



Eckert Seamans Cherin & Mellott, LLC  
213 Market Street  
8<sup>th</sup> Floor  
Harrisburg, PA 17101

TEL: 717 237 6000  
FAX: 717 237 6019

Kristine E. Marsilio  
717.237.6037  
[kmarsilio@eckertseamans.com](mailto:kmarsilio@eckertseamans.com)

June 24, 2020

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: PA Pennsylvania Public Utility Commission et al., v. Philadelphia Gas Works –  
Docket No. R-2020-3017206

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Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' Motion in Limine Regarding the Testimony Submitted by the Environmental Stakeholders in the above referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*Kristine E. Marsilio*

Kristine E. Marsilio

KEM/lww

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

## **CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of PGW's Motion in Limine upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

### **Via Email**

Carrie B. Wright, Esq.  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
[carwright@pa.gov](mailto:carwright@pa.gov)

Daniel G. Asmus, Esq.  
Sharon E. Webb, Esq.  
Office of Small Business Advocate  
Forum Place, 1<sup>st</sup> Floor  
555 Walnut Street  
Harrisburg, PA 17101  
[dasmus@pa.gov](mailto:dasmus@pa.gov)  
[swebb@pa.gov](mailto:swebb@pa.gov)

Robert D. Knecht  
Industrial Economics Incorporated  
2067 Massachusetts Ave.  
Cambridge, MA 02140  
[rdk@indecon.com](mailto:rdk@indecon.com)

Darryl A. Lawrence, Esq.  
Christy M. Appleby, Esq.  
Santo G. Spataro, Esq.  
Laura Antinucci, Esq.  
Office of Consumer Advocate  
5th Floor, Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
[OCAPGW2020@paoca.org](mailto:OCAPGW2020@paoca.org)

Gregory J. Stunder, Esq.  
Philadelphia Gas Works  
800 West Montgomery Avenue  
Philadelphia, PA 19122  
[Gregory.Stunder@pgworks.com](mailto:Gregory.Stunder@pgworks.com)

John W. Sweet, Esq.  
Elizabeth R. Marx, Esq.  
Ria M. Pereira, Esq.  
Pennsylvania Utility Law Project  
118 Locust Street  
Harrisburg, PA 17101  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)

Todd S. Stewart, Esq.  
Hawke McKeon & Sniscak LLP  
100 North Tenth Street  
Harrisburg, PA 17101  
[tsstewart@hmslegal.com](mailto:tsstewart@hmslegal.com)

Charis Mincavage, Esq.  
Adeolu A. Bakare, Esq.  
Jo-Anne Thompson, Esq.  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
[cmincavage@mcneeslaw.com](mailto:cmincavage@mcneeslaw.com)  
[abakare@mcneeslaw.com](mailto:abakare@mcneeslaw.com)  
[jthompson@mcneeslaw.com](mailto:jthompson@mcneeslaw.com)

Josie B. H. Pickens, Esq.  
Joline R. Price, Esq.  
Robert W. Ballenger, Esq.  
Kintéshia Scott, Esq.  
Community Legal Services, Inc.  
1410 West Erie Avenue  
Philadelphia, PA 19140  
[jpickens@clsphila.org](mailto:jpickens@clsphila.org)  
[jprice@clsphila.org](mailto:jprice@clsphila.org)  
[rballenger@clsphila.org](mailto:rballenger@clsphila.org)  
[kscott@clsphila.org](mailto:kscott@clsphila.org)

Joseph Otis Minott, Esq.  
Ernest Logan Welde, Esq.  
Clean Air Council  
135 S. 19<sup>th</sup> Street, Suite 300  
Philadelphia, PA 19103  
[joe\\_minott@cleanair.org](mailto:joe_minott@cleanair.org)  
[lwelde@cleanair.org](mailto:lwelde@cleanair.org)

Cassandra R. McCrae, Esq.  
Devin McDougall, Esq.  
Earthjustice  
1617 John F. Kennedy Blvd., Suite 1130  
Philadelphia, PA 19103  
[cmccrae@earthjustice.org](mailto:cmccrae@earthjustice.org)  
[dmcDougall@earthjustice.org](mailto:dmcDougall@earthjustice.org)

Dated: June 24, 2020

*Kristine E. Marsilio*

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Kristine E. Marsilio, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	
	:	Docket No. R-2020-3017206
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	

**NOTICE TO PLEAD**

TO: Sierra Club and Clean Air Council

You are hereby notified to file a response to the enclosed Motion in Limine in the form and manner as directed by the Administrative Law Judges or a judgment may be entered against you.

Respectfully submitted,

*/s/ Kristine E. Marsilio*

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Daniel Clearfield, Esq.  
Sarah C. Stoner, Esq.  
Kristine E. Marsilio, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8th Floor  
Harrisburg, PA 17101  
717.237.6000; 717.237.6019 (fax)  
[dclearfield@eckertseamans.com](mailto:dclearfield@eckertseamans.com)  
[sstoner@eckertseamans.com](mailto:sstoner@eckertseamans.com)  
[kmarsilio@eckertseamans.com](mailto:kmarsilio@eckertseamans.com)

*Counsel for Philadelphia Gas Works*

Of Counsel:  
Craig W. Berry, Esq.  
Senior Attorney  
*Admitted pro hac vice*  
Graciela Christlieb, Esq.  
Senior Attorney, Legal Department  
Philadelphia Gas Works  
800 W. Montgomery Ave.  
Philadelphia, PA 19122  
Tel (215) 684-6049  
Fax (215) 684-6798  
[Craig.Berry@pgworks.com](mailto:Craig.Berry@pgworks.com)  
[Graciela.Christlieb@pgworks.com](mailto:Graciela.Christlieb@pgworks.com)

Dated: June 24, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	
	:	Docket No. R-2020-3017206
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	

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**MOTION IN LIMINE OF PHILADELPHIA GAS WORKS REGARDING  
THE TESTIMONY SUBMITTED BY  
THE ENVIRONMENTAL STAKEHOLDERS**

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**TO ADMINISTRATIVE LAW JUDGES HEEP AND GUHL:**

Pursuant to 52 Pa. Code § 5.103 of the regulations of the Pennsylvania Public Utility Commission (“Commission”), Philadelphia Gas Works (“PGW” or “Company”) files this Motion in Limine to bar from consideration in this proceeding certain portions of the pre-served Direct Testimony submitted on behalf of the Sierra Club and Clean Air Council (collectively, “Environmental Stakeholders”). Specifically, PGW moves to exclude from this proceeding the following portions of the Direct Testimony of Ezra D. Hausman, SC St. No. 1 (the “Contested Portions”):

- Page 3, lines 7 through 8 (the sentence that begins, “I address both elements [...].”)
- Page 3, line 14 through and including page 4, line 14
- Page 6, lines 1 through 2 (the sentence that begins, “Methane is a powerful [...].”)
- Page 6, line 5 through and including line 14
- Page 7 line 4 through and including page 18, line 10
- Page 26, line 1 through and including page 28, line 7
- Page 28, line 11 through and including page 29, line 12

In the Contested Portions, the Environmental Stakeholders make recommendations based on goals established by Governor Wolf in Executive Order Number 2019-01 and the Philadelphia City Council in City Council Resolution No. 190728 regarding eliminating greenhouse gas emissions in the Commonwealth and the City of Philadelphia, requiring the use of renewable energy and ordering PGW to present a plan to transition away from the sale and distribution of natural gas in favor of “electrification.” While the environmental concerns raised in SC St. No. 1 are important, they are not relevant to this base rate case and are outside the Commission’s jurisdiction. As such, the Contested Portions of SC St. No. 1 should not be admitted to the record or otherwise considered in this proceeding.

## **I. BACKGROUND**

1. On February 28, 2020, 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. 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. At that time, 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, 2020 (its fiscal year) in this proceeding.

2. By Order entered April 16, 2020 (“Suspension Order”), the 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,<sup>1</sup> Supplement No. 128 and Supplement No. 85 were suspended by operation of law until November 28, 2020, unless permitted by

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<sup>1</sup> 66 Pa. C.S. § 1308(d).

Commission Order to become effective at an earlier date.<sup>2</sup> The Suspension Order did not consider the Petition for Waiver. In addition, the Commission ordered that the investigation include consideration of the lawfulness, justness and reasonableness of PGW'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.

3. A telephonic prehearing conference was held on May 5, 2020, which resulted in the issuance of a Corrected Prehearing Order dated May 15, 2020.

4. Pursuant to the May 15, 2020 Corrected Prehearing Order, other parties' direct testimony was required to be served by June 15, 2020. Rebuttal testimony will be due on July 13, 2020 and surrebuttal testimony will be due on July 24, 2020. Hearings are scheduled for July 28-30, 2020.

5. On June 15, 2020, the Environmental Stakeholders served SC St. No. 1. In the Contested Portions, the Environmental Stakeholders make recommendations based on environmental-related directives of Governor Wolf and the Philadelphia City Council. For the reasons set forth above and more fully explained hereinafter, the Contested Portions of SC St. No. 1 should be barred from admission and should not be considered in the disposition of this proceeding because they raise matters that are beyond the Commission's jurisdiction and are not relevant to PGW's base rate case.

## **II. APPLICABLE LEGAL STANDARDS**

6. Section 5.403(a)(1) of the Commission's regulations authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence.<sup>3</sup> The

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<sup>2</sup> PGW later agreed to voluntarily extend the end of the suspension period to December 4, 2020. *See Corrected Prehearing Order* at 2 (May 15, 2020).

<sup>3</sup> 52 Pa. Code § 5.403(a)(1).

presiding officer also has authority to confine the evidence to the issues in the proceeding and to impose necessary limitations upon the admission of evidence.<sup>4</sup>

7. A motion in limine has been recognized as a valid means of requesting that the presiding officer control the receipt of evidence in the proceeding.<sup>5</sup> Upon the filing of a Motion in Limine, Administrative Law Judges have employed the authority granted by Section 5.403 to exclude evidence that is beyond the proper scope of Commission proceedings and focus the evidence on the matters properly at issue.<sup>6</sup>

8. As a matter of policy, evidence that is irrelevant or immaterial to the issues presented in a proceeding must be excluded.<sup>7</sup>

9. Further, the Commission has only the power and jurisdiction expressed or necessarily implied to it by the legislature.<sup>8</sup> The Commission must act within, and cannot exceed, its jurisdiction.<sup>9</sup> Jurisdiction cannot be conferred where none exists.<sup>10</sup> Therefore, to the extent evidence pertains to an issue that is outside the Commission's jurisdiction, it must be excluded.

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<sup>4</sup> 52 Pa. Code §§ 5.403 and 5.483.

<sup>5</sup> See e.g. *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015); see also 52 Pa. Code § 5.403(b) (requires presiding officers to "actively employ [Section 5.403(a)] powers to direct and focus the proceedings consistent with due process.").

<sup>6</sup> *Id.*

<sup>7</sup> 66 Pa. C.S. § 332(b); 52 Pa. Code § 5.401(a).

<sup>8</sup> See *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); see also *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008).

<sup>9</sup> *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

<sup>10</sup> *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).



### III. ARGUMENT

10. The Contested Portions of testimony raise issues and make recommendations that are outside the Commission's jurisdiction. Specifically, in the Contested Portions, the Environmental Stakeholders argue that the Company has not adequately considered energy efficiency and electrification as alternatives to its proposed infrastructure work with the purpose of reducing or eliminating PGW's sale and distribution of natural gas, a claimed source of carbon emissions.<sup>11</sup> The Environmental Stakeholders recommend that the Commission direct PGW to produce a Climate Business Plan, consistent with the goals set forth by Governor Wolf in Executive Order Number 2019-01 and the Philadelphia City Council in City Council Resolution No. 190728.<sup>12</sup> These goals include aggressively reducing, and ultimately eliminating, greenhouse gas emissions in the Commonwealth of Pennsylvania and the City of Philadelphia and transitioning to renewable energy and away from the sale of natural gas to PGW's customers.<sup>13</sup> The Contested Portions further provide that PGW should cease replacing its pipelines, presumably including the some 3,000 miles of cast iron main and be required to investigate non-pipeline alternatives, even if distribution system maintenance is necessary for safety-related reasons.<sup>14</sup>

11. Whether or not these demands are reasonable or appropriate is not the issue. The Contested Portions are not legally relevant, as the Commission lacks jurisdiction over the environmental issues and recommendations that are the subject of the testimony. While the

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<sup>11</sup> SC St. No. 1 at 3-4.

<sup>12</sup> SC St. No. 1 at 4, 11-18.

<sup>13</sup> SC St. No. 1 at 4, 6.

<sup>14</sup> SC St. No. 1 at 4, 6, 10-11.

Commission has jurisdiction over a utility's facilities and service,<sup>15</sup> those requirements are in the context of providing utility service, in this case natural gas service. It is clear that the Commission does not have jurisdiction over environmental issues (including eliminating greenhouse gas emissions and directing utilities to produce Climate Business Plans to close down their operations and convert themselves to another type of utility entirely), or compliance with state or federal environmental laws.<sup>16</sup>

12. The Commission also lacks jurisdiction to order PGW to consider electrification and non-pipeline related alternatives to safety-related distribution system maintenance. Pursuant to Section 2212 of the Public Utility Code,<sup>17</sup> PGW is obligated to provide safe and adequate *natural gas* service to its existing and future customers at just and reasonable rates. The Commission cannot legally direct PGW to abandon this obligation or provide a wholly different utility service. PGW has no obligation to evaluate alternatives such as electrification, which are wholly outside the scope of its Commission regulated services.

13. The Contested Portions discuss, at length, Executive Order Number 2019-01 and the Philadelphia City Council in City Council Resolution No. 190728.<sup>18</sup> The recommendations made by the Environmental Stakeholders in the Contested Portions are based entirely on the

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<sup>15</sup> 66 Pa. C.S. § 1505.

<sup>16</sup> *Rovin, D.D.S. v. Pa. Public Utility Commission*, 502 A. 2d 785 (Pa. Cmwlth 1986) (“*Rovin*”) (Enforcement of environmental statutes is specifically vested in the Department of Environmental Protection and the Federal Environmental Protection Agency.); *Pickford v. PUC*, 4 A.3d 707 (Pa. Cmwlth. Ct. 2010) (“*Pickford*”) (customer complaints related to the conversion of water treatment plants from chlorinated water to chloraminated water were obvious challenges to the health effects of chloramines under permits issued by the Department of Environmental Protection and, thus, outside the Commission’s jurisdiction); *Country Place Waste Treatment Company, Inc. v. Pa. Pub. Util. Comm’n*, 654 A.2d 72 (Pa. Cmwlth. 1995) (Commission lacks authority to regulate air quality where sewage treatment plant caused odor).

<sup>17</sup> 66 Pa. C.S. § 2212.

<sup>18</sup> SC St. No. 1 at 7-11.

premise that PGW must comply with said Executive Order and Resolution. The commitments established in the referenced Executive Order and City Council Resolutions are not requirements set out in the Public Utility Code or the Commission’s regulations. Executive Orders and City Council Resolutions “cannot legally operate to expand the powers of a statutory agency.”<sup>19</sup> As discussed, the Commission does not have jurisdiction over these issues, and the referenced Executive Order and City Council Resolutions cannot operate to expand jurisdiction where none exists.

14. While Mr. Hausman takes the position that these issues should be considered in the context of a rate case, the bottom line is that the Commission simply does not have jurisdiction to consider these issues or to order PGW to comply with commitments contained in the referenced Executive Order or City Council Resolution. The place to raise these concerns are before the bodies that *do* have jurisdiction to consider them. For example, the Pennsylvania Department of Environmental Protection (“DEP”) has been directed by Governor Wolf to develop a rulemaking package to abate, control, or limit CO<sub>2</sub> emissions from fossil-fueled electric power generators via Executive Order 2019-7.<sup>20</sup> And DEP is currently reviewing a proposed rulemaking directed at regulating methane emissions from the oil and gas industry.<sup>21</sup> Further, PGW’s various gas operations – such as its LNG facilities – are subject to numerous DEP permitting requirements.

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<sup>19</sup> *Funk v. Wolf*, 144 A.3d 228, 249 (Pa. Cmwlth. Ct. 2016); citing *Cnty Coll. of Delaware Cnty.*, 342 A.2d 468, 474 (Pa. Cmwlth. Ct. 1974); see also *Nat’l Solid Wastes Mgmt. Ass’n*, 600 A.2d 260, 261 (Pa. Cmwlth. Ct. 1991).

<sup>20</sup> <https://www.dep.pa.gov/Pages/default.aspx>.

<sup>21</sup> Control of VOC Emissions from Oil and Natural Gas Sources, 50 Pa.B. 2633 (proposed May 23, 2020) (to be codified at 25 Pa. Code Chapters 121 and 129).

15. Even if the Commission had jurisdiction over the issues and recommendations in the Contested Portions of testimony, the testimony is not relevant to this rate case proceeding. The scope of a base rate case is to determine the reasonableness of a utility's proposed and existing Tariff (or any new proposals raised therein); it is not a "free-for-all," enabling a party to introduce any issue or complaint that it may have with the utility seeking the rate increase. Issues pertaining to electrification, greenhouse gas emissions, and renewable energy are not relevant to this proceeding, as they are outside the Commission's purview.

16. The Contested Portions also contain testimony suggesting that PGW modify, or otherwise reevaluate, its energy efficiency programs.<sup>22</sup> PGW's energy efficiency programs were fully and comprehensively addressed in PGW's Demand Side Management Program Implementation Plan proceeding<sup>23</sup> and Universal Service and Energy Conservation Plan proceeding.<sup>24</sup> Any attempt to litigate PGW's energy efficiency programs in this proceeding should be rejected.<sup>25</sup>

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<sup>22</sup> For example, Hausman testifies that elements of PGW's Climate Business Plan should include, among other things, aggressive energy efficiency programs. SC St. No. 1 at 12.

<sup>23</sup> *Petition of Philadelphia Gas Works for Approval of Demand Side Management Plan for FY 2014-2016 and Philadelphia Gas Works Universal Service and Energy Conservation Plan for 2014-2016* 52 Pa. Code § 62.4 – Request for Waivers, Docket No. P-2014-2459362. Of note, Clean Air Council was a party to this proceeding.

<sup>24</sup> PGW's Universal Service and Energy Conservation Plan was just approved by the PUC and is on appeal to Commonwealth Court. PGW's 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, *et. al.*, Order (March 26, 2020).

<sup>25</sup> See *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015). In *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*, the ALJ struck pre-served written testimony regarding proposals to undertake a cost-benefit analysis and other studies, noting that other Commission proceedings were available for addressing those issues and that challenges could also be effectively pursued in complaint proceedings. See also *Pa. Public Utility Commission, et al. v. Pennsylvania American Water Co.*, Docket No. R-00932670 *et al.*, 1994 Pa. PUC LEXIS 120 at \*158 (Final Order entered July 26, 1994) (adopting the ALJ's conclusion that the issues raised by OCA were outside the scope of the rate case and would be better addressed in a statewide rulemaking proceeding); *Re Gas Cost Rate No. 5*, 57 Pa. P.U.C. 158 (1983) ("The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding.").

#### IV. CONCLUSION

For the reasons set forth above, PGW respectfully requests that the ALJs issue an order determining that the Contested Portions of SC St. No. 1 should not be admitted into the evidentiary record or considered in this proceeding because the issues raised are not relevant to this proceeding and are not within the Commission's jurisdiction.

Respectfully submitted,

*/s/ Kristine E. Marsilio*

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Daniel Clearfield, Esq.  
Sarah C. Stoner, Esq.  
Kristine E. Marsilio, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8th Floor  
Harrisburg, PA 17101  
717.237.6000; 717.237.6019 (fax)  
[dclearfield@eckertseamans.com](mailto:dclearfield@eckertseamans.com)  
[sstoner@eckertseamans.com](mailto:sstoner@eckertseamans.com)  
[kmarsilio@eckertseamans.com](mailto:kmarsilio@eckertseamans.com)

*Counsel for Philadelphia Gas Works*

Of Counsel:  
Craig W. Berry, Esq.  
Senior Attorney  
*Admitted pro hac vice*  
Graciela Christlieb, Esq.  
Senior Attorney, Legal Department  
Philadelphia Gas Works  
800 W. Montgomery Ave.  
Philadelphia, PA 19122  
Tel (215) 684-6049  
Fax (215) 684-6798  
[Craig.Berry@pgworks.com](mailto:Craig.Berry@pgworks.com)  
[Graciela.Christlieb@pgworks.com](mailto:Graciela.Christlieb@pgworks.com)

Dated: June 24, 2020