



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

May 8, 2023

Via Electronic Filing

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission v.
Philadelphia Gas Works
Docket Nos.: P-2022-3034264
R-2022-3034229

**I&E Brief in Support of Philadelphia Gas Works
Petition for Interlocutory Review**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Bureau of Investigation & Enforcement's (I&E) **Brief in Support of Philadelphia Gas Works Petition for Interlocutory Review** for the above-captioned proceeding.

Copies are being served on parties per the attached Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads 'Carrie B. Wright'.

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cc: Hon. Marta Guhl, OALJ Philadelphia (*via email only*)
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Office of Special Assistants (*Word file via email only*)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:		
	:		
v.	:	Docket Nos.	P-2022-3034264
	:		R-2022-3034229
Philadelphia Gas Works	:		

**BRIEF IN SUPPORT OF PHILADELPHIA GAS WORKS
PETITION FOR INTERLOCUTORY REVIEW**

I. INTRODUCTION

On April 27, 2023, Philadelphia Gas Works (PGW or Company) filed its Petition for Interlocutory Review and Answer to Material Questions (Interlocutory Review Petition) that related to the Interim Order issued on February 23, 2023, by Administrative Law Judge Marta Guhl (ALJ Guhl) denying a Petition for Leave to Withdraw (Withdrawal Petition) filed by PGW on November 8, 2023. Pursuant to 52 Pa. Code § 5.302, the Bureau of Investigation and Enforcement (I&E) now files its Brief in Support of PGW’s Petition for Interlocutory Review.

In 2002, the Public Utility Commission (PUC or Commission) authorized PGW to implement a Weather Normalization Adjustment (WNA). A WNA adjusts a customer’s bill to correct for variations from normal weather in order to have the bill reflect normal weather conditions through surcharges and credits for colder than normal and warmer than normal weather, respectively. PGW’s WNA had generally worked as it was intended to, until May of 2022 due to warmer than anticipated weather. As a result, some PGW customers experienced much higher than normal bills due to the WNA. While it appears that the WNA calculation itself was correct, PGW took steps to refund the affected customers.

As a result of the May 2022 anomaly, on August 2, 2022, PGW filed a Petition for Approval on Less than Statutory Notice of Tariff Supplement Revising Weather Normalization

Adjustment and Supplement No. 152 to Gas Service Tariff – Pa. P.U.C. No. 2, effective October 1, 2022 (WNA Cap Petition). The sole revision to the WNA proposed by PGW was that a 25% cap be added to the WNA so that customers would not be billed a WNA charge or credit of greater than 25% of total delivery charges.¹ The 25% cap would prevent the situation that occurred in May of 2022 from happening again. Apart from the 25% cap, PGW proposed no changes to the current WNA or WNA formula. By order entered September 15, 2022, the Commission suspended Supplement No. 152 for investigation until April 1, 2023.² As part of that Order, the Commission opened the WNA as a whole to an investigation to consider “the lawfulness, justness, and reasonableness of the PGW’s existing rates, rules, and regulations,”³ which was a much more exhaustive review than PGW had initially envisioned in its WNA Cap Petition.

The ALJ issued a Prehearing Conference Order on September 19, 2022, and that Order contemplated evidentiary hearings being held in this case during the week of November 4, 2022 and the end of the suspension period concluding on April 1, 2023.⁴ As a result of the more comprehensive review of PGW’s WNA that was required by the Suspension Order, PGW voluntarily extended the suspension period until October 1, 2023.⁵ On November 8, 2023, PGW submitted both a Motion to Hold in Abeyance the Procedural Schedule (Abeyance Motion) and a Petition for Leave to Withdraw its Supplement No. 152. As part of its Abeyance Motion, PGW requested that the litigation schedule initially in place for this proceeding be held in abeyance pending a decision on its Withdrawal Petition.⁶ PGW’s Withdrawal Petition reflected

¹ WNA Cap Petition, p. 1.

² *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*, Docket Nos. R-2022-3034229 and P-2022-303426 (Ordered entered September 15, 2022). (Suspension Order).

³ Suspension Order, p. 3, ¶4.

⁴ Prehearing Order, p. 2 (Entered on September 19, 2022).

⁵ PGW Letter dated October 3, 2022

⁶ PGW Abeyance Motion, p. 1.

its position that a thorough review of the WNA should occur in the context of a more robust proceeding such as a base rate case, where a more comprehensive review would be facilitated.⁷

PGW circulated a proposed schedule to parties and the ALJ by e-mail on December 6, 2022. That was the schedule to be utilized if the Withdrawal Petition was not granted. However, the ALJI&E supports full resolution of the clause in this case, where the Gas Service Tariff can be appropriately investigated and where a comprehensive record on this rate-related issue can be developed did not memorialize that proposed schedule until almost 80 days later, in a Prehearing Conference Order issued on February 22, 2023.⁸ In addition, in that Prehearing Conference Order, the ALJ determined that the result of PGW proposing an alternate schedule was that the Withdrawal Petition was rendered moot. As noted above however, that what was intended when an alternate schedule was presented.

This produced a scheduling impossibility as the Prehearing Conference Order issued on February 22, 2023 set February 14, 2023 as the date for PGW's Direct Testimony, making it impossible for PGW to satisfy the deadline. Because of the impossibility of meeting a deadline which had already passed, PGW requested that the ALJ allow it to submit Direct Testimony on April 3, 2023, a request which was denied. Instead, the ALJ directed PGW to file its Direct Testimony on February 23, 2023.

In addition, on February 27, 2023, PGW filed a base rate case with the Commission at Docket No. R-2023-3037933. As part of that proceeding, on April 3, 2023, PGW filed Supplemental Direct testimony regarding a comprehensive review of its WNA. I&E supported PGW's efforts because I&E believes full resolution of the WNA in a base rate case, where the Gas Service Tariff can be appropriately investigated and where a comprehensive record on this

⁷ PGW Withdrawal Petition, p. 5.

⁸ Prehearing Conference Order issued at this docket on February 22, 2023 (Prehearing Conference Order).

rate-related issue can be developed is the appropriate approach to this issue.

Based on the infringement on its due process along with the unnecessary litigation of the WNA in two proceedings before the Commission, PGW submitted a Petition for Interlocutory Review.

I&E now submits this Brief in support of PGW's Petition for Interlocutory Review. I&E requests interlocutory review be granted and that PGW's material questions be answered in the affirmative as described in more detail below.

II. MATERIAL QUESTIONS PRESENTED

Pursuant to the Commission's regulations governing Interlocutory review,⁹ PGW is requesting that the Commission grant review of and answer the following question in the affirmative:

- 1) Does PGW's fundamental right to due process regarding the continuation of the WNA clause support withdrawal of the Cap Petition and movement of WNA issues to the Base Rate Case?
- 2) Does the continued litigation of WNA issues in two separate proceedings involve an unnecessary waste of valuable resources?

III. SUMMARY OF ARGUMENT

The public interest requires that the needs of both the utility and its ratepayers must be examined. PGW operates on a cashflow basis and has no shareholders to absorb any revenue shortfalls that may occur. Therefore, the cost related to PGW's filings are borne by those ratepayers. To this end, the harm done to PGW by the deprivation of PGW's due processes rights which have resulted in PGW's WNA being litigated in two separate proceedings will befall the PGW ratepayers who will bear the burden of the costs associated with such litigation.

⁹ 52 Pa. Code §§ 5.302.

Traditionally, before this Commission, the implementation and review of a WNA has been evaluated in base rate proceedings. PGW filed its WNA Cap Petition in August 2022 for the purpose of ensuring the billing anomaly did not reoccur in the 2022 heating season. The Commission's September 2022 suspension order required a more comprehensive review of the WNA and, at that time, the only available venue was the instant proceeding. However, in the ensuing months, the Company filed a base rate case on February 27, 2023. It is I&E's position that if PGW's WNA as a whole is being investigated to determine "the lawfulness, justness, and reasonableness of the PGW's existing rates, rules, and regulations"¹⁰ that this review be done as part of a base rate case. PGW's WNA is one component of its rates as a whole and would necessarily have to be evaluated as part of its base rate case to make a determination that PGW's rates are just and reasonable. While a 25% cap on the WNA may have been appropriately vetted separately, it makes little sense to review one component of PGW's rates to a separate proceeding while a base rate case is ongoing. The initial intent of the WNA Cap Petition was for a very limited purpose, but the Commission opened up a far broader investigation into PGW's WNA. When the Commission issued its suspension order in September 2022, PGW had not yet made its base rate filing; however, PGW subsequently filed its base rate case in February 2023 and the broader review should occur in that proceeding.

Granting interlocutory review in this matter will enable the Commission to preserve parties' due process rights in this proceeding and will guarantee that parties have an opportunity to develop a complete record that is consistent with the Commission's authority and jurisdiction in this proceeding. Without the granting of interlocutory review the due process violation imposed upon PGW cannot be cured. I&E avers that these are compelling reasons for granting

¹⁰ Suspension Order, p. 3, ¶4.

the interlocutory review now requested. Therefore, I&E recommends the Commission answer PGW's material questions in the affirmative.

IV. ARGUMENT

A. Standard for Interlocutory Review

The pertinent Commission standards governing the interlocutory review requested here are found in Sections 5.302 and 5.303 of Commission regulations.¹¹ The interlocutory review standard has been interpreted in *In re: Application of Knights Limousine Service, Inc.*, wherein the Commission explained that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons.¹² The Commission has determined that such a showing may be accomplished by a petitioner proving that without interlocutory review some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later, and that granting interlocutory review would “prevent substantial prejudice or expedite the proceeding.”¹³

B. The Contrived Procedural Schedule Deprived PGW of Due Process

Material Question #1: Does PGW's fundamental right to due process regarding the continuation of the WNA clause support withdrawal of the Cap Petition and movement of WNA issues to the Base Rate Case?

Suggested Answer: Yes.

As a threshold matter, the constitutional guarantee of due process of law is equally applicable to administrative and judicial proceedings.¹⁴ The key components of procedural due process include “notice and opportunity to be heard and to defend **in an orderly proceeding**

¹¹ 52 Pa. Code §§ 5.302-5.306.

¹² *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

¹³ *Id.*

¹⁴ *Begis v. Industrial Board of Department of Labor & Industry*, 9 Pa. Cmwlt. 558, 308 A.2d 643 (1973) as quoted by *Pocono Water Co. v. Pennsylvania Pub. Util. Comm'n*, 158 Pa. Cmwlt. 41, 44, 630 A.2d 971, 973 (1993).

adapted to the nature of the case before a tribunal having jurisdiction of the cause.”¹⁵ Due process requires that a judicial or administrative tribunal provide a hearing where each party in a case has an opportunity to hear the evidence introduced against him, to introduce evidence, and to cross-examine witnesses.¹⁶ The procedural history of this case demonstrates that PGW did not have access to an orderly proceeding adapted to the nature of the case. As a result, absent Interlocutory Relief, PGW will not have an adequate opportunity to introduce critical evidence in this case.

At the outset, it is important to recognize that PGW initiated this proceeding shortly after PGW petitioned and received Commission approval to voluntarily refund WNA charges resulting from May 2022 usage; it was not ordered by the Commission. According to PGW, this proceeding was initiated to protect consumers in the event that the WNA produced an unusually large increase during the then-current heating season, 2022.¹⁷ However, after, the Commission suspended Supplement No. 152 for investigation until April 1, 2023.¹⁸ As part of its Suspension Order, the Commission opened the WNA as a whole to an investigation to consider “the lawfulness, justness, and reasonableness of the PGW’s existing rates, rules, and regulations.”¹⁹ As explained below, PGW has been functionally prohibited from bringing a case-in-chief on these matters as a direct result of the procedural hurdles that have been imposed in this case.

At the outset of this case, the ALJ issued a Prehearing Conference Order on September 19, 2022, and that Order contemplated evidentiary hearings being held during the week of November 4, 2022 and the end of the suspension period concluding on April 1, 2023.²⁰ On

¹⁵ *Wiley v. Woods*, 393 Pa. 341, 351, 141 A.2d 844, 849–850 (1958); *Carter v. Kubler*, 320 U.S. 243, 64 S.Ct. 1, 88 L.Ed. 26 (1943), as quoted by *Honey Brook Water Co. v. Pennsylvania Pub. Util. Comm'n*, 167 Pa. Cmwlth. 140, 147–48, 647 A.2d 653, 657 (1994). (Emphasis added).

¹⁶ *Pennsylvania State Athletic Commission v. Bratton*, 177 Pa. Superior Ct. 598, 112 A.2d 422 (1955).

¹⁷ PGW Withdrawal Petition, p. 2.

¹⁸ *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*, Docket Nos. R-2022-3034229 and P-2022-303426 (Ordered Entered on September 15, 2022).

¹⁹ Suspension Order, p. 3, ¶4.

²⁰ Prehearing Order, p. 2 (Entered on September 19, 2022).

October 3, 2023, PGW voluntarily extended the suspension period until October 1, 2023 in order to address challenges that would otherwise be created by a condensed procedural schedule.²¹ On November 8, 2023, PGW submitted both a Motion to Hold in Abeyance the Procedural Schedule (Abeyance Motion) and a Petition for Leave to Withdraw its Supplement No. 152 to Gas Service Tariff – Pa. P.U.C. No. 2 and the Petition for Approval on Less than Statutory Notice of Tariff Supplement Revising Weather Normalization Adjustment (Withdrawal Petition). As part of its Abeyance Motion, PGW requested that the litigation schedule initially in place for this proceeding be held in abeyance pending a decision on its Withdrawal Petition.²² PGW’s Withdrawal Petition reflected its position that a thorough review of the WNA should occur in the context of a more robust proceeding such as a base rate case, where a more comprehensive review would be facilitated.²³

It is I&E’s understanding that while its Withdrawal Petition was pending, and in an attempt to hedge against the possibility that the Withdrawal Petition may not be granted, PGW did agree to an extended procedural schedule in the interim which was presented to the ALJ on December 6, 2022. The proposed schedule was as follows:

Action	Proposed Date
PGW Direct Testimony	February 14, 2023
Other Parties’ Direct Testimony	April 6, 2023
Rebuttal Testimony	May 2, 2023
Surrebuttal Testimony	May 12, 2023
Rejoinder Testimony	May 19, 2023
Hearings	May 23-25, 2023
Main Briefs	June 7, 2023
Reply Briefs	June 16, 2023
Public Meeting	September 21, 2023
End of Suspension	October 5, 2023

²¹ PGW Letter dated October 3, 2022

²² PGW Abeyance Motion, p. 1.

²³ PGW Withdrawal Petition, p. 5.

While PGW circulated the proposed schedule to parties and the ALJ via electronic mail on December 6, 2022, the ALJ did not memorialize that proposed schedule until almost 80 days later, on February 22, 2023 by way of a Prehearing Conference Order.²⁴ In that Prehearing Conference Order, the ALJ also determined that PGW's Withdrawal Petition was moot based solely on the fact that an extended procedural schedule was offered. In sum, the practical impact of the ALJ's delayed rulings were that on February 22, 2023, PGW was ambushed with the determination that its Withdrawal Petition was deemed moot and that its direct testimony was due on February 14, 2023, a date that was over a week in the past.²⁵

In an apparent recognition that PGW could not serve direct testimony on the already-passed date of February 14, 2023, the ALJ held an emergency telephonic conference on February 22, 2023, which, to the best of I&E's knowledge, was not transcribed. The ALJ sent an email at 2:35 p.m. on February 22, 2023, requesting the emergency conference be held at 3:30 giving the parties less than an hour to make themselves available. Due to the timing of the request, I&E was unable to attend the conference and it is I&E's understanding that at least one attorney for PGW was unable to attend. After the emergency conference, the ALJ issued a Prehearing Order #2 on February 23, 2023 to attempt to reconcile the procedural impossibility of PGW time-traveling to serve testimony on a date in the past. In Prehearing Order #2, the ALJ directed PGW to serve its direct testimony on February 23, 2023 by close of business. From I&E's perspective, this untimely determination, which had been pending for almost 80 days, deprived PGW of due process by giving it less than one full day to prepare its case-in-chief.

Furthermore, the due process rights of the other parties to this proceeding were infringed upon. While the due date for the PGW direct testimony was ultimately moved to February 23,

²⁴ Prehearing Conference Order issued at this docket on February 22, 2023.

²⁵ Prehearing Conference Order, pp. 2-4.

2023, the due date for the other parties direct remained April 6, 2023. This would act to deprive the other parties of approximately 9 days to prepare their direct case based on the PGW direct testimony. On March 23, 2023, the Office of Consumer Advocate (OCA) requested that the ALJ move the other parties' direct testimony to April 13, 2023 due to the shortened interval that was created between the PGW direct and the other parties direct. On March 28, 2023, OCA renewed its request to modify the procedural schedule and the ALJ issued an order memorializing April 13, 2023 as the due date for the other parties direct testimony. Therefore, it seems clear to I&E that all parties' rights to due process were violated.

I&E submits that the contrived procedural hurdles imposed upon PGW, and ultimately all parties, deprived it of due process by preventing it adequate notice and time to develop its direct case in chief. By delaying any adoption of PGW's proposed schedule for 80 days, and until over a week after the deadline had passed for PGW to serve its direct testimony under that schedule, and then subsequently adopting the schedule after that deadline had passed, the ALJ needlessly imposed an insurmountable procedural hurdle upon PGW. Consequently, PGW's resulting inability to develop its direct case and to submit evidence in support of its position is a direct due process violation. The due process violation also has the harmful ripple effect of depriving all other parties of the ability to develop the type of record necessary to present to the Commission so that it may reach an informed determination in this important matter that will directly impact PGW and its ratepayers. I&E submits that such a result not only fails to protect the public interest, but it is antithetical to the public interest and inconsistent with affording all parties due process.

Now that a year has passed since PGW's May 2022 billing spike, it is plain to see that a full and comprehensive investigation of the WNA cannot occur in the instant case. Even assuming, *arguendo*, that PGW was not prejudiced by having 1 day of lead time to process the

ALJ's denial of its Motion pending for almost 80 days, PGW's ability to include core evidence in its direct case was compromised. More specifically, critical evidence about PGW's WNA was unable to be included in this case because of issues of timing and data collection that were beyond PGW's control. Specifically, PGW needed to contract for the services of an independent, third-party consultant to review its WNA formula and to conduct an analysis of the WNA in order to make recommendations to improve the accuracy and remove volatility.²⁶ As PGW's current base rate case filing indicates, the timing of the consultants' review was impacted by PGW's requisite protocol of issuing a request for proposal for the consultant contract, as well as PGW's need to use the most current data available.²⁷

While the timing of PGW's WNA investigation was impacted by outside factors, the resulting recommendations and findings of it are critical evidence in any consideration of the WNA and of the lawfulness, justness, and reasonableness of the PGW's existing rates, rules, and regulations.²⁸ Denying PGW's Interlocutory Relief will also functionally deny PGW the right to include the results of the WNA investigation in this case (or anywhere), and will deprive parties and the Commission of critical information necessary to evaluate PGW's WNA and frustrating the Commission's ability to protect ratepayers from unjust and unreasonable rates. Accordingly, I&E supports full resolution of the WNA issues in PGW's current base rate case, where the Gas Service Tariff can be appropriately investigated and where a comprehensive record on this rate-related issue can be developed appropriately and with the order and certainty of a statutory deadline.

²⁶ *Pennsylvania Public Utility Commission vs. Philadelphia Gas Works*, Docket No. R-2023-3037933, St. No. 1, p. 12.

²⁷ *Id.*

²⁸ Suspension Order, p. 3, ¶4.

C. Interlocutory Review is Appropriate Because Continued Litigation of the WNA in Two Separate Proceedings Wastes Valuable Resources for PGW, the Commission, and all Parties Involved.

Material Question #2: Does the continued litigation of WNA issues in two separate proceedings involve an unnecessary waste of valuable resources?

Suggested Answer: Yes.

PGW operates on a cashflow basis. Because PGW has no shareholders, any revenue shortfalls are borne by its ratepayers. As explained above, a public interest review requires looking not just at the rights of the ratepayers, but at the rights of the Company as well. Herein, not only have the due process rights of the Company been violated, but now customers will need to pay for unnecessary litigation of the WNA issues across more than one proceeding.

In cases such as this, where the utility is a cashflow utility, it is imperative to recognize that ratepayers bear the burden of all costs. Litigating this issue in both the WNA Cap Petition proceeding and the base rate case is costly to PGW ratepayers and is frankly unnecessary. PGW has before the Commission a proceeding which is the appropriate forum for a holistic review of its WNA. WNA's have traditionally been viewed as part of a base rate case as the WNA is a component of a utility's overall revenue picture.

As PGW noted, the WNA Cap Petition proceeding was initiated to protect consumers in the event that the WNA produced an unusually large increase *during the 2022 heating season*.²⁹ That heating season has now passed, and no action has been taken in the WNA Cap Petition proceeding. Now, instead of protecting ratepayers from the possibility of an unusually large increase in that heating season, a situation has been created wherein ratepayers are being burdened by the cost of litigating PGW's WNA in more than one proceeding. This is a

²⁹ PGW Withdrawal Petition, p. 2.

counterproductive waste of resources when PGW's original intent was to protect its ratepayers for a defined time period.

Therefore, I&E recommends the Commission answer PGW's second material question in the affirmative and grant PGW's request to move all WNA issue to the pending base rate proceeding.

WHEREFORE, the Bureau of Investigation and Enforcement respectfully requests that the Commission answer the material questions in the affirmative and allow the WNA issues to be litigated in the pending PGW Base Rate Case to cure the infringement upon PGW's procedural due process and stop the waste of resources resulting from litigating these issues simultaneously in two proceedings.

Respectfully submitted,



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Pennsylvania Public Utility Commission	:	
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Philadelphia Gas Works	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Brief in Support** dated May 8, 2023, in the manner and upon the person listed below.

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