



June 29, 2023

**VIA E-MAIL**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

Re: *Pa. PUC v. Philadelphia Gas Works*, Docket No. R-2023-3037933

Dear Secretary Chiavetta:

Please find enclosed the Answer of POWER Interfaith to PGW's Motion to Compel. The parties have been served per the attached Certificate of Service. Should you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

/s/ Devin McDougall

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Hon. Eranda Vero

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PA PUC Secretary's Bureau

Parties of Record

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, et  
al.

Docket No. R-2023-3037933

v.

Philadelphia Gas Works

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**ANSWER OF POWER INTERFAITH**

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## **EXHIBIT LIST**

- Exh. 1. PGW Set I Interrogatories
- Exh. 2. POWER Written Objections
- Exh. 3. POWER First Partial Responses
- Exh. 4. POWER Second Partial Responses
- Exh. 5. Declaration of Julie Greenberg
- Exh. 6. Declaration of Steven Greenspan
- Exh. 7. Declaration of Mitch Chanin
- Exh. 8. Declaration of Karl R. Rábago

\* Exhibits are available for download [here](#).

## **I. Introduction**

Pursuant to 52 Pa. Code § 5.342, POWER Interfaith hereby respectfully Answers the Motion to Compel (“Motion”) filed by Philadelphia Gas Works (“PGW”) in the above-captioned proceeding (“Proceeding”) of the Pennsylvania Public Utility Commission (the “Commission”) on June 26, 2023.

### **A. Legal Framework**

The Public Utility Code and its implementing regulations provide for reasonable discovery in rate cases in order to develop the factual record necessary to support informed decision-making by the Commission on whether a utility’s proposed rates are just and reasonable.<sup>1</sup> A party may obtain discovery regarding any matter that is relevant to the subject matter of the Proceeding or is reasonably calculated to lead to the discovery of relevant admissible evidence.<sup>2</sup> Information is relevant if “it tends to establish a material fact, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact.”<sup>3</sup> Commission regulations also provide that discovery which would cause an undue burden or require an unreasonable investigation is not permitted.<sup>4</sup>

A further limitation on discovery is privilege.<sup>5</sup> This includes attorney-client privilege<sup>6</sup> as well as privilege under the First Amendment to the United States Constitution (“First

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<sup>1</sup> 66 Pa. C.S. §§ 1301, 2212.

<sup>2</sup> 52 Pa. Code § 5.321(c).

<sup>3</sup> *Application of Exeter Twp. for Certificate of Pub. Convenience to Offer, Furnish, Render & Supply Wastewater Serv. to the Pub. in Certain Portions of Lower Alsace Twp., Berks Cnty., Pennsylvania*, No. A-2018-3006505, 2019 WL 1506802, at \*1 (Mar. 22, 2019).

<sup>4</sup> 52 Pa. Code § 5.361(a)(2); 52 Pa. Code § 5.361(a)(4).

<sup>5</sup> 52 Pa. Code § 5.361(a)(3).

<sup>6</sup> 52 Pa. Code § 5.323(a).

Amendment”).<sup>7</sup> As discussed below, certain of PGW’s Set I interrogatories are so inappropriate and intrusive that they are appropriate to disallow on the basis that they infringe the First Amendment rights of POWER. The Commission need not reach this issue, because as also explained below, the contested interrogatories are also plainly inappropriate on the basis of relevance, undue burden, and other forms of privilege. However, to the extent that any additional reason may be needed, the most inappropriate of PGW’s questions should also be disallowed on the grounds of First Amendment privilege.

As background, in the context of discovery, courts have recognized that the First Amendment is the source of a privilege against the compelled disclosure of information that would have a chilling effect on the exercise of associational rights protected by the First Amendment.<sup>8</sup> A litigant’s application for the use of governmental power to compel disclosure through a motion to compel provides the requisite element of governmental action for First Amendment protections to apply, even if only private litigants are involved in the dispute.<sup>9</sup>

Courts have recognized that First Amendment associational privilege is applicable to protect the exercise of such associational rights such as participating freely and fully in advocacy

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<sup>7</sup> *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093 (E.D. Pa. Apr. 6, 2023); *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394 (E.D. Mo. Dec. 31, 2015) *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007).

<sup>8</sup> *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093 (E.D. Pa. Apr. 6, 2023); *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394 (E.D. Mo. Dec. 31, 2015) *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007).

<sup>9</sup> *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (“Although the First Amendment does not normally restrict the actions of purely private individuals, the amendment may be applicable in the context of discovery orders, even if all of the litigants are private entities. In this case, for example, the magistrate’s order compelling discovery and the trial court’s enforcement of that order provide the requisite governmental action that invokes First Amendment scrutiny.”); *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093, at \*6 (E.D. Pa. Apr. 6, 2023) (“Discovery requests represent ‘state action’ that may impermissibly affect an organization’s associational activities.”). While the First Amendment applies even in disputes involving private litigants, here, PGW is a governmental entity, as part of the City of Philadelphia.

organizations and communicating freely and fully with others regarding advocacy strategies,<sup>10</sup> as well as making donations to advocacy organizations.<sup>11</sup> Each of these aspects of First Amendment privilege will be discussed where applicable in connection with the detailed discussion of Set I questions below.

As the Eastern District of Pennsylvania has recently explained, the applicability of First Amendment associational privilege is assessed as follows.<sup>12</sup> First, the party claiming the privilege must establish the applicability of the privilege. This can be done by making a *prima facie* showing of circumstances that “objectively suggest a ‘chilling’ impact on associational rights.”<sup>13</sup> This required *prima facie* showing can be made through declarations of members about

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<sup>10</sup> *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association.”); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (holding that compulsory disclosure of internal campaign strategy communications “can have [a deterrent] effect on the exercise of protected activities.”); *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093 (E.D. Pa. Apr. 6, 2023) (finding that declarations from members of a police association “give rise to a ‘reasonable inference’ that disclosure of members’ internal communications will discourage them from freely exchanging ideas with other members in the future, and thus, infringe up on those members’ associational rights.”); *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394 (E.D. Mo. Dec. 31, 2015) (“The First Amendment may protect membership lists of advocacy groups, as well as requests for internal communications of and among such groups, where disclosure would ‘have a potential for chilling the free exercise of political speech and association guarded by the First Amendment.’”); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007).

<sup>11</sup> *Americans for Prosperity Found. v. Bonta*, 210 L. Ed. 2d 716, 141 S. Ct. 2373, 2389 (2021) (striking down a California law requiring disclosure of major donors to nonprofits on First Amendment grounds since “[t]he risk of a chilling effect on association is enough, ‘[b]ecause First Amendment freedoms need breathing space to survive.’”); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (“Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.”); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., & its Locs. 1093, 558 & 25 v. Nat'l Right to Work Legal Def. & Ed. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978) (“The First Amendment's protection in the legal aid context extends not only to the organization itself, but also to its staff, members, contributors and others who affiliate with it.”); *Tree of Life Christian Sch. v. City of Upper Arlington*, No. 2:11-CV-00009, 2012 WL 831918, at \*2 (S.D. Ohio Mar. 12, 2012) (“The freedom to associate encompasses the ability to make financial contributions in order to further a common goal”); *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (“The courts have long recognized the sensitivity of information related to such activities and consequently have ruled that the following information is protected by the First Amendment: membership and volunteer lists, contributor lists, and past political activities of plaintiffs and of those persons with whom they have been affiliated. Consequently, discovery requests from Defendants that seek such information will not be allowed.”).

<sup>12</sup> *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093, at \*6 (E.D. Pa. Apr. 6, 2023).

<sup>13</sup> *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093, at \*6 (E.D. Pa. Apr. 6, 2023).



chilling effects of compelled disclosure on the exercise of their associational rights, including statements that compelled disclosures of internal strategy conversations will make the declarant less likely to engage freely in internal discussions in the future.<sup>14</sup> Once this *prima facie* showing has been made, the proponent of compelling disclosure must then “show that the information sought is highly relevant to the claims or defenses in the litigation,” a “more demanding standard of relevance” than normally applicable procedural rules.<sup>15</sup> POWER has provided three First Amendment associational privilege declarations from members, attached hereto, which will be discussed as applicable in the context of particular contested discovery questions.<sup>16</sup>

## **B. Overview**

This Answer responds to PGW’s Motion to Compel Answers to its Set I Interrogatories filed on June 26, 2023, which PGW filed in response to POWER’s Written Objections<sup>17</sup> to its Set I Interrogatories served on June 22, 2023. POWER had served its First Partial Response to PGW’s Set I Interrogatories on June 9, 2023,<sup>18</sup> and served its Second Partial Response to PGW’s Set I Interrogatories<sup>19</sup> on June 22, 2023 alongside its Written Objections.<sup>20</sup> As explained in POWER’s Written Objections, PGW incorporated into its Set I Interrogatories instructions that required every question to be answered both on behalf of POWER and on behalf of any POWER

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<sup>14</sup> *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093, at \*7 (E.D. Pa. Apr. 6, 2023) (finding that “These declarations give rise to a ‘reasonable inference’ that disclosure of members’ internal communications will discourage them from freely exchanging ideas with other members in the future, and thus, infringe up on those members’ associational rights.”).

<sup>15</sup> *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093, at \*6 (E.D. Pa. Apr. 6, 2023).

<sup>16</sup> Exh. 5. Declaration of Julie Greenberg; Exh. 6. Declaration of Steven Greenspan; Exh. 7. Declaration of Mitch Chanin.

<sup>17</sup> Exh. 2. POWER Written Objections.

<sup>18</sup> Exh. 3. POWER First Partial Responses.

<sup>19</sup> Exh. 4. POWER Second Partial Responses.

<sup>20</sup> Exh. 2. POWER Written Objections.

affiliate, regardless of whether any such affiliate is involved in this Proceeding, but did not define the intended scope of the term “affiliate.”<sup>21</sup> However, POWER went to significant lengths to produce as much information as possible concerning itself and also confirmed that it has no affiliates involved in this Proceeding.

POWER’s Written Objections reviewed PGW’s Set I interrogatories in detail on a question-by-question basis and discussed all the applicable objections for each question. PGW’s Motion to Compel contains an initial section styled as PGW’s “General Responses” to POWER’s objections.<sup>22</sup> PGW’s General Responses make a variety of blanket claims for why all of its Set I questions are justified, but notably do not discuss any specific Set I questions or explain how any specific Set I questions relate to the general claims PGW makes in its General Responses. PGW’s General Responses are followed by PGW’s “Specific Responses” addressed to particular groupings of Set I questions. This Answer will address the arguments in PGW’s Motion, both in PGW’s General Responses and Specific Responses, as they apply to the questions in Set I. This Answer will also explain what portions of each Set I question POWER has answered, and why POWER should not be compelled to provide further information.

As an initial matter, PGW’s General Responses make a blanket claim that a purpose of the Set I interrogatories is to test POWER’s standing.<sup>23</sup> This claim is misplaced. An organization may have standing on behalf of its members, and need only demonstrate at least one member who will suffer a direct injury as a result of the challenged action.<sup>24</sup> POWER’s Petition to

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<sup>21</sup> Exh. 2. POWER Written Objections, at 3.

<sup>22</sup> PGW Motion to Compel, at 3-6.

<sup>23</sup> PGW Motion to Compel, at 4.

<sup>24</sup> *Energy Conservation Council of Pennsylvania v. Pub. Util. Comm’n*, 995 A.2d 465, 476 (Pa. Commw. Ct. 2010) (“An association may have standing as a representative of its members. *Tripps Park v. Pennsylvania Public Utility Commission*, 52 Pa.Cmwlth. 317, 415 A.2d 967, 970 (1980). Thus, as long as an organization ‘has at least one member who has or will suffer a direct, immediate, and substantial injury to an interest as a result of the challenged action[, i.e., is aggrieved, the organization] has standing.’”).

Intervene contained the necessary averments to establish organizational standing by pleading that POWER has members that are PGW customers and live in PGW's service territory. PGW was afforded an opportunity to object to POWER's Petition to Intervene, but chose not to, and POWER's Petition to Intervene was granted on April 20, 2023.<sup>25</sup> While POWER's granted Petition to Intervene should be sufficient to establish standing, in addition to that, POWER's member declarations attached hereto further establish that POWER has at least one member that is a PGW customer and lives in PGW's service territory.<sup>26</sup>

It is also notable that while PGW attempts to rationalize its Set I interrogatories as an inquiry into POWER's standing, and while various of the Set I questions take a dragnet-style approach to requesting voluminous amounts of internal information about POWER, none of the Set I questions actually ask any specific information about the elements of standing, such as asking POWER to specifically identify at least one member that is a customer of PGW.

In its General Responses, PGW also attempts to justify its Set I interrogatories as an investigation of "the relevance, materiality, standing and credibility of POWER's averments" in POWER's Petition to Intervene and the compliance of POWER's Petition to Intervene with 52 Pa. Code §§ 5.72-5.75. This claim is also misplaced. To start, POWER's Petition to Intervene was granted approximately two months ago, and PGW's attempt to relitigate it should be rejected. PGW was provided an opportunity to object to the granting of POWER's Petition to Intervene, but did not, and PGW's attempt to assert an untimely objection should not be permitted.

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<sup>25</sup> POWER's Petition to Intervene was granted during the Prehearing Conference convened on April 20, 2023, which was memorialized in the Prehearing Conference Order issued on May 10, 2023 and updated on May 11, 2023 to correct a minor error.

<sup>26</sup> Exh. 5. Declaration of Julie Greenberg at 1; Exh. 6. Declaration of Steven Greenspan at 1; Exh. 7. Declaration of Mitch Chanin at 1.

Moreover, while PGW claims that all of its Set I questions are justified because they investigate POWER's statements in its Petition to Intervene, not a single Set I question cites POWER's Petition to Intervene. Only one Set I question has any discernible connection to a Petition to Intervene, a question that asks POWER to name what its unique interest in the Proceeding is that is not represented by another party.<sup>27</sup> This question simply restates part of the applicable regulation's language<sup>28</sup> in the form of a question, a question that POWER's Petition already answered, and it is unclear how this question in any way investigates the response POWER provided originally in its Petition to Intervene.

As such, it is unclear what PGW means by its desire to investigate the "materiality," "relevance," and "credibility" of POWER's statements in its Petition to Intervene. All three of these are evidence law concepts that apply to a witness's testimony offered as evidence, but PGW does not indicate how it plans to use any of the information requested in Set I to challenge any claim in POWER's three expert witnesses' testimonies. More broadly, none of the Set I questions cite or refer to any of POWER's three pieces of pre-served expert witness testimony. As discussed in further detail below, PGW's Set I questions are in fact not connected to the subject matter of this Proceeding or any claim of any party, and PGW's attempt to rationalize their Set I questions by reaching back to POWER's Petition to Intervene should be rejected.

The final blanket justification for its Set I questions offered by PGW in its General Responses is that PGW needs the information requested by Set I in order to be able to show that PGW is providing "adequate, efficient, safe, and reasonable service and facilities" under 66 Pa.C.S. § 1501.<sup>29</sup> This claim is misplaced, because none of the questions relate in any way to the

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<sup>27</sup> Exh. 1. PGW Set I Interrogatories, at 11.

<sup>28</sup> 52. Pa. Code § 5.72.

<sup>29</sup> PGW Motion to Compel, at 6.

provision of gas service. As discussed below, the topics of questions range from the names of POWER's donors, to the contents of internal POWER case strategy discussions, to the contents of communications POWER has had with any environmental coalitions it is part of, as well as other areas. However, none of the questions relate to any information that PGW needs to establish that it is providing safe and reliable gas service. This blanket rationalization, too, should be rejected.

As part of its blanket claim that its Set I questions are needed to be able to demonstrate it is providing "adequate, efficient, safe, and reasonable service and facilities" under 66 Pa.C.S. § 1501, PGW also attempts to rely on a document it apparently downloaded from POWER's website, which reflects POWER's support for the City of Philadelphia's publicly-expressed goal of phasing out PGW's use of fossil fuels by 2050.<sup>30</sup> It is unclear how or why PGW believes this document has any bearing on whether its Set I questions are related to the subject matter of this Proceeding. POWER has not made any reference to that document or raised any environmental or climate claims in this Proceeding, and none of POWER's expert testimony, which is focused on technical recommendations for improving the affordability of gas service, relies on any environmental or climate claims.

POWER has the right as a party to this Proceeding to decide what claims to bring in this Proceeding, and the decision is weighty, given the intense resource and time demands of litigating each claim made. POWER, as a multi-faith, multi-issue advocacy organization, is generally concerned about advancing justice in a variety of contexts and has exercised its First

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<sup>30</sup> Philadelphia City Council, Resolution No. 190728 (2019) (resolving that "the City of Philadelphia shall take measures to achieve a fair and equitable transition to the use of 100% clean renewable energy for electricity in municipal operations by 2030, for electricity City-wide by 2035, and for all energy (including heat and transportation) city-wide by 2050 or sooner."), *available at* <https://phila.legistar.com/LegislationDetail.aspx?From=RSS&ID=4142523&GUID=BA06CC3B-7B43-4743-A07E-515A145C4A2A>.

Amendment rights to speak out publicly on a range of issues. However, in this rate case, POWER has elected to focus on fighting for improvements to the affordability of gas service, given the burden that rising gas rates will inflict on Philadelphians.

It is not appropriate for PGW to troll through POWER's website, cherry pick statements made outside this Proceeding as part of POWER's engagement in public debate in Philadelphia about the long-term future of PGW in light of the City of Philadelphia's climate commitments, and then turn around and claim that PGW needs extensive discovery about those statements in order to defend itself from claims that POWER has not made in this Proceeding. It bears emphasis that POWER, not PGW, has the right to define what claims POWER is bringing in this Proceeding. PGW may earnestly disagree with various public statements POWER has made as part of general public discourse about City of Philadelphia policy on PGW's long term future, but it is not appropriate for PGW to attempt to use the tools of discovery, which are reserved for developing the record for this Proceeding, to pursue any disagreements it may have with POWER outside the scope of this Proceeding.

This Answer will next proceed to discussing specific Set I questions in topical groups. However, before proceeding to do so, it is relevant to note the unusually intrusive nature of many of the Set I questions. As noted, not a single question refers to or cites any of POWER's three pieces of expert witness testimony in this Proceeding. Instead, the Set I questions ask for, among other things, large amounts of internal financial data (there are four separate questions asking, in different ways, for the names of POWER's donors), the contents of POWER's internal strategy discussions and discussions with coalition partners, and lists of all POWER affiliations and the participants in any affiliations. This is not an appropriate use of the Commission's or the parties' limited resources, which should be focused on developing the record needed for the Commission

to make an informed decision on the merits of PGW’s pending application for a general rate increase.

On a national level, a utility seeking these kinds of discovery questions in a public utility commission proceeding is both highly unusual and highly inappropriate, as noted in the attached Declaration of Karl R. Rábago, a former Commissioner of the Public Utility Commission of Texas and experienced expert on public utility regulation.<sup>31</sup> As Mr. Rábago notes, participation by community organizations at public utility commissions is in the public interest, because it helps bring in a broader range of perspectives and helps achieve wider buy-in to decisions.<sup>32</sup> However, if the kinds of intrusive and irrelevant discovery questions contained in PGW’s Set I are accepted and normalized, this may have the effect of deterring participation by community organizations in public utility commission proceedings, to the detriment of the public interest.<sup>33</sup>

## **II. POWER’s Objections to Producing Detailed Information About POWER’s Internal Discussions and Processes Relating to Interrogatory Responses Should Be Sustained**

### **A. Overview**

In Questions 1, 8, and 9, PGW seeks detailed information about POWER’s internal processes for preparing responses to PGW’s discovery questions, including the name, contact information, and present location for any person who was spoken to or who provided information to assist in answering any question, the contents of any information provided by any person to any other person in connection with answering the interrogatories, any records of PGW referred to, the “originator” (an undefined term) of any PGW records referred to, all correlated to

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<sup>31</sup> Exh. 8. Declaration of Karl R. Rábago at 1, 2.

<sup>32</sup> Exh. 8. Declaration of Karl R. Rábago at 6.

<sup>33</sup> Exh. 8. Declaration of Karl R. Rábago at 6.

the subpart of each discovery question as applicable. As modified by the Instructions, when identifying any person in response to any question, PGW requests the person's full name, their present or last known address, present or last known telephone number, present or last known place of employment, position, or business affiliation, the person's position or business affiliation at the time in question, and a general description of the business in which he or she is engaged.<sup>34</sup> In POWER's Second Partial Response, POWER agreed to provide the name, job title, and business address of the person answering each interrogatory on behalf of POWER.<sup>35</sup> PGW's Motion to Compel does not explain why this information is not sufficient, and does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>36</sup>

## **B. Discussion**

A discovery request must either seek information that is itself relevant or be reasonably calculated to lead to relevant admissible evidence.<sup>37</sup> As an initial matter, the information sought by these questions is not itself relevant, because POWER's internal process of responding to interrogatories is not itself a material fact that must be resolved in the Commission's investigation into PGW's application for a general rate increase.

These questions are also not reasonably calculated to lead to admissible relevant evidence. To be reasonably calculated to lead to relevant evidence, there must be some articulation of a relevant evidentiary goal and of how the question will lead towards the production of that relevant evidence. As noted above, POWER has already provided the name

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<sup>34</sup> Exh. 1. PGW Set I Interrogatories, at 6.

<sup>35</sup> POWER Second Partial Responses, at 2.

<sup>36</sup> PGW Motion to Compel, at 7-8.

<sup>37</sup> 52 Pa. Code § 5.321(c).



and contact information for the person answering each question for POWER. PGW also has the full unabridged right to issue discovery to POWER in this Proceeding by serving its attorneys, so it is unclear why PGW would need the contact information or “present location” of other individuals with relation to POWER’s responses to these interrogatories. PGW has not explained what relevant evidence it calculates the additional information sought by questions will lead to, or why any such calculation would be reasonable. PGW has also offered no explanation for why the information POWER has provided and the existing and ordinary tools of discovery are not sufficient and proportional to the needs of developing the record for this Proceeding.

Under certain circumstances, it may be appropriate to ask for the names of personnel with knowledge of facts that are material to the subject matter of the proceeding, particularly where the subject of discovery is a Commission-regulated utility seeking approval for an application and the internal workings of the utility may be relevant to the proceeding. However, a blanket question to an intervenor requesting the identifying information and present location for everyone spoken to by anyone in connection with preparing discovery responses and the contents of information conveyed in every conversation with any person is excessive and disproportionate to the needs of the case.

A discovery request must also not inflict an unreasonable burden.<sup>38</sup> Compiling this information would impose an unreasonable burden on POWER. According to PGW’s questions, as modified by the Instructions, it would require generating a list of every person spoken to by anyone, the information conveyed in any conversation with anyone, and the name, contact information, present location, present or last known telephone number, present or last known place of employment, position, or business affiliation, the person’s position or business

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<sup>38</sup> 52 Pa. Code § 5.361(a)(2); 52 Pa. Code § 5.361(a)(4).

affiliation at the time in question, and a general description of the business in which he or she is engaged for all persons identified.<sup>39</sup> POWER is a small nonprofit with limited resources, and its ability to participate meaningfully in this Proceeding depends on its ability to focus its engagement on matters that are actually relevant and material to the Proceeding. POWER can and should be freed from the burden of excessive and disproportionate discovery in order to focus on defending its actual claims in this Proceeding as reflected in its expert testimony. PGW's attempt to burden and impair POWER's ability to do so by forcing POWER to expend additional resources on responding to inappropriate discovery requests should be disallowed.

Additionally, to the extent that these questions seek production of the contents of every conversation with any person by any person in connection with preparing responses to the interrogatories, they should be disallowed by application of the appropriate privileges. The contents of any conversation involving attorney-client communications or advice should be considered protected by attorney-client privilege. The contents of any conversation involving internal discussion of case strategy considerations relating to how to respond to the interrogatories should be considered protected by First Amendment associational privilege, triggering a heightened standard for relevance that PGW cannot meet.<sup>40</sup> As reflected in the attached declarations, compelled disclosure of the contents of internal case strategy discussions

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<sup>39</sup> Exh. 1. PGW Set I Interrogatories, at 6

<sup>40</sup> *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (holding that compulsory disclosure of internal campaign strategy communications “can have [a deterrent] effect on the exercise of protected activities.”); *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093 (E.D. Pa. Apr. 6, 2023) (finding that declarations from members of a police association “give rise to a ‘reasonable inference’ that disclosure of members’ internal communications will discourage them from freely exchanging ideas with other members in the future, and thus, infringe up on those members’ associational rights.”); *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394 (E.D. Mo. Dec. 31, 2015) (“The First Amendment may protect membership lists of advocacy groups, as well as requests for internal communications of and among such groups, where disclosure would ‘have a potential for chilling the free exercise of political speech and association guarded by the First Amendment.’”); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007).

would have a chilling effect on the effective exercise of POWER's associational rights by impairing and deterring a full and candid exchange of views.<sup>41</sup> Accordingly, these questions should be disallowed.

### **III. POWER's Objections to Producing Detailed Corporate Entity and Participant Information About Any Affiliates Not Involved in this Proceeding Should Be Sustained**

#### **A. Overview**

In Questions 2, 3, 4, 5, and 6, PGW seeks detailed corporate entity information about POWER and any affiliates of POWER as well as information about any persons that participate in any affiliation.<sup>42</sup> On June 22, 2023, POWER produced the requested corporate entity information as to POWER itself and confirmed that POWER does not have any affiliates involved in this Proceeding.<sup>43</sup> PGW's Motion to Compel does not explain why this information is not sufficient, and does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>44</sup>

#### **B. Discussion**

A discovery request must either seek information that is itself relevant or be reasonably calculated to lead to relevant admissible evidence.<sup>45</sup> POWER's perspective is that the requested corporate entity details relating to POWER and any affiliates are not relevant, and the

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<sup>41</sup> Exh. 5. Declaration of Julie Greenberg at 2, 3; Exh. 6. Declaration of Steven Greenspan at 1, 2; Exh. 7. Declaration of Mitch Chanin at 1.

<sup>42</sup> Exh. 1. PGW Set I Interrogatories, at 9.; Per the Instructions, this question also seeks the same information from any POWER affiliate.

<sup>43</sup> Exh. 4. POWER Second Partial Responses, at 7.

<sup>44</sup> PGW Motion to Compel, at 7, 8.

<sup>45</sup> 52 Pa. Code § 5.321(c).

interrogatories are not reasonably calculated to lead to any relevant admissible evidence because this information is not a material fact for any issue in this Proceeding.

However, in a spirit of cooperation, notwithstanding this objection, POWER provided all of the requested corporate entity information regarding POWER itself and confirmed that no affiliate of POWER is involved in this Proceeding.<sup>46</sup> POWER also noted the vagueness of the term affiliate, and noted that PGW had not defined it.<sup>47</sup> PGW declined to provide any clarification of the intended scope of the term in its Motion to Compel.<sup>48</sup> PGW's failure to clarify this term is inappropriate because the term has a wide range of potential meanings. It could sweep in all manner of affiliations and associations that POWER as an interfaith advocacy organization may have, including participation and membership in political, policy, and religious coalitions and caucuses.

Given the information POWER has already produced, including confirming that it is not affiliated with any party in this Proceeding, PGW's Motion to Compel seeks to compel production of detailed corporate entity information for any POWER affiliates not a party to this Proceeding as well as the names of any person participating in any POWER affiliations. PGW provides no reasoning or argument for why this information is relevant to this Proceeding or why compelling production is proper.

This information is not itself relevant because the nature and details of POWER's affiliations outside this Proceeding and the names of participants in those affiliations is not a material fact relating to any issue in this Proceeding. These questions also cannot be considered reasonably calculated to lead to the production of relevant admissible evidence, because they are

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<sup>46</sup> Exh. 4. POWER Second Partial Responses, at 7.

<sup>47</sup> Exh. 2. POWER Written Objections, at 10.

<sup>48</sup> PGW Motion to Compel, at 7, 8.

not aimed at any discernible relevant evidence and there is no indication of any reasonable calculation. As such, the Commission should disallow these questions on the grounds of relevance.

It would also be an unreasonable burden for POWER to be required to produce detailed corporate entity information and the identification of any participants for any affiliates not involved in this Proceeding (along with the burdensome list of identifying information required for all persons identified per PGW's Instructions, discussed above). The referenced questions request very detailed information for any such affiliates, none of which is relevant to any material fact for any issue in this Proceeding.<sup>49</sup> As noted, POWER is a small community nonprofit with limited resources, and it is harmful to POWER's ability to make its case in this Proceeding to be subjected to the undue burdens of excessive and irrelevant discovery requests.

These questions should also be disallowed to the extent that they seek information protected by privilege. To the extent that the questions seek the names of participants in any POWER affiliations, this seeks information appropriately protected by First Amendment associational privilege. Courts have expressly found that parties seeking to compel disclosure of membership lists of those involved in advocacy organizations are seeking information protected by First Amendment associational privilege, and must meet a high bar of relevance and need to obtain that information.<sup>50</sup> As discussed above, PGW cannot meet such a bar, because the

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<sup>49</sup> Exh. 1. PGW Set I Interrogatories, at 6.

<sup>50</sup> *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association."); *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093 (E.D. Pa. Apr. 6, 2023); *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394 (E.D. Mo. Dec. 31, 2015) ("The First Amendment may protect membership lists of advocacy groups, as well as requests for internal communications of and among such groups, where disclosure would 'have a potential for chilling the free exercise of political speech and association guarded by the First Amendment.'"); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007); *State of Wyoming v. United States Dep't of*

requested information about affiliates not involved in this Proceeding has no relevance to any issue in this Proceeding, let alone a high degree of relevance.

#### **IV. POWER's Objections to Producing Information About Any Affiliates' Previously Expressed Policy and Political Views Should Be Sustained**

##### **A. Overview**

In Questions 7, 17, 20, 21, and 22, PGW seeks detailed information about the previously expressed policy views and studies conducted by POWER and any affiliates of POWER.<sup>51</sup> On June 22, 2023, POWER produced the requested information as to POWER itself, and confirmed that POWER does not have any affiliates involved in this Proceeding.<sup>52</sup> PGW's Motion to Compel does not explain why this information is not sufficient, and does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>53</sup>

##### **B. Discussion**

A discovery request must either seek information that is itself relevant or be reasonably calculated to lead to relevant admissible evidence.<sup>54</sup> Question 7 asks about any studies conducted about electricity generated from natural gas,<sup>55</sup> Question 17 asks about any organizational policy

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*Agric.*, 208 F.R.D. 449, 454 (D.D.C.2002) (“Membership lists are not the only information afforded First Amendment protection. In blocking the government's discovery request of political action groups, this court recently stated, ‘it is crucial to remember that we are considering the essence of First Amendment freedoms—the freedom to protest policies to which one is opposed, and the freedom to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest.’”) *citing Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 2 (D.D.C.2002).

<sup>51</sup> Exh. 1. PGW Set I Interrogatories, at 9,11; Per the Instructions, this question also seeks the same information from any POWER affiliate.

<sup>52</sup> Exh. 4. POWER Second Partial Responses, at 7.

<sup>53</sup> PGW Motion to Compel, at 8, 12, 13.

<sup>54</sup> 52 Pa. Code § 5.321(c).

<sup>55</sup> Exh. 1. PGW Set I Interrogatories, at 9.

about electricity generated from natural gas,<sup>56</sup> Question 20 asks about the meaning of the term affordability and any studies POWER conducted in connection with a document on its website relating to public discourse on the future of PGW,<sup>57</sup> Question 21 asks about any organizational position on a municipal gas ban,<sup>58</sup> and Question 22 asks about indoor air quality issues associated with gas use.<sup>59</sup>

POWER reasonably believes all of the questions to be irrelevant to the subject matter of this Proceeding and wholly unrelated to any claim made in POWER's testimony, which does not raise any environmental issues. However, in a spirit of cooperation, POWER produced responses to all of the questions with regard to itself. As noted above, POWER did decline to produce answers to the questions on behalf of any affiliates.

The matter remaining for adjudication is whether PGW should be able to compel POWER to produce answers to these questions on behalf of any POWER affiliates. As discussed above, PGW has declined to clarify what it means by the term affiliate or what the intended scope of inclusion is. In the portions of its Motion to Compel addressed to these questions, PGW provides no explanation for why it believes this information is relevant or why it is entitled to it, but simply repeats its conclusory assertion that "the scope of discovery is broad."<sup>60</sup> In the absence of any identifiable link between whatever views any POWER affiliates may have on the miscellaneous environmental and other policy questions PGW has posed with any material fact at issue in this Proceeding, POWER respectfully submits that its objection should be sustained on the grounds of relevance.

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<sup>56</sup> Exh. 1. PGW Set I Interrogatories, at 11.

<sup>57</sup> Exh. 1. PGW Set I Interrogatories, at 11.

<sup>58</sup> Exh. 1. PGW Set I Interrogatories, at 11.

<sup>59</sup> Exh. 1. PGW Set I Interrogatories, at 12.

<sup>60</sup> PGW Motion to Compel, at 8, 12, 13.

POWER's objection should also be sustained on the grounds of undue burden.

Particularly given the vagueness of the term affiliate, which could sweep in a wide variety of political, policy, and religious affiliations, requiring POWER to track down the policy views of any affiliates on this miscellany of policy questions with no bearing on the subject matter of this Proceeding would be an unreasonable burden, particularly given the already heavy time and resource demands of this case.

## **V. POWER's Objections to Producing Information About Board Members and Personnel of Any Affiliates Not Involved in this Proceeding Should Be Sustained**

### **A. Overview**

In Questions 10 and 11, PGW asks that POWER produce information concerning the organizational chart and board members of POWER.<sup>61</sup> By application of the Instructions to the Interrogatories, this question is extended to include any POWER affiliates. POWER produced responses to these questions for POWER itself, but declined to produce responses pertaining to any POWER affiliates.<sup>62</sup> PGW's Motion to Compel does not explain why this information is not sufficient, and does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>63</sup>

### **B. Discussion**

POWER reasonably believes that Questions 10 and 11 are irrelevant to the subject matter of this Proceeding, as articulated in its Written Objections.<sup>64</sup> However, notwithstanding these

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<sup>61</sup> Exh. 1. PGW Set I Interrogatories, at 10.

<sup>62</sup> Exh. 4. POWER Second Partial Responses, at 10.

<sup>63</sup> PGW Motion to Compel, at 9.

<sup>64</sup> Exh. 2. POWER Written Objections, at 19, 21.



objections, in a spirit of cooperation, POWER produced answers with regard to POWER. To the extent that PGW is continuing to seek responses to Question 10 and 11 on behalf of any POWER affiliates, POWER respectfully submits that this request should be denied on the grounds of relevance. POWER has also noted that vagueness of the term affiliate, and PGW's failure to define it, results in a term that could sweep in a large range of political, policy, and religious associations. If this question regarding personnel and board members of any POWER affiliates is found to be relevant, and broadly construed, it may also result in an undue burden and require an unreasonable investigation to compile this information.

## **VI. POWER's Objections to Producing Detailed Information About POWER's Donors and Expenditures Should Be Sustained**

### **A. Overview**

In Questions 12, 13, 14, and 19, PGW seeks detailed information about POWER's donors and expenditures of donated funds.<sup>65</sup> These information requests seek the names of POWER's donors, information about the purposes the donors had for donating, and details on how POWER spent all donated monies.<sup>66</sup> Per the Instructions, this question also seeks the same information from any POWER affiliate, and for all donors identified, seeks their full name, present or last known address, present or last known telephone number, present or last known place of employment, position or business affiliation, position or business affiliation at the time in question, and a general description of the business in which they are engaged.<sup>67</sup> PGW's Motion

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<sup>65</sup> Exh. 1. PGW Set I Interrogatories, at 10, 11.

<sup>66</sup> Exh. 1. PGW Set I Interrogatories, at 10, 11.

<sup>67</sup> Exh. 1. PGW Set I Interrogatories, at 5.

to Compel does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>68</sup>

## **B. Discussion**

A discovery request must either seek information that is itself relevant or be reasonably calculated to lead to relevant admissible evidence.<sup>69</sup> As an initial matter, the information sought by these questions is not itself relevant, because information about POWER's donors and expenditures is not itself a material fact that must be resolved in the Commission's investigation into PGW's application for a general rate increase.

These questions are also not reasonably calculated to lead to admissible relevant evidence. To be reasonably calculated to lead to relevant evidence, there must be some articulation of a relevant evidentiary goal and of how the question will lead towards the production of that relevant evidence. PGW's Motion to Compel provides no argument for why it is seeking this information, and POWER is not able to discern any relevant evidentiary goal these questions are designed to advance.

Notably, PGW has not supplied any precedent for a finding that information about an intervenor nonprofit's donors is relevant to the Commission's investigation into a utility's application for a general rate increase. However, similar precedent on an applicant utility seeking discovery of competitive business information of intervenors holds that such business information is not relevant. In *Application of Peregrine Keystone Gas Pipeline LLC*, the judge found discovery requests from the applicant utility into the competitive business information of

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<sup>68</sup> PGW Motion to Compel, at 9.

<sup>69</sup> 52 Pa. Code § 5.321(c).

an intervenor to be not relevant.<sup>70</sup> As the judge explained, discovery by the applicant utility into the internal finances of an intervenor is not subject to the general liberal allowance for discovery regarding the applicant utility, because the internal finances of an intervenor do not “implicat[e] the central and relevant issue in the case,” namely, the application under investigation.<sup>71</sup> As the judge further noted, “[a] suspicious mind would suspect that the Applicant's motivation in these contested interrogatories is either to obtain competitive information, to drive up the cost of the protestants' involvement in this litigation, or to make the parties too uncomfortable to participate in similar cases in the future.”<sup>72</sup>

Here, POWER's donor and expenditure information is not relevant to the Commission's investigation of PGW's application. There is no finding required as part of the Commission's investigation as to the donors and expenditures of nonprofit intervenors in this proceeding. PGW's request appears to be a classic fishing expedition and attempt to gather internal financial information about an advocacy organization with which it disagrees. Relevance, and not curiosity, is the standard for discovery requests.<sup>73</sup> As such, POWER's objections should be

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<sup>70</sup> Sixth Prehearing Order, Application of Peregrine Keystone Gas Pipeline, LLC for Approval on a Non-Exclusive Basis to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering, Compression, Dehydration, and Transportation Or Conveying Service by Pipeline to the Public in All Municipalities Located in Greene and Fayette Counties and in East Bethlehem Township in Washington County, Pennsylvania, Docket No. A-2010-2200201, at 5 (Dec. 5, 2011).

<sup>71</sup> Sixth Prehearing Order, *Application of Peregrine Keystone Gas Pipeline, LLC for Approval on a Non-Exclusive Basis to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering, Compression, Dehydration, and Transportation Or Conveying Service by Pipeline to the Public in All Municipalities Located in Greene and Fayette Counties and in East Bethlehem Township in Washington County, Pennsylvania*, Docket No. A-2010-2200201, at 5 (Dec. 5, 2011).

<sup>72</sup> Sixth Prehearing Order, *Application of Peregrine Keystone Gas Pipeline, LLC for Approval on a Non-Exclusive Basis to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering, Compression, Dehydration, and Transportation Or Conveying Service by Pipeline to the Public in All Municipalities Located in Greene and Fayette Counties and in East Bethlehem Township in Washington County, Pennsylvania*, Docket No. A-2010-2200201, at 5 (Dec. 5, 2011).

<sup>73</sup> Order on Motion to Compel, *Pa. PUC v. Pennsylvania American Water Co.*, Docket No. R-2011-2232243, at 22 (July 21, 2011).

sustained on the grounds that these questions do not fall within the scope of relevance for this Proceeding.

POWER's objections to these questions should also be upheld on the grounds of undue burden. PGW's Set I includes no less than four separate questions asking for the names of POWER's donors, their purpose for donating, and the uses of donated monies. Compiling donation and spending reports with the requested information for every single donation received by POWER during 2021, the year covered by the request, would be a serious burden for POWER, particularly on top of the demands of making its case in this Proceeding and carrying out its normal programmatic activities. With regard to the questions asking about the purpose each donor has, POWER may not have any documentation on that for every donor, and compelling POWER to contact all donors to confirm what their purpose for donating was would require an unreasonable investigation. Further, PGW's request for full names, current and past addresses, telephone numbers, and employment information regarding every POWER donor would be functionally impossible for POWER to procure, on top of the privacy and associational rights implications of doing so.

POWER's objections to these questions should also be sustained due to the confidential and proprietary nature of the financial information requested. The details of how POWER raises funds and from whom and the details of all the expenditures POWER makes all comprise highly sensitive business information. Since PGW has identified no relevance of this information to any claim in this case, it should not be allowed to compel production of such sensitive information.

POWER's objections to these questions should also be sustained on the grounds of First Amendment associational privilege, which triggers a heightened standard for relevance that PGW cannot meet. Courts have recognized that individuals contributing donations to an

advocacy group and advocacy groups pooling those donations to advance shared aims are core associational activities protected by the First Amendment, and that the compelled disclosure of donor identities can have a chilling effect on the exercise of such protected associational rights.<sup>74</sup> As reflected in the attached declaration of Rabbi Julie Greenberg, compelled disclosure of donor information would have a chilling effect on POWER's associational rights by impairing its ability to raise funds from its supporters.<sup>75</sup> Such a compelled disclosure would also upset the reasonable expectation of privacy that many donors may have.<sup>76</sup>

PGW argues, citing no authority, that POWER cannot claim any First Amendment associational privilege for its donor information because nonprofits like POWER must file publicly-accessible Form 990 tax returns and annual registration forms with the Commonwealth of Pennsylvania. This argument is misplaced. PGW's requests for the identity of every POWER donor, the purpose of donated funds, and POWER's use of all donated funds go far beyond the information required in POWER's Form 990 and Pennsylvania registration filings. Moreover, PGW appears to be unaware of or indifferent to the extensive precedent, cited above, for the

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<sup>74</sup> *Americans for Prosperity Found. v. Bonta*, 210 L. Ed. 2d 716, 141 S. Ct. 2373, 2389 (2021) (striking down a California law requiring disclosure of major donors to nonprofits on First Amendment grounds since “[t]he risk of a chilling effect on association is enough, ‘[b]ecause First Amendment freedoms need breathing space to survive.’”); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (“Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.”); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., & its Locs. 1093, 558 & 25 v. Nat'l Right to Work Legal Def. & Ed. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978) (“The First Amendment's protection in the legal aid context extends not only to the organization itself, but also to its staff, members, contributors and others who affiliate with it.”); *Tree of Life Christian Sch. v. City of Upper Arlington*, No. 2:11-CV-00009, 2012 WL 831918, at \*2 (S.D. Ohio Mar. 12, 2012) (“The freedom to associate encompasses the ability to make financial contributions in order to further a common goal”); *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (“The courts have long recognized the sensitivity of information related to such activities and consequently have ruled that the following information is protected by the First Amendment: membership and volunteer lists, contributor lists, and past political activities of plaintiffs and of those persons with whom they have been affiliated. Consequently, discovery requests from Defendants that seek such information will not be allowed.”).

<sup>75</sup> Exh. 5. Declaration of Julie Greenberg at 2.

<sup>76</sup> Exh. 5. Declaration of Julie Greenberg at 2.

proposition that donor information has been repeatedly recognized as protected under the First Amendment. As such, PGW's conclusory and unsupported argument should be disregarded.

## **VII. POWER's Objections to Producing Detailed Information About POWER's Decision to Intervene in this Proceeding Should Be Sustained**

### **A. Overview**

In Questions 15 and 16, PGW seeks all documents relating to POWER's decision to intervene in this Proceeding, including "written materials of any kind or character relating to the decision of POWER to participate in this Proceeding."<sup>77</sup> POWER declined to answer this request, raising objections on the basis of relevance, undue burden, and privilege.<sup>78</sup> PGW's Motion to Compel does not provide any argument for why these objections are inapplicable or any specific argument for why the requested information is relevant to the subject matter of this Proceeding.<sup>79</sup>

### **B. Discussion**

A discovery request must either seek information that is itself relevant or be reasonably calculated to lead to relevant admissible evidence.<sup>80</sup> As an initial matter, the information sought by these questions is not itself relevant, because information about POWER's decision to intervene in the Proceeding is not itself a material fact that must be resolved in the Commission's investigation into PGW's application for a general rate increase. To the extent that POWER's Petition to Intervene contains information relating to POWER's decision to intervene, such

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<sup>77</sup> Exh. 1. PGW Set I Interrogatories, at 11.

<sup>78</sup> Exh. 2. POWER Written Objections, at 29-32.

<sup>79</sup> PGW Motion to Compel, at 12.

<sup>80</sup> 52 Pa. Code § 5.321(c).

information has already been provided to PGW, and POWER's Petition to Intervene has already been granted. As such, further production of any written materials relating to POWER's decision to intervene in this Proceeding has no bearing on the subject matter of this Proceeding.

These questions are also not reasonably calculated to lead to admissible relevant evidence. To be reasonably calculated to lead to relevant evidence, there must be some articulation of a relevant evidentiary goal and of how the question will lead towards the production of that relevant evidence. PGW's Motion to Compel provides no argument for why it is seeking this information, and POWER is not able to discern any relevant evidentiary goal these questions are designed to advance.

More broadly, these questions seek internal information about POWER's process of decision-making with regard to making the determination to intervene. Even if POWER's Petition to Intervene had not already been ruled upon, an intervenor's internal motives for joining a Proceeding are not a criterion for eligibility to participate in Commission proceedings. An intervenor must demonstrate either a unique interest or that it would be in the public interest to permit participation,<sup>81</sup> and for an organization to demonstrate organizational standing, it must have at least one affected member.<sup>82</sup> However, if an intervenor clears these bars,<sup>83</sup> Commission regulations on intervention do not impose any additional "internal motives" tests on would-be intervenors.

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<sup>81</sup> 52 Pa. Code § 5.72.

<sup>82</sup> *Energy Conservation Council of Pennsylvania v. Pub. Util. Comm'n*, 995 A.2d 465, 476 (Pa. Commw. Ct. 2010) ("An association may have standing as a representative of its members. *Tripps Park v. Pennsylvania Public Utility Commission*, 52 Pa.Cmwlth. 317, 415 A.2d 967, 970 (1980). Thus, as long as an organization 'has at least one member who has or will suffer a direct, immediate, and substantial injury to an interest as a result of the challenged action[, i.e., is aggrieved, the organization] has standing.'").

<sup>83</sup> As noted above, POWER made the necessary averments in its Petition to Intervene, which was granted. The attached declarations of POWER members also confirm that POWER meets the standing requirement of having at least one member who is a PGW customer and lives in PGW's service territory.

PGW does not explain why it needs this information, or how information about an intervenor's internal motives for intervention can be relevant to any issue in this Proceeding. As such, these questions, like many of PGW's Set I questions, seem to be in the nature of a dragnet fishing expedition, in which PGW asks for sheafs of documents which it will subsequently review to see if it can make any hay out of them. This is not an appropriate use of discovery tools.

Moreover, allowing this type of "internal motives for intervention" discovery would be unadministrable and inefficient, and could lead to a discovery "arms race" in which parties to a proceeding seek to launch inquisitions into each others' internal intervention decision processes to "prove" that other parties have the wrong "internal motives" for intervention. Adjudicating these additional disputes would not be an efficient use of the Commission's resources and would not help illuminate the central question in a general rate increase proceeding, which is whether or not the requested rate increase should be granted.

A federal court confronted with a similar scenario, in which a company subject to regulation under the Clean Air Act sought intrusive discovery into the motives of plaintiff environmentalists for bringing a Clean Air Act enforcement suit, disallowed such discovery as irrelevant. As the judge concluded, "[t]he Court agrees with Plaintiff that discovery relating to Plaintiff's alleged motive for bringing this lawsuit, such as discovery regarding the 'Beyond Coal' campaign, is irrelevant to any issue in this case."<sup>84</sup>

POWER's objections to these questions should also be upheld on the grounds that being required to compile "any written material" relating to its decision to intervene in this Proceeding

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<sup>84</sup> *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394, at \*5 (E.D. Mo. Dec. 31, 2015).



would be an undue burden.<sup>85</sup> POWER is a small nonprofit, with limited resources. Excessively broad and irrelevant discovery requests, like these ones, impose an undue burden on POWER's ability to dedicate resources to advancing its actual claims in this Proceeding, as reflected in its three pieces of expert testimony. PGW should not be allowed to "drive up the cost"<sup>86</sup> of POWER's exercise of its due process rights to participate as an intervenor with irrelevant and burdensome discovery request.

Additionally, to the extent that these questions seek documents relating to internal discussions and deliberations regarding POWER's decision to intervene in this Proceeding, POWER's objections to these questions should also be upheld on the grounds of attorney-client privilege. Any internal discussions relating to making the determination of whether or not to engage in a litigated proceeding is inextricable from privileged attorney-client communications about the litigation objectives attainable in that proceeding.<sup>87</sup>

Finally, to the extent that these questions seek documents relating to internal discussions and deliberations regarding POWER's decision to intervene in this Proceeding, POWER's objections to these questions should also be upheld on the grounds of First Amendment associational privilege.<sup>88</sup> The decision to initiate intervention into a litigation is one of the most

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<sup>85</sup> First Interim Order Addressing Complainant Richard C. Culbertson's Motion To Compel Discovery, *Pa. PUC v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2021-3024296, at 2 (June 25, 2021). ("Discovery that would cause unreasonable burden or expense or require an unreasonable investigation by a party is not permitted... The law is [ ] clear that the Commission has the right to limit discovery that would place an unreasonable burden upon a participant in litigation.") (internal citations omitted).

<sup>86</sup> Sixth Prehearing Order, *Application of Peregrine Keystone Gas Pipeline, LLC for Approval on a Non-Exclusive Basis to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering, Compression, Dehydration, and Transportation Or Conveying Service by Pipeline to the Public in All Municipalities Located in Greene and Fayette Counties and in East Bethlehem Township in Washington County, Pennsylvania*, Docket No. A-2010-2200201, at 5 (Dec. 5, 2011).

<sup>87</sup> 52 Pa. Code § 5.323(a).

<sup>88</sup> *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (holding that compulsory disclosure of internal campaign strategy communications "can have [a deterrent] effect on the exercise of protected activities."); *Fraternal Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093 (E.D. Pa. Apr. 6, 2023) (finding that declarations from members of a police association "give rise to a 'reasonable inference' that

sensitive and weighty decisions that an advocacy organization can make. Since these questions request all documents reflecting internal discussions on POWER’s decision to intervene in this Proceeding, they run the risk of chilling participation in such internal discussions, impairing the exercise of POWER members’ associational rights under the First Amendment.<sup>89</sup> This triggers a heightened standard for relevance that PGW cannot meet. As such, PGW’s attempt to compel production of materials reflecting such internal discussions is improper and should not be allowed.

## **VIII. POWER’s Objections to Producing Information Duplicative of That Provided in POWER’s Granted Petition to Intervene Should Be Sustained**

### **A. Overview**

In Question 18, PGW asks that POWER state the “specific interest of POWER may be directly affected in this proceeding and which is not adequately represented by other participants.”<sup>90</sup> POWER produced a response to this question, referring PGW to POWER’s Petition to Intervene, which expressly addressed this question.<sup>91</sup> PGW’s Motion to Compel does not contain any specific discussion of or reference to Question 18 or POWER’s response to it, but makes a blanket request for the Commission to compel full responses to all Set I questions.<sup>92</sup>

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disclosure of members’ internal communications will discourage them from freely exchanging ideas with other members in the future, and thus, infringe up on those members’ associational rights.”); *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394 (E.D. Mo. Dec. 31, 2015) (“The First Amendment may protect membership lists of advocacy groups, as well as requests for internal communications of and among such groups, where disclosure would ‘have a potential for chilling the free exercise of political speech and association guarded by the First Amendment.’”); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007).

<sup>89</sup> Exh. 5. Declaration of Julie Greenberg at 2, 3; Exh. 6. Declaration of Steven Greenspan at 1, 2; Exh. 7. Declaration of Mitch Chanin at 1.

<sup>90</sup> Exh. 1. PGW Set I Interrogatories, at 11.

<sup>91</sup> Exh. 4. POWER Second Partial Responses, at 15.

<sup>92</sup> PGW Motion to Compel, at 15.

## **B. Discussion**

It is not clear from PGW's Motion to Compel what, if any, further information it is seeking in response to Question 18. To the extent that PGW is seeking further information in response to this question, this request should be disallowed on the grounds of relevance, because POWER has already provided all information required and fully complied with all applicable requirements for its Petition to Intervene, which has been granted, and which PGW had an opportunity to object to but did not.

## **IX. POWER's Objections to Producing Personal Information About Board Members of Any Affiliates Not Involved in this Proceeding Should Be Sustained**

### **A. Overview**

In Questions 23 and 24, PGW asks that POWER to identify how many and what percentage of its board members are PGW customers and Philadelphia residents.<sup>93</sup> By application of the Instructions to the Interrogatories, this question is extended to include any POWER affiliates. POWER produced responses to these questions for POWER itself, but declined to produce responses pertaining to any POWER affiliates. PGW's Motion to Compel does not explain why this information is not sufficient, and does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>94</sup>

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<sup>93</sup> Exh. 1. PGW Set I Interrogatories, at 12.

<sup>94</sup> PGW Motion to Compel, at 9.

## **B. Discussion**

POWER reasonably believes that Questions 23 and 24 are irrelevant to the subject matter of this Proceeding, as articulated in its Written Objections.<sup>95</sup> However, notwithstanding these objections, in a spirit of cooperation, POWER produced answers with regard to POWER. To the extent that PGW is continuing to seek responses to Question 23 and 24 on behalf of any POWER affiliates, POWER respectfully submits that this request should be denied on the grounds of relevance. POWER has also noted that vagueness of the term affiliate, and PGW's failure to define it, results in a term that could sweep in a large range of political, policy, and religious associations. If this question regarding personal information on board members of any POWER affiliates is found to be relevant, and broadly construed, it may also result in an undue burden and require an unreasonable investigation to compile this information.

## **X. POWER's Objections to Producing All Work Papers for Prior Testimony Submitted in Other Proceedings by POWER's Testifying Experts Should Be Sustained**

### **A. Overview**

In Question 25, PGW asks that POWER identify the experts it intends to call as witnesses and furnish a copy of their curriculum vitae, identify all cases in which the witness has provided testimony in the last three years, and provide copies of all testimony, reports, and workpapers the witness generated in connection with every case they testified in for the last three years.<sup>96</sup>

POWER produced all of the requested information and documents except for all of the workpapers associated with prior testimony, which POWER objected to providing on the basis of

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<sup>95</sup> Exh. 2. POWER Written Objections, at 45, 46.

<sup>96</sup> Exh. 1. PGW Set I Interrogatories, at 12.

unreasonable burden and lack of relevance.<sup>97</sup> PGW's Motion to Compel does not explain why this information is not sufficient, and does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>98</sup>

## **B. Discussion**

PGW's Motion to Compel claims that POWER objected to providing the information requested by Question 25 "primarily on the nonsensical grounds that their testimony is not relevant because it has not yet been entered into evidence in this proceeding."<sup>99</sup> It is not clear what the basis for this assertion is, because POWER's Written Objections do not contain such a claim. PGW's Motion to Compel neither acknowledges that POWER has provided essentially all of the information requested nor explains why PGW needs the workpapers associated with the witnesses' previous testimony or why production of those workpapers should be compelled. POWER's witnesses' workpapers from their testimony in other proceedings are not themselves relevant to any issue in this Proceeding, nor is the production of such papers likely to lead to any relevant admissible evidence. It would also be unreasonable burden on POWER to be required to compile such workpapers, as POWER's witnesses have testified in many proceedings in the last three years. For all these reasons, POWER's objection to producing all workpapers for its witnesses' prior testimony in other proceedings should be sustained.

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<sup>97</sup> Exh. 2. POWER Written Objections, at 47.

<sup>98</sup> PGW Motion to Compel, at 13-14.

<sup>99</sup> PGW Motion to Compel, at 13.

## **XI. POWER's Objections to Producing Information About POWER's Coalition**

### **Memberships and Policy Communications Should Be Sustained**

#### **A. Overview**

In Question 26, PGW seeks detailed information on POWER's associations with all local, state, or national organizations or coalitions that address environmental, climate, and or sustainability issues, including all communications involving research and policy ideas.<sup>100</sup> Per the Instructions,<sup>101</sup> this question also seeks the same information regarding any POWER affiliate. POWER declined to respond to this question, raising objections based on relevance, undue burden, and privilege.<sup>102</sup> PGW's Motion to Compel claims these objections to do not apply, but does not provide any specific argument why the requested information is relevant to the subject matter of this Proceeding.<sup>103</sup>

#### **B. Discussion**

A discovery request must either seek information that is itself relevant or be reasonably calculated to lead to relevant admissible evidence.<sup>104</sup> As an initial matter, the information sought by these questions is not itself relevant, because information about POWER's environmental coalition memberships and any policy communications associated with the same is not itself a material fact that must be resolved in the Commission's investigation into PGW's application for a general rate increase.<sup>105</sup> It is doubtful whether such a sweeping and intrusive data request

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<sup>100</sup> Exh. 1. PGW Set I Interrogatories, at 12.

<sup>101</sup> Exh. 1. PGW Set I Interrogatories, at 5.

<sup>102</sup> Exh. 2. POWER Written Objections, at 49, 50.

<sup>103</sup> PGW Motion to Compel, at 14.

<sup>104</sup> 52 Pa. Code § 5.321(c).

<sup>105</sup> 52 Pa. Code § 5.321(c).

would ever be appropriate, but it is certainly not relevant in a case where POWER has, as discussed above, raised no environmental claims.

This question is also not reasonably calculated to lead to admissible relevant evidence. To be reasonably calculated to lead to relevant evidence, there must be some articulation of a relevant evidentiary goal and of how the question will lead towards the production of that relevant evidence. In its section addressing this question, PGW's Motion to Compel provides no explanation for why it is seeking this information, and simply argues, without any elaboration, that "the scope of discovery is broad."<sup>106</sup>

POWER's objections to this question should also be upheld on the grounds of undue burden. POWER is a member of many coalitions and organizations, many of which address environmental issues, and many of which involve frequent communication on policy matters. Responding to PGW's request that POWER produce a list of all coalition and organization memberships and of all policy ideas communicated between members of all coalitions and organizations POWER participates in would be a very time-consuming and burdensome project.

To the extent that this question seeks to compel the production of nonpublic policy-related communication of other groups and individuals outside POWER, it should also be disallowed due to the sensitive nature of such communications and the reasonable expectation of privacy that others may have regarding such communications.

Additionally, to the extent that this question seeks to compel POWER to produce all communications with coalition partners relating to policy, it should be disallowed on the grounds of First Amendment associational privilege.<sup>107</sup> As reflected in the attached declarations,

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<sup>106</sup> PGW Motion to Compel, at 14.

<sup>107</sup> *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (holding that compulsory disclosure of internal campaign strategy communications "can have [a deterrent] effect on the exercise of protected activities."); *Fraternal*

compelled disclosure of the contents of policy-related communications with coalition partners would have a chilling effect on the effective exercise of POWER’s associational rights by impairing and deterring a full and candid exchange of views regarding advocacy and campaign strategies.<sup>108</sup> Notably, if coalitions or other organizations with whom POWER associates have their documents and communications regarding shared policy and campaign positions—and the development of those positions and related strategies—made subject to compulsory disclosure, it will impair POWER’s ability to freely associate and exchange ideas with those entities in advancement of its mission.<sup>109</sup> This triggers a heightened standard for relevance for this question, one that PGW cannot meet, and so this question should be disallowed.

## **XII. Conclusion**

WHEREFORE, for the foregoing reasons, POWER respectfully requests that the Commission deny PGW’s Motion to Compel and sustain POWER’s Objections to PGW’s Set I Interrogatories.

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*Ord. of Police Pennsylvania Lodge v. Twp. of Springfield*, No. CV 23-332-KSM, 2023 WL 2839093 (E.D. Pa. Apr. 6, 2023) (finding that declarations from members of a police association “give rise to a ‘reasonable inference’ that disclosure of members’ internal communications will discourage them from freely exchanging ideas with other members in the future, and thus, infringe up on those members’ associational rights.”); *Sierra Club v. Union Elec. Co.*, No. 4:14-CV-00408-AGF, 2015 WL 9583394 (E.D. Mo. Dec. 31, 2015) (“The First Amendment may protect membership lists of advocacy groups, as well as requests for internal communications of and among such groups, where disclosure would ‘have a potential for chilling the free exercise of political speech and association guarded by the First Amendment.’”); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLW-DWB, 2007 WL 852521 (D. Kan. Mar. 16, 2007); *Int’l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (“[I]t is crucial to remember that we are considering the essence of First Amendment freedoms—the freedom to protest policies and programs to which one is opposed, and the freedom to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest.”).

<sup>108</sup> Exh. 5. Declaration of Julie Greenberg at 2, 3; Exh. 6. Declaration of Steven Greenspan at 1, 2; Exh. 7. Declaration of Mitch Chanin at 1.

<sup>109</sup> Exh. 5. Declaration of Julie Greenberg at 2, 3; Exh. 6. Declaration of Steven Greenspan at 1, 2; Exh. 7. Declaration of Mitch Chanin at 1.



Dated: June 29, 2023

Respectfully submitted,

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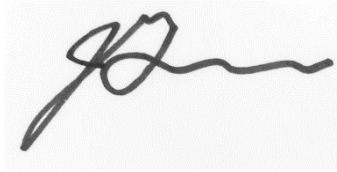
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## VERIFICATION

I hereby verify that the facts set forth in this Answer are true and accurate to the best of my knowledge and that I am duly authorized to make this verification, and that I expect to be able to prove the same at any hearing held in this matter. I understand that the statements herein are made subject to penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: June 29, 2023

A handwritten signature in black ink, appearing to read 'Julie Greenberg', is centered on the page. The signature is fluid and cursive, with a large initial 'J' and 'G'.

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Rabbi Julie Greenberg

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of this electronically-filed document upon the parties, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Dated: June 29, 2023

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