BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission : R-2017-2586783

Office of Consumer Advocate : C-2017-2592092

Office of Small Business Advocate : C-2017-2593497

Philadelphia Industrial & Commercial :

Gas Users Group : C-2017-2595147

William Dingfelder : C-2017-2593903

 :

 v. :

 :

Philadelphia Gas Works :

# **PREHEARING ORDER #6**

On February 28, 2017, Philadelphia Gas Works (PGW) filed Supplement No. 100 to PGW’s Gas Service Tariff – PA. P.U.C. No. 2 (Supplement No. 100) to become effective April 28, 2017, seeking a general rate increase calculated to produce $70 million (11.6%) in additional annualrevenues. 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, 2017 in this proceeding.

On March 6, 2017, Carrie B. Wright, Esq., entered a Notice of Appearance on behalf of the Commission’s Bureau of Investigation and Enforcement (BI&E).

On March 6, 2017, the Office of Consumer Advocate (OCA) filed a Public Statement, a Notice of Appearance on behalf of Kristine E. Marsilio, Esq., Harrison W. Breitman, Esq., Darryl A. Lawrence, Esq., and Christy M. Appleby and a formal Complaint. The Complaint was docketed at C-2017-2592092.

On March 13, 2017, the Office of Small Business Advocate (OSBA) filed a Verification, Public Statement, a Notice of Appearance on behalf of Sharon E. Webb, Esq., and a formal Complaint. The Complaint was docketed at C-2017-2593497.

On March 16, 2017, William Dingfelder (“Mr. Dingfelder” or “Complainant”) filed a formal Complaint. The Complaint was docketed at C-2017-2593903.

 By Order entered March 16, 2017, the Pennsylvania Public Utility Commission (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.A. § 1308(d), Supplement No. 100 to Philadelphia Gas Works’ Gas Service Tariff – PA. P.U.C. No. 2 was suspended by operation of law until November 28, 2017, unless permitted by Commission Order to become effective at an earlier date. In addition, the Commission ordered that the investigation include consideration of the lawfulness, justness and reasonableness of the respondent’s existing rates, rules, and regulations. 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.

 On March 17, 2017, the Retail Energy Supply Association (RESA) filed a Petition to Intervene in this proceeding.

 In accordance with the Commission’s March 16, 2017 Order, the matter was assigned to Deputy Chief Administrative Law Judge Christopher P. Pell and Administrative Law Judge Marta Guhl.

 On March 22, 2017, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), through its counsel, filed a Petition to Intervene in this proceeding.

 On March 23, 2017, the Philadelphia Industrial and Commercial Gas Users Group filed a formal Complaint. The Complaint was docketed at C-2017-2595147.

 On March 24, 2017, the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN *et al*.) filed a Petition to Intervene in this proceeding.

 In compliance with the Commission’s March 16, 2017 Order, on March 27, 2017, PGW filed Supplement No. 103 to Gas Service Tariff – Pa P.U.C. No. 2, suspending the effectiveness of rates proposed in Supplement No. 100 to Tariff Pa.P.U.C. No. 2 until November 28, 2017.

 In accordance with a Prehearing Conference Order dated March 17, 2017, PGW, I&E, OCA, OSBA, RESA, CAUSE-PA, PICGUG and TURN *et al*. submitted prehearing memoranda to the presiding officers.

 A call-in telephonic prehearing conference was held on March 29, 2017. The presiding officers were in the Philadelphia Office for the prehearing conference. Counsel for PGW, I&E, OCA, OSBA, RESA, CAUSE-PA, PICGUG and TURN *et al*. participated.

In our Prehearing Order #1 dated March 30, 2017, we granted RESA’s Petition to Intervene and established the procedural schedule and the procedures applicable to this proceeding.

On March 31, 2017, PGW filed a Motion for Protective Order (Motion) pursuant to 52 Pa.Code § 5.423(a). There was no formal opposition to the request and we granted the Protective Order via Prehearing Order #3 dated April 19, 2017.

Also On March 31, 2017, PGW filed its Answers opposing the Petitions to Intervene of both CAUSE-PA and TURN *et al*.

On April 5, 2017, CAUSE-PA and TURN *et al*. each filed a response to PGW’s Answer opposing their respective Petitions to Intervene. Additionally, OCA and I&E each, separately, filed responses to PGW’s Answers. We granted the Petitions to Intervene of CAUSE-PA and TURN et al. via Prehearing Order #2 dated April 7, 2017.

Public Input hearings were held in this matter on May 9 and May 10, 2017.

 On May 10, 2017, Ms. Pickens from TURN *et al*. contacted us via electronic mail indicating that there was a discovery dispute and requesting a modification of the procedural schedule. We responded via electronic mail to the parties indicating that they had until noon on Friday, May 12, 2017 to provide a solution to the discovery dispute.

 On May 11, 2017, a Hearing Notice was issued setting the evidentiary hearings for this matter for Wednesday, June 28, 2017, Thursday, June 29, 2017 and Friday, June 30, 2017 starting at 10:00 a.m. each day.

 Later on May 11, 2017, counsel for PGW informed us that PGW and TURN *et al*. had reached a resolution that involved a proposed modification to the procedural schedule. PGW proposed that TURN *et al*. be allowed to submit its Direct Testimony on Friday, May 19, 2017 and that PGW be allowed to submit Rejoinder Testimony to TURN *et al*.’s testimony on Tuesday, June 13, 2017.

 On May 16, 2017, the non Company parties, excluding TURN *et al*., submitted their witnesses’ direct testimony.

By Prehearing Order #4 dated May 17, 2017, we granted the proposed modifications to the procedural schedule.

On May 19, 2017, TURN *et al*. submitted its direct testimony.

 On May 22, 2017, PGW filed its Motion In Limine to Limit the Scope of the Evidentiary Hearing and this Proceeding and to Exclude Certain Portions of Testimony Submitted by the Office of Consumer Advocate.

 On May 25, 2017, OCA filed its Response to PGW’s Motion.

 By Prehearing Order #5 dated May 26, 2017, we denied PGW’s Motion In Limine.

 On June 9, 2017, all parties, with the exception of CAUSE-PA and RESA, submitted their respective witnesses’ rebuttal testimony.

 On June 22, 2017, all parties, with the exception of CAUSE-PA, their respective witnesses’ surrebuttal testimony. Specifically, as it relates to this Order, TURN *et al*. submitted the surrebuttal testimony of Harry S. Geller.

 On June 23, 2017, PGW filed its Motion to Strike Certain Portions of Testimony Submitted by TURN (Motion).

 On June 26, 2017, I&E filed a letter to indicate its support for PGW’s Motion and its agreement that portions of the surrebuttal testimony of Harry S. Geller should stricken.

 Also on June 26, 2017, TURN *et al*. filed its Answer of the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia to the Motion to Strike of Philadelphia Gas Works (Answer).

 On the same date, CAUSE-PA filed a letter indicating its opposition to PGW’s Motion.

 This matter is ripe for disposition.

DISCUSSION

 In its Motion, PGW has requested that we strike a portion TURN *et al*. witness Harry S. Geller’s surrebuttal testimony. Specifically, PGW has requested that we strike the portion of Mr. Geller’s surrebuttal testimony beginning on Page 17, line 12 through, and including, page 23, line 4. As basis for the request, PGW stated as follows:

The Contested Portions of Mr. Geller’s surrebuttal testimony were submitted for the clear purpose of raising issues that should have been included in TURN’s case-in-chief. *See* TURN St. 1-SR at 17, which acknowledges that this issue was not addressed in TURN’s direct or rebuttal testimony. The Contested Portions of Mr. Geller’s surrebuttal testimony do not rebut any opinion, position or statement in rebuttal testimony. To the contrary, the Contested Portions of Mr. Geller’s surrebuttal testimony were submitted for the clear purpose of advancing a new position, TURN’s “agreement” with and support of OCA witness Colton. The Contested Portions of Mr. Geller’s testimony could properly have been addressed in Mr. Geller’s rebuttal testimony but should not be permitted into the record at this late stage of the proceeding in this case.

Motion at paragraph 8.

 For its part, I&E maintained that it would be “procedurally inappropriate to allow the contested portions of Mr. Geller’s testimony into the record at this time.” I&E asserted that “[t]he portions of the TURN testimony identified by PGW should have been included in TURN’s case-in-chief and serve as nothing more than an opportunity for TURN to respond to the OCA Direct Testimony of Roger Colton and advance a new position.”

 In response to PGW’s Motion, TURN *et al*. denied that Mr. Geller’s testimony inappropriately responds to the direct testimony of OCA witness Colton regarding LIURP funding issues and a low-income heater repair or replacement pilot proposal. Instead, TURN *et al*. asserted that:

Mr. Geller’s testimony specifically rebuts positions raised in the rebuttal testimony of PGW witness Adamucci and I&E witness Maurer regarding the LIURP budget (TURN *et al*. St. No 1SR at 17-21 rebutting positions in PGW St. No. 9-R and I&E St. No. 1-R at 3-5) and to positions raised in the rebuttal testimony of PGW witnesses Adamucci and Peach regarding Mr. Colton’s heater repair or replacement proposal (TURN *et al*. St. No. 1SR at 21-23 rebutting positions in PGW St. No. 9-R and PGW St. No. 11-R). PGW incorrectly categorizes this testimony as only responsive to Mr. Colton’s proposals in direct testimony. However, Mr. Geller’s testimony is appropriately responsive to the positions of PGW witnesses Adamucci and Peach, and I&E witness Maurer that were raised in their rebuttal testimony.

Answer at Pg. 2, paragraph 5. Turn *et al*. further asserted that PGW’s argument that Mr. Geller’s testimony should have been included in TURN *et al.*’s case-in-chief is illogical because “Mr. Geller cannot reasonably be expected to anticipate all of the rebuttal testimony of all other parties to this proceeding.” Moreover, TURN *et al*. argued that “to the extent that PGW seeks to advance a position that TURN *et al.*’s witness may only submit surrebuttal testimony to address other parties’ rebuttals of issues raised in TURN *et al*.’s direct testimony, that argument is without precedent and should be swiftly and properly rejected.” TURN *et al*. maintained that “[i]n the process of surrebuttal, it is appropriate to support the initial argument that was rebutted.” Answer at Pgs. 4-5.

 Additionally, TURN *et al*. argued that, in his direct testimony, Mr. Geller indicated his position that “PGW’s policies severely limit the options that low-income customers have to connect to, maintain and restore service,” that “in light of this testimony, it is reasonable and appropriate for Mr. Geller to rebut other parties’ positions which would further exacerbate the harm to PGW’s low-income customers,” and that “[t]his would include PGW and I&E’s position that the LIURP budget should not be discussed in this proceeding and PGW’s opposition to a low-income heater repair or replacement proposal.”

 CAUSE-PA submitted a letter opposing PGW’s Motion, maintaining that granting this motion would set a dangerous precedent. Specifically, CAUSE-PA indicated:

It would appear that PGW and I&E are seeking to advance a position that a witness may only submit surrebuttal testimony to address other parties’ rebuttal of that witness’s testimony. CAUSE-PA is aware of no such rule. While the rules clearly provide that a party cannot raise issues in the rebuttal phase that it should have raised in direct, a party should not be prohibited from rebutting (or surrebutting) other parties’ testimony that is adverse to the positions and interests of that party. PGW and I&E’s positions in rebuttal testimony on LIURP, and PGW’s position in rebuttal testimony in opposition to a low-income heater repair program, are adverse to the interests of TURN and the positions it sought to advance in this proceeding.

Accordingly, CAUSE-PA asserted that TURN et al. has the right to submit surrebuttal testimony that is directly responsive to PGW and I&E’s rebuttal testimony.

 Regarding thepresentation of evidence by parties, Commission regulations provide in pertinent part that “[a] party will not be permitted to introduce evidence during a rebuttal phase which: . . . [s]hould have been included in the party’s case-in-chief.” 52 Pa. Code § 5.243(e). The Commission has opined that “Section 5.243(e) reinforces a party’s right to prevent the inappropriate or abuse of presentation rights.”[[1]](#footnote-1)

 PGW characterized TURN *et al*.’s “new position” as “TURN’s ‘agreement’ with and support of OCA witness Colton.” PGW argued that to allow this portion of Mr. Geller’s testimony into the record at this stage of the proceeding would be “patently unfair to PGW.” After reviewing the portion of Mr. Geller’s testimony at issue, we do not agree.

If Mr. Geller had advanced an entirely new argument or position in his surrebuttal testimony, we would strike it as being inappropriate at this phase in the proceeding pursuant to 52 Pa. Code § 5.243(e). However, Mr. Geller merely agreed with and supported a position advanced by OCA witness Colton in his direct testimony regarding LIURP and de facto heating proposals. Since Mr. Colton already introduced these issues, they are not “new” issues within the context of this proceeding. Moreover, we do not find that PGW will be prejudiced by TURN *et al*.’s witness simply indicating his support for Mr. Colton’s positions on these issues.

 Additionally, as noted by TURN *et al*. in its Answer, Mr. Geller indicated in his direct testimony that “PGW’s policies severely limit the options that low-income customers have to connect to, maintain and restore service.”[[2]](#footnote-2) We agree with TURN *et al*. that it is reasonable and appropriate for Mr. Geller to rebut the rebuttal testimony of PGW’s and I&E’s witnesses where he believes that their rebuttal testimony advances a position “which would further exacerbate the harm to PGW’s low-income customers.”

Accordingly, we will deny PGW’s Motion to Strike.

# ORDER

 THERERFORE,

 IT IS ORDERED:

1. That Philadelphia Gas Works’ Motion to Strike Certain Portions of Testimony Submitted by TURN is denied.

Date: June 27, 2017 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Christopher P. Pell

 Deputy Chief Administrative Law Judge

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 Marta Guhl

 Administrative Law Judge

Pennsylvania Public Utility Commission v. Philadelphia Gas Works

Docket Number R-2017-2586783

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(C-2017-2593903)

1. *Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission*, Docket No. L-00020156 (Order entered January 4, 2006. [↑](#footnote-ref-1)
2. *See* TURN *et al*. Statement No. 1 (Revised) at Pg. 5: “In additional sections of my testimony, I address how various PGW policies result in vulnerable customers, including many tenants and seniors, being unable to access or maintain affordable gas service.” [↑](#footnote-ref-2)