**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

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|  | Public Meeting held August 6, 2020 |
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| Commissioners Present:  Gladys Brown Dutrieuille, Chairman  David W. Sweet, Vice Chairman  John F. Coleman, Jr.  Ralph G. Yanora |  |
| Pennsylvania Public Utility Commission  Office of Consumer Advocate  Office of Small Business Advocate  Philadelphia Industrial and Commercial  Gas Users Group  v.  Philadelphia Gas Works | R-2020-3017206  C-2020-3019161  C-2020-3019100  C-2020-3019430 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are two Petitions for Interlocutory Review and Answer to Material Question (Petitions) filed on July 15, 2020 and July 21, 2020, by the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN, *et al*.) and the Office of Consumer Advocate (OCA), respectively, (collectively, Petitioners), in the above-captioned proceeding.[[1]](#footnote-2) The Petitioners and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), all filed Briefs in Support of the Petitions of the OCA and TURN, *et al.*, on July 27, 2020. On that same date, Philadelphia Gas Works (PGW or Company) filed a Brief in Opposition to the Petitions.

The Petitioners seek interlocutory review and an answer in the affirmative by the Commission to the Material Question, summarized as follows:

Whether the ALJs’ evidentiary ruling, dated July 8, 2020, erred as a matter of law, by granting PGW’s Motions *In Limine* to exclude portions of the Direct Testimony of TURN *et al*. witness Harry Geller and OCA Witness Roger Colton, on the basis that language access considerations are not within the scope of the Commission’s jurisdiction and therefore not relevant to PGW’s quality of service in the context of PGW’s general base rate proceeding?

OCA Pet. at 1; TURN, *et al.* Pet. at 1.

For the reasons discussed more fully below, on the basis of our finding that the ALJs erred by striking testimony relevant to the question of whether PGW, as the party seeking a rate increase, provides reasonable service under Section 1501 of the Public Utility Code (Code), we shall grant the Petitions, answer the Material Question in the affirmative, and return the matter to the Office of Administrative Law Judge (OALJ) for proceedings in accordance with this Opinion and Order. *See* 66 Pa. C.S. § 1501, 52 Pa. Code § 69.2703(a)(7) and 52 Pa. Code § 69.2703(a)(8). *See also*, 52 Pa. Code § 5.303(a)(2) (pertaining to Commission action on petition for interlocutory review and answer).[[2]](#footnote-3)

**I. History of the Proceeding**

This case originated as a base rate proceeding on February 28, 2020, when 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.

The Commission’s Bureau of Investigation and Enforcement (BIE) filed a Notice of Appearance. Formal Complaints were filed by the Office of Small Business Advocate (OSBA) on March 6, 2020, the OCA on March 10, 2020, and the Philadelphia Industrial and Commercial Gas Users Group (PICGUG) on April 7, 2020, respectively.

Petitions to Intervene were filed by CAUSE-PA on March 10, 2020, Direct Energy Services on March 19, 2020, and by TURN, *et al.* on April 10, 2020, respectively.

By Order entered April 16, 2020, the Commission initiated an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase. Supplement No. 128 and Supplement No. 85 were suspended by operation of law until November 28, 2020, unless permitted by Commission Order to become effective at an earlier date.

The matter was assigned to ALJs Darlene Heep and Marta Guhl. On June 25, 2020, PGW filed a Motion *in Limine* regarding Testimony Submitted by the OCA’s witness Roger Colton (PGW’s OCA Motion) and a Motion *in Limine* regarding Testimony Submitted by TURN, *et al.*’switness Harry Geller(PGW’s TURN Motion)*.*

On June 30, 2020, the OCA filed an Answer opposing PGW’s OCA Motion; CAUSE-PA filed an Answer in Opposition to PGW’s TURN Motion; TURN, *et al*., filed an Answer opposing PGW’s TURN Motion; and the Sierra Club and Clean Air Council (collectively, Environmental Stakeholders) filed an Answer in Opposition to PGW’s Motion *in Limine* regarding Testimony Submitted by the Environmental Stakeholder’s witness Ezra D. Hausman filed on June 24, 2020*.*

On July 8, 2020, the ALJs issued an order granting PGW’s Motions *in Limine* regarding the OCA and TURN’s testimony (*July 2020 Order*).

On July 15, 2020, and July 21, 2020, TURN *et al*., and the OCA, respectively, filed their Petitions for Interlocutory Review and Answer to Material Questions for consideration by this Commission.

As previously noted, the Petitioners and CAUSE-PA all filed Briefs in Support of the Petitions of the OCA and TURN, *et al.*, on July 27, 2020. On that same date, PGW filed a Brief in Opposition to the Petitions.

**III. Discussion**

**A. Legal Standards**

As a preliminary matter, we note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC*,625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

Generally, a party seeking interlocutory review of an issue which arises or may arise in a proceeding may file a Petition in accordance with Section 5.302 of Commission Regulations, 52 Pa. Code § 5.302[[3]](#footnote-4) (pertaining to petitions for interlocutory review and answer to material question), at any time, or within fifteen days of the entry of an order at issue, per Section 5.572(c) of Commission Regulations, 52 Pa. Code § 5.572(c) (pertaining to petitions for relief). Petitions for interlocutory review are disfavored and allowed only in the most extraordinary circumstances. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3.

The requisite elements for granting a petition for interlocutory review and answer to material question raised by a party, are set forth at Section 5.302(a). In such case, the petitioner must provide a statement of “the question to be answered and the *compelling reasons* why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings.” 52 Pa. Code § 5.302(a) (emphasis added).

Under case law construing Section 5.302(a), the “compelling reasons” for interlocutory review are the reasons establishing that such review is *necessary* to either prevent substantial prejudice or to expedite the conduct of the proceeding. In other words, a petition under Section 5.302(a) must allege compelling reasons why any alleged prejudice flowing therefrom could not be rectified during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A‑310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R‑00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc*., 59 Pa. P.U.C. 538 (1985).

Therefore, for a Section 5.302(a) petition for interlocutory review to be properly before the Commission for consideration, the pertinent consideration is whether the asserted reasons establish that interlocutory review is *necessary* under the circumstances. Based on the Commission’s determination as to whether interlocutory review is necessary to either prevent the alleged substantial prejudice or expedite the proceedings, the Commission will then either: (1) continue, revoke or grant a stay of the proceedings, if necessary; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or (4) answer the question. 52 Pa. Code § 5.303(a)(1)-(4).

In a petition for interlocutory review involving the scope and admissibility of evidence in a proceeding, the Commission will consider the presiding ALJ’s authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in the statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and the Commission’s Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 5.403 (pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions); 5.222 (pertaining to prehearing conference in non-rate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice); and 5.223 (pertaining to authority of presiding officer at conferences). 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and 5.223.

As noted, petitions for interlocutory review regarding evidentiary matters within the ALJ’s authority are not favored. The preferred approach is to permit proceedings to move forward in the normal course to provide all parties, the presiding officer, and the Commission, with a full opportunity to develop the record, brief issues, and present arguments at each stage. *See* *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3.

**B. Positions of the Parties**

**1. The Petitioners**

As noted previously, the Petitioners seek interlocutory review and an answer in the affirmative by the Commission to the following Material Question:

Whether the ALJs’ evidentiary ruling, dated July 8, 2020, erred as a matter of law, by granting PGW’s Motions *In Limine* to exclude portions of the Direct Testimony of TURN *et al*. witness Harry Geller and OCA Witness Roger Colton, on the basis that language access considerations are not within the scope of the Commission’s jurisdiction and therefore not relevant to PGW’s quality of service in the context of PGW’s general base rate proceeding?

OCA Pet. at 1; TURN, *et al.* Pet. at 1.

The Petitioners argue that it was reversable legal error for the ALJs to exclude relevant direct testimony addressing considerations based on language access. The Petitioners argue that language access, or stated another way, language barriers for non-English speaking and limited English proficiency (LEP) utility customers, is an important and relevant matter related to the quality of service provided by PGW to the very same customers for whom the Company presently proposes a rate increase.

The Petitioners assert that the Commission’s interlocutory review and Answer in the Affirmative to the Material Question is necessary to prevent substantial prejudice to the Petitioners and harm to the public interest if the Commission were to permit the exclusion of relevant direct testimony on the subject of PGW’s quality of service, pertaining to language access issues, which is within the scope of the Commission’s jurisdiction to consider under Section 1501 of the Code, particularly in rate proceeding in which PGW seeks a rate increase for its customers which may be non-English speaking, and thereby experience language access issues. OCA Pet. at 2-3; TURN, *et al.* Pet. at 2-3.

The direct testimony at issue was served by TURN *et al*., on June 15, 2020. *See* Direct Testimony of Harry Geller, TURN *et al.* Statement No. 1. Also at issue, is the direct testimony served by the OCA, on that same date. *See* Direct Testimony of Roger Colton, OCA Statement No. 5. The testimonies proposed changes related to PGW’s practices for communicating with LEP customers. The testimonies regarding language access considerations raised the issue of PGW’s quality of service where the population served by PGW would have a percentage of non-English speaking and LEP customers.

The witnesses for the OCA and Turn, *et al.*, specifically refenced language access standards in place under the Philadelphia Home Rule Charter (PHRC) and Title VI of the Civil Rights Act of 1964 (Title VI).[[4]](#footnote-5) The testimony was that Title VI and the PHRC each imposed language access requirements to address demonstrable language access barriers in the same population served by PGW.

Specifically, the OCA avers:

This testimony evaluates PGW’s lack of a Language Access Plan that meets the requirements of the City of Philadelphia ordinance. The City Ordinance, and the need to have understandable information conveyed to consumers, are important issues when considering the quality of service provided by PGW as well as the efficacy of PGW’s universal service programs. Mr. Colton’s testimony goes directly to quality of service and to the importance of the local ordinance, given the local citizenry, and the need to assure that all customers can receive necessary information about their utility service in their language.

Petition of OCA at 2.

The OCA avers that if Mr. Colton’s testimony is stricken, the OCA and the public interest will be irreparably prejudiced, where material and relevant testimony regarding quality of service will not be considered by the Commission in its final determination of just and reasonable rates in this proceeding. *Id*.

Similarly, TURN, *et al*, avers that the language access considerations are material to the determination of whether PGW provides reasonable service and is thereby eligible to seek a rate increase. TURN, *et al.,* argues that the ALJs’ exclusion of Mr. Geller’s testimony was unwarranted, particularly because the witness was *not* asserting that the Commission should assert jurisdiction under the PHRC or Title VI. Specifically, TURN, *et al.,* asserts:

…Mr. Geller’s testimony makes only a single, passing mention to Title VI of the Civil Rights Act of 1964 and the Philadelphia Home Rule Charter, indicating that he has been advised by counsel that those provisions *may* apply to PGW. On the basis of that one statement, the ALJs erroneously struck more than six pages of Mr. Geller’s testimony, setting forth the extent of language access needs in Philadelphia, examining and criticizing PGW’s policies and practices for meeting those needs, and providing his recommendations for PGW LEP customer service improvements.

TURN, *et al*. Petition at 2.

**2. PGW**

PGW opposes the Petitions and argues that the Material Questions should be answered in the negative. PGW argues that the ALJs correctly concluded that language access considerations are not within the scope of the Commission’s jurisdiction under Section 1501 of the Code, and therefore, not relevant to the present base rate proceeding. *See* PGW Brief in Opposition at 4-5.

With respect to interlocutory review, PGW asserts that the Petitioners fail to meet the standard for granting interlocutory review. PGW Brief in Opposition at 7-8.

PGW maintains that granting interlocutory review is not warranted, where the Petitioners have failed to assert any matter which cannot be rectified in the normal course of this administrative proceeding, since PGW already satisfies the existing Commission Regulations which address matters of language access. Therefore, PGW asserts the Petitions should be denied. *Id*.

Specifically, PGW avers that PGW’s current practices for accommodating LEP customers already go above and beyond the regulatory requirements that do apply to PGW (unlike Title VI and the Home Rule Charter) and meet the needs of the overwhelming majority of LEP customers. PGW Brief in Opposition at 7.

**C. Disposition**

In summary, the Petitioners’ argument in support of granting interlocutory review is that a just and reasonable rate increase for the Company depends upon the Company’s reasonable standards of communication with its utility customers, including non-English speaking and LEP customers, for whom the rate increase is sought. We agree. Therefore, as discussed *infra*., we find that the ALJ’s exclusion of direct testimony related to language access considerations in PGW’s communication with its customers is reversible legal error, which may not be rectified in the normal course of our review, because it would exclude relevant testimony in a rate proceeding regarding whether PGW provides reasonable service.

We note that interlocutory review is disfavored, particularly where the Material Questions pertain to matters within the presiding ALJ’s authority, including evidentiary rulings. However, in this case, the Petitioners’ Material Questions directly relate to the admission of relevant evidence, specifically, evidence regarding language access considerations, which the Petitioners argue must be included as part of the evidentiary record.

Our analysis turns on whether the Petitions raise compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings. 52 Pa. Code § 5.302(a). In other words, there must be allegations of why the alleged error could not be rectified during the normal course of the Commission review process. Once these allegations are demonstrated, the Commission may take one of four actions: (l) continue, revoke or grant a stay of the proceedings, if necessary; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or (4) answer the question.[[5]](#footnote-6)

In this case, the filings do allege an error or other oversight that could not be rectified during the normal review process. Specifically, the record reflects that the ALJs expressly concluded that language access considerations are not within the scope of the Commission’s jurisdiction in a rate proceeding. *July 2020 Order* at 6. The ALJs reasoned that because the OCA’s and Turn, *et al.*’s witnesses referenced language access standards applicable under the PHRC and Title VI, those references should be stricken, because the Commission has no jurisdiction to find a violation of the PHRC or Title VI.  *Id*.

Based on our review of the instant Petitions, the Positions of the Parties, and the applicable law, we find that the OCA and TURN, *et. al.* have asserted a question which, if unanswered, would result in substantial prejudice to the rights of the parties to present all relevant evidence regarding the question of whether PGW, as the party seeking a rate increase, provides reasonable service to customers which experience language access issues. Exclusion of relevant direct testimony regarding language access issues would render the ALJs without an adequate record upon which to conduct an informed review of the language access considerations, and therefore, the quality of service provided by PGW to all its customers, as raised by the Material Questions. Therefore, we find that the Petitions are properly before us, and shall answer the Material Question in the affirmative and return the matter to the presiding ALJs for action consistent with this Opinion and Order.

We disagree with the ALJs’ conclusion, and PGW’s assertion, that the direct Testimony of the OCA’s and TURN, *et al.*’s, witnesses (that the PUC should direct PGW to comply with the language access requirements established in the Philadelphia Home Rule Charter and Title VI) was tantamount to a request that the ALJs rule PGW to be in violation of the Home Rule Charter and Title VI. Upon review of the testimony in question, we do not find that testimony urged any improper assertion of jurisdiction.

To the contrary, the OCA’s and TURN *et al.*’s witnesses offered testimony of the language access standards applicable under the PHRC and Title VI as evidence of the existing standards which may be applicable to determine what is a reasonable standard to apply to determine whether PGW provides reasonable language access for the population it serves, which is known to have a percentage of non-English speaking customers.

By testifying that the Home Rule Charter and Title VI language access standards are applicable to PGW’s customers, and that PGW is not in compliance with those standards, the OCA’s and TURN, *et al.*’s witnesses did not ask that the Commission render a finding that PGW is in violation of the Home Rule Charter or Title VI standards for language access. Rather, the witnesses offered evidence to suggest that the reasonable standard to apply to the language access issue has already been established under the Home Rule Charter and Title VI and that this Commission, is free to adopt those standards, to determine whether PGW provides reasonable service by communicating with its customers in a reasonable manner, including its non-English speaking and LEP customers, under Section 1501 of the Code.[[6]](#footnote-7)

We are not persuaded by PGW’s assertion that, because PGW satisfies existing Commission Regulations regarding the duty to include Spanish language translations on certain forms, the OCA and TURN, *et al.,* necessarily fail to meet the standard for Interlocutory Review. *See* PGW, Brief in Opposition at 7-8 (asserting PGW goes “above and beyond” existing regulations). The base rate proceeding is a case-by-case consideration by the Commission whether the utility is entitled to a just and reasonable rate increase. The utility’s provision of reasonable service to the effected ratepayers, including language access considerations, is an important factor in that proceeding. While a party may not ultimately prevail in a claim of unreasonable service based on language access considerations, that party is entitled to present relevant evidence in support of the claim.

Accordingly, we find the direct testimony at issue, offered by the witnesses of the OCA and TURN *et al*, to be relevant evidence, and its exclusion to be reversable legal error. We note that our determination is limited to the finding that the evidence is relevant and must be admitted. We make no determination as to the weight the ALJs are to ascribe to the evidence.

Further, we expressly agree with the ALJs and PGW to the extent that we concur that the Commission has *no jurisdiction* to decide whether the service provided by PGW would be in violation of the PHRC or Title VI, and the ALJs are not to decide that question on the remand.

**IV. Conclusion**

Based on our review of the Petitions, the Positions of the Parties, and the applicable law, we shall grant the Petitions and return this matter to the presiding ALJs, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

l. That the Petitions for Interlocutory Review and Answer to Material Question (Petitions) filed on July 15, 2020 and July 21, 2020, by the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN, *et al*.) and the Office of Consumer Advocate (OCA), respectively, (collectively, Petitioners), in the above-captioned proceeding are granted, and the Material Question:

Whether the ALJs’ evidentiary ruling, dated July 8, 2020, erred as a matter of law, by granting PGW’s Motions *In Limine* to exclude portions of the Direct Testimony of TURN *et al*. witness Harry Geller and OCA Witness Roger Colton, on the basis that language access considerations are not within the scope of the Commission’s jurisdiction and therefore not relevant to PGW’s quality of service in the context of PGW’s general base rate proceeding?

is answered in the affirmative.

2. That this matter shall be returned to the presiding Administrative Law Judges, for further proceedings consistent with this Opinion and Order.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 6, 2020

ORDER ENTERED: August 6, 2020

1. Procedurally, the material questions are asserted by Petitioners pursuant to a party’s right to seek interlocutory review and answer to a material question, under Section 5.302 of Commission Regulations, 52 Pa. Code § 5.302. [↑](#footnote-ref-2)
2. We note that interlocutory review of an ALJ’s evidentiary ruling is generally disfavored and typically would not be warranted, however, under the unique circumstances of this case, raising questions of PGW’s reasonableness of service and quality of service pertaining to language access considerations and due process, we find that review is warranted in the interest of establishing a full and complete record upon which the ALJs may decide questions related a utility’s provision of reasonable service in the context of a base rate proceeding. [↑](#footnote-ref-3)
3. **§ 5.302. Petition for interlocutory Commission review and answer to a material question.**

   (a) During the course of a proceeding, a party may file a *timely* petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition must be in writing with copies served on all parties and the presiding officer and state, in not more than three pages, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

   (Emphasis added). [↑](#footnote-ref-4)
4. 46 U.S.C. § 2000d. [↑](#footnote-ref-5)
5. 52 Pa. Code § 5.303(a)(1)-(4). [↑](#footnote-ref-6)
6. We note that the Commission is free to take judicial notice of the existence of facts and legal standards, where, as here, the knowledge of those facts and standards may aid in our review. [↑](#footnote-ref-7)