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March 18, 2020

Via Electronic Filing

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

Re: Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo
v. Philadelphia Gas Works, Docket No. C-2019-3013933

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Answer to Motion to Compel and Dismiss Objections to Requests for Production of Documents, Nos. 3-8, Propounded by Complainants with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury

KOM/lww
Enclosure

cc: Hon. Darlene Heep w/enc.(via email only)
Cert. of Service w/enc.

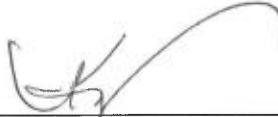
CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Answer to Motion to Compel upon the person(s) listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

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Dated: March 18, 2020



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Dwayne Ackie, Miguel J. Chavarria, Jr.,	:	
Maurice A. Goodwin and Wayne Rauceo,	:	Docket No. C-2019-3013933
Complainants	:	
	:	
v.	:	
	:	
Philadelphia Gas Works,	:	
Respondent	:	

**ANSWER OF PHILADELPHIA GAS WORKS TO MOTION TO COMPEL
ANSWERS AND DISMISS OBJECTIONS TO REQUESTS FOR PRODUCTION OF
DOCUMENTS NOS. 3-8 PROPOUNDED BY DWAYNE ACKIE, MIGUEL J.
CHAVARRIA, JR., MAURICE A. GOODWIN AND WAYNE RAUCEO**

Pursuant to Section 5.342(g)(1) of the Commission’s regulations, 52 Pa. Code § 5.342(g)(1), Philadelphia Gas Works (“PGW”) files this Answer to the Motion to Compel (“Motion”) filed by Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo (“Complainants”) on March 13, 2020. By the Motion, Complainants seek dismissal of PGW’s objections to Requests for Production of Documents Nos. 3-8, which were propounded by Complainants on March 2, 2020. In support hereof, PGW states as follows:

I. INTRODUCTION AND BACKGROUND

The Complainants initiated this proceeding on October 31, 2019 with the filing of a Complaint against PGW. PGW timely filed an Answer on November 20, 2019 and also filed Preliminary Objections on that date. The Administrative Law Judge (“ALJ”) issued an Order Granting in Part and Denying in Part Preliminary Objections on January 3, 2020 (“January 3 Interim Order”). By the January 3 Interim Order, the ALJ dismissed all allegations in the Complaint relating to employment discrimination. Additionally, the January 3 Interim Order

dismissed Paragraph No. 14 (alleging an automobile accident at the Passyunk Plant) and Paragraph No. 16 (alleging the release of gas) of the Complaint as the events discussed did not occur within the three-year statute of limitations in 66 Pa.C.S. § 3314(a).

A prehearing conference was held on February 6, 2020. At the conference, a procedural schedule was established, with dates for the service of written testimony and evidentiary hearings scheduled for June 3-5, 2020. By a Procedural Order dated February 11, 2020, the ALJ memorialized this schedule and further directed that responses to motions to compel be filed within five days after service. As Complainants' Motion was filed on March 13, 2020, PGW's Answer is timely filed on this date, March 18, 2020.

The Complainants' Motion to Compel should be denied because Requests for Production of Documents Nos. 3-8 are a classic fishing expedition through which the Complainants are seeking to obtain any information that might be remotely related to the incidents that are alleged in the Complaint, without any link to an alleged violation, safety-related or otherwise, of the Public Utility Code or Commission regulations. Under Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), the Complainants have the burden of proof. This means that the Complainants must produce substantial and credible evidence showing a violation by PGW of the Public Utility Code or Commission regulations. *See Samuel J. Lansberry, Inc. v. Pa PUC*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990).

Upon the filing of the Complaint, the Complainants should have been positioned to move forward in producing substantial and credible evidence in support of their allegations. PGW should not be required to undergo the unreasonable and burdensome process of opening up all of its records, policies, procedures and documents to satisfy the curiosity of the Complainants. Notably, the Complainants have each filed federal lawsuits in the United States District Court for

the Eastern District of Pennsylvania against PGW raising employment discrimination issues relating to many of the same allegations that are set forth in the Complaint pending before the Commission. Complaint, ¶ 18. Complainants should not be permitted to use the Commission's discovery process to search for any possible nugget of information that they may find useful in pursuing their federal court lawsuits. A discussion of PGW's specific objections appears below, along with additional argument relating to Complainants' Motion.

II. ANSWER AND ARGUMENT

A. REQUEST FOR PRODUCTION OF DOCUMENTS NOS. 3-8

Complainants, Document Request Nos. 3-8 state as follows:

3. Provide copies of Passyunk Plant schedules for Operations personnel only for the following time periods:
 - a. December 1, 2017 to January 1, 2018, inclusive;
 - b. August 1, 2018 to November 1, 2018, inclusive; and
 - c. August 1, 2019 to November 1, 2019, inclusive.
4. Any and all documents referring to the investigation, reporting, interviews, disciplinary actions, terminations, safety violations, policy violations and resolution of the February 2018 incident identified in paragraph 11 of the Formal Complaint.
 - a. Documents shall include, but are not limited to, unsworn statements, incident reports, security logs and logbook entries, emails, memoranda, calendar entries, text messages, security video recordings and handwritten notes.
5. Any and all documents referring to the investigation, reporting, interviews, disciplinary actions, terminations, safety violations, policy violations and resolution(s) of the December 25, 2017 incident identified in paragraph 13 of the Formal Complaint.
 - a. Documents shall include, but are not limited to, unsworn statements, incident reports, security logs and logbook entries, time cards, emails, memoranda, calendar entries, text messages, handwritten notes and security video recordings.
6. Any and all documents referring to Passyunk Plant General Supervisor David Martinez's scheduled vacation time taken during the 2017 calendar year.
7. For the period from January 1, 2016 to the present, any and all documents referring to damages to Passyunk Plant vehicles used and/or caused by Operations personnel only.
 - a. Documents shall include, but are not limited to, incident reports; names of persons operating vehicles at time of incident; damages to vehicles; time(s), date(s) and location(s) of incident; and description of incident.

8. Resumes and Employee's Service Records of Passyunk Plant General Supervisor David Martinez and Passyunk Plant Operations Supervisor Ryan O'Donnell.

B. OBJECTION

Complainants are requesting months of plant and vacation schedules, years of employee service records, and even resumes of plant personnel. (Nos. 3, 6, 8.) They also seek all documents dating back to over four years ago that make any reference to any damage to any plant vehicles that were used by any Operations personnel. (No. 7.) Finally, Complainants seek all documents relating to two alleged "incidents" involving the whereabouts of two employees at the plant. (Nos. 4, 5.)

Complainants have yet to plead any regulation or code provision that PGW has allegedly violated, and therefore can show no relevance that these documents could possibly have to this proceeding. For example, Paragraph 13 of the Complaint, which is referenced in request No. 5, alleges that one employee reported late for work, without offering any basis for how that single act, assuming it is true, could constitute a safety violation. Further, request Nos. 3, 6, 7 and 8 do not even identify a Paragraph in the Complaint or any allegation to which they pertain. Accordingly, PGW objects to these requests on the grounds that they seek irrelevant information. 52 Pa. Code § 5.321(c).

Moreover, all of these requests are overly broad and unduly burdensome, as they would require PGW to make an unreasonable investigation. 52 Pa. Code § 5.361(a). The investigation necessary to respond to the length and breadth of Complainant's requests would require diverting critical resources that are needed to operate the LNG plant safely; and all to indulge them in their fishing expedition. These requests were made in the hopes that the information supplied will enable them to concoct a viable sounding cause of action either in the instant case or in their federal

court litigation. This is a blatant misuse of the discovery process and is barred by the Commission's regulations. *See id.*

C. RESPONSE TO MOTION TO COMPEL

PGW fully incorporates its objections in this Answer to Complainants' Motion to Compel. Additionally, by this Answer, PGW provides more specific information relating to each request, in support of its position that its objections should be sustained and that it should not be compelled to produce the documents requested by Complainants' Document Requests Nos. 3-8.

Document Request No. 3 (Plant Schedules for Operations Personnel)

In the Motion, Complainants provide no basis for how Request No. 3, which seeks plant schedules for operations personnel, is relevant to any alleged safety violations by PGW. Although the Motion contends that Complainants limited the requests to three periods of time so as to make them less burdensome, that restriction offers no link between PGW's plant schedules and its safe operation of the plant. Which operations personnel were scheduled to work on particular dates in 2017, 2018 and 2019 has no relevance to the allegations in the Complaint. This omission is unsurprising given that the Complainants have failed to identify any safety violation predicated on either the presence or absence of operations personnel. Rather, the Complainants justify their sweeping and irrelevant requests by unjustifiably stating that the mere presence or absence of personnel can, in itself, constitute a safety violation.

While Request No. 3 did not identify any paragraphs or allegations in the Complaint to which it pertained, the Motion states that it relates to Paragraph 13 of the Complaint. A review of Paragraph 13 of the Complaint reveals that it involves a single alleged incident on December 25, 2017 of one operations personnel at the plant being late for work. It is absurd to suggest that the plant schedules for all operations personnel at the plant for the entire month of December 2017

and January 1, 2018 are even remotely relevant to one person allegedly reporting late on December 25, 2017. Notably, Complainants have yet to allege any facts in the Complaint (or through the filing of an Amended Complaint) that would support a Commission finding that one employee being late for work on a single day constitutes a violation by PGW of any provision of the Public Utility Code, Commission regulations or Commission orders.

As to the date range of August 1, 2018 to November 1, 2018, the Motion identifies Paragraph 10 of the Complaint as the basis for requesting the schedules of plant operations personnel during that 90-day period. Paragraph 10 of the Complaint alleges that on a single date in September 2018, one plant operations personnel left the property in a company vehicle and was involved in an automobile accident. Again, it is irrelevant to PGW's safe operation of the plant what may have happened involving one operations personnel – while he was allegedly away from the plant – on a single date that falls within a 90-day period. Complainants have simply not explained the relevance of PGW's plant schedules for all operations personnel during this time period to any allegation in the Complaint or any potential safety violation.

Regarding the dates of August 1, 2019 through November 1, 2019, the Motion identifies Paragraph 9 of the Complaint as the basis for Complainants' request for the schedules of all plant operations personnel during that 90-day period. Paragraph 9 of the Complaint relates to Complainants' allegation that on a single date in September 2019, one operations personnel left the plant "without notification" and left a company radio at a local store. Complainants have failed to explain the relevance of PGW's plant schedules for all operations personnel to the disposition of this allegation. Even if it is true that the named operations personnel did exactly what is alleged in the Complaint, Complainants have failed to make any averments to support a finding that PGW violated any provision of the Public Utility Code, Commission regulations or Commission orders.

The Motion seeks to compel PGW to undergo the burdensome process of searching its records and providing the schedules for all plant operations personnel during three time periods in 2017, 2018 and 2019 in hopes that some piece of evidence may be found that would create a viable case for Complainants in the frivolous lawsuits they have filed in federal court. As the Commission has held previously, this type of fishing expedition is not a proper use of the discovery process. *See West Goshen Twp. v. Sunoco Pipeline, L.P.*, Docket No. C-2017-2589346 (Order on Motion to Compel dated Nov. 1, 2017 at 2) (“While discovery is broad in Pennsylvania, parties are not entitled to engage in ‘fishing expeditions.’”) (citing *Land v. State Farm Mut. Ins. Co.*, 410 Pa. Super. 579, 585, 600 A.2d 605, 608 (1991)).

Document Request No. 4 (Documents relating to Paragraph 11)

In the Motion, Complainants fail to explain the relevance of the allegations set forth in Paragraph 11 of the Complaint to any purported violation of the Public Utility Code, Commission regulations or Commission orders. Even if it is accepted as true that the plant manager was let into the plant while off duty in February 2018, without credentials, the Complaint does not make any allegations as to how such action would constitute a safety violation by PGW. Moreover, assuming these and other factual averments in Paragraph 11 of the Complaint are true, the Complainants have failed to make any averments to support a finding that PGW violated any provision of the Public Utility Code, Commission regulations or Commission orders. Therefore, any documents relating to the alleged incident are irrelevant.

Document Request No. 5 (Documents relating to Paragraph 13)

In the Motion, Complainants fail to explain how a single instance of one operations personnel reporting late for work, if the allegation is presumed to be true, on December 25, 2017 provides a basis upon which the Commission may find that PGW violated any provision of the

Public Utility Code, Commission regulations or Commission orders. As Complainants are seeking to use the Commission's discovery process to conduct a fishing expedition in hopes of unearthing some piece of evidence that they believe will support their position in this forum or elsewhere, they should be prohibited from using this tactic.

Document Request No. 6 (Scheduled Vacation Time)

Document Request No. 6 seeks documents referring to scheduled vacation time taken during the 2017 calendar year by the plant's general supervisor. In the Motion, Complainants aver that this information is sought in connection with Paragraph 12 of the Complaint, which makes allegations concerning the use of operations personnel to return a company vehicle to the lot.

When the plant's general supervisor was scheduled to use vacation time in 2017 has no bearing on the material factual allegations in Paragraph 12 concerning the plant being "left without two vital employees during vital operations." Complaint, ¶ 12. If Complainants have evidence to support this allegation, it is incumbent upon them to produce it. Further, even if these material factual allegations are accepted as true, Complainants have failed to present any averments showing how such action would constitute a violation by PGW of any provision of the Public Utility Code, Commission regulations or Commission orders.

In short, the general supervisor's vacation schedule has no relevance whatsoever to the burden that Complainants are obligated to carry as part of this proceeding to prove their factual averments. PGW should not be required to produce irrelevant information to satisfy Complainants' curiosity. *See Pa PUC, et al. v. Pennsylvania American Water Company*, Docket No. R-2011-2232243 (Order on Motion to Compel dated July 21, 2011 at 21-22).

Document Request No. 7 (Damages to Company Vehicles)

While Document Request No. 7 identified no paragraph or allegation to which it pertained, the Motion states that it relates to Paragraphs 9 and 10 of the Complaint. Upon review of Paragraph 9, it alleges that an operations supervisor left the plant “without notification” and left the company radio at a local store. This allegation has absolutely no link to documents relating to damages to company vehicles.

As to Paragraph 10 of the Complaint, it alleges that on September 11, 2018, the same operation supervisor left the property in a company vehicle and was involved in a car accident. While Paragraph 10 contains an allegation of a company vehicle being involved in a car accident, it does not justify Complainants’ request for over four years of documents relating to damages to company vehicles. Damages to other company vehicles are irrelevant to the material factual allegations of Paragraph 10. Indeed, the Motion contains no explanation as to how records of damages to company vehicles, beyond the particular alleged incident described in Paragraph 10 of the Complaint, relate to this proceeding.

Moreover, in seeking records back to January 1, 2016, Document Request No. 7 is unduly burdensome. This is particularly true in view of the statute of limitations in the Public Utility Code which expressly bars any complaints relating to matters that occurred more than three years ago. 66 Pa.C.S. § 3314. Notably, the statute of limitations in the Public Utility Code wholly divests the Commission of jurisdiction over a dispute if the complaint is not filed within three years of the date on which liability arose. *See Perry v. Public Power, LLC*, Docket No. C-2018-3003086 (Order entered March 29, 2019 adopting Initial Decision of Administrative Law Judge Jones issued February 15, 2019, at 10-11) (“statute of limitations is a non-waivable defense if the time

limitation contained in it terminates not just the remedy but the actual right to bring the action; “[c]onsequently, the Commission’s statute of limitations is a non-waivable defense”).

Document Request No. 8 (Resumes and Service Records)

Complainants’ Request No. 8 seeks the resumes and employee service records for the plant’s general supervisor and operations supervisor without reference to any allegation or paragraph in the Complaint. By the Motion, Complainants refer to Paragraph 17 of the Complaint, which contains allegations of promotions occurring at the plant “while more qualified and experienced racially protected class employees are not provided equal promotion opportunities.” Complaint, ¶ 17. By the January 3 Interim Order, Administrative Law Judge Heep made it clear that the Commission lacks jurisdiction to address discrimination allegations involving employment matters. Describing the Complaint as involving two series of allegations, including (1) specific concerns regarding plant operations, and (2) the alleged “promotion and protection of employees who violate safety protocols,” (January 3 Interim Order at 1-2), the Interim Order correctly concluded that employment discrimination matters are beyond the Commission’s jurisdiction. (January 3 Interim Order at 4). *See N.A.A.C.P. v. P.U.C.*, 5 Pa. Commw. 312, 290 A.2d 704 (1972). Despite efforts of Complainants to bring their discrimination allegations under the guise of alleged “safety violations,” the January 3 Interim Order plainly states that “[d]iscrimination allegations in the instant Complaint involve employment matters are therefore not within the jurisdiction of the Commission.” (January 3 Interim Order at 4).

Complainants’ allegations involving employment matters have been dismissed in this proceeding. No basis exists for permitting Complainants to continue attempting to pursue these matters in this forum by obligating PGW to produce resumes and service records for the two

operations personnel who are alleged in Paragraph 17 of the Complaint to have received unwarranted promotions due to racial discrimination.

III. CONCLUSION

For the foregoing reasons, PGW respectfully requests that PGW's objections to Complainants' Requests for Production of Documents Nos. 3-8 be sustained and an Order be entered dismissing Complainants' Motion to Compel Answers and Dismiss Objections.

Respectfully submitted,



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Dated: March 18, 2020