**BEFORE THE**

**PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc. *et al.* : 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

**ORDER ON PGW’S MOTION IN LIMINE AND OBJECTIONS TO THE TESTIMONY OF S. PULLEY, ESQ.**

On May 29, 2015, counsel for the Complainants filed eight separate Complaints against PGW, at Docket Nos. 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 alleging in each of the Complaints that the respective Complainant:

1. Dispute[s] the billed usage because the validity and calibration of the meter and meter reading equipment have not been tested in accordance to 52 Pa. Code § 56.12(5).

2. Dispute[s] the amount demanded by PGW on its shut off notice attached hereto as Exhibit "A" and "B".

3. Dispute[s] the calculation and rate of interest and penalties assessed and the application of all payments made.

4. Believe[s] that PGW has refused to address our concerns about the accuracy of the billings.

5**. Believe[s] that PGW has incorrectly applied payments for these accounts in error.**

6. Believe[s] that PGW is continuing to use unfair, unjust and untimely billing and collection practices to collect sums due and accrue large unmanageable arrearages.

7. Believe[s] that PGW failed to mitigate its damages by its refusal and/or its inability to correct its accounting as requested by Complainant.

8. Believe[s] that PGW failed to resolve these matters as required by law.

9. Believe[s] that PGW has acted in bad faith.

10. Believe[s] that PGW has refused to address our request for information; and forestalled satisfactorily resolving inquiries and grievances by deliberately failing to disclose substantially material information which would have shown that PGW's servicing and accounting practices affirmatively mislead account balances and indirectly result in discriminatory rates which are in excess of the approved tariff and violate the Public Utility Code and state law.

11. Believe[s] that PGW has wrongfully encumbered our property causing us irreparable harm.

12. **Believe[s] PGW wrongfully over billed, charged and collected sums due and that SBG is due a substantial refund.**

13. PGW's failure to disclose substantially material information and actions warrants that the statute of limitations be tolled and its request for relief be granted. Including, but not limited to an order for a refund of overpayment of sums from the date of inception of the accounts to the present.

2015 Complaints. (Emphasis added).

Because these eight Complaints involved the same parties, and at least some of the issues, as the two Complaints remanded to the Commission by the Commonwealth Court in *PGW v. PUC,* 2022 Pa. Commw. Unpub. LEXIS 92, 2022 WL 793332 (Pa.Cmwlth., Mar. 16, 2022) (*PGW III*) (referring to Docket Nos. C-2012-2304183 and C-2012-2304324) the ten cases were consolidated for discovery, hearing and disposition.

In my Order dated December 19, 2022, on PGW’s Motion to Dismiss, I clarified the scope of the scope of the litigation on the consolidated matters as follows:

4. That only the above-captioned matters at Docket Nos. C-2012-2304324, C-2012-2304183, C-2015-2486642, C-2015-2486677, C-2015-2486674; C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648, and C-2015-2486618 will proceed to a hearing.

5. That the 2015 Complaints at Docket Nos. C-2015-2486642, C-2015-2486677, C-2015-2486674; C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648, and C-2015-2486618 **will proceed to an evidentiary hearing on all pending issues.**

6. That the 2012 Complaints at Docket Nos. C-2012-2304324 and C-2012-2304183 will proceed to an evidentiary hearing for the calculation of refunds due because of Philadelphia Gas Works’ improper assessment of 18% tariffed interest rate as late payment charge on outstanding balances that had already been filed as municipal liens.

December 19, 2022 Order at 21. (Emphasis added).

The scope of the litigation was further clarified in my Order dated January 20, 2023, on PGW’s first Motion in Limine where I stated,

Before concluding, I’d like to clarify that, unlike the 2012 Complaints which were litigated at length, the 2015 Complaints (at Docket Nos. C-2015-2486642, C-2015-2486677, C-2015-2486674; C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648, and C-2015-2486618) were not. The eight 2015 Complaints involve not only the same parties and properties but also raise the same or similar issues as the 2012 Complaints. **In particular, in each of the 2015 Complainants, Complainants have checked the boxes next to the statements “Incorrect Charges are on my bill,”** “I am having a reliability, safety and quality of service problem with my utility service,” and “Other,” and submitted detailed explanations of their claims. On June 8, 2016, counsel for SBG and PGW filed a Joint Motion in each of the 2015 Complaints requesting that the proceedings under those Docket Numbers be stayed pending Commission determination on the eight 2012 Complaints at Docket No. (C-2012-2304183, C-20012-2304215, C-2012-2304324, C-2012-2304167, C-2012-23043003, C-2012-2308454, C-2012-2308462, and C-2012-2308465)….

January 20, 2023 Order at 5-6. (Emphasis added).

The Ordering Paragraphs of the January 20, 2023 Order reiterated the same instruction provided a month earlier in the December 19, 2022 Order,

2. That the 2015 Complaints at Docket Nos. C-2015-2486642, C-2015-2486677, C-2015-2486674; C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648, and C-2015-2486618 **will proceed to an evidentiary hearing on all pending issues.**

3. That the 2012 Complaints at Docket Nos. C-2012-2304324 and C-2012-2304183 will proceed to an evidentiary hearing for the calculation of refunds due because of Philadelphia Gas Works’ improper assessment of 18% tariffed interest rate as late payment charge on outstanding balances that had already been filed as municipal liens.

January 20, 2023 Order at 7. (Emphasis added).

On October 30, 2022, PGW filed the Remand Direct Testimony and Exhibits of Bernard L. Cummings, in which Mr. Cummings explained the Complainants’ outstanding balances,

Q. WHAT ARE THE COMPLAINANTS’ CURRENT BALANCES ON THEIR PGW 13 ACCOUNTS?

A. **As shown in Exhibit BLC-3, Page 1 - Master Account Balance, the Complaints have outstanding balances of $1,405,216.51 owed to PGW on their accounts as of the submission of this testimony.** Below is a tabulation of the outstanding account balance by property owner:

SBG Entity Balance owed on PGW accounts

Colonial Garden Realty Co., - LP $0.00

Elrae Garden Realty Co., LP - $179.54

Fairmount Manor Realty Co., LP - $258,185.15

Fern Rock Realty Co., LP - $954,786.36

Marchwood Realty Co., LP - $40,160.23

Marshall Square Realty Co., LP - $72,605.09

Oak Lane Court Realty Co., LP - $39,529.96

Simon Garden Realty Co., LP - $39,949.72

TOTAL BALANCE SBG OWES TO PGW AS OF OCT. 2022 - $1,405,216.51

PGW Remand Direct Testimony of Bernard L. Cummings, at 10. (Emphasis added). He further added,

Q. WHAT DOES IT MEAN IF A LIEN WAS VACATED?

A. I am informed by counsel that when a lien or judgment is vacated, the effect is to nullify or cancel, make void, or invalidate the judgment, and the rights of the parties are left as though no judgment had ever been entered. Simply, it is as if the judgment never existed. **Vacated liens are not paid by the customer. Vacated liens are withdrawn or negated for reasons other than payment, such as discussions between PGW and the customer, to rectify mistakes or administrative errors, or for other reasons**. The arrearage on a vacated lien is not the subject of a perfected lien/judgment and, therefore, PGW’s Tariffed LPCs continue to apply.

PGW Remand Direct Testimony of Bernard L. Cummings, at 18. (Emphasis added).

On January 20, 2023, SBG filed the Remand Direct Testimony and Exhibits of Christopher Hanson. In his testimony, Mr. Hanson stated,

Q. DID YOU PERFORM ANY ANALYSES OF VACATED LIENS?

A. Yes. I understand that PGW excluded all vacated liens. PGW interpreted liens identified as “vacated” being liens that were judged to be null and void. **PGW, then for the purposes of its analysis, assumed the “vacated” lien to have never existed. However, I am unaware of any evidence provided by PGW that the ‘vacated” liens were not paid. I understand from Counsel that, for SBG, the vacated liens were in fact frequently satisfied through payments made directly or indirectly by SBG contemporaneous with property sales or refinancings or at other times**. I reviewed refinancing and sale transaction information provided by SBG, including Form HUD- 1s. I identified several cases where the transaction documentation itemized amounts to be paid to PGW that were contemporaneous to the status date of liens listed as “vacated”. On the basis of this information supporting that vacated liens were possibly satisfied as opposed to nullified, I included all vacated liens as a separate category in the recalculations at Counsel’s request.

SBG Remand Direct Testimony of Christopher Hanson at 7. (Emphasis added). No documents supporting his claim of payments were proffered.

On February 1, 2023, PGW served its Set II Interrogatories on SBG, seeking information regarding Mr. Hanson’s testimony on payments made in relation “vacated” liens. See PGW Set II, Interrogatory #1.[[1]](#footnote-2)

On February 7, 2023, PGW Submitted the Remand Rebuttal Testimony of Bernard L. Cummings, in which Mr. Cummings stated,

1. how did SBG WITNESS HANSON treat vacated liens?

Mr. Hanson treated vacated liens in the same manner as satisfied liens. In other words, he assumed that: 1) SBG paid the entire principle of the vacated lien; and 2) that SBG paid all of the late payment charges (at 18%) between the date the perfected lien was filed and the date that perfected lien was vacated.

1. DOES PGW AGREE WITH the treatment of vacated liens by SBG WITNESS HANSON?

No**. PGW excluded all vacated liens there is no evidence that SBG either: 1) paid the entire principle of the vacated lien**; or 2) that any LPC of 18% was paid. PGW interpreted liens identified as “vacated” as having never existed which I am advised by counsel complies with the case law in Pennsylvania on the effect of vacating a lien.

1. What was Mr. Hanson’s position on “vacated” liens, and what evidence did he provide as support for that position?

Mr. Hanson argued that “vacated” liens were paid by SBG. While Mr. Hanson does not provide any evidence to support payments were made by SBG on the various “vacated” liens, the singular example SBG did provide does not support his argument.

PGW Remand Rebuttal Testimony of Bernard L. Cummings, at 13-14.

On February 16, 2023, SBG submitted the Remand Rebuttal Testimony of Mr. Hanson, in which he reiterated and summarized his original position as stated in his direct testimony.

In the meanwhile, SBG failed to provide any responses to PGW Set II by the due date of February 21, 2023. Instead, SBG proceeded to request, and PGW to grant several extensions to the deadline for submission of responses to PGW Set II Interrogatories. On Friday, April 14, 2023, PGW filed a Motion to Compel SBG’s Response to PGW Set II Interrogatories, requesting that they be submitted by Thursday, April 20, 2023. SBG provided responses to PGW Set II on Friday, April 21, 2023, at 11:24 p.m.

On Monday, April 24, 2023, PGW filed its Errata to the Remand Direct Testimony and Remand Rebuttal Testimony of Bernard Cummings along with the Supplemental Remand Rebuttal of Bernard Cummings. The Supplemental Remand Rebuttal Testimony of Bernard L. Cummings consists of six (6) pages of testimony and a one-page exhibit, in which Mr. Cummings updates the outstanding balances for all the Complainants and agreed to accept two of the vacated liens as paid.

The evidentiary hearing on these consolidated matters was held as scheduled on April 25, 2023. During the hearing, counsel for submitted as exhibit its responses to PGW Set II Interrogatories. See SBG exhibit 3. SBG also requested permission to submit written surrebuttal testimony by May 2, 2023, in response to PGW’s supplemental rebuttal testimony. PGW did not object to this request. See Tr. 1172-76.

On May 2, 2023, SBG submitted the Remand Sur-rebuttal Testimony of Christopher E. Hanson, as well as the 25-page Remand Testimony of Samantha Pulley, Esq., which is accompanied by 13 exhibits consisting approximately 600 pages.

On May 15, 2023, PGW filed a Motion in Limine and Formal Objection to Preclude from Consideration the May 2, 2023 Remand Testimony of Samantha Pulley, Esq. (Motion). In its Motion, PGW argues that,

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.

Motion, at 2. (Original emphasis removed; new emphasis added).

In its Motion, PGW argues that Ms. Pulley’s testimony is expressly barred by 52 Pa. Code § 5.243(e)[[2]](#footnote-3) because it is attempting to introduce during rebuttal phase evidence that should have been included in the parties’ case in chief. 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.

On May 26, 2023, SBG filed its Response to PGW’s Motion clarifying that the correct description/caption of Ms. Pulley’s testimony was “Remand Sur-rebuttal Testimony of Samantha Pulley, Esq.” See SBG Response to PGW’s Motion at 4. It its Response, SBG argued that the Sur-Rebuttal Testimony of Ms. Pulley (as well as that of Mr. Hanson) addresses only the statements presented by Mr. Cummings during his in-person testimony on April 25, 2023, and in his Supplemental Remand Rebuttal Testimony served on April 24, 2023. SBG Response at 8.

Upon review, I find Ms. Pulley’s testimony and exhibits to be responsive to Mr. Cummings’ written and oral testimony, but also have ramifications that touch upon the Complainants’ 2015 claims of billing inaccuracy. The issues of billing accuracy were raised with specificity in the 2015 Complaints. They were briefly addressed in Mr. Hanson’s written Direct Testimony on Remand enough to prompt PGW to propound its Set II discovery request directly seeking information on payments made towards the lined amounts. The issue of the unaccounted-for payments was visited again in Mr. Hanson’s written Rebuttal Testimony on Remand. The issue of the payments was persistent enough to, again, prompt PGW to make it the topic of Mr. Cummings’ Supplemental Rebuttal Testimony on Remand. Consequently, I find that Ms. Pulley’s testimony does not expand the scope of these matters. Instead, it represents a detailed response to PGW’s position in these cases.

Although hinted to, and broadly summarized, the calculations at the heart of Ms. Pulley’s testimony and the 600 pages of documentation were not provided prior to May 2, 2023. I am perplexed as to why, since information included in the spreadsheets that make up the approximately 600-pages of exhibits accompanying Ms. Pulley’s testimony was not something that was discovered, collected or compiled in the seven-day period between April 25, 2023 and May 2, 2023. While I do not believe that Ms. Pulley’s testimony was the result of an attempt by SBG’s counsel to surprise and ambush the opposing party, I will ascribe the incident to counsel’s lack of experience with administrative proceedings, especially those before this Commission.

In order to ensure that Ms. Pulley’s testimony will not unfairly prejudice PGW or violate PGW’s fundamental due process rights, I will provide PGW with the opportunity to respond fully to Ms. Pulley’s testimony, cross examine Ms. Pulley, or otherwise put forth a suitable defense to the allegations contained in her testimony. To that effect, I will extend the litigation and procedural schedule in these matters, beginning with a new Prehearing Conference to be held on Friday, October 20, 2023, at 10:00 a.m., in which the parties will come prepared to discuss:

* why Ms. Pulley’s testimony and exhibits were not presented earlier;
* the purpose of Ms. Pulley’s testimony:
* the scope of Complainants’ claims;
* whether a further hearing is necessary;
* the extension to the litigation and procedural schedule if necessary.

To provide further clarification and guidance to the parties, I take this opportunity to point out that,

* At the April 24, 2023 hearing, the parties stipulated that all the “vacated” liens were collecting an interest rate of 18% per year (in accordance with PGW’s Commission approved tariff rate for late-payment charges) between the date they were filed with the Common Pleas Court of Philadelphia and the date they were marked “vacated.” See Tr. 1192-94.
* The 2012 Complaints at Docket Nos. C-2012-2304324 and C-2012-2304183 have been remanded **only** for the purpose calculating the refunds due to the Complainants because of Philadelphia Gas Works’ improper assessment of 18% tariffed interest rate as late payment charge on outstanding balances that had already been filed as municipal liens. The review will cover the period May 11, 2008, to December 10, 2012.[[3]](#footnote-4)
* The review of the 2015 Complaints at Docket Nos. 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 will begin on December 11, 2012.[[4]](#footnote-5)

THEREFORE,

IT IS ORDERED:

1. That the litigation and procedural schedule in these matters will be extended.
2. That a new Prehearing Conference to be held on Friday, October 20, 2023, at 10:00 a.m.
3. That the parties will come to the Prehearing Conference prepared to discuss:
4. why Ms. Pulley’s testimony and exhibits were not presented earlier;
5. the purpose of Ms. Pulley’s testimony;
6. the scope of Complainants’ claims;
7. whether a further hearing is necessary;
8. the extension to the litigation and procedural schedule if necessary.
9. That the parties have stipulated that all the “vacated” liens were collecting an interest rate of 18% per year (in accordance with PGW’s Commission approved tariff rate for late-payment charges) between the date they were filed with the Common Pleas Court of Philadelphia and the date they were marked “vacated.”
10. That the 2012 Complaints at Docket Nos. C-2012-2304324 and C-2012-2304183 have been remanded **only** for the purpose calculating the refunds due to the Complainants because of Philadelphia Gas Works’ improper assessment of 18% tariffed interest rate as late payment charge on outstanding balances that had already been filed as municipal liens. The review will cover the period May 11, 2008, to December 10, 2012.
11. That the review of the 2015 Complaints at Docket Nos. 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 will begin on December 11, 2012.

Date: October 10, 2023 /s/

 Eranda Vero

 Administrative Law Judge

**C-2012-2304183, C-2012-2304324, C-2015-2486618, C-2015-2486642, C-2015-2486677, C-20145-2486674, C-2015-2486670, C-2015-2486664, C-2015-2486655, C-2015-2486648 - SBG MANAGEMENT SERVICES, INC. ET AL V. PHILADELPHIA GAS WORKS**

*Revised 01/11/23*

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1. “Refer to Page 7, line 10 to 12: Please identify each lien listed as vacated that was paid directly or indirectly by SBG “contemporaneous with property sales.” For each such lien, please state (1) the date the lien was filed (or perfected); (2) the date the lien was vacated, (3) **the date of payment by SBG, and (4) the total amount paid by SBG regarding the lien**.” PGW Set II, Interrogatory #1. (Emphasis added). [↑](#footnote-ref-2)
2. 52 Pa. Code § 5.243(e) 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. [↑](#footnote-ref-3)
3. The 2012 Formal Complaints at Docket Nos. C-2012-2304324 and C-2012-2304183 were filed on May 11, 2012. The Amended Complaints were filed on December 10, 2012. [↑](#footnote-ref-4)
4. The end dates vary based on the type of claim and property. [↑](#footnote-ref-5)