**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc. *et al.* : C-2012-2304183
: C-2012-2304324
: C-2015-2486618
: C-2015-2486677
: C-2015-2486674
: C-2015-2486670

v. : C-2015-2486664

: C-2015-2486655

: C-2015-2486648

Philadelphia Gas Works : C-2015-2486674

**ORDER ON PARTIAL MOTION TO DISMISS**

There are two issues remaining in this proceeding: **1)** determining the amount the Complainants are entitled to receive because of PGW’s improper application of partial payments; and **2)** the amount Complainants are entitled to receive as a result of the Supreme Court’s decision in *PGW v. PUC*, 249 A.3d 963 (Pa. 2021) (“*PGW II*”) holding that docketed municipal liens are “the equivalent of a final resolution of a claim between parties” and are “treated in the same manner as a judgment that has been rendered following an adjudicative process.” *[[1]](#footnote-1)*

The second issue is the subject of a Partial Motion to Dismiss filed by PGW on October 14, 2022 (Motion).[[2]](#footnote-2) In its Motion, PGW argues that: **1)** the Commission lacks subject matter jurisdiction to adjudicate the claims of the Complainants having to do with interest charged on docketed municipal liens/judgments; **2)** even if it is determined that the Commission has jurisdiction to adjudicate the claims of the Complainants having to do with docketed municipal lien/judgment interest, several of the Complainants have waived their right to such consideration for the 2009-2012 period because the retroactivity of the Supreme Court’s Opinion in *PGW II* is limited only to parties that appealed to that Court andto proceedings pending at the time the Opinion was issued on April 28, 2021; and **3)** the Complainants have filed a 2021 Civil Action in Philadelphia Court of Common Pleas (“Trial Court*”)* raising issues identical to those before this Commission.

SBG Management Services, Inc., *et al* (SBG or Complainants) filed its Response to the Motion on November 2, 2022 (Response). In its Response to the Motion, SBG argued that: **1)** PUC not only has jurisdiction to determine the amounts that PGW overcharged complainants by improperly using the PUC’s 18% tariff rate, but it is also the Commission’s responsibility to make this determination.pursuant to the Public Utility Code, 66 Pa.C.S. § 101 *et seq.*: **2)** the SBG parties’ claims have not been foreclosed because all eight the SBG’s 2012 Complaints were pending before the PUC in April of 2021; and **3)** this matter and its 2021 Civil Action in front of the Court of Common Pleas are not duplicative but complementary of each other.

A telephonic evidentiary hearing scheduled for November 8, 2022, was converted to a prehearing conference, wherein the parties discussed the arguments contained in PGW’s Motion and SBG’s response to them. At the conclusion of the hearing, I instructed the parties to file legal briefs in support of their respective positions regarding the Motion by no later than November 29, 2022. SBG and PGW filed timely briefs.

The Motion is ready for ruling.

1. **Whether the existence of a judgment (from a docketed municipal lien) has a preemptive effect on the Commission’s jurisdiction**

In its Motion, PGW avers that the existence of a judgment (docketed municipal lien) has a preemptive effect on the Commission’s jurisdiction, and the claims and issues raised in the Complaints regarding the 18% interest rate that PGW improperly applied as a tariffed late-payment charge on the amounts that became municipal liens must be dismissed. PGW bases its position on the fact that the Supreme Court of Pennsylvania, for the first time in *PGW II*, made clear that the docketing or filing a municipal lien gives that lien the same force and effect as a judgment that was obtained following a trial before a civil court.[[3]](#footnote-3) Motion at 5-6. PGW argues that under settled law, the existence of any judgment on unpaid utility service balances ends the Commission’s jurisdiction, as any issues and claims related to the amounts owed by the customer are merged into the judgement.[[4]](#footnote-4) Motion at 6. PGW explains that “The claim or demand in its original form is at an end and cannot again be the subject of litigation.”[[5]](#footnote-5) *Id.* In its merged form as a judgment, it may be enforced by judicial process, and it can be pleaded only in its merged form.[[6]](#footnote-6) PGW concludes that the original form – here a dispute on rates paid by the utility customer – is at an end, and with a lack of enforcement or adjudicatory power over judgments and post-judgment relief, the Commission’s subject matter jurisdiction is at an end as well.  *Id.*

In its Motion, PGW highlights *Gasparro v. PUC*, 814 A.2d 1282 (Pa.Cmwlth. 2003) as the seminal case explaining the Commission’s lack of jurisdiction over amounts subject to judgments. Motion at 6. In *Gasparro*, PECO obtained a money judgment for an unpaid gas bill in civil court. Subsequently, Gasparro filed a complaint with the Commission[[7]](#footnote-7) disputing the legitimacy of the amount of the judgment, claiming that he was overbilled due to alleged metering errors. The Commission refused to review the merits of Gasparro’s utility bills that were subject to the judgment. The Commonwealth Court affirmed, finding that if Gasparro had raised his billing disputes before the entry of the judgment, then the Commission could have reviewed the underlying facts to determine whether overcharges occurred.[[8]](#footnote-8) However, since Gasparro raised his billing disputes after the entry of the judgment, the Commonwealth Court concluded that the Commission could not review the merits of Gasparro’s utility bill overcharge claims.

According to PGW, the Commission’s review of billing disputes, after a judgment has been obtained, would be an impermissible collateral attack upon the judgment. PGW argues that, based on *PGW II* and *Gasparro*, the Commission is not empowered to review the merits of judgments, and explains that the proper forum to challenge the legitimacy of a judgment is civil court. Motion at 8, 9-10.

While PGW frames SBG’s claim regarding the refund due to them following *PGW II* as a challenge to the interest rate assessed on judgments, in its Response to the Motion SBG frames the issue of the refund as a mere calculation of the amount of overcharges that SBG parties suffered from PGW’s improper application of its 18% tariff rate. In SBG’s view, “The question is simply *how much* PGW overcharged SBG Parties using the 18% tariff rate on arrearages.” Response at 4. (*Emphasis in the original*). Citing *Bell Tel. Co. v. Philadelphia Warwick Co.*, 50 A.2d 684, 688 (Pa. 1947) (recognizing Commission’s authority “to determine the reasonable and just amount” of all rates, as a condition precedent to any recovery on outstanding balances) and 66 Pa.C.S.A. § 102 (defining the term “rate” under the Public Utility Code), SBG explains that the Commission has always had jurisdiction to decide questions concerning the rates under its regulatory control. Response at 3. According to SBG, the Commission has subject matter jurisdiction over a service or billing issue raised in a lien-related complaint, which allowed it to find that PGW improperly imposed late payment charges on past due amounts subject to a municipal lien, and neither the Supreme Court, nor the Commonwealth Court, determined that this restatement of the Commission’s authority was incorrect. Response at 3, footnote 1. As such, SBG concludes that the issue of the refund is within the PUC’s jurisdiction. Response at 3.

In addition, SBG emphatically maintains that it is not disputing the placement of the municipal liens/judgment for unpaid services. Distinguishing the present case from *Gasparro*, SBG argues that, unlike the customer in *Gasparro*, SBG does not challenge the underlying arrearage amount docketed, only the impermissible interest and late fees charged at 18%.SBG explains that it is not disputing the utility usage by its properties, but rather asking the PUC to determine the amount of overcharges based on PGW’s application of the incorrect rate to docketed liens. Response at 4. Moreover, SBG points out that unlike Gasparro, SBG did raise this rate issue before the Commission, and the Commission ruled that PGW could not charge its tariff rate of 18% on amounts docketed as liens. SBG could not raise this issue before the liens had been docketed and PGW improperly charged 18% on those docketed amounts. Response at 4.

SBG further opines that, if the Commission accepted PGW’s jurisdictional argument, a utility could improperly docket a rate amount and strip the Commission of jurisdiction to issue a rate determination and resolve the dispute. Response at 6. SBG rejects this conclusion arguing that the Commission is the authority on rate amounts, not the Court of Common Pleas.[[9]](#footnote-9) *Id.*

As for PGW’s argument that the Commission is stripped of jurisdiction because SBG’s rate complaints ‘merged’ with the docketed municipal liens/judgements, SBG avers that it lacks cogency because that is not how the doctrine of merger woks. According to SBG, the doctrine of merger requires that the party holding the judgment be the same party whose claim is merged. In SBG’s view, PGW’s argument that SBG’s rate complaints filed in the PUC merge with PGW’s civil judgments confuses (a) which party holds the judgment with (b) which party filed the rate complaints. Response at 7-8.

**Disposition**

PUC’s jurisdiction over PGW’s assessment of 18% interest rate as late payment charges on outstanding balances after they were docketed as municipal liens has been at the forefront of discussions and rulings on these cases from their original filing with the Commission in 2012 and 2015. Beginning with my Order on PGW’s Preliminary Objections issued on July 17, 2012, at Docket Nos. C-2012-2304215; C-2012-2304183; C-2012-2304167; C-2012-2304324; C-2012-2304303, the issue was addressed in a threshold analysis and ruled upon as follows,

Unlike the placement of municipal liens, [SBG’s claims regarding the accuracy of billing related to the calculation of interest and penalties assessed] fall squarely within the purview of the Commission’s jurisdiction and are rightfully brought before it for adjudication. *Dennis J. Vicario v. Philadelphia Gas Works*, C-2010-2213955 (Order entered November 16, 2011).

(Order at 10), continuing with my Initial Decision issued on August 21, 2015, on *SBG Management Services, Inc. et al. v. Philadelphia Gas Works*, at Docket Nos. C-2012-2304183 and C-2012-2304324 (2012 Complaints of Simon Garden and Colonial Garden):

It is well-settled that the Commission does not have jurisdiction over the placement of municipal liens. *See*, *Josephine Pitt v. Philadelphia Gas Works*, Docket No. C-2009-2140025 (Order entered April 29, 2010). In *See Dennis J. Vicario v. Philadelphia Gas Works*, C-2010-2213955 (Opinion and Order entered November 16, 2011), the Commission recognized its lack of subject matter jurisdiction over the placement of municipal liens but explained that it retains jurisdiction over the utility’s service and billing practices reflected in the outstanding balance on which the municipal lien was filed. See *Viccario*, Opinion and Order at 5.

The interest rate at which late payment charges are accrued on an outstanding balance is a billing issue, which lies squarely within the jurisdiction of this Commission, even if the outstanding balance in question is the subject of a municipal lien filed against the Complainants’ property for unpaid gas service.

(Initial Decision at 55-56)[[10]](#footnote-10), and further with the Commission’s Opinion and Order entered December 8, 2016, on *SBG Management Services, Inc. et al. v. Philadelphia Gas Works*, at Docket Nos. C-2012-2304183 and C-2012-2304324 in which the Commission concluded that PGW’s practice of using the lien amount to count toward, or to be considered in, the derivation and accrual of charges pursuant to a Commission authorized tariff, was illegal (Opinion and Order at 79-80).

PGW successfully challenged the Commission's determination in the Commonwealth Court. In *Phila. Gas Works v. Pa. PUC*, 222 A.3d 1218 (Pa. Commw. 2019) (*PGW I*),the Commonwealth Court reasoned that, “recording of a lien, like recording of a mortgage, … does not even amount to commencement of a civil action, which the Commission has acknowledged does not divest it of jurisdiction.” *Id.* at 1222. The Court held that the Commission erred in holding that it lacked jurisdiction over gas charges subject to docketed liens because docketing a lien for charges on natural gas did not invoke judicial process. Thus, there was no legal basis to conclude that merely docketing an existing lien affected the Commission's jurisdiction. *Id.* at 1224.

In turn, SBG Management Services, Colonial Garden Realty Company, L.P. (Colonial Garden) and Simon Garden Realty Company, L.P. (Simon Garden) successfully appealed the Order of the Commonwealth Court in *PGW I*. In *Phila. Gas Works v. Pa. PUC*, 249 A.3d 963 (Pa 2021) (*PGW II*), the Supreme Court of Pennsylvania stated,

At issue in this appeal is whether a public utility operating in Philadelphia may continue to impose its regulatory tariff rate on municipal liens that arise from delinquent customer accounts when the utility elects to record the liens for its service. We conclude that pursuant to Section 7106(b) of the Municipal Claims and Tax Lien Law, 53 P.S. § 7106(b), once the lien is recorded, the tariff rate no longer applies. Accordingly, we reverse the order of the Commonwealth Court.

*PGW II at* 965. With regard to the issue of the Commission’s jurisdiction, the Supreme Court stated in footnote 4 of the Order,

Although the issue of the Commission's jurisdiction figured into the Commission's ruling and the Commonwealth Court's decision, and was addressed by the parties in their briefs, it is beyond the scope of the issue upon which this Court granted discretionary review and is not encompassed in our resolution of this appeal.

*PGW II*, at 969, n. 4. On June15, 2021, the Supreme Court granted, in part, PGW’s Application for Reargument to the extent it sought that the case be remanded to the Commonwealth Court for consideration of any outstanding issues. *Phila. Gas Works v. Pa. PUC*, 256 A.3d 1092 (Pa. 2021).

In its unpublished Opinion dated March 26, 2022, the Commonwealth Court provided an extensive history of the proceedings in which the issue of the Commission’s jurisdiction (over the 18% tariff rate applied by PGW to docketed liens), as well as the Supreme Court’s ruling in *PGW II* (that a lien docketed by a city of the first class constitutes a judgment pursuant to Section 3(b) of the Lien Law) featured prominently. Importantly, one of the outstanding issues that PGW had sought remand for was that of “**Refund Calculations.**” On that issue, the Commonwealth court stated,

PGW asserts that, in the event this Court determines *PGW II* applies to require refunds to Intervenors, a remand is needed for the presentation of evidence and a determination by the Commission of the correct refund amounts. At oral argument, Intervenors agreed to a remand for this purpose. Moreover, this Court is unable to determine from the record the basis of the Commission's calculation of the refunds it ordered. Accordingly, we will grant PGW's request to remand this matter for the purpose of allowing the parties to present additional evidence concerning the correct calculation of any refunds PGW owes to Intervenors.

*PGW III,* at 1219 (citations omitted). (Emphasis added). Consequently, the Commonwealth Court ordered:

As agreed by the parties, this matter is REMANDED to the Pennsylvania Public Utility Commission (Commission) in part, solely for the presentation of evidence by the parties and a determination by the Commission concerning the correct amounts of any refunds owed by PGW to SBG Management Services, Inc., Colonial Garden Realty Company and Simon Garden Realty Company (collectively, Intervenors) relating to late fees charged on docketed municipal liens against Intervenors for unpaid natural gas charges prior to April 29, 2021.

*PGW III,* at 1219. (Emphasis added). Subsequently the Court relinquished jurisdiction over the matter. *Id.*

In *PGW II*, the Supreme Court explained that,

With respect to liens filed under Section 7106(b), pursuant to Section 7184, a property owner may challenge a recorded municipal lien, including the amount thereof, by serving the municipality with a notice to issue a writ of scire facias, thereby forcing a hearing on the lien and allowing the property owner to assert defenses thereto. 53 P.S. § 7184; *N. Coventry Twp. v. Tripodi*, 64 A.3d 1128, 1133 (Pa. Commw. 2013). Alternatively, a property owner may pay the amount of the lien into court and then obtain a hearing on the validity of the amount of the lien. 53 P.S. § 7182.

*PGW II*, at 971. Yet, the Commonwealth Court in *PGW III*, did not instruct the Intervenors (SBG) to challenge the amount of the municipal liens/judgment by serving the City of Philadelphia with a notice to issue a writ of scire facias. Instead, it clearly and unambiguously remanded the case to the Commission for the calculation of the refund.

To claim at this stage, as PGW does, that the Commission has no jurisdiction to calculate “the correct amounts of any refunds owed by PGW to SBG … relating to late fees charged on docketed municipal liens against Intervenors for unpaid natural gas charges prior to April 29, 2021” is to essentially claim that the Commonwealth Court erred in its assessment of the Commission’s jurisdiction to perform the calculation. Considering the extensive analysis in these proceedings concerning the exact demarcation of this Commission’s jurisdiction in relation to tariffed rates applied to municipal liens/judgments filed by PGW, it is hard to believe that the Commonwealth Court simply ignored the Supreme Court’s ruling in *PGW II* or overlooked any impact that the ruling might have on Commission’s jurisdiction to calculate the ordered refund when it remanded the case. However, if PGW wants to amend or reverse the Commonwealth Court’s ruling in *PGW III*, it should do so by applying to the court for relief. A collateral attack of the ruling of the Commonwealth Court by way of a Motion with the Commission will not be entertained.[[11]](#footnote-11)

Contrary to PGW’s implied position that the remand was either in error or an oversight on the part of the Commonwealth Court in *PGW III*, I believe that the remand occurred because the Commonwealth Court did not see the calculation of the refund as a “challenge [of] a recorded municipal lien, including the amount thereof” and as a matter outside of this Commission’s purview . Notably, the remand of the case back to the Commission for the calculation of the refund avoids the inequitable reality that PGW’s argument creates. In its Response to the Motion, SBG articulated the inequity as follows:

[T]he PUC proceedings filed in 2012 and 2015 tolled the statute of limitations as to those claims. Therefore, if the Commission determines that it has jurisdiction, the PUC would determine the rate issue presented from at least 2012, if not 2008, four years before the initial PUC filings. If, however, the Commission concludes that this rate issue should be decided by the Common Pleas Court … [that court could reason] that the statute of limitation has run as to the claims filed in 2012 and 2015. In fact, the Court of Common Pleas might consider only those claims filed from 2017 forward, which is a substantial difference of 9 years of overcharges for which the SBG parties would not be compensated. This result would thwart the clear language and spirit of both the Supreme and Commonwealth Courts’ decisions.

Response at 11-12. In its Brief, SBG further explained,

If SBG were left with only its Common Pleas action as an avenue of recovery, there will likely be no recovery. As PGW has made clear, it will argue that the statute of limitations as to the 2012 and 2015 claims has expired. Neither the Supreme Court nor the Commonwealth Court envisioned that the SBG Parties would be denied recovery of the overcharges.[[12]](#footnote-12) That is clearly not the intent of the Supreme Court’s holding in *PGW II* or the Commonwealth Court’s decision finding that *PGW II* applied retroactively and remanding to the Commission. In fact, if the PUC were to dismiss SBG’s claims, the result could be the complete nullification of the *PGW II* and the Commonwealth Court’s subsequent decision.

SBG Brief at 16-17. (Emphasis added). SBG has been litigating the issue of the 18% tariff rate applied on amounts that were docketed liens/judgments since at least 2012. And SBG’s decade-long litigation has been successful, in that the Supreme Court agreed with SBG and the PUC and held that PGW cannot charge its 18% tariff rate against docketed liens/judgments. However, the relief SBG worked so hard to attain could be completely lost if Commission is without jurisdiction to calculate how much PGW overcharged SBG over more than a decade and the statute of limitations is not tolled. Notably, SBG’s 2015 Complaints against PGW were filed with the Commission, and subsequently stayed, for the specific purpose of tolling the statute of limitation although they involve the same parties and raise the same issues as the 2012 Complaints.

* 1. **Whether *PGW III* foreclosed certain claims and issues which must be dismissed.**

In its Motion, PGW points out that the Commonwealth Court expressly held in *PGW III* that the Supreme Court’s decision in *PGW II* applies retroactively only to *the* *parties* of *PGW II* as well as other proceedings pending at the time *PGW II* was decided on April 28, 2021.[[13]](#footnote-13) Therefore, it is PGW’s position that the Supreme Court’s decision in *PGW II* retroactivity extends only to the 2012 PUC Complaints by Colonial Garden and Simon Garden.[[14]](#footnote-14) PGW argues that Colonial Garden and Simon Garden were the only parties that filed an appeal to *PGW I* and were *the parties* to *PGW II*. The other 2012 PUC Complaints by Elrea Garden, Fairmount Manor, and Marshall Square,[[15]](#footnote-15) as well as the 2012 PUC Complaints by Marchwood, Oak Lane, and Fern Rock,[[16]](#footnote-16) were not appealed or did not join the appeal with Colonial Garden and Simon Garden, and thus the Commonwealth Court’s clear statement that *PGW II* applies only to parties of *PGW II* forecloses any further consideration or retroactive application of *PGW II* with respect to those Complaints*.*[[17]](#footnote-17) Motion at 10-11.PGW maintains that those parties who did not appeal, therefore, are not entitled to any relief based on docketed municipal liens (which have become judgements per *PGW II*) for the period of time covered by their 2012 Complaints. Motion at 11-12.

In its Response to the Motion, SBG did not claim that Elrea Garden, Fairmount Manor, and Marshall Square[[18]](#footnote-18) as well as Marchwood, Oak Lane, and Fern Rock[[19]](#footnote-19) had appealed the Commonwealth Court’s ruling in their respective cases. Nor did SBG claim that these entities joined the appeal with Colonial Garden and Simon Garden that culminated in Supreme Court’s ruling in *PGW II.* Instead, SBG claimed that *PGW II* should apply retroactively tothe Complainants who did not intervene in the appeal culminating in *PGW II* (Elrea Garden, Fairmount Manor, and Marshall Square as well as Marchwood, Oak Lane, and Fern Rock) because they were parties to proceedings pending before the PUC. Response at 10.

**Disposition**

Upon careful review of the record in both 2012 and 2015 Complaints, the appellate history of these cases, and the present Motion, Response and Briefs, I find that only the 2015 Complaints of Simon Garden and Colonial Garden, along with Elrea Garden, Fairmount Manor, and Marshall Square, as well as Marchwood, Oak Lane, and Fern Rock were stayed. *See* Orders on Joint Motion Requestion a Further Stay of Proceedings dated July 5, 2016, at Docket Nos. C-2015-2486618; C-2015-2486648; C-2015-2486655; C-2015-2486664; C-2015-2486670; C-2015-2486674; C-2015-2486677. The 2012 Complaints of these same entities/parties all received final orders by the Commission.

On December 8, 2016, the Commission issued a Final Opinion and Order on the 2012 Complaints of Simon Garden and Colonial Garden at Docket Nos. C-2012-2304183 and C-2012-2304324, addressing two issues: 1) PGW’s methodology for applying partial payments; and 2) PGW’s assessment of a tariff-based 18 % interest rate as a late payment charge on outstanding balances that had already been docketed as municipal liens. The Commission also issued an Opinion and Order on May 18, 2018 (denying PGW Petition for Reconsideration of the December 8, 2016, Order) and an Opinion and Order on August 23, 2018 (granting in part and denying in part PGW’s Petition for Reconsideration of the May 18, 2018, Order). It was only the Commission’s ruling on the 18% interest rate in these Orders that was appealed by PGW to the Commonwealth Court in *PGW v. PUC* (Pa.Cmwlth., No. 1291 C.D. 2018), with the Court reversing the Commission’s Orders in its ruling of December 9, 2019, (*PGW I).*  In turn, Simon Garden and Colonial Garden successfully appealed the Commonwealth Court’s ruling in *PGW I* in *PGW v. PUC*, 249 A.3d 963 (Pa. 2021) (*PGW II).* The Supreme Court granted PGW’s request for partial rehearing and remand in *PGW v. PUC,* 256 A.3d 1092, 2021 Pa. LEXIS 2905, 2021 WL 2697432 (Pa., June 15, 2021), and lastly the Commonwealth Court heard *PGW v. PUC,* 2022 Pa. Commw. Unpub. LEXIS 92, 2022 WL 793332 (Pa.Cmwlth., Mar. 16, 2022) (*PGW III*) on remand and issued a ruling.

On September 20, 2018, the Commission issued a Final Opinion and Order on the 2012 Complaints of Elrea Garden Realty Co., L.P. (Elrea Garden), Fairmount Manor Realty Co. L.P. (Fairmount Manor), and Marshall Square Realty Co., L.P. (Marshall Square), at Docket Nos. C-2012-2304167; C-2012-2304215; and C-2012-2304303. In its September 20, 2018, Order the Commission addressed two issues: 1) PGW’s methodology for applying partial payments; and 2) PGW’s assessment of the tariff-based 18% interest rate as a late payment charge on outstanding balances that had already been docketed as municipal liens. It was only the Commission’s ruling on the 18% interest rate in this Order that was appealed to the Commonwealth Court by PGW in *PGW v. PUC* (Pa.Cmwlth., No. 1405 C.D. 2018). In its unpublished Opinion of December 9, 2019, the Commonwealth Court reversed the Commission’s September 20, 2018, Order with regard to PGW’s assessment of a tariff-based 18% interest rate on outstanding balances that had already been docketed as municipal liens. However, Elrea Garden, Fairmount Manor, and Marshall Square did not appeal the Commonwealth Court’s ruling, like Simon Garden and Colonial Garden did in *PGW II.* Consequently, the issue of the tariff-based 18% interest rate in the 2012 Complaints of Elrea Garden, Fairmount Manor, and Marshall Square (Docket Nos. C-2012-2304167; C-2012-2304215; and C-2012-2304303) is neither pending nor stayed with the Commission. The Commonwealth Court’s ruling in *Philadelphia Gas Works v. Pennsylvania Public Utility Commission* (Pa.Cmwlth., No. 1405 C.D. 2018) on this issue stands.

Similarly, on October 4, 2018, the Commission issued a Final Opinion and Order on the 2012 Complaints of Fern Rock Realty Co., L.P. (Fern Rock), Marchwood Realty Co., L.P. (Marchwood), and Oak Lane Court Realty Co., L.P. (Oak Lane) at Docket Nos. C-2012-2308462; C-2012-2308454, and C-2012-2308465. It was this Commission Order[[20]](#footnote-20) that PGW appealed to the Commonwealth Court in *Philadelphia Gas Works v. Pennsylvania Public Utility Commission* (Pa.Cmwlth., No. 1404 C.D. 2018). In its unpublished Opinion of December 9, 2019, the Commonwealth Court reversed the Commission’s October 4, 2018, Order. However, Fern Rock, Marchwood and Oak Lane did not appeal the Commonwealth Court’s ruling like Simon Garden and Colonial Garden did in *PGW II*. Consequently, the 2012 Complaints of Fern Rock, Marchwood and Oak Lane (Docket Nos. C-2012-2308462; C-2012-2308454, and C-2012-2308465) are neither pending nor stayed with the Commission, and the Commonwealth Court’s ruling in *Philadelphia Gas Works v. Pennsylvania Public Utility Commission* (Pa.Cmwlth., No. 1404 C.D. 2018) stands.

The status of the eight 2012 Complaints (after PGW I, but before PGW II) was summarized in my Order Requesting a Status Update on the 2015 Complaints dated February 7, 2020:

By Opinion and Order entered May 9, 2019, the Commission denied PGW’s October 19, 2018 Petition for Stay of its duty to comply with the prior final orders of the Commission entered on September 20, 2018 at Docket Nos. C-2012-2304167, C-2012-2304215 and C-2012-2304303 (*September 2018 Order*), and on, October 4, 2018 at Docket Nos. C-2012-2308454, C-2012-2308462 and C-2012-2308465 (*October 2018 Order*) (collectively, the *Commission Orders*), pending the Commonwealth Court’s consideration of PGW’s Petitions for Review of the Commission Orders. The Commission ordered PGW to comply with the Pennsylvania Public Utility Commission’s Opinions and Order entered on September 20, 2018,and October 4, 2018.

By a separate Opinion and Order also entered on May 9, 2019, the Commission denied PGW’s April 12, 2019, Petition for Reconsideration of the Commission’s Opinion and Order entered March 28, 2019, in the proceedings at Docket Nos. C-2012-2304183, C-2012-2304324.

The eight complaints docketed at Docket Nos. C-2012-2304183, C-2012-2304215, C-2012-2304324, C-2012-2304167, C-2012-2304303, C-2012-2308454, C-2012-2308462, and C-2012-2308465 are now closed.

Furthermore, on December 9, 2019, the Commonwealth Court of Pennsylvania reversed the Commission’s Orders at Docket Nos. C-2012-2304183, C-2012-2304215, C-2012-2304324, C-2012-2304167, C-2012-2304303, C-2012-2308454, C-2012-2308462, and C-2012-2308465 on the issue of late fees on docketed liens. See, *Phila. Gas Works v. Pa. PUC*, 2019 Pa. Commw. Unpub. LEXIS 664, 2019 WL 6698105; *Phila. Gas Works v. Pa. PUC*, 2019 Pa. Commw. LEXIS 1081, 2019 WL 6690588; *Phila. Gas Works v. Pa. PUC*, 2019 Pa. Commw. Unpub. LEXIS 666, 2019 WL 6698103.

**Since** **all the proceedings related to Docket Nos. C-2012-2304183, C-2012-2304215, C-2012-2304324, C-2012-2304167, C-2012-2304303, C-2012-2308454, C-2012-2308462, and C-2012-2308465 have concluded**, the parties shall submit an update on the status of the Complaints filed at Docket Nos. C-2015-2486642, C-2015-2486677, C-2015-2486674, C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648, C-2015-2486618, by no later than March 6, 2020.

Order at 2-3. (**Emphasis added**). As mentioned above, SBG’s appeal of *PGW I* for Simon Garden and Colonial Garden to the Supreme Court, and the subsequent rulings in *PGW II* and *PGW III* changed the status of the 2012 Complaints at Docket Nos. C-2012-2304183 and C-2012-2304324 with regard to the 18% tariff interest rate issue, remanding the cases back to the Commission for the sole purpose of calculating the refund.

In support of its position that none of the SBG parties’ claims have been foreclosed, SBG relies on PGW’s language in two status reports filed by PGW on March 6, 2020, and July 6, 2021. SBG Brief at 11-12. According to SBG, in its Status Report dated March 6, 2020, PGW stated that “Rule 1701 of the Pennsylvania Appellate Rules of Practice continue[d] to divest the Commission of jurisdiction over the ‘2012 Complaints….” *Id*. In the same document, PGW defined the 2012 Complaints as follows:

The 2012 Complaints are at the following docket numbers:

C-2012-2304183 by Colonial Garden Realty Co., L.P. and SBG; C-2012-2304215 by Fairmont Manor Realty Co., L.P., and SBG; C-2012-2304324 by Simon Garden Realty Co., L.P., and SBG; C-2012-2304167 by Elrea Garden Realty Co., L.P., and SBG; C-2012-2304303 by Marshall Square Realty Co., L.P., and SBG; C-2012-2308454 by Marchwood Realty Co., L.P., and SBG; C-2012-2308462 by Oak Lane Court Realty Co., L.P., and SBG; and, C-2012-2308465 by Fern Rock Realty Co., L.P. and SBG.

PGW Status Report, 3/6/2020, at 2 n.2. Additionally, SBG points out that in its Status Report filed on July 6, 2021, PGW indicated to this Commission that all Complaints filed by SBG parties – including both the 2012 Complaints and the 2015 Complaints – were stayed and “should continue to be stayed pending the final disposition of the appellate proceedings before the Courts.” *See* SBG Brief at 12, *citing* PGW Status Report, 7/6/21, at 2.

The two status reports, however, were filed at two different stages of the appellate process, so the “2012 Complaints” in the first status report does not necessarily define the “2012 Complaints” at issue in the second status report. More importantly, even imprecise statements in PGW’s status reports could not revive a claim that was concluded on appeal. *See Philadelphia Gas Works v. Pennsylvania Public Utility Commission* (Pa.Cmwlth., No. 1404 C.D. 2018), and *Philadelphia Gas Works v. Pennsylvania Public Utility Commission* (Pa.Cmwlth., No. 1405 C.D. 2018). Because only Simon Garden and Colonial Garden appealed the Commonwealth Court’s ruling in *PGW I* (regarding the 18% tariff rate) to the Supreme Court, and because the Commonwealth Court held in *PGW III* that the Supreme Court’s decision in applies retroactively only to *the* *parties* of *PGW II* as well as other proceedings pending at the time *PGW II* was decided on April 28, 2021, only Simon Garden’s and Colonial Garden’s 2012 Complaints claims regarding the 18% tariff rate survived the appellate process. Similar claims from the 2012 Complaints of Fairmont Manor (Docket No. C-2012-2304215), Elrea Garden (Docket No. C-2012-2304167, Marshall Square (Docket No. C-2012-2304303) Marchwood (Docket No. C-2012-2308454), Oak Lane (Docket No. C-2012-2308462), and Fern Rock (Docket No. C-2012-2308465) have been foreclosed.[[21]](#footnote-21)

* 1. **Whether this action should be dismissed because it is duplicative of the 2021 Civil Action filed by Complainants in the Philadelphia Court of Common Pleas currently pending disposition.**

In its Motion, PGW states,

The complaints should be dismissed, and action should be deferred on the issues and claims involving judgments and post-judgment relief because: (a) they are the same inquiry that is subject of a pending 2021 Civil Action before the Philadelphia Court of

Common Pleas; (b) the Commission cannot award monetary damages or review the judgments at issue; and (c) any Commission action on the issues would be an improper collateral attack on the pending decision of the Trial Court in the 2021 Civil Action.

Motion at 12. PGW argues that it should not be forced to defend against the same claims in different forums at the same time. *Id.* According to PGW, continuing this matter in a parallel race to disposition with the Trial Court does not serve judicial efficiency and is a waste of the parties’ resources, especially where only one forum, the Trial Court, is properly vested with the authority to rule on claims under the Lien Law and award any post-judgment, monetary relief to the extent it is or is not warranted. PGW requests that the Commission defer any further action to the Trial Court and “dismiss the Complaints.” Motion at 13.

In its Response, SBG disagrees. In particular, SBG states that, “This matter and the Common Pleas action are actually complementary. Each tribunal has its own functions, and what the PUC decides in this instance can and will inform and guide the Common Pleas Court in its determinations in the 2021 action.” Response at 11. It further explains,

The PUC is tasked with determining the rate issue and calculating how much PGW overcharged SBG. [ ] To receive a refund or repayment from PGW, SBG must seek redress in the Court of Common Pleas. But this redress does not – and should not – require the Court of Common Pleas to issue a rate determination as to the overcharged amounts. While the Court is capable of determining the overcharged amounts, this body has the authority and jurisdiction to do so. *See Bell Tel. Co.*, 50 A.2d at 688 (explaining the Commission, however, is equipped to redress “complaining of rates or regulations which [are] under [its] control”). This is a rate determination. The Commission should decide how muchPGW overcharged SBG, and the amount of the refund required. Enforcement of any relief lies within the authority of the Common Pleas Court. Given the discrete functions of the Commission and the Court of Common Pleas, it is plain that this matter is not duplicative.

*Id.*

Not much is known by the undersigned about the 2021 Civil Action filed by Complainants in the Philadelphia Court of Common Pleas. The sole document submitted from the 2021 Civil Action was the “Third Amended Complaint” filed with the Philadelphia Court of Common Pleas by SBG Management Services, Inc., et al. against City of Philadelphia C/O Philadelphia Gas Works (Case ID: 210402801).[[22]](#footnote-22) The Third Amended Complaint contains two counts, one for breach of contract and one for unjust enrichment. Under the breach of contract claim, SBG avers that,

118. Plaintiffs have incurred hundreds of million of dollars in damages from the improper billing practices of PGW (and/or the City), which collected and overcharged Plaintiffs for late fees, costs, and interest by wrongly applying the 18% tariff rate to delinquent amounts docketed as municipal liens.

119. As a direct and proximate cause of PGW’s (and/or the City’s) breach, Plaintiffs have suffered damages in an amount in excess of $10,245,000.00, exclusive of interest, attorneys’ fees, and costs.”

2021 Civil Action, Third Amended Complaint, $¶¶ 118$-19. As relief, SBG demands entry of a judgment in their favor in the amount of $10,245,000.00, plus interest, costs, and any and all additional relief as may be deemed appropriate by the Court.

The unjust enrichment claim was pled in the alternative to the contract claim under Count I. *Id.* at ¶ 123. Under this claim SBG avers that “As a result of the improper billing practices referenced above, and the Pennsylvania Supreme Court’s Opinion [in *PGW II*] Defendant has been unjustly enriched by collecting the improper amounts from the Plaintiffs in the amount of Ten Million Two Hundred Forty-Five Thousand Dollars ($10,245,000.00).” *Id.* at ¶ 124. As relief, SBG demands entry of a judgment in their favor in the amount of $10,245,000.00, plus interest, and costs.

It appears from this document that, following the Supreme Court’s ruling in *PGW II*, SBG is seeking monetary damages from the City of Philadelphia and PGW, not the calculation of the refund owed. This reading of the Third Amended Complaint in the 2021 Civil Action matches the bifurcated procedure that SBG promotes in is Response to the Motion.

In a complaint against a public utility that seeks monetary damages arising from a failure to provide safe, adequate, reasonable, or efficient service, the Supreme Court has approved of a bifurcated procedure.

The question of the PUC's jurisdiction was before us recently in *Feingold v. Bell of Pennsylvania,* 477 Pa. 1, 383, A.2d 791 (1977) and *Elkin v. Bell Telephone Co. of Pennsylvania,* 491 Pa. 123, 420 A.2d 371 (1980). In *Feingold,* we held that the courts of common pleas have original jurisdiction to hear suits against public utilities for damages arising from failure to provide adequate service. 477 Pa. at 10, 383 A.2d at 795. *See also, Elkin,* 491 Pa. at 130, 420 A.2d at 375. In *Elkin* we further defined the parameters of our holding in *Feingold.* Elkin involved an action challenging the adequacy of a complainant's telephone service, and this Court there approved of a bifurcated procedure for certain situations, whereby the issue of liability is decided initially by the PUC, after which the court of common pleas considers the issue of damages where appropriate. *Elkin,* 491 Pa. at 134, 420 A.2d at 377.

*De Francesco v. Western Pennsylvania Water Co.****,*** 453 A.2d 595 (Pa. 1982). Thus, service and billing issues are first decided by the Commission, and then a court of common pleas may consider the issue of damages. See, *DeFrancesco v. Western Pa. Water Co.,* 453 A.2d 595 (Pa. 1982).

ORDER

THEREFORE,

IT IS ORDERED:

1. That Philadelphia Gas Works’ Motion for Partial Dismissal of the Complaints is approved, in part, and denied, in part.

2. That the Motion is approved only to the extent that the Commonwealth Court’s ruling in *PGW III* foreclosed claims related to the 18% tariff rate in the 2012 Complaints filed byFairmont Manor (Docket No. C-2012-2304215), Elrea Garden (Docket No. C-2012-2304167), Marshall Square (Docket No. C-2012-2304303) Marchwood (Docket No. C-2012-2308454), Oak Lane (Docket No. C-2012-2308462), and Fern Rock (Docket No. C-2012-2308465).

3. That the Motion is denied on all the other grounds.

4. That only the above-captioned matters at Docket Nos. C-2012-2304324, C-2012-2304183, C-2015-2486642, C-2015-2486677, C-2015-2486674; C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648, and C-2015-2486618 will proceed to a hearing.

5. That the 2015 Complaints at Docket Nos. C-2015-2486642, C-2015-2486677, C-2015-2486674; C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648, and C-2015-2486618 will proceed to an evidentiary hearing on all pending issues.

6. That the 2012 Complaints at Docket Nos. C-2012-2304324 and C-2012-2304183 will proceed to an evidentiary hearing for the calculation of refunds due because of Philadelphia Gas Works’ improper assessment of 18% tariffed interest rate as late payment charge on outstanding balances that had already been filed as municipal liens.

Date: December 19, 2022 /s/

 Eranda Vero

 Administrative Law Judge

**C-2012-2304183, C-2012-2308454, C-2012-2308462, C-2012-2308465,**

**C-2012-2304167, C-2012-2304215, C-2012-230430, C-2012-2304324, C-2015-2486618,**

**C-2015-2486677, C-2015-2486674, C-2015-2486670, C-2015-2486664, C-2015-2486655,**

**C-2015-2486648, C-2015-2486674 - SBG MANAGEMENT SERVICES, INC /SIMON GARDEN REALTY CO., L.P., ET AL V. PHILADELPHIA GAS WORKS**

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1. *PGW v. PUC*, 249 A.3d 963 (Pa. 2021) (“*PGW II”),* *rehearing granted by, in part, and remanded*, 256 A.3d 1092, 2021 Pa. LEXIS 2905, 2021 WL 2697432 (Pa., June 15, 2021), *on remand*, 2022 Pa. Commw. Unpub. LEXIS 92, 2022 WL 793332 (Pa.Cmwlth., Mar. 16, 2022) (“*PGW III*”). [↑](#footnote-ref-1)
2. The first issue was not subject to PGW’s appeal and is not contested by the utility. [↑](#footnote-ref-2)
3. *PGW II*, 249 A.3d at 974 (footnotes added). *See also PGW II*, 249 A.3d at 973 (judgments (docketed municipal liens) are “the equivalent of a final resolution of a claim between parties.”); *PGW II*, 249 A.3d 963, 970 (Pa. 2021) (“By expressly stating that the docketed lien is to be treated like a judgment with regard to the underlying claim, the General Assembly has expressed its intent that docketing the lien have the same effect as a final determination of a dispute between parties without further proceedings that would generally be required to effectuate the result.”). [↑](#footnote-ref-3)
4. *Lance v. Mann*, 360 Pa. 26, 60 A.2d 35 (1948). [↑](#footnote-ref-4)
5. 28 Pennsylvania Legal Encyclopedia, JUDGMENT § 228, *citing, Miller v. Rohrer*, 127 Pa. 384, 18 A. 2 (1889); Brenner, Trucks & Co. v. Moyer, 98 Pa. 274 (1881); Bell v. Allegheny County, 184 Pa. 296, 39 A. 227 (1898); and Nelson v. Nelson, 117 Pa. 278, 11 A. 61 (1887). [↑](#footnote-ref-5)
6. *See, e.g., Wilmington Tr. v. Unknown Heirs*, 219 A.3d 1173 (Pa.Super. 2019); *EMC Mortg., LLC v. Biddle,* 114 A.3d 1057 (Pa.Super. 2015). [↑](#footnote-ref-6)
7. *Gasparro*, 814 A.2d at 1284. *See also Robert P. Gasparro v. PECO Energy Company*, C-00015482, Opinion and Order entered April 22, 2002. [↑](#footnote-ref-7)
8. *Gasparro*, 814 A.2d at 1285. *See also Ronald Ford v. Duquesne Light Company*, Z-00245911, 1995 WL 944910 (discussed above); and *Theresa Kelsey v. Philadelphia Gas Works*, C-20054279; Opinion and Order entered February 23, 2006, 2006 WL 6611388. In her exceptions, Ms. Kelsey indicated that a “municipal lien had not yet been filed against the property and that there may still be time for her to attend a hearing and arrange to pay the gas bills in question.” *Id* at 4. The Commission, “in view of the Complainant’s efforts to pay current bills and her difficulties encountered in running a small family business,” granted the Complainant’s Exception and allowed her another opportunity for a hearing. Id. at 5. She failed to attend the remand hearing, and the Complaint was dismissed. Opinion and Order entered July 24, 2006, adopting the Initial Decision dated May 30, 2006. [↑](#footnote-ref-8)
9. PGW agrees with this argument, “it is true that the Commission will lose jurisdiction over “billing disputes” once a judgment is obtained by docketing a lien. However, the Commission is empowered to review the merits of a utility bill **before** there is a docketed municipal lien (judgment).” PGW Brief at 9. (**Emphasis in the original).** [↑](#footnote-ref-9)
10. Identical analysis was included in my Initial Decision in *SBG Management Services, Inc. et al. v. Philadelphia Gas Works*, Docket Nos. C-2012-2304167; C-2012-2304215; C-2012-230430 (2012 Complaints of Elrea Garden Realty Co., L.P. (Elrea Garden), Fairmount Manor Realty Co. L.P. (Fairmount Manor), and Marshall Square Realty Co., L.P. (Marshall Square)); as well as in my Initial Decision in *SBG Management Services, Inc. et al. v. Philadelphia Gas Works*, Docket Nos. C-2012-2308462; C-2012-2308454, and C-2012-2308465 (2012 Complaints of Fern Rock Realty Co., L.P. (Fern Rock), Marchwood Realty Co., L.P. (Marchwood), and Oak Lane Court Realty Co., L.P. (Oak Lane). [↑](#footnote-ref-10)
11. PGW did not cite to any legal cases where such a collateral attack was entertained by this Commission or any other state agency with quasi-adjudicative powers. [↑](#footnote-ref-11)
12. If the PUC determines that it will not perform the refund calculations, it will essentially render moot the existing controversy of PGW’s overcharges. The Supreme Court does not issue advisory opinions. “An advisory opinion is one issued despite the lack of a justiciable case or controversy between the parties to an appeal. *See Pennsylvania Public Utility Commission v. County of Allegheny,* 415 Pa. 313, 203 A.2d 544, 546 (1964). Where the issues in a case are moot, any opinion issued would be merely advisory and, therefore, inappropriate. *Department of Environmental Resources v. Jubelirer,* 531 Pa. 472, 614 A.2d 204, 212–13 (1992) (citations omitted).” *Stuckley v. Zoning Hearing Bd. of Newtown Twp.*, 79 A.3d 510, 516 (Pa. 2013). (Footnote in the original). [↑](#footnote-ref-12)
13. *PGW III*, 2022 Pa. Commw. Unpub. LEXIS 92, 2022 WL 793332, \*1 [↑](#footnote-ref-13)
14. *Colonial Garden/Simon Garden v. PGW*, C-2012-2304183; C-2012-2304324. [↑](#footnote-ref-14)
15. Commonwealth Court Docket No. 1405 CD 2018. [↑](#footnote-ref-15)
16. Commonwealth Court Docket No. 1404 CD 2018. [↑](#footnote-ref-16)
17. Because *PGW II* only applies retroactively to complainants whose complaints were pending as of the time of the Supreme Court’s decision, there is no basis on which the Commission could award them the relief they are seeking – a determination that PGW did not have authority to bill them LPCs on arrearages. [↑](#footnote-ref-17)
18. Elrea Garden, Fairmount Manor, and Marshall Square were intervenors in *PGW v. PUC,* Commonwealth Court Docket No. 1405 CD 2018. [↑](#footnote-ref-18)
19. Marchwood, Oak Lane, and Fern Rock were intervenors in *PGW v. PUC*, Commonwealth Court Docket No. 1404 CD 2018. [↑](#footnote-ref-19)
20. Only the issue related to the 18% interest rate on outstanding balances that were docketed as municipal liens was appealed to the Commonwealth Court. *See Philadelphia Gas Works v. Pennsylvania Public Utility Commission* (Pa.Cmwlth., No. 1404 C.D. 2018). [↑](#footnote-ref-20)
21. If, however, SBG believes that the Commonwealth Court’s ruling in *PGW III,* regarding the retroactive applicability of PGW *II,* is non-inclusive or inconclusive, it can apply to the court for further clarity or amendment of that language. [↑](#footnote-ref-21)
22. A copy of this pleading was submitted by PGW’s counsel on August 24, 2022, at my request. [↑](#footnote-ref-22)