**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 RESPONDENT’S MOTION IN LIMINE**

On December 28, 2022, Philadelphia Gas Works (PGW or Respondent) filed a Motion in Limine along with a request for expedited response and treatment (Motion). In its Motion, PGW states,

On November 8, 2022, PGW served its Set I Interrogatories requesting that the Complainants SBG Management Services, Inc. *et al* (“SBG”) identify their expert and other witnesses and identify the subject matter of those witnesses’ testimony that will be provided on by SBG on December 30, 2022. On December 8, 2022, SBG served its responses to PGW Set I. Concerningly, SBG’s responses identifying the subject matter of their witness testimony signals that SBG intends to submit expert testimony on alleged damages including “resulting lost income/excess costs incurred as a result of liens” and lay witness testimony on “the damages caused by the improper calculations and billings made by PGW.” *See* SBG responses to PGW-I-1(b) and 2(b) included as **Attachment A**. As such testimony on alleged damages is outside the limited scope of these proceedings and improper before the Commission, SBG should be precluded from inserting new, never before raised issues through its witness testimony.

Motion at 1-2, footnotes omitted. In its Motion, PGW argues that SBG appears to be intending to expand the scope of the issues and to provide testimony on *alleged* consequential damages SBG has suffered. According to PGW, SBG’s responses to discovery states that SBG hopes to provide both expert and lay testimony on alleged damages in the form of “lost income / excess costs” and other “damages caused by the improper calculations and billings made by PGW.” However, PGW points out that testimony on such issues is not within the scope of the two remaining issuesin this proceeding and is obviously outside the scope of the Commission’s jurisdiction. Even if the Commission could hear such claims for damages, PGW argues that the Commonwealth Court’s remand and remaining issues do not give SBG the ability to pursue alleged consequential damages at this late point in the procedural posture. Moreover, PGW notes that given the very compressed schedule that has been established for the remand proceeding, there simply is not sufficient time for this new issue testimony to be adequately addressed. Consequently, PGW filed the Motion in attempt to avoid having to prepare to respond – through rebuttal testimony or cross-examination – to SBG’s inappropriate testimony. Motion at 3-4.

By email dated December 29, 2022, SBG’s counsel informed me that his offices sustained serious water damage due to a major pipe leak.  Counsel requested and was granted an extension of time to file SBG’s Response to PGW’s Motion.

On January 10, 2023, SBG filed a timely letter-response (Response) to PGW’s Motion. In its Response, SBG explains that, although it does not necessarily agree with PGW’s description as to the nature and scope of the two issues currently pending before the Commission, recognizes that Section 1312(a) of the Public Utility Code (the Code) defines the parameters of the refund proceeding. In particular, SBG argues that, when determining the amount PGW owes Complainants for its erroneous application of the eighteen percent (18%) tariff rate over the course of many years – as specified by the Supreme Court’s decision in *PGW II* – § 1312(a) provides as follows:

…the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment.

66 Pa. C.S.A. § 1312(a). Accordingly, SBG argues that in determining the refund amounts owed by PGW – the Commission shall assess the exact amount of the overcharges (a) looking back “four years prior to the date of the filing of [each SBG] complaint” in 2012 and 2015, and (b) adding “interest at the legal rate from the date of each such excessive payment.” Id. SBG further explains that its expert report will only include and discuss the refund amounts as permitted under § 1312(a) of the Code. SBG’s expert analysis will not include any discussion of “lost income / excess costs” and “damages caused by the improper calculations and billings made by PGW.” SBG reserves the right to pursue those consequential damages – which are related to the refund amounts – in the appropriate forum and after this Commission determines the total refund amount PGW must remit to SBG.

The Motion is now ready for ruling.

As a creature of legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Public Utility Code (the “Code”), 66 Pa. C.S.

§§ 101, *et* *seq*. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 1191 (Pa. 1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 237 A.2d 602 (Pa. 1967).

*Behrend v. Bell of PA*, 390 A.2d 233 (Pa. Super. 1978); *Pa. Department of Highways v. Pa. P.U.C.*, 182 A.2d 267 (Pa. Super. 1962); *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978). Nothing in the Code confers jurisdiction upon the Commission to award monetary damages. See, *DeFrancesco v. Western Pennsylvania Water Company*, 453 A.2d 595 (Pa. 1982); *Elkin v. Bell of Pa.*, 420 A.2d 371 (Pa. 1980); Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977); *Poorbaugh v. Pa. PUC*, 666 A.2d 744 (Pa.Cmwlth. 1995). To the extent that SBG seeks or plan to seek compensation for monetary damages, this request will be denied because the Commission lacks the authority to award such damages.

However, under Public Utility Code Sections 3301(a) and (b), "the Commission may levy a fine of up to $ 1,000 per day for continuing violations of the Public Utility Code." 66 Pa.C.S.A. § 3301. The Commission has set forth, in a statement of policy, the factors and standards for evaluating proceedings involving violations of the Public Utility Code for purposes of determining appropriate civil penalty amounts. See, 52 Pa. Code § 69.1201(c). These factors and standards are as follows:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) **Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.**

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201(c). **(Emphasis added).** A party that alleges violation of the public Utility Code may put forth on-the-record testimony on any or all of the factors and standards listed above (e.g., whether the resulting consequences of the conduct at issue were of a serious nature) for the limited purpose of allowing the presiding officer to assess a civil penalty against the violator.

Additionally, I agree with SBG that the provisions of 66 Pa. C.S.A. § 1312 grant the Commission the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. Therefore, any discussion and testimony pertaining to overcharges alleged in the Complaints are relevant and admissible under § 1312(a) of the Code.

In view of the above, PGW’s Motion is granted, in part, with regard to any relief requested by SBG in the form of monetary damages, and denied, in part, with regard to evidence related to overcharges or submitted on the record for the purpose of assessment of civil penalties.

 Before concluding, I’d like to clarify that, unlike the 2012 Complaints which were litigated at length, the 2015 Complaints (t 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) were not. The eight 2015 Complaints involve not only the same parties and properties but also raise the same or similar issues as the 2012 Complaints. In particular, in each of the 2015 Complainants, Complainants have checked the boxes next to the statements “Incorrect Charges are on my bill,” “I am having a reliability, safety and quality of service problem with my utility service,” and “Other,” and submitted detailed explanations of their claims. On June 8, 2016, counsel for SBG and PGW filed a Joint Motion in each of the 2015 Complaints requesting that the proceedings under those Docket Numbers be stayed pending Commission determination on the eight 2012 Complaints at Docket No. (C-2012-2304183, C-20012-2304215, C-2012-2304324, C-2012-2304167, C-2012-23043003, C-2012-2308454, C-2012-2308462, and C-2012-2308465). In that Joint Motion, the parties averred that in August 2015, the parties entered into an agreement regarding, *inter alia*, the inspection of SBG’s properties involved in the 2015 Complaints. As the inspections occurred, “the parties clarified and resolved” some of the issue raised in the 2015 Complaints and committed to provide the following information:

1. Information on new meters installed after exchange
2. Information the meter removed for testing
3. The meter test results
4. Technician notes on the investigation
5. Updated late payment analysis and account histories for the accounts at issue.

Joint Motion at 2. (Emphasis added).

By Orders dated July 5, 2016, the Joint Motion for Further Stay of proceedings in the 2015 Complaints were granted and the 2015 Complaints have remained stayed until, at least, March 26, 2022, when 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, in turn, remanding the two 2012 Complaints at Docket No. C-2012-2304183, C-2012-2304324 to the Commission

…**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).** Consequently, as ordered in my December 19, 2022 Order on PGW’s Partial Motion to Dismiss, “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.”** December 19, 2022 Order, Ordering Paragraph # 5. **(Emphasis added).**

As for the 2012 Complaints, the December 19, 2022, Order, Ordering Paragraph #6 specified that, “[T]he 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.”

These rulings remain unchanged.

THEREFORE,

IT IS ORDERED:

1. That Philadelphia Gas Works’ Motion in Limine is granted, in part, with regard to any relief requested by the Complainants in the form of monetary damages, and denied, in part, with regard to evidence related to overcharges or submitted on the record for the purpose of assessment of civil penalties.

2. 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.

3. 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: January 20, 2023 /s/

 Eranda Vero

 Administrative Law Judge

**C-2012-2304183, C-2012-2304324, C-2015-2486618, C-2015-2486642, C-2015-2486677,**

**C-20145-2486674, C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648 - SBG MANAGEMENT SERVICES, INC. ET AL V. PHILADELPHIA GAS WORKS**

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