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May 5, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Fl.
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission v. Philadelphia Gas Works;
Docket No. R-2020-3017206

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Answer to the Bureau of Investigation and Enforcement's Expedited Motion to Extend the Statutory Suspension Period During the Emergency Interruption of Normal Operations of the Pennsylvania Public Utility Commission with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Sarah C. Stoner

Sarah C. Stoner

Enclosure

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

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing 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: May 5, 2020

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Sarah C. Stoner, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	R-2020-3017206
	:	
	:	C-2020-3019161
Office of Consumer Advocate	:	C-2020-3019100
Office of Small Business Advocate	:	C-2020-3019430
Philadelphia Industrial And Commercial	:	
Gas User Group	:	
v.	:	
	:	
Philadelphia Gas Works	:	

**PHILADELPHIA GAS WORKS’
ANSWER TO THE
BUREAU OF INVESTIGATION AND ENFORCEMENT’S
EXPEDITED MOTION TO EXTEND THE STATUTORY
SUSPENSION PERIOD DURING THE EMERGENCY
INTERRUPTION OF NORMAL OPERATIONS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pursuant to 52 Pa. Code § 5.61, Philadelphia Gas Works (“PGW” or the “Company”) hereby submits this Answer in opposition to the Bureau of Investigation and Enforcement’s (“I&E”) Expedited Motion to Extend the Statutory Suspension Period (“Motion”) of PGW’s Base Rate Proceeding during the emergency interruption of normal operations of the Pennsylvania Public Utility Commission (“Commission” or “PUC”). In support of this Answer, PGW submits the following:

I. INTRODUCTION

On February 28, 2020,¹ 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.

¹ PGW provided confidential notice to the Commission 30 days before filing the base rate cases as required by 52 Pa. Code § 53.45(a).

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.

In response to the coronavirus (or COVID-19) pandemic,² Pennsylvania is currently under a statewide “stay-at-home” order.³ The Commission’s offices were closed beginning on Monday, March 16, 2020.⁴ There are “telework” and work from home provisions in place for Commission employees, and I&E employees are willing and able to review and analyze the Company’s rate increase data from home.⁵

On April 16, 2020, the above-described Tariff Supplements were suspended⁶ by the Commission until November 28, 2020, unless permitted by Commission Order to become effective at an earlier date.⁷ Existing case law establishes that the Commission does not have the authority to delay the effective date of rates beyond the statutory suspension period.⁸ The

² Governor Tom Wolf issued a Disaster Proclamation regarding the coronavirus outbreak on March 6, 2020. Motion at ¶ 2; *Proclamation of Disaster Emergency*, 50 Pa.B. 1637, 1644 (Saturday, May 21, 2020). Unless sooner terminated or renewed, that Proclamation expires on Thursday, June 4, 2020. See 35 Pa.C.S. § 7301(c).

³ Governor Wolf and Secretary of Health Dr. Rachel Levine announced statewide stay-at-home orders on March 15, 2020. See Motion at ¶ 2. Those orders were extended until Friday, May 8, 2020. See Motion at ¶ 11. It has been announced that Pennsylvania will utilize a three-phase matrix to determine when counties and/or regions are ready to begin easing some restrictions on work, congregate settings, and social interactions.

⁴ Friday, March 13, 2020, was the last day the Commission’s Offices were open for regular business. See Motion at ¶ 4. The Commission’s offices were closed beginning Monday, March 16, 2020. *Id.*

⁵ Motion at ¶ 18.

⁶ Suspension Order entered April 16, 2020, <http://www.puc.state.pa.us/pcdocs/1660470.doc>. See Motion at ¶ 10. 66 Pa. C.S. § 1308(a) provides for 60 day notice to the Commission, at which time the tariff will go into effect, unless suspended by the Commission. The 60 day period for the subject Supplements ended on April 28, 2020. Between filing date (of February 28, 2020) and April 28, 2020, the Commission scheduled and held public meetings on March 12, 2020, March 26, 2020 and April 16, 2020. See http://www.puc.state.pa.us/about_puc/public_meeting_calendar.aspx.

⁷ Sections 1308(d) of the Public Utility Code provides for a maximum of nine months between the filing of a general rate increase request and the date when rates are permitted to go into effect. See Motion at ¶ 5. November 28, 2020 is the last day of the statutory suspension period. See Motion at ¶ 10.

⁸ *Bell Telephone Co. of Pa. v. Pa. Public Utility Commission*, 452 A.2d 86 (Pa. 1982), *affirmed per curiam*, 482 A.2d 1272 (Pa. 1984) (*Bell Telephone*); see also *National Fuel Gas Distribution Corp. v. Pa. Public Utility Commission*, 464 A.2d 546, 567 (Pa.Cmwlth. 1983).

Commission has also recognized that “there appears to be a statutory right to have an effective date of new rates no later than the end of the suspension period date. . .”⁹

On April 29, 2002, I&E filed its Motion¹⁰ seeking to extend the statutory suspension for PGW’s rate case proceedings from November 28, 2020 to January 14, 2021.¹¹ This request would involuntarily extend the suspension period for 48 days.¹² As of May 4, 2020, an Answer to I&E’s Motion has been filed by the Office of Consumer Advocate (“OCA”).¹³ Generally, the OCA’s Answer supports I&E’s Motion based on similar reasoning.

PGW appreciates the challenges created by the orders requiring attorneys and witnesses to work remotely, as PGW and other parties are currently experiencing those same challenges. However, simply extending the statutory deadlines in these proceedings does not provide a legal or workable solution that properly balances the needs of all interested stakeholders. This approach would prevent the Company from billing literally millions of dollars in revenue, thus threatening critical infrastructure projects as well as PGW’s financial health and, potentially, its standing with credit rating agencies. This outcome is not in the public interest. PGW submits that, given the financial harm that would befall the Company, it is incumbent on all parties to find ways in which to continue to proceed with the litigation of PGW’s rate case. Additionally, it is premature to extend the statutory suspension period in the manner demanded by I&E. There are less drastic modifications that can be made to the schedule, if necessary, to provide I&E and the other parties with an adequate and reasonable period in which to investigate PGW’s rate requests without the harms to PGW that would be caused by extending the suspension period and

⁹ *Petition of Philadelphia Electric Company for Declaratory Order*, P-890349, Opinion and Order entered May 3, 1989; 1989 Pa PUC LEXIS 56 (citing *Bell Telephone*).

¹⁰ <http://www.puc.state.pa.us/pcdocs/1661807.pdf>.

¹¹ See Motion at Introduction, § III.A, and ¶ 10, 12, 27.

¹² The requested 48 day involuntary extension equals 6 weeks and 6 days. I&E has referred to the length of the requested involuntary extension as approximately seven weeks. See Motion at ¶ 10, 11.

¹³ <http://www.puc.state.pa.us/pcdocs/1662279.pdf>.

delaying PGW's ability to implement a Commission authorized base rate increase. For these reasons and those discussed in detail below, I&E's motion should be denied.

II. ANSWER

A. PGW Has A Statutory Right To New Rates Becoming Effective No Later Than Nine Months After Its Filings.

The fundamental flaw in I&E's Motion is that it asserts – without legal support – that the Commission (through the Chief ALJ who, PGW understands has been delegated authority to modify procedural schedules) has the legal authority to rescind or suspend Section 1308(d) of the Public Utility Code, which provides for a maximum of nine months between the filing of a general rate increase request and the date when rates are permitted to go into effect.¹⁴ Section 1308(d) states, in relevant part:

Before the expiration of such seven-month period, a majority of the members of the commission . . . shall make a final decision and order . . . granting or denying, in whole or in part, the general rate increase requested. If, however, such an order has not been made at the expiration of such seven-month period, the proposed general rate increase shall go into effect at the end of such period [subject to refund].

66 Pa. C.S. § 1308(d). But existing case law establishes that the Commission does not have the authority to delay the effective date of rates beyond the statutory suspension period.¹⁵ The Commission has also recognized that “there appears to be a statutory right to have an effective date of new rates no later than the end of the suspension period date. . .”¹⁶

¹⁴ 66 Pa. C.S. § 1308(a) requires that a public utility provide 60 day notice before changing existing rates. 66 Pa. C.S. § 1308(d) (regarding general rate increases) allows the Commission to suspend the rate increase for up to seven additional months. This results in a maximum of nine months between the rate filing and the date when new rates go into effect. The ability of ALJs to regulate the course of hearing, 66 Pa.C.S. § 331(d)(4), (d)(7), (d)(9); 52 Pa.Code § 5.483, is limited to actions within the statutory suspension period. Those provisions do not empower the ALJ to extend the suspension period for the reasons stated in the next two footnotes together with the accompanying text.

¹⁵ *Bell Telephone Co. of Pa. v. Pa. Public Utility Commission*, 452 A.2d 86 (Pa. 1982), *affirmed per curiam*, 482 A.2d 1272 (Pa. 1984) (*Bell Telephone*); *see also National Fuel Gas Distribution Corp. v. Pa. Public Utility Commission*, 464 A.2d 546, 567 (Pa.Cmwlth. 1983).

¹⁶ *Petition of Philadelphia Electric Company for Declaratory Order*, P-890349, Opinion and Order entered May 3, 1989; 1989 Pa PUC LEXIS 56 (*citing Bell Telephone*).

Accordingly, PGW submits that the Commission does not have the authority to simply suspend the provisions of Section 1308(d). The Emergency Order states that, for pending rate cases, the Administrative Law Judge may “establish reasonable deadlines under the circumstances.”¹⁷ The Order does not specify that the ALJ or the Chief ALJ has been given the authority to actually suspend a non-procedural statutory directive – Section 1308(d) – and no emergency order of the Governor (or anyone else) appears to extend that power to the PUC.¹⁸

The Commission’s Emergency Order is based upon the March 6th Proclamation of Disaster Emergency by Governor Wolf. While very broad, the Governor’s powers are not unrestrained. The Constitution of the Commonwealth of Pennsylvania states that: “No power of suspending laws shall be exercised unless by the Legislature or by its authority.”¹⁹ The Governor of Pennsylvania therefore assumes his emergency management powers under specific provisions of the Emergency Management Services Code (the “Emergency Code”), 35 Pa. C.S. §§ 7101-7104. Section 7301(f) of the Emergency Code provides, in part, that the Governor may: “Suspend the provisions of any regulatory statute prescribing the *procedures* for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, *if strict compliance* with the provisions of any statute, order, rule or regulation *would in any way prevent, hinder or delay necessary action in coping with the emergency*.”²⁰ In the Proclamation regarding COVID-19 issued on March 6, 2020, the Governor stated he suspended “the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, *if strict compliance*

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ Pa. Const., Art. I, § 12.

²⁰ 35 Pa. C.S. § 7103(f)(1) (emphasis added).

with the provisions of any statute, order, rule or regulation would in any way prevent, hinder, or delay necessary action in coping with this emergency.”²¹

Accordingly, to be consistent with Constitutional and legislative authority, any suspension of a regulatory statute must: (1) have to do with procedures proscribed by the state; and, (2) be based upon a finding that strict compliance would prevent, hinder or delay necessary action in coping with the emergency.

PGW submits that said standard has not been satisfied for I&E’s request to suspend the statutory suspension period. First, as previously noted, the right to put rates into effect at the end of the suspension period (subject to refund, if the Commission has failed to act), is not a procedural right but a substantive one granted to utilities, as the Commission has previously ruled.²²

Second, the allegations by I&E (in its Motion) and the other Answers merely state (at best) that it would be difficult or inconvenient for the Commission and the parties to respond to PGW’s proposals within the statutory suspension period. Even in the current situation, the interested stakeholders have managed to proceed with discovery that is typical at this point in time for a rate case. Thus, strict compliance with the statutory suspension period will not prevent, hinder or delay necessary action in coping with the emergency or even in continuing to process and investigate PGW’s rate request in the normal course.

Accordingly, since the Commission itself lacks the authority to waive the Section 1308(d) deadline for action, and to the extent that the Commission fails to act by then, the remedy is already established by the statute – PGW would have the option of placing the rates into effect subject to refund. As the Commission has continued to hold public meetings and issue

²¹ *Proclamation of Disaster Emergency*, 50 Pa.B. 1637, 1644 (Saturday, May 21, 2020) (emphasis added).

²² *Petition of Philadelphia Electric Company for Declaratory Order*, P-890349, Opinion and Order entered May 3, 1989; 1989 Pa PUC LEXIS 56 (citing *Bell Telephone*).

orders during the physical closure of its offices, it does not appear that timely ruling on PGW's rate case would present a particular challenge for the Commission. Moreover, it is certainly not reasonable to extend the suspension period for 48 days as I&E's Motion requests. As will be discussed below, there are less extreme measures that could accommodate the parties' due process rights to investigate PGW's proposals without the same harms that would result from the lengthy extension that I&E has requested.

B. The Parties Are Currently Investigating PGW's Proposals Remotely.

Despite claims of limitations created by teleworking, I&E, OCA and the Office of Small Business Advocate ("OSBA") began serving discovery requests to PGW. As of May 4, 2020, PGW has received twenty-two sets of discovery totaling well over 316 questions (not inclusive of subparts). Many of these questions include numerous subparts. This evidences an ability by those who have intervened to continue to investigate PGW's filing despite the teleworking status.²³ Importantly, this is exactly what would be occurring under normal circumstances – discovery. PGW is working diligently (also remotely) to provide timely responses to those interrogatories.²⁴ PGW should not be penalized by a delay in these proceedings on the basis that working remotely is somehow impeding the ability of interested entities to investigate the rate filing.

²³ In addition, the parties have already agreed to electronic service of documents among themselves, thereby decreasing the need for personnel to print, copy and mail hard copies of documents.

²⁴ Concerns about access to confidential documents, if any, can be addressed via an appropriate Protective Order. It is anticipated that a form of Protective Order will be submitted to the ALJ for approval. That Protective Order will recognize some of the challenges for parties needing access to confidential documents in a teleworking environment. PGW has also made all of its documents and discovery responses available via a secured, password protected website that the parties have successfully used in prior proceedings and are regularly accessing in this case as well. Thus, appropriate accommodations have been established to enable what would "normally" be occurring at this stage of a rate case, the exchange of information via discovery.

C. Any Involuntary Extension Of The Suspension Period Will Harm PGW's Finances.

If I&E's Motion is granted and the suspension period is involuntarily extended, PGW will suffer significant financial harm as a result. Under the current statutory suspension period, PGW may be able to place new rates in effect by December 1, 2020. Under the involuntary extended suspension period, PGW may have to wait until February 1, 2021 to place new rates in effect. This two month delay in new rates will cause PGW to lose over \$20.5 million, based on current projections due to the requested delay (PGW typically bills nearly 30% of its annual sales in December and January).²⁵

A significant delay before a rate increase can go into effect would have a detrimental effect on PGW. The requested involuntary extension will cut into the winter heating season, the prime period for gas demand and revenues for PGW. This will make it difficult (if not impossible) for PGW to maintain adequate cash on hand before the end of the FPFTY (i.e., August 31, 2021), PGW's fiscal year-end.²⁶ PGW's testimony indicates that, at present rates, PGW's cash projection is negative in FY 2022 and that PGW could face cash on hand of zero or close to zero balances in January and February 2022.²⁷ Without a timely rate increase, the year-end FPFTY cash balance would be materially below the level expected by rating agencies, and could lead to adverse actions by rating agencies.

Additionally, an involuntary extension of the suspension period and the related loss of revenue will also impact how PGW finances critical infrastructure improvement projects. PGW does not have shareholders who can fund projects or who will benefit from a rate increase;

²⁵ See Motion at ¶¶ 25, 26 wherein I&E states that it is mindful that PGW is a cash flow basis company and that it is imperative that PGW meet its debt service coverage obligations and have enough cash on hand to support its operations.

²⁶ PGW St. 2, at 14-15.

²⁷ PGW St. 2, at 14-15.

rather, the requested rate increases are largely for the purpose of improving PGW's aging infrastructure. A delay in receiving additional funds could require PGW to use long-term borrowing, instead of rate based internally generated funds, to improve the overall safety and reliability of its distribution system, including the removal and replacement of "at-risk" cast iron mains,²⁸ and other critical infrastructure projects. As described in PGW's testimony, it is important that PGW continue to fund a portion of its capital improvement projects through internally generated funds as well as meeting or exceeding other financial metrics so that PGW can continue to access the capital markets on reasonable terms.²⁹

D. The Motion Does Not Justify An Involuntary Extension Of The Suspension Period Even if Legally Permitted.

The Motion requests an additional 48 days be added to the statutory suspension period. Nothing in the Motion explains or justifies the 48 day period requested. The Motion explains that it will be slower, more difficult, or inconvenient for the Commission and the parties to respond to PGW's proposals without an extension of the statutory suspension period. The Motion does not explain why 48 days is the amount of time needed. Without the required findings, as discussed in Section II.A, there is no ability to determine that this requested involuntary extension is justified. That being said, it must also be kept in mind that, as discussed below, there are other less extreme measures that could be taken to provide the parties with adequate time to develop their respective cases.

Nothing in the Motion indicates that I&E, the parties or PGW's customers will be deprived of due process if statutory suspension period (November 28, 2020) remains in place. The Motion expresses concerns over the use of telephonic (or other non-in-person) public input hearings or evidentiary hearings. The Motion does not, however, indicate that the inability to

²⁸ See PGW St. 7, at 2-8.

²⁹ PGW St. 2, at 3-4.

hold in-person public input hearings or evidentiary hearings will result in the deprivation of due process rights. In fact, the OCA's Answer to the Motion specifically requests that remote or virtual public input hearings be arranged in lieu of traditional in-person public input hearings.³⁰ Further, as evidenced by PGW's Prehearing Memorandum, it is possible to develop a schedule where input hearings can be held before the submission of direct testimony by I&E, OCA and others. Alternatively, it is possible for parties to submit supplemental direct testimony to address testimony received in public input hearings.

The Motion also raises concerns about the impact on PGW's low income customers. PGW is supporting its customers during the coronavirus pandemic and will continue to do so. PGW has a variety of assistance programs in place for customers to assist with their natural gas bills and has recently received approval from the PUC to increase the assistance it provides to eligible customers.³¹ Nevertheless, the Motion states that more time is needed to assess the impact of pandemic on PGW's low and moderate income customers. I&E acknowledges that the pandemic circumstances are quickly changing, and that (at this juncture) it is impossible to determine if more of PGW's customers will be in need of rate assistance. These concerns, however, do not justify the requested involuntary extension, since PGW's goal is always to work with customers and give them as much support as we can, in order to keep their vital natural gas service on. Whether the need is temporary or ongoing, PGW's experienced team regularly works with customers who are in tough financial situations. As such, the concern raised in I&E's Motion does not justify an extension and therefore the Motion should be denied.

³⁰ OCA Answer at 7-8.

³¹ See *Philadelphia Gas Works Universal Service and Energy Conservation Plan for 2017-2022 and Petition to Amend Philadelphia Gas Works Universal Service and Energy Conservation Plan for 2017-2022*, Docket Nos. M-2016-2542415 and P-2020-3018867, Order entered March 26, 2020.

E. Scheduling Considerations And Alternatives

I&E's Motion seeks to extend the suspension period to a different scheduled public meeting of the Commission.³² The Commission's March 20, 2020 Emergency Order states that in pending rate case litigation, the Chief Administrative Law Judge may "establish reasonable deadlines under the circumstances." The Motion requests an extension until the public meeting scheduled for January 14, 2021.³³ However, the Motion does not explain why a short extension – such as an extension to the meeting scheduled for December 3, 2020.³⁴ With such a date, PGW would be able to implement new rates by mid-December. This would, based on projections, significantly reduce the financial harm to PGW (although it would still suffer a cash flow drain). However, the Motion does not clearly articulate why such a less draconian remedy is unreasonable.

Based on a November 19 PUC Public Meeting date, PGW anticipates that other parties will not be required to file direct testimony until approximately May 29, 2020.³⁵ The COVID-19 pandemic has created a quickly evolving situation and it is unclear how events will play out in the coming weeks. If necessary, other less extreme measures could be taken to provide the parties with adequate time to develop their respective cases. For example, the parties could agree to reduce the rounds of testimony to two (other party direct and PGW rebuttal) with any further testimony conducted at the hearings, shorten the briefing period, certify the record directly to the Commission for decision or the Commission could also shorten its review time of a recommended decision. The Commission could also conduct any public input hearings telephonically if necessary, as discussed above. PGW submits that it is not necessary to make

³² See Motion at ¶ 12.

³³ See Motion at ¶ 12.

³⁴ http://www.puc.state.pa.us/about_puc/public_meeting_calendar.aspx.

³⁵ PGW Prehearing Memorandum: <http://www.puc.state.pa.us/pdocs/1661831.pdf>.

such adjustments at this time, but that the parties could revisit these possibilities in 30 days to determine whether any scheduling modifications are warranted at that time. This is a more reasonable and balanced approach under the circumstances that will allow the parties to adjust timelines if necessary without causing significant harm to PGW.

In the alternative, if the suspension period is extended, PGW's proposed rates should either: (1) be allowed to go into effect after the suspension period ends, subject to refund;³⁶ or (2) once approved, the increased rates must apply retroactively to the date they would have gone into effect under the original suspension date. These approaches respect PGW's statutory rights and help limit the damage that any delay in these proceedings would cause to PGW's finances while permitting the delay sought by I&E and the other stakeholders filing answers to the Motion.

³⁶ See 66 Pa. C.S. §1308(d), which provides that “[i]f, however such an order has not been made at the expiration of the seven-month period, the proposed general rate increase shall go into effect at the end of such period, but the commission may by order require the interested public utility to refund, in accordance with section 1312 (relating to refunds), to the persons in whose behalf such amounts were paid, such portion of such increased rates as by its decision shall be found not justified, plus interest...”

III. CONCLUSION

For the foregoing reasons, PGW respectfully requests that I&E's motion be denied. In the alternative, any involuntary extension of the suspension period must allow PGW's rates to go into effect as scheduled subject to refund, or allow rates to be effective retroactively.

Respectfully submitted,

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Dated: May 5, 2020

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