



July 23, 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. R-2020-3017206

Dear Secretary Chiavetta,

Enclosed for filing in the above-referenced proceeding, please find the Motion in Limine to Exclude Portions of the Rebuttal Testimony of Philadelphia Gas Works' Witness Mr. James Cawley. As evidenced by the attached Certificate of Service, all parties to the proceeding are being served with a copy of this document. If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

/s/ Devin McDougall

Staff Attorney

Earthjustice

1617 John F. Kennedy Blvd., Suite 1130

Philadelphia, PA 19103

dmcdougall@earthjustice.org

(917) 628-7411

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE REBUTTAL TESTIMONY
OF PHILADELPHIA GAS WORKS’ WITNESS JAMES CAWLEY**

Pursuant to 52 Pa. Code §5.103, Sierra Club, PA Chapter and Clean Air Council (the “Environmental Stakeholders”) respectfully move to exclude portions (the “Contested Portions”) of the Rebuttal Testimony submitted by Philadelphia Gas Works’ (“PGW”) witness James Cawley in PGW St. No. 9-R. Because the Contested Portions (1) are irrelevant to the development of the factual record; (2) consist of impermissible legal opinions; (3) include hearsay; (4) violate due process; and (5) improperly attempt to reopen prior determinations of the Administrative Law Judges (“ALJs”), they should be excluded from the record.

The Contested Portions that the Environmental Stakeholders seek to exclude are:

- Page 36, line 3 through and including line 21;
- Page 37, line 1 through and including line 10;
- Page 38, line 5 through and including line 10; and
- Page 38, line 12 through and including line 17.

A copy of the relevant portions of Mr. Cawley’s Rebuttal Testimony is attached as Exhibit A.

I. BACKGROUND

As stated in their Petition to Intervene on May 22, 2020, the Environmental Stakeholders intervened in this proceeding to ensure that environmental and energy efficiency issues of significant public interest are adequately considered as the Commission weighs whether the proposed rates are just and reasonable.¹ The ALJs granted the Environmental Stakeholders' Petition to Intervene on June 1, 2020, and the next day, Clean Air Council filed two sets of interrogatories to PGW, requesting information about, *inter alia*, PGW's energy efficiency programs, efforts to promote electrification, greenhouse gas emissions, and methane leakages.² PGW filed written objections on June 9, 2020, arguing that the "Commission lacks jurisdiction over the environmental issues that are the subject of the [Clean Air Council's] discovery requests."³ The ALJs subsequently heard over an hour of oral argument on June 25, 2020, much of which focused on the topic of the Commission's jurisdiction.⁴ At the close of the hearing, the ALJs issued an oral decision dismissing objections to all of the contested interrogatories except for those relating to electrification.⁵

On June 15, 2020, the Environmental Stakeholders filed the Direct Testimony of their expert witness Dr. Ezra D. Hausman.⁶ Dr. Hausman's testimony focuses on the impacts of climate change on PGW's business operations and how those impacts impose costs and risks that

¹ Environmental Stakeholders' Petition to Intervene, Docket No. R-2020-3017206, ¶ 8 (May 22, 2020) ("Pet. To Intervene").

² Clean Air Council Interrogatories Set I, Docket No. R-2020-3017206 (June 2, 2020); Clean Air Council Interrogatories Set II, Docket No. R-2020-3017206 (June 2, 2020).

³ Philadelphia Gas Works' Objections to Clean Air Council Interrogatories, Set I, Nos. 2–4 and 7–12, Docket No. R-2020-3017206, at 2 (June 9, 2020); Philadelphia Gas Works' Objections to the Clean Air Council Interrogatories, Set II, Nos. 1–3, Docket No. R-2020-3017206, at 1 (June 9, 2020).

⁴ Transcript of Call-In Telephonic Motion Hearing, Docket No. R-2020-3017206 ("June 25 Hearing Transcript").

⁵ June 25 Hearing Transcript.

⁶ Direct Testimony of Ezra D. Hausman, Ph.D. on behalf of the Sierra Club and the Clean Air Council, Docket No. R-2020-3017206 (June 15, 2020) ("Hausman Direct Testimony").

should be accounted for in determining whether or not PGW's proposed investments are prudent, just, and reasonable.⁷ Dr. Hausman's testimony also identifies numerous ways that PGW's infrastructure planning could be improved in order to minimize the costs of climate change impacts for ratepayers.⁸

PGW then filed a Motion in Limine on June 24, 2020, seeking to exclude all portions of Dr. Hausman's testimony that reference climate change, again on the grounds that "the Commission lacks jurisdiction over the environmental issues and recommendations that are the subject of the testimony."⁹ The Environmental Stakeholders filed their answer on June 30, 2020, which included extensive briefing on the issue of the Commission's jurisdiction.¹⁰

On July 7, 2020, the ALJs issued an Order resolving the dispute and admitting all of the contested portions of Dr. Hausman's testimony except for references to electrification.¹¹ On the jurisdictional question, the ALJs rejected PGW's jurisdictional arguments and ruled that "environmental considerations, including methane and other leaks that may exist in the infrastructure, are relevant to determining whether the rates increase sought by PGW for infrastructure work is just and reasonable."¹² The ALJs also found that "whether the proposed rate increase and associated infrastructure work present a risk of stranded assets given regional environmental planning issues are also relevant to the reasonableness of the proposed rates, rules and regulations."¹³

⁷ *Id.* at 3-4.

⁸ *Id.*

⁹ Philadelphia Gas Works' Motion in Limine Regarding the Testimony Submitted by the Environmental Stakeholders, Docket No. R-2020-3017206, at 6 (June 24, 2020) ("PGW MIL").

¹⁰ Environmental Stakeholders' Answer in Opposition to Philadelphia Gas Works' Motion in Limine, Docket No. R-2020-3017206 (June 30, 2020) ("Answer to PGW MIL")

¹¹ Order on PGW's Motion in Limine Regarding the Direct Testimony of Ezra D. Hausman, Ph.D., Submitted by the Environmental Stakeholders, Docket No. R-2020-3017206 (July 7, 2020) ("Order on PGW MIL")

¹² *Id.* at 4.

¹³ *Id.*

On July 2, 2020, PGW filed a motion to dismiss Environmental Stakeholders’ objections to several interrogatories issued by PGW which sought to compel Environmental Stakeholders to divulge their legal theories as to the Commission’s jurisdiction to consider environmental matters.¹⁴ After the Environmental Stakeholders filed their Answer on July 9, 2020,¹⁵ the ALJs sustained the Environmental Stakeholders’ objections to PGW’s interrogatories, noting that the interrogatories “appear[ed] 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.”¹⁶

On July 13, 2020, PGW filed the Rebuttal Testimony of Mr. James Cawley, a practicing lawyer and former PUC Commissioner.¹⁷ Mr. Cawley addresses the direct testimony of Dr. Hausman on pages 36–39 of his testimony. Therein, he opines on various matters of law, including the Commission’s jurisdiction to consider environmental matters and the legal standards governing this rate proceeding.¹⁸ Mr. Cawley also repeatedly states that he formed his legal opinions based on advice received from PGW’s counsel.¹⁹

¹⁴ Philadelphia Gas Works’ Discovery Requests Directed To The Clean Air Council And Sierra Club/PA Chapter, Set I, Docket No. R-2020- 3017206, at 6–7 (June 19, 2020) (“PGW Interrogatories to ES”); Philadelphia Gas Works’ Motion to Dismiss the Objections of the Sierra Club and Clean Air Council and Compel Responses to PGW’s Interrogatories Set I, Nos. 6, 8–10, and 17–18, Docket No. R-2020-3017206 (July 2, 2020) (“PGW MTD”)

¹⁵ 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, Docket No. R-2020-3017206 (July 9, 2020) (“Answer to PGW MTD”).

¹⁶ Order On Philadelphia Gas Works’ Motion To Dismiss The Objections Of Environmental Stakeholders To Its Interrogatories, Set I, Docket No. R-2020-3017206, at 11 (July 14, 2020) (“Order on PGW MTD”)

¹⁷ Rebuttal Testimony Of James H. Cawley On Behalf Of Philadelphia Gas Works, Docket No. R-2020-3017206 (July 13, 2020) (“Cawley Rebuttal Testimony”).

¹⁸ *Id.* at 36–39.

¹⁹ *Id.*

II. ARGUMENT

A. The Contested Portions Should Be Excluded Because They Are Not Relevant To Establishing Any Fact

Relevance is the touchstone of admissibility.²⁰ As the Supreme Court of Pennsylvania has noted, “[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.”²¹ Information is relevant if it “logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact.”²²

The Contested Portions fail to meet this basic test of relevance. To the contrary, they consist entirely of Mr. Cawley’s opinions on various legal questions purportedly at issue in this proceeding. Specifically, Mr. Cawley offers his opinions on the jurisdiction of the Commission to consider a gas company’s contribution to global warming and greenhouse gas emissions;²³ the jurisdiction of the Commission to make rate case determinations based on the effects of global warming or greenhouse gas emissions;²⁴ the jurisdiction of the Commission to make decisions based on environmental considerations under a recently-decision Commonwealth Court case;²⁵ the scope of the City of Philadelphia’s regulatory powers vis-à-vis the Commission;²⁶ the power of the Commission to adopt Dr. Hausman’s recommendations;²⁷ and the legal standard the

²⁰ See 52 Pa. Code 5.401(a) (stating that “[r]elevant and material evidence is admissible”).

²¹ *Martin v. Soblotney*, A.2d 1022, 1024 (Pa. 1983).

²² *EQT Prod. Co. v. Borough of Jefferson Hills*, 208 A.3d 1010, 1025 (Pa. 2019) (citing *Commonwealth v. Johnson*, 639 Pa. 196, 160 A.3d 127, 146 (2017); *Commonwealth v. DeJesus*, 584 Pa. 29, 880 A.2d 608, 615 (2005)).

²³ Cawley Rebuttal Testimony at 36:3–10.

²⁴ *Id.* at 36:11–21, 37:1–6.

²⁵ *Id.* at 37:1–6.

²⁶ *Id.* at 38:5–10.

²⁷ *Id.* at 38:12–13.

Commission must apply to determine just and reasonable rates.²⁸ Because all of these statements address pure questions of law, they are completely irrelevant to proving the existence of any material fact. Consequently, they must be dismissed.²⁹

This is not the first time that PGW has attempted to improperly introduce purely legal matters into the factual record. On June 19, 2020, PGW served interrogatories to Environmental Stakeholders seeking, among other things, statements providing the legal authority supporting various claims made in Environmental Stakeholders' Direct Testimony.³⁰ After PGW refused to withdraw the requests in response to Environmental Stakeholders objections, they were dismissed as not related to any relevant evidence.³¹ Specifically, the ALJs noted that "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."³²

The Contested Portions of Mr. Cawley's testimony are irrelevant for precisely the same reason. Because there is nothing in the Contested Portions that contributes to the development of the factual basis in this case, they are irrelevant and should be excluded.

B. The Contested Portions Should Be Excluded Because They Are Inadmissible Legal Opinions

It is well settled Pennsylvania law that expert witnesses cannot testify as to their opinion on matters of law.³³ The prohibition on legal opinion testimony is codified in Rule 702 of the

²⁸ *Id.* at 38:14–17.

²⁹ 52 Pa. Code 5.401(a).

³⁰ PGW Interrogatories to ES at 6–7.

³¹ Order on PGW MTD at 11.

³² *Id.*

³³ See *Waters v. State Employees' Ret. Bd.*, 955 A.2d 466, 471 (Pa. Commw. Ct. 2008) ("It is well-settled that an expert is not permitted to give an opinion on a question of law."); *Browne v. Department of Transportation*, 843 A.2d 429, 433 (Pa. Commw. Ct. 2004) (explaining that an expert's legal opinion testimony, such as whether a party has violated an ordinance, is not admissible); *Kosey v. City of Washington Police Pension Board*, 73 Pa. Commw. 564, 459 A.2d 432, 434 (1983) (stating that an expert witness may not testify as to issues of law, which are for a

Pennsylvania Rules of Evidence, which states that experts may offer testimony in the form of an expert opinion only if their expertise “will help the trier of fact to understand the evidence or to determine a fact in issue.”³⁴ Because judicial decisionmakers are fully qualified to determine legal questions, expert testimony on legal opinion is unhelpful, unnecessary, and usurps the role of the presiding officers.³⁵

Here, the presiding officers and Commission are fully qualified to decide legal questions under the governing statutes, and Mr. Cawley’s purported expert legal opinion is unhelpful, unnecessary and usurps the role of the Commission. As described above in Section A, in the Contested Portions Mr. Cawley offers his expert opinion on various legal matters including the Commission’s jurisdiction to consider environmental matters in its decisionmaking, the legal powers of City of Philadelphia and the Commission, and the legal standard applicable to this case. Each of these matters is a purely legal question that is fully within the expertise of this tribunal to decide without expert assistance.³⁶ Thus, it cannot be argued that the Contested Portions “will help the trier of fact to understand the evidence or to determine a fact in issue” as required under Rule 702.³⁷

On a practical note, allowing expert witnesses to testify as to legal questions makes no sense because it would transform cross-examination during the evidentiary hearing

court to decide); *see also Casper v. SMG*, 389 F. Supp. 2d 618, 621 (D.N.J. 2005) (citing *In re Initial Public Offering Sec. Lit.*, 174 F.Supp.2d 61, 64 (S.D.N.Y.2001)) (“The rule prohibiting experts from providing their legal opinions or conclusions is so well established that it is often deemed a basic premise or assumption of evidence law—a kind of axiomatic principle. In fact, every circuit has explicitly held that experts may not invade the court’s province by testifying on issues of law.”).

³⁴ 225 Pa. Code § 702(b).

³⁵ *See Waters v. State Employees’ Ret. Bd.*, 955 A.2d 466, 471 (Pa. Commw. Ct. 2008) (“The law is evidence of itself, and it is up to the courts, not a witness, to draw conclusions as to its meaning.”); *Com. v. Neal*, 421 Pa. Super. 478, 618 A.2d 438 (1992) (holding that legal expert opinion on whether trial counsel was ineffective was inadmissible because opinion did not go to issue outside the expertise of a post-conviction relief judge).

³⁶ Cawley Rebuttal Testimony at 36–39.

³⁷ 225 Pa. Code § 702(b).

into oral argument. Debates over jurisdiction and the legal powers of the Commission belong in briefs and in oral argument—not in the evidentiary hearing, which is reserved for development of the factual record. PGW should not be permitted to disrupt the orderly progression of discovery by improperly inserting legal opinions into the factual record. Respectfully, the Contested Portions of Mr. Cawley’s testimony should be excluded as inadmissible legal opinion.

C. The Contested Portions Violate Due Process Rights They Allow PGW To Submit An Additional, Pre-Emptive Legal Brief

The Environmental Stakeholders, along with all the other parties to this proceeding, have a due process right 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”³⁸ and that due process is rooted in “the due process provisions of constitutional law and . . . the principles of common fairness.”³⁹

The Commission’s regulations enable such a fair and equitable process by providing for an orderly progression of stages of litigation, whereby the parties first develop the factual record through discovery and cross-examination, and only after that submit legal briefs.⁴⁰ 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 informed by the completed factual record. Here, the 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.⁴¹

³⁸ 52 Pa. Code § 5.403.

³⁹ *Borough of Bridgewater v. Pennsylvania Pub. Util. Comm’n*, 124 A.2d 165, 173 (Pa. Super. Ct. 1956).

⁴⁰ 52 Pa. Code § 5.331 (addressing sequencing of discovery); 52 Pa. Code § 5.202 (addressing scheduling of hearings); 52 Pa. Code § 5.502 (stipulating that, unless superseded by order of the presiding officer, initial briefs “shall be filed and served within 20 days after the date of service” of the hearing transcript).

⁴¹ Corrected Prehearing Order, Docket No. R-2020-3017206, at 7 (May 15, 2020) (“Corrected Prehearing Order”).

By improperly attempting to introduce legal arguments into its Rebuttal Testimony, PGW seeks to subvert the orderly and fair process provided in the Corrected Prehearing Order.⁴² Indeed, as discussed above, the Contested Portions consist entirely of legal arguments about important legal questions at issue in this proceeding.⁴³ Either Mr. Cawley is offering an expert opinion regarding legal questions entrusted to the presiding officers, which as discussed above is prohibited by rules of evidence and also unnecessary, or Mr. Cawley is simply expressing the legal positions of PGW, which is prohibited as an improper attempt to gain additional briefing not available to other parties.

PGW unilaterally expanding the number of briefs it can file has significant due process implications. To allow Mr. Cawley's statements to stand in the evidentiary record would effectively allow PGW to submit an additional, pre-emptive legal brief, before any of the other parties have a chance to be heard on the issues. This would be fundamentally unfair and a violation of the due process rights of all other parties to this proceeding.⁴⁴ In the interests of fairness and due process, the Contested Portions should be excluded.

D. The Contested Portions Based On Hearsay Should Also Be Excluded Because They Are Merely A Conduit For PGW's Counsel's Legal Opinions.

PGW cannot avoid the prohibition against offering legal opinions through testimony by offering hearsay through its witness. But PGW attempts to do just that through Mr. Cawley. Portions of Mr. Cawley's testimony begin, "*I am informed by counsel . . .*," "*Upon advice of PGW's counsel . . .*," "*I am further advised by PGW's counsel . . .*," "*I am advised by counsel for*

⁴² Corrected Prehearing Order at 7.

⁴³ See Cawley Rebuttal Testimony at 36–39.

⁴⁴ 52 Pa. Code § 5.403.

the Company that . . .”⁴⁵ These sentences offer textbook hearsay, and by transmuted Mr. Cawley into a mere conduit for PGW’s counsel’s legal opinions, PGW attempts to skirt the prohibition on offering legal opinions through testimony *and* to insulate those legal opinions from cross-examination. Such use of expert testimony hinders the fair development of the factual record and should not be permitted.

The following portions of Mr. Cawley’s testimony should be excluded from the record as improper hearsay (“Hearsay Testimony”):

Page:Lines	Hearsay Testimony
36:3–7	<i>“I am informed by counsel that the Commission does not have the authority to make such determinations about whether a natural gas distribution company’s operations unreasonably contribute to global warming, or to mandate greenhouse gas emission reductions, and neither the Governor’s executive order nor City Council’s resolution provides that authority.”</i>
36:11–13	<i>“Upon advice of PGW’s counsel, there is nothing in the Public Utility Code that authorizes the Commission to make rate case determinations based on the perceived effects of greenhouse gases or global warming.”</i>
37:7–10	<i>“Finally, I am further advised by PGW’s counsel that the Commonwealth Court of Pennsylvania recently held in Funk v. Wolf [144 A.3d 228 (Pa. Commw. Ct. 2016)] that the Commission cannot make (or be made to make) decisions based upon environmental considerations or implement regulations addressing climate change.”</i>
38:5–7	<i>“Finally, I am advised by counsel for the Company that, whatever the City or the City Council ultimately determines to do in furtherance of the Resolution, it would not be binding on the Commission.”</i>

In each of the foregoing statements, Mr. Cawley plainly offers unsworn statements made by PGW counsel outside this proceeding for the truth of the matter asserted. It would be impossible

⁴⁵ Cawley Rebuttal Testimony at 36–37. Environmental Stakeholders note that additional portions of Mr. Cawley’s testimony responding to other parties’ witnesses also contain hearsay. This Motion focuses on portions of Mr. Cawley’s testimony purporting to respond to Dr. Hausman’s Direct Testimony.

for any party to cross-examine Mr. Cawley on these assertions, as the opinions expressed are nothing more than restatements of what someone else told him. The actual proponent of these contentions—PGW’s counsel—is not available for cross-examination.

Although the technical rules of evidence are relaxed in administrative proceedings, that does not apply to hearsay: “[t]he Hearsay Rule is not a technical rule of evidence but a basic, vital and fundamental rule of law which out to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed upon the record.”⁴⁶ Where the matters at issue in a proceeding are highly sensitive—as they are here, since this proceeding involves whether it would reasonable and prudent for a monopoly utility to dramatically increase the rates paid by its captive customers—the Commission “should be particularly astute to exclude hearsay[.]”⁴⁷

Further, the Hearsay Testimony does not fit within Rule 703’s limited exception to the general rule that hearsay is not admissible. Under Rule 703, expert witnesses may base their opinions on the hearsay opinions of others, but only “if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.”⁴⁸ Thus, where an expert witness bases their opinion on the opinions of others not in evidence, “[t]he proponent must establish that the facts or data forming the bases for the opinion are the type reasonably relied upon by experts in the particular field.”⁴⁹ This limited exception applies out of necessity in limited circumstances; for example, a plaintiff’s expert in a medical malpractice suit

⁴⁶ *Bleilevens v. Com. State Civil Serv. Comm’n*, 11 Pa. Commw. 1, 5, 312 A.2d 109, 111 (1973).

⁴⁷ See e.g., *id.* (opining that agency “should be particularly astute to exclude hearsay where, as here, the state is attempting to remove a veteran employee from a well-paid position of great responsibility requiring difficult decisions on sensitive public matters”).

⁴⁸ 225 Pa. Code § 703.

⁴⁹ *Bettors v. Beaver Cty.*, 200 A.3d 1044, 1049 (Pa. Commw. Ct. 2018), appeal denied, 213 A.3d 1001 (Pa. 2019) (citing *Kimberly Clark Corp. v. Workers’ Compensation Appeal Board (Bullard)*, 790 A.2d 1072, 1076 (Pa. Commw. Ct. 2001)).

will, out of necessity, rely on medical records and other out-of-court statements to form a retrospective opinion on the quality of care.⁵⁰

However, the exception does not allow an expert to be used as a “mere conduit for the opinion of another.”⁵¹ The Superior Court of Pennsylvania has noted that the admissibility of hearsay-based expert testimony depends “on the expert actually acting as an expert and not as a mere conduit or transmitter of the content of an extrajudicial source . . . An ‘expert’ should not be permitted simply to repeat another’s opinion or data without bringing to bear on it his own expertise and judgment.”⁵² In somewhat blunter terms, an expert may not “go so far as to just baldly read into the record the opinions of others, and then say he agrees with them.”⁵³

But this is exactly what Mr. Cawley professes to do here. Indeed, Mr. Cawley prefaces each piece of Hearsay Testimony by stating that his opinion is based on advice received from PGW’s counsel.⁵⁴ Notably, even though Mr. Cawley is himself an attorney capable of forming independent legal opinions, that is not what he offers in the Hearsay Testimony. In the Hearsay Testimony, Mr. Cawley does not identify any basis for the opinions beyond the advice of PGW’s counsel. Because Mr. Cawley serves as a “mere conduit” for the legal arguments of PGW’s counsel in the Hearsay Testimony, it is barred under Rule 703.⁵⁵

⁵⁰ See, e.g., *Com. v. Thomas*, 282 A.2d 693, 698 (Pa. 1971) (recognizing “limited exception” to hearsay rule where “medical witnesses ... express opinion testimony on medical matters based, in part, upon reports of others which are not in evidence, but which the expert customarily relies upon in the practice of his profession”); *Primavera v. Celotex Corp.*, 608 A.2d 515, 519 (Pa. Super. 1992) (reaffirming Thomas’s exception to the hearsay rule for medical witnesses as “born of practical necessity”).

⁵¹ Comment to 225 Pa. Code § 703 (“An expert witness cannot be a “mere conduit” for the opinion of another.”).

⁵² *Primavera*, 608 A.2d at 521; see also *Woodard v. Chatterjee*, 827 A.2d 433, 444–45 (2003) (repeating same language).

⁵³ *Oxford Presbyterian Church v. Weil-McLain Co.*, 815 A.2d 1094, 1101 (2003).

⁵⁴ Cawley Rebuttal Testimony at 36:3–7 (“I am informed by counsel that the Commission does not have jurisdiction to make such determinations...”); *Id.* at 36:11–13 (“Upon advice of PGW’s counsel, there is nothing in the Public Utility Code that authorizes...”); *Id.* at 37:7–10 (“I am further advised by PGW’s counsel that...”); *Id.* at 38:5–7 (“I am advised by Counsel for the Company that...”).

⁵⁵ 225 Pa. Code § 703.

Mr. Cawley's testimony is also inadmissible because advice from a party's counsel in a litigated proceeding is simply not a reasonable basis to form an expert opinion on a legal matter that is being contested in that very same litigated proceeding. As noted above, expert witnesses offering testimony based on the hearsay opinions of others must prove "that the facts or data forming the bases for the opinion are the type reasonably relied upon by experts in the particular field."⁵⁶ It is not plausible to contend that one side's self-serving opinions on the legal questions involved in an ongoing, litigated proceeding constitutes a reliable basis for forming an impartial opinion on the applicable law.

It is beyond dispute that PGW's lawyers could not themselves submit testimony on the legal questions at issue in this case. PGW cannot avoid this rule by simply having Mr. Cawley repeat PGW's counsel's legal opinions under the guise of expert testimony. Hearsay of this kind is inadmissible. It is a basic principle of procedural fairness that parties must have the opportunity to cross-examine witnesses as to their on-the-record testimony. PGW's counsel will not be taking the stand, and PGW's counsel's legal opinions do not belong in the factual record. The Hearsay Testimony improperly injects out-of-court statements by PGW counsel into the factual record, and should be excluded.

E. The Contested Portions Should Be Excluded Because They Improperly Attempt to Reopen the ALJs' Prior Determinations on Jurisdiction

The Contested Portions of Mr. Cawley's testimony should also be excluded because the ALJs have already considered and decided the jurisdictional issues they address on three separate occasions. PGW first raised its argument that the Commission does not possess jurisdiction to

⁵⁶ *Bettors v. Beaver Cty.*, 200 A.3d 1044, 1049 (Pa. Commw. Ct. 2018), appeal denied, 213 A.3d 1001 (Pa. 2019) (citing *Kimberly Clark Corp. v. Workers' Compensation Appeal Board (Bullard)*, 790 A.2d 1072, 1076 (Pa. Commw. Ct. 2001)).

consider climate change and other environmental factors in response to the Clean Air Council’s first set of interrogatories, which requested information about PGW’s efforts to promote energy efficiency programs and electrification, reduce greenhouse gas emissions, and address methane leakages.⁵⁷ The ALJs heard over an hour of oral argument on this issue on June 25, 2020, and then dismissed all of PGW’s objections except for those concerning electrification.⁵⁸

Notwithstanding that ruling, PGW raised the same jurisdictional arguments again in a Motion in Limine seeking exclusion of Dr. Hausman’s direct testimony. Consistent with their earlier ruling, the ALJs’ Order on PGW’s Motion in Limine ruled that “environmental considerations . . . are relevant to determining whether the rates increase sought by PGW for infrastructure work is just and reasonable” and that “whether the proposed rate increase and associated infrastructure work present a risk of stranded assets given regional environmental planning issues are also relevant to the reasonableness of the proposed rates, rules and regulations.”⁵⁹

PGW further pressed the issue by refusing to withdraw interrogatories that sought to compel Environmental Stakeholders to produce their legal theories as to the Commission’s jurisdiction in advance of the briefing period. In dismissing PGW’s interrogatories, the ALJs noted that “[t]hese 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.”⁶⁰

⁵⁷ Philadelphia Gas Works’ Objections to the Interrogatories of Clean Air Council, Set I, Nos. 2–4 and 7–12, Docket No. R-2020-3017206, at 2 (June 9, 2020); Philadelphia Gas Works’ Objections to the Interrogatories of Clean Air Council, Set II, Nos. 1–3, Docket No. R-2020-3017206, at 1 (June 9, 2020).

⁵⁸ June 25 Hearing Transcript.

⁵⁹ Order on PGW MIL at 4.

⁶⁰ Order on PGW MTD at 11.

PGW now attempts to raise jurisdictional issues a fourth time through the Rebuttal Testimony of Mr. Cawley. This is yet another attempt to re-litigate the question of the Commission's jurisdiction to consider environmental factors in its ratemaking decisions, and should be rejected. Indeed, PGW's refusal to accept the results of not one, but three separate prior rulings on this issue betrays a willful disregard orderly progress of this proceeding. Because the Contested Portions improperly attempt to re-open already-decided legal questions, Environmental Stakeholders respectfully request that they be excluded.

IV. CONCLUSION

For the reasons discussed above, the Environmental Stakeholders respectfully request that the ALJs grant this Motion in Limine and exclude the Contested Portions of Mr. Cawley's testimony from the evidentiary record.

July 23, 2020

Respectfully submitted,

/s/
Devin McDougall, Staff Attorney
Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
dmcdougall@earthjustice.org
(917) 628-7411

/s/
Cassandra McCrae, Associate Attorney
Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
cmccrae@earthjustice.org
(407) 462-1342

/s/

Logan Welde
Staff Attorney & Director of Legislative Affairs
Clean Air Council
135 S 19th St, Suite 300
Philadelphia, PA 19103
lwelde@cleanair.org
(215) 567-4004

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 23, 2020

/s/ _____
Devin McDougall
Staff Attorney
Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
dmcDougall@earthjustice.org

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).

Carrie B. Wright, Esq. Bureau of Investigation & Enforcement Pennsylvania Public Utility Commission Commonwealth Keystone Building 400 North Street P.O. Box 3265 Harrisburg, PA 17105-3265 carwright@pa.gov	Gregory J. Stunder, Esq. Philadelphia Gas Works 800 West Montgomery Avenue Philadelphia, PA 19122 Gregory.Stunder@pgworks.com
Daniel G. Asmus, Esq. Sharon E. Webb, Esq. Office of Small Business Advocate Forum Place, 1st Floor 555 Walnut Street Harrisburg, PA 17101 dasmus@pa.gov swebb@pa.gov	John W. Sweet, Esq. Elizabeth R. Marx, Esq. Ria M. Pereira, Esq. Pennsylvania Utility Law Project 118 Locust Street Harrisburg, PA 17101 pulp@palegalaid.net
Robert D. Knecht Industrial Economics Incorporated 2067 Massachusetts Ave. Cambridge, MA 02140 rdk@indecon.com	Todd S. Stewart, Esq. Hawke McKeon & Sniscak LLP 100 North Tenth Street Harrisburg, PA 17101 tsstewart@hmslegal.com
Darryl A. Lawrence, Esq. Christy M. Appleby, Esq. Santo G. Spataro, Esq. Laura Antinucci, Esq. Office of Consumer Advocate 5th Floor, Forum Place 555 Walnut Street Harrisburg, PA 17101-1923 OCAPGW2020@paoca.org cappleby@paoca.org	Charis Mincavage, Esq. Adeolu A. Bakare, Esq. Jo-Anne Thompson, Esq. McNees Wallace & Nurick LLC 100 Pine Street P.O. Box 1166 cmincavage@mcneeslaw.com abakare@mcneeslaw.com jthompson@mcneeslaw.com
Josie B.H. Pickens, Esq. Joline Price, Esq. Robert W. Ballenger, Esq. Kintéshia Scott, Esq.	Lauren M. Burge, Esq. Eckert Seamans Cherin & Mellott, LLC 600 Grant Street, 44 th Floor Pittsburgh, PA 15219

<p>Community Legal Services 1424 Chestnut Street Philadelphia, PA 19102 jpickens@clsphila.org jprice@clsphila.org rballenger@clsphila.org kscott@clsphila.org</p>	<p>412-56602146 lburge@eckertseamans.com</p>
<p>Daniel Clearfield, Esq. Sarah C Stoner, Esq. Kristine Marsilio, Esq. Eckert Seamans Cherin & Mellott, LLC 213 Market Street 8th Floor Harrisburg, PA 17101 dclearfield@eckertseamans.com sstoner@eckertseamans.com kmarsilio@eckertseamans.com</p>	<p>Joseph Otis Minott, Esq. Logan Welde, Esq. Clean Air Council 135 S 19th Street Suite 300 Philadelphia, PA 19103 joe_minott@cleanair.org lwelde@cleanair.org</p>

Dated: July 23, 2020

/s/

Devin McDougall
Staff Attorney
Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
dmcDougall@earthjustice.org

Exhibit A

1 of the need for the Company to replace its cast iron and bare steel gas mains, we always
2 sought to *avoid* putting the Company in a financial crisis.

3 The Commission should reject Mr. Knecht’s recommendation to delay or
4 minimize the requested rate relief. Instead, for the good of the Company and its
5 customers, it should continue to provide gradual rate increases to the Company on a
6 timely basis.

7 **XII. RESPONSES TO DR. HAUSMAN’S TESTIMONY**

8 **Q. WHAT DOES DR. HAUSMAN RECOMMEND IN HIS TESTIMONY?**

9 A. Dr. Hausman generally contends (or intimates) that PGW, as a natural gas distribution
10 company, is operating unreasonably because it allegedly has not recognized that its
11 continued operation is contributing to global warming and the emission of greenhouse
12 gases. He concludes that PGW is acting imprudently to the extent that it continues to
13 modernize its natural gas distribution facilities over the next several decades, as is its
14 present plan. Instead, he contends that PGW should be examining more “cost effective”
15 approaches, and therefore the Commission should find that the Company has failed to
16 demonstrate that its proposed investments are necessary, reasonable, or prudent.”⁶¹

17 Dr. Hausman recommends that, “[t]o redress these deficiencies, and *to provide the*
18 *Commission with the necessary information to determine whether or not the Company’s*
19 *proposed rate increase is just and reasonable*, the Commission should direct the
20 Company to produce a Climate Business Plan (“CBP”) ... which should include

⁶¹ SC St. No. 1, p. 3.

1 consideration of potentially cost-effective alternatives to maintaining or expanding the
 2 Company’s gas infrastructure, such as energy efficiency.”⁶²

3 The CBP would not include continuation of PGW’s cast-iron and bare steel
 4 pipeline replacement program (a major driver of PGW’s rate request) because such
 5 modernized infrastructure “will have no use by the time the project is complete [about
 6 2055], and, therefore, further spending on it is a “wasteful endeavor.”⁶³

7 Until such CBP is completed and PGW is found by the Commission to be
 8 compliant with it, all rate relief should be denied.

9 **Q. WHAT AUTHORITY DOES DR. HAUSMAN CITE AS AUTHORITY FOR**
 10 **REQUIRING A CBP TO BE FILED AS A PREREQUISITE TO COMMISSION**
 11 **APPROVAL OF A RATE INCREASE?**

12 A. He first cites Gov. Wolf’s Executive Order Number 2019-01 which sets out aspirational
 13 targets to reduce greenhouse emissions by 26% on or before 2025 and 80% by 2050.⁶⁴ He
 14 also cites the Philadelphia City Council’s Resolution No. 190728 which sets a goal to
 15 reduce the City’s carbon footprint by 80% before the year 2050.⁶⁵ This non-binding
 16 resolution aims to have the City served by “100% clean renewable energy” by 2050.

17 **Q. ARE MR. HAUSMAN’S ASSERTIONS WELL GROUNDED?**

18 A. No. They are fatally flawed in many ways. His entire testimony presupposes that the
 19 continued operation of PGW as a natural gas distribution company is or will be
 20 unreasonable and should be ended because it unreasonably contributes to global
 21 warming. But no such legislative directive to that effect has been made by the

⁶² *Id.* at pp. 3-4 (emphasis added).

⁶³ *Id.* p. 10.

⁶⁴ *Id.* at p. 8.

⁶⁵ *Id.* at p. 8-9.

1 Pennsylvania General Assembly or any other agency of Pennsylvania Government. Yet,
2 Dr. Hausman asks the Commission to deny rate relief based on those conclusions.

3 I am informed by counsel that the Commission does not have the authority to
4 make such determinations about whether a natural gas distribution company's operations
5 unreasonably contribute to global warming, or to mandate greenhouse gas emission
6 reductions, and neither the Governor's executive order nor City Council's resolution
7 provides that authority.

8 The Commission simply lacks jurisdiction to base its decision on such
9 determinations that are foreign not only to its governing statute but to its expertise as
10 well.

11 Upon advice of PGW's counsel, there is nothing in the Public Utility Code that
12 authorizes the Commission to make rate case determinations based on the perceived
13 effects of greenhouse gases or global warming. The Commission would act ultra vires if
14 it made such determinations, and it would usurp the authority of the Pennsylvania
15 Department of Environmental Protection ("DEP") by doing so.

16 To illustrate the point, Governor Wolf issued Executive Order No. 2019-07, as
17 amended, on June 22, 2020, directing DEP "[b]y no later than September 15, 2020, [to]
18 develop and present to the Environmental Quality Board a proposed rulemaking to abate,
19 control or limit carbon dioxide emissions from fossil-fuel-fired electric power
20 generators."⁶⁶ The proposed rulemaking directs DEP "working with the Public Utility
21 Commission" to engage with PJM Interconnection to minimize emissions leakage.⁶⁷

⁶⁶ See Executive Order No. 2019-07 as amended, *Commonwealth Leadership in Addressing Climate Change through Electric Sector Emissions Reductions* (June 22, 2020), 50 Pa.B. 3406, 3407 (July 11, 2020).

⁶⁷ *Id.* at 3408.

1 Thus, the Commission may assist other Commonwealth agencies on matters that
2 are ancillary or tangential to the Commission’s jurisdiction but do not fall directly within
3 it, but nothing in its enabling statute authorizes it to take the actions recommended by Dr.
4 Hausman. At the least, requiring the Commission to make ratemaking (or other)
5 determinations in response to climate change would create the real possibility of disparate
6 and potentially inconsistent regulation.

7 Finally, I am further advised by PGW’s counsel that the Commonwealth Court of
8 Pennsylvania recently held in *Funk v. Wolf*⁶⁸ that the Commission cannot make (or be
9 made to make) decisions based upon environmental considerations or implement
10 regulations addressing climate change.

11 **Q. Have you reviewed City Council Resolution No. 190728?**

12 A. Yes. The resolution states: “RESOLVED, That the City of Philadelphia shall take
13 measures to achieve a fair and equitable transition to the use of 100% clean renewable
14 energy for electricity in municipal operations by 2030, for electricity City-wide by 2035,
15 and for all energy (including heat and transportation) city-wide by 2050 or sooner.” The
16 measures to be undertaken are not specifically identified in the Resolution. Rather, it
17 refers generally to the Office of Sustainability’s “Clean Energy Vision Plan” (and
18 apparently the same document by reference to that Office’s “Powering Our Future: A
19 Clean Energy Vision for Philadelphia”), that Office’s “Municipal Energy Master Plan,”
20 and the 2018 International Building Code for commercial construction. Further, the
21 Resolution resolves to appoint members to the Philadelphia Gas Commission “who
22 support and advocate for clean renewable energy in PGW’s operations.”

⁶⁸ *Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth. 2016).

1 I have not read the referenced documents, but I am confident without reading
2 them that they are responsible and sensible enough *not* to include Dr. Hausman’s
3 suggested denial of PGW rate relief (only excepting rate relief “narrowly tailored ... for
4 safety-related distribution system maintenance and addressing major gas leakage.”)⁶⁹

5 Finally, I am advised by counsel for the Company that, whatever the City or the
6 City Council ultimately determines to do in furtherance of the Resolution, it would not be
7 binding on the Commission. Any determinations that would affect PGW’s provision of
8 safe and reliable natural gas service to current and prospective customers would have to
9 be consistent with the Public Utility Code and approved by the Pennsylvania Public
10 Utility Commission.

11 **Q. WHAT DO YOU CONCLUDE ABOUT DR. HAUSMAN’S TESTIMONY?**

12 A. The Commission is powerless to adopt Dr. Hausman’s recommendations, even if every
13 member of the Commission agreed fervently with everything stated in his testimony.

14 Indeed, as I have already testified, the PUC must determine PGW’s just and
15 reasonable rates in accordance with the provisions of Section 2212, not in accordance
16 with or in furtherance of a CBP which term or concept is not found in the Public Utility
17 Code.

18 Even if the Commission possessed the requisite jurisdiction, and even if Dr.
19 Hausman’s recommendations were adopted, they would take considerable time to
20 implement. Meanwhile, the Company’s financial condition would need to be maintained
21 to continue operations and ongoing infrastructure improvements. Denying the current
22 rate increase (and necessary future ones) would not only cripple the Company but prevent

⁶⁹ SC St. No. 1, p. 4.

1 it from financing the “energy efficiency” or other methane reducing efforts that Dr.
2 Hausman recommends.

3 **XIII. CONCLUSION**

4 **Q. DOES THAT COMPLETE YOUR REBUTTAL TESTIMONY?**

5 A. Yes.