



Eckert Seamans Cherin & Mellott, LLC  
213 Market Street  
8<sup>th</sup> Floor  
Harrisburg, PA 17101

TEL: 717 237 6000  
FAX: 717 237 6019

Karen O. Moury  
717.237.6036  
[kmoury@eckertseamans.com](mailto:kmoury@eckertseamans.com)

January 8, 2021

**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' Motion in Limine Regarding the Supplemental Direct Testimony Submitted by the Complainants in this Proceeding. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*Karen O. Moury*  
Karen O. Moury

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

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of PGW's Motion in Limine, 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**

Karin M. Gunter, Esquire  
Law Office of Karen M. Gunter  
85 Old Cedarbrook Road  
Wyncote, PA 19095  
Kgunterlaw2@gmail.com

Dated: January 8, 2021

/s/ Karen O. Moury  
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 :

**NOTICE TO PLEAD**

TO: Karin M. Gunter, Esquire  
Law Office of Karen M. Gunter  
85 Old Cedarbrook Road  
Wyncote, PA 19095  
Kgunterlaw22gmail.com

You are hereby notified to file a response to the enclosed Motion in Limine in the form and manner as directed by the Administrative Law Judge or a judgment may be entered against you.

Respectfully submitted,

*Karen O. Moury*

Of Counsel:  
Graciela Christlieb, Esq.  
Senior Attorney, Legal Department  
Philadelphia Gas Works  
800 W. Montgomery Ave.  
Philadelphia, PA 19122  
Tel (215) 684-6049  
Fax (215) 684-6798  
[Graciela.Christlieb@pgworks.com](mailto:Graciela.Christlieb@pgworks.com)

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Karen O. Moury, Esq.  
Heather R. Olson, Esq.  
Kristine E. Marsilio, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8th Floor  
Harrisburg, PA 17101  
717.237.6000; 717.237.6019 (fax)  
[kmoury@eckertseamans.com](mailto:kmoury@eckertseamans.com)  
[holson@eckertseamans.com](mailto:holson@eckertseamans.com)  
[kmarsilio@eckertseamans.com](mailto:kmarsilio@eckertseamans.com)

Dated: January 8, 2021

*Counsel for Philadelphia Gas Works*

**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	:	

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**PHILADELPHIA GAS WORKS’  
MOTION IN LIMINE REGARDING THE  
SUPPLEMENTAL DIRECT TESTIMONY  
OF WAYNE RAUCEO**

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TO THE HONORABLE ADMINISTRATIVE LAW JUDGE DARLENE HEEP:

Pursuant to Section 5.103 of the Pennsylvania Public Utility Commission's regulations, 52 Pa. Code § 5.103, Philadelphia Gas Works (“PGW”) submits this Motion in Limine (“Motion”) to bar from consideration in this proceeding certain portions of the Supplemental Direct Testimony of Wayne Rauceo (“EE St. No. 4 – SUP”) submitted on behalf of the Complainants in this proceeding. Specifically, PGW moves to exclude from this proceeding the following (the “Contested Portions”):

- EE St. No. 4 – SUP, p. 1, line 8 (“But, I am aware ...”) through and including line 12;
- EE St. No. 4 – SUP, p. 1, line 22 through and including line 25;
- EE St. No. 4 – SUP, p. 2, line 9 through and including line 24;
- Exhibit IV (in its entirety); and
- Exhibit VI (in its entirety).

A copy of the Contested Portions is attached hereto as Exhibit A, except confidential Exhibit VI.

In these Contested Portions, Mr. Rauceo implies that PGW failed to provide documents/disclose information in response to discovery. It is improper to address a discovery issue through witness testimony. Mr. Rauceo's testimony is based on his inadmissible, lay legal opinions. If Complainants truly believed that PGW was withholding relevant information to which Complainants were entitled, the Complainants should have pursued this issue through a Motion to Compel.

The Contested Portions also contain testimony and exhibits based on information that Complainants obtained through their federal employment discrimination lawsuit against PGW. This evidence falls outside the scope for which Complainants were permitted to submit supplemental testimony in this proceeding, as the supplemental testimony was expressly limited to information provided by PGW in its supplemental response to Complainants' discovery request, Set III, question 4 ("Set III-4"). The Complainants had a full opportunity to pursue their issues in this proceeding. It is not appropriate for Complainants to introduce new and/or cumulative evidence nearly two months after the hearing in this case.

Additionally, Complainants reference and seek disclosure of a privileged report which they already unsuccessfully attempted to obtain in their unrelated federal employment discrimination litigation and were told by the judge in that matter that the report was privileged.

As such, the Contested Portions of EE St. No. 4 – SUP should not be admitted into the record or otherwise considered in this proceeding.

## **I. BACKGROUND**

1. This proceeding was initiated on October 31, 2019 with the filing of a Complaint against PGW by Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne

Rauceo (collectively, “Complainants”), wherein Complainants alleged “safety violations and other concerns.”

2. PGW timely filed an Answer on November 20, 2019 and filed Preliminary Objections on that date. Administrative Law Judge Darlene Heep (“ALJ Heep”) issued an Order Granting in Part and Denying in Part Preliminary Objections on January 3, 2020.

3. ALJ Heep convened a Prehearing Conference on February 6, 2020, at which time a procedural schedule was established. ALJ Heep issued a Hearing Notice on February 10, 2020 and an Order on February 11, 2020, in which she memorialized the original procedural schedule.

4. This procedural schedule was modified several times due to COVID-19 health directives and to accommodate the requests of the parties.

5. Of relevance to this Motion, on February 29, 2020, Complainants served their third set of discovery upon PGW. Set III-4 sought information and documents pertaining to the investigation, reporting, interviews, disciplinary actions, terminations, safety violations, policy violations and resolution of the February 2018 incident alleged in Paragraph 11 of the Formal Complaint. PGW objected to this discovery request, and the Complainants filed a Motion to Compel.

6. On March 19, 2020, ALJ Heep issued an Order ruling on Complainants’ Motion to Compel. In her Order, ALJ Heep directed that PGW need only provide documents related to the alleged February 2018 incident identified in paragraph 11 of the Formal Complaint as they concern “plant safety and operations matters.”

7. On April 9, 2020, consistent with the March 19, 2020 Order, PGW provided a response indicating that it had no responsive documents concerning the safe operation of the plant.

8. In accordance with the revised litigation schedule, the Complaints served the Direct Testimony of Complainants Dwayne Ackie, Miguel Chavarria, Jr., Maurice Goodwin, and Wayne Rauceo on July 2, 2020. The Complainants served the Amended Direct Testimony of Miguel Chavarria, Jr. on July 27, 2020. PGW served the Rebuttal Testimony of Raymond M. Snyder, Daniel J. Cassidy, and Brian McGuire on August 17, 2020.

9. Complainants served the Surrebuttal Testimony of Dwayne Ackie and Wayne Rauceo on August 28, 2020.

10. PGW served the Supplemental Rebuttal Testimony of Brian McGuire on August 31, 2020, in which Mr. McGuire addressed the Amended Direct Testimony of Mr. Chavarria.

11. Complainants served the Surrebuttal Testimony of Mr. Chavarria on September 14, 2020.

12. A hearing in this proceeding was held on October 21, 2020. During the hearing, Counsel for Complainants claimed that PGW had failed to produce all responsive documents to discovery request, Set III-4, pursuant to ALJ Heep's March 19, 2020 Order. ALJ Heep directed PGW to serve any remaining documents to Set III-4 within two weeks. Judge Heep indicated that she would give Complainants seven days from the date they receive the supplemental information to review and supplement their exhibits and testimony.<sup>1</sup>

13. Pursuant to Judge Heep's direction at the October 21, 2020 hearing, PGW provided a supplemental response to Set III-4 on November 4, 2020. Indicating its continued belief that no responsive documents are available concerning the February 2018 incident relating to the safe operation of the plant, in the spirit of cooperation, PGW provided security logs for February 21-23, 2018.

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<sup>1</sup> See Tr. at 7-9, 162.

14. Thereafter on November 24, 2020, Judge Heep issued an Order authorizing the Complainants to supplement their direct testimony “with respect to the additional answers provided by PGW no later than December 18, 2020.” Importantly, the Order provided: “That **all supplemental testimony is limited** to the issues addressed in the supplemental responses provided by PGW.” (emphasis in original.)

15. Via e-mail dated November 25, 2020, counsel for Complainants indicated that Complainants have decided not to supplement their testimony.

16. Nonetheless, on December 18, 2020, the Complainants served the Supplemental Direct Testimony of Wayne Rauceo. Mr. Rauceo’s Supplemental Direct Testimony included, among other things, Exhibit V, which consists of select pages of PGW’s supplemental responses to Set III-4. Also on December 18, 2020, PGW served the Surrebuttal Testimony of Brian McGuire to address issues raised for the first time during the hearing on October 21, 2020.

17. PGW submits this Motion, seeking to exclude the Contested Portions of the Supplemental Testimony of Wayne Rauceo from being admitted to the record or otherwise considered in this proceeding.

## **II. LEGAL STANDARDS**

18. Section 5.403(a)(1) of the Commission’s regulations authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence.<sup>2</sup> The presiding officer also has authority to confine the evidence to the issues in the proceeding and to impose necessary limitations upon the admission of evidence.<sup>3</sup> Section 5.403(b) of the Commission's regulations requires the presiding officers to "actively employ these powers to

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<sup>2</sup> 52 Pa. Code § 5.403(a)(1).

<sup>3</sup> 52 Pa. Code §§ 5.403 and 5.483.

direct and focus the proceedings consistent with due process."<sup>4</sup>

19. A motion in limine has been recognized as a valid means of requesting that the presiding officer control the receipt of evidence in the proceeding.<sup>5</sup>

20. As a matter of policy, evidence that is irrelevant or immaterial to the issues presented in a proceeding must be excluded.<sup>6</sup> Information is relevant if it “logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact.”<sup>7</sup>

21. Further, Section 5.323(a) of the Commission’s regulations codifies the attorney work product privilege, which prohibits the “disclosure of the mental impressions of a party’s attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories.” 52 Pa. Code § 5.323(a).

22. The Pennsylvania Rules of Evidence also limit opinion testimony by lay witnesses and prohibit lay opinions based on scientific, technical, or other specialized knowledge.<sup>8</sup> Even when a witness qualifies as an expert, it is well settled that expert witnesses cannot testify as to their opinion on matters of law.<sup>9</sup> While the Commission, as an administrative agency having quasi-judicial functions, is not limited by the strict rules relating to the

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<sup>4</sup> 52 Pa. Code § 5.403(b).

<sup>5</sup> See e.g. *Pa. Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015); see also 52 Pa. Code § 5.403(b) (requires presiding officers to “actively employ [Section 5.403(a)] powers to direct and focus the proceedings consistent with due process.”).

<sup>6</sup> 66 Pa. C.S. § 332(b); 52 Pa. Code § 5.401(a).

<sup>7</sup> *EQT Prod. Co. v. Borough of Jefferson Hills*, 208 A.3d 1010, 1025 (Pa. 2019), citing *Commonwealth v. Johnson*, 160 A.3d 127, 146 (2017); *Commonwealth v. DeJesus*, 880 A.2d 608, 614-15 (Pa. 2005).

<sup>8</sup> Pa.R.E. 701.

<sup>9</sup> See *Waters v. State Employees' Ret. Bd.*, 955 A.2d 466, 471 (Pa. Cmwlth. 2008) (“It is well-settled that an expert is not permitted to give an opinion on a question of law.”); *Browne v. Department of Transportation*, 843 A.2d 429, 433 (Pa. Cmwlth. 2004) (explaining that an expert's legal opinion testimony is not admissible); *Kosey v. City of Washington Police Pension Board*, 459 A.2d 432, 434 (Pa. 1983) (stating that an expert witness may not testify as to issues of law, which are for a court to decide).

admissibility of evidence, essential principles must be observed.<sup>10</sup>

### III. ARGUMENT

#### **A. Mr. Rauceo's testimony that he is aware of other "relevant" documents and/or information that PGW allegedly failed to disclose in discovery constitutes an inadmissible legal opinion and raises an issue that the Complainants should have pursued through a Motion to Compel.<sup>11</sup>**

23. In his Supplemental Direct Testimony, Mr. Rauceo alleges that PGW failed to provide documents/disclose information in response to discovery, including: 1) a disciplinary letter from PGW to Brian McGuire related to Mr. McGuire's alleged violations of timekeeping and security policies and protocols ("HR Letter");<sup>12</sup> and 2) information pertaining to the privileged investigation of "security and other matters" at the Passyunk Plant performed by an outside law firm at the request of PGW's General Counsel ("Investigation Information").<sup>13</sup> Mr. Rauceo testifies that he "believe[s]" the Investigation Information "is relevant to this PUC matter."<sup>14</sup> This testimony constitutes an inadmissible legal opinion and raises an issue that the Complainants should have pursued through a Motion to Compel.

#### **a. Inadmissible Legal Opinion**

24. It appears from his testimony that Mr. Rauceo is of the opinion that the confidential HR Letter and the privileged Investigation Information: 1) contain information that

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<sup>10</sup> *Pittsburgh and Lake Erie Railroad Company, v. Pennsylvania Public Utility Commission*, 85 A.2d 646, 653 (Pa. Super Ct. 1952); *Bleilevens v. State Civil Service Commission*, 312 A.2d 109, 111 (Pa. Commw. 1973).

<sup>11</sup> EE St. No. 4 – SUP, p. 1, line 8 ("But, I am aware ...") through and including line 12.

<sup>12</sup> The HR letter was produced by PGW during the federal litigation and marked as confidential but it was not so marked or otherwise treated in a proprietary manner by the Complainants in this proceeding. This issue has been resolved in principle between the Complainants and PGW, and counsel for the parties plan to discuss the details for addressing it on January 11, 2021.

<sup>13</sup> EE St. No. 4 – SUP, p. 1, lines 8-12. As explained below, a federal judge has already determined that the Investigation Information referenced by Mr. Rauceo is privileged material and not discoverable.

<sup>14</sup> EE St. No. 4 – SUP, p. 1, lines 10-12.

would be responsive to Complainants' request; 2) contain information that is relevant to the issues raised in this proceeding; and 3) are not privileged or otherwise protected from disclosure. In fact, as noted, Mr. Rauceo specifically testifies that it is his belief that the Investigation Information is relevant to this matter. Mr. Rauceo's opinions as to whether documents/information should have been disclosed in discovery and the relevancy of the information to this proceeding amount to legal opinions. Certainly, the record contains no evidence that Mr. Rauceo is a lawyer or is, otherwise, an expert on the law. Even if Mr. Rauceo possessed some legal expertise, Pennsylvania law makes clear that expert opinions as to matters of law (*e.g.* relevancy and privilege) are prohibited.<sup>15</sup> As such, the Contested Portions of EE St. No. 4 – SUP related to the documents and information that PGW allegedly failed to disclose should not be admitted into the record or otherwise considered in this proceeding.

#### **b. Motion to Compel**

25. If Complainants believed that PGW was withholding relevant, discoverable information, Complainants should have filed a Motion to Compel. The Commission's regulations set forth the procedures that are to be followed in the event of a discovery dispute. Under the Commission's regulations, parties are authorized to file a Motion to Compel and request that the presiding officer compel that a data request be answered.<sup>16</sup> Indeed, the Complainants are aware of this process, having previously filed a Motion to Compel in this proceeding.

26. A Motion to Compel would have also been consistent with due process

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<sup>15</sup> See FNs 8-9, *supra*.

<sup>16</sup> 52 Pa. Code § 5.342(g). This provision, generally, contemplates that motions to compel will be filed following an objection to an interrogatory. In this case, PGW did not file an objection, as it believed (and still believes) that it was fully responsive to the discovery request. See Tr. at 8. Nonetheless, PGW submits that a Motion to Compel would have been appropriate in this case. Even if Section 5.342(g) does not apply, the Complainants could have filed a Motion to Compel pursuant to 52 Pa. Code § 5.103 (related to Motions generally).

considerations, in that it would have provided both parties an opportunity to be heard regarding their opinions as to whether the confidential HR Letter and privileged Investigation Information are responsive to Complainants' discovery request, Set III-4, (as narrowed in scope by ALJ Heep's March 19, 2020 Order to the safe operation of the plant), are relevant to this proceeding, and are otherwise discoverable. These legal issues are questions to be decided by the presiding officer.

27. It is also important to clarify that, even if the Complainants had pursued a Motion to Compel, it is PGW's position that the confidential HR Letter and the privileged Investigation Information are not discoverable. As noted, the Complainants received a copy of the confidential HR Letter through their federal lawsuit against PGW, and Mr. Rauceo attached the Letter to his Supplemental Direct Testimony as Exhibit VI.

28. Importantly, the confidential HR Letter is not responsive to the Complainants' request for information. Set III-4 requests information specific to the "February 2018 incident identified in paragraph 11 of the Formal Complaint." Via Order dated March 19, 2020, ALJ Heep directed that PGW need only provide documents related to the February 2018 allegations that concern the safe operation of the Passyunk Plant. The HR Letter is entirely unrelated and not relevant to the February 2018 allegations. This point can be demonstrated in the first paragraph of the HR Letter, which indicates that the Letter is in regard to a December 21, 2017 complaint related to alleged employment discrimination. As such, the HR Letter falls outside of the scope of information requested in Set III-4.

29. Additionally, the Investigation Information is not relevant to the February 2018 allegations (and, therefore, falls outside of the scope of the information requested in Set III-4), does not concern the safe operation of the plant (which also takes it outside the scope of the

information requested in Set III-4) and/or contains privileged information that is protected from disclosure. As stated above, Section 5.323(a) of the Commission's regulations codifies the attorney work product privilege, which prohibits the "disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories." 52 Pa. Code § 5.323(a). The referenced investigation was performed by PGW's outside legal counsel at the request of PGW's General Counsel, and resulted in an Investigation Report that contains the mental impressions and opinions of an attorney hired by PGW. As such, the Report is protected from disclosure under Section 5.323(a). Notably, Judge Pappert has already ruled in the federal lawsuit, following an *in camera* review, that the legal memorandum prepared by outside counsel is privileged material that is not discoverable. Judge Pappert's November 6, 2020 Order is attached as Exhibit B.

**B. Mr. Rauceo's testimony related to statements and information obtained during Complainants' federal lawsuit against PGW, including Exhibits IV and VI, are beyond the scope of permissible, supplemental testimony.<sup>17</sup>**

30. Mr. Rauceo's Supplemental Direct Testimony includes statements related to information obtained during Complainants' federal lawsuit against PGW. Mr. Rauceo alleges violations of timekeeping, security and/or safety policies and protocols by Mr. McGuire and implies that Operations Supervisor David Martinez engaged in similar behavior. Mr. Rauceo testifies that the manner in which PGW handled the matter demonstrates "continued discrimination" by PGW.<sup>18</sup> The testimony also includes as exhibits a copy of Mr. McGuire's deposition testimony in the federal suit which relates to the February 2018 allegations and the

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<sup>17</sup> EE St. No. 4 – SUP, p. 1, line 22 through and including line 25 and p. 2, lines 9-24; Exhs. IV and VI.

<sup>18</sup> EE St. No. 4 – SUP, p. 1, line 22 through and including line 25 and p. 2, lines 9-24.

HR Letter.<sup>19</sup> This evidence is all beyond the scope of permissible, supplemental testimony, and Mr. Rauceo's testimony related to employment discrimination is beyond the scope of this proceeding.

31. As discussed, Your Honor's November 24, 2020 Order specifically limited Complainants' supplemental testimony to "issues addressed in the supplemental responses provided by PGW." None of this information was provided to Complainants as a supplemental response to Set III-4, but rather was obtained through Complainants' federal employment discrimination lawsuit. The deposition testimony occurred after PGW provided supplemental responses in this case (although, it should be emphasized that Complainants had a full opportunity to pursue their February 2018 allegations in this proceeding). Moreover, Mr. Rauceo's testimony pertaining to alleged violations of timekeeping, security and/or safety policies and protocols and "continued discrimination," as well as the HR Letter, are beyond the scope of the information requested in Set III-4, as none of this evidence is relevant to the February 2018 allegations. As such, the evidence based on information that the Complainants obtained through their federal lawsuit, including Exhibits IV and VI, clearly falls outside the scope of permissible, supplemental testimony.

32. Moreover, Mr. Rauceo's testimony related to continued discrimination is not relevant to this proceeding, as the Commission does not have jurisdiction over this issue. While Mr. Rauceo states that the continued discrimination impacts the safety and operation of the Plant, he provides no explanation to make this connection. Via Order dated January 3, 2020, Your Honor decided that Complainants' discrimination allegations are beyond the jurisdiction of the Commission. As such, Mr. Rauceo's testimony related to same should not be admitted into the

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<sup>19</sup> Exhs. IV and VI.

record or otherwise considered in this proceeding.

33. Specific to the HR Letter (Exhibit VI), it is also important to note that, consistent with e-mail communications exchanged between Judge Heep and the parties, this letter contains confidential information as part of a Confidential Stipulation and 502(d) Order issued by Judge Pappert in the federal lawsuit on August 12, 2020. Should the HR Letter be admitted into the record in this matter, Complainants have agreed to mark it accordingly.

34. As explained above, the information obtained during Complainants' federal lawsuit, including Exhibits IV and VI, are beyond the scope of permissible supplemental testimony. The Complainants had a full opportunity to pursue their issues in this proceeding. It is not appropriate for the Complainants to introduce new and/or cumulative evidence that is outside the scope of PGW's supplemental response to Set III-4 approximately two months after the hearing in this case. For these reasons, the Contested Portions of EE St. No. 4 – SUP related to information obtained during Complainants' federal lawsuit against PGW, including Exhibits IV and VI, should not be admitted into the record or otherwise considered in this proceeding.

### **III. CONCLUSION**

For the reasons set forth above, PGW respectfully requests that ALJ Heep issue an order determining that the Contested Portions of EE St. No. 4 – SUP should not be admitted into the evidentiary record or considered in this proceeding.

Respectfully submitted,

*Karen O. Moury*

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Karen O. Moury, Esq. (PA ID #36879)  
Heather R. Olson, Esq. (PA ID # 92073)  
Kristine E. Marsilio, Esq. (PA ID #316479)  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
717.237.6000

Graciela Christlieb, Esq. (PA ID # 200760)  
Philadelphia Gas Works  
800 W. Montgomery Ave.  
Philadelphia, PA 19122  
215.684.6164

Date: January 8, 2021

# EXHIBIT A

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SUPPLEMENTAL DIRECT TESTIMONY

OF

WAYNE RAUCEO,  
ON BEHALF OF COMPLAINANTS

CONCERNING ADDITIONAL (LATE-FILED) ANSWERS  
OF PHILADELPHIA GAS WORKS (PGW)

Docket No.: C-2019-3013933

DECEMBER 18, 2020

1 **I. INTRODUCTION**

2 **Q: WHY ARE YOU PROVIDING THIS SUPPLEMENTAL DIRECT TESTIMONY?**

3 A: At the hearing on October 21, 2020, the Judge allowed PGW to submitted additional  
4 information regarding the February 23, 2018 incident relating to our Formal Complaint  
5 paragraph number 11. On November 4, 2020, PGW provided additional answers and/or  
6 supplemental responses related to paragraph number 11. Those supplemental documents  
7 included only security sign-in sheets for the periods of February 21, 2018 through  
8 February 23, 2018. **But, I am aware of other documents that show Brian McGuire**  
9 **received a letter from PGW due to violations of timekeeping and security policies and**  
10 **protocols. PGW did not disclosed that letter. PGW also had an outside law firm perform**  
11 **an investigation of security and others matters at the Passyunk Plant, which I believe is**  
12 **relevant to this PUC matter, and of which PGW did not disclose.**

13 **II. SUPPLEMENTAL DIRECT TESTIMONY**

14 **Q: WHAT ADDITIONAL DIRECT TESTIMONY WOULD YOU LIKE TO GIVE**  
15 **REGARDING THE NOVEMBER 4, 2020 SUPPLEMENTAL RESPONSE?**

16 A: The security/safety protocol at Passyunk Plant is that anyone who comes into the plant  
17 after hours, i.e., any time after 3:30 p.m., must contact the duty operations supervisor.  
18 Then, the operations supervisor will then head up to the main gate to find out what that  
19 person is there for. This policy covers anyone who comes into the plant after hours –  
20 contractors, visitors, employees and the like. Especially, when there is LNG truck  
21 unloading going on at the plant, which was the case on February 23, 2018.

22 **Brian McGuire did not have his employee ID badge, which he acknowledged not having**  
23 **in his deposition testimony in our lawsuits against PGW. His deposition took place on**  
24 **November 24, 2020 and select pages. (See EE Statement No. 4 – Exhibit IV, at 138:21-**  
25 **142:22).**

1 If an employee does not have his ID badge, he must sign in at the security guard shack.  
2 As you can see from the security sign in sheets from February 23, 2018, Brian McGuire  
3 did not sign in. (See EE Statement No. 4 - Exhibit V) Especially, when an employees  
4 does not have his badge, the operations supervisor must come to the security guard shack  
5 to verify who the employee is, and escort that employee wherever they want to go. This  
6 did not happen on February 23, 2018 with Brian McGuire. These are security and safety  
7 violations because this is a gas processing plant, the operations supervisor must know at  
8 all times who is present at the plant.

9 **Q: OK. WHAT OTHER STATEMENTS, IF ANY, DO YOU WANT TO MAKE**  
10 **ABOUT THE SECURITY AND SAFETY VIOLATIONS AT PASSYUNK PLANT**  
11 **REGARDING BRIAN MCGUIRE?**

12 **A: During our lawsuits in federal court, I learned that Brian McGuire, as plant manager,**  
13 **acknowledged he violated PGW's timekeeping, security and/or safety policies and**  
14 **protocols by manipulating TLM (time labor management, i.e., time clock) and C-CURE**  
15 **(badge swiping) systems. (A true and correct copy of Brian McGuire's April 19, 2018**  
16 **letter is included herein as EE Statement No. 4 – Exhibit VI). David Martinez, as**  
17 **operations general supervisor, also received a letter similar to Brian's. The operations**  
18 **supervisors also received letters regarding accurate time records. Our letters as**  
19 **operations supervisors (all of whom are African American and/or black/brown employees**  
20 **except Ryan O'Donnell) were titled "Disciplinary Warnings," but the letters to Brian**  
21 **McGuire and David Martinez, who are the persons responsible for all plant operations,**  
22 **were titled "Performance Issues." I think this is continued discrimination that impacts**  
23 **safety and security at the Plant. I also still believe these practices are continuing by Brian**  
24 **McGuire and David Martinez.**

25 **III. CONCLUSION**

BRIAN MCGUIRE

1 (Pages 1 to 4)

1	3
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA	C O N T E N T S - - -
MIGUEL J. CHAVARRIA, JR., : CIVIL ACTION : NO. 19-cv-04428-GJP Plaintiff, : : -vs- : : PHILADELPHIA GAS WORKS and : GAS WORKS EMPLOYEES' UNION : LOCAL 686, : : Defendants. : -----	TESTIMONY OF: BRIAN MCGUIRE By: Ms. Gunter 4 By: Ms. Zahorchak 237 E X H I B I T S EXHIBIT NO. PAGE (All referenced documents will be attached.)
Oral deposition of BRIAN MCGUIRE, taken via Zoom video conferencing, on Wednesday, November 24, 2020, commencing at 10:00 a.m., before Suzanne Wackowski, Certified Professional Reporter and Notary Public in and of the Commonwealth of Pennsylvania. ELITE LITIGATION SOLUTIONS, LLC One Penn Center 1617 JFK Boulevard, Suite 340 Philadelphia, Pennsylvania 19103 www.elitesllc.com - (215)563-3703	
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A P P E A R A N C E S: LAW OFFICE OF KARIN M. GUNTER BY: KARIN M. GUNTER, ESQUIRE 85 Old Cedarbrook Road Wyncote, Pennsylvania 19095 Telephone: (215)548-9992 E-mail: kgunterlaw2@gmail.com -- Representing the Plaintiff PHILADELPHIA GAS WORKS BY: BRETT A. ZAHORCHAK, ESQUIRE 800 West Montgomery Avenue 4th Floor Philadelphia, Pennsylvania 19122 Telephone: (215)684-6647 E-mail: Brett.Zahorchak@PGW.com -- Representing Defendant Philadelphia Gas Works	1 - - - 2 It is hereby stipulated and 3 agreed by and between counsel that the 4 reading, certification, sealing, and 5 filing are waived; and that all 6 objections, except as to the form of the 7 question, are reserved until the time of 8 trial. 9 - - - 10 BRIAN MCGUIRE, having been duly 11 sworn, was examined and testified as 12 follows: 13 MS. ZAHORCHAK: And I'd like to 14 reserve the witness's right to read and 15 sign, please. 16 - - - - - 17 E X A M I N A T I O N 18 - - - - - 19 BY MS. GUNTER: 20 Q Good morning, Mr. McGuire. 21 Would you please state your full name for 22 the record? 23 A My name is Brian Aloysius McGuire. 24 Q Can you spell your middle name?

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1 Q What does that statement relate to?  
 2 A The night I came into the plant out of  
 3 hours.  
 4 Q Is this Mr. Ackie's allegation against  
 5 you?  
 6 A Yes.  
 7 Q Okay. All right. And this is Exhibit  
 8 McGuire-4, as it relates to Miguel Chavarria's EEOC  
 9 charge against PGW and Local 686, correct?  
 10 MS. ZAHORCHAK: Objection.  
 11 THE WITNESS: Yes.  
 12 MS. ZAHORCHAK: Document speaks  
 13 for itself.  
 14 BY MS. GUNTER:  
 15 Q I'm going to show you another exhibit,  
 16 Mr. McGuire.  
 17 MS. GUNTER: Brett, this is  
 18 McGuire-3.  
 19 BY MS. GUNTER:  
 20 Q Mr. McGuire, you also gave a statement in  
 21 Mr. Ackie's charge of discrimination against PGW and  
 22 Local 686, correct?  
 23 A Yes.  
 24 Q And this exhibit, McGuire-3, is that the

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1 statement that you gave in Mr. Ackie's charge of  
 2 discrimination against PGW and Local 686? I'll go  
 3 down to the bottom.  
 4 A Yes.  
 5 Q And is that your signature on the fourth  
 6 page?  
 7 A Yes.  
 8 Q And did you date this document  
 9 October 24th, 2018?  
 10 A Yes.  
 11 Q And I'm going to represent to you -- and I  
 12 can pull them up and let you read it word for  
 13 word -- but this document states almost verbatim  
 14 what you said in response to Mr. Chavarria's --  
 15 portions of it does; is that correct?  
 16 MS. ZAHORCHAK: Objection. The  
 17 documents speak for themselves.  
 18 BY MS. GUNTER:  
 19 Q Is that correct, Mr. McGuire?  
 20 A Yes.  
 21 Q So we're going to go to Mr. Ackie's charge  
 22 statement by you for the following day on or about  
 23 February 23rd, 2018. Okay?  
 24 A Okay.

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1 Q So it's your testimony or it was your  
 2 statement that you returned to the plant earlier,  
 3 you said, to retrieve some documents, correct?  
 4 A Yes.  
 5 Q And those documents you have identified as  
 6 your son's driver's license exam, documents needed  
 7 for his driver's license exam early the next  
 8 morning, correct?  
 9 A Yes.  
 10 Q Why were those documents in your desk?  
 11 A It was a letter from his eye specialist.  
 12 My son has a rare eye disease. He will not pass a  
 13 vision test. So in order to get a license, he was  
 14 required a letter from his specialist, his eye  
 15 specialist, which was sent to me at work. I opened  
 16 it up, printed it out, and left it on my desk.  
 17 Q All right. So you earlier testified that  
 18 you came from your home to the plant that Friday on  
 19 or about February 23rd, 2018, correct?  
 20 A Yes.  
 21 Q Okay. And you had your car keys in order  
 22 to drive your vehicle, correct?  
 23 A Correct.  
 24 Q Are your work keys on your car key chain?

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1 A No.  
 2 Q Okay. Is your badge on your car key  
 3 chain?  
 4 A No. It was in my company vehicle.  
 5 Q Oh, you have a company vehicle?  
 6 A Yes.  
 7 Q So your badge was in your company vehicle?  
 8 A Yes.  
 9 Q Where was your company vehicle on the  
 10 evening of February 23rd, 2018?  
 11 A It was at home.  
 12 Q So you drove your personal vehicle to the  
 13 plant?  
 14 A Yes.  
 15 Q Are you allowed to drive your company  
 16 vehicle other than for company business?  
 17 A With permission.  
 18 Q Permission from who?  
 19 A My superior.  
 20 Q That would have been Mr. Snyder?  
 21 A That would have been Mr. Snyder --  
 22 Mr. Snyder, Malkemes, or Zuk.  
 23 Q Okay. What kind of personal vehicle did  
 24 you drive on February 23rd, 2018?

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1 A It was a 2005 Hyundai Elantra, gold/tan.  
 2 Q Okay. Are personal vehicles allowed in  
 3 the plant?  
 4 A With permission.  
 5 Q All right. So you're at the plant to get  
 6 your son's letter from his eye specialist so that he  
 7 could take his driver's license exam the next  
 8 morning; is that correct?  
 9 A Yes.  
 10 Q And then you say, "As I was only there to  
 11 pick up paperwork from my office, I was just in  
 12 street clothes."  
 13 That's your statement, correct?  
 14 A Yes.  
 15 Q Okay. You said, "I deny that I had been  
 16 drinking and I deny that I cursed at any employee  
 17 that evening as alleged in the charge."  
 18 That's your statement, correct?  
 19 A Yes.  
 20 Q And then you say, "As plant manager, I  
 21 have unrestricted access to the plant and would not  
 22 'announce' my appearance as it seems to be implied  
 23 by Mr. Chavarria's charge?"  
 24 MS. ZAHORCHAK: Objection. Just

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1 because it said -- you misread part of it.  
 2 MS. GUNTER: Oh, I did?  
 3 MS. ZAHORCHAK: Yeah. Just one  
 4 word.  
 5 MS. GUNTER: Okay. I'll read it  
 6 again.  
 7 MS. ZAHORCHAK: It's okay. It's  
 8 the word "presence." You said the  
 9 appearance instead of presence.  
 10 MS. GUNTER: Okay.  
 11 MS. ZAHORCHAK: Just so the  
 12 record is clear. Please don't read it  
 13 again.  
 14 MS. GUNTER: No, I want a clear  
 15 record.  
 16 BY MS. GUNTER:  
 17 Q "As plant manager, I have unrestricted  
 18 access to the plant and would not 'announce' my  
 19 presence as seems to be implied in Mr. Chavarria's  
 20 charge."  
 21 Is that your statement, Mr. McGuire?  
 22 A That is my statement yes.  
 23 Q And so how -- well, never mind.  
 24 You say, "I entered the control room to

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1 find all the overhead lights off," correct?  
 2 A Correct.  
 3 Q All right. So when you say "control  
 4 room," you mean central control room, correct?  
 5 A Yes.  
 6 Q "All the overhead lights were off where  
 7 Mr. Benson was and where Mr. Ackie was located?"  
 8 A Mr. Benson had the desk light on.  
 9 Q Were all the overhead lights off where Mr.  
 10 Benson and Mr. Ackie were located?  
 11 A Yes.  
 12 Q "I saw Wallace Benson, supervisor, with  
 13 his feet on his desk, while reclining in a chair."  
 14 Is that against protocol?  
 15 A In the position he was in, yes.  
 16 Q What protocol? Tell me what the protocol  
 17 is that that violated.  
 18 A Sleeping on the job.  
 19 Q Was Mr. Benson sleeping?  
 20 A No, he was not.  
 21 Q Okay. And then it says, "And Dwayne  
 22 Ackie, process operator, reclining on a bench."  
 23 Does that violate protocol?  
 24 A Yes.

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1 Q And what protocol is that?  
 2 A He is going to sleep during working hours.  
 3 Q So both Mr. Benson and Mr. Ackie were  
 4 sleeping on the job, based on the position of their  
 5 bodies at the time that you found them; is that  
 6 correct?  
 7 A Yes, that is correct.  
 8 Q All right. "Having just been directed by  
 9 the VP of my department that I needed to make sure  
 10 policies are being followed at the plant, I was  
 11 concerned that these employees appeared to be  
 12 sleeping and asked why the lights were off."  
 13 That's your statement, correct?  
 14 A Yes.  
 15 Q So your statement on October 24th, 2018,  
 16 was that they appeared to be sleeping, correct?  
 17 A They were laying in a sleeping position.  
 18 Q So you're changing your statement?  
 19 A It's what it says right there.  
 20 Q Okay. So they appeared to be sleeping.  
 21 And then you said, "Mr. Ackie claimed that  
 22 he was taking readings, but I knew this could not be  
 23 true, given Mr. Ackie's location."  
 24 Do you see that statement?

# EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MIGUEL CHAVARRIA, JR.,

*Plaintiff,*

v.

PHILADELPHIA GAS WORKS, et al.,

*Defendants.*

CIVIL ACTION  
NO. 19-04428

**ORDER**

**AND NOW**, this 6th day of November 2020, upon consideration of Plaintiff's Motion to Compel Discovery, (ECF No. 35), the exhibits and memorandum of law in support of the Motion, (ECF Nos. 36, 37), the parties' letters to the Court and the telephone conference on November 5, 2020, and following the Court's *in camera* review of the relevant documents, it is hereby **ORDERED** that ECF No. 35 is **DENIED**.<sup>1</sup>

BY THE COURT:

/s/ Gerald J. Pappert  
GERALD J. PAPPERT, J.

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<sup>1</sup> Plaintiff seeks discovery of a legal memorandum that outside counsel prepared for PGW. PGW has produced most of the memorandum, redacting portions it claims are privileged work product or are irrelevant to the Plaintiff's case. The Court has reviewed the full memorandum and concludes the redacted portions are properly classified as work-product prepared in anticipation of litigation or fall outside the scope of discovery. *See* Fed. R. Civ. P. 26(b)(1), (3); *see Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3d Cir. 1993). The memorandum contains both "core" work product, which "is afforded almost absolute protection," and "fact" work product which is protected absent a showing by Plaintiff of substantial need and an inability to otherwise obtain the information without undue hardship. *See In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 381 (E.D. Pa. 2006) (citations omitted). PGW did not waive privilege by producing a redacted version of the memorandum. *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991) ("When a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed."). The work-product rule is "intensely practical," and therefore must be flexible enough to permit partial disclosure of some documents that contain both discoverable information and privileged information, such as an attorney's legal conclusions. *United States v. Nobles*, 422 U.S. 225, 238 (1975); *see* Fed. R. Civ. P. 26(b)(3) advisory committee's note (1970).