

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc, : Docket No. C-2012-2304324
Simon Garden Realty Co., L.P. : C-2015-2486642

v. :

Philadelphia Gas Works :

SBG Management Services, Inc, : Docket No. C-2012-2304183
Colonial Garden Realty Co., L.P. : C-2015-2486677

v. :

Philadelphia Gas Works :

SBG Management Services, Inc, : Docket No. C-2012-2304167
Elrea Garden Realty Co., L.P. : C-2015-2486674

v. :

Philadelphia Gas Works :

SBG Management Services, Inc, : Docket No. C-2012-2304465
Fern Rock Realty Co., L.P. : C-2015-2486670

v. :

Philadelphia Gas Works :

SBG Management Services, Inc, : Docket No. C-2012-2304215
Fairmount Manor Realty Co., L.P. : C-2015-2486664

v. :

Philadelphia Gas Works :

SBG Management Services, Inc, : Docket No. C-2012-2308462
Oak Lane Realty Co., L.P. : C-2015-2486655

v. :

Philadelphia Gas Works :

SBG Management Services, Inc, : Docket No. C-2012-2308454
Marchwood Realty Co., L.P. : C-2015-2486648
:

v. :

Philadelphia Gas Works :

SBG Management Services, Inc, : Docket No. C-2012-2304303
Marshall Square Realty Co., L.P. : C-2015-2486618
:

v. :

Philadelphia Gas Works :

EXCEPTIONS OF COMPLAINANTS SBG PARTIES

SBG Management Services, Inc., et al. (SBG or SBG parties), through the undersigned counsel, files these Exceptions to the Initial Decision on Remand and Order by the Honorable Eranda Vero, dated July 26, 2024.

A. Exception No. 1: The Decision and Order Improperly Applies a Three-Year Statute of Limitations to Exclude from Consideration Some of SBG Parties' Complaints.

Judge Vero improperly applies a three-year statute of limitations to exclude certain 2012 Complaints from consideration and calculation in both the Order and Decision of July 26, 2024 and of the pre-hearing Order entered on November 15, 2023. For the purposes of calculating refunds to SBG, these Orders erred in failing to apply the appropriate four-year statute of limitations under the Public Utilities Code.

The Public Utilities Code at 66 Pa.C.S. § 1312(a) establishes a 4-year statute of limitations whenever the PUC determines that a rate paid to a public utility is in excess of the rate allowed by law. Judge Vero's Order, dated January 20, 2023, ruled, *inter alia*,

“the provisions of 66 Pa. C.S.A. § 1312 grant the Commission the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment.” *See* Order, 1/20/23, at 5 of 9 (citing 66 Pa.C.S. § 1312(a)). Judge Vero, however erred in issuing the November 15, 2023 Order – as well as the Decision and Order on Remand – which states:

3. 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.**

4. 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.**

Order Extending Litigation Schedule, November 15, 2023 at 2.

The 2012 complaints, which were filed on May 11, 2012, involve only two properties, Colonial Garden Realty Co., L.P., and Simon Garden Realty Co., L.P. The Order provides that the statute of limitations on these claims allows Your Honor to award refunds from May 11, 2008, to December 10, 2012. The statute of limitations should allow refunds to be calculated from Sunday May 11, 2008, **4 years before the filing of the complaints in 2012**, through the date on which PGW actually complied with the Pennsylvania Supreme Court’s decision dated April 29, 2021, determining that PGW had been charging an unlawful rate of interest on docketed liens.

The 2015 complaints were filed on May 29, 2015, and involve eight properties: Simon Garden, Colonial Garden, Elrea Garden, Fern Rock Gardens, Fairmont Manor, Oak Lane, Marchwood, and Marshal Square (“2015 Complaints”). Judge Vero’s November 12, 2023 Order states that the statute of limitations on 2015 Complaints commences on December 11, 2012. She applies this in the current Decision and Order dated July 26, 2024, as well. This pronouncement, however, misstates the application of the 4-year statute of limitations provided under § 1312(a). The 4-year statute should run from Sunday May 29, 2011 (four years before the filing of the 2015 Complaints) through the date on which PGW actually complied with the Supreme Court’s April 29, 2021 decision. The date specified in the November 15, 2023 Order from which refunds may be calculated eliminates the period between May 29, 2011 through December 11, 2012, or approximately 18 months. There is not complete identity of the parties in the 2012 and 2015 Complaints; therefore, only Colonial Garden and Simon Garden would be fully compensated using the dates in the Order. For the other properties in the 2015 Complaints, the entire 4-year statute of limitations under § 1312(a) would not be applied as instructed in Judge Vero’s prior Order of January 20, 2023.

SBG respectfully requests that the November 15, 2023 Order and the July 26, 2024 Order and Decision wrongly apply the appropriate statute of limitations, and as a result, Judge Vero improperly excluded years from consideration of the 2015 Complaints falling squarely within the confines of the 4-year limitations period.

B. Exception No. 2: The Decision and Order Improperly Awards SBG Parties' Credits, Instead of Cash Refunds, for Amounts Overcharged by PGW.

Judge Vero's Decision and Order directs PGW, *inter alia*, to provide SBG Parties credits on certain accounts where PGW systematically overcharged the Complainants for years. SBG Parties maintain their entitlement to cash refunds for these amounts, not credits on gas accounts (some of which are no longer used by the named litigant).

The Decision and Order instructs PGW "[to] remove the amount of \$96,385.30 from the accounts of Colonial Garden Realty Co., L.P.[:]" and "[to] remove the amount of \$403,808.58 from the accounts of Simon Garden Realty Co., L.P." See Order, 7/26/2024, at p. 86, ¶¶14-15. It further instructs PGW "[to] remove" other smaller amounts from the accounts of specific individual Complainants. *Id.* at 86-87. SBG Parties demanded refund amounts for the overcharged rates, which they paid for years and for which their expert Christopher Hanson testified. PGW presented an unauthenticated, unverified chart that purported to establish the Complainants owed past due balances on their gas accounts. These past due balances, however, were not a part of this litigation before the PUC. Moreover, PGW has never filed any action with the PUC or the Court of Common Pleas to collect on these allegedly owed.

It appears that the Decision and Order, instead of awarding cash refunds that were at issue, credited PGW's argument concerning past due balances and simply instructed the outstanding balances to be reduced by the amount of overcharges. In doing so, Judge Vero erred as a matter of law. No outstanding balances were at issue in this proceeding. Evidence was not presented or cross-examined on this specific issue.

And, most importantly, PGW did not submit a claim for the allegedly outstanding balances. This should not be a consideration, and SBG should be entitled to cash refunds for the amounts awarded by Judge Vero's order.

C. Exception No. 3: The Decision and Order Improperly Excludes Prior Amounts that had been Previously Award to SBG Parties, prior to PGW's Original Appeal.

When PGW appealed the Commission's original decision to the Commonwealth Court, Judge Vero had issued orders directing PGW to pay SBG Parties cash amounts related to the overcharges. These refund awards were reduced to orders, which were ostensibly stayed pending PGW's appeal. On remand to the PUC following the Supreme Court's decision, SBG Parties believed the refund amounts awarded by the Commission in this prior orders were part of this proceeding - and would ultimately be included in Judge Vero's Decision and Order on remand.

Accordingly, SBG Parties maintains that Judge Vero erred in excluding the amounts previously awarded to SBG Parties from the content of the current Decision and Order. No execution on these orders could have occurred while the appeals were pending, and additional amounts have accrued to SBG Parties on areas covered by these prior orders. SBG Parties requests that the Decision and Order be molded to include the amounts previously awarded to SBG Parties in prior orders - before the initial appeal - and that those amounts be updated to reflect the passage of time.

D. Exception No. 4: The Decision and Order Improperly Ruled that Some Complaints by SBG Parties were Not Pending during the Appeal Phase and thus Excluded from Consideration on Remand.

Judge Vero's Decision and Order excludes some of the 2012 Complaints from consideration, concluding that they were not pending when the Supreme Court issued its ruling. This is not correct.

The Commonwealth Court's decision does not, as PGW posits, limit the application of its retroactivity holding to SBG, Simon Garden Realty and Colonial Garden Realty. The exact language of that Court's opinion states: "we conclude that our Supreme Court's decision in *PGW II* applies retroactively only as to parties to this litigation **and to other proceedings pending at the time the *PGW II* decision was issued in April 2021.**" *PGW v. PUC*, 1291 C.D. 2018 at *29 (Pa. Cmwlth. March 16, 2022) (emphasis added. 2018 at *). The question, as fleshed out at the pre-hearing conference, has become precisely which parties had pending proceedings in April of 2021. The answer is simple, straightforward, and one to which PGW has already conceded. All Complaints filed by SBG parties in 2012 and in 2015 remain pending and had been stayed awaiting the outcome from the appellate courts.

As Judge Vero noted in the November 8, 2022 pre-hearing conference, PGW had previously agreed that all of the 2012 and 2015 claims remained pending. In fact, in a status report filed on July 6, 2021, PGW indicated to this Commission that **ALL** Complaints filed by SBG parties - including both the 2012 Complaints and the 2015 Complaints - were stayed and "should continue to be stayed pending the final disposition of the appellate proceedings before the Courts." See PGW Status Report,

7/6/21, at 2. This included SBG's appeal to the Supreme Court, resulting in the April 2021 opinion, and the subsequent remand to the Commonwealth Court to address "any outstanding issues." *Id.* According to PGW's status report, "Rule 1701 of the Pennsylvania Appellate Rules of Practice continue[d] to divest the Commission of jurisdiction over the '2012 Complaints[.]' " *Id.* PGW defined the 2012 Complaints as follows:

The 2012 Complaints are at the following docket numbers: C-2012-2304183 by Colonial Garden Realty Co., L.P. and SBG; C-2012-2304215 by Fairmont Manor Realty Co., L.P., and SBG; C-2012-2304324 by Simon Garden Realty Co., L.P., and SBG; C-2012-2304167 by Elrea Garden Realty Co., L.P., and SBG; C-2012-2304303 by Marshall Square Realty Co., L.P., and SBG; C-2012-2308454 by Marchwood Realty Co., L.P., and SBG; C-2012-2308462 by Oak Lane Court Realty Co., L.P., and SBG; and, C-2012-2308465 by Fern Rock Realty Co., L.P. and SBG.

PGW Status Report, 3/6/2020, at 2 n.2. Thus, all of the 2012 Complaints remained pending and stayed through the Commonwealth Court's decision early this year. PGW's Status Report on July 6, 2021, requested that *each* of the above docket sheets remain stayed until the Commonwealth Court issued its decision on remand. PGW wanted these matters stayed because, on remand, the Commonwealth Court would decide the retroactive application of the Supreme Court's holding and issues related to PGW's refund obligations. It recognized that such a decision would directly impact the 2012 and 2015 Complaints pending before the Commission.

"In July 2016, at the request of PGW and the Complainants, ALJ Vero stayed each of the 2015 Complaints." PGW Status Report, 3/6/2020, at 5. PGW described the 2015 Complaints "as 'protective filings' to prevent the running of the statute of limitations on Complainants' right to seek refunds/credits for the additional billing

periods beyond those litigated in the 2012 Complaints.” *Id.* When PGW asked for the 2015 Complaints to remain stayed as of July 6, 2021, it acknowledged that the appeal proceedings in the Supreme Court and in the Commonwealth Court pertained to the claims by SBG parties of overcharged amounts and entitlement to refunds set forth in these filings:

Certain issues in (and any related remedies requested by) the 2015 complaints, such as the remedies for inclusion of amounts subject to a docketed lien (i.e., deemed a judgment by the Supreme Court) on a jurisdictional bill, are still subject to the appeal regarding the 2012 Complaints.

PGW Status Report, 7/6/21, at 2 (footnotes omitted; emphasis added). Despite its evolving position at the conference before this Commission in October 2022, PGW explicitly stated that the decision of the Supreme Court – as refined and clarified by the Commonwealth Court on remand – applies to **BOTH** the 2012 and 2015 Complaints *pending* before this Commission.

Yet, at the November 8 pre-hearing conference, PGW, for the first time, argued that the 2012 and 2015 complaints that were not part of the appeal to the Supreme Court were not included in the remand currently before the Commission. This change of position by PGW is shocking, contrary to the record, and contrary to PGW’s counsel’s own statements.

The Commonwealth Court’s language is broad. It encompasses parties other than SBG entities who were pursuing challenges to PGW’s use of the 18% tariff rate before the PUC or the Court of Common Pleas, where those claims remained pending in April of 2021. No such parties took part in the Supreme Court appeal, yet the plain

language of the Commonwealth Court's directive would include them among the parties to whom *PGW II* should apply.

Regarding the SBG entities who pursued this precise claim before the PUC but were not parties to the Supreme Court appeal – notably *all* the 2015 Complaints, given those claims were not part of any appeal and have been stayed since 2016 – the Commonwealth Court's broad language also applies to them. PGW curiously insinuated at the pre-hearing conference that the 2012 and 2015 Complaints, which were not directly part of the Supreme Court appeal, were not pending in April 2021. Not only is this suggestion patently false, it contradicts PGW's own statements when *it* asked this Commission to stay those Complaints pending the full resolution of the appeal process. **ALL** 2012 and 2015 Complaints were pending when the Supreme Court issued its decision in April 2021. PGW has explained this very fact to the Commission since March 2020.

Each of the 2012 and 2015 Complaints remain active matters before the PUC. For the 2012 Complaints, the Commonwealth Court remitted each docket number to the PUC following its disposition, and the PUC has not entered final decisions. Each of the 2015 Complaints has been stayed since 2016, and remains pending without final resolution as evidenced by the Commission's docket. In each of these cases, there remain outstanding issues like partial payments, an issue that Judge Vero noted at the pre-hearing conference is still pending in all of the SBG matters. PGW explicitly recognizes that the issue of "remedies for inclusion of amounts subject to a docketed lien (i.e., deemed a judgment by the Supreme Court) on a jurisdictional bill" remain

pending in **BOTH** the 2012 and 2015 Complaints. See PGW Status Report, 7/6/21, at 2. At the request of PGW, the PUC did not take any action to resolve the outstanding issues in these cases while the Supreme Court appeal was pending, and while the Commonwealth Court addressed “any outstanding issues” on remand. Both PGW and the Commission recognized that the resolution of those matters would be dependent upon the Supreme Court’s decision and how that holding applies. As none of these cases have been closed and final determinations have not been made, they are, by definition, pending.

The plain language of the Commonwealth Court’s decision can lead to only one conclusion – that all of the 2012 and 2015 Complaints are included in the Court’s decision on retroactivity. Each of these Complaints was pending in April 2021, and remains pending now before the PUC. “[Ca]ses pending at the time of [the Supreme Court’s *PGW II*] decision in which the issue[s] of [§ 7106(b)’s proper construction and the applicability of PGW’s tariff rate to docketed municipal liens] w[ere] timely raised and preserved.” *Blackwell v. Com., State Ethics Comm’n*, 589 A.2d 1094, 1099 (Pa. 1991) (relied upon by the Commonwealth Court). The PUC proceedings in the captioned cases presented identical issues to those raised by the Intervenors before the Supreme Court. PGW explained that the 2012 and 2015 Complaints raise the same issues when it asked the Commission for each Complaint to remain stayed until the appellate process came to an end.

II. CONCLUSION

For the foregoing reasons, SBG respectfully requests that the Commission grant these exceptions and reverse the Initial Decision consistent with the foregoing discussion.

GOLDSTEIN LAW PARTNERS, LLC

By: /s/ Shawn M. Rodgers
Michael Yanoff
Shawn M. Rodgers
Patricia M. Starner
11 Church Road, Suite 1A
Hatfield, PA 19440
(tel) 610.949.0444
(fax) 610.296.7730
myanoff@goldsteinlp.com
srodgers@goldsteinlp.com
pstarner@goldsteinlp.com

*Counsel for Complainants SBG
Management Services, Inc., et al.*

CERTIFICATE OF SERVICE

I, Shawn M. Rodgers, Esquire, do hereby certify that on August 15, 2024, I caused a true and correct copy of Complainants' Exceptions to the Initial Decision on Remand to be served upon the following by e-filing and/or email:

Daniel Clearfield, Esquire
Carl R. Schultz, Esquire
Bryce R. Beard, Esquire
Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102
Tel: (215) 851-8400
Fax: (215) 851-8383
dclearfield@eckertseamans.com
cschultz@eckertseamans.com
bbeard@eckertseamans.com

/s/ Shawn M. Rodgers

MICHAEL YANOFF, ESQUIRE
SHAWN M. RODGERS, ESQUIRE
PATRICIA M. STARNER, ESQUIRE