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January 19, 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 Reply 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 Karin M. Gunter  
85 Old Cedarbrook Road  
Wyncote, PA 19095  
Kgunterlaw2@gmail.com

Dated: January 19, 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 Karin 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 Judges or a judgment may be entered against you.

Respectfully submitted,

*Karen O. Moury*

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Dated: January 19, 2021

*Counsel for Philadelphia Gas Works*



In these Contested Portions, Mr. Ackie discusses incidents that allegedly occurred on October 5, 2020 and October 14, 2020, prior to the date of the evidentiary hearing on October 21, 2020, and which have nothing to do with the October 15, 2020 valve incident raised for the first time at the hearing. Under the Order on Supplemental Testimony issued by Administrative Law Judge (“ALJ”) Darlene Heep and dated November 30, 2020, PGW was permitted to submit supplemental testimony regarding the valve incident no later than December 18, 2020. In compliance with the November 30, 2020 Order, PGW submitted the Surrebuttal Testimony of Brian McGuire on December 18, 2020. This Order also permitted Complainants to submit reply testimony regarding the valve incident no later than January 20, 2021. Complainants submitted Reply Testimony on January 8, 2021. However, this Reply Testimony was not limited to the October 15, 2020 valve incident. As ALJ Heep’s November 30, 2020 Order did not authorize Complainants to further expand the scope of the reply testimony to address any other issue, the discussion of these prior alleged incidents is impermissible.

The Contested Portions also contain uncorroborated hearsay that may not be relied upon to support findings of fact or conclusions of law. Specifically, Mr. Ackie’s Reply Testimony refers to out-of-court statements made by John Walker, Operations Supervisor at the Passyunk Plant, regarding the valve incident. Similarly, Mr. Chavarria’s Reply Testimony refers to out-of-court statements made by Steve Edwards, Working Foreman at the Passyunk Plant, regarding same.

As such, the Contested Portions of EE St. No. 1 – Reply and EE St. No. 3 - Reply should not be admitted into the record or otherwise considered in this proceeding.

## **I. BACKGROUND**

1. For purposes of brevity, PGW is omitting much of the background from this

section and only highlighting the events that are relevant to this Motion.

2. A hearing in this proceeding was held on October 21, 2020. During the hearing, Mr. Ackie and Mr. Chavarria raised an issue for the first time through verbal testimony regarding an alleged “valve incident,” which they believed raised safety concerns. PGW objected to the introduction of this new testimony since it was not addressed in pre-served testimony submitted prior to the hearing.<sup>1</sup>

3. ALJ Heep permitted the verbal testimony but ruled that PGW would have an opportunity to respond to these new allegations.<sup>2</sup> She further indicated that PGW would have at least two weeks after receipt of the transcript to provide responsive testimony and that Complainants would have an opportunity to reply to it.<sup>3</sup>

4. In the Order on Supplemental Testimony dated November 30, 2020, ALJ Heep permitted PGW to submit supplemental testimony regarding the valve incident no later than December 18, 2020. The Order further permitted Complainants to submit reply testimony regarding the valve incident no later than January 20, 2021.

5. Consistent with the November 30, 2020 Order, PGW submitted the Surrebutal Testimony of Mr. McGuire addressing the verbal testimony offered by Complainants during the October 21, 2020 hearing regarding an alleged incident involving a valve on October 15, 2020.

6. On January 8, 2020, Complainants served the Reply Testimony of Mr. Ackie and Mr. Chavarria. Although the Reply Testimony is characterized as being responsive to Mr. McGuire’s Surrebutal Testimony, it raises new issues concerning alleged incidents that Complainants claim occurred on October 5, 2020 and October 14, 2020 – prior to the hearing on

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<sup>1</sup> Tr. 19.

<sup>2</sup> Tr. 19.

<sup>3</sup> Tr. 19, 69, 163-164.

October 21, 2020 and that are unrelated to the October 15, 2020 valve incident. The Reply Testimony also contains several hearsay statements by referring to out-of-court statements allegedly made by PGW employees, which are offered for the truth of the matters asserted.

7. PGW submits this Motion, contending that the Contested Portions of the Reply Testimony of Mr. Ackie and Mr. Chavarria should not be admitted into the record or otherwise considered in this proceeding.

## II. LEGAL STANDARDS

8. 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>4</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>5</sup> Section 5.403(b) of the Commission's regulations requires the presiding officers to "actively employ these powers to direct and focus the proceedings consistent with due process."<sup>6</sup>

9. 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>7</sup>

10. As a matter of policy, evidence that is irrelevant or immaterial to the issues presented in a proceeding must be excluded.<sup>8</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

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<sup>4</sup> 52 Pa. Code § 5.403(a)(1).

<sup>5</sup> 52 Pa. Code §§ 5.403 and 5.483.

<sup>6</sup> 52 Pa. Code § 5.403(b).

<sup>7</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>8</sup> 66 Pa. C.S. § 332(b); 52 Pa. Code § 5.401(a).

supports a reasonable inference or presumption regarding the existence of a material fact.”<sup>9</sup>

11. Pursuant to the Pennsylvania Rules of Evidence, hearsay evidence is not admissible, subject to certain enumerated exceptions.<sup>10</sup> Pennsylvania Rule of Evidence 801 defines “hearsay” as an out-of-court statement offered to prove the truth of the matter asserted.<sup>11</sup>

12. While the Commission, as an administrative agency having quasi-judicial functions, is not limited by the strict rules relating to the admissibility of evidence, essential principles must be observed.<sup>12</sup> It has long been recognized in Pennsylvania that hearsay rules are not mere “technical rules of evidence” but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record.<sup>13</sup>

### III. ARGUMENT

#### **A. Mr. Ackie’s testimony concerning incidents that allegedly occurred on October 5, 2020 and October 14, 2020 should not be admitted into the record or otherwise considered in this proceeding.**<sup>14</sup>

13. In his Reply Testimony, Mr. Ackie alleges that Mr. McGuire “continues to downplay safety problems and incidents at Passyunk plant and to hide Dave’s incompetency as General Supervisor, this is a pattern.”<sup>15</sup> The person referred to by Mr. Ackie as “Dave” is David

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<sup>9</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>10</sup> Pa.R.E. 802.

<sup>11</sup> Pa.R.E. 801.

<sup>12</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>13</sup> See, e.g., *Loudon v. Viridian Energy*, PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012); *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.*, PA PUC No. C-2014-2408057 (Order entered July 30, 2014).

<sup>14</sup> EE St. No. 1 – Reply, p. 3, line 19 (“McGuire continues to...” through and including p. 4, line 9.

<sup>15</sup> EE St. No. 1 – Reply, p. 3, lines 19-20.

Martinez, General Supervisor, Operations at PGW's Passyunk Plant. Mr. Ackie goes on to make allegations about other instances when he says that Mr. Martinez "was negligent."<sup>16</sup> The examples he discusses allegedly occurred on October 5, 2020 and October 14, 2020.<sup>17</sup> One involves allegations concerning a procedure to pack the LNG pumps header with LNG and the other describes allegations relating to the placement of the plant fire system offline.

14. Incidents that allegedly occurred on October 5, 2020 and October 14, 2020 are outside the permissible scope of Complainants' Reply Testimony, as defined by ALJ Heep's November 30, 2020 Order. ALJ Heep expressly limited the scope of this testimony to matters regarding the October 15, 2020 valve incident. These additional allegations regarding events that occurred on October 5, 2020 and October 14, 2020 are completely unrelated to the valve incident.

15. Notably, these alleged incidents occurred prior to the hearing held on October 21, 2020 and to the extent they are properly raised as part of this proceeding, they should have been addressed at that time.

16. If this additional testimony is permitted, PGW should be offered an opportunity to respond to it to ensure compliance with fundamental principles of due process.<sup>18</sup> PGW proposes that if ALJ Heep follows this approach that it be afforded two weeks from the date on which an Interim Order is served to submit this responsive testimony.

17. Notwithstanding the availability of the remedy identified in Paragraph 23 of this Motion, which was previously used in this proceeding to address the new testimony introduced

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<sup>16</sup> EE St. No. 1 – Reply, p. 3, lines 20-22.

<sup>17</sup> EE St. No. 1 – Reply, p. 3, line 22 ("On October 14, 2020....") through and including p. 4, line 9.

<sup>18</sup> *Snyder Brothers, Inc. v. Pa. PUC*, 224 A.3d 450 (Pa. Cmwlth. 2020) (entity may not be deprived of a meaningful hearing and/or opportunity to adequately protect its interests).

at the hearing, PGW submits that at this stage, this cure would unnecessarily prolong the resolution of this proceeding. If Complainants are permitted to continue amending their allegations against PGW – in this instance, after the hearing about incidents they claim occurred prior to the hearing – this proceeding may never end.

18. PGW operates a liquefied natural gas plant, which is a business that inherently faces some operational risks and where incidents will happen. However, as PGW’s testimony has shown in this proceeding, it has safety measures in place that are relied upon to address these issues and keep the plant safely operating.<sup>19</sup>

19. If Complainants have new claims to lodge against PGW regarding the safe operation of the Passyunk Plant (which they do not since the issues raised by them to date are not valid), the appropriate remedy is for them to file another Formal Complaint, giving PGW a full opportunity to defend it, rather than taking a piecemeal approach of adding to the original set of allegations in the pending proceeding.

**B. The testimony of Mr. Ackie and Mr. Chavarria, which contains out-of-court statements relied upon to prove the truth of the matter asserted, constitutes hearsay and should not be admitted or otherwise considered in this proceeding.<sup>20</sup>**

20. Mr. Ackie’s Reply Testimony (EE St. No. 1 – Reply) refers to out-of-court statements allegedly made by Mr. Walker in an effort to prove Complainants’ claims that LNG was present in the truck unloading lines, and that LNG got into the hose because of a problem with PCV1027, which PGW has known about for years but has not fixed it. He also refers to out-of-court statements allegedly made by Mr. Walker that are designed to show that Mr. Martinez wanted to hide the incident. Further, Mr. Ackie refers to out-of-court statements

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<sup>19</sup> PGW Statement No. 1 at 3-5; PGW Statement No. 3-SR at 3-5.

<sup>20</sup> EE St. No. 1 – Reply, p. 2, line 13 (“Even Walker acknowledged...”) through and including p. 3, line 5 (...from entering there”); EE St. No. 3 – Reply, p. 1, line 13 (“..., and”) through and including line 16.

allegedly made by Mr. Edwards in an attempt to prove the Complainants' claims that odorless gas was venting.<sup>21</sup>

21. Mr. Chavarria's Reply Testimony (EE St. No. 3- Reply) refers to out-of-court statements allegedly made by Mr. Edwards regarding the reason for the area taped off in an effort to prove the allegation that gas was "blowing from the LNG truck unloading hose."<sup>22</sup>

22. The self-serving out-of-court statements were allegedly made to Mr. Ackie and Mr. Chavarria by PGW employees who are not witnesses in this proceeding. If Complainants believed that statements allegedly made by Mr. Walker and Mr. Edwards would substantiate their claims, they were free to utilize the Commission's procedures for depositions procedure,<sup>23</sup> requests for admissions,<sup>24</sup> or subpoenas.<sup>25</sup> Yet, none of those processes were used and it is impermissible for Complainants to ignore available procedures for gathering information and presenting evidence, and to instead rely on their own version of statements allegedly made by these individuals.

23. None of this hearsay testimony, which is identified in the Contested Portions, should 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. 1 – Reply and EE St. No. 3 – Reply should not be admitted into the evidentiary record or otherwise considered in this proceeding.

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<sup>21</sup> EE St. No. 1 – Reply, p. 2, line 13 through and including p. 3, line 5.

<sup>22</sup> EE St. No. 3 – Reply, p. 1, line 13 through and including line 16.

<sup>23</sup> 52 Pa. Code §§ 5.343-5.348.

<sup>24</sup> 52 Pa. Code § 5.350.

<sup>25</sup> 52 Pa. Code § 5.421.

Respectfully submitted,

*Karen O. Moury*

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Date: January 19, 2021

# EXHIBIT A

EE STATEMENT. NO. 1-REPLY

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

REPLY TESTIMONY

OF

DWAYNE ACKIE,  
ON BEHALF OF COMPLAINANTS

CONCERNING OCTOBER 15-16, 2020 VALVE INCIDENT  
AT  
PGW PASSYUNK GAS PROCESSING PLANT

Docket No.: C-2019-3013933

JANUARY 3, 2021

1 positions. Both Working Foreman Steve Edwards (“Edwards”) and I heard this on our  
2 radios. On hearing Walker response, I then filled out the leak survey sheet at Central  
3 Control.

4 **Q: OK. WHAT OTHER STATEMENTS, IF ANY, MADE BY BRIAN MCGUIRE**  
5 **ARE UNTRUE?**

6 A. McGuire again is being untruthful with his statements when he said Walker asked me to  
7 close GLV-114.<sup>2</sup> Walker did not tell me to close GLV-114 on finding that LNG had  
8 gotten all the way to the truck unloading hose. Walker called me over the radio and told  
9 me to come to truck unloading with a wrench. On arriving to truck unloading, I saw that  
10 LNG had gotten all the way to the hose and venting out to the atmosphere. The hose was  
11 completely covered in frost, a clear sign that LNG was present at truck unloading as is  
12 seen when off-loading LNG from a LNG truck, a job I performed almost yearly at  
13 Passyunk plant. Even Walker acknowledged that LNG was present in the truck  
14 unloading lines as he told me when I reported to him at truck unloading. After getting off  
15 his cellphone (a device that can cause an ignition) talking to Dave at truck unloading,  
16 Walker started venting to me that LNG got all the way to the hose because of PCV1027,  
17 saying that the company knew this valve was a problem for years and haven’t fixed this  
18 problem. Walker then asked me to close the two blocking valves (GAV-113 and GAV-  
19 114) and the 3 drain valves of PVC1027, which I did with him supervising me. He never  
20 directed me to close GLV-114. We were returning to Central when Walker informed me  
21 that Dave didn’t want him to do an incident report, a clear sign Dave wanted to hide this  
22 incident. I continued my operator duties in the Boiler room before returning to Central.  
23 At Central, Working Foreman Edwards informed me that Walker and he went out to the  
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<sup>2</sup> PGW Statement No. 3-SUR at 4:3-4.

1 incident area adjusting some valves and that the venting of odorless gas was continuous  
2 and very unsafe so much so that he said Walker shouldn't have me operating any valve  
3 with a regular wrench because that could have produced a spark. Edwards quickly asked  
4 me to go to the truck unloading area with him so we could secure the area to prevent a  
5 guard, unaware of the dangers, from entering there. We used cones to set up a safe  
6 perimeter at first, then after locating caution tape, we implemented it. Walker notices our  
7 safe perimeter setup and complemented us on our safety measures.

8 **Q: WAS BRIAN MCGUIRE PRESENT ON OCTOBER 15, 2020 WHEN THE**  
9 **EVENTS OF THIS INCIDENT OCCURRED?**

10 A: McGuire was not in the field, second gate – work area, when these events occurred.

11 **Q: WHO HAS DIRECT, FIRST HAND KNOWLEDGE OF THE EVENTS OF**  
12 **OCTOBER 15, 2020 BESIDES YOURSELF?**

13 A: Working Foreman, Steve Edwards who worked from 2:00 p.m. to 10: p.m.; Operations  
14 Supervisor John Walker who worked from 2:00 p.m. to 10:00 p.m., and Dave Martinez,  
15 General Supervisor who generally works from 6:00 a.m. to 3:30 p.m., but he stayed over  
16 that day until the process (testing the pumps) was over.

17 **Q: WHAT OTHER TESTIMONY WOULD YOU LIKE TO GIVE REGARDING MR.**  
18 **MCGUIRE'S SURREBUTTAL TESTIMONY?**

19 A: McGuire continues to downplay safety problems and incidents at Passyunk plant and to  
20 hide Dave's incompetency as General Supervisor, this is a pattern. Dave not only  
21 supervised the October 15<sup>th</sup> procedure but supervised two other procedures within a week  
22 where he was negligent. On October 14, 2020, the day before the October 15<sup>th</sup> incident,  
23 there was a procedure to pack the LNG pumps header with LNG. Dave forgot to open  
24 HCV110 a valve that needed to be opened to introduce LNG into the header. McGuire  
25 had to intervene calling Dave on the radio about his mishap - not opening the HCV110.

1 McGuire called Edwards by phone that moment telling him, "That [Edwards] should  
2 have Dave's back," shows how McGuire hides Dave's incompetency. The other incident  
3 on October 5, 2020, Dave placed the plant fire system offline so that contractors could  
4 complete testing but Dave didn't place the fire system back online at the end of his work  
5 day leaving the plant vulnerable. A vigilant Operations supervisor, co-complainant  
6 Wayne Rauceo noticed this negligence and notified Dave, who had to send the Plant  
7 Protections guy, already home, back to the Plant to place the fire system online. In a  
8 space of 1 week, Dave had three mishaps and there are a lot more of this since Dave  
9 Martinez has been appointed General Supervisor for Passyunk Plant.

10 **III. CONCLUSION**

11 **Q: DOES THIS COMPLETE YOUR REPLY TESTIMONY?**

12 **A: Yes**

13 **DWAYNE ACKIE RESERVES THE RIGHT TO SUPPLEMENT/AMEND HIS**  
14 **REPLY TESTIMONY AS WARRANTED AT TRIAL/HEARING.**

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EE STATEMENT. NO. 3-REPLY

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

REPLY TESTIMONY

OF

MIGUEL CHAVARRIA, JR.,  
ON BEHALF OF COMPLAINANTS

CONCERNING OCTOBER 15-16, 2020 VALVE INCIDENT  
AT  
PGW PASSYUNK GAS PROCESSING PLANT

Docket No.: C-2019-3013933

JANUARY 7, 2021

1 **I. INTRODUCTION**

2 **Q: WHY ARE YOU PROVIDING THIS REPLY TESTIMONY?**

3 A. Because Brian McGuire's ("McGuire")(Caucasian) testimony were untruthful and  
4 misleading, and an attempt to divert blame to John Walker ("Walker"), Wallace Benson  
5 ("Benson") and Dwayne Ackie ("Ackie"), all of whom are African American and/or  
6 black/brown employees.

7 **II. REPLY TO SURREBUTTAL TESTIMONY OF BRIAN MCGUIRE**

8 **Q: WHAT STATEMENTS MADE BY BRIAN MCGUIRE DO YOU SAY ARE**  
9 **UNTRUTHFUL AND MISLEADING?**

10 A. McGuire said that I testified "upon inspection, [I] saw that a hose was frosted. . ." <sup>1</sup> That  
11 was not my testimony. My testimony was and is that I immediately saw the LNG truck  
12 unloading area was yellow caution taped off (surrounded), which was clearly visible  
13 when approaching the Central Control Building on the main road in the process area, and  
14 upon notification from Working Foreman Steve Edwards ("Edwards")(Caucasian), whom  
15 I was relieving, that the area was caution taped off because there was gas blowing from  
16 the LNG truck unloading hose.

17 **Q: OK. WHAT OTHER STATEMENTS, IF ANY, MADE BY BRIAN MCGUIRE**  
18 **ARE LIES?**

19 A. Brian McGuire states that Ackie demonstrates a complete lack of knowledge regarding  
20 plant operations" and then admits that "gas was emitted to an outdoor area" and then  
21 "[t]he amount of gas that was emitted did not even trigger any of PGW detectors."<sup>2</sup> Any  
22 time PGW Passyunk Plant releases natural gas into the atmosphere, there is a strict  
23 procedure of notification to the fire department, police department and PGW Gas Control  
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25 <sup>1</sup> PGW Statement No. 3-SUR at 2:19-21.

<sup>2</sup> PGW Statement No.3-SUR at 3:4-10.