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July 31, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: PA Pennsylvania Public Utility Commission et al., v. Philadelphia Gas Works –
Docket No. R-2020-3017206

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Brief In Opposition to the Petition of the Office of Consumer Advocate For Interlocutory Review and Answer to Material Question in the above referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Lauren M. Burge

Lauren M. Burge

LMB/lww

cc: Hon. Marta Guhl w/enc. (via email only)
Hon. Darlene Heep w/enc. (via email only)
Cert. of Service w/enc. (via email only)
Graciela Christlieb w/enc. (via email only)

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Brief In Opposition to the Petition of OCA For Interlocutory Review and Answer to Material Question upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: July 31, 2020

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Lauren M. Burge, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**BRIEF OF PHILADELPHIA GAS WORKS IN OPPOSITION TO
THE PETITION OF THE OFFICE OF CONSUMER ADVOCATE FOR
INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTION**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to 52 Pa. Code § 5.302(b), Philadelphia Gas Works (“PGW” or “Company”) files this Brief in opposition to the Petition for Interlocutory Review and Answer to Material Question (“Petition”) filed by the Office of Consumer Advocate (“OCA”) on July 21, 2020. Through the Petition, OCA seeks interlocutory review of and answer to material question regarding the Order on PGW’s Motions *in Limine* Regarding Testimony on behalf of OCA and TURN issued by Administrative Law Judges (“ALJs”) Marta Guhl and Darlene Heep on July 8, 2020. The Order excluded portions of the direct testimony of OCA witness Roger Colton and the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (“TURN *et al.*”) witness Harry Geller recommending that the Pennsylvania Public Utility Commission (“Commission” or “PUC”) require PGW to comply with federal and local laws regarding customers with Limited English Proficiency (“LEP”).

PGW respectfully requests that the OCA Petition be denied and the material question answered in the negative. The ALJs properly excluded the testimony on requiring compliance with laws associated with LEP customers given that the issues raised are outside the

Commission's jurisdiction and not appropriately considered as part of this base rate proceeding. Additionally, the Petition does not meet the requirements for Interlocutory Review. Therefore, the Commission should deny the Petition and the July 8, 2020 Order should remain intact.

I. BACKGROUND

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 Commission instituted an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase. Pursuant to Section 1308(d) of the Public Utility Code, 66 Pa. C.S. § 1308(d), Supplement No. 128 and Supplement No. 85 were suspended by operation of law until November 28, 2020, unless permitted by Commission Order to become effective at an earlier date.¹ The matter was assigned to the Office of Administrative Law Judge for the prompt scheduling of hearings culminating in the issuance of a Recommended Decision.

A telephonic prehearing conference was held on May 5, 2020, which resulted in the issuance of a Corrected Prehearing Order dated May 15, 2020. Pursuant to the May 15, 2020 Corrected Prehearing Order, other parties' direct testimony was served on June 15, 2020.

¹ PGW later agreed to voluntarily extend the end of the suspension period to December 4, 2020. *See Corrected Prehearing Order*, at 2 (May 15, 2020).

Rebuttal testimony was served on July 13, 2020, and surrebuttal testimony was served on July 24, 2020. An Evidentiary Hearing was held on July 29, 2020.

On June 15, 2020, OCA served the Direct Testimony of Roger Colton, OCA Statement No. 5. Also on June 15, 2020, TURN *et al.* served the Direct Testimony of Harry Geller, TURN *et al.* Statement No. 1. Each of these testimonies proposed changes related to PGW’s practices for working with LEP customers in light of the requirements established in the Philadelphia Home Rule Charter and Title VI of the Civil Rights Act of 1964 (“Title VI”).²

On June 25, 2020, PGW filed Motions *in Limine* seeking, in part, to exclude the LEP sections of the OCA and TURN *et al.* testimonies. On June 30, 2020, Answers to PGW’s Motions *in Limine* were filed by OCA, TURN *et al.*, and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”). On July 8, 2020, the ALJs issued an Order on PGW’s Motions *in Limine*. The Order excluded portions of the direct testimony of OCA witness Colton and TURN *et al.* witness Geller regarding LEP customers. On July 15, 2020, TURN *et al.* filed a Petition for Interlocutory Review and Answer to Material Question regarding the July 8, 2020 Order and the exclusion of Mr. Geller’s testimony on LEP customers. PGW filed a Brief in Opposition to TURN *et al.*’s Petition on July 27, 2020.

On July 21, 2020, OCA filed its Petition for Interlocutory Review and Answer to Material Question. As part of its Petition, OCA seeks an answer to the following material question:

Does the July 8, 2020 Order on PGW’s Motions In Limine Regarding Testimony on Behalf of OCA and TURN err in finding that language access considerations are not relevant to quality of service and not within the Commission’s jurisdiction in a base rate proceeding and, therefore, excluding the direct testimony of OCA Witness Roger Colton regarding language access considerations?³

² 46 U.S.C. § 2000d.

³ Petition at 1.

PGW now files this brief in opposition to OCA's Petition. For the reasons discussed below, the testimony was properly excluded due to a lack of Commission jurisdiction to decide the issues raised and because LEP issues are outside the scope of this base rate proceeding. Further, the Petition does not meet the requirements for interlocutory review. Therefore, the Petition must be denied and the material question must be answered in the negative.

II. ARGUMENT

A. Applicable Legal Standards

The standards for interlocutory review are well established and stringent. "The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is the, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process." *Evans v. FirstEnergy Solutions Corporation*, Docket No. P-2014-2421556 (Order entered January 26, 2015), at 6; *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002 (Order entered June 14, 1999). The correctness of the ALJs' ruling is not a determinative issue when the Commission sets out to examine whether a petitioner has fulfilled the regulatory requirements for interlocutory review and answer to a material question. *See Saucon Creek Assoc., Inc. v Borough of Hellertown*, 69 Pa. P.U.C. 467 (1989).

B. The July 8, 2020 Order Properly Excluded Testimony

The portions of OCA's testimony that were excluded by the July 8, 2020 Order raised issues with PGW's accommodations for LEP customers. It did not simply argue that PGW's rate request was unreasonable because of its accommodations for LEP customers. The OCA's testimony specifically argued that the PUC should require PGW to comply with Title VI of the

Civil Rights Act of 1964⁴ as an entity that receives federal grants, and due to recent changes in the Philadelphia Home Rule Charter requiring “City agencies” to meet these and other requirements. This testimony asking the PUC to require PGW to comply with language access issues are claimed to be imposed by federal and local law are plainly outside the Commission’s jurisdiction and thus were properly excluded from consideration in this proceeding.

The OCA’s Petition claims that the excluded testimony related to the quality of service provided to LEP customers and identifying the impact of PGW’s rate increase request on universal service programs.⁵ In actuality, the excluded testimony focused heavily on whether PGW’s language access practices comply with Title VI, the Home Rule Charter, the Mayor of Philadelphia’s guidance on language access policies, and whether PGW has a language access plan on file with the Philadelphia Office of Immigrant Affairs (“OIA”).⁶ It included a detailed breakdown of language in the Home Rule Charter to assess whether PGW is in compliance,⁷ and one of Mr. Colton’s primary recommendations was that the Commission require PGW to file a language access plan with the Philadelphia OIA and also submit the plan to the Commission’s Bureau of Consumer Services.⁸ This argument was not about the impact on universal service programs as regulated by the Commission, but rather was focused on compliance with local ordinances and federal law.

⁴ 46 U.S.C. § 2000d.

⁵ *See* Petition at 2.

⁶ *See* OCA St. No. 5 at 66-72.

⁷ *Id.* at 70-72.

⁸ *Id.* at 72-73

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code.⁹ The Commission must act within, and cannot exceed, its jurisdiction.¹⁰ Jurisdiction may not be conferred by the parties where none exists.¹¹ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹²

Obviously, the Commission does not have jurisdiction to enforce the Civil Rights Act of 1964 or Philadelphia Home Rule Charter. Certainly, the Commission does not have jurisdiction to evaluate PGW's compliance with the Philadelphia Home Rule Charter or Title VI. The Commission also lacks jurisdiction to order PGW to make a filing with the Philadelphia OIA, as the excluded OCA testimony would have required. Further, Title VI or other requirements included in the amendment to the Philadelphia Home Rule Charter do not even apply to PGW since it is not a City agency.

In the July 8, 2020 Order, the ALJs correctly found that "a base rate matter is not the appropriate proceeding to consider language access considerations. . . This forum, and particularly this base rate matter, is not the place to address the Civil Rights Act of 1964 or the Philadelphia Home Rule Charter compliance issues with respect to CRP language access

⁹ See *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); see also *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008).

¹⁰ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

¹¹ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹² *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

program design.”¹³ This testimony was correctly excluded because it is outside the Commission’s jurisdiction to apply these laws and, further, these issues are outside the scope of this base rate proceeding and are not appropriately addressed here. Therefore, the material question should be answered in the negative since the ALJs did not err in excluding this testimony, and the July 8, 2020 Order should remain intact.

C. The Petition Does Not Meet the Requirements for Interlocutory Review

When the Commission considers a Petition for Interlocutory Review, the relevant question is “whether interlocutory review is necessary in order to prevent substantial prejudice – that is the, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process.”¹⁴ The OCA Petition does not meet this standard. As established above, the Commission does not have jurisdiction to determine PGW’s compliance with or to enforce Title VI or the Philadelphia Home Rule Charter. The parties, the ALJs and the Commission should not be required to waste resources addressing an issue that the Commission ultimately lacks jurisdiction to decide.

Additionally, PGW’s current practices for accommodating LEP customers already go above and beyond the regulatory requirements that do apply to PGW (unlike Title VI and the Home Rule Charter) and meet the needs of the overwhelming majority of LEP customers. The Commission’s regulations require that termination notices include information in Spanish providing phone numbers to call for information and translation assistance, and that similar information be provided in other languages when census data shows that 5% or more of the

¹³ Order at 6.

¹⁴ *Evans v. FirstEnergy Solutions Corporation*, Docket No. P-2014-2421556 (Order entered January 26, 2015), at 6; *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002 (Order entered June 14, 1999).

residents in the utility's service territory are using a particular language.¹⁵ PGW's termination notices are provided in English and Spanish to comply with this requirement, as Spanish is the only other language spoken by more than 5% of people in PGW's service territory. PGW also complies with the requirement that utilities with a substantial number of Spanish-speaking customers provide billing information in both English and Spanish.¹⁶ PGW has gone above these requirements by providing a variety of other documents in Spanish, including LIHEAP and Crisis outreach letters, Customer Responsibility Program ("CRP") Recertification letters, and collection agency referral notices. Additionally, PGW provides CRP brochures, UESF flyers, and LIHEAP and Crisis flyers in Spanish as well as Chinese and French. PGW also offers Language Line services which provide translation services for callers and visitors to its District Offices. PGW's efforts in this regard plainly satisfy PUC requirements; if they did not, OCA undoubtedly would have pointed that out. OCA is not satisfied with PUC requirements in this regard, but, rather than petition the Commission to consider enhancements that factor in these other mandates, it has decided to inject this issue into the middle of a base rate case.

Therefore, OCA will not be substantially prejudiced if interlocutory review is not granted at this time. It has already been appropriately determined that the Commission lacks jurisdiction over the issues raised in OCA witness Colton's testimony, and that a base rate proceeding is not the correct forum to address these issues. Further, PGW's already provides language access services that are above and beyond the relevant requirements. As such, OCA will not be substantially prejudiced and the Petition must be denied.

¹⁵ 52 Pa. Code §§ 56.91(b)(17), 56.331(b)(13).

¹⁶ 52 Pa. Code § 56.201(b).

III. CONCLUSION

For the foregoing reasons, the ALJs properly excluded the testimony on LEP customers, and the Petition does not meet the requirements for Interlocutory Review. Therefore, PGW respectfully requests that the Commission deny the OCA's Petition for Interlocutory Review and leave the July 8, 2020 Order intact, and answer the Material Question in the negative.

Respectfully submitted,

/s/ Lauren M. Burge

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