

Daniel Clearfield
717.237.7173
dclearfield@eckertseamans.com

May 15, 2023

Via Electronic Filing

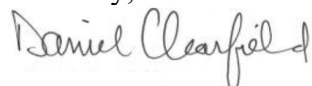
Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: *SBG Management Services, Inc. et al., v. PGW*; Docket Nos. C-2012-2304183; C-2012-2304324; C-2015-2486618; C-2015-2486642; C-2015-2486648; C-2015-2486655; C-2015-2486664; C-2015-2486670; C-2015-2486674; and C-2015-2486677; **PGW'S MOTION IN LIMINE AND FORMAL OBJECTION TO PRECLUDE FROM CONSIDERATION THE MAY 2, 2023 REMAND TESTIMONY OF SAMANTHA PULLEY, ESQ.**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Motion in Limine and Formal Objection to Preclude from Consideration the May 2, 2023 Remand Testimony of Samantha Pulley, Esq.. with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Daniel Clearfield, Esq.

DC/lww
Enclosure

cc: Hon. Eranda Vero w/enc.
Cert. of Service w/enc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc. <i>et al.</i>	:	C-2012-2304183
	:	C-2012-2304324
	:	C-2015-2486618
	:	C-2015-2486642
	:	C-2015-2486648
	:	C-2015-2486655
v.	:	C-2015-2486664
	:	C-2015-2486670
	:	C-2015-2486674
Philadelphia Gas Works	:	C-2015-2486677

NOTICE TO PLEAD

To: Each of the Complainants
c/o *Counsel for Complainants*

Patricia M. Starner, Esquire
Michael Yanoff, Esquire
Shawn M. Rodgers, Esquire
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
pstarner@goldsteinlp.com
myanoff@goldsteinlp.com
srodgers@goldsteinlp.com

You are hereby notified that a written response to the enclosed Motion in Limine and Formal Objection by Philadelphia Gas Works must be filed within twenty (20) days from service hereof, pursuant to 52 Pa. Code § 5.103. A written response must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served on the Administrative Law Judge and undersigned counsel.

Daniel Clearfield

Daniel Clearfield, Esquire
Carl R. Shultz, Esquire
Bryce R. Beard, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Fl.
Harrisburg, PA 17101
Phone: (717) 237-7173
Fax: (717) 237-6019
dclearfield@eckertseamans.com
cshultz@eckertseamans.com
bbeard@eckertseamans.com

Date: May 15, 2023

Attorneys for Philadelphia Gas Works

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc. <i>et al.</i>	:	C-2012-2304183
	:	C-2012-2304324
	:	C-2015-2486618
	:	C-2015-2486642
	:	C-2015-2486648
	:	C-2015-2486655
v.	:	C-2015-2486664
	:	C-2015-2486670
	:	C-2015-2486674
Philadelphia Gas Works	:	C-2015-2486677

**MOTION IN LIMINE AND FORMAL OBJECTION TO
PRECLUDE FROM CONSIDERATION THE MAY 2, 2023
REMAND TESTIMONY OF SAMANTHA PULLEY, ESQ.**

Pursuant to 52 Pa. Code § 5.103, Philadelphia Gas Works (“PGW”) hereby files this Motion in Limine and Formal Objection to Preclude from Consideration the May 2, 2023 Remand Testimony of Samantha Pulley, Esq.. (“Motion”)¹ In support, PGW avers as follows:

I. BACKGROUND

1. On April 24, 2023, PGW provided its 6-page Supplemental Rebuttal testimony which providing: 1) an update to Mr. Cumming’s direct testimony regarding SBG’s existing account balances previously submitted on October 31, 2022 (Exhibit BLC-3), February 7, 2023 (Exhibit BLC-6), now updated as of April 18, 2023 (Exhibit BLC-12) for purposes of showing changes to SBG’s account balances over time due to payments or other charges, and for the purposes of how the relief/credits should be applied in this matter² (“*Direct Update*”); and 2)

¹ PGW is not objecting to the “remand surrebuttal” of Mr. Hanson, as that testimony was explicitly permitted by Your Honor and contained 6-pages of testimony directly responsive to PGW’s April 24, 2023 Supplemental Rebuttal testimony. While PGW may not agree with Mr. Hanson’s position, Your Honor strictly allowed Mr. Hanson’s testimony, unlike the new “Pulley Direct” testimony as discussed herein.

² See PGW Remand St. No. 1 at 12:2-7 :

Q. HOW DOES PGW PROPOSE THE CREDITS BE APPLIED?

A. Upon a final Commission order in these proceedings, PGW will apply the credits to the various accounts on their next bill. If no balance is owed by the SBG Entity listed on BLC-1 as of the next bill, PGW will

supplemental rebuttal testimony on the topic of vacated liens as a result of SBG's late-filed, April 21, 2023 responses to PGW Set II discovery ("*Supplemental Rebuttal*").

2. At the evidentiary hearing on April 25, 2023, both SBG's and PGW's pre-filed written testimonies were entered into the record. During the hearing, Your Honor permitted SBG to provide written responsive surrebuttal to PGW's *Supplemental Rebuttal* on the topic of vacated liens by its witness Mr. Chris Hanson by no later than May 2, 2023.

3. On May 2, 2023, SBG served the "Remand Surrebuttal" testimony of Mr. Hanson on the issues permitted by Your Honor **and** the "Remand Testimony"³ of a new, never identified witness, Samantha Pulley, Esq..

4. The "Remand Testimony" of Samantha Pulley, Esq. (hereinafter "Pulley Direct") included twenty-five (25) pages of new testimony and thirteen (13) new exhibits which obviously goes far beyond the scope of SBG's permitted surrebuttal on vacated liens.

II. MOTION IN LIMINE AND FORMAL OBJECTION

5. The Pulley Direct Testimony is not responsive to the *Supplemental Rebuttal* testimony provided by PGW on the topic of vacated liens. Instead, the Pulley Direct is new direct testimony from SBG on various alleged billing, accounting, and other payment disputes never previously discussed in this proceeding. The new alleged billing, accounting, and payment disputes obviously fall far outside the scope of this proceeding and the recalculation of partial payments and credits due for liens that were the focus of **each and every piece of testimony admitted into the record** and the cross examination on the record on April 25, 2023.

either credit the account for future gas service charges or in the case of Elrae Garden Realty, which is no longer owned by an SBG entity, issue a refund for the difference provided above.

³ SBG May 2, 2023 cover letter and email service described the testimony as: "(1) the **Remand Sur-rebuttal Testimony** of Christopher E. Hanson; and (2) the **Remand Testimony** of Samantha Pulley with Exhibits." (emphasis added).

6. The Pulley Direct is expressly barred by 52 Pa. Code § 5.243(e)⁴ and well settled case law. The purpose of the Section 5.243(e) is to protect a party's due process rights to avoid trial by ambush and prevent surprise.⁵ SBG's Pulley Direct clearly violates this well settled law.

7. The Pulley Direct also violates the Commission's discovery rules at 52 Pa. Code § 5.332,⁶ as SBG was under a continuing obligation to identify any witness and the subject of their testimony in this matter. PGW served its Set I interrogatories on SBG on November 8, 2022 specifically requesting that SBG identify its witnesses who will testify in this proceeding and to identify the subject of each witness' testimony. SBG's responses did not identify Ms. Pulley or the contents of any testimony she may offer. At no time prior to May 2, 2023 did SBG supplement its

⁴ 52 Pa. Code § 5.243(e) (emphasis added) provides:
(e) A party will not be permitted to introduce evidence during a rebuttal phase which:
(1) Is repetitive.
(2) Should have been included in the party's case-in-chief.
(3) Substantially varies from the party's case-in-chief.

⁵ "The clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case." *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, *85; *Pennsylvania Public Utility Commission v Total Environmental Solutions, Inc.*, 103 Pa. P.U.C. 110 (July 30, 2008) (parties here were "ambushed" by the new information contained in rebuttal testimony that "corrected" information provided in direct testimony and discovery responses.); *Pennsylvania Public Utility Commission v. Total Environmental Solutions, Inc. -- Treasure Lake Water Division, et al.*, Docket No. R-00072493, 2008 Pa. PUC LEXIS 42 at *114-116 (Pa PUC May 23, 2008) ("...it is not equitable to permit TESI to take a second bite at direct testimony, or to allow it to shore-up inadequate direct at the rebuttal phase of this case."), *aff'd*, Opinion and Order at 89 (July 30, 2008); *City of Lancaster (Sewer Fund) v. Pennsylvania Public Utility Commission*, 793 A.2d 978 (Pa. Cmwlth. 2002) (Commonwealth Court affirmed the PUC's ruling that the City improperly proffered direct evidence during a rebuttal phase of the proceeding, citing 52 Pa. Code § 5.243(e)).

⁶ 52 Pa. Code § 5.332 provides:

A party or an expert witness who has responded to a request for discovery with a response that was complete when made is under a duty to supplement a response to include information thereafter acquired, as follows:

(1) A party is under a continuing duty to supplement responses with respect to a question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at hearing, the subject matter on which the expert is expected to testify and the substance of the testimony as provided in § 5.324(a)(1) (relating to discovery of expert testimony).

(2) A party or an expert witness is under a continuing duty to amend a prior response upon discovering that the response is incorrect or incomplete.

(3) A duty to supplement responses may be imposed by order of the presiding officer, agreement of the parties, or at a time prior to hearing through new requests to supplement prior responses.

responses to identify Ms. Pulley as SBG was required to do under 52 Pa. Code § 5.332.⁷ SBG's violation and failure to disclose Ms. Pulley and the topics of her testimony in discovery is prejudicial to PGW.

8. Lastly, consideration of the Pulley Direct would unfairly prejudice PGW and violate PGW's fundamental due process rights as PGW has no opportunity to respond to the new issues raised in the Pulley Direct, depose Ms. Pulley on the topics of her testimony, pursue other necessary discovery on Ms. Pulley and her testimony, cross examine Ms. Pulley, or otherwise put forth a suitable defense to the new, never presented allegations. The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by principles of common fairness.⁸ Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.⁹ Moreover, "the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."¹⁰

9. A brief review of the Pulley Direct presents a simple, indisputable fact – the May 2, 2023 Pulley Direct seeks to expand the scope of this proceeding *after* the evidentiary hearings have concluded where PGW has no ability to respond. It is hard to avoid the conclusion that this was not intentional and an attempt by SBG to bolster its case and prejudice PGW which cannot be condoned.

⁷ See SBG's Set I Responses as Attachment A to PGW's December 28, 2022 Motion in Limine. <https://www.puc.pa.gov/pcdocs/1768934.pdf>

⁸ *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014).

⁹ *Id.*

¹⁰ *Morgan v. United States*, 304 U.S. 1, 18 (1938).

10. Therefore, PGW formally objects to the admission of the May 2, 2023 Pulley Direct testimony, and through this Motion avers Your Honor should neither admit nor consider the Pulley Direct testimony in this proceeding.

11. To the extent Your Honor permits the Pulley Direct to be considered in this matter, the litigation schedule in this proceeding must be extended to allow PGW to provide responsive testimony and so that PGW can undertake new investigations into the alleged billing, accounts, and payment claims of SBG not previously within the scope of this matter which span more than a decade across over 30 PGW customer accounts. PGW also requires time to explore the veracity of the Pulley Direct through discovery and depositions to address the 25 pages and 13 new exhibits.

III. CONCLUSION

For the foregoing reasons, PGW respectfully requests that Your Honor:

- 1) Preclude the May 2, 2023 Remand Testimony of Samantha Pulley, Esq. from consideration and rule it inadmissible in the evidentiary record; or
- 2) If the Pulley Direct is permitted by Your Honor, PGW requests that the litigation and procedural schedule be substantially extended to protect PGW's due process rights to discovery, cross examination, and to provide responsive testimony to the Remand Testimony of Samantha Pulley, Esq.

Respectfully submitted,



Graciela Christlieb, Esquire
(PA Atty. I.D. No. 200760)
Senior Attorney
Legal Department
Philadelphia Gas Works
800 W. Montgomery Ave.
Philadelphia, PA 19122
graciela.christlieb@pgworks.com

Daniel Clearfield, Esquire (PA Atty. I.D. No. 26183)
Carl R. Shultz, Esquire (PA Atty. I.D. No. 70328)
Bryce R. Beard, Esquire (PA Atty. ID. No. 325837)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-6000 (phone)
(717) 237-6019 (fax)
dclearfield@eckertseamans.com
cshultz@eckertseamans.com
bbeard@eckertseamans.com

Date: May 15, 2023

Attorneys for Philadelphia Gas Works

CERTIFICATE OF SERVICE

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

VIA EMAIL

Shawn M. Rodgers, Esquire
Patricia M. Starner, Esquire
Michael Yanoff, Esquire
Goldstein Law Partners, LLC
11 Church Road
Hatfield, PA 19440
Srodgers@goldsteinlp.com
Pstarner@goldsteinlp.com
Myanoff@goldstinelp.com

Dated: May 15, 2023



Daniel Clearfield, Esq.

Counsel for Philadelphia Gas Works