Direct Answers to Interrogatories of the Environmental Stakeholders*, PGW ¶12 (June 12, 2020) (citing Explanatory Note to Pa.R.C.P. 4003.1).

¹⁷ Explanatory Note to Pa.R.C.P. 4003.1.

¹⁸ Pa.R.C.P. 1019 (setting out required contents of pleadings); Pa.R.C.P. 1034 (allowing parties to move for judgment on the pleadings); Official Note to Pa.R.C.P. 1035.2 (allowing parties to move for summary judgment).

arguments, and the schedule provided in the Corrected Prehearing Order reflects that.¹⁹ As such, in a rate case such as this one, during the discovery stage there are no legal “claims, defenses or contentions made in pleadings or other documents”²⁰ that could possibly warrant legal interrogatories like the Statutory Authority Requests. Moreover, since in a Commission rate case, legal arguments are made after discovery is complete, during discovery there is no possible way to obtain early dismissal or narrowing of legal arguments which simply have not been made yet.

Consequently, the sole circumstance under which the Explanatory Note suggests that legal interrogatories be “sparingly used,”²¹ namely, to facilitate the early disposition or narrowing of legal claims during the discovery phase of a civil lawsuit, is absent from a Commission rate case. It makes sense, therefore, that the Commission chose not to adopt the Explanatory Note in its discovery regulations, and explains why PGW was unable to identify a single instance in which the Commission has ever upheld a legal interrogatory like the Statutory Authority Requests.

Since PGW’s Statutory Authority Requests directly violate multiple Commission regulations protecting privileged material from discovery, and the sole authority cited by PGW in support of its requests is a nonbinding Explanatory Note to an inapplicable Rule of Civil Procedure, the Environmental Stakeholders’ Objections to the Statutory Authority Requests should be sustained. The Commission’s regulations, and the Corrected Prehearing Order, lay out an orderly process in which discovery is used to develop a complete factual record, and then all parties brief their case, at the same time, with the benefit of a complete factual record.²² PGW’s attempt to breach the protections of privilege in order to invert this process should be rejected.

¹⁹ 52 Pa. Code § 5.502(f); May 15 Order.

²⁰ Explanatory Note to Pa.R.C.P. 4003.1.

²¹ *Id.*

²² 52 Pa. Code § 5.502(f); May 15 Order.

B. The Environmental Stakeholders' Objections Should Be Sustained Because, As Requests for Advisory Legal Opinions, the Statutory Authority Requests Have No Relevance to Building the Factual Record in this Proceeding

The Environmental Stakeholders' Objections should also be sustained because the Statutory Authority Requests seek advisory legal opinions from the Environmental Stakeholders and as such are not relevant to establishing any fact that can contribute to building the factual record in this proceeding.

On the issue of relevance, some clarification is needed, because PGW, in its Motion to Dismiss, regrettably attempts to muddy the waters by misconstruing the nature of the Environmental Stakeholders' relevance objection. PGW claims that the Environmental Stakeholders' relevance objection is that the recommendations in the Expert Testimony that are the subject of the Statutory Authority Requests are not relevant to this proceeding.²³ This is a baffling claim, given that the Environmental Stakeholders have vigorously defended the relevance of their recommendations and Expert Testimony, and PGW does not provide any citation for where such a claim can be found in the Objections of the Environmental Stakeholders. This is because the Environmental Stakeholders do not make such a claim. Nevertheless, PGW chooses to spend over a page of its Motion to Dismiss engaging in a rebuttal of this imaginary argument.²⁴

This seems to be an attempt to distract attention from the actual relevance objection of the Environmental Stakeholders, which is that the threshold criterion for the relevance for a discovery request is that it must contribute to establishing a fact that is admissible to the record, and the Statutory Authority Requests, which seek to compel Environmental Stakeholders to

²³ Motion to Dismiss ¶¶ 16–18.

²⁴ *Id.*

provide advisory legal opinions, do not contribute to establishing any fact at all. As the Commission’s regulations provide, and as the Environmental Stakeholders explained in their Objections, the guiding standard for discovery is that it must be “reasonably calculated to lead to the discovery of admissible evidence.”²⁵

More broadly, as the Supreme Court of Pennsylvania has instructed, “[i]t is well established that the fundamental consideration in determining the admissibility of evidence is whether the proffered evidence is relevant to the fact sought to be proved. Evidence is relevant if it tends to make a fact at issue more or less probable.”²⁶

It is telling that PGW, in its Motion to Dismiss, does not even attempt to identify any “admissible evidence”²⁷ – or even any fact at all – that its Statutory Authority Requests are calculated to discover. As the Environmental Stakeholders explained in their Objections, PGW’s failure to meet this basic requirement is a direct violation of Section 5.321(c).²⁸ PGW’s sole response to the Environmental Stakeholders on this issue is to simply reiterate, in a two-sentence paragraph,²⁹ PGW’s previous argument that the Explanatory Note from the Rules of Civil Procedure means that PGW can compel responses to interrogatories about the “legal basis”³⁰ for the policy recommendations in the Expert Testimony.

By declining to identify any admissible evidence that the Statutory Authority Requests could possibly discover, PGW appears to be conceding that its Statutory Authority Requests do not seek any admissible evidence, and instead appears to be relying entirely on the premise that

²⁵ 52 Pa. Code § 5.321(c); Objections at 2.

²⁶ *Martin v. Soblotney*, A.2d 1022, 1024 (Pa. 1983).

²⁷ 52 Pa. Code § 5.321(c).

²⁸ Objections at 2.

²⁹ Motion to Dismiss ¶19.

³⁰ *Id.*

the Explanatory Note authorizes their “legal basis”³¹ interrogatories. For the reasons explained above, this reliance is unavailing.

C. The Environmental Stakeholders’ Objections Should Be Sustained Because the Statutory Authority Requests Are Unduly Burdensome and Violate the Environmental Stakeholders’ Due Process Rights

The Environmental Stakeholders’ Objections should also be sustained because the Statutory Authority Requests seek to compel the Environmental Stakeholders to produce the “legal basis”³² for why the Commission could act on the recommendations of the Expert Testimony over a month in advance of the briefing schedule set forth in the Corrected Prehearing Order. Singling out the Environmental Stakeholders in such a fashion, while all other parties can enjoy the benefits of a complete factual record before producing their arguments regarding the legal basis of their direct testimony, is both unduly burdensome and a violation of the Environmental Stakeholders’ due process rights to a fair proceeding that follows the procedures set forth in the Commission’s regulations.

It is common ground that the presiding officers have the power to “direct and focus the proceedings consistent with due process”³³ and that due process is rooted in “the due process provisions of constitutional law and...the principles of common fairness.”³⁴

The Commission’s regulations are designed to enable such a fair and equitable process by enabling all parties to a proceeding to review the complete factual record for the proceeding before submitting their legal arguments in the briefing period that follows discovery.³⁵ This

³¹ *Id.*

³² *Id.*

³³ 52 Pa. Code § 5.403.

³⁴ *Borough of Bridgewater v. Pennsylvania Pub. Util. Comm’n*, 124 A.2d 165, 173 (Pa. Super. Ct. 1956).

³⁵ 52 Pa. Code § 5.502(f) (main briefs will be filed and served within 20 days after filing of the transcript, unless otherwise ordered by the presiding officer).

process makes sense, because it enables all parties to be fairly heard on pertinent issues in the case at the same time and for legal briefing to be enriched by the complete factual record. Here, the Administrative Law Judges (“ALJs”) have affirmed such a fair approach by ordering that all parties’ legal briefs shall be submitted on August 19, 2020 following the close of the factual record.³⁶

PGW’s Statutory Authority Requests seek to subvert the orderly and fair process provided in the Corrected Prehearing Order.³⁷ The discovery process is for the focused and efficient development of the factual record to assist the Commission in its decisionmaking. The discovery process should not be derailed, as PGW seeks to do, by misappropriating the tools of discovery to seek an early examination of another party’s legal positions.

There is no basis to allow PGW to single out the Environmental Stakeholders in this fashion, and as such, the Environmental Stakeholders’ objections should be sustained. PGW’s attempt to compel the Environmental Stakeholders to articulate the statutory basis for why the Commission has the power to act on the Expert Testimony, before the briefing period, before the completion of the factual record, and before any other party needs to put forth their legal arguments in support of their direct testimony would constitute both an unreasonable burden and a violation of due process.

D. PGW’s Motion to Dismiss Should Also Be Denied Because It Is Unnecessary and Moot

An independent basis for the denial of PGW’s Motion to Dismiss is that it is both unnecessary and moot, because the Statutory Authority Requests can serve no identifiable purpose at this point in the proceeding. According to the Motion to Dismiss, PGW needs answers

³⁶ May 15 Order.

³⁷ *Id.*

to the Statutory Authority Requests in order to pursue early dismissal of issues raised by the Expert Testimony, narrowing the scope of these proceedings.³⁸ However, PGW has already done what the Commission's rules allow for in this regard: PGW has already filed a Motion in Limine seeking to exclude substantial portions of the Expert Testimony, and to narrow the scope of issues to be considered in this proceeding.³⁹

The ALJs resolved that Motion in Limine on July 7, 2020.⁴⁰ As such, the proper scope of issues to be considered in this proceeding and whether the Expert Testimony fits within that scope has already been determined. Consequently, the only function identified by PGW for the Statutory Authority Requests has already been fulfilled, leaving PGW's Motion to Dismiss unnecessary and moot.

Furthermore, as a practical matter, the Environmental Stakeholders have, in the normal course of litigating this proceeding, provided ample discussion of their views on pertinent legal issues, most notably in their Answer to PGW's Motion in Limine and in over an hour of oral argument.⁴¹ As a result, the legal answers that PGW insists it needs the Environmental Stakeholders to help it discover are available not just by reading the governing statutes, but also by reading the Environmental Stakeholders' earlier filings. Beyond the fact that PGW's Statutory Authority Requests violate numerous Commission discovery regulations, the lack of any need for the requests is an additional, independent basis for the denial of PGW's Motion to Dismiss.

³⁸ Motion to Dismiss ¶¶14, 21.

³⁹ Motion in Limine.

⁴⁰ Order on Motion in Limine.

⁴¹ Motion to Dismiss; Answer in Opposition.

IV. CONCLUSION

In sum, PGW’s Motion to Dismiss should be denied because the Statutory Authority Requests, in violation of numerous Commission rules, seek privileged information; are not relevant to establishing any admissible factual evidence or any fact at all; are unduly burdensome; and violate the Environmental Stakeholders’ due process rights. To top it off, as demonstrated above, PGW’s Motion to Dismiss is moot and unnecessary.

PGW has provided no precedent for any “legal basis”⁴² interrogatories similar to the Statutory Authority Requests ever being upheld by the Commission, and the sole authority PGW relies upon is an inapplicable Explanatory Note from the Rules of Civil Procedure, which govern a fundamentally different type of adjudicative process. In Commission rate cases such as this one, the orderly and efficient development of the record, and the due process rights of the parties, depend on reserving the discovery process for the development of the factual record. Contentions over the “legal basis”⁴³ for various expert recommendations should play out in briefing and be informed by a fully developed factual record, as they have in the past.

For these reasons, PGW’s Motion to Dismiss should be denied, and the Environmental Stakeholders’ Objections to PGW’s Interrogatories, Set I, Nos. 6, 8–10, and 17–18, should be sustained.

July 9, 2020

Respectfully submitted,

/s/ _____
Devin McDougall Staff Attorney

⁴² Motion to Dismiss ¶19.

⁴³ *Id.*

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VERIFICATION

I hereby verify that the facts contained in the foregoing pleading are true and accurate to the best of my knowledge and that I am duly authorized to make this verification, and that I expect to be able to prove the same at any hearing held in this matter. I understand that the statements herein are made subject to penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: July 9, 2020

/s/

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of this electronically-filed document upon the parties, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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