**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

#### Harrisburg, PA 17105-3265

Public Meeting held April 15, 2010

Commissioners Present:

James H. Cawley, Chairman

Tyrone J. Christy, Vice Chairman

Wayne E. Gardner

Robert F. Powelson

Pennsylvania Public Utility Commission P-2009-2097639

v.

Philadelphia Gas Works

Pennsylvania Public Utility Commission R-2009-2139884

v.

Philadelphia Gas Works

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for consideration is the Joint Petition for Interlocutory Review of a Material Question (Joint Petition) pursuant to 52 Pa. Code §§ 5.231 and 5.302(a), which was filed on March 9, 2010, by Philadelphia Gas Works (PGW) and Clean Air Council (CAC). PGW states that the Petition asks the Commission to grant a Joint Motion for Partial Summary Judgment to Approve Settlement for Expedited Implementation of Residential DSM[[1]](#footnote-1) Programs (Joint Motion), which was also filed by PGW and CAC on March 9, 2010. On March 18, 2010, PGW filed a Brief in Support of Interlocutory Review and Affirmative Answer to Material Question and Approval of Partial Settlement. CAC filed a Brief in Support of Petition for Interlocutory Review. On March 19, 2010, the Office of Consumer Advocate (OCA) filed an Answer and Affidavit of David Nichols in Response to the Joint Motion. Also on March 19, 2010, the OCA and the Office of Trial Staff (OTS) each filed a Brief in Response to the Joint Petition. On March 29, 2010, the OTS filed an Answer to the Joint Motion.

On March 19, 2010, the Office of Small Business Advocate (OSBA) filed a Brief in Response to the Joint Petition. Also on March 19, 2010, the OSBA filed an Answer to the Joint Motion, along with the Affidavit of Robert D. Knecht, Exhibit A and Exhibit B. Two consumer organizations, Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN) filed a Letter in Opposition to the Joint Petition.

On April 8, 2010, PGW filed a Reply to New Matter in Answer to OSBA in Opposition to Joint Motion and Affidavit of John J. Plunkett.

**History of the Proceeding**

On March 26, 2009, PGW filed its Petition for Approval of a Five-Year Gas DSM Plan. On April 3, 2009, PGW petitioned to withdraw its DSM Plan filing temporarily in order to engage in discussions with other interested parties about suggested changes and modifications to the Plan. A revised DSM Plan was submitted by PGW on April 20, 2009. Several Parties, including the OTS, the OCA and the Office of Small Business Advocate (OSBA) filed answers to that filing. Other Parties, including CAC, filed petitions to intervene. Collaborative sessions were held in which the Plan was discussed and informal discovery sessions with all interested Parties commenced.

PGW filed its general rate increase request on December 18, 2009. On that same date, PGW filed a Motion to Consolidate Proceedings, in which it requested that the Commission consolidate its DSM Plan filing with its base rate case filing. By Order entered February 11, 2010, the Commission granted that Motion and approved the consolidation. Complaints and Protests were filed by various individuals, agencies and entities to the general rate increase.

A Prehearing Conference was held on March 2, 2010, at which time a procedural schedule was set for the development of a record in this proceeding. That schedule provides for the submission of intervenor direct testimony on March 26, 2010. In addition to dates for responsive testimony and Public Input Hearings, the schedule established that evidentiary hearings would be held on May 10-14, 2010. Main Briefs are due June 3, 2010, and Reply Briefs are due June 11, 2010.

PGW and CAC filed the above-outlined Joint Petition and Joint Motion on March 9, 2010. On March 18, 2010, PGW filed a Brief in Support of Interlocutory Review and Affirmative Answer to Material Question. CAC also filed a Brief in Support of Petition for Interlocutory Review. The OCA filed an Answer in Opposition and Affidavit of David Nichols in Response to the Joint Motion. The OTS filed an Answer in Opposition to the Joint Motion.

The OSBA filed a Brief in Response to the Joint Petition on March 19, 2010. Also on March 19, 2010, the OSBA filed an Answer to the Joint Motion, along with the Affidavit of Robert D. Knecht, Exhibit A and Exhibit B. TURN filed a Letter in Opposition to the Joint Petition. On April 8, 2010, PGW filed a Reply to New Matter in Answer to OSBA in Opposition to Joint Motion and Affidavit of John J. Plunkett.

**Discussion**

**Joint Petition for Interlocutory Review**

The material question to be answered is as follows:

Should the Commission approve the Settlement to permit PGW to implement the Residential DSM Programs proposed in PGW’s Five-Year Gas Demand-Side Management (DSM) Plan pending further review in the rate case and in the detailed implementation process to enable low-income and other residential customers to begin receiving the benefits of reduced and more efficient energy usage as soon as possible before the next winter heating season, and to maximize the reduction of the CRP subsidy paid by non-low income firm service customers?

Joint Petition at 2.

The standards for interlocutory review of a material question sought by a participant are set forth at 52 Pa. Code § 5.302(a). The petitioning party must “state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” The central question is whether interlocutory review is necessary in order to prevent substantial prejudice. Therefore, the test is whether the alleged error, and any prejudice flowing from that issue, could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, et al. (Order entered June 10, 1999); Pa*. PUC v. Frontier Communications of Pa., Inc*., Docket No. R‑00984411 (Order entered February 11, 1999).

The interlocutory review standard has also been interpreted in *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985), where the Commission stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. The Commission has determined that such a showing may be accomplished by a petitioner by its proving that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding.

We note that, in this case, the petitioning parties are not alleging an error, but are instead proffering the alleged compelling reasons why interlocutory review will “prevent substantial prejudice.” In essence, the petitioning parties allege that expedited implementation of PGW’s proposed residential DSM programs, prior to the final resolution of its base rate case, is reasonable and in the public interest, and will not prejudice any party’s right to address any other DSM program issue. The petitioning parties allege that the benefits to all firm service customers would be maximized by having these programs in place before the beginning of the next winter heating season.

Joint Petition at 1.

**Joint Motion for Partial Summary Judgment to Approve Settlement**

The petitioning parties also submitted the above-captioned pleading, which requests that the Commission, in accordance with 52 Pa. Code §§ 5.102, 5.231 and 69.401, approve their Stipulation and Settlement as reasonable and in the public interest. The Settlement, as outlined above, provides for the expedited implementation of DSM programs. The petitioning parties allege that approval of the Settlement will permit thousands of PGW residential customers to receive conservation services sooner, and also to enjoy lower bills and more efficient energy use, potentially before the next winter heating season. Joint Motion at 3.

In response, the OCA avers that it is not opposed to PGW’s proposal to implement DSM and energy efficiency programs. The OCA submits, however, that the petitioning parties are not entitled to summary judgment in this matter and that it is not reasonable for the Commission to approve early implementation of these programs in the course of the base rate proceeding of a cash flow utility like PGW. The OCA also points out that many issues remain unresolved regarding PGW’s DSM programs, and that the OCA and the other parties have not even had an opportunity to file their direct testimony

on those issues. OCA’s Answer to Joint Motion at 2-7.

In its Answer, the OTS requests that we deny the Joint Motion. The OTS

avers that PGW has failed to provide adequate support in justification of the requested relief. The OTS furthermore alleges that PGW’s claim that there are no disputed facts in this proceeding is clearly inconsistent with the evidence adduced up to this point. The OTS also asserts that PGW and CAC cannot be permitted, via their Joint Petition and their Joint Motion, to circumvent the development of a thorough evidentiary record in this proceeding. OTS’ Answer to Joint Motion at 3-6.

**Disposition**

Section 5.303(a) of our Regulations deals with Commission action on a petition for interlocutory review and answer. That Section reads, in pertinent part, as follows:

1. Within 30 days of receipt of the petition, the Commission will, without permitting oral argument, do one of the following:
2. Continue, revoke or grant a stay of the proceedings if necessary to protect the substantial rights of the parties.
3. Determine that the petition was improper and return the matter to the presiding officer.
4. Decline to answer the question.
5. Answer the question.

On review, we determine that the petition is improper and we will return this matter to the presiding ALJ. The Joint Petition asks that we grant the Joint Motion for Partial Summary Judgment, which was filed pursuant to our Regulation at 52 Pa. Code § 5.102. In pertinent part, that regulation states:

(3) *Form of decision*. The presiding officer will grant, in whole or in part, the motion in the form of an initial or recommended decision which shall be subject to exceptions as set forth in § 5.533 (relating to exceptions). Denial of a motion will be in the form of a written order.

52 Pa. Code § 5.102(d)(3). By filing the Joint Petition on the same day that the Joint Motion was filed, the Joint Petitioners were obviously attempting to prevent the presiding officer from issuing a decision on the Joint Motion, and were instead seeking a ruling on the Joint Motion directly from the Commission.

For the Commission to be able to grant interlocutory review, the petitioning parties would have to show that, without interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later or that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. We are not convinced that the petitioning parties have demonstrated any of the above. In short, we find no valid reason to preempt the normal process prior to the ALJ’s having an opportunity to render his decision herein.

**Conclusion**

For the reasons set forth above, we find that the Joint Petition is improper and the matter will be returned to the Office of Administrative Law Judge for further proceedings consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Joint Petition for Interlocutory Review of a Material Question, filed by Philadelphia Gas Works and Clean Air Council on March 9, 2010, is improper.

2. That this matter is returned to the Office of Administrative Law Judge for further proceedings, consistent with this Opinion and Order.



**BY THE COMMISSION,**

James J. McNulty

Secretary

(SEAL)

ORDER ADOPTED**:** April 15, 2010

ORDER ENTERED**: April 15, 2010**

1. As used here, “DSM” is an acronym for “demand side management.” [↑](#footnote-ref-1)