**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission : R-2020- 3017206

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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 :

**Order on Philadelphia Gas WOrks’ Motion to Dismiss the objections of Environmental stakeholders’ to its interrogatories, Set I**

HISTORY OF THE PROCEEDING

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.

By Order entered April 16, 2020 (Suspension Order), the Pennsylvania Public Utility Commission (Commission or PUC) instituted an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase. 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. The Suspension Order did not consider the Petition for Waiver.

The Commission’s Bureau of Investigation and Enforcement (BIE) filed a Notice of Appearance. Three formal complaints have been filed: The Office of Consumer Advocate (OCA); the Office of Small Business Advocate (OSBA); and the Philadelphia Industrial and Commercial Gas Users Group (PICGUG).

 The matter was assigned to the Office of Administrative Law Judge (OALJ), Administrative Law Judges Darlene Heep and Marta Guhl, to schedule such hearings as necessary to develop a record in this proceeding.

 A Telephonic Prehearing Conference was held on Tuesday, May 5, 2020, at which time multiple issues were address. A Prehearing Order was issued which granted the Petitions to Intervene, and Petition for Waiver.

On May 14, 2020, a Telephonic Public Input Hearings Notice was issued which indicated that telephonic public input hearings were scheduled for June 2 and 3, 2020, at 1:00 p.m. and 6:00 p.m. each day.

On June 2 and 3, 2020, the telephonic public input hearings were held as scheduled. Members of the public and legislators provided testimony regarding the pending PGW filing.

On June 2, 2020, Meenal Ravel offered testimony at the 1:00 p.m. public input hearing and then submitted her statement as an exhibit on the same date. On June 3, 2020, State Senator Sharif Street offered testimony on behalf of his constituents at the 1:00 p.m. public input hearing and submitted his statement as an exhibit on the same date.

Via electronic mail dated June 8, 2020, we provided the exhibits to the parties and indicated that any objections to the exhibits have to be submitted by June 15, 2020. As of this date, no party has submitted an objection to the exhibits. Based on the fact that no party has objected to the public input hearing exhibits and they are relevant to the proceedings, the exhibits were entered into the record.

On June 9, 2020, PGW filed objections to interrogatories of Environmental Stakeholders. On June 12, 2020, Environmental Stakeholders filed a Motion to Dismiss the objections of PGW.

PGW specifically objected to interrogatories seeking information regarding PGW’s Energy Sense Program, other energy efficiency programs and environmental concerns, objecting that these matters were addressed in the PGW Demand Side Management implementation Plan and the Universal Service and Energy Conservation Plan proceedings and that the Commission does not have jurisdiction over certain environmental claims. The Environmental Stakeholders responded that the interrogatories and responses are relevant to whether the rate sought in the instant proceeding is just and reasonable.

 Non-company parties submitted direct testimony on June 15, 2020.

A hearing on the Environmental Stakeholders’ Motion to Dismiss PGW objections was held on June 25, 2020. Rulings on the objections and motion were made on the record at the time of the hearing. PGW objections to interrogatories regarding electrification as alternatives to proposed infrastructure work included in rate calculations were sustained. All other objections were overruled.

On June 24, 2020, PGW filed a Motion *in Limine* Regarding the Testimony Submitted by Environmental Stakeholders. On June 25, 2020. PGW filed a Motion *in Limine* Regarding Testimony Submitted by the Office of Consumer Advocate Regarding Universal Service Programs (OCA Motion) and a Motion *in Limine* Regarding Testimony Submitted by TURN, et al. Regarding Universal Service Programs (TURN Motion).

On June 30, 2020, OCA filed an Answer of the OCA Motion; CAUSE-PA filed an Answer of CAUSE-PA in Opposition to PGW’s TURN Motion; TURN filed an Answer of the TURN Motion; and Environmental Stakeholders filed an Answer in Opposition to PGW’s Motion *in Limine*.

On June 26, 2020, the Environmental Stakeholders filed Objections to PGW’s Set I of Interrogatories, Nos. 6, 8-10, and 17-18.

On July 2, 2020, PGW filed a Motion to Dismiss the Objections of Sierra Club and Clean Air Council (Environmental Stakeholders) to the Company’s Set I of Interrogatories.

On July 9, 2020, the Environmental Stakeholders filed an Answer to PGW’s Motion to Dismiss.

At this point, the Motion to Dismiss is now ripe for a decision.

DISCUSSION

 Section 5.321(c) of the Commission’s Rules of Administrative Practice and Procedure, 52 Pa.Code §5.321(c), specifically provides that “a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Discovery is permitted regardless of whether the information sought “relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant.” *Id*. Information may be discoverable, even if it would be inadmissible at a hearing. “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.” *Id*. Consistently, the Commission has allowed participants wide latitude in discovery matters. *Pa. Pub. Util. Comm’n. v. The Peoples Natural Gas Company*, 62 Pa. P.U.C. 56 (August 26, 1986); and *Pa. Pub. Util. Comm’n. v. Equitable Gas Company*, 61 Pa. P.U.C. 468 (May 16, 1986).

 Regarding the limitation of scope of discovery and deposition, the Commission’s regulations provide:

Discovery or deposition is not permitted which:

   (1)  Is sought in bad faith.

   (2)  Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.

   (3)  Relates to matter which is privileged.

   (4)  Would require the making of an unreasonable investigation by the deponent, a party or witness.

52 Pa.Code § 5.361.

 The discovery at issue are PGW interrogatories, as follows:

**PGW Interrogatories Set 1, Nos. 6, 8-10, and 17-18:**

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.

* 1. Provide statutory authority under which the PA PUC can order PGW to investigate the potential for non-pipeline alternatives.

* 1. Provide statutory authority under which the PA PUC can direct PGW to reduce fossil fuels.

* 1. Provide statutory authority under which the PA PUC has jurisdiction over issues pertaining to greenhouse gas emissions.

* 1. Provide the statutory authority under which the PUC may direct PGW to switch its customers to electric service.

* 1. Provide the statutory authority under which PGW ratepayers can be required to subsidize a customer’s switch from natural gas to electric service.

**Parties’ Arguments**

The Environmental Stakeholders (ES) lodged the same objections to all the interrogatory questions. Specifically, the Environmental Stakeholders argue that these requests are impermissible because they seek information protected by privilege. The Environmental Stakeholders note that discovery is not permitted that “relates to matter which is privileged.”[[1]](#footnote-1) 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.”[[2]](#footnote-2) The Environmental Stakeholders assert that PGW’s requests would impermissibly require its counsel to disclose privileged and confidential legal research and legal theories that are protected from discovery by the rules of the Commission.[[3]](#footnote-3) (ES Objections at 2).

Further, the Environmental Stakeholders maintain that the requests are not relevant because they are not “reasonably calculated to lead to the discovery of admissible evidence,” or any evidence at all.[[4]](#footnote-4) The Environmental Stakeholders contend that 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 Environmental Stakeholders state that the standard for discovery is that it must be “reasonably calculated to lead to the discovery of admissible evidence.”[[5]](#footnote-5) The Environmental Stakeholders argue that the inquiries concerning the mental impressions and legal theories of the Environmental Stakeholders’ counsel will not contribute to establishing a single fact for the development of the evidentiary record regarding PGW’s proposed rates. (ES Objections at 2-3).

Lastly, the Environmental Stakeholders also assert that the requests are unduly burdensome[[6]](#footnote-6) because they require Environmental Stakeholders to produce legal research and legal theories relating to their case well in advance of the briefing deadlines set out in this proceeding. (ES Objections at 3).

PGW argues that it is not seeking attorney work product or legal conclusions, opinions, or theories. PGW contends that it is seeking for the Environmental Stakeholders to identify the statutory basis for the claims and recommendations made by the Environmental Stakeholders in their pre-served Direct Testimony. PGW maintains that 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. PGW notes that 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.” PGW cites to Pa. R.C.P. 4003.1(c) and the Note related to this provision.[[7]](#footnote-7) (PGW Motion to Dismiss at 4-5).

PGW asserts that it seeks the information regarding the legal basis for claims and recommendations raised by the Environmental Stakeholders in their pre-served Direct Testimony. PGW noted that it has filed a Motion *in Limine[[8]](#footnote-8)* seeking to exclude from this proceeding the portions of the Environmental Stakeholders’ pre-served testimony that serves as the basis for these discovery requests. PGW maintains that these interrogatories target contentions that it “reasonably suspects may be the proper subjects of early dismissal” of the issues raised by the Environmental Stakeholders. Further, PGW contends that 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. PGW indicates that the discovery requests will permit it a reasonable opportunity to develop a factual record to respond to any mixed questions of law and fact or policy. (PGW Motion to Dismiss at 6).

Further, PGW also argues that it 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. PGW maintains that the Environmental Stakeholders has raised the issues in their direct testimony that they pre-filed. PGW asserts that it is preposterous for the Environmental Stakeholder to now challenge its interrogatories which seeks information related to these issues. (PGW Motion to Dismiss at 7-8).

Finally, PGW states that the Commission’s regulations do not prohibit discovery merely because it would require some investigation. PGW notes that the standard is “*unreasonable*” burden. PGW maintains that Set I, Nos. 6, 8-10, and 17-18 should not require any legal research. As noted above, PGW contends it is not requesting a legal analysis or for the Environmental Stakeholders to produce every source that supports a legal position. PGW indicates that it is seeking the Environmental Stakeholders’ view of the jurisdiction for these issues that the Environmental Stakeholders have already raised and should already know this information. (PGW Motion to Dismiss at 8-9).

In its Answer to the Motion to Dismiss, the Environmental Stakeholders also argue that PGW’s requests to “[p]rovide the statutory authority” under which the Commission can act on various recommendations in the Direct Testimony are in 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 Environmental Stakeholders also asserts that the requests seek an advisory opinion from the Environmental Stakeholders as to purely legal questions and PGW has its own lawyers to assist it in understanding the scope of the Commission’s statutory authority. The Environmental Stakeholders maintains that PGW’s requests are inappropriate, and there is no Commission case or section of the Public Utility Code or regulations that support its requests. (ES Answer at 5).

The Environmental Stakeholders also argue that PGW’s reliance on the Rules of Civil Procedure is misplaced because it deals with civil litigation which is a different adjudicative process. The Environmental Stakeholders asserts that PGW’s reliance on the Explanatory Note is also misplaced because the Commission never adopted anything like it anywhere in its regulations which reflects the differences between civil litigation and a Commission proceeding. Specifically, the Environmental Stakeholders note that in 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. (ES Answer at 6).

The Environmental Stakeholders note that 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 arguments. The Environmental Stakeholders asserts that 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” that could possibly warrant legal interrogatories like the PGW requests. Moreover, the Environmental Stakeholders maintain that 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. (ES Answer at 6-7).

The Environmental Stakeholders note that they have vigorously defended the relevance of their recommendations and Direct Testimony, and PGW does not provide any citation for where such a claim can be found in the Objections of the Environmental Stakeholders. The Environmental Stakeholder state 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 PGW requests do not contribute to establishing any fact. The Environmental Stakeholders argue that 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.”[[9]](#footnote-9) The Environmental Stakeholders asserts that PGW, in its Motion to Dismiss, does not attempt to identify any “admissible evidence”[[10]](#footnote-10) – or even any fact at all – that its requests are calculated to discover. (ES Answer at 8-9).

The Environmental Stakeholders also argue that PGW is singling them out by requesting their legal arguments while other parties can enjoy the benefits of a complete factual record before producing their arguments regarding the legal basis of their direct testimony. The Environmental Stakeholders assert that this is both unduly burdensome and a violation of its due process rights to a fair proceeding that follows the procedures set forth in the Commission’s regulations. The Environmental Stakeholders maintain that the Commission’s regulations are designed to enable 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.[[11]](#footnote-11) The Environmental Stakeholders contend that this 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. The Environmental Stakeholders state that PGW’s requests seek to subvert the orderly and fair process provided in the Corrected Prehearing Order and the discovery process is for the focused and efficient development of the factual record to assist the Commission in its decision making. (ES Answer at 10-11).

The Environmental Stakeholders also note in their Answer that an independent basis for the denial of PGW’s Motion to Dismiss is that it is both unnecessary and moot, because the request can serve no identifiable purpose at this point in the proceeding. The Environmental Stakeholders indicate that PGW already filed a Motion *in Limine* seeking to exclude substantial portions of its Direct Testimony, and to narrow the scope of issues to be considered in this proceeding. The Environmental Stakeholders state that the Motion *in Limine* was resolved on July 7, 2020, via an Order issued by the presiding officers. The Environmental Stakeholders maintains that the proper scope of issues to be considered in this proceeding and whether its Direct Testimony fits within that scope has already been determined. The Environmental Stakeholder also note that in the normal course of litigating this proceeding, they have provided ample discussion of their views on pertinent legal issues. As such, the Environmental Stakeholders argue that the only function identified by PGW for the request has already been fulfilled, leaving PGW’s Motion to Dismiss unnecessary and moot. (ES Answer at 11-12).

Ruling

In this matter, we agree with the Environmental Stakeholders. The requests from PGW appear aimed at obtaining the Environmental Stakeholders’ legal theories and analysis before the briefing period. We agree with the Environmental Stakeholders that this request will mean that they have to divulge this information before the record is fully formed and the parties brief the issues in this case.

Further, there is nothing in the Motion to Dismiss that points to any relevant evidence that this request is intended to produce for the purposes of a factual basis in this case. These requests appear to be another attempt by PGW to revisit issues that the company raised in its Motion *in Limine* related to the Environmental Stakeholders’ Direct Testimony.

Moreover, these requests are burdensome and in direct opposition to due process considerations. There is nothing in the Commission’s regulations related to discovery that would allow this type of request. To require the Environmental Stakeholders to provide their legal theory of the case at this point is not allowed in Commission proceedings, which clearly differ from general civil litigation. Allowing the requests would violate the Environmental Stakeholders’ due process rights and would place an unfair burden on them. As such, the objections to PGW’s Interrogatories Set I, Nos. 6, 8-10, and 17-18 are sustained and PGW’s Motion to Dismiss is denied.

ORDER

THEREFORE,

IT IS ORDERED;

1. That the Motion to Dismiss of Philadelphia Gas Works is denied;
2. That the objections by the Clean Air Council and Sierra Club of Pennsylvania to the Philadelphia Gas Works’ Interrogatories Set I, Nos.6, 8-10, and 17-18 are sustained;

Date: July 14, 2020 \_\_\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Darlene Heep

 Administrative Law Judge

 \_\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Marta Guhl

 Administrative Law Judge

**R-2020-3017206 - PA PUBLIC UTILITY COMMISSION, et. al. v. PHILADELPHIA GAS WORKS**

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1. 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”). [↑](#footnote-ref-1)
2. 52 Pa.Code § 5.323(a). [↑](#footnote-ref-2)
3. 52 Pa.Code § 5.361(a)(3). [↑](#footnote-ref-3)
4. 52 Pa.Code § 5.321(c). [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. 52 Pa.Code § 5.361(a)(2). [↑](#footnote-ref-6)
7. *Note:* Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made inpleadings 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.

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.Cmwlth. 2016). [↑](#footnote-ref-7)
8. The Motion *in Limine* was granted in part and denied in part in an Order dated July 7, 2020. [↑](#footnote-ref-8)
9. *Martin v. Soblotney*, A.2d 1022, 1024 (Pa. 1983). [↑](#footnote-ref-9)
10. 52 Pa. Code § 5.321(c). [↑](#footnote-ref-10)
11. 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). [↑](#footnote-ref-11)